State of Iowa

1972

THIRTY-NINTH BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1972

RICHARD C. TURNER
Attorney General

Published by
THE STATE OF IOWA
Des Moines

ATTORNEYS GENERAL OF IOWA

1853 - 1972

NAME	HOME COUNTY	SERVED YEARS
David C. Cloud	Muscatine	1853-1856
Samuel A. Rice	Mahaska	1856-1861
Charles C. Nourse	Polk	1861-1865
Isaac L. Allen	Tama	1865-1866
Frederick E. Bissell	Dubuque	1866-1867
Henry O'Connor	Muscatine	1867-1872
Marsena E. Cutts	Mahaska	1872-1877
John F. McJunkin	Washington	1877-1881
Smith McPherson	Montgomery	1881-1885
A. J. Baker	Appanoose	1885-1889
John Y. Stone	Mills	1889-1895
Milton Remley	Johnson	1895-1901
Charles W. Mullan	Black Hawk	1901-1907
Howard W. Byers	Shelby	1907-1911
George Cosson	Audubon	1911-1917
Horace M. Havner	Iowa	1917-1921
Ben J. Gibson	Adams	1921-1927
John Fletcher	Polk	1927-1933
Edward L. O'Connor	Johnson	1933-1937
John H. Mitchell	Webster	1937-1939
Fred D. Everett	Monroe	1939-1940
John M. Rankin	Lee	1940-1947
Robert L. Larson	Johnson	1947-1953
Leo A. Hoegh	Lucas	1953-1954
Dayton Countryman	Story	1954-1957
Norman A. Erbe	Boone	1957-1961
Evan Hultman	Black Hawk	1961-1965
Lawrence F. Scalise	Warren	1965-1967
Richard C. Turner	Pottawattamie	1967-

PERSONNEL OF THE
DEPARTMENT OF JUSTICE

RICHARD C. TURNER ..... Attorney General
B. September 30, 1927, Avoca, Iowa; B.A., J.D., S.U.I.; married, three children; private practice 1953-1967; State Senator from Pottawattamie County 1960-1964; Ass't. Pottawattamie County Attorney 1954-1956; Avoca Town Clerk 1953-1960; Elected Attorney General 1966, 1968, 1970 and 1972.

RICHARD E. HAESEMEYER ..... Solicitor General and First Ass't. Attorney General
B. April 11, 1928, Tipton, Iowa; B.S., University of Illinois; L.L.B., Harvard Law School; married, three children; American Airlines, Inc., N.Y.C., 1956-1962; Monsanto Company, Textile Div. (formerly the Chemstrand Corp.) N.Y.C. 1962-1967; App't Solicitor General and First Ass't. Attorney General February 20, 1967.

JOHN E. BEAMER ..... Special Assitant Attorney General
B. September 23, 1939, Abilene, Texas; B.A., Cornell College; J.D., S.U.I.; Agent F.B.I., 1964-1970; married, two children; App't. Ass't. Atty. Gen. 1970, App't. Special Ass't. Atty. General, 1972.

DAVID A. ELDERKIN ..... Special Assistant Attorney General
B. June 4, 1941, Cedar Rapids, Iowa; B.B.A., J.D., S.U.I.; married, one child; App't. Ass't. Atty. Gen. 1966, App't. Special Ass't. Atty. Gen. 1970, resigned 1972.

GEORGE W. MURRAY ..... Special Assistant Attorney General
B. June 1, 1920, Chicago, Illinois; Coe College 2 years; L.L.B., Drake University; married, one child; App't. Spec. Ass't. Atty. Gen. 1961-1965 and also 1967.

JAMES F. PETERSEN ..... Special Assistant Attorney General
B. July 23, 1931, Omaha, Nebraska; B.S., J.D., University of Nebraska; married, four children; U.S. Veterans Administration 1959-1960; Special Assistant Atty. Gen., State of Nebraska, 1960-1968; App't. Ass't. Atty. Gen. 1968, App't. Special Ass't. Atty. Gen. 1970, resigned 1971.

ASHER E. SCHROEDER ..... Special Assistant Attorney General
B. May 12, 1925, Maquoketa, Iowa; married, three children; B.A., J.D., S.U.I.; App't. Ass't. Atty. Gen. 1969, App't. Special Ass't. Atty. Gen. 1971.

LORNA L. WILLIAMS ..... Special Assistant Attorney General
B. February 9, 1915, Gaylord, Kansas; B.A., J.D., Drake University; two children, private practice 1941-1967; App't. Special Ass't. Atty. Gen. 1967.

JOHN I. ADAMS ..... Assistant Attorney General
B. July 11, 1926, Des Moines, Iowa; B.A., L.L.B., S.U.I.; Agent F.B.I., 1953-1955; Legal Department, Continental Western Insurance Company, 1958-1968; App't. Ass't. Atty. Gen. 1969.

JOHN W. BATY ..... Assistant Attorney General
B. October 5, 1942, Monticello, Iowa; B.S., Iowa State University; J.D., Drake University; Ass't. Marshall Co. Atty. 1968-1969; App't. Ass't. Atty. Gen. 1972.

LARRY M. BLUMBERG ..... Assistant Attorney General
B. September 8, 1946, Omaha, Nebraska; B.A., University of Minnesota; J.D., Drake University; married; App't. Ass't. Atty. Gen. 1971.

JAMES E. BOBENHOUSE ..... Assistant Attorney General
B. March 19, 1945, Des Moines, Iowa; B.S., S.U.I.; J.D., Drake University; single; App't. Ass't. Atty. Gen. 1970, resigned 1971.

GORDON G. BOWLES ..... Assistant Attorney General
B. July 25, 1947, Pittsburgh, Pa.; B.A., William Penn College; J.D., Drake University Law School; married; App't. Ass't. Atty. Gen. 1972.

DOUGLAS R. CARLSON ..... Assistant Attorney General
B. December 3, 1942, Des Moines, Iowa; B.A., J.D., Drake University; single; App't. Ass't. Atty. Gen. 1968.

COLEMAN, JR., C. JOSEPH ..... Assistant Attorney General
B. October 11, 1946, Fort Dodge, Iowa; B.A., Creighton University, Loyola University of Rome; J.D., Creighton University Law School; married; App't. Ass't. Atty. Gen. 1972.

ROXANNE BARTON CONLIN ..... Assistant Attorney General
B. June 30, 1944, Huron, South Dakota; B.A., J.D., Drake University; married, two children; private practice 1966; Deputy Industrial Commissioner 1966-1968; App't. Ass't. Atty. Gen. 1969.

G. BENNETT CULLISON, JR. ..... Assistant Attorney General
B. November 26, 1932, Harlan, Iowa; B.A., Grinnell College; L.L.B., Columbia University; private practice 1960-1962; Ass't. District Attorney, New York County 1962-1966; Legislative Ass't. to U.S. Senator, Jack R. Miller, 1966-1967; App't. Ass't. Atty. Gen. 1968.

JAMES C. DAVIS ..... Assistant Attorney General
B. February 23, 1937, Bloomington, Indiana; Oregon State College 2 years; Greenville College 1 year; B.A., J.D., S.U.I.; married, one child; private practice 1962-1970; Justice of the Peace 1967-1970; App't. Ass't. Atty. Gen. 1970.

KERMIT L. DUNAHOO ..... Assistant Attorney General
B. October 30, 1941, Nevada, Iowa; B.S., M.S., Iowa State University; J.D., Drake University; married, two children; App't. Ass't. Att'y. Gen. 1972.

G. DOUGLAS ESSY ..... Assistant Attorney General
B. October 14, 1942, Des Moines, Iowa, undergraduate, J.D., Creighton University; single; private practice 1966-1967; Trial Counsel, United States Navy 1967-1969; App't. Ass't. Atty. Gen. 1970, resigned 1971.

JULIAN B. GARRETT ..... Assistant Attorney General
B. November 7, 1940, Des Moines, Iowa; single; B.A., Central College; J.D., S.U.I.; App't. Ass't. Atty. Gen. 1967.

WILLIAM W. GARRETSON ..... Assistant Attorney General
B. July 1, 1935, Oklahoma City, Oklahoma; B.A., Iowa Wesleyan College; J.D., The George Washington University Law School; married, three children; U.S. Treasury Department, D.C. 1957-1959; U.S. Labor Department, D.C., 1959-1961; private practice 1961-1969; appointed Ass't. Atty. Gen. 1969, resigned 1972.

ROBERT W. GOODWIN ..... Assistant Attorney General
B. June 25, 1943, Indianola, Iowa; B.S., J.D., Drake University; married, two children; App't. Ass't. Atty. Gen. 1970.

MAX A. GORS ..... Assistant Atotrney General
B. January 21, 1945, Viborg, South Dakota; B.A., Augustana College; J.D., Drake University; married; App't. Ass't. Atty. Gen. 1970, resigned 1971.

HARRY M. GRIGER ..... Assistant Attorney General
B. March 13, 1941, Des Moines, Iowa; B.A., J.D., S.U.I.; married; App't. Ass't. Atty. Gen. 1967.

FRED M. HASKINS ..... Assistant Attorney General
B. October 18, 1947, Des Moines, Iowa; B.B.A., J.D., University of Iowa; single; App't. Ass't. Atty. Gen. 1972.

DONALD L. HOEGER ..... Assistant Attorney General
B. December 7, 1937, Luxemburg, Iowa; B.A., Loras College; J.D., S.U.I.; married, one child; App't. Ass't. Atty. Gen. 1970, resigned 1972.

HENRY L. HOLST ..... Assistant Attorney General
B. March 17, 1927, Moline, Illinois; B.A., S.U.I., M.A., Nebraska University; J.D., Nebraska University; married; Chief Trial Examiner, Nebraska Railway Commission 1957-1959; Special Ass't. Atty. Gen. State of Nebraska, 1958-1969; Deputy City Atty., Lincoln, Nebraska, 1959-1965; City Atty., Ames, Iowa, 1966-1967; App't. Ass't. Atty. Gen. 1967, App't. Special Ass't. Atty. Gen. 1968, resigned 1970, App't. Ass't. Atty. Gen. 1972, resigned 1972.

THOMAS R. HRONEK ..... Assistant Attorney General
B. May 18, 1947, Vinton, Iowa; B.A., Loras College, J.D., Northwestern University; single; App't. Ass't. Atty. Gen. 1972.

JAMES W. HUGHES ..... Assistant Attorney General
B. February 11, 1944, Des Moines, Iowa; single; B.A., Grinnell College, J.D., Drake University; App't. Ass't. Atty. Gen. 1969, resigned 1972.

ROBERT D. JACOBSON ..... Assistant Attorney General
B. April 23, 1942, Enid, Oklahoma; B.A., J.D., University of Iowa; Judge Advocate U.S.A.F. 1967-1971; App't. Ass't. Atty. Gen. 1971.

JOHN L. KIENER ..... Assistant Attorney General
B. June 21, 1940, Fort Madison, Iowa; married; B.A., Loras College; J.D., Drake University; private practice, 1965-1968; App't. Ass't. Atty. Gen. 1968, resigned 1972.

DAVID L. KOHLHAMMER ..... Assistant Attorney General
B. February 8, 1944, Rock Island, Illinois; B.A., J.D., University of Iowa; married; private practice 1967-1968; U.S. Army (certified JAGC) 1968-1971; Ass't. Muscatine County Attorney 1971-1972; App't. Ass't. Atty. Gen. 1972.

GERALD A. KUEHN ..... Assistant Attorney General
B. September 28, 1938, Hastings, Nebraska; B.B.A., State University of Iowa; J.D., Drake University; married, two children; private practice 1967-1969, 1970-1971; Ass't. City Att'y. Des Moines, Iowa, 1969-1970; App't. Ass't. Atty. Gen. 1971.

RONALD W. KUNTZ ..... Assistant Attorney General
B. April 9, 1937, Brooklyn, Iowa; B.S., J.D., Drake University; married; Ass't. Polk County Attorney, 1966-1972; App't. Ass't. Atty. Gen. 1972.

STEPHEN C. LANDE ..... Assistant Attorney General
B. August 19, 1947, Des Moines, Iowa; B.A., Morningside College; J.D., Drake University; married; App't. Ass't. Atty. Gen. 1972.

MICHAEL J. LAUGHLIN ..... Assistant Attorney General
B. February 27, 1944, Des Moines, Iowa; married; B.S.B.A., J.D., Drake University; private practice 1969; App't. Ass't. Atty. Gen. 1969, resigned 1972.

ALLEN J. LUKEHART ..... Assistant Attorney General
B. April 1, 1946, Cedar Rapids, Iowa; B.A., J.D., Drake University; App't. Ass't. Atty. Gen. 1971.

JEROME F. LUNDGREN ..... Assistant Attorney General
B. May 16, 1929, Chicago, Illinois; B.S., J.D., Drake University; married, four children; private practice 1968-1969; App't. Ass't. Atty. Gen. 1969, resigned 1972.

THOMAS D. McGRANE ..... Assistant Attorney General
B. November 2, 1940, Waverly, Iowa; B.A., U.N.I.; J.D., University of Iowa; married, three children; U.S.A.F. 1961-1964; App't. Ass't. Atty. Gen. 1971.

CLAYTON C. MOWERS ..... Assitant Attorney General
B. September 2, 1946, Algona, Iowa; married; B.A., J.D., Drake University; App't. Ass't. Atty. Gen. 1970, resigned 1971.

ELIZABETH A. NOLAN ..... Assitant Attorney General
B. Des Moines, Iowa; B.S., St. Mary's College, Notre Dame, Ind.; J.D., S.U.I.; U.S. Dept. of Interior, 1955-1962; private practice, Washington, D.C., 1962-1963; App't. Ass't. Atty. Gen. 1967.

RICHARD J. NOLAN ..... Assistant Atorney General
B. November 8, 1939, Iowa City, Iowa; A.B., J.D., Creighton University; married, one child; App't. Ass't. Atty. Gen. 1970, resigned 1971.

JOHN A. PABST ..... Assistant Attorney General
B. June 12, 1946, Ottumwa, Iowa; A.B., Dartmouth College; J.D., Drake University; married; App't. Ass't. Atty. Gen. 1971, resigned 1972.

CLIFFORD E. PETERSON ..... Assitant Attorney General
B. June 30, 1921, Ellsworth, Iowa; B.A., J.D., S.U.I.; married, two children; App't. Ass't. Atty. Gen. 1968.

GARY M. PETERSON ..... Assistant Attorney General
B. February 1, 1945, Fairbanks, Alaska; B.S., Iowa State; J.D., S.U.I.; married; App't. Ass't. Atty. Gen. 1972.

STEPHEN J. PETOSA ..... Assistant Attorney General
B. April 24, 1943, Fort Wayne, Indiana; B.S., Regis College; J.D., S.U.I.; App't. Ass't. Atty. Gen. 1968, resigned 1971.

FRANKLIN W. SAUER ..... Assistant Attorney General
B. February 16, 1941, Central City, Iowa; B.A., J.D., S.U.I.; single; private practice, 1966; U.S. Army, 1966-1968; App't. Ass't. Atty. Gen. 1970.

LARRY S. SEUFERER ..... Assistant Attorney General
B. September 6, 1940, Des Moines, Iowa; B.B.A., J.D., S.U.I.; married, one child; App't. Ass't. Atty. Gen. 1971.

IKE SKINNER ..... Assistant Attorney General
B. October 4, 1928, Des Moines, Iowa; B.A., J.D., Drake University; married, three children; App't. Ass't. Atty. Gen. 1971.

DOUGLAS R. SMALLEY ..... Assistant Attorney General
B. January 21, 1946, Centralia, Washington; B.A., S.U.I.; J.D., Drake University; single; App't. Ass't. Atty. Gen. 1971.

WILLIAM R. STENGEL ..... Assistant Attorney General
B. March 30, 1947, Rock Island, Illinois; B.S., University of Illinois; J.D., S.U.I.; married, one child; App't. Ass't. Atty. Gen. 1972.

OSCAR STRAUSS ..... Assistant Attorney General
B. September 23, 1876, Des Moines, Iowa; Ph.B., U. of Michigan; L.L.B., S.U.I.; married; App't. Ass't. Atty. Gen. 1944-1957; App't. First Ass't. Atty. Gen. 1958, 1959, 1961, 1963, 1965; App't. Ass't. Atty. Gen. 1967, retired 1972.

RAYMOND W. SULLINS ..... Assistant Attorney General
B. February 4, 1945, Princeton, Indiana; B.A., Los Angeles Baptist College; J.D., Drake University; married; App't. Ass't. Atty. Gen. 1972.

GARY H. SWANSON ..... Assistant Attorney General
B. October 26, 1939, Waverly, Iowa; B.A., J.D., Drake University; Ass't. Des Moines City Atty. 1965-1968; Private Practice 1968-1972; App't. Ass't. Atty. Gen. 1972.

PETER E. VOORHEES ..... Assistant Attorney General
B. May 19, 1947, Waterloo, Iowa; B.A., University of Northern Iowa; J.D., University of Iowa; App't. Ass't. Atty. Gen. 1972.

THOMAS J. WHORLEY ..... Assistant Attorney General
B. March 2, 1947, Sheldon, Iowa; B.A., J.D., University of South Dakota; married; App't. Ass't. Atty. Gen. 1972.

JOHN E. WIETZKE ..... Assistant Atotrney General
B. November 27, 1937, Greenfield, Iowa; B.S.E.E., M.S.E.E., Iowa State U., M.B.A., U. of Utah, J.D., S.U.I.; U.S. Air Force, Ogden, Utah 1962-1964; A.T.&T., 1965-1969, Salt Lake City, Los Angeles, San Francisco; App't. Ass't. Atty. Gen. 1972.

RICHARD N. WINDERS ..... Assistant Attorney General
B. April 13, 1945, Milwaukee, Wisconsin; married; B.A., J.D., Drake University; App't. Ass't. Atty. Gen. 1970.

GARY D. WOODWARD ..... Assistant Attorney General
B. April 18, 1926, Muscatine, Iowa; B.A., L.L.D., S.U.I.; married, one child; App't. Ass't. Atty. Gen. 1972.

SARA A. CANADA ..... Administrative Assistant

RICHARD C. TURNER

Attorney General

REPORT OF THE ATTORNEY GENERAL

February 20, 1973

The Honorable Robert D. Ray
Governor of Iowa
Capitol Building

Dear Governor Ray:

In accordance with the requirements of Sections 13.2(6) and 17.6, Code of Iowa, 1973, I am privileged to submit the following report of the condition of the office of the Attorney General, opinions rendered and business transacted of public interest.

OPINIONS

During 1971 and 1972, the Iowa Department of Justice prepared pursuant to Section 13.2(4) 488 written legal opinions. This compares with 443 opinions written during the 1969-1970 biennium and 607 opinions furnished in 1967 and 1968. Of the 488 opinions issued during the last two years, 140 were furnished in response to requests from members of the General Assembly, 194 in response to questions from State Officers and 154 in answer to inquiries from County Attorneys.

The preparation and furnishing of these opinions constitutes one of the more important and time-consuming functions which the Department of Justice is required to perform. The existence of annual sessions and the continuing growth in the size and complexity of government will certainly require that an increasing portion of Department of Justice staff resources be devoted to writing these Attorney General's opinions.

CIVIL RIGHTS

Under Chapter 601A, Code of Iowa, 1973, the Iowa Department of Justice is charged with the duty of representing the complainant in cases brought to public hearings before the Iowa Civil Rights Commission.

Currently there are three cases involving Civil Rights pending in the Iowa Supreme Court. We are directly and specifically involved at the present time in eight lawsuits before Iowa District Courts, and eighteen cases before the Iowa Civil Rights Commission. The cases involve every aspect of discrimination on the basis of race, color and sex in employment, housing and public accommodations.

Cases currently pending include a complaint by a black man that the use of the Bennett Mechanical Comprehension Test unfairly discriminates against minorities and prevents him

from transferring to an all-white department with higher pay and better working conditions; a complaint by a pregnant school teacher that the maternity leave policy of the system for which she works discriminates on the basis of sex by requiring her to discontinue teaching at the fifth month and which prohibits her return for a period in excess of that recommended by her doctor; a complaint by a black man that a trailer court operator unlawfully removed his trailer from the court because of his race; a complaint by a woman against her former employer for his failure to provide maternity benefits for female employees under a company-sponsored health plan while at the same time providing such coverage for the wives of male employees; a complaint by three Spanish-surnamed individuals that they were discriminatorily discharged as a result of their national origin; and a complaint by the Iowa Civil Rights Commission against a manufacturing plant with an historically all-white work force for its failure to offer employment opportunities to minorities.

The Assistant Attorney General who among other things is assigned to handle Civil Rights matters is called upon daily to advise the Commission regarding legal problems and to participate in the conciliation process in settlement negotiations. The Department of Justice also aids in the investigation of patterns of discrimination by large employers in employment practices.

Rules regarding the recent amendments prohibiting discrimination on the basis of age and disability are being drafted.

The Assistant Attorney General assigned to Civil Rights also regularly participates in the seminars and studies on Civil Rights in order to educate the public generally, and employers particularly concerning the requirements of the Iowa Civil Rights Act and the practical problems involved in compliance.

At the present time, there is only one Assistant Attorney General working on Civil Rights matters and she also must handle treble damage anti-trust cases and actions for removal for misconduct of public officers. We also have furnished one investigator full-time to investigate Civil Rights complaints, a function one would normally expect the Civil Rights Commission to perform itself. If the General Assembly approves your recommendations to nearly double the budget for the Civil Rights Commission to enable it to hire more investigators and staff, it is inevitable that the work load of the Assistant Attorney General who handles Civil Rights matters on a part-time basis will reach crisis proportions. Your budget recommendations for the Department of Justice does not contain any additional funding to enable the Attorney General to employ additional attorneys to handle Civil Rights matters and I would strenuously urge you to reconsider your budget recommendations for this department so that we do not become a bottle neck in the effective implementation of the Civil Rights effort.

CONSUMER PROTECTION

Although measured by the standards of other states, the staff of the Consumer Protection division of the Iowa Department of Justice is pitifully small, both its work load and its achievements continue to grow at an accelerating, almost exponential rate. The attached two tables show how dramatically the activities of the Consumer Protection division of the Attorney General's office have grown.

COMPLAINTS

	Received	Closed	Moneys Recovered
1967-1968	1,226	959	$ 48,494
1969-1970	2,968	2,452	451,633
1971-1972	7,590	5,798	1,140,374

COURT ACTIONS

	Filed	Won	Lost	Pending
1967-1968	21	10	-0-	11
1969-1970	37	23	-0-	25
1971-1972	31	33	-0-	23

Interms of recoveries of moneys for citizens, this division of the Iowa Department of Justice has paid for itself many times over.

In addition to the lawsuits described above, attorneys from the Consumer Protection division appeared before the Iowa Supreme Court on several occasions. The most notable case involved an appeal by a multi-million dollar company called, Koscot Interplanetary, Inc., and its owner, Glen W. Turner. It is believed that when this division obtained an injunction against the company and its owner, restraining them from various unlawful activities, this was the first time in the United States that a court of final appeal had found Koscot to be in violation of the law in its multi-level or pyramid sales distributorship plan. In this case, it is estimated that Koscot may have obtained over $1,000,000 from more than 700 different Iowans who invested in the scheme.

Some of the other more significant court cases filed involve such things as: 1) Fraud in the sale of chinchillas. 2) Out of state land sales. 3) Bait-and-switch advertising in the sale of sewing machines. 4) Fraud in the sale of modeling courses. 5) Magazine sales. 6) Odometer turnbacks on automobiles. 7) Fraud in the sale of used automobiles. 8) Deception in the sale of encyclopedia sets. 9) Fraud in the sale of training courses by vocational or trade schools. 10) Other lawsuits against multi-level or pyramid distributorship plans.

During all of this time, the Consumer Protection division has

been very active in informing the public as to its activities and warning the citizens of various questionable schemes and fast-buck operators working in their areas. In addition to sending bulletins and news releases to the media, personnel from this office have appeared before many school, church, and other civic organizations discussing various schemes and the Attorney General's authority in the area of Consumer Protection.

Another area of activity in which the Consumer Protection division has been involved relates to the recommending of legislation of benefit to the consumer. In 1971, a bill outlawing the turn back of odometer readings on automobiles which had been recommended by this office became law when it was passed by the General Assembly and signed by you. In 1972, a bill was passed requiring trade and correspondence schools to post either a $50,000 bond to insure performance of their contracts and obligations or a financial statement showing assets of at least $250,000 owned either by themselves or a parent corporation.

My office has drafted and submitted to the current session of the General Assembly proposals to further improve the protection which the consumer receives from the law. One measure, if enacted, would strengthen law enforcement in the Consumer Protection area by enabling any persons contracting or purchasing consumer goods or services, solicited by a seller at the home of the buyer, to rescind the contract or purchase within three days after the contract or purchase is made. Another bill seeks to eliminate the privileged position that the law has given to holders of negotiable instruments made in connection with the sale of consumer goods or services, who otherwise could claim to take the instruments without knowledge of any defenses that might be asserted. We have also asked for a change in the mechanic's lien law to require that suppliers of building contractors notify home owners that they are furnishing supplies to the contractor for which they have not been paid and in the event the supplier fails to give such notice, he could not file a mechanic's lien on the property of the home owner where the latter had already paid the contractor not knowing that the latter had failed to pay his materialmen. Finally, a bill has been proposed to make a number of changes in the existing Consumer Protection law, the principal of these would be to increase the penalty for contempt from $500 to $5,000. We believe all of these measures are very desirable from the standpoint of the consumer and would hope that you could give them your whole-hearted support.

As the tables set forth above demonstrate, the work load of the Consumer Protection division of the Iowa Department of Justice has increased at a tremendous rate since 1967 when I first took office. We currently have three Assistant Attorneys General, one investigator and four secretarial personnel as-

signed to Consumer Protection. In our budget askings we requested an additional attorney, an additional investigator and one more secretary for our Consumer Protection division office here in Des Moines. Consistent with the trend in other states we also requested the establishment of two field offices, one in the eastern and one in the western part of the state, each to be staffed by an attorney, an investigator and a secretary. Your budget recommendations to the Legislature did not allow for the hiring of any of these additional people and we respectfully request that you reconsider your determination in this respect.

The number of complaints received during 1971 and 1972 is more than double the number received during the previous two year period. If, as expected, this kind of growth continues, our present staff simply will be unable to handle the work load, and complaints of citizens, many of whom are among the aged and disadvantaged, will go unanswered and unscrupulous operators will be able to prey upon them in violation of the law without our office being able to act quickly and decisively or indeed, in some instances, at all, to halt illegal practices.

ENVIRONMENTAL PROTECTION

As a result of the continued interest of governmental regulatory agencies and the general public in environmental matters, the work load of the Environmental Protection division of the Attorney General's office continues to increase. The division represents the State Conservation Commission, Natural Resources Council, Department of Soil Conservation, Air Pollution Control Commission, Water Pollution Control Commission, Real Estate Commission and various other state boards and officials concerned with environmental quality.

During the biennium, abstracts of title to more than 50 tracts of land purchased by the State Conservation Commission were reviewed and approved, principally in connection with three artificial lake projects. In addition, 37 other tracts were taken in condemnation proceedings with 25 appeals to District Court and one appeal to the Supreme Court. Ten appeals have been tried in District Court or settled, leaving 15 cases pending.

Cases involving boundary disputes along the Missouri River and other meandered streams and lakes continue to require a great deal of time. Although the *Nebraska v. Iowa* case was finally submitted in 1970 to a Special Master appointed by the Supreme Court of the United States, hearings have continued with regard to the form of the final decree of the Supreme Court. The recent filing of the final decree therein is already prompting the filing of numerous quiet title actions involving land claimed by the State of Iowa. Work continued on the U. S. condemnation suit involving land claimed by the Winnebago Tribe of Indians, the State of Iowa and others.

Orders of the Water Pollution Control Commission were enforced in ten District Court actions and nine other such cases remain pending as does one appeal to the Supreme Court. One hundred ninety-five contracts for state grants for construction of sewage treatment works totaling $10,957,052 were reviewed and approved. This division also was involved in the proceedings resulting in provision for off-stream (Mississippi River) facilities for dissipating heat produced in generating electrical power at an atomic energy faciliity near Cordova, Illinois.

Orders of the Air Pollution Control Commission were enforced in ten District Court actions and nine such cases were pending at the end of the biennium. This division also initiated court action to enjoin construction and operation of a giant feed-lot near Newton, resulting in at least temporary abandonment of the project.

Three court actions involving the Department of Soil Conservation and six cases involving flood plain activities regulated by the Natural Resources Council and 15 cases involving various functions of the State Conservation Commission were in process of litigation during the biennium.

In addition to this litigation, a great deal of time was spent in participation in the meetings and administrative hearings of the assigned agencies and in counseling and advising the agencies with regard to proposed legislation, rules and regulations, implementation and enforcement of Environmental Protection laws, and general agency functions and the need and demand for these services continue to increase.

Despite the heavy work load of this division and the likelihood, with the establishment of the new Department of Environmental Quality, that it will increase, we have not included in our budget askings any additional staff for this division.

CRIMINAL APPEALS

In the years 1971-72 the Criminal Appeals division of the Attorney General's office has participated in precisely 300 criminal appeals taken to the Iowa Supreme Court from the District and municipal courts of this state. The State prevailed in 263 of these appeals, failed in 12 and 25 cases were remanded for further proceedings.

Before the Iowa Supreme Court the State defended the denial by the Iowa District Courts of 12 habeas corpus and post-conviction petitions. The State was sustained by the Supreme Court in ten of these cases. In the United States District Courts the State was upheld in 32 cases and failed in none. One of these rulings was appealed to the United States Court of Appeals for the Eighth Circuit and the State was upheld in this case. Of the 14 cases taken to the Supreme

Court of the United States on writ of certiorari from various state and federal criminal and habeas corpus decisions, the State prevailed in 13 of the 14 cases.

During 1971-72 the Criminal Appeals division disposed of 120 extradition cases.

In addition to its criminal appeal and extradition work, the Criminal Appeals division gives legal assistance to the Iowa Beer and Liquor Control Department, the Iowa Board of Parole, the Iowa Drug Abuse Authority, the Iowa Board of Pharmacy Examiners, and the Iowa Industrial Commission. During 1972 this division handled 35 hearings involving liquor license denials, suspensions and revocations before the Iowa Beer and Liquor Control Department hearing board.

The significance of the activities of this division was highlighted recently in the February 1972 Iowa Law Review. In a most comprehensive survey, [215 pages] funded by the Iowa Crime Commission through a federal grant from the Law Enforcement Assistance Administration of the United States Department of Justice, the Iowa Law School scrutinized the criminal justice system in Iowa. In the article entitled "Contemporary Studies Project: Perspectives on the Administration of Criminal Justice in Iowa" the role of the Attorney General was carefully noted. Specifically commenting on the responsibilities of the Criminal Appeals Division, it is stated that the division is overburdened by not only case work in the state and federal courts, but also handles extradition, workmen's compensation, state pharmacy board, liquor commission and the state parole board. "A larger staff with increased pay would be needed to remedy this problem." Section 57, Iowa Law Review, 598, 645. The article further states ". . . The Attorney General's office is undermanned and cannot be expected to improve on the quality of their replies to the 99 county attorneys until this deficiency is corrected. If improvements are made, prosecution in Iowa will become more effective". Section 57, Iowa Law Review, 598, 657.

The following table shows dramatically how the work of the Criminal Appeals division has grown:

CASES IN THE IOWA SUPREME COURT

Year	Pending as of January 1	Disposed of During the Year
1967	98	104
1968	112	148
1969	133	187
1970	134	131
1971	190	129
1972	280	300
1973	357	

Despite the fact that the Criminal Appeals division has increased from two attorneys in 1967 to five at the present time and despite the fact that the division has disposed of a thousand cases *in the Iowa Supreme Court alone* during the period, the backlog of cases has grown from 98 in January 1967 to 357 in January 1973.

Clearly, the additional staffing needs of the Criminal Appeals division requires special consideration. Although we requested two additional attorneys for Criminal Appeals for the next biennium, funds for this purpose have not been included in your budget recommendations to the General Assembly. Here again, we would request that you reconsider your determination in this respect.

AREA PROSECUTORS

The effectiveness of the Area Prosecutor Program established in November, 1971, is now being realized. This new program financed 75% from federal funds through the Iowa Crime Commission with 25% matching funds from the state results in an average annual increase in our budget askings. It is worthwhile to consider some of the notable achievements of this department in one year of operation.

From its inception in 1971 through the end of 1972 the Area Prosecutors have been asked for assistance in 94 cases, ranking from the major felony of first degree murder to 22 criminal trespassing cases. Included in the above total are 15 major investigations which have been conducted by the Area Prosecutors. The requests for assistance have originated from County Attorneys, the State Auditor's Office, and the Bureau of Criminal Investigation. In the 79 felony cases, the state received convictions in 32 cases, one trial resulted in an acquittal, three cases were dismissed by the Area Prosecutors for lack of evidence, and the remaining 43 cases are still pending for trial.

The Area Prosecutors have been asked and have taken part in various training sessions for B.C.I. agents and County Attorneys. In addition, they are now publishing a Criminal Law Bulletin, two issues of which have been printed and disseminated to all County Attorneys and judges. This division also provides a phone-in answering service for County Attorneys, Area Prosecutors, and judges covering any legal issues that might arise during the trial of criminal cases. Additionally, they are preparing a County Attorneys Handbook and a Police Journal for all law enforcement officers.

Six attorneys and one secretary are currently assigned to the Area Prosecutors division. Because of the tremendous success of this program in strengthening law enforcement, the Iowa Crime Commission recently offered to increase the number of attorneys by three and this would certainly be a desir-

able proposal provided that funds could be found for providing the necessary 25% State match.

SPECIAL PROSECUTIONS

Like the Area Prosecutors division, the Special Prosecutions division was formed during 1972 with the assistance of funds received from the Federal Government. These federal funds were a grant awarded under Title I, of the Omnibus Crime Control and Safe Streets Act of 1968 (Administration of the grant is through the office of Law Enforcement Programs, Law Enforcement Assistance Administration (LEAA), U.S. Department of Justice. The Iowa Crime Commission currently has an advisory and concurrence responsibility only.)

In the three years prior to formation of the Special Prosecutions Section, the U.S. Department of Justice, through the LEAA, had anticipated the states' needs for such efforts and had written specifications for "State-wide Investigatory and Prosecutorial Units". "Discretionary" grant programs to fund special units were made available to any state that could formulate its needs, submit an application reflecting realistic goals, and demonstrate the capability to achieve its goals. My office, in studying the Federal specifications, initially found them restrictive in that they applied only to traditional organized crime. Therefore, the scope of our grant application was written to include anti-trust, tax evasion, and official misconduct cases as well as organized crime. The need in Iowa for this effort was evidenced to us principally by an uninvestigated backlog of complaints and leads dating as far back as 1969. This backlog was not acted upon due to insufficient staff in the Attorney General's Office and inadequate appropriations to form a staff. As a result, a grant application was submitted in 1971 and approved by the LEAA to start in 1972.

In February of 1972, after federal funding was received, two attorneys and a secretary were transferred from the regular staff to the Special Prosecutions Section. By the end of 1972, a full compliment of five attorneys, five investigators and two secretaries were assigned and working in the Special Prosecutions Section.

The details of the operation of the Special Prosecutions Section must of necessity remain confidential since at the time of this writing all but two of its cases are in the investigative phase. However, it is significant to note that of those cases presently in work a total of thirteen were activated from allegations on record in this office at the time the Special Prosecutions Section was formed. It is also significant that an additional thirty cases were logged during 1972 from allegations and investigative leads received from a variety of sources.

Complaints were received from the following sources in 1972:

11 Citizen's Complaints
2 Referred by a Federal Agency
1 Referred by another State Agency
1 Anonymous
3 Confidential Informant
12 Initiated by Special Prosecutions Section

Since the grant project is new and in a developmental phase, it is reasonable to expect that as knowledge of its presence and objectives increase so too will the quantity and quality of allegations received by the Attorney General's Office. The difficult task of the Special Prosecutions Section will then be, as it is now, to reduce anti-trust violations, official misconduct, tax evasion and organized crime allegations to realistic evidence and hard facts.

When the Special Prosecutions Section was formed early in 1972, it continued prosecution of the International Harvester price fixing case started earlier by the Attorney General's Office. In this case, the State alleged a conspiracy to fix prices by approximately 142 International Harvester dealer corporations and employees throughout the state. These individuals allegedly participated in a reprinting of the manufacturer's suggested price list for spare parts, and thereby raised the the prices to their agricultural customers in Iowa by ten percent. A conspiracy to fix prices is a violation of state law and the Special Prosecutions Section obtained conspiracy convictions on the first sixteen defendants selected for trial. Trial of the next 16 defendants resulted in the acquittal of seven and a mistrial with respect to nine. Thus far 37 defendants have plead guilty. Trial of the balance of the defendants is still pending at this time. A conviction of conspiracy to fix prices carries a $500 to $5,000 fine plus one year in jail. Each defendant was fined $500, and the non-corporate defendants were also given one year in jail, with the jail sentence suspended upon successful completion of a two year probationary period.

The Special Prosecutions Section is also attentive to what could be outdated provisions of the Iowa Code in certain areas. The anti-trust statute was written in 1890 and, we believe it is weak in the protection it affords citizens in 1972. Professor Ellis of the State University of Iowa Law School, has, therefore, at our request, rewritten the anti-trust statute for presentation to the current session of the Legislature. Based on the insight afforded this office through Special Prosecutions Section investigations, I would recommend passage of the revised statute.

We understand the Department of Revenue will also propose a revision of the statute governing special fuel tax collection.

The Special Prosecutions Section in 1972 conducted an extended investigation for possible special fuel tax evasion, and failed to uncover evidence leading to an indictment. However, information obtained relative to the opportunities available for tax evasion, plus statistical evidence from the Highway Commission that such evasion may be present, would suggest that a general revision to the statute is advisable.

TORT CLAIMS

In 1971 the Tort Claims division of the Department of Justice handled before the State Appeal Board 144 tort claims totaling $3,884,109. In 1972, 149 such claims involving a total asking of $4,497,840 were handled. Upon the recommendation and approval of the Special Assistant Attorney General assigned to the division, the Appeal Board in 1971 and 1972 paid out $20,424 and $76,475 on said claims. The division also in 1971 handled before the Appeal Board 818 general, non-reciprocity claims amounting in the aggregate to $421,258. In 1972, 803 such claims involved a total asking of $342,287. Pursuant to the recommendation of the Special Assistant Attorney General, the Appeal Board paid 1971 claims in the amount of $374,137 and 1972 claims in the amount of $320,637.

The Tort Claims division instituted a large number of lawsuits on behalf of the State in Iowa District Courts during the past two years. Several of the cases were of first impression in Iowa. On a theory of public nuisance a successful action was initiated in Polk County District Court enjoining a major truck company from violating Iowa's overlength statute. Another successful case resulted in a recovery for the State when a highway patrolman damaged his own vehicle in a hot pursuit situation, on the theory that the defendant caused the accident by failing to stop. Other actions are pending for indemnification against road contractors where the State has been held negligent for failing to adequately warn of road hazards on the proposition that the contractor is primarily responsible for establishing proper warnings.

During 1971 three judgments were entered against the State amounting in total to $13,603 and in 1972 three judgments were entered totaling $209,810. Currently, the division is handling 96 District Court lawsuits involving a total of $13,426,353 and has eight cases pending in the Supreme Court.

RECIPROCITY

During the past two years the Department of Justice handled 170 claims filed by interstate motor vehicle carriers for reciprocity of overpayment of registration fees paid during years 1971-1972. These refund claims were based on the Iowa Supreme Court's decisions in *Consolidated Freightways Corp. v. Nicholas,* 258 Iowa 115, 137 N.W.2d 900; and *General Ex-*

pressways, Inc. v. Iowa Reciprocity Board, 163 N.W.2d 413. Refunds awarded by the State Appeal Board for the 1971 through 1972 years totaled $720,453.

TREBLE DAMAGE — ANTI-TRUST CASES

Settlement funds in the price-fixing case against the five major manufacturers of the drug tetracycline, have been distributed to 1,000 consumers of that drug in the State of Iowa. The remaining 1.5 million dollars will soon be distributed to public hospitals, state institutions and county governments. Four hundred thousand dollars will be available to the Department of Health for use, under Court order, for special projects including public health nursing services, the treatment of alcoholism, the detection of sickle cell anemia and sewage treatment problems. Iowa continues to receive its aliquot share of settlement funds in the copper and brass tubing cases. The amount collected to date is $138,000. The case against the manufacturers of plumbing fixtures has been settled also and city, county and state institutions shared in the distribution of $24,000.

After the United States Supreme Court declined to hear the case against automobile manufacturers for their alleged conspirotorial failure to develop effective anti-air pollution devices, we filed suit against those same defendants in federal district court. Our suit and those filed by many other states will be tried in Los Angeles in February.

Interrogatories have been propounded and answered on both sides and depositions are being taken in the fleet discount case and the Ampicillin case which were filed in 1970.

Iowa joined several other states in suing the manufacturers of cast iron pipe for an alleged territorial price-fixing scheme that began as early as 1945 and continued until the filing of suit on May 26, 1971. This office represents all State institutions as well as all other governmental units who have purchased the pipe and fixtures during that period. Almost five million dollars worth of cast iron pipe has been purchased during that period by State institutions and local government units, which this office also represents in this matter. Trial is set in April of 1973 in Birmingham, Alabama.

Iowa has also become a member of the settling class in a case against the manufacturers of fire and burglar alarms. State purchases of these products in the conspiracy period amounted to $59,000.

As is evident from the foregoing, significant recoveries both for the State and its citizens have been realized in treble damage anti-trust cases and hopefully additional amounts will be obtained in the next biennium. However, the Assistant Attorney General who handles these cases also represents the Civil

Rights Commission and as the workload of the Civil Rights Commission increases, it is to be expected that she will have to make some difficult decisions as to priorities and the amount of time she can spend on anti-trust matters. This is another reason why additional funds should be appropriated for the Department of Justice to enable us to hire additional attorneys to handle Civil Rights cases.

REMOVAL OF PUBLIC OFFICERS

The Attorney General is authorized under Chapter 66 of the Code to bring removal actions against public officials whom he believes to be guilty of willful or habitual neglect or refusal to perform their duties; or willful misconduct or maladministration; corruption; extortion; intoxication; or upon the conviction of a felony. This office has filed five such actions in the past biennium. One municipal court judge was charged with intoxication and another with habitual neglect of duty. After much pre-trial investigation, both judges were defeated in their bid for re-election.

The three members of the Worth County Board of Supervisors were charged with willful or habitual neglect or refusal to perform their duties; with willful misconduct or maladministration; and with corruption. After trial on these charges in District Court, one board member was removed by the court and the Court's opinion spoke critically of the activities of the other two. All these cases are on appeal to the Iowa Supreme Court.

TAXATION

The Iowa Department of Revenue has been represented by the Department of Justice in a considerable volume of litigation, and in administrative hearings, involving the corporate and personal income taxes, franchise tax on financial institutions, sales and use taxes, property taxes, inheritance tax, cigarette and tobacco taxes, motor vehicle fuel taxes, and chain store tax.

In the past two years, there were 29 administrative hearings before the Iowa Director of Revenue and 17 taxpayer appeals were taken to the State Board of Tax Review from decisions of the Director of Revenue. Nine of these appeals were disposed of by the state board in favor of the Director of Revenue, two were lost, two were settled, three are pending decision, and one is pending hearing. Iowa District Courts decided 26 cases in favor of the Department of Revenue and 10 such cases were lost. A total of 16 District Court cases were settled. The two cases which arose in the federal district courts were settled. The Iowa Supreme Court upheld the state in three out of four

cases decided during the biennium. Four cases are presently pending in the Supreme Court and 28 cases are pending trial in Iowa District Courts.

All of the Supreme Court cases involved the Iowa inheritance tax. In *Estate of Cecil A. Noe,* 1972, Iowa, 195 N.W.2d 361, the Department of Revenue prevailed in its contention that the normal rules of abatement set forth in §633.436 applied in the usual testate situation so that the share of the surviving spouse abates last. This case has served as a guide to the Revenue Department as well as attorneys who probate estates, particularly since the Internal Revenue Service has interpreted the Iowa abatement statute contrary to that of the Department. In *Estate of John A. Waddington,* 1972, Iowa, 201 N.W.2d 77, the Supreme Court held that expenses incurred in selling property in an estate were nondeductible in computing inheritance tax. Such expenses had been allowed as a deduction by the former Tax Commission and Revenue Department for a number of years prior to 1971.

In *Estate of Hannah English,* Jackson County District Court, No. *12190,* decided June 12, 1972, the District Court adopted our formula for inheritance taxation of inter vivos transfers whereby the transferor reserved, in whole or in part, a life interest in the property transferred. This case is on appeal to the Supreme Court. In *Fleming Co. of Nebraska, Inc. v. Iowa Department of Revenue,* Polk County District Court, Law No. 1573, a suit against the Department for attaching a delinquent taxpayer's monies which the plaintiff allegedly had a security interest in, the court adopted our theory of sovereign immunity from suit. In the companion cases of *Chumara et. al. v. State Board of Tax Review,* No. *96465,* and *Henke et. al. v. State Board of Tax Review,* No. *96914,* involving property tax assessments of certain utilities, the Polk County District Court vacated the decisions of the Board affirming the Director's assessments as not supported by substantial evidence. These cases have been appealed to the Supreme Court.

In addition to administrative hearings and litigation, a far greater amount of time was spent by Tax Division staff in advising the Director of Revenue and his staff on legal tax problems, drafting tax opinions of the Attorney General, and aiding with the drafting of tax legislation.

The workload involving all taxes collected by the Department of Revenue and the property tax has increased in each biennium since I became Attorney General without any increase in staff size. The staff is presently engaged in the handling of problems not required of them before in areas involving corporate income tax, franchise tax, priority of tax liens against other liens, criminal income tax frauds, inheritance tax, and motor vehicle fuel tax audits of interstate truckers.

While we have not asked for any increase in staff for the next biennium for Revenue Department work because we felt that our needs in other areas such as Civil Rights, Consumer Protection and Criminal Appeals were more critical, it would certainly be most desirable to add another Assistant Attorney General to Taxation work especially since we are beginning to move for the first time into the area of income tax evasion.

HIGHWAY COMMISSION

For a variety of reasons, the Attorney General's staff assigned to the Highway Commission has continued to experience burgeoning workload. An expanding acquisition program, recent enactment of federal and state legislation relating to environmental considerations of highway planning and construction, and relocation assistance for persons displaced by highway improvements are notable examples. Additionally, the staff at Ames aids in helping Commission officials implement many of the federal aid programs concerned with highways. Finally, the recent complete revision of the Iowa eminent domain procedure continues to result in a large number of appeals to the District Courts.

While condemnations and condemnation appeals comprise the greater part of the staff's legal work, miscellaneous litigation involving such varied actions as contractor's suits, retained percentage cases, environmental law, certiorari and mandamus have been increasing.

The staff is also active in providing advisory opinions and legal counsel to various Commission departments, drafting proposed legislation, preparing rules and regulations, aiding in the implementation of new legislation and furnishing miscellaneous legal services in connection with a variety of functions in which the Commission is engaged.

During the biennium the staff processed well over 600 condemnations (this number does not include a large number which were dismissed prior to the sheriff's jury award) involving suit amounts in excess of 20 million dollars and condemnation awards in excess of 11 million dollars.

There were 154 appeals pending as of January 1, 1971, and 165 appeals were filed during the biennium. During this period, 153 cases were settled and 42 cases were tried, leaving 123 cases pending as of January 1, 1973.

Also during this period the staff experienced an increase in other types of litigation. On January 1, 1971, there were 35 cases pending. In addition, another 106 cases were filed. Of these cases 78 were disposed of during the biennium, leaving 63 cases pending as of January 1, 1973.

Approximately one dozen cases in all categories were handled

on appeal to the Supreme Court by this office during this period of time.

SOCIAL SERVICES

The Attorney General performs legal services for the Department of Social Services pursuant to §13.6, Code of Iowa, 1973, requiring a Special Assistant Attorney General to serve in such capacity. In addition, there are presently two other Assistant Attorneys General assigned full time to the work of this department.

Among the services which these attorneys provide to the Department of Social Services are: 1) furnishing consultations and advice with respect to statutes, judicial decisions and state and federal regulations; 2) advising with regard to proposed regulations, legislation and manual materials; 3) defending suits brought against the Commissioner or employees of the Department in state and federal courts; 4) inspecting and approving contracts and leases, and handling real estate matters involving the department; 5) referring to County Attorneys various suspected welfare fraud matters in the federal categorical programs, as well as matters connected with uniform reciprocal support actions and habeas corpus and other juvenile delinquency, dependency and neglect cases commenced at the county level; 6) representing the State of Iowa, and Iowa Department of Social Services before the Supreme Court in matters which had been handled by the County Attorneys at the District Court levels; 7) researching and preparing drafts of proposed Attorney General opinions; 8) representing the Department of Social Services in all estates of decedents and conservatorships to protect liens on real estate and to recover assistance granted in the programs of old age assistance and medical assistance; 9) representing the Department in appeals to the District Courts in administrative hearings; 10) representing the Department in proceedings involving state institutions under the direction of the various bureaus of the Department.

The Assistant Attorneys General assigned to the Department of Social Services to assist the Department on a daily basis in the recovery of assistance in the old age, medical and blind aid programs, have played an important part in the total recovery of over $2,600,000 by the Department in this biennium. Their duties included correspondence with attorneys, preparation and filing of objections to final reports, foreclosure of liens, real estate sales and approval and foreclosure of real estate sale contracts, as well as actual litigation.

Our attorneys have participated with the Attorney General, as a party or as an *amicus curiae,* in five United States Supreme Court cases in the last two years. In addition, four cases involving the Department of Social Services and this

office have been before the Federal Appeals Court for the Eighth Circuit. In the Federal District Courts of Iowa, the office has been involved with a growing number of prisoner rights cases in addition to suits challenging Iowa social welfare legislation.

The amount of litigation in the Iowa District Courts has also increased substantially over the last biennium. This is due to a large increase in appeals from Departmental hearings and the increase in assistance recipients from whom recovery is sought. Appeals to the Iowa Supreme Court have increased in both the juvenile area and in welfare litigation.

The following is the number of cases appearing on this office's docket over the last two years:

United States Supreme Court	Five (5)
Eighth Circuit Court of Appeals	Four (4)
United States District Courts (Iowa)	Thirty-six (36)
Iowa District Courts	Four Hundred and thirty-four (434)
Iowa Supreme Court	Thirty-two (32)
Out of State	Three (3)

PUBLIC SAFETY

During the 1971-72 period, the Department of Justice represented the Drivers' License Division of the Department of Public Safety in the District Courts in 340 appeals by motorists from the suspension or revocation of their drivers' licenses. 134 cases were settled in the State's favor before trial. 206 cases came to trial, with the State winning 184, losing only 22.

Ten motorists who lost in the District Court appealed to the Supreme Court. Six of these appeals were dismissed, three were won and one was lost.

The Attorney General's office also furnishes legal services to other divisions of the Department of Public Safety, including the Fire Marshal, Motor Vehicle Inspection Division, Dealers' License Division, B.C.I., and the Highway Patrol.

EDUCATION

During the past two years there has been a marked increase in the workload of the Attorney General's office with respect to the state agencies concerned with education: Department of Public Instruction, Board of Regents, Commission on Higher Education and the State Educational Television and Radio Facility Board.

The enactment of the foundation aid plan for funding state support for elementary and secondary schools is a completely new legislative approach to the problem of assuring equal

educational opportunities to all children within the borders of the state. This new legislation has engendered many legal problems concerning proper local budgeting and the use of federal programs. Additionally, there was concern expressed for the need to provide special education programs in every community. A complete revision of the election laws with the lowering of the voting age has also prompted questions relevant to school elections and a number of opinions on this subject have been issued.

Further, recent legislation establishing a professional teaching practices commission with authority to formulate rules and a responsibility for developing professional practices criteria is adding a new dimension to the licensing of teachers which function formerly was handled exclusively by the State Board of Public Instruction acting as the State Board of Educational Examiners. Whereas during the biennium only one decision of the State Board of Educational Examiners has been contested, there is every indication that there will be innumerable challenges to the rules developed by the professional practices commission. In this connection it should be noted that many more school districts are showing interest in adopting a master bargaining contract setting out definite contractual provisions for teachers. Such contracts anticipate the enactment of public contract negotiations laws.

Other school questions on which opinions have been issued include teacher sick leave and retirement; legality of deferred compensation contribution by board; responsibility of student teachers; reimbursement for vocational aid programs; sale of school property; apportionment of assets and liabilities upon merger of two school districts; insurance coverage for school board; payroll deductions for disability insurance; methods of obtaining bids for school construction; who pays the county superintendent's bond; cooperative agreements between school districts and other governmental agencies; transportation of students to school and special programs; legality of claims for reimbursement for providing auxiliary services; what school documents are public records; limitations on powers to lease or sell school property; use of school funds for sabbatical leaves for teachers, band uniforms, the defraying of costs of litigation incident to the sale of bonds; acceptance of gifts for construction of buildings and the necessity for following public bidding laws; investment of area school funds; statutory limitations on acquisition of land for playgrounds; computation of reimbursement to districts for tax free lands; sale of anticipatory warrants; recovery of sick leave paid to teachers from workmen's compensation insurance carriers; use of county education funds to provide equipment for special education personnel; and residence requirement for secretary of school board.

At the Regent's institutions a number of legal problems have emerged in connection with the development of a merit em-

ployment scheme corresponding to the State Merit System. The Board of Regents is developing a complete set of regulations governing all aspects of employment of persons not otherwise excluded from its regulation coverage. The question of who is covered or excluded under such regulations is currently in litigation in the District Court of Iowa in Johnson County. Matters other than personnel actions of importance during the biennium at the Regents' institutions include: Execution of appropriate agreements for the construction of new roadways extending through and beyond the grounds of the institutions, development of regulations for traffic control at the universities, transfer of a sewer line, protection of the private right-of-way, and responsibility of the state for reconstruction of buildings which prior to destruction by fire were located on state owned or state leased land.

In higher education we have noted a considerable increase in the number of student loans to doctors which are in default at the present time. Collection efforts are being made and some success is evident.

With regard to educational radio and television, appropriations by the Legislature authorizing the full development of the television networks across the state has prompted numerous agreements for the lease of space necessary for production facilities and the acquisition of tower space for transmitting as well. This office has prepared such lease agreements. There is a requirement that the E.T.V. Board prepare merit regulations. Advice has been furnished here also.

BANKING

The constitutionality of the Iowa Banking Act of 1969 was upheld during the biennium by the Supreme Court of Iowa. *Grant v. Fritz,* 1972, 201 N.W.2d 188. This case is important because it involved a challenge to the right of the Superintendent of Banking to regulate the location of new banks within the state and further because the court's opinion contains guidelines for administrative decisions based on substantive evidence.

Due to an increase in new federal regulations, the supervisory authorities of financial institutions in Iowa have presented questions requiring advice by this office on questions concerning interpretations of the Iowa Bank Holding Act, the use of convertible securities and other investments as well as numerous other matters.

Certain banking activities have resulted in the necessity for the State Superintendent to take over the management of a state bank (Bellevue) and a great deal of time has been spent by this office in advising the Superintendent in this matter.

Credit unions also have been searching for new avenues for development and as a result numerous questions have been

presented requiring opinions of this office as to their power to establish travel agencies, combine with home plant credit unions located in other states and the commercial sale of services and computer time. One credit union established in the model city's area was, upon examination of the Banking Department, determined to be insolvent and this office has been instrumental in the appointment of a receiver for the liquidation thereof through the Polk County District Court.

AGRICULTURE

Litigation resulted from legislation allowing a check off for soy beans and also the requirement that swine sold through livestock markets be eartagged. The outcome of suits in both these areas successfully upheld the actions of the State Agriculture Department. Other cases involved the legality of the department's action denying registration and licensing to certain soil conditioners and inorganic fertilizers. Such litigation has not been concluded. Also, similar suits developed from the establishment of rules and regulations prohibiting the use of certain inorganic compounds determined by the Chemical Review Board to be harmful to the general public.

INSURANCE

Shortly before the end of the biennium the Chicago Title Insurance Company filed a suit against the Commissioner of Inusrance as Defendant to test the statute prohibiting the writing of title insurance in the State of Iowa. This important litigation is presently pending. Other matters concerning the Insurance Department involved advice in connection with the establishment of regulations on illegal practices, the efforts of the department to control the unauthorized sale of certain types of insurance in the State of Iowa, and the power of nonprofit medical service corporation to acquire real property.

There has been much activity requiring the Attorney General's approval of various merger and consolidation activities of Iowa insurance companies. The credit life and health and accident business is apparently being taken over by companies specializing in this field and several Iowa companies have been extremely active in acquiring blocks of insurance of smaller companies in other states thus requiring the action of the Commissioner of Insurance for the approval of treaties reinsuring such blocks of business. Smaller county mutuals have been active also in amending and updating their articles of incorporation.

THE IOWA BAR EXAMINATIONS

The past two years have witnessed a great increase in the number of applicants for the Iowa Bar Examination. As administrator of this exam and Chairman of the Board of Bar

Examiners, I have observed that the number of new lawyers seeking to practice law in this state has nearly doubled since 1967. As Chairman of the Board of Law Examiners, a particular effort has been made to assure that the exams are graded promptly and fairly and that the results are available without delay. A recent ruling of the Supreme Court has changed the date and location of the examinations so that they are held in alternate years in Iowa City and Des Moines. Examinations are given twice a year and considerable time and effort is expended to insure that they are properly administered.

ADMINISTRATIVE LAW

It is clear that this state is ready for and needs a well formulated administrative procedures law. To that end, we have worked with a special committee of the Iowa Bar Association to adopt the provisions of a model administrative procedures act for use in this state. The prospect of such legislation appears good and the outcome would vitally change Chapter 17A of the Code by providing procedures giving greater notice of proposed rulemaking to the public and require more uniformity in hearing procedures in the various state departments.

REAPPORTIONMENT

Again, in 1971, attorneys of the Department of Justice were called upon to undertake the defense of a plan of reapportionment of the two houses of the General Assembly. In this latest case, *Noun, et. al. v. Turner,* the Iowa Supreme Court was asked to declare unconstitutional Chapter 95, 64th General Assembly, First Session (1971), a measure which had created fifty Senatorial districts and one hundred Representative districts having a deviation between the smallest and the largest districts of only 3.8 percent. Extensive evidence was presented and testimony was taken before a Special Master appointed by the Iowa Supreme Court and thereafter we submitted a lengthy brief bristling with law and fact and oral arguments were presented. In a disappointing decision handed down January 14, 1972, the court found that Chapter 95 did not meet the one man, one vote requirements laid down by the U.S. Supreme Court largely because the Iowa Court felt that there was present an unacceptable element of protection of incumbents. A petition for a rehearing was filed, briefs were submitted and arguments presented but the court adhered to its determination to undertake reapportionment itself and ultimately produced its own reapportionment plan which is expected to remain in existence until the end of the present decade.

GAMBLING

Although extensive press coverage was given to the gambling controversy which erupted in the summer of 1972 and al-

though the matter resulted in two and one-half months of legal battles involving four courts and three cases and three appeals to higher courts, the amount of time required by staff members of the Department of Justice was not as great as might at first appear, since I was able to assign much of the research involved in these cases to two summer law clerks.

Until September 5, 1971, gambling complaints were almost always referred to County Attorneys. On that date, I received a telephone call from a news reporter informing me that the Immaculate Conception Church in North Buena Vista, Iowa, was having its annual fund-raising picnic with beer being sold on Sunday without a license and bingo, craps and roulette openly being played while local law enforcement officials directed traffic. Local citizens voiced strong opposition to the resulting raids as being discriminatory where the state allowed gambling at the state fair. The Linn County Attorney raised the issue again in May, 1972, resulting on May 24, 1972, in a letter from me to Mr. Kenneth R. Fulk, Secretary of the State Fair Board, in which I stated that the state had an interest in enforcing all of its constitutional laws and should not tolerate violations of its own laws, on its own property, in its own activities.

The Association of Iowa Fairs, Outdoor Business Association and Century 21 Shows, Inc., launched a spirited and multifaceted attack on this announced policy that our gambling laws were going to be enforced. A suit was first filed in Polk County District Court on June 22, 1972, in which the plaintiffs asked that certain games traditionally played at fairs be declared not to be gambling. This action resulted in a temporary injunction being issued restraining enforcement of the gambling laws against the plaintiffs. However, when the case was subsequently decided on the merits the court determined that the games constituted gambling and the injunction was dismissed. The plaintiffs promptly appealed to the Iowa Supreme Court and requested a stay and injunction. When the Iowa Supreme Court denied this request, the plaintiffs began a new suit in Federal District Court asking that a three-judge panel be convened and prosecution of the Iowa law be enjoined. The Federal Court refused to grant the relief requested because of the pendency of the State Court action in the Iowa Supreme Court.

Next, the plaintiffs filed another suit in Polk County District Court asking the same relief and for the same reason raised in the Federal Court suit described above. Again, the plaintiffs gained a temporary injunction in the District Court. We took certiorari to the Iowa Supreme Court and the injunction was dissolved. Finally, on August 23, 1972, the plaintiffs made application for an injunction to the U.S. Supreme Court and this was denied on September 5, 1972. As a result of the foregoing, I was able to fulfill my responsibility with respect to enforcement of our gambling laws. We had plainclothes de-

tectives patrolling the state fair and our officers saw only one instance of gambling.

With the repeal in November, 1972, of the constitutional prohibition against lotteries, the Legislature has a great deal more flexibility in dealing with this subject and it is expected that the 65th General Assembly will enact a measure legalizing some of the more harmless gambling games.

OTHER MATTERS

Numerous legislative proposals designed to strengthen law enforcement have been prepared by my office and submitted to the current session of the Legislature. These include measures dealing with witness immunity, joint trials, state-wide Grand Jury and a bill to establish a system of District Attorneys in the State.

In addition to the foregoing, the Department of Justice has been active in its cooperation with other law enforcement agencies at different levels of government. We have conducted cooperative research, given speeches and participated in conferences. I and my representatives have taken an active part in the affairs of the Law Enforcement Academy Council and the Iowa Crime Commission. In addition to this, the Attorney General is Chairman of the three member Hearing Board established by law for the purpose of conducting departmental hearings relating to controversies concerning the issuance, suspension or revocation of liquor licenses and beer permits and numerous hearings have been held and decisions rendered.

The present Attorney General has served as Chairman of the Midwest Conference of the National Association of Attorneys General and as a member of the Executive Committee of the National Association of Attorneys General. In addition, he is currently serving as the Chairman of the Consumer Protection Committee of the National Association of Attorneys General and has been Chairman of and served on numerous other committees of both Associations in the past. He is also the National Association of Attorneys General representative to the Advisory Committee on the special committee on Revision of Uniform Rules of Criminal Procedure of the Conference of Commissioners on Uniform State Laws.

The efforts by my department to do its job was made no easier in the last two years by a rash of suits aimed at placing obstacles in our paths. Because of criticism we directed at the Worth County supervisors my chief deputy and I were sued personally by such supervisors for a total of $1,650,000. Along with the Attorneys General of the other states I was sued for $100,000,000 by Glen Turner and Koscot Interplanetary, Inc. (See Consumer Protection, P. 3, supra). In addition, as mentioned previously, suits in equity have been brought against me to enjoin me from enforcing the gambling laws.

We have previously been sued by utility companies seeking to stop our investigation of their merger by removing us from a Grand Jury investigation and by publishers of an underground newspaper for allegedly illegally seizing copy they were delivering to the printer.

Thus far, we have always avoided any personal liability and have prevailed in the cases which have attempted to stop our investigations. Defending such cases has, nevertheless, been extremely costly to the state in terms of outside counsel as well as the use of our own man power. Our experience, coupled with that of other state officials and employees who we have been called upon to defend, such as Commissioner Gillman of the Department of Social Services and Secretary Crews of the Board of Pharmacy Examiners, as well as Representative Logemann in the Worth County Supervisors case, convinces me that the state should perhaps move in the direction of enacting legislation to protect public employees, officials and state witnesses, not only by furnishing them counsel but also perhaps by appropriating funds to pay any judgments rendered against them. Perhaps, too, those who sue public officials and state witnesses could be held liable for defending attorney fees and court costs in the event their suit is unsuccessful, and bonds could be required for that purpose.

REORGANIZATION

Attached hereto as Exhibit 1 is an organization chart showing how the Attorney General's office is presently structured. Manifestly, this kind of arrangement is extremely unwieldy and very nearly impossible to administer. The difficulties are compounded by the fact that the staff of the Department of Justice is scattered all over the Capitol Complex and in Ames at the Highway Commission. The Governor's Economy Committee recognized this problem and recommended that this office be reorganized into fewer divisions. It also recommended that our personnel be officed in a single location, not only to save expenses such as duplicate library upkeep, Xeroxing, centralized filing, secretarial pooling, but also to improve communications and permit closer staff supervision. Despite our repeated requests, this has not been done.

Exhibit 2 is an organization chart showing how we would like to reorganize our office into three major divisions; Civil, Criminal and State Departments. The proposal has the endorsement of a management consultant who recently studied our office under the auspices of the National Association of Attorneys General, and in our opinion would go far toward strengthening the operation of this office and improving efficiency.

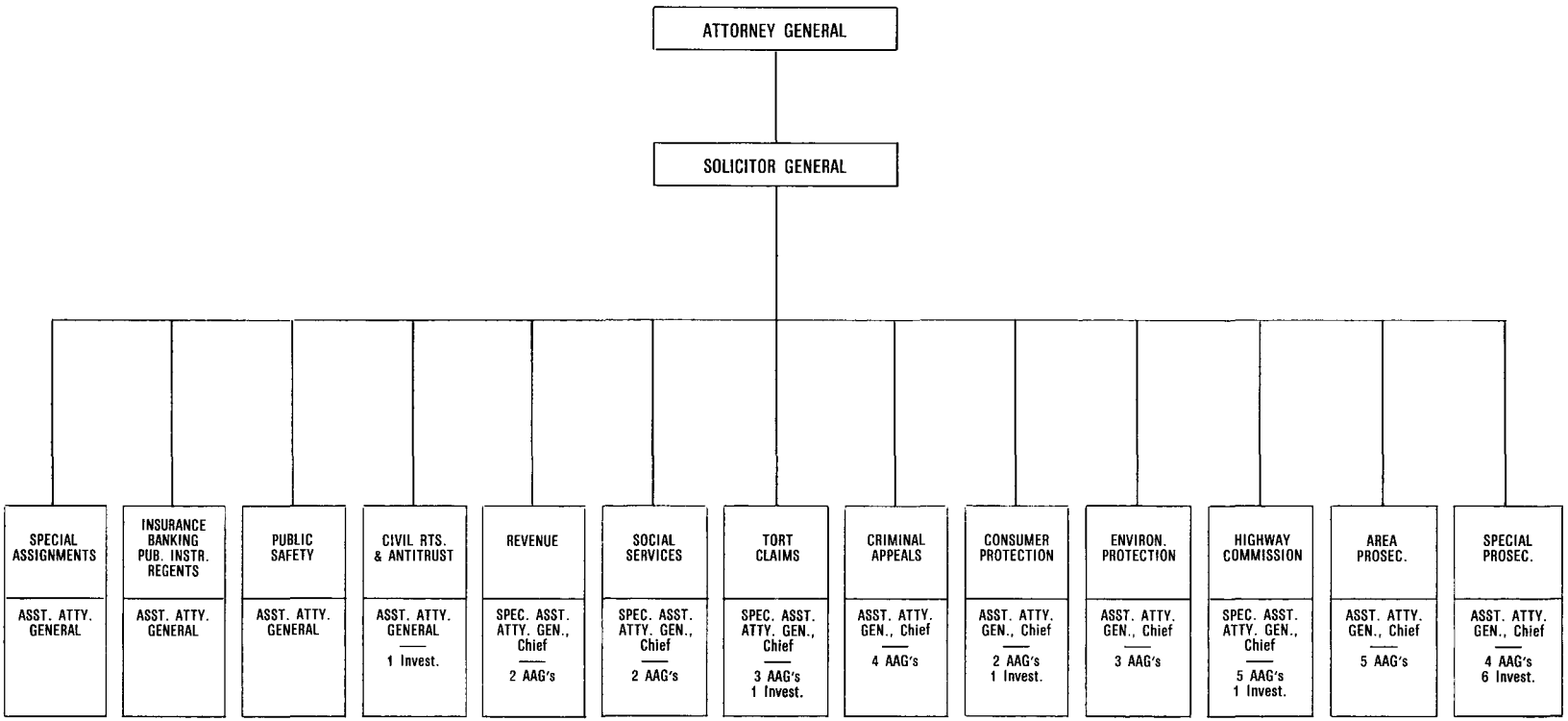
In our budget askings we requested funds to implement this

proposal, however, your recommendations make no provision for this purpose. Again we respectfully request that you reconsider your determination in this respect.

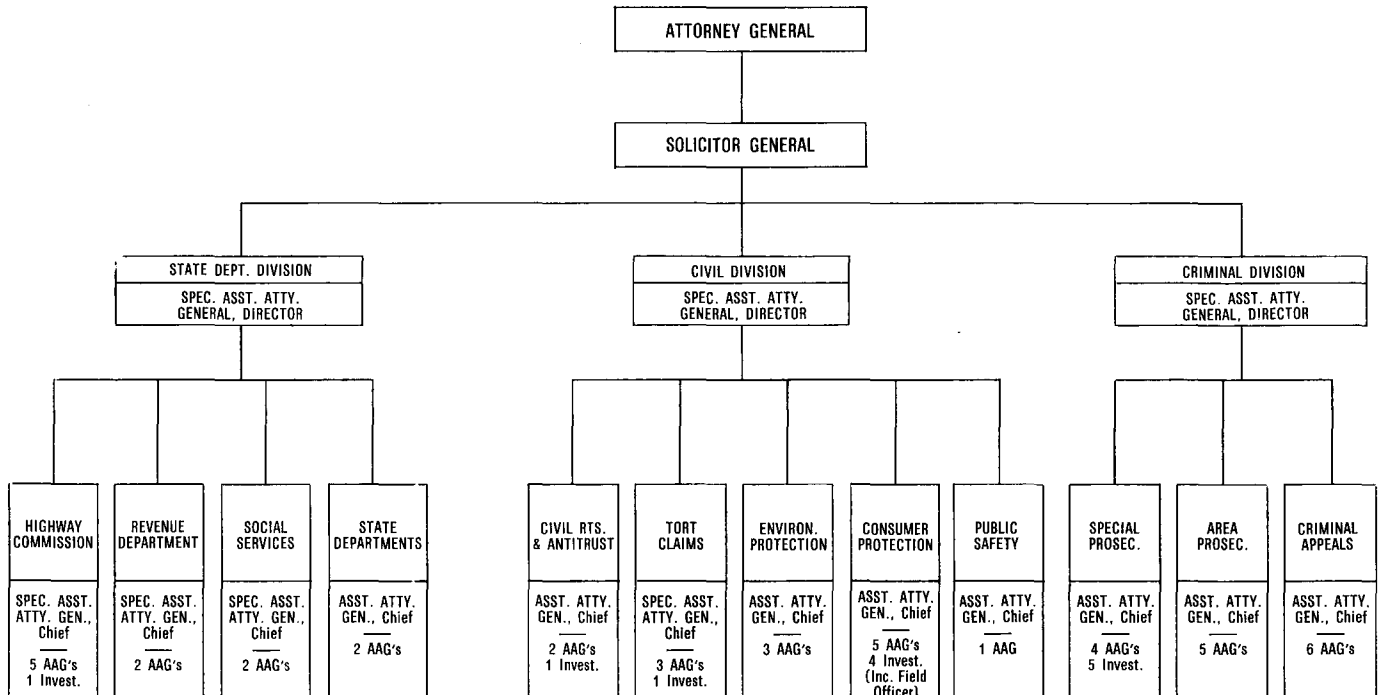
CONCLUSION

The foregoing constitutes the record of some of the more important achievements and urgent needs of the Department of Justice in handling its enormous workload. Unless we receive substantially more money to operate the Iowa Department of Justice in the 1973-1975 biennium than is proposed in the budget you have submitted to the Legislature, our ability to fulfill the duties required of us by law and perform the mission the people expect of us will be severely impaired to the manifest detriment of the public good and it will be necessary to farm our work out to private lawyers under the provisions of §13.7 of the Code, and the additional cost will be staggering.

IOWA DEPARTMENT OF JUSTICE
Present Organization Chart



IOWA DEPARTMENT OF JUSTICE
Proposed Organization Chart



NOTE: Includes filling vacancies not shown on Exhibit 1 plus other staff increases requested in budget submission.

State of Iowa

1972

THIRTY-NINTH BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1972

RICHARD C. TURNER
Attorney General

Published by
THE STATE OF IOWA
Des Moines

ATTORNEYS GENERAL OF IOWA

1853 - 1972

NAME	HOME COUNTY	SERVED YEARS
David C. Cloud	Muscatine	1853-1856
Samuel A. Rice	Mahaska	1856-1861
Charles C. Nourse	Polk	1861-1865
Isaac L. Allen	Tama	1865-1866
Frederick E. Bissell	Dubuque	1866-1867
Henry O'Connor	Muscatine	1867-1872
Marsena E. Cutts	Mahaska	1872-1877
John F. McJunkin	Washington	1877-1881
Smith McPherson	Montgomery	1881-1885
A. J. Baker	Appanoose	1885-1889
John Y. Stone	Mills	1889-1895
Milton Remley	Johnson	1895-1901
Charles W. Mullan	Black Hawk	1901-1907
Howard W. Byers	Shelby	1907-1911
George Cosson	Audubon	1911-1917
Horace M. Havner	Iowa	1917-1921
Ben J. Gibson	Adams	1921-1927
John Fletcher	Polk	1927-1933
Edward L. O'Connor	Johnson	1933-1937
John H. Mitchell	Webster	1937-1939
Fred D. Everett	Monroe	1939-1940
John M. Rankin	Lee	1940-1947
Robert L. Larson	Johnson	1947-1953
Leo A. Hoegh	Lucas	1953-1954
Dayton Countryman	Story	1954-1957
Norman A. Erbe	Boone	1957-1961
Evan Hultman	Black Hawk	1961-1965
Lawrence F. Scalise	Warren	1965-1967
Richard C. Turner	Pottawattamie	1967-

PERSONNEL OF THE
DEPARTMENT OF JUSTICE

RICHARD C. TURNER ..... Attorney General
B. September 30, 1927, Avoca, Iowa; B.A., J.D., S.U.I.; married, three children; private practice 1953-1967; State Senator from Pottawattamie County 1960-1964; Ass't. Pottawattamie County Attorney 1954-1956; Avoca Town Clerk 1953-1960; Elected Attorney General 1966, 1968, 1970 and 1972.

RICHARD E. HAESEMEYER ..... Solicitor General and First Ass't. Attorney General
B. April 11, 1928, Tipton, Iowa; B.S., University of Illinois; L.L.B., Harvard Law School; married, three children; American Airlines, Inc., N.Y.C., 1956-1962; Monsanto Company, Textile Div. (formerly the Chemstrand Corp.) N.Y.C. 1962-1967; App't Solicitor General and First Ass't. Attorney General February 20, 1967.

JOHN E. BEAMER ..... Special Assitant Attorney General
B. September 23, 1939, Abilene, Texas; B.A., Cornell College; J.D., S.U.I.; Agent F.B.I., 1964-1970; married, two children; App't. Ass't. Atty. Gen. 1970, App't. Special Ass't. Atty. General, 1972.

DAVID A. ELDERKIN ..... Special Assistant Attorney General
B. June 4, 1941, Cedar Rapids, Iowa; B.B.A., J.D., S.U.I.; married, one child; App't. Ass't. Atty. Gen. 1966, App't. Special Ass't. Atty. Gen. 1970, resigned 1972.

GEORGE W. MURRAY ..... Special Assistant Attorney General
B. June 1, 1920, Chicago, Illinois; Coe College 2 years; L.L.B., Drake University; married, one child; App't. Spec. Ass't. Atty. Gen. 1961-1965 and also 1967.

JAMES F. PETERSEN ..... Special Assistant Attorney General
B. July 23, 1931, Omaha, Nebraska; B.S., J.D., University of Nebraska; married, four children; U.S. Veterans Administration 1959-1960; Special Assistant Atty. Gen., State of Nebraska, 1960-1968; App't. Ass't. Atty. Gen. 1968, App't. Special Ass't. Atty. Gen. 1970, resigned 1971.

ASHER E. SCHROEDER ..... Special Assistant Attorney General
B. May 12, 1925, Maquoketa, Iowa; married, three children; B.A., J.D., S.U.I.; App't. Ass't. Atty. Gen. 1969, App't. Special Ass't. Atty. Gen. 1971.

LORNA L. WILLIAMS ..... Special Assistant Attorney General
B. February 9, 1915, Gaylord, Kansas; B.A., J.D., Drake University; two children, private practice 1941-1967; App't. Special Ass't. Atty. Gen. 1967.

JOHN I. ADAMS ..... Assistant Attorney General
B. July 11, 1926, Des Moines, Iowa; B.A., L.L.B., S.U.I.; Agent F.B.I., 1953-1955; Legal Department, Continental Western Insurance Company, 1958-1968; App't. Ass't. Atty. Gen. 1969.

JOHN W. BATY ..... Assistant Attorney General
B. October 5, 1942, Monticello, Iowa; B.S., Iowa State University; J.D., Drake University; Ass't. Marshall Co. Atty. 1968-1969; App't. Ass't. Atty. Gen. 1972.

LARRY M. BLUMBERG ..... Assistant Attorney General
B. September 8, 1946, Omaha, Nebraska; B.A., University of Minnesota; J.D., Drake University; married; App't. Ass't. Atty. Gen. 1971.

JAMES E. BOBENHOUSE ..... Assistant Attorney General
B. March 19, 1945, Des Moines, Iowa; B.S., S.U.I.; J.D., Drake University; single; App't. Ass't. Atty. Gen. 1970, resigned 1971.

GORDON G. BOWLES ..... Assistant Attorney General
B. July 25, 1947, Pittsburgh, Pa.; B.A., William Penn College; J.D., Drake University Law School; married; App't. Ass't. Atty. Gen. 1972.

DOUGLAS R. CARLSON ..... Assistant Attorney General
B. December 3, 1942, Des Moines, Iowa; B.A., J.D., Drake University; single; App't. Ass't. Atty. Gen. 1968.

COLEMAN, JR., C. JOSEPH ..... Assistant Attorney General
B. October 11, 1946, Fort Dodge, Iowa; B.A., Creighton University, Loyola University of Rome; J.D., Creighton University Law School; married; App't. Ass't. Atty. Gen. 1972.

ROXANNE BARTON CONLIN ..... Assistant Attorney General
B. June 30, 1944, Huron, South Dakota; B.A., J.D., Drake University; married, two children; private practice 1966; Deputy Industrial Commissioner 1966-1968; App't. Ass't. Atty. Gen. 1969.

G. BENNETT CULLISON, JR. ..... Assistant Attorney General
B. November 26, 1932, Harlan, Iowa; B.A., Grinnell College; L.L.B., Columbia University; private practice 1960-1962; Ass't. District Attorney, New York County 1962-1966; Legislative Ass't. to U.S. Senator, Jack R. Miller, 1966-1967; App't. Ass't. Atty. Gen. 1968.

JAMES C. DAVIS ..... Assistant Attorney General
B. February 23, 1937, Bloomington, Indiana; Oregon State College 2 years; Greenville College 1 year; B.A., J.D., S.U.I.; married, one child; private practice 1962-1970; Justice of the Peace 1967-1970; App't. Ass't. Atty. Gen. 1970.

KERMIT L. DUNAHOO ..... Assistant Attorney General
B. October 30, 1941, Nevada, Iowa; B.S., M.S., Iowa State University; J.D., Drake University; married, two children; App't. Ass't. Att'y. Gen. 1972.

G. DOUGLAS ESSY ..... Assistant Attorney General
B. October 14, 1942, Des Moines, Iowa, undergraduate, J.D., Creighton University; single; private practice 1966-1967; Trial Counsel, United States Navy 1967-1969; App't. Ass't. Atty. Gen. 1970, resigned 1971.

JULIAN B. GARRETT ..... Assistant Attorney General
B. November 7, 1940, Des Moines, Iowa; single; B.A., Central College; J.D., S.U.I.; App't. Ass't. Atty. Gen. 1967.

WILLIAM W. GARRETSON ..... Assistant Attorney General
B. July 1, 1935, Oklahoma City, Oklahoma; B.A., Iowa Wesleyan College; J.D., The George Washington University Law School; married, three children; U.S. Treasury Department, D.C. 1957-1959; U.S. Labor Department, D.C., 1959-1961; private practice 1961-1969; appointed Ass't. Atty. Gen. 1969, resigned 1972.

ROBERT W. GOODWIN ..... Assistant Attorney General
B. June 25, 1943, Indianola, Iowa; B.S., J.D., Drake University; married, two children; App't. Ass't. Atty. Gen. 1970.

MAX A. GORS ..... Assistant Atotrney General
B. January 21, 1945, Viborg, South Dakota; B.A., Augustana College; J.D., Drake University; married; App't. Ass't. Atty. Gen. 1970, resigned 1971.

HARRY M. GRIGER ..... Assistant Attorney General
B. March 13, 1941, Des Moines, Iowa; B.A., J.D., S.U.I.; married; App't. Ass't. Atty. Gen. 1967.

FRED M. HASKINS ..... Assistant Attorney General
B. October 18, 1947, Des Moines, Iowa; B.B.A., J.D., University of Iowa; single; App't. Ass't. Atty. Gen. 1972.

DONALD L. HOEGER ..... Assistant Attorney General
B. December 7, 1937, Luxemburg, Iowa; B.A., Loras College; J.D., S.U.I.; married, one child; App't. Ass't. Atty. Gen. 1970, resigned 1972.

HENRY L. HOLST ..... Assistant Attorney General
B. March 17, 1927, Moline, Illinois; B.A., S.U.I., M.A., Nebraska University; J.D., Nebraska University; married; Chief Trial Examiner, Nebraska Railway Commission 1957-1959; Special Ass't. Atty. Gen. State of Nebraska, 1958-1969; Deputy City Atty., Lincoln, Nebraska, 1959-1965; City Atty., Ames, Iowa, 1966-1967; App't. Ass't. Atty. Gen. 1967, App't. Special Ass't. Atty. Gen. 1968, resigned 1970, App't. Ass't. Atty. Gen. 1972, resigned 1972.

THOMAS R. HRONEK ..... Assistant Attorney General
B. May 18, 1947, Vinton, Iowa; B.A., Loras College, J.D., Northwestern University; single; App't. Ass't. Atty. Gen. 1972.

JAMES W. HUGHES ..... Assistant Attorney General
B. February 11, 1944, Des Moines, Iowa; single; B.A., Grinnell College, J.D., Drake University; App't. Ass't. Atty. Gen. 1969, resigned 1972.

ROBERT D. JACOBSON ..... Assistant Attorney General
B. April 23, 1942, Enid, Oklahoma; B.A., J.D., University of Iowa; Judge Advocate U.S.A.F. 1967-1971; App't. Ass't. Atty. Gen. 1971.

JOHN L. KIENER ..... Assistant Attorney General
B. June 21, 1940, Fort Madison, Iowa; married; B.A., Loras College; J.D., Drake University; private practice, 1965-1968; App't. Ass't. Atty. Gen. 1968, resigned 1972.

DAVID L. KOHLHAMMER ..... Assistant Attorney General
B. February 8, 1944, Rock Island, Illinois; B.A., J.D., University of Iowa; married; private practice 1967-1968; U.S. Army (certified JAGC) 1968-1971; Ass't. Muscatine County Attorney 1971-1972; App't. Ass't. Atty. Gen. 1972.

GERALD A. KUEHN ..... Assistant Attorney General
B. September 28, 1938, Hastings, Nebraska; B.B.A., State University of Iowa; J.D., Drake University; married, two children; private practice 1967-1969, 1970-1971; Ass't. City Att'y. Des Moines, Iowa, 1969-1970; App't. Ass't. Atty. Gen. 1971.

RONALD W. KUNTZ ..... Assistant Attorney General
B. April 9, 1937, Brooklyn, Iowa; B.S., J.D., Drake University; married; Ass't. Polk County Attorney, 1966-1972; App't. Ass't. Atty. Gen. 1972.

STEPHEN C. LANDE ..... Assistant Attorney General
B. August 19, 1947, Des Moines, Iowa; B.A., Morningside College; J.D., Drake University; married; App't. Ass't. Atty. Gen. 1972.

MICHAEL J. LAUGHLIN ..... Assistant Attorney General
B. February 27, 1944, Des Moines, Iowa; married; B.S.B.A., J.D., Drake University; private practice 1969; App't. Ass't. Atty. Gen. 1969, resigned 1972.

ALLEN J. LUKEHART ..... Assistant Attorney General
B. April 1, 1946, Cedar Rapids, Iowa; B.A., J.D., Drake University; App't. Ass't. Atty. Gen. 1971.

JEROME F. LUNDGREN ..... Assistant Attorney General
B. May 16, 1929, Chicago, Illinois; B.S., J.D., Drake University; married, four children; private practice 1968-1969; App't. Ass't. Atty. Gen. 1969, resigned 1972.

THOMAS D. McGRANE ..... Assistant Attorney General
B. November 2, 1940, Waverly, Iowa; B.A., U.N.I.; J.D., University of Iowa; married, three children; U.S.A.F. 1961-1964; App't. Ass't. Atty. Gen. 1971.

CLAYTON C. MOWERS ..... Assitant Attorney General
B. September 2, 1946, Algona, Iowa; married; B.A., J.D., Drake University; App't. Ass't. Atty. Gen. 1970, resigned 1971.

ELIZABETH A. NOLAN ..... Assitant Attorney General
B. Des Moines, Iowa; B.S., St. Mary's College, Notre Dame, Ind.; J.D., S.U.I.; U.S. Dept. of Interior, 1955-1962; private practice, Washington, D.C., 1962-1963; App't. Ass't. Atty. Gen. 1967.

RICHARD J. NOLAN ..... Assistant Atorney General
B. November 8, 1939, Iowa City, Iowa; A.B., J.D., Creighton University; married, one child; App't. Ass't. Atty. Gen. 1970, resigned 1971.

JOHN A. PABST ..... Assistant Attorney General
B. June 12, 1946, Ottumwa, Iowa; A.B., Dartmouth College; J.D., Drake University; married; App't. Ass't. Atty. Gen. 1971, resigned 1972.

CLIFFORD E. PETERSON ..... Assitant Attorney General
B. June 30, 1921, Ellsworth, Iowa; B.A., J.D., S.U.I.; married, two children; App't. Ass't. Atty. Gen. 1968.

GARY M. PETERSON ..... Assistant Attorney General
B. February 1, 1945, Fairbanks, Alaska; B.S., Iowa State; J.D., S.U.I.; married; App't. Ass't. Atty. Gen. 1972.

STEPHEN J. PETOSA ..... Assistant Attorney General
B. April 24, 1943, Fort Wayne, Indiana; B.S., Regis College; J.D., S.U.I.; App't. Ass't. Atty. Gen. 1968, resigned 1971.

FRANKLIN W. SAUER ..... Assistant Attorney General
B. February 16, 1941, Central City, Iowa; B.A., J.D., S.U.I.; single; private practice, 1966; U.S. Army, 1966-1968; App't. Ass't. Atty. Gen. 1970.

LARRY S. SEUFERER ..... Assistant Attorney General
B. September 6, 1940, Des Moines, Iowa; B.B.A., J.D., S.U.I.; married, one child; App't. Ass't. Atty. Gen. 1971.

IKE SKINNER ..... Assistant Attorney General
B. October 4, 1928, Des Moines, Iowa; B.A., J.D., Drake University; married, three children; App't. Ass't. Atty. Gen. 1971.

DOUGLAS R. SMALLEY ..... Assistant Attorney General
B. January 21, 1946, Centralia, Washington; B.A., S.U.I.; J.D., Drake University; single; App't. Ass't. Atty. Gen. 1971.

WILLIAM R. STENGEL ..... Assistant Attorney General
B. March 30, 1947, Rock Island, Illinois; B.S., University of Illinois; J.D., S.U.I.; married, one child; App't. Ass't. Atty. Gen. 1972.

OSCAR STRAUSS ..... Assistant Attorney General
B. September 23, 1876, Des Moines, Iowa; Ph.B., U. of Michigan; L.L.B., S.U.I.; married; App't. Ass't. Atty. Gen. 1944-1957; App't. First Ass't. Atty. Gen. 1958, 1959, 1961, 1963, 1965; App't. Ass't. Atty. Gen. 1967, retired 1972.

RAYMOND W. SULLINS ..... Assistant Attorney General
B. February 4, 1945, Princeton, Indiana; B.A., Los Angeles Baptist College; J.D., Drake University; married; App't. Ass't. Atty. Gen. 1972.

GARY H. SWANSON ..... Assistant Attorney General
B. October 26, 1939, Waverly, Iowa; B.A., J.D., Drake University; Ass't. Des Moines City Atty. 1965-1968; Private Practice 1968-1972; App't. Ass't. Atty. Gen. 1972.

PETER E. VOORHEES ..... Assistant Attorney General
B. May 19, 1947, Waterloo, Iowa; B.A., University of Northern Iowa; J.D., University of Iowa; App't. Ass't. Atty. Gen. 1972.

THOMAS J. WHORLEY ..... Assistant Attorney General
B. March 2, 1947, Sheldon, Iowa; B.A., J.D., University of South Dakota; married; App't. Ass't. Atty. Gen. 1972.

JOHN E. WIETZKE ..... Assistant Atotrney General
B. November 27, 1937, Greenfield, Iowa; B.S.E.E., M.S.E.E., Iowa State U., M.B.A., U. of Utah, J.D., S.U.I.; U.S. Air Force, Ogden, Utah 1962-1964; A.T.&T., 1965-1969, Salt Lake City, Los Angeles, San Francisco; App't. Ass't. Atty. Gen. 1972.

RICHARD N. WINDERS ..... Assistant Attorney General
B. April 13, 1945, Milwaukee, Wisconsin; married; B.A., J.D., Drake University; App't. Ass't. Atty. Gen. 1970.

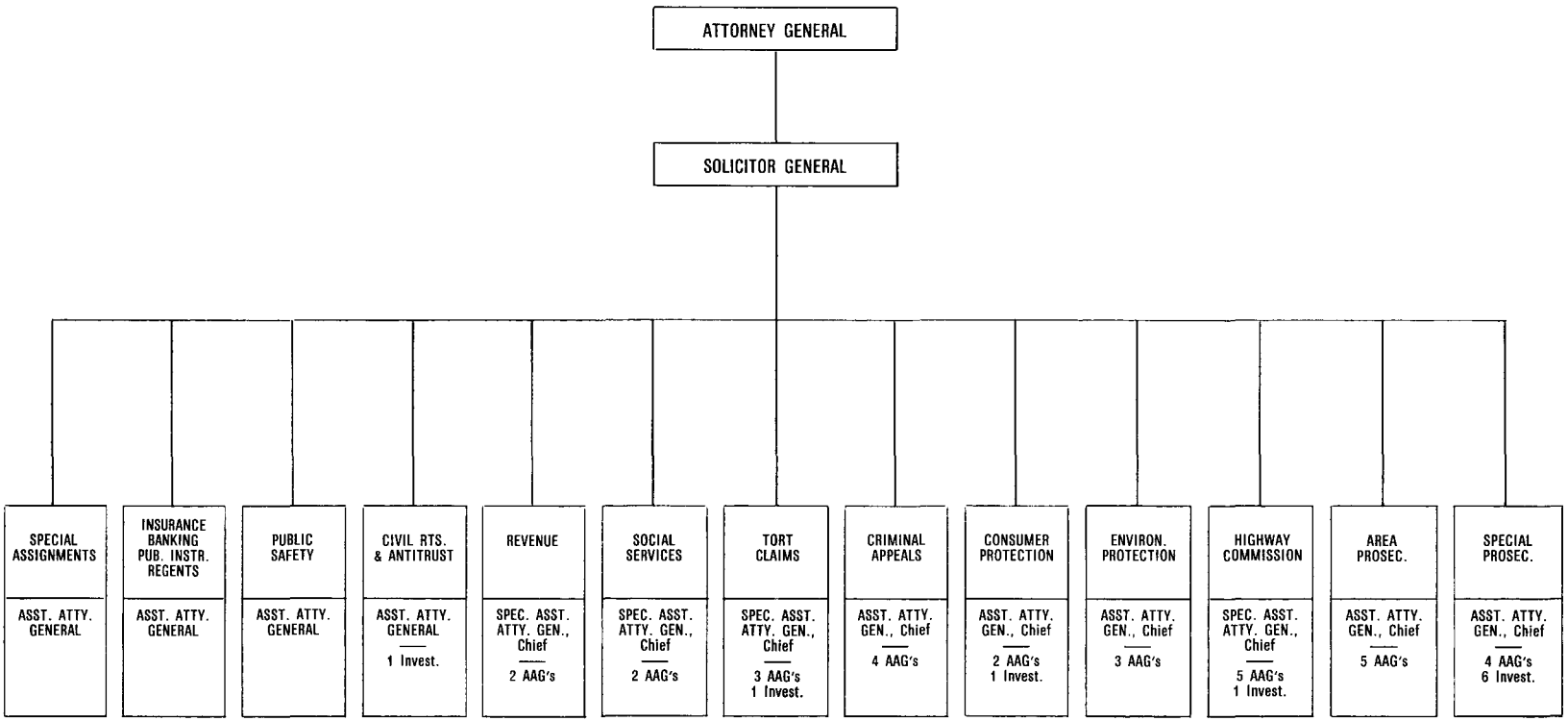
GARY D. WOODWARD ..... Assistant Attorney General
B. April 18, 1926, Muscatine, Iowa; B.A., L.L.D., S.U.I.; married, one child; App't. Ass't. Atty. Gen. 1972.

SARA A. CANADA ..... Administrative Assistant

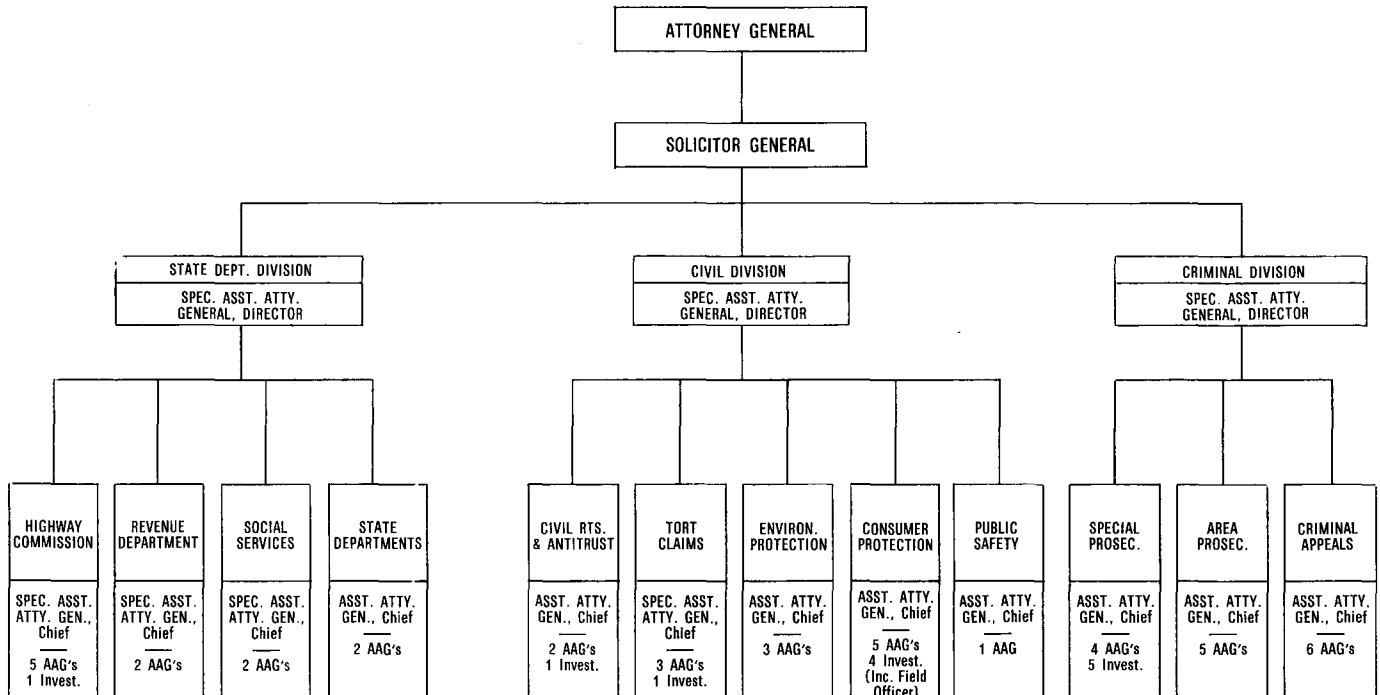
RICHARD C. TURNER

Attorney General

IOWA DEPARTMENT OF JUSTICE
Present Organization Chart



IOWA DEPARTMENT OF JUSTICE
Proposed Organization Chart



NOTE: Includes filling vacancies not shown on Exhibit 1 plus other staff increases requested in budget submission.

THE
OFFICIAL OPINIONS
OF THE
ATTORNEY GENERAL
FOR
BIENNIAL PERIOD
1971 - 1972

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January 6, 1971

COUNTIES AND COUNTY OFFICERS: County Attorney may select and appoint own secretary — §341.1, Code of Iowa, 1971. A county attorney's appointment of a legal secretary is essentially a personal matter which must be exercised by the county attorney rather than the board. The appointment is his choice, not theirs. (Turner to Goen, Dubuque County Attorney, 1/6/71) #71-1-1

Mr. John Goen, Dubuque County Attorney: You have requested an opinion of the attorney general with reference to a situation which has occurred in your hiring of a secretary for the county attorney's office. As I understand it, you want to hire a Mrs. Green and the board of supervisors has failed and neglected to act upon the appointment, and probably will refuse to do so, because she was an unsuccessful candidate for the board of supervisors in the last election or simply because they do not like her, her politics, etc.

If what you say is true, the board is clearly acting improperly and an action in mandamus would lie to compel their approval. *Smith v. Newell,* 1962, 254 Iowa 496, 117 N. W. 2d 883. You might also show the board 1931 OAG 1, a copy of which is herewith enclosed. The board must have a proper and legitimate reason, aside from politics, for refusing, failing, or neglecting to approve your appointment if, indeed, their duty in this respect is more than merely ministerial. Surely, your board of supervisors will recognize that a county attorney's appointment of a legal secretary is essentially a personal matter which must be exercised by the county attorney rather than the board. The appointment is your choice, not theirs. §341.1, Code of Iowa, 1971.

OPINIONS OF THE ATTORNEY GENERAL

COUNTY OFFICERS—BOARD OF SUPERVISORS: A board of supervisors may not refuse to approve the appointment of a deputy clerk because of the qualifications of such appointee.

January 7, 1931. *County Attorney, Logan, Iowa:* We are in receipt of your letter of January 3rd wherein you ask:

May the board of supervisors refuse to approve the appointment of a deputy clerk of the district court who is a minor, basing their refusal upon the opinions of its respective members as to the qualifications of the appointee?

Section 5238 of the Code of 1927, provides as follows:

"Each county auditor, treasurer, recorder, sheriff, county attorney, clerk of the district court, and county superintendent of schools, may, with the approval of the board of supervisors, appoint one or more deputies or assistants, respectively, not holding a county office, *for whose acts he shall be responsible.* The number of deputies, assistants, and clerks for each office shall be determined by the board of supervisors, and such number together with the approval of each appointment shall be by resolution made of record in the proceedings of such board."

Section 5239 of said Code is as follows:

"When any such appointment has been approved by the board of supervisors, the officer making such appointment shall issue in writing a certifi-

cate of such appointment, and file the same in the office of the auditor where it shall be kept."

If the board of supervisors has the power to disapprove the aforementioned appointee because of its ideas as to the qualifications of the appointee, then they may by the processes of elimination require the appointment of a particular individual for whose official acts the clerk of the District Court might not desire to be responsible.

The individual disqualified from holding the office of the county official making the appointment may nevertheless hold the deputyship. (*Rehmel vs. Board of Supervisors, etc.*, 172 Iowa, 455, and cases there cited.)

It is, therefore, our opinion that the code sections above set forth refer to the number of appointees, if any, to be approved, rather than to the qualifications of such appointees, and the board of supervisors may not refuse to approve the appointment of a deputy clerk because of the respective opinions of its various members as to the qualifications of such appointee, even though that appointee be a minor.

COUNTY OFFICERS—BOARD OF SUPERVISORS—VACANCIES: The board of supervisors has authority to fill a vacancy in the office of constable when the person elected to that office refuses to qualify or resigns.

January 9, 1931. *County Attorney, Humboldt, Iowa:* We have your communication of the 8th instant requesting the opinion of this department upon the following question:

Has the Board of Supervisors of Humboldt County, Iowa, as constituted subsequent to January 2, 1931, authority to appoint a successor to fill a

January 13, 1971

STATE OFFICERS AND DEPARTMENTS: Special Assessments: Chapter 1129, Acts 63rd G. A. and §307.10, Code of Iowa, 1966. The State of Iowa, through the Highway Commission, is obligated to pay ten special assessments levied by the City of Ames against state-owned property out of the primary road fund. (Elderkin to Wellman, Secretary, Executive Council of Iowa, 1/13/71) #71-1-2

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: You have recently requested my opinion on a matter which I have summarized as follows: The City of Ames has levied ten special assessments against certain property owned by the State of Iowa for the new Street Improvement Program #2, 1970 (Elwood Drive Paving) in the total amount of $360,390.92. The property involved specifically consists of portions of four farms under the jurisdiction of the State Board of Regents for the use and benefit of Iowa State University. Notice, as required by Section 391.53 of the 1966 Code of Iowa, was published on April 4, 1970, and April 11, 1970, in the Ames Daily Tribune. On April 13, 1970, the Board of Regents received a "Notice to Property Owners" regarding the aforementioned assessments, which stated in part that a hearing would be held on April 21, 1970, at which time representatives of the State could appear before the Ames City Council and "be heard for or against the making of the improvement, the boundaries of the district, the cost, the assessment against any lot or the final adoption of the proposed Resolu-

tion of Necessity." No written objections were filed with the Story County Clerk and no appearance was made at the aforementioned hearing on behalf of the State of Iowa and, accordingly, the Resolution of Necessity was given final approval by the City Council at the April 21st hearing. On October 2, 1970, after completion of the project in question, the City Council adopted the final assessment schedule and duly certified it to the Story County Auditor. In regard to the foregoing facts and circumtances, you ask (1) whether there is an obligation on the part of the State of Iowa to pay the instant assessment and, (2) if so, from what fund they should be paid.

Section 307.10 of the 1966 Code of Iowa reads as follows:

"When a city, town or county shall drain, oil, pave, or hard-surface a road which extends through or abuts upon lands owned by the state or constructs a bridge on any such road, the state, *through the highway commission*, shall pay such portion of the cost of making such improvements through or along such lands as would be legally assessable against said lands were said land privately owned. The amount shall be determined by the highway commission and the city, town, or county concerned." (Emphasis added.)

The above-quoted statute, however, was recently repealed by Chapter 1129 of the 63rd G. A. and the following enacted in lieu thereof in pertinent part:

"Assessments against property owned by the state and not under the jurisdiction and control of the state highway commission shall be made in the same manner as those made against private property and payment thereof *shall be made by the executive council* from any funds of the state not otherwise appropriated." (Emphasis added.)

This legislation was signed by the Governor on March 4, 1970, and thus went into effect on July 1, 1970. See Iowa Const. art. 3, §26.

It is thus obvious that regardless of which statute controls in the instant situation, the State of Iowa is obligated to pay the assessments in question. It is equally obvious that the determination of the fund out of which the payment should be made depends upon which of the aforementioned statutes is controlling — if Section 307.10 of the 1966 Code of Iowa controls, the payment should be made by the State Highway Commission out of the primary road fund, (see Section 313.4 of the 1966 Code of Iowa); if Chapter 1129 of the 63rd G. A. controls, then the requisite payment should be made by State Executive Council out of the general fund (See Section 444.21 of the 1966 Code of Iowa).

The Supreme Court of Iowa in *Schultz* vs. *Gosselink*, 260 Iowa 115, 117-118, 148 N. W. 2d 434, stated that the question of whether a statute operates retroactively or prospectively only is one of legislative intent. In determining such intent it is a general rule that all statutes are to be construed as having a prospective operation only unless the purpose and intent of the legislature to give it retroactive effect is clearly expressed in the Act or necessarily implied therefrom. The rule is subject to an exception where the statute relates to remedies and modes of procedure. If a statute relates to a substantive right, it ordinarily applies prospectively only. If it relates to remedy or procedure, it ordinarily applies both prospectively and retrospectively.

However, the *Schultz* decision went on to quote with approval *Bascom*

vs. *District Court,* 231 Iowa 360, 362-363, 1 N. W. 2d 220, wherein it was stated: "If *before final decision* a new law as to procedure is enacted and goes into effect, it must from that time govern and regulate the proceeding. . . ." Therefore, it would seem apparent that it is irrelevant whether a new statute applies prospectively or retrospectively in the situation where a "final decision" has been rendered prior to the enactment of the same.

In this regard, Section 391.20 of the 1966 Code of Iowa reads as follows:

"Before the resolution of necessity is introduced, the council shall prepare and file with the clerk a plat and schedule showing:

"1. The boundaries of the district, if any.

"2. The streets to be improved.

"3. The width of such improvement.

"4. Each lot proposed to be assessed together with a valuation fixed by the council.

"5. An estimate of the cost of the proposed improvement, stating the same for each different type of construction and kind of material to be used.

"6. In each case the amount thereof which is estimated to be assessed against each lot."

Section 391.53 of the 1966 Code of Iowa reads in pertinent part:

"After filing the plat and schedule for street improvements . . . the [city] council shall give notice by two publications in each of two newspapers published in the city, if there by that number, otherwise in one, and by handbills posted in conspicuous places along the line of such street improvement . . . Said notice shall state that said plat and schedule or report are on file in the office of the clerk, and that within twenty days after the first publication all objections thereto, or to the prior proceedings, on account of errors, irregularities, or inequalities, must be made in writing and filed with the clerk. The clerk shall send by certified mail to each property owner, whose property is subject to assessment for said improvement, as shown by the records in the office of the county auditor, a copy of the above mentioned notice, said mailing to be made on or before the first publication of said notice."

Section 391.56 of the 1966 Code of Iowa provides as follows:

"All objections to errors, irregularities, or inequalities in the making of said special assessments, or in any of the prior proceedings or notices, not made before the council at the time and in the manner provided in Section 391.53, shall be waived except where fraud is shown."

In *Moss* vs. *Incorporated Town of Hull,* 249 Iowa 1178, 1181, 1182, 91 N. W. 2d 599, the issue to be determined was whether the appellant's failure to make objections at the hearing on the Resolution of Necessity precluded him from thereafter objecting to a special assessment. The trial court had held that by not appearing and objecting to the Resolution appellant had waived all objections except as to the levy being excessive in amount. In affirming the decision, the Supreme Court of Iowa held:

"We think the legal principle announced in [*Smith, Lichty & Hillman Co.* vs. *City of Mason City,* 210 Iowa 700, 231 N. W. 370] is that all matters pertaining to the boundaries, the streets to be improved, the width thereof (being section 391.20, subdivisions 1, 2, 3 and 4) *are to be finally determined* at the time the Resolution of Necessity is adopted, and a failure to object at that time constitutes a waiver thereof. As to section

391.20, subdivisions [5] and [6], these call for estimates as to the cost and the amount to be assessed and may be reviewed and corrected if objected to under section 391.53, even though no objection was filed to the Resolution of Necessity." (Emphasis added.)

The Court went on to state that they believed their view was the intent and meaning of Section 391.56 of the Code.

It is thus apparent that the determination that a specific lot will be assessed by a governmental body is final at the time of the adoption of the Resolution of Necessity where no objections are made pursuant to Section 391.53 of the Code. Therefore, as no such objections were made in the instant situation, the determination that the State property in question be assessed was final as of the April 21st Ames City Council hearing at which time Section 307.10 of the 1966 Code of Iowa was applicable. Accordingly, the instant assessments should be paid by the Iowa State Highway Commission from the primary road fund.

January 27, 1971

MOTOR VEHICLES: "Special trucks" — Farm licensed trucks — §321.1 (71). A "special truck" is to be used by the owner in his own farming operation, whether to transport commodities produced by him or commodities purchased by him for such farming operation, and is not to be used for the farmer's own non-farm use. (Garretson to Campbell, State Representative, 1/27/71) #71-1-3

The Hon. Herbert L. Campbell, State Representative: This is in reply to your letter of October 8, 1970 requesting an opinion as to whether one having a farm licensed truck may go to a stone quarry and haul gravel for lots and lanes on his farm. More specifically, your letter reads in part as follows:

"I have a farm licensed truck. Do I have the right to go to a stone quarry and haul gravel to gravel by lots and lane for the farm that I live on and own? In other words does this license permit me to haul for my own use?"

It is not clear what you mean by the term farm licensed truck. If it is an ordinary truck with a license like any other truck then of course the properly licensed person could exercise his *privilege* to use the truck for his own use.

We would assume that what you refer to by the term "farm licensed truck" is really a "special truck" as defined by Acts of the 63rd G. A., First Session, Chapter 213, §7, now codified as Iowa Code Annotated 321.1 (71). Such "special trucks" are defined as follows:

"A 'special truck' means a motor truck not used for hire with a gross weight registration of eight through twelve tons, inclusive, used by a person engaged in farming to transport commodities produced only by the owner, or to transport commodities purchased by the owner for use in his own farming operation."

We would not question that gravel could not in many situations be used in the farming operation. Gravel could certainly be considered a commodity. Commodities have been defined as goods, wares, and merchandise of any kind. This word is a broader term than merchandise, and in referring to commerce may include almost any article of movable or personal property. *Pound* v. *Lawrence,* Tex. Civ. App., 233 S. W. 359, 361;

Shuttleworth v. *State*, 35 Ala. 415; *State* v. *Henke*, 19 Mo. 225. If such gravel was *purchased* by the owner for use in his own farming operation then it could be transported in the "special truck." But the special truck defined by the Iowa Code as shown above *is not* a blanket allowance to entitle the owner to haul for his own use.

It is our opinion, therefore, that the "special truck" must be used by the owner for his *farming* operation, whether to transport commodities produced by him or commodities purchased by him for such farming operation.

January 28, 1971

MOTOR VEHICLES: Snowmobiles — Registration and operation — Chapter 321G, Code of Iowa, 1971. Registration and operation of snowmobiles in conformity with Chapter 321G is regulated solely under the provisions thereof, including rules promulgated pursuant thereto. (C. Peterson to Priewert, Director, State Conservation Commission, 1/28/71) #71-1-4

Fred A. Priewert, Director, State Conservation Commission: Reference is made to your letter of December 23, 1970 requesting the opinion of the Attorney General on the following questions:

"1. Does being defined and specifically regulated under Chapter 1158 remove the snowmobile from the status of motor vehicle or motorcycle as defined in Chapter 321 of the Code?

"2. If it is not removed from the status of a motor vehicle or motorcycle as defined in Chapter 321, and is not a vehicle of husbandry, is it subject to the registration, equipment, operation, and financial responsibility laws and regulations of Chapter 321 of the Code?"

Said Chapter 1158 has now been incorporated in the 1971 Code of Iowa, the Code Editor electing to codify the Act as Chapter 321G. Code Chapters 321 through 321F refer to and regulate the use and operation of vehicles upon highways.

Code Chapter 321, the statute of general application purporting to regulate all vehicular traffic on highways, provides in pertinent part as follows:

"321.1(1) 'Vehicle' means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway. . . .

"321.1(2) 'Motor vehicle' means every vehicle which is selfpropelled. . . .

"321.1(48) 'Street' or 'highway' means the width between property lines of every way or place or whatever nature when any part thereof is open to the use of the public, as a matter of right, for the purposes of vehicular traffic.

"321.17 It is a misdemeanor punishable as provided in §321.482, for any person to drive or move or for an owner knowingly to permit to be driven or moved upon any highway any vehicle of a type required to be registered hereunder which is not registered, or for which the appropriate fee has not been paid when and as required hereunder.

"321.18 Every motor vehicle, trailer, and semitrailer when driven or moved upon a highway shall be subject to the registration provisions of this Chapter except:

* * *

"2. Any such vehicle which is driven or moved upon a highway only for the purpose of crossing such highway from one property to another.

"321.30(2) The treasurers shall refuse registration upon any one of the following grounds:

* * *

"(2) That the vehicle is mechanically unfit or unsafe to be operated or moved upon the highways, providing such condition is revealed by a member of this department or any peace officer.

"321.381 It is a misdemeanor . . . for any person to drive or move . . . on any highway any vehicle . . . which is in such unsafe condition as to endanger any person or which does not contain those parts or is not at all times equipped with such lamps and other equipment . . . as required in this Chapter."

The recent advent and burgeoning population of small recreational vehicles has created many problems in the administration and enforcement of statutes developed over the past 40 or 50 years and designed to regulate and control vehicles and traffic on streets and highways.

Problems relating to the registration and licensing of snowmobiles were considered by this office in an opinion issued January 10, 1969, Zeller to Lynch, Winneshiek County Attorney, 1/10/69, #69-1-4. We concluded therein that inasmuch as snowmobiles are not equipped as required in then existing statutes and are mechanically unfit or unsafe to operate on highways, they could not be registered under the provisions of §§321.30 and 321.381 and, therefore, could not be driven or moved upon the highways other than for the purpose of crossing same from one property to another.

Under these circumstances, the Sixty-third General Assembly considered and enacted Chapter 1158, an Act comprehensively regulating the use and operation of snowmobiles. The Act defines those vehicles regulated thereunder; provides for their registration, equipment, and operation on streets, highways and roadways; requires filing of accident reports; delineates methods or condition of operation which are unlawful; authorizes the adoption of rules and regulations; and provides penalties for violation of the Act or any regulation imposed thereunder. All of the requirements set forth therein are quite different from those established in Code Chapter 321 with regard to conventional motor vehicles generally. Rather, the language used in Chapter 1158 is remarkably similar in text, organization and coverage to that employed in Chapter 106 of the Code, the comprehensive statute regulating registration and operation of watercraft.

Thus the general statutes (Chapter 321 through Chapter 321F, Code 1971) purport to regulate in comprehensive fashion the use and operation of all motor vehicles as defined therein and the later-enacted special statute (Chapter 321G) purports to regulate in comprehensive fashion the use and operation of certain vehicles defined therein as "snowmobiles." We see no way in which Chapter 321G can be reconciled with the general statutes nor do we think the legislature intended such result. The statutes being in direct and irreconcilable conflict, the question becomes one of determining which statute prevails.

Perhaps the foremost rule to be followed in the interpretation of statutes is to discover and give effect to the intent of the legislature in enacting it.

"This rule has been reformulated, expanded, restricted, explained, and rephrased, but the conclusions of it, the application of the law according to the spirit of the legislative body, remains the principal objective of judicial interpretation." Sutherland, Statutory Construction, Vol. 2, p. 315.

This rule is declared so frequently and followed so uniformly by the courts, citation of even a small sample of the cases would serve no useful purpose. For an expression of the Iowa Supreme Court, see *Olson et al v. District Court in and for Dickinson County, et al*, 1952, 243 Iowa 1211, 55 N. W. 2d 339, and *In re Quinn's Estate*, 1952, 243 Iowa 1271, 55 N. W. 2d 175.

The distinction between general and special statutes is analyzed briefly in 82 C.J.S., Statutes, §163 on page 277, as follows:

"A statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special."

Chapters 321 through 321F are general in nature, relating to every type of motor vehicle as a class, while Chapter 321G is special in nature applying only to snowmobiles.

The Iowa Supreme Court considered this question in *Liberty Consolidated School District v. Schindler*, 1955, 246 Iowa 1060, 70 N. W. 2d 544, as follows:

"It is a fundamental rule that where a general statute, if standing alone, would include the same matter as a special statute and thus conflict with it, the special act will be considered an exception to or qualification of the general statute and will prevail over it, whether it was passed before or after such general enactment. Yarn v. City of Des Moines, 243 Iowa 991, 998, 54 N. W. 2d 439, 443, and citations; Iowa Mutual Tornado Insurance Association v. Fischer, 245 Iowa 951, 65 N. W. 2d 162, 165; 82 C.J.S. Statutes, §369, pp. 843, 844. See also State ex rel. Michael v. McGill, 265 Wis. 336, 61 N. W. 2d 494, 496."

The problem was again considered by the Iowa court in *Warren v. Iowa State Highway Commission*, 1958, 250 Iowa 473, 93 N. W. 2d 60, on facts analogous to the question presented here. The court held that the special statutes governing controlled-access highways are in conflict with and cannot be reconciled with general statutes dealing with the establishment, alteration and vacation of highways, with the result that the state highway commission may close off state and county roads at their intersections with controlled-access facilities under the authority granted by the special statutes and without resorting to the procedure set up by the general statutes for the assessment and collection of damages by an owner of land abutting the road which is vacated or closed.

Accordingly, while we adhere to the conclusion reached in the January 29, 1969, opinion previously referred to, that a snowmobile is a "motor vehicle" within the meaning of §321.1 (2), it is nevertheless our opinion that as a result of the enactment of Chapter 321G, the registration and regulation of snowmobiles is governed solely by such Chapter 321G.

January 28, 1971

STATE OFFICERS AND DEPARTMENTS: Special Assessments — §391A.21, Code of Iowa, 1971. Where a municipality levies special assessments against state-owned land pursuant to the provisions of Ch. 391A of the 1971 Code of Iowa, such assessments should be paid by the executive council from the state general fund. Also see Elderkin to Wellman, Secretary, Executive Council of Iowa, 1/13/71, #71-1-2. (Elderkin to Wellman, Secretary, Executive Council of Iowa, 1/28/71) #71-1-5

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: You will recall that on January 13, 1971, I rendered you an opinion which held that pursuant to section 307.10 of the 1966 Code of Iowa the State of Iowa, through the Highway Commission, was obligated to pay ten special assessments levied by the City of Ames against certain state-owned property for the new Street Improvement Program #2, 1970 (Elwood Drive Paving). My information at the time of that opinion was that the assessments in question were levied pursuant to the provisions of Chapter 391 of the 1966 Code of Iowa and said opinion was written on that basis. However, I have subsequently received a letter from Mr. Robert H. Helmick of the law firm of Herrick, Langdon, Belin & Harris, special attorneys to the City of Ames, who states that the assessments were in fact levied by Ames pursuant to the alternate assessment procedure available to municipalities in Chapter 391A of the 1966 Code of Iowa. In support of his letter, Mr. Helmick has furnished certified copies of the complete proceedings by and on behalf of the Ames City Council in this matter, which, upon thorough examination clearly support his aforementioned assertion.

Therefore, viewing the situation in light of the facts as they now appear to me, I would cite you to Section 391A.21 of the 1966 Code of Iowa, which reads in pertinent part as follows:

"Municipalities may assess the cost of a public improvement which extends through or abuts upon, or is adjacent to lands owned by the state, and the executive council shall pay such portion of the cost of making said improvement through or along such lands as provided hereinafter. Payment of such assessments shall be made by the executive council from any funds of the state not otherwise appropriated."

"Public improvements" are defined by Section 391A.1(4)(c) as "[s]treet grading, paving, graveling, macadamizing, curbing, guttering, and surfacing with oil, oil and gravel, and chloride."

It would thus appear that Section 391A.21 is clearly controlling in the situation, such as now appears to be the case here, where a municipality levies special assessments against state-owned land pursuant to the provisions of Chapter 391A rather than those of Chapter 391. Therefore, it is my opinion that the ten assessments in question should be paid by the executive council from the state general fund.

February 1, 1971

COUNTY AND COUNTY OFFICERS: Absence of a Magistrate — Other

officer accepting bond money — §§763.4, 763.7, 748.1 and 748.2, Code of Iowa, 1971. Only a magistrate or the court or its clerk may take bail money. (Nolan to Sackett, Clay County Attorney, 2/1/71) #71-2-1

Mr. Robert W. Sackett, Clay County Attorney: Reference is made to your letter of December 17, 1970, in which you submitted the following:

"In the absence of a magistrate, may an officer accept the individual's bond money at a rate set forth on a chart given to his department by the magistrate?"

In reply thereto, I refer you to the following Sections of the Code of Iowa (1971):

Section 763.4 states,

"Bail is put in by a written undertaking, executed by one or more sufficient sureties (with or without the defendant, in the discretion of the court, clerk or magistrate), accepted by the court, clerk, or magistrate taking the same, and may be substantially in the following form: * * *."

Section 763.7 states,

"When the defendant is so delivered into custody, if the felony charged be bailable, bail must be taken by that court, or its clerk, or by any magistrate in the same county."

Section 748.1 states,

"The term 'magistrate' includes:

"1. All judges of the supreme, district, superior or municipal courts, throughout the state.

"2. All justices of the peace, mayors, and judges of the police court within their respective counties."

Section 748.2 states,

"Magistrates have power to * * * take bail, as provided by law."

The necessity of the proper party taking bail is stressed in *State v. Carothers*, 1860, 11 Iowa 273, wherein it was held that a bail bond taken other than as provided by the statute then in force is inoperative and void.

Therefore, it is our opinion that only a magistrate as defined in Section 748.1 or the court or its clerk may take bail as so provided in Section 763.7. Expressio unius est exclusio alterius.

February 1, 1971

STATE OFFICERS AND DEPARTMENTS: Department of Health — Renewal of License to Practice Medicine — §147.10, Code of Iowa, 1971, and Chapters 1083 and 1084, 2nd Regular Session, 63rd G. A. Action by Department of Health concerning collection of renewal fees was lawful. Law requiring display of renewal certificates contemplates issuance of certificates. (Hughes to Conklin, State Senator, 2/1/71) #71-2-2

Hon. W. Charlene Conklin, State Senator: You have requested an opinion of the Attorney General concerning the Board of Medical Examiners' action taken in connection with renewal of licenses to practice medicine. The problem you present stems from the fact that in 1970 the 63rd General Assembly enacted Chapters 1083 and 1084, which increased the renewal

fee for physicians' license from five dollars ($5.00) to fifteen dollars ($15.00). Such Chapters 1083 and 1084 became effective July 1, 1970. However, under §147.10, Code of Iowa 1971, applications for renewal must be made at least thirty (30) days prior to the expiration date of the current license, which expiration date is June 30 of each year. In your letter you state:

"Renewal notices were issued by the State of Iowa, as prescribed, for the legal fee of $5.00. May 1 is the due date for payment according to department regulation. At a later date an additional billing was made for $10.00 additional in light of the new law.

"My question is: Can a department of State Government collect fees in this manner prior to the time that the change becomes law? If not, what action should be taken concerning this additional $10.00 collected from each applicant?

"An additional request for opinion concerns the further content of 147.10 in which a physician is required to display his renewal with the original. What is the position of the individual physician who has complied with all sections of the law but the state department has not sent the renewal to them?"

Section 147.10, Code of Iowa, 1971, states in part as follows:

"Every license to practice a profession shall expire on the thirtieth day of June following the date of issuance of such license, and shall be renewed annually upon application by the licensee, without examination. Application for such renewal shall be made in writing to the department accompanied by the legal fee at least thirty days prior to the expiration of such license. Every renewal shall be displayed in connection with the original license."

Chapters 1083 and 1084, insofar as they relate to your opinion request, simply increase the fee for renewal of licenses to practice medicine and surgery, osteopathic medicine and surgery, or osteopathy from $5.00 to $15.00. The issue to be resolved is whether the Department of Health, Board of Medical Examiners, acted lawfully by collecting before July 1, 1970, the increased renewal fee in light of the fact that the statute authorizing the increased fee did not become law until July 1, 1970.

Section 147.10, Code of Iowa, 1971, provides that licenses to practice medicine shall expire on the thirtieth day of June of each year. Each license must be renewed annually upon application by the licensee. Every duly licensed physician from whom the $15.00 renewal fee was collected was licensed through June 30, 1970, presumably at the $5.00 rate. The $15.00 fee had obsolutely no application to the *period* of licensure preceding July 1, 1970. Chapters 1083 and 1084 provided that as of July 1, 1970, the renewal fee should be $15.00, and the action taken by the Department of Health required the $15.00 fee for renewals which became *effective* on July 1, 1970.

It is our opinion that the increased renewal fee became law on July 1, 1970, and the renewal licenses to which the fee was applied became effective on the same day. Therefore, there is unity of time concerning the fee for licensure and the period of licensure which is lawful. In our opinion the Department of Health, Board of Medical Examiners, did not violate the law by collecting the increased fees before July 1, 1970. The time at which the increased fees were collected as irrelevant if the application of the fees to the license was lawful as explained above.

Part of Section 147.10, Code of Iowa, 1966, states: "Every renewal shall be displayed in connection with the original license." The problem, as I understand it, is that the certificates of renewal probably were not delivered to licensees until sometime after July 1, 1970. It is our opinion that the law requiring display of the annual renewal certificates contemplates that the Department of Health and Board of Medical Examiners have made said certificates available to the licensee for display. Based upon our opinion that the law must be construed in the aforementioned context, it is our further opinion that the law is not violated if the Department of Health has not issued the certificates, thus making display thereof an impossibility.

February 1, 1971

COUNTY AND COUNTY OFFICERS: Sheriff — Residence Allowance — §340.7(13), Code of Iowa, 1971. County is required to furnish only one residence for the sheriff and board of supervisors has discretion to determine whether the residence is suitable and adequate for the sheriff and his family. If a residence is not provided for the sheriff, he should be provided a residence allowance as provided in §340.7(13). However, sheriff cannot turn residence provided by county to his deputy and demand another. (Nolan to Dillon, Louisa County Attorney, 2/1/71) #71-2-3

Mr. John L. Dillon, Louisa County Attorney: This will acknowledge and reply to your letter requesting an Attorney General's opinion interpreting §340.7(13), Code of Iowa, 1971. With your letter was a copy of your opinion to the sheriff of Louisa County in which you conclude that a Board of Supervisors has a mandatory duty to provide a residence for the sheriff or to pay the sum of $750.00 per year in lieu thereof. We have carefully read your opinion and the authorities you cite therein, but have come to the opposite conclusion.

The controlling factor in this case is that the sheriff voluntarily moved from the residence provided for him by the Board of Supervisors and turned it over to his deputy without consent of the board.

We have taken note of the resolution of the Board of Supervisors dated December 21, 1970, which states as follows:

"WHEREAS, the Board of Supervisors have been presented with the proposition of paying the sheriff of Louisa County for housing allowance over and above his salary, and

"WHEREAS, on June 9, 1970, the Sheriff of Louisa County moved from the County Jail to a home he then owned and the deputy sheriff moved into the Jail, this all done without notice to or any conference with the Board of Supervisors, and

"WHEREAS, housing facilities are now and have been deemed adequate for the occupance of the sheriff since the Jail was constructed, and necessary repairs have been made from time to time to keep it livable, and

"NOW THEREFORE BE IT RESOLVED, that no housing allowance will be paid to the Sheriff of Louisa County, Iowa, unless and until the Attorney General of the State of Iowa rules that the law requires the payment of the same under the facts of this particular case."

It is the opinion of this department that the county is required to furnish only one residence for the sheriff. It is implied that the residence

provided by the county must be adequate. 1968 OAG 43. The determination as to adequacy of the residence furnished for the sheriff must remain in large degree the right of discretion on the part of the Board of Supervisors. 1936 OAG 165.

There is no provision that the deputy sheriff be provided with a residence or a residence allowance. 1966 OAG 109. With this in mind we proceed to your specific questions.

"1. Does the Code section 340.7(13), as amended, make it mandatory, where the Sheriff is not furnished a residence by the county, that he receive $750.00 per year?

"2. Or as the Board contents does the fact that there is housing in the county jail, now occupied by a Deputy Sheriff, release them from paying under said code section?

"3. Does the fact that the Sheriff prior to June 1970 had lived in the housing in the Jail, and at that time moved out and put a deputy in the Jail housing quarters make any difference?

"4. Does the fact that the Sheriff or Deputy living in the Jail must also act as Jailer and as night time radio operator, without extra compensation, besides working as Sheriff or Deputy Sheriff full time make any difference in your Answer?

"5. Is there any law that says the Sheriff has to live in the housing furnished by the Board of Supervisors? If none, then if he elects to operate his office by having a Deputy live at the Jail in the only residence quarters available for his office, does this eliminate the mandatory legislative enactment that he be paid a housing allowance?"

In answer to the above we advise that under the provisions of §340.7 (13), supra, the sheriff is entitled to be furnished a residence by the county or to receive in lieu thereof $750.00 per year. If the sheriff refuses to live in the residence provided by the county, it is not mandatory for the county to pay the residence allowance as long as an actual, suitable dwelling is provided and made available for use by the sheriff.

The second question must, in our opinion, be answered affirmatively unless the Board of Supervisors consents to the occupation of the housing in the county jail by the deputy sheriff. Then the sheriff would be entitled to the residence allowance.

The answer to the third question depends upon whether or not the Board of Supervisors has consented to the occupation of the housing in the jail by the deputy sheriff. If this is the case and a residence therein is no longer available to the sheriff, then he should be paid the residence allowance.

The answer to both the fourth and fifth questions set out above is no. However, if it is to be inferred from the last part of your question that the only residence furnished the sheriff is office space, our view would have to be qualified to clarify the point that under §340.7, Code of Iowa, the sheriff is entitled to a residence or a residence allowance to be furnished by the county in addition to whatever office space is made available at the court house or jail.

COUNTIES AND COUNTY OFFICERS: Compensation of Deputy Sheriffs—§§340.8(1) and (2), 1962 Code of Iowa; Senate File 136,

Acts of the 61st G.A. Deputy Sheriffs are to receive up to eighty-five (85) per cent of the sheriff's salary and do not receive any percentage at all of the residence allowance.

July 12, 1965

Mr. Ira F. Morrison
County Attorney of Washington County
P. O. Box 67
Washington, Iowa

Dear Mr. Morrison:

I have your letter of July 6, 1965 in which you ask the following question:

"The question, of course, is whether or not this language (referring to Senate File 136, Sheriff's pay raise) limits the deputy sheriffs to strictly eighty-five per cent (85%) of the sheriff's salary, or can they also draw eighty-five per cent (85% of the residence allowance."

Please be advised that Senate File 136, Section 1, Subsection 11, states as follows:

"11. In counties where the sheriff is not furnished a residence by the county, an additional sum of seven hundred and fifty (750) dollars per annum in addition to the foregoing schedule. The foregoing additional allowance for residence shall not be considered as salary in computing the salary of deputies as provided in section three hundred forty point eight (340.8) of the Code."

Section 340.8(1) and (2) of the Code state in effect that deputy sheriffs are to receive up to eighty-five (85) per cent of the salary of the sheriff.

It is my opinion that deputy sheriffs are to receive eighty-five (85) per cent of the sheriff's salary and do not receive any percentage at all of the residence allowance.

The language of Subsection 11 of Section 1 of Senate File 136, Acts of the 61st G.A. is plain and unambiguous and admits of no construction.

"The only legitimate purpose of statutory construction is to ascertain legislative intent, and when language of statute is so clear, certain and free from ambiguity and obscurity that its meaning is evident from mere reading thereof, canons of statutory construction are unnecessary as there is no need of construction and court need not search beyond wording of statute. *Hindman v. Reaser,* (1956), 246 Iowa 1375, 72 N. W. 2d 559."

February 1, 1971

COUNTY AND COUNTY OFFICERS: Soldiers' Relief Commission — Ch. 250, Code 1971. The tax collectible under the authority of §250.1, Code of 1971, to create a fund for the relief of honorably discharged men and women of the United States who served in several wars, is not available for the payment of supplies required for the operation of the county soldiers' relief commission. (Strauss to Mansfield, Humboldt County Attorney, 2/1/71) #71-2-4

Mr. John P. Mansfield, Humboldt County Attorney: This will acknowledge receipt of your letter in which you submitted the following:

"Will you please advise me as to whether or not the supplies for the

Soldiers Relief Commission should be paid for from the Soldiers Relief Fund or from the County Fund?"

In reply thereto I advise you the Soldiers Relief Commission Fund is established by §250.1, Code of 1971, in terms as follows:

"A tax not exceeding one mill on the dollar may be levied by the board of supervisors upon all taxable property within the county, to be collected at the same time and in the same manner as other taxes, to create a fund for the relief of, and to pay the funeral expenses of honorably discharged, indigent men and women of the United States who served in the military or naval forces of the United States in any war including the Korean Conflict at any time between June 27, 1950, and July 27, 1953, both dates inclusive, and including the Viet Nam Conflict at any time between August 5, 1964 and ending on the date the armed forces of the United States are directed by formal order of the government of the United States to cease hostilities, both dates inclusive . . ."

From the foregoing statute it is to be noted that the use to be made of the foregoing tax levy is "the relief of and to pay the funeral expenses of honorably discharged, indigent men and women of the United States who served in the military or naval forces in any war" including the Korean Conflict, now including also the Viet Nam War.

Having limited, in the foregoing terms, the personnel to whom the benefits of the foregoing tax levy is available provides the setting for the application of the rule of expressio unius est exclusio alterius which, according to the case of *Holland vs. State of Iowa*, 253 Iowa 1006, 115 N. W. 2d 161:

". . . in plain English this means that the express mention of one thing implies the exclusion of others. As we said in State v. Flack, 251 Iowa 529, 533, 101 N. W. 2d 535, 538: 'Thus the legislative intent is expressed by omission as well as by inclusion.' We expounded and followed the rule in the Flack case, and cited authorities. Loc. cit. 251 Iowa 533, 534, 101 N. W. 2d 538; and we also applied it in Dotson v. City of Ames, 251 Iowa 467, 471, 472, 101 N. W. 2d 711, 714."

The soldiers relief funds not being available for providing supplies for the soldiers relief commission, but being appointees of the county board of supervisors and being a county agency, not designated expressly for which such supplies are available, is impliedly so entitled under an opinion of this department appearing in the 1968 report, page 614 the following:

"Essentially the requirement of what the board of supervisors must furnish by way of supplies and equipment to each of the county officers is set out in §332.10 of the Code. Were this section to be strictly construed it might be said that it would not be necessary to furnish such office with telephones. However, 1954 OAG 3, advised that items such as furniture and telephones are necessary and proper and must be furnished by the board of supervisors from the county general fund. With the exception of items specified in §332.10, it is our view that the board of supervisors has the final decision as to what equipment is necessary to perform the functions of a given county office and consequently has the final decision as to what budget cuts can be made in all offices except those which are certifying offices or boards e.g. county public hospitals' boards of trustees."

The opinion in the 1954 Attorney General Report, to which reference is made in the foregoing, stated more specifically as pertinent thereto the following:

". . . Nor is the county board of education mentioned in sections 332.9

and 332.10 as an office or official entitled to the supplies detailed in section 332.10. A somewhat similar situation was presented to this department respecting the furnishing of supplies to the county board of social welfare, where, in respect thereto, it was said in an opinion appearing in the Report of Attorney General for 1944 at page 100, as follows:

'Although sections 5133 and 5134 fail to direct the board of supervisors to provide the county board of social welfare with an office, heat, lights, supplies, etc., yet, certainly, it would be an unusual anomoly if the legislature created a county office and did not intend that the board of supervisors should provide it with such necessities. These statutes also do not include the overseer of the poor and yet the board of supervisors furnishes him and his clerical force with an office, supplies, etc. Would anyone seriously contend that the board did not have the duty and right to do so? We think not.'

"Section 5130, Code of 1939, provides in part as follows:

'The board of supervisors at any regular meeting shall have power: * * * 6. To represent its county and have the care and management of the property and business thereof in all cases where no other provision is made.'

"In the case of Wilhelm vs. Cedar County, 50 Iowa 254, the Supreme Court had occasion to interpret this section. On page 255, the court said:

'No, because the statute does not expressly authorize the board of supervisors to employ a special agent or attorney to assist in the collection of taxes, not collectible by the county treasurer in the discharge of his duty, it does not follow that they may not have the implied power to do so. They have the power "to represent their respective counties, business of the county in all cases where no other provision is made." Revision, sec. 312; Code, sec. 303. It is the business of the county to collect taxes, and to use all reasonable means to do it. We think, therefore, the board of supervisors had the power to employ the plaintiff to render the service in question.' " (Italics supplied.)

"It made similar pronouncement in Call vs. Hamilton County, 62 Iowa 448, and in Allen vs. Cerro Gordo County, 34 Iowa 54. In the latter case, the court said:

'But if the power were not thus in direct terms conferred, it would seem that it must be necessarily implied from the power to hold the property.'

"It is, therefore, our opinion that the county board of supervisors has implied power to furnish an office and the necessary heat, light, stationery, etc., for its county board of social welfare."

February 1, 1971

STATE OFFICERS AND DEPARTMENTS: State Department of Health — Board of Examiners for Nursing Home Administrators — Ch. 1085, §8, Laws of the 63rd G. A., Second Session. A full time salaried professor at the State University of Iowa may not receive per diem compensation for services rendered the State while acting as a member of the Board of Examiners for Nursing Home Administrators, nor may the per diem compensation be paid to the professor's employer. (Hughes to Reeve, Commissioner of Public Health, 2/1/71) #71-2-5

Arnold M. Reeve, M.D., Commissioner of Public Health, Department of Health: Receipt of your letter of November 17, 1970 in which you requested an opinion of the Attorney General hereby is acknowledged. In that letter you inquired as to whether a full-time, salaried professor of the State University of Iowa may be paid per diem compensation for his

services as a member of the Board of Examiners for Nursing Home Administrators. Section 8 of Chapter 1085, Laws of the Sixty-Third (63rd) General Assembly, Second Session authorizes compensation for Board members and states in part as follows:

"Each member shall receive, as compensation for his services, an amount agreed upon by the board but not to exceed that of other state boards."

In a recent opinion of the Attorney General, Strauss to Wellman, Secy., Executive Council, 9/16/70), #70-9-10, a similar question was propounded. That opinion held that professors at state universities receiving fixed salaries could not receive additional compensation from the State Geologist for services rendered pursuant to contract between them and the State Geologist. The authority for the aforementioned opinion is found in the Report of the Attorney General for 1922 at page 286 and is as follows:

"Mr. Geo. L. McCaughan, Secretary of Railroad Commission: This department is in receipt of a letter from you dated August 30th, in which you state that one R. G. Nourse, who is in the employ of the State College of Agriculture and Mechanic Art at Ames, Iowa, who was a witness for the state before the interstate commerce commission at the hearing of the western grain and hay rate case, has filed his expense account for the trip to Washington, and has included a charge of $25.00 per day for each day that he served as a witness.

"You desire to be advised in this connection as to whether Mr. Nourse, whom you state is drawing a stated salary from the college at Ames, is entitled to pay for his time in addition to his traveling expenses.

"Persons in the employ of the state working for a stated salary, are not entitled to other compensation from the state unless it is expressly provided for by statute.

"As we understand the facts in the matter submitted to us, Mr. Nourse was drawing a salary from the state of Iowa for the time covered by his trip to Washington, and it would be against public policy for him to be allowed a per diem compensation for that same time for which he had once been paid by the state. It would be optional with him, however, in my judgment, to forego his stated salary and draw a per diem in case he desired to do so, but he cannot draw both the per diem and the salary for the same time, from the public treasury.

"You would be justified, therefore, in denying him the per diem asked for in the event that he received a salary covering the period for which he now presents claim."

In light of the foregoing it is our opinion that a full-time salaried professor at the State University of Iowa may not receive per diem compensation for services rendered the State while acting as a member of the Board of Examiners for Nursing Home Administrators.

Furthermore, you inquired as to whether the Board of Examiners could pay the per diem compensation of the professor to the professor's employer, the State University of Iowa. Section 8 of Chapter 1085, Laws of the Sixty-Third (63rd) General Assembly, Second Session, provides that the Board may compensate *members* for service. It is our opinion that the Board may not pay per diem compensation to the professor's employer, the State University of Iowa, for the reason that compensation

is exclusively restricted to board members.

February 1, 1971

TAXATION: City-Owned Property—§427.1(2), Code of Iowa, 1971. City-owned land which is leased to private business enterprises and from which income is derived is not entitled to a property tax exemption. (Griger to Atwell, Auditor's Office, 2/1/71) #71-2-6

Mr. H. E. Atwell, Public Accounts Audit Supervisor, Office of Auditor of State: In your letter of January 21, 1971, you have requested an opinion of the Attorney General with reference to the property tax status of certain properties in the City of Council Bluffs, Iowa which properties were purchased by the city under the Urban Renewal program and which the city is leasing to private mercantile businesses for indefinite periods of time. The rentals paid for the use of these properties vary from $500 to $1,500 per month. Your question, specifically, is whether these properties should be listed by the Council Bluffs City Assessor for taxation.

Section 427.1(2), Code of Iowa, 1971, provides for a property tax exemption with regard to municipal property as follows:

"The property of a county, township, city, town, school corporation, levee district, drainage district or military company of the state of Iowa, when devoted to public use and not held for pecuniary profit."

In *Town of Mitchellville vs. Board of Supervisors*, 1884, 64 Iowa 554, 21 N. W. 31, the Iowa Supreme Court, in construing a statute which provided for a property tax exemption of an incorporated town's property which is devoted entirely to the public use, and not held for pecuniary profit, stated at 64 Iowa 555:

"To be exempt, the property in question in this case must be devoted entirely to public use, and not held for pecuniary profit. Now, it appears that the property is not devoted to public use, but an income is derived therefrom."

In 1934 O.A.G. 749, the Attorney General ruled that where a school district owned three vacant lots and was about to enter into a long term lease with a private concern which expected to erect a building thereon, that property would not be exempt from taxation. The Attorney General noted the general rule to be that where land of a city or other municipal corporation is rented out to private parties and from which an income is derived, such land would be subject to property taxation.

Section 427.1(2) requires, as a prerequisite for property tax exemption, that the property of a city be devoted to public use and not held for pecuniary profit. When the city leases its property to private business enterprises who use the property for income producing purposes, it cannot be said that such property is devoted to a public use nor can it be said that the property is not held for pecuniary profit. Consequently, it is our opinion that the property described in your letter is subject to taxation and the city assessor should so list and assess it.

February 1, 1971

SCHOOLS: School District Director: Director moving from one director-district to another in same school district — §275.12 (2C) and 69.2, Code of Iowa, 1971. A district director becomes ineligible to serve the re-

maining portion of his term by moving from the director-district he was elected to represent, to some other part of the same school district. (Nolan to Smith, O'Brien County Attorney, 2/1/71) #71-2-7

Mr. R. T. Smith, O'Brien County Attorney: You have asked for an opinion on the question of whether if a director of a school district moves from one director-district to another in the same school district, he becomes ineligible to serve the remaining portion of the term for which he was elected. In the school system in question, the directors are elected according to the plan set out in Sub-section 2C, §275.12, Code of Iowa, 1971. This statute provides:

"Such petition shall also state the number of directors which may be either five or seven and the method of election of the school directors of the proposed district. The method of election of the directors shall be one of the following optional plans:

(a) * * *

(b) * * *

(c) Election of not more than one-half of the total number of school directors at large from the entire district and the remaining directors from and as residents of designated director-districts into which the entire school district shall be divided. In such case, all directors shall be elected by the electors of the entire school district."

Assuming that the director in question was elected to represent one of the districts for which residence in such district is required, it is my opinion that he vacates such office by moving from the district even though the move is merely from one director-district to another within the same school district. The provisions §69.2, Code of Iowa, 1971, which state that every civil office shall be vacant upon the incumbent ceasing to be a resident of the state, district, county, etc., have been held to apply to school officers not withstanding the fact that other provisions in the same chapter specify the filling of vacancies in other than school offices. *Independent School District of Manning, Carroll County v. Miller,* 1920, 189 Iowa 123, 178 N. W. 323. That case held that a mere temporary absence is not sufficient to create a vacancy but a vacancy is created where the school officer leaves the district where his duties are to be exercised without the intention of returning.

In 1919-20 OAG 637 this office advised that where a member of the Board of Supervisors moved from the district in which he was elected to another district in a county, a vacancy in the office was created. The situation appears to be similar to the question presented here and it is our opinion that a district director becomes ineligible to serve the remaining portion of his term by moving from the director-district he was elected to represent, to some other part of the same school district.

February 1, 1971

COUNTIES: Board of Supervisors: Contracts Mileage: County Attorney. §§332.3(6), 79.9. Boards of Supervisors have implied power to make a contract with investigator on county attorney's staff in lieu of mileage but the contractual amount should not be paid in advance. (Nolan to

Miller, Assistant Polk County Attorney, 2/1/71) #71-2-35

Mr. Philip F. Miller, Assistant County Attorney: This reply is to your letter requesting an Attorney General's opinion as to whether the county board of supervisors has authority to make a valid contract, in lieu of mileage, with the investigator employed by the Polk County Attorney's office.

There was enclosed with your request a copy of the 1970 contract approved by resolution of the Polk County Board of Supervisors. You also made reference to 1966 OAG 149, which states the county attorney may maintain an investigator to supplement his staff for the purpose of investigating applicants and recipients of the various state welfare programs. (Koster to Fenton, Polk County Attorney, 1-19-66)

The board of supervisors has specific statutory authority under §§332.3 (18) Code, to make contracts with employees of the sheriff's office who use automobiles as the board deems advantageous to the county. However, the subsection does not make provision for any person other than the sheriff and his employees. Under §332.3(6) Code, 1971, the board of supervisors has the power "to represent its county and have the care and management of the property and business thereof in all cases where no other provision is made." It is our view that Subsection 6 is applicable to the situation you present.

However, there is a long standing rule that contractual sums may not be paid in advance and we believe the better practice in a situation such as this is for the reimbursement of expenses upon the submission of a claim therefor, "pursuant to §79.9, Code 1971."

February 1, 1971

COUNTY AND COUNTY OFFICERS: Zoning — Public Hearings — §§358A.6 and 358A.8, Code of 1966. The law requires that public hearings be held by the Zoning Commission and by the Board of Supervisors prior to adoption of zoning regulations, restrictions or effecting the change of district boundaries. (Nolan to Yarham, Cass County Attorney, 2/1/71) #71-2-41

Mr. Ray Yarham, Cass County Attorney: This is in answer to your request for an attorney general opinion as to whether or not procedure heretofore used in Cass County in regard to holding public hearings on county zoning matters is in compliance with the law. Your letter states:

"Cass County, Iowa, a few years ago, passed a comprehensive zoning ordinance and sub-division regulations which were originally prepared for the Cass County Planning and Zoning Commission by Wallace and Howland, Engineers, Mason City, Iowa. These ordinances substantially conform to Chapter 358A of the 1966 Code of Iowa entitled County Zoning Commission.

"For many years when an application was submitted to the Zoning Commission to change a small portion of a district to provide for a business not provided for in the original district the application was submitted to the Zoning Commission and the Zoning Commission required a public notice to adjoining land owners as provided for in said ordinance. Then at the conclusion of the meeting after the public notice, the Zoning Commission would make recommendations to the Board of Supervisors as to the change set out in the application.

"Section 32 of the Cass County ordinance provides as follows: 'The Board of Supervisors may from time to time amend regulations imposed in the districts created by this ordinance, but no such amendment shall be made without a report from the Zoning Commission and public notice as provided by Iowa statutes.'

"The question that has now been raised in regard to the change of a small portion of land from agricultural to heavy industry is whether or not it is necessary for the Board of Supervisors to hold a public hearing as provided for in Chapter 358A.6 of the 1966 Code of Iowa which provides for public hearings.

"It has been our procedure in this county since our zoning ordinance has been in effect to have the notice and public hearing before the Zoning Commission rather than the public hearing before the Board of Supervisors, and it is still my contention that under 358A.6 that such notice as provided for in public hearing were held before the Zoning Commission complies with this section of the Code and therefore it is not necessary to hold two public hearings, one before the Zoning Commission and a second public hearing before the Board of Supervisors."

We believe it is amply clear that no zoning change made by the county board of supervisors will become effective until a public hearing has been held in accordance with §358A.6, Code 1966. This section provides:

"The board of supervisors shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established, and enforced, and from time to time amended, supplemented or changed. However, no such regulation, restriction, or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least fifteen days' notice of the time and place of such hearing shall be published in a paper of general circulation in such county. Such notice shall state the location of the district affected by naming the township and section, and the boundaries of such district shall be expressed in terms of streets or roads wherever possible."

The county zoning commission is required to hold public hearings by §358A.8 which provides:

"In order to avail itself of the powers conferred by this chapter, the board of supervisors shall appoint a commission, to be known as the county zoning commission to recommend the boundaries of the various original districts, and appropriate regulations and restrictions to be enforced therein. Such commission shall, with due diligence, prepare a preliminary report and hold public hearings thereon before submitting its final report and the board of supervisors shall not hold its public hearings or take action until it has received the final report of such commission. After the adoption of such regulations, restrictions, and boundaries of districts, the zoning commission may, from time to time, recommend to the board of supervisors amendments, supplements, changes, or modifications."

It is our view that §358A.8 practically mandates the holding of two hearings and the procedure followed in Cass County should be changed to substantially comply with the law.

February 3, 1971

STATE OFFICERS AND DEPARTMENTS: Department of Health — Questions concerning interpretation of Chapter 1085, Laws of the 63rd

G. A., Second Session, which provides for licensing of nursing home administrators. (Hughes to Shaffer, Secretary, State Board of Examiners for Licensing of Nursing Home Administrators, 2/3/71) #71-2-8

Eloise Shaffer, Secretary, State Board of Examiners for Licensing of Nursing Home Administrators: You have propounded several questions concerning the licensing of nursing home administrators pursuant to Chapter 1085, Laws of the 63rd G. A., Second Session. The questions and answers are as follows:

Q. What is a nursing home?

A. The definition of a nursing home which you should adopt is that found in Chapter 135C, Code of Iowa 1971, as amended. New definitions of nursing homes found in Chapter 1079, Laws of the 63rd G. A. should be adopted on July 1, 1971.

Q. Do we license only administrators of licensed nursing homes?

A. As a matter of law, you are not bound to accept the determination of those who license nursing homes as to whether an institution is a nursing home or not. As a practical matter, it would appear embarrassing for agencies to make conflicting determinations as to the classification of the same institution. For that reason, I suggest that your Board work in conjunction with the Department of Health and agree upon a classification.

Q. Will a person who is unable to qualify (as a nursing home administrator) or one who does not wish to qualify, be able to simply change to custodial license and continue to operate as usual?

A. The person who operates such an institution has no control over the determination of classification which is a function of services rendered. If you determine that an institution licensed as a custodial home is in fact functioning as a nursing home, you may require licensure of the administrator thereof; however, I urge that uniformity of classification should be agreed upon by you and the Board of Health as previously explained.

Q. Does the Board act in capacity of an ethics committee?

A. One of your duties as set forth in Section 10(1) is to "insure that nursing home administrators will be individuals of good character." If the Board determines that an applicant for a license has in the past abused patients, is an alcoholic, is a narcotic's addict or has engaged in any other activity which would indicate that he is not of "good moral character," these matters may be considered for the purpose of determining a person's qualifications to be licensed.

Q. Does the "provisional administrator" apply only to homes which have had licensed administrators or could this include new facilities too? Would they be required to have fully licensed administrator on opening day?

A. The purpose of the "provisional administrator" clause [Section 10(3)] is to permit a nursing home to appoint a temporary unlicensed administrator for a six-month period subsequent to termination of employment of the regular (licensed) administrator and during the period when the nursing home is attempting to recruit another qualified administrator. The "provisional administrator" clause is inapplicable to new facilities for the reason that they are not engaged in the process of replacing a licensed administrator.

If you have any additional questions, please do not hesitate to forward them to me.

February 3, 1971

STATE OFFICERS AND DEPARTMENTS: Credit Unions — §533.4, Code of Iowa, 1971. Furnishing data processing services to other organizations is not a recognized function of credit unions. However, there may be occasions where limited use of data processing equipment by others is permissible. (Nolan to Fritz, Superintendent, Department of Banking, 2/3/71) #71-2-9

Mr. Collin Fritz, Superintendent, Department of Banking: This replies to your letter concerning a proposed use of data processing equipment leased by the Collins Employees Credit Union, Cedar Rapids, Iowa. In your letter you have requested an opinion as to whether or not a credit union organized under the laws of this state may furnish data processing services to outsiders on computer time not used by the credit union in the processing of its business, or lease such unused equipment to others.

You have also asked for guidelines for determining whether the furnishing of such services, or time, represents a function that is merely incidental to the operation of the credit union as opposed to the credit union engaging in the business of furnishing data processing services, or leasing or subletting time to others.

From the data submitted, it appears that Collins Employees Credit Union has acquired certain data processing equipment (processing unit, printer, tape driver, multifunction card machine) by lease with a monthly rental based on 176 hours per month for each individual piece of equipment. The overtime rate for use of such equipment is 10% of the regular monthly charge.

It also appears that in the first four months of 1970, the processing unit was used 99.075% of the time available for utilization without running into overtime charges. The printer was used 89.675% of such time, tape drive 86.275%, and multi-function card machine 75.742%.

The proposed use contemplated by Collins Credit Union is to rent 30 to 40 equipment hours per month to outsiders. The outsiders would store no records in the Credit Union office and would have no access to Credit Union records. §533.4, Code of 1966, authorizes a credit union to "exercise such incidental powers as may be necessary or requisite to enable it to carry on effectively the business for which it is incorporated."

Furnishing data processing services to other organizations is not recognized as a valid function for a credit union except insofar as may be necessary for such credit union to effectively utilize necessary equipment for which the leasing arrangement cannot be adapted to its specific needs. In such case a time availability of something less than 20% might be the proper guideline for determining whether the machine was of economical size, and there may be marginal cases in which some additional processing work could be acceptable.

The Collins Credit Union machinery appears to be utilized to a substantial extent so as to indicate that the leasing of unused time to outsiders would be merely an incidental use to promote the economy requisite to good management of the office.

February 3, 1971

STATE OFFICERS AND DEPARTMENTS: Superintendent of Printing; Department of Public Instruction, control of printing and duplicating equipment. §15.37, Code of Iowa, 1971. The state department of public instruction has no right to maintain its own printing and duplicating department. All printing and duplicating machines costing more than $2,000 are under the control of the state printing board. (Haesemeyer to Moore, Superintendent of Printing, 2/3/71) #71-2-10

Mr. J. C. Moore, Superintendent of Printing: You have requested an opinion of the Attorney General with respect to the following:

"An official Attorney General's Opinion is respectfully requested.

"House File 354 passed by the second session of the 63rd General Assembly gives the Printing Board and the Superintendent of Printing rather broad authority over state printing and reproduction of printed matter.

"Line three on page two needs some clarification. The question which needs resolving is: 'Does printing equipment purchased wholly or in part with Federal Funds that have been distributed by the Federal Government to any Department for help with various programs, belong to the State?' This question will undoubtedly arise in connection with Public Instruction, Agriculture Statistics and Employment Security Commission. Perhaps others.

"May we call your attention to an opinion issued July 16, 1968, regarding H.F. 354 (Second Session 63rd G. A.)."

H.F. 354, Acts, 63rd G. A. 2nd Session (1970) among other things repeals Section 15.37, Code of Iowa, 1966, as amended by Chapter 90, Section 1, 62nd G. A. (1967) and substituted in lieu thereof the following:

"All printing presses, except such presses owned by the auditor of state and purchased pursuant to the provisions of chapter seventy-three (73), Acts of the Sixty-third General Assembly, First Session, and other printing equipment owned by the state and in the possession of any department, commission, agency, or board located in the city of Des Moines shall be centralized in a state building in the city of Des Moines under the control of the state printing board.

"All office copiers and other duplicating equipment owned by or in the possession of executive and judicial departments, commissions, agencies, or boards located in the city of Des Moines shall be under the jurisdiction

of the state printing board. The board may lease or purchase such duplicating machines as are necessary for each of the departments with funds from the state printing board revolving fund and assess the costs of operating such duplicating machines to the appropriate department."

Section 15.37 prior to the enactment of H.F. 354 read as follows:

"With the exception only of machines purchased at a cost of two thousand dollars ($2,000.00) or less of the offset type, mimeographs and similar duplicators, no department or agency of the state located in the city of Des Moines shall purchase, possess or operate any presses and other printing equipment without the written permission of the state printing board. All other presses and printing equipment owned by the state of Iowa or possessed by any of its departments or agencies operating such equipment in the city of Des Moines shall be centralized in a state building at the city of Des Moines to be and remain under the control of the state printing board."

In an opinion to you dated July 16, 1968, in which essentially the same question you now raise was presented we said:

"§15.37, Code of Iowa, 1966, as amended by H.F. 92, Chapter 90, Acts, 62nd G. A., can and should be enforced regardless of the fact that federal funds are involved and; (2) the department of public instruction has no right to maintain its own printing and duplicating department."

The 1970 amendments to Section 15.37 do not in our opinion in any material way affect the July 16, 1968 opinion previously issued and this latter opinion is dispositive of the question you raise.

February 3, 1971

COUNTIES AND COUNTY OFFICERS: County Treasurer, Bond Required — §§64.8, 64.9 and 64.10, Code of Iowa, 1971. It is not permissible for a county to pay premiums on a county treasurer's bond in an amount in excess of $10,000. (Haesemeyer to Erhardt, Wapello County Attorney, 2/3/71) #71-2-11

Mr. Samuel O. Erhardt, Wapello County Attorney: Reference is made to your letter of January 21, 1971, in which you request an opinion of the attorney general on the following question:

"Is it permissible for a County to pay premiums on a bond in excess of $10,000 bond required to be filed by the County Treasurer? In other words if our Board of Supervisors wanted to put our County Treasurer under a $100,000 bond and wanted to pay the premium for said bond out of County funds, can such expenditure be made legally?"

Section 64.10, Code of Iowa, 1971, provides:

"64.10 Bond of county treasurer. The bond of the county treasurer shall be in the sum of ten thousand dollars."

It is to be observed that this statutory provision simply provides that the bond "shall be in the sum of ten thousand dollars" and admits of no flexibility in the supervisors in fixing a larger sum. Contrast this section 64.10 with sections 64.8 and 64.9 which provide respectively:

"64.8 County officers. The bonds of the following county officers, viz.: Clerks of the district courts, county attorneys, recorders, auditors, superintendents of schools, sheriffs, justices of the peace, and constables, and assessors shall each be in a penal sum to be fixed by the board of supervisors.

"64.9 Minimum bonds of county officers. Bonds of members of the board of supervisors, clerks of the district courts, county auditors, sheriffs, and county attorneys shall not be in less sum than five thousand dollars each, and those of justices and constables, not less than five hundred dollars each."

It is clear from the foregoing that if the legislature had intended to make the ten thousand dollar figure a minimum in the case of the county treasurer it would have chosen language similar to that used in §64.9, i.e. "shall not be in less sum than. . . ."

Accordingly it is our opinion that it is not permissible for a county to pay premiums on a county treasurer's bond in excess of ten thousand dollars.

February 3, 1971

STATE OFFICER AND DEPARTMENTS: Commission on the Aging; out-of-pocket expenses to senior citizen participants in the retired senior volunteer program (RSVP). §§249B.4, 249B.7, Code of Iowa, 1971. Funds appropriated to the State of Iowa under the federal RSVP program may be used for the payment of out-of-pocket expenses of participants in the program. (Haesemeyer to Nelson, Executive Secretary, Commission on the Aging, 2/3/71) #71-2-12

Mr. Earl V. Nelson, Executive Secretary, Commission on the Aging: We have your letter requesting an opinion of the attorney general as to whether or not there is a barrier to the paying of out-of-pocket expenses to senior csitizens participating in the retired senior volunteer program established pursuant to 42 USCA §3044, hereinafter referred to as RSVP.

Such §3044 provides:

"§3044. Grants and contracts for volunteer service projects — Approval of programs; rules and regulations.

"(a) In order to help retired persons to avail themselves of opportunities for volunteer service in their community, the Secretary is authorized to make grants to State agencies (established or designated pursuant to section 3023(a) (1) of this title) or grants to or contracts with other public and nonprofit private agencies and organizations to pay part or all of the costs for the development or operation, or both, of volunteer service programs under this section, if he determines in accordance with such regulations as he may prescribe that —

"(1) volunteers shall not be compensated for other than transportation, meals, and other out-of-pocket expenses incident to their services;

"(2) only individuals aged sixty or over will provide services in the program (except for administrative purposes), and such services will be performed in the community where such individuals reside or in nearby communities either (a) on publicly owned and operated facilities or projects, or (b) on local projects sponsored by private nonprofit organizations (other than political parties), other than projects involving the construction, operation, or maintenance of so much of any facility used or to be used for sectarian instruction or as a place for religious worship;

"(3) the program will not result in the displacement of employed workers or impair existing contracts for services;

"(4) the program includes such short-term training as may be neces-

sary to make the most effective use of the skills and talents of those individuals who are participating, and provides for the payment of the reasonable expenses of trainees;

"(5) the program is being established and will be carried out with the advice of persons competent in the field of service being staffed, and of persons with interest in and knowledge of the needs of older persons; and

"(6) the program is coordinated with other related Federal and State programs.

Method of payment

"(b) Payments under this part pursuant to a grant or contract may be made (after necessary adjustment, in the case of grants, on account of previously made overpayments or underpayments) in advance or by way of reimbursement, in such installments and on such conditions, as the Secretary may determine.

Conditions upon award of grant or contract

"(c) The Secretary shall not award any grant or contract under this part for a project in any State to any agency or organization unless, if such State has a State agency established or designated pursuant to section 3023(a) (1) of this title, such agency is the recipient of the award or such agency has had not less than sixty days in which to review the project application and make recommendations thereon."

The Iowa Commission on the Aging was established pursuant to Chapter 249B, Code of Iowa, 1971. §249B.4 provides in part:

"It shall be the duty of the commission to:

* * *

"5. Co-operate with agencies, federal, state and local, or private organizations, in administering and supervising demonstration programs of services for aging designed to foster continued participation of older people in family and community life and to prevent insofar as possible the onset of dependency and the need for long-term institutional care.

* * *"

Section 249B.7 provides:

"249B.7 Grants and gifts received. The commission may receive federal funds or any grants and gifts on behalf of the state for such purposes as are within the jurisdiction of the commission. All federal funds, grants and gifts shall be deposited with the state treasurer and shall be used only for such purposes agreed upon as conditions for receiving the funds, grants and gifts."

In view of the foregoing it is our opinion that there is no legal obstacle to using any funds appropriated to the state of Iowa under the RSVP program for the payment of out-of-pocket expenses of persons participating in the program. Indeed, §249B.7 would appear to require that any such funds be used only for such purposes. It should be noted, however, that under §3044 of 42 USCA funds may be used only for transportation, meals and other out-of-pocket expenses. Since the individuals involved will not be employees of the state there should be no merit employment problems.

February 3, 1971

SCHOOLS: Special Services — Handicapped students — §257.25, amended Chs. 280, 281, Code of Iowa, 1971. School district has discretion as to type of special services furnished handicapped students as long as it meets the obligation mandated by statute, therefore, may not be required to furnish transportation in lieu of home instruction. (Nolan to Holden, State Representative, 2/3/71) #71-2-13

The Hon. Edgar H. Holden, State Representative: This is in reply to your letter requesting an interpretation of §257.25, Code 1966, as amended by (S.F. 409) Ch. 174, Acts of the 63rd G. A., First Session, and also of Ch. 280, Code 1966, as applied to the case of a fifteen-year-old severely physically handicapped student who is confined to a wheelchair and is presently attending sixth grade in his home elementary attendance center in the Davenport Community School District.

Your letter states that this student has been offered home instruction but his parents have refused this and have chosen to send him to school providing their own transportation. Your questions are:

"1. Is the Davenport Community School District required to provide this severely handicapped student with the special transportation arrangements that would be necessary to transport him to and from school?

"2. In lieu of special transportation, can the school district meet its obligation mandated in S.F. 409 by providing this student home instruction with duly certificated teachers?

"3. Has a school district the option of providing *either* home instruction or special transportation for students who are physically unable to get to and from school?"

The answer to your first question is that the Davenport Community School District is not required to provide transportation for such a student. The amendment to Ch. 280 to which you refer provides:

"The board in each school district shall make provision whereby special education services are made available to all handicapped pupils enrolled in kindergarten and in all grades of its schools. Programs offered under this section shall comply with rules and standards promulgated by the state board of public instruction and shall be subject to approval and reimbursement of excess costs as are provided in chapter two hundred eighty-one (281) of the Code. Programs offered under this section may be carried on by cooperative arrangements between districts and county boards of education as provided by chapter two hundred eighty-one (281) of the Code." (Ch. 174, Acts 63rd G. A., First Session).

If there is no special education facility available at the attendance center which this student would normally attend, it is possible under the law for the board to maintain such center at another location and to provide for the bussing of such student to the special education classes. Also, Ch. 285, Code 1966, permits a school board to use discretion in providing transportation for resident elementary children attending public school who live less than the distance at which transportation is required. See §285.1(c). In an opinion dated April 27, 1965, 1966 OAG 259 at page 260, this office stated:

"Subsection 1 of Section 285.1, when read together with the first paragraph of paragraphs (c) and (e), places a duty upon the school boards to transport certain eligible students. The second paragraphs of (c) and

(e) grant the school boards a discretionary power to transport certain additional students."

In answer to your second question, there is provision in the code for home instruction, under §281.3. The division of special education of the state department of public instruction is required by §281.3, Code 1966, to adopt plans for the establishment and maintenance of home instruction and of the methods of special education for children requiring special education in addition to plans for the establishment and maintenance of day classes and schools.

Ch. 174, Acts of the 63rd G. A., First Session, requires the school board in each school district to make provision for special education services to be available to all handicapped pupils enrolled in the school system. We believe that there are several possibilities for satisfying such requirement.

February 3, 1971

TAXATION: Compromise of Taxes — County boards of supervisors may, under §§445.16, 445.19, 633.475 and 427.10, Code of Iowa, 1971, compromise taxes if the situation in question falls within the requirements and provisions of the statutes as interpreted by the attorney general. (Griger to Samore, Woodbury County Attorney, 2/3/71) #71-2-14

Mr. Edward F. Samore, Woodbury County Attorney: This is in reply to your letter requesting an opinion of the Attorney General on the following question:

"Under what conditions is the board of supervisors authorized to compromise real estate taxes and personal taxes in sums substantially in excess of the apparent ability of the taxpaper."

There are several statutory provisions allowing the compromise of both real and personal property taxes by the county board of supervisors. Section 445.16, Code of Iowa, 1971, provides as follows:

"When any property in this state has been offered by the county treasurer for sale for taxes for two consecutive years and not sold, or sold for only a portion of the delinquent taxes, then and in that event the board of supervisors of the county is hereby authorized to compromise the delinquent taxes against said property antedating any tax sale certificate; or being a part of the taxes due for the year for which such property was sold for taxes, and may enter into a written agreement with the owner of the legal title or with any lienholder for the payment of a stipulated sum in full liquidation of all delinquent taxes included in such agreement."

Section 445.19, Code of Iowa, 1971, provides for the compromise of personal property taxes as follows:

"When personal property taxes are not a lien upon any real estate and are delinquent for one or more years, the board may, when it is evident that such tax is not collectible in the usual manner, compromise such tax as provided in sections 445.16 to 445.18, inclusive."

Also, §633.475, Code of Iowa, 1971, provides for the compromise of taxes owned by an estate as follows:

"For the purpose of facilitating the speedy settlement and distribution of estates, the county treasurer of such county, by and with the consent of the board of supervisors may compromise and agree upon the amount

of personal taxes at any time due or to become due the county from an estate, and payment in accordance with such compromise or agreement shall be for the satisfaction of all taxes in such estate matter. No compensation shall be allowed any person because of such compromise or agreement."

This provision was formerly embodied in §682.36 of the Code of Iowa until repealed by chapter 326, Acts 60th G. A., and incorporated as above in the probate law of chapter 633. However, the provisions allowing the board of supervisors to cancel by court order all unpaid personal property taxes of an insolvent estate was not included in §633.475 after its repeal under §682.36.

In addition to the above-quoted statutes, the Supreme Court of Iowa has stated that "The rule is well established. . . . that a board of supervisors does have authority to enter into compromise agreements." *Plymouth County v. Koehler*, 1936, 221 Iowa 1022, 1026, 267 N. W. 106, 108. See also *Barthell v. Hermanson*, 1913, 158 Iowa 329, 138 N. W. 1108.

Section 427.10, Code of Iowa, 1971, although not explicitly granting authority to compromise to county boards of supervisors, has been held to have such an effect. The provision deals with the suspension of taxes upon the property of persons receiving old-age assistance, and provides for an additional order as follows:

"The board of supervisors may, if in their judgment it is for the best interest of the public and the petitioner referred to in section 427.8, or the public and the aged person referred to in section 427.9, cancel and remit the taxes assessed against the petitioner referred to in section 427.8, or the aged person referred to in section 427.9, his polls or estate or both, even though said taxes have previously been suspended as provided in sections 427.8 and 427.9."

Several opinions of the attorney general have held that, under this section "[t]he power to cancel vested in the board of supervisors would include the power to compromise." 1968 O.A.G. 243, 244. *See* 1958 O.A.G. 337, 1942, O.A.G. 158, 1932 O.A.G. 221.

Sections 445.16 and 445.19, quoted above, have also been construed and interpreted by previous opinions of this department. At 1938 O.A.G. 699, §7193-al, Code of Iowa, 1938, the predecessor to §445.16, was examined and interpreted not literally but in conjunction with surrounding provisions (now sections 446.18, 19). Holding that boards of supervisors do not have the power to compromise taxes against real property offered for sale by county treasurers in two consecutive years but not sold, the opinion reasoned as follows at 1938 O.A.G. 700:

"If the board of supervisors under section 7193-al [445.16] now have the authority to compromise taxes after the property has been offered for sale for two consecutive years and all the boards would so exercise this purported authority, there would be little property in the state that would be offered for sale at a 'scavenger' sale. If this were the law, few taxpayers would pay their taxes until after their property had been twice offered for sale because they could then come before the board of supervisors and attempt to secure a compromise of their taxes."

This opinion apparently reaffirmed the detailed opinion located at 1936 O.A.G. 319, which held that there must be a "scavenger" sale before boards of supervisors may compromise and that such compromise can be

made only of delinquent taxes on the land which is sold, paid for and receipted by a sale certificate. All of the provisions discussed in these opinions are still a part of the law of this state, and we perceive no reason to alter the above holdings. Thus, it is the opinion of this office that §445.16 allows the county boards of supervisors to compromise delinquent taxes on property which is sold, paid for and receipted to the purchaser at a "scavenger" sale. However, it appears that, under 1928 O.A.G. 226, the holding that "special assessments would not be affected by this provision and that the provisions of chapter 346 apply to general taxes only" is of legal effect today although other portions of the opinion were overruled by 1936 O.A.G. 319 and 1938 O.A.G. 699.

Section 445.19, Code of Iowa, 1971, relating to the compromise of taxes on personal property, has similarly been the subject of several opinions of the attorney general. At 1938 O.A.G. 123, the three requirements of the statute which must be shown to the board of supervisors were enumerated as follows:

"1. That such personal taxes are not a lien upon any real estate.
2. That said personal taxes are delinquent for one or more years.
3. That such personal taxes are not collectible in the usual manner."

See also 1928 O.A.G. 320, 1928 O.A.G. 308, 1928 O.A.G. 275. An earlier opinion, 1928 O.A.G. 221, had defined "collectible in the usual manner" as referring to the collection of personal property taxes by the sale of real estate, and including distress and sale under what is now §445.6. The opinion stated that a law action was not included within the statutory term. Again, we believe that the holdings of these opinions are of effect and equally applicable today as they were when rendered. It is the opinion of this office that, under §445.19, Code of Iowa 1971, county boards of supervisors are allowed to compromise taxes against personal property when: (1) such taxes are *not* a lien upon any real estate; (2) such taxes are "not collectible in the usual manner" as defined by 1928 O.A.G. 221.

Section 633.475, Code of Iowa 1971, and its predecessor §682.36, have not been the subject of any prior decisions or opinions. However, it is apparent from the wording of the statute that the board of supervisors may authorize and consent to a compromise of personal taxes due or to become due the county by an estate, payment of said compromise to constitute full satisfaction of all such taxes owed by the estate to the county, if it is reasonably believed that such compromise would facilitate the settlement and distribution of the estate. It is to be noted that no compensation shall be paid any person because of the compromise or agreement.

Therefore, in light of the above discussion, it is the opinion of this office that county boards of supervisors are authorized to compromise taxes if the factual situation falls within the requirements and provisions of the above-quoted statutes as interpreted by this office.

February 3, 1971

MOTOR VEHICLES: Chauffeur License — §321.1(43) and §321.176(3),

Code of Iowa, 1966. Where out-of-state resident employees occasionally drive trucks in Iowa for their employer, said employees are not required to obtain an Iowa Chauffeur License, notwithstanding that the weight classification of the truck would otherwise require the operator to have a Chauffeur License. (Mowers to Fenton, Polk County Attorney, 2/3/71) #71-2-15

Mr. Ray A. Fenton, Polk County Attorney: Reference is made to your request for an opinion as to whether it is necessary for out-of-state resident railroad employees to obtain an Iowa Chauffeur's License when occasionally driving trucks for their employer in Iowa.

We think clearly that it is unnecessary for these employees to obtain an Iowa Chauffeur's License as long as: (1) they are principally hired and perform as mechanics and laborers and only occasionally operate a vehicle without additional pay; and (2) that they have a valid operator's or chauffeur's license from their resident state which is carried on their person at all times.

Section 321.1, paragraph 43, of the Code of Iowa, 1966, defines a chauffeur as follows:

" 'Chauffeur' means any person who operates a motor vehicle in the transportation of persons, including school buses, for wages, compensation or hire, or any person who operates a truck, tractor, road tractor or any motor truck which is required to be registered at a gross weight classification exceeding five tons, or any such motor vehicle exempt from registration which would be within such gross weight classification if not so exempt except when such operation by the owner or operator is occasional and merely incidental to his principal business."

We think the railroad employees fall within the exception of the above section, provided by the following language:

". . . except when such operation by the owner or operator is occasional and merely incidental to his principal business."

Therefore if said employees do not fall within the chauffeur classification of Section 321.1, paragraph 43, they must be "operator's," and, as a consequence, we have to look to Section 321.176, paragraph 3 to determine if the out-of-state resident employees can operate the vehicle on the Iowa highways. This Section provides that:

"The following persons are exempt from obtaining license hereunder:

"3. A nonresident who is at least sixteen years of age and who has in his immediate possession a valid operator's license issued to him in his home state or country may operate a motor vehicle in this state only as an operator."

Accordingly, it is the opinion of this office that out-of-state resident employees who operate a vehicle only occasionally, not as the principal aspect of their business, be not required to obtain an Iowa Chauffeur's License.

February 3, 1971

COUNTIES AND COUNTY OFFICERS: Cities and Towns: Sanitary Disposal Project, §§28E, 346.23, Code of Iowa, 1971. A joint agreement establishing a Sanitary Disposal Commission is authorized by §28E, Code 1971. County could use its bonding power pursuant to §19, Ch.

1191, Acts, 63rd G. A., 2d Session. (Nolan to McNeal, Hardin County Attorney, 2/3/71) #71-2-16

Mr. Clark McNeal, Hardin County Attorney: The request for an opinion relevant to the establishment of a sanitary disposal commission and funding thereof is hereby acknowledged. We understand that the board of supervisors of Hardin County and the city councils of all the cities and towns in Hardin County have indicated a desire to establish a sanitary disposal commission to have jurisdiction over all sanitary disposal problems on a county-wide basis. The letter submitted by Mr. Letz states:

"Section 28E.11 would seem to authorize and empower the County and the respective cities and towns of Hardin County Iowa to impose the levy as provided in Sections 8 and 9 of Senate File 1232 [Chapter 1191, 63rd G. A., Second Session] and then pass the funds to the Sanitary Disposal Commission established under the provisions of Chapter 28E."

The letter continues:

"Would you please render an opinion as to whether or not you believe that the establishment of the commission and the proposed funding of the commission would be in compliance with Iowa law.

"I should also wish your opinion as to whether or not all of the political entities entering into the agreement forming the commission would have to have a member on the commission in order to afford proper representation to their constituents under the Iowa and Federal Constitution."

By subsequent letter you also asked:

"In the event the sanitary disposal commission would be established under Chapter 28E of the Code, could the county still invoke the bonding provisions as set forth in Section 19, and pass the proceeds of the bonds to the commission."

I

It is my opinion that the cities and towns of Hardin County have sufficient authority to join with the county government in an agreement made pursuant to Ch. 28E, Code of Iowa 1966, to establish a sanitary disposal commission as a separate entity. Although there appears to be no express statutory authority for a commission designated "Sanitary Disposal Commission," the creation of such a commission would be within the purview of the broad constitutional powers accorded to cities and towns by the home rule amendment to the Iowa Constitution:

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

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

Art. 3, §2 of the Constitution of the State of Iowa as amended by Amendment Two, Amendments of 1968.

In an opinion issued by this office on April 4, 1969, (Turner to Coupal, Director of Highways, Highway Commission), we stated:

"28E.12 authorizes not only the joint exercise of mutually possessed powers, but also the exercise by one agency of the power of the other in accordance with the contract."

Accordingly, if an appropriate agreement were made pursuant to Ch. 28E, Code of Iowa, between the governing bodies of the cities and towns in Hardin County and the county board of supervisors, a commission could be established for the purposes outlined in your letter.

Ch. 1191, Acts of the 63rd G. A., Second Session, which sets the deadline of July, 1975, for the establishment of sanitary disposal projects, provides in §3, that such projects "may be established either separately or through cooperative efforts for the joint use of the participating public agencies as provided by law." The Act, supra, further authorizes cities and towns as well as the county to issue general obligation bonds to provide funds to pay the cost of "establishing, constructing, acquiring, purchasing, equipping, improving, extending, reconstructing and repairing sanitary disposal projects." §§19, 20. Under §28E.11, funds may be appropriated to operate a joint undertaking for which there is a Ch. 28E agreement.

II

The stated purpose of Ch. 28E, Code of Iowa 1966, is to permit efficient use of governmental powers by permitting public agencies to provide joint services and cooperation for mutual advantage. If a commission were established as a separate entity pursuant to §28E.4, it would not be necessary for each party to the agreement to have a representative on the commission — the precise organization and nature together with the powers delegated to the commission would have to be specifically provided by agreement however, as prescribed by §28E.6.

On the other hand, if the cities and towns and the county arrive at a mutual agreement for the establishment and operation of a public disposal project without establishing a separate legal entity to conduct the joint or cooperative undertaking, they must, by their agreement, make provision for an administrator or a joint board responsible for administrating the joint or cooperative undertaking. "In the case of a joint board, public agencies party to the agreement shall be represented." §28E.6.

III

In the event the sanitary disposal commission would be established under Ch. 28E, of the code, the county could still invoke the bonding provisions set forth in §19 of Ch. 1191, 63rd G. A., Second Session, which provides:

"The boards of supervisors of counties are hereby authorized to contract indebtedness and to issue general obligation bonds of the county to provide funds to pay the cost of sanitary disposal projects as defined in section two (2) of this Act."

Under §28E.11: Any public agency entering into an agreement pursuant to Ch. 28E, "may appropriate funds . . . to operate the joint or cooperative undertaking. . . ."

Accordingly, it is my view that the county could still invoke the bonding provisions an dwith the proceeds thereof appropriate funds to the sanitary disposal commission for operation of the project.

February 3, 1971

COUNTY OFFICES: Schools: §§341.6, 336.2(7), Code of Iowa 1971. Incompatibility. Offices of assistant county attorney and member of community school board are incompatible. (Nolan to Folkers, Mitchell County Attorney, 2/3/71) #71-2-17

Mr. Jerry H. Folkers, Mitchell County Attorney: We have your letter requesting an Attorney General's opinion on the following question:

"Are the offices of the assistant county attorney and member of the board of a community school district incompatible?"

The records of this office indicate that an opinion was issued on February 27, 1956, advising that a county attorney may not serve on a local school board. A copy of this opinion does not appear to be available at the present time. However, it seems clear that two public offices, rather than two instances of mere public employment are involved. The assistant county attorney may be required to perform the duties of his principal (§341.6, Code of Iowa 1971) and such duties may include giving advice or opinions in writing without compensation to school officers when requested to do so by such board. §336.2(7). Such opinions are usually given considerable weight by the board.

The test for incompatibility of office as announced in the case of *State v. White*, 1965, 257 Iowa 606, 133 N. W. 2d 903, is:

". . . that consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in doing so, a due regard for the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time . . . that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other . . . subject in some degree to . . . revisory power . . . or where the duties of the two offices 'are inherently inconsistent and repugnant' . . . it is held that incompatibility in office exists 'where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both.' *State ex rel Crawford v. Anderson*, 155 Iowa 271, 273, 136 N. W. 128, 129."

Based on the foregoing, it is my view that the offices of assistant county attorney and member of a school district board of directors are incompatible.

February 3, 1971

FIRE DEPARTMENT: Chapter 292, 63rd G. A., First Session. A fire department that serves its members without compensation, but serves non-members for compensation is not entitled to the benefits of Chapter 292, 63rd G. A., First Session. (Strauss to Ellsworth, 2/3/71) #71-2-18

The Hon. Theodore R. Ellsworth, State Representative: Replying to your letter of October 16, 1970, in which you advise: "There are several volunteer fire departments around Dubuque County and it has been discussed in various insurance circles the fact that these units are leaving themselves open to suit if they respond to the calls of emergency from their members, as well as others, seeking help of their rescue units." And more specifically, John Frangos on September 24, 1970, stated with respect to the situation you described, the following:

"A local volunteer fire department has a rescue unit that they operate for their members and also when called by others. When called by other parties than their own, they would customarily make a service charge of about $25.00.

"The question of mal-practice insurance arises for this group since it is not covered under their public liability coverage. This type of insurance can be quite costly and the department was wondering if they did not make a charge for their rescue service, would they be exempt from prosecution under the above mentioned law?"

In the foregoing situation I advise you as follows. According to the case of *Seaver v. Cooper,* 187 Iowa 1109, 175 N. W. 19, 21:

"A 'volunteer' is a person who performs services without promise of remuneration, either express or implied, and therefore is not entitled thereto." Slate v. Henkle, 45 Ore. 430 (78 Pac. 325); Continental Hose Co. v. City of Fargo, 17 N. D. 5, (114 N. W. 834).

Such person would be entitled to the benefits of Chapter 292, 63rd General Assembly, First Session, providing the following:

"Any person, who in good faith renders emergency care or assistance without compensation at the place of an emergency or accident, shall not be liable for any civil damages for acts or omissions unless such acts or omissions constitute recklessness."

However, this is not the situation that exists in the department you described above. Such department provides free service to members of the department; but for services for any other person, compensation is required. The benefits of the foregoing chapter are available to persons described in such statute rendering service without compensation. Obviously, the members of your department are not of that type and are not entitled to the statutory exemption. The members of your department cannot be both volunteer and paid. Volunteer service alone is a prerequisite to securing the benefits of this statute. Performing both voluntary and paid services excludes your voluntary department from its benefits.

February 3, 1971

TAXATION: Real Property Taxes: State-owned property. §§427.1(1), 427.1(26), 445.28, Code of Iowa, 1966. Real property which was conveyed to the state of Iowa whereby a fifty year use was reserved to the grantors who established a golf course and club house thereon is exempt from property taxation, even if the property is the location of a federal retail liquor sales permit. (Griger to Robert H. Story, Jones County Attorney, 2/3/71) #71-2-19

Mr. Robert H. Story, Jones County Attorney: You have requested the opinion of the Attorney General pertaining to the following factual situation.

The records of the Jones County Recorder's Office show a conveyance on February 16, 1928, of land, upon which is now located the Wapsipinicon Country Club, to the State of Iowa, reserving the use of the land and club house located thereon for a period of fifty (50) years to the grantors pursuant to the terms of the recorded deed. The country club is located in Wapsipinicon State Park near the City of Anamosa, Iowa, and operates a golf course and the club house. The country club was organized by the grantors after the conveyance of the property to the State of Iowa

and the same has been operated since that time. It is the position of the country club that the title to the land is in the State of Iowa with only a use thereof being retained in said country club, and, therefore, the land is exempt from property taxes pursuant to §427.1(1), Code of Iowa, 1966. The country club does pay personal property taxes on the equipment and fixtures located in the club house building. The Wapsipinicon Country Club has a retail liquor license and sells liquor on its premises.

Based upon the above factual situation, you have posed the following questions:

"1) Does the arrangement by which Wapsipinicon Country Club use as this property for a period of fifty (50) years without payment of any rent or any lease arrangement make them liable to pay Property Taxes or be assessed for the land on which they operate?

"2) If the land is exempt from taxation as being State owned land, does the provision in Iowa Code Section 427.1(26), which requires to mandatory denial of exemption upon property which is the location of the Federal Retail Liquor Sales Tax Permit, operate against the State of Iowa, requiring the denial of the exemption and require the State of Iowa to pay property taxes on this land?

"3) If any exemption granted to either Wapsipinicon Country Club or the State of Iowa should be renewed, can the Jones County Assessor or Board of Review make application to the Director of Revenue for revocation of exemption based upon alleged violations of Chapter 427, as allowed by Section 427.1(27)?"

Section 427.1(1), Code of Iowa, 1966, provides in part as follows:

"The following classes of property shall not be taxed:

"1. *Federal and State property.* The property of the United States and this state, ..."

Clearly, if the property here involved is owned by the State of Iowa, it is exempt from property taxation.

From your letter, the facts depict a situation where the grantors reserved to themselves the use of property, which was conveyed to the State of Iowa, for a definite period of time. With regard to such reservation, the following appears in 26 C.J.S. *Deeds*, §140 (10):

"It is competent for the grantor to reserve the possession of land to himself for a determinate or indefinite period extending to that of his life. This rule applies to a reservation of the use, or of the possession, or of support for life, and such reservation will save such incidents and rights, and be subject to such restrictions as the rules of construction applicable to the subject matter and to the language employed in the particular case will warrant."

A reservation by the grantor of the use of the property after the time of conveyance is not inconsistent with the vesting of title in the grantee. *Gatchell v. Gatchell*, 1928, 127 Me. 328, 143 Atl. 169; *Wilford v. Dickey*, 1962, 196 Pa. Super. 468, 175 A. 2d 98; *Brezinski v. Tyler*, 1948, 115 Vt. 316, 59 A. 2d 221. Therefore, a conveyance of property subject to a reservation of use by the grantor does pass title to the grantee. Thus, the State of Iowa has title to the land described in your letter and the country club has a right to the use of that land.

An Iowa case somewhat on point is *C. R. I. & P. R. Co. v. City of Davenport*, 1879, 51 Iowa 451, 1 N. W. 720. The City of Davenport had assessed a tax against the railroad's interest in a bridge spanning the Mississippi River. It was shown that the bridge was the property of the United States Government [also exempt from taxation under §427.1(1)] and that the railroad's interest therein consisted of the right to use the bridge in consideration of furnishing a portion of the construction and maintenance costs. The Court held that the bridge, in such circumstances, could not be taxed in whole or in part to the railroad.

Furthermore, in *Crews v. Collins*, 1961, 252 Iowa 863, 109 N. W. 2d 235, the Court stated at 252 Iowa 868-69:

"In White v. City of Marion, 139 Iowa 479, 485, 117 N. W. 254, 256, this court said:

" 'A life estate in land is not subject to taxation as such. *The land itself is taxed*, and the only question which may arise with reference to the taxation thereof is who should pay the taxes, the life tenant or the owner of the fee?'

"In 51 Am. Jur., Taxation, section 435, p. 451, we find this general statement: 'Although it is generally held that a leasehold interest for a term of years is a chattel real, and that for the purpose of taxation the whole of the land is assessed against the owner of the fee, which covers the value of the leasehold interest as well as the reversionary interest, in some jurisdictions provision is made for . . . leasehold interests being held to be real property within the tax law, under statutes specifically defining "real property" for the purpose of taxation. . . .'

"In 84 C.J.S., Taxation, section 95, page 212, appears this statement: 'As a general rule property under lease for a term of years is taxable to the owner, not to the tenant. . . .' " (Emphasis supplied)

In view of the above, it is clear that the State of Iowa has title to the property conveyed to it. Property owned by the State of Iowa is exempt from the property tax pursuant to §427.1(1). Therefore, the arrangement by which the country club uses property owned by the State of Iowa does not subject that property to taxation. The country club, of course, is liable for property taxes on real or personal property which is owned by it.

Your second question concerns the applicability of §427.1(26), Code of Iowa, 1966, to state-owned property. Section 427.1(26) provides as follows:

"No exemption shall be granted upon any property which is the location of a federal retail liquor sales permit or in which federally licensed devices not lawfully permitted to operate under the laws of the state of Iowa are located."

At first glance, §427.1(26) would appear to prohibit a property tax exemption on state-owned land which is the location of a federal retail liquor sales permit and require the State of Iowa to pay property taxes on such land. However, a careful consideration of other property tax principles compels a negative answer to your second question.

The theory of real property taxes was expressed by the Court in the recent case of *Laubersheimer v. Huiskamp*, 1967, 260 Iowa 1340, 152 N. W. 2d 625, at 260 Iowa 1340:

"Land taxes are a tax against the land and unpaid taxes are a lien against that particular tract of land. Section 445.28."

Section 445.28, Code of Iowa, 1966, provides:

"Taxes upon real estate shall be a lien thereon against all persons *except the state.*" (Emphasis supplied)

In 1966 O.A.G. 409, 411, the Attorney General stated:

"Although there is not direct authority in Iowa on this point, it is our view that the acquisition of the title to land by a state or other governmental body acts to extinguish prior tax liens against the property. We believe this view to be correctly expressed in *State ex rel. Peterson v. Maricopa County*, 38 Ariz. 347, 300 Pac. 175 (1931), wherein the Court held that any tax lien existing upon property acquired by the state merges with the legal title when acquired. Also see *Hoover v. Minidoka County*, 50 Idaho 419, 298 Pac. 366 (1931), where the Idaho Supreme Court held that when the state obtained complete unconditional title to land, the title was freed from any charge of taxes, either present or past, and that all such liens on the tax records become null and subject to cancellation.

"It is the opinion of this office that upon acquisition of real property by the state, subsequent real property taxes assessed and levied upon that property are illegal and must be cancelled; and real property tax liens in existence against that property become merged with the title in the state."

It is, therefore, clear that real property taxes constitute taxes against the real estate, as distinguished from a tax on the privilege of using that real estate. If the taxes are delinquent, they constitute a lien against the real estate which, as a general rule, may be collected by the sale of the real estate as outlined in Chapter 446 of the Iowa Code. However, it is also clear that, by the doctrine of merger, existing real estate tax liens are extinguished if said property is conveyed to the State of Iowa. Moreover, real estate taxes cannot be a lien thereon against the state (§445.28). Consequently, any attempt to assess real estate taxes against state-owned land cannot be enforced because no tax lien exists against such land, there is no power of execution, and there is no authority to sue the State of Iowa for nonpayment of such taxes. 1926 O.A.G. 352. Section 427.1(26) must, for the reasons stated, be held inapplicable with reference to property owned by the State of Iowa.

Since we have concluded that the state-owned property which is being used by the Wapsipinicon Country Club is exempt from property taxation by operation of law, it follows that said exemption cannot be revoked as long as the property is owned by the State of Iowa. Therefore, no useful purpose would be served by an extended discussion of your third question.

February 3, 1971

COUNTIES: Supervisors: Ambulances. §332.3(23), Code of Iowa 1971. There is no legislative requirement that county supervisors furnish ambulance service although there is statutory authority for them to do so. (Nolan to Richard L. Stephens, Sr., Senator, 2/3/71) #71-2-20

The Hon. Richard L. Stephens, Sr., State Senator: This is in answer to your letter concerning ambulance service and specifically your request for an Attorney General's opinion on the following question:

"Is there legislative requirement that the county board of supervisors is required to furnish ambulance service in their respective county?"

The authority under which ambulance service is provided by the county is contained in §332.3, Code of Iowa 1971, which provides:

"The board of supervisors at any regular meeting shall have power:

* * *

"23. To purchase, lease, equip, maintain and operate an ambulance or ambulances to provide necessary and sufficient ambulance service or to contract for such vehicles, equipment, maintenance, or service.

"The board may adopt a schedule of fees to be charged to the users of such service, and such fee schedule may include considerations concerning the costs of the service and the user's ability to pay.

"If a county shall provide ambulance service, it shall first ascertain what cities and towns in such county also provide ambulance service pursuant to Section three hundred sixty-eight point seventy-four (368.74). The county shall then coordinate its services with that provided by any such city or town in order to eliminate duplication and to make the ambulance service provided by the county and such cities and towns as economical as possible.

"Any third party pay or making payment for ambulance service shall make such payment either jointly to the person on whose behalf the payment is made and to the person or organization providing such ambulance service, or directly to the person or organization providing such ambulance service."

I find no mandate in the above statute requiring the supervisors to furnish ambulance service in their respective counties. Accordingly, it is my opinion that there is no such legislative requirement.

February 3, 1971

STATE OFFICERS: Comptroller: Escheats. §§633.545, 450.10(3). The heirs of a pre-deceased spouse may be paid money from an estate turned over to the state under §633.546 if their claims are properly authenticated. When such claim is based on inheritance the money is taxable under §450.10(3). (Nolan to Selden, Jr., State Comptroller, 2/3/71) #71-2-21

Mr. Marvin R. Selden, Jr., State Comptroller: This is in response to the request from your office for an opinion as to whether the heirs of Fritz Koenig, deceased husband of Ruth Koenig, are entitled to the $1,852.93 which is being held pursuant to §633.545, Code of Iowa, 1966.

Ruth Koenig died leaving no surviving spouse or heirs. Her estate was duly probated in Winneshiek County, Iowa, and the amount remaining after the payment of claims was turned over to the state of Iowa for the benefit of the school fund. Code §633.546 provides:

"The money or any portion of it shall be paid at any time within ten years after the sale of the property or the appropriation of the money, but not afterwards, to anyone showing himself entitled thereto."

These claimants state that the basis of their claims is the case of *Kellogg v. Kellogg*, 245 Iowa 689, 63 N. W. 2d 923, which holds that to avoid escheat the statute providing rules for devolution of intestate property permits such property to pass to the heirs of a predeceased spouse. The case states:

" 'In the Ramsay case, supra, 241 Iowa at page 718, 24 N. W. 2d at page 388, we said with equal certainty: 'If heirs of the intestate "are not thus found" the search for heirs to the "portion uninherited" starts anew with the lines of intestate's wives, * * * The spouse and heirs of the deceased spouse of the intestate take direct from the intestate and not as heirs of intestate's father or any third person.' We think that must be our answer to this appeal."

Accordingly, it is our opinion that if the claims of the heirs of Fritz Koenig are properly authenticated, such claimants are entitled to the money from the Ruth Koenig estate now held for the benefit of the school fund since the ten year period for filing such claims has not elapsed. Further, it would appear that the money is taxable under §450.10(3), Code, when it passes to the claimants.

February 3, 1971

COUNTIES AND COUNTY OFFICERS: Cities and Towns: Organization of City Councils. §§363B.1, 363B.2, 363B.3, Code of Iowa 1971. A city, organized under and pursuant to §363B.1 after July 1, 1951, which thereafter sustains a population loss must reorganize under the terms and conditions of §363B.2 within a reasonable time after census figures are certified. (Conlin to Glenn, Senator, 2/3/71) #71-2-22

The Hon. Gene W. Glenn, State Senator: Reference is made to your letter of December 15, 1970 requesting our written opinion concerning the effect of a reduction in population to less than 30,000 in a city with a council organized pursuant to Chapter 363B, Code of Iowa, 1966.

Presently the Ottumwa City Council is organized and operating according to Section 363B.1, Code of Iowa, 1971, which states as follows:

"Cities of 30,000 or more population. Municipal corporations operating under the commission form of government, and having a population of thirty thousand or over shall be governed by a council, consisting of a mayor and four councilmen elected at large. One councilman shall be elected to preside over the department of accounts and finances. One councilman shall be elected to preside over the department of public safety. One councilman shall be elected to preside over the department of parks and public property. One councilman shall be elected to preside over the department of streets and public improvements."

As a result of the 1970 census Ottumwa's population has unofficially fallen below 30,000 which would bring the council within the regulation of Section 363B.2, which provides as follows:

"Council-cities of less than 30,000 population. Cities operating under the commission form of government, and having a population of less than thirty thousand, shall be governed by a council consisting of a mayor and two councilmen elected at large. One councilman shall be elected to preside over the departments of accounts and finances and public safety. One councilman shall be elected to preside over the departments of parks and public property and streets and public improvements."

Section 363B.3 states:

"Reduction or increase in population. Whenever any city shall have been organized on the commission plan on or before July 4, 1951, no reduction or increase of the population of such city, shown by a subsequent census shall have any effect upon the organization and number of councilmen but the same shall continue, remain, and be as then by law prescribed for cities of the population such city had at the time its electors voted to adopt such plan of government as shown by the then preceding census."

Since Ottumwa has been operating under this form of government only since January 2, 1962, the city would not come under the provisions of Section 363B.3, Code of Iowa 1971. The rule, expressio unius est exclusio alterius, applies to this provision. The expression of one thing is the exclusion of all others.

The legislature contemplated the possibility of population alterations and set guidelines for maintaining the same form of government despite such alterations, but only where the commission plan was adopted prior to July 4, 1951.

It is, therefore, the opinion of the Attorney General that any city organized under and pursuant to Section 363B.1 after July 4, 1951, which thereafter sustains a population loss, must reduce the number of councilmen and otherwise comply with Section 363B.2 within a reasonable time after census figures are certified.

February 3, 1971

CITIES AND TOWNS: Lease purchase of Equipment: §§368.2, 404.18, Code of Iowa 1971. A municipality may enter into a lease purchase agreement for a reasonable length of time so long as the amount of the yearly rental does not put the city over the statutory limit on indebtedness in the years in which the annual rental is paid. (Haesemeyer to Henke, Office for Planning and Programming, 2/3/71) #71-2-23

Mr. Kenneth C. Henke, Jr., Director, Division of Municipal Affairs, Office for Planning and Programming: Reference is made to your letter in which you state:

"We are continuing to receive information that some cities and towns are purchasing motor vehicle equipment and other items by means of the lease-purchase agreement. There has been some question as to the legality of such lease-purchase agreements in view of the opinion from your office.

"We therefore would like a clarifying opinion on this subject. . . ."

In 1968 the people approved the Home Rule Amendment to the Constitution of Iowa. This amendment provides:

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

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

Section 404.18, Code of Iowa, 1971, provides in part:

"Municipal corporations shall have power to establish and maintain a revolving fund to be used for the central purchasing of city or town stores, supplies, motor vehicles, or other equipment. . . .

". . . purchases of motor vehicles and equipment and replacements therefore; and administrative costs incurred in the operation of such fund, may be paid therefrom."

Section 368.2 sets forth the statutory powers granted to municipal corporations by the legislature. It states in part that municipal corporations ". . . shall have the general powers and privileges granted, and such others as are incident to municipal corporations of like character, . . . they may sue and be sued, contract and be contracted with, acquire, lease, and hold real and personal property. . . ."

These statutory provisions and the constitutional amendment taken together constitute a broad grant of powers to municipalities not only to purchase but also to "acquire, lease, and hold real and personal property" in addition to the power to govern themselves as they deem most beneficial for their inhabitants.

If we had only to deal with §404.18 standing alone it might be urged that the term "purchase" in referring to the acquiring of equipment or motor vehicles, requires the payment of cash in full before the city may acquire the item. However, the word "purchase" has not been so restricted in its legal significance:

"The authorities seem to be in agreement that the word 'purchase' has two significations, a popular but restricted one and a legal but enlarged one. . . . The legal or enlarged definition is . . . 'Purchase including every mode of acquisition known to law, except that by which an heir, on the death of an ancestor, becomes substituted in his place as owner by the act of law.' " *3 Washburn, Real Property* (6th Ed) 3, §18.24; *Shepard Paint Co. v. Board of Trustees,* 1950, 100 N. E. 2d 248, 251, 88 Ohio App. 319; *People ex rel Nelson v. Union Bank of Chicago,* 1941, 31 N. E. 2d 343, 348, 305 Ill. App. 91.

Black's Law Dictionary, (4th Ed), 1951, defines purchase as: "Transmission of property from one person to another by voluntary act and agreement, founded on a valuable consideration."

Therefore, it may be seen that the word "purchase" is not as restrictive in legal terminology as it is in the common usage.

Article XI, §3, Constitution of Iowa, provides in part that no municipal corporation may "become indebted in any manner, or for any purpose to an amount, in the aggregate, exceeding five percentum on the value of the taxable property" within such corporation.

Accordingly, it is our opinion that a municipality may enter into a lease-purchase agreement so long as the amount of the yearly rental does not put such city over the statutory limit on indebtedness in the years in which the annual rental is paid. The total contractual obligation does not fall due in one year. Thus, for example, a city which lease-purchases a piece of equipment for ten years for a aggregate rental for the term of $100,000.00 has only an indebtedness increase of $10,000.00 during the year the contract was entered into and $10,000.00 for each of the succeeding nine years. *Dively v. The City of Cedar Falls,* 1869, 27 Iowa 227, 233; *Burlington Water Co. v. Woodward,* 1878, 49 Iowa 58, 62; 15 McQuillan *Mun. Corp.,* §41.26 (3rd Ed, 1970).

Moreover, the general rule is that one council may bind a future council with respect to business enterprises entered into by a city council for the city. Therefore, there would be no problem in a city council binding a succeeding council with a contract for a reasonable length of time. 63

CJS, Municipal Corporations, §987 (1950); *Iowa-Nebraska Light & Power Co. v. City of Villisca,* 1935, 220 Iowa 235, 261 N. W. 423, 429; *City of Des Moines v. City of West Des Moines,* 1948, 239 Iowa 1, 30 N. W. 2d 500, 507, 149 A.L.R. 336.

February 3, 1971

STATE OFFICERS AND DEPARTMENTS: Public Safety Peace Officers Retirement Accident and Disability System — §97A.6(10), Code of Iowa 1971. The statutory requirement that a resigned member's accumulated contributions be "paid on demand" should be reasonably construed to allow time to make the computation and process the necessary paper work in thirty days. (Haesemeyer to Fulton, Dept. of Public Safety, 2/3/71) #71-2-24

Mr. Jack M. Fulton, Chairman, Peace Officers' Retirement System, Department of Public Safety: You have requested an opinion of the attorney general with respect to the following:

"Chapter 97A.6, subsection 10, reads as follows: 'Return on accumulated contributions. Should a member cease to be a peace officer in the division of highway safety and uniformed force or the division of criminal investigation and bureau of identification in the department of public safety except by death or retirement, he shall be paid on demand the amount of his accumulated contributions standing to the credit of his individual account in the annuity savings fund.'

"What is meant by 'Paid on demand'? Can this be construed to mean a reasonable period of time, i.e. 30 days allowing the time necessary to make the proper computation so that his contribution account may be correctly paid out."

We have been unable to find any Iowa cases or decisions from other jurisdictions construing the expression "paid on demand" in the context in which it is used in §97A.6(10), Code of Iowa, 1971.

However, we do not think that it would be reasonable to adopt a construction of the term which would require return of a resigning member's contributions instantly upon his resignation. In our opinion a reasonable period of time, e.g. 30 days, could be taken to make the computation and process the necessary paper work.

February 3, 1971

SCHOOLS: Joint County Boards: Publication of Notices. §§273.13(13), 273.22(12), 347.13, 24.9. Joint county school systems are not required to publish notice of hearings on budgets in more than one newspaper. (Nolan to Representative Ewell, 2/3/71) #71-2-25

The Hon. Vernon A. Ewell, State Representative: This is in reply to your request for an opinion in regard to the publication procedures of county and joint county school systems. You have indicated that some counties have as many as three or four official newspapers, and as a result, joint county school systems are incurring large publication expenditures by publishing their minutes and budgets in all of the official newspapers of the counties involved.

The question on which you would like an opinion is:

"May the joint County School Systems publish their minutes and bud-

gets in one official newspaper in each county involved or must they publish their minutes and budgets in all of the official newspapers in the counties involved?"

The controlling statutes in this case are §273.13(13) and §273.22(12), Code of Iowa 1966. §273.13 provides that the county board of education shall:

"Cause to be published annually in the official newspapers of the county a list of the bills and claims allowed, with the name of each individual receiving such payment, the amount thereof, and the reason therefor."

§273.22(12) provides:

"Joint boards shall exercise all powers and carry out all duties imposed on county boards of education by statute, and shall be governed in general by the provisions of this chapter."

In 1968 OAG at page 269 this office advised that publication of bills allowed by a hospital board of trustees must be made in each official newspaper in the county under the mandatory provisions of §347.13, Code of Iowa 1966.

We are unable to locate any statutory requirement that the minutes of the joint county boards be published in official newspapers. Therefore, that part of your question may be answered negatively.

With respect to the budgets, under §24.9, Code of 1966, as amended by §4 of Ch. 1025, Acts of the 63rd G. A., Second Session, every municipality (corporations that have power to levy or certify a tax) shall file an estimate of proposed expenditures with the clerk of the certifying board and shall publish such estimates and any annual levies previously authorized as provided in Section 76.2, with a notice of the time when and the place where such hearing shall be held at least ten days before the hearing.

For any municipality other than a county "such publication shall be in a newspaper published therein, if any, if not, then in a newspaper of general circulation therein." (§24.9, supra)

Thus, publication in a single newspaper is all that is required by a joint county board. See 1968 OAG 933, copy of which is enclosed.

October 8, 1968

COUNTY OFFICERS — County Agricultural Extension Law — Ch. 176A and §24.9, 1966 Code of Iowa. Budget estimate of County Agricultural Extension Council is to be published in only one newspaper, rather than all official newspapers in the county. (Ivie to Soults, Cooperative Extension Service, 10/8/68) #68-10-3

Mr. Maurice Soults, Asst. Director, Cooperative Extension Service: You have asked whether or not the annual budget required by §176A.8 (9), 1966 Code of Iowa, must be published in all official newspapers in the county, as is required for county budgets under §24.9, 1966 Code of Iowa, or whether a single publication as required of municipalities is sufficient.

Each extension council created under Chapter 176A, 1966 Code of Iowa,

with the exception of those created in Pottawattamie County, governs a "district" that is a county wide district (§176A.4), and, I am certain that any ambiguity you feel exists under the requirements of §24.9, 1966 Code of Iowa, comes about because of this fact.

However, §24.2(1), 1966 Code of Iowa, defines municipality as follows:

"The word 'municipality' shall mean the *county*, city, town, school district, and *all other public bodies or corporations* that have power to levy or certify a tax or sum of money to be collected by taxation, but shall not include any drainage district, township, or road district." (Emphasis supplied)

§176A.3 defines "county agricultural extension district" as a "governmental subdivision" and a "public body corporate."

It is clear from these definitions that the requirement of §24.9, 1966 Code of Iowa, which directs publication of county budget estimates in the official newspapers of that county does not apply to budget estimates of a county agricultural extension district which by definition is a "municipality" distinct from the "county."

Therefore, publication in a single newspaper as directed for "any other municipality" in §24.9 is all that is required for the budget estimate of each county agricultural extension district.

February 3, 1971

COURTS: Juvenile Court: Deputy Clerks Salary. §§231.7, 602.49, Code of Iowa 1971. When the municipal court sits as juvenile court the salaries of clerks are fixed by the city council and county board of supervisors has no power to make an addition to such salary even though the county has power to approve and resposibility for sharing expenses of the juvenile court. (Nolan to Smith, Clinton County Attorney, 2/3/71) #71-2-26

Mr. Lauren Ashley Smith, Assistant County Attorney, Clinton County: We have your letter requesting an Attorney General's opinion on the following:

"Can the Clinton County Board of Supervisors make salary payments for the deputy clerk of the juvenile court here?"

Your letter states that the deputy clerk in question is a deputy clerk of the municipal court. You further state that you have an opinion of this office dated December 13, 1968, which indicates the court may pay expenses of the juvenile court even though the juvenile court judge is a municipal judge. The opinion to which reference is made concludes that expenses for equipment are county expenses inasmuch as the juvenile court is a county office. 1968 OAG 985.

Municipal courts are not independent juvenile courts but are merely properly appointed divisions of the county juvenile court. 1962 OAG 180. When a municipal judge acts as the juvenile court, the clerk of the municipal court acts as clerk of the juvenile court. §231.7, Code of Iowa 1971. However, under §602.49, Code, the salaries of all clerks, bailiffs, and deputies of the municipal court are fixed by the city council. The county merely has the power to approve the salary thus fixed and the responsibility for sharing the expense of operating such courts.

There is no provision for the county board of supervisors to fix the salary of the deputy clerk of the juvenile court, nor to make an over-the-top addition such salary as the city council may provide. Accordingly, it is our opinion that the county may not make an extra payment for the juvenile court work performed by the clerk.

February 3, 1971

ELECTIONS: Drainage Districts: Trustees Proxies: Election Contests. There is no statutory authority to determine drainage district election tie by lot. A remainderman does not qualify as trustee because he would be unable to show title. Proxy form used in such election must be acknowledged by a notary public or officer empowered to make acknowledgments. General statutory provisions relating to election contests do not apply to drainage district elections. (Nolan to Senator Neu, 2/3/71) #71-2-27

The Hon. Arthur A. Neu, State Senator: Reference is made to your letter of January 22, 1971, requesting an opinion as follows:

"Drainage District No. 23 of Carroll County, Iowa is managed by a board of trustees under Chapter 462 of the Code of Iowa. At an election held on January 16, 1971, the canvassers of the vote declared that there was a tie vote and drew lots to determine the new trustee. The new trustee so selected is, along with nine others, the holder of a remainder interest in approximately eighty acres of agricultural land.

"At the date of the election, an effort was made to secure votes by proxy and a number of persons presented a form to the judge of the election which bore a filing mark of the county auditor of that day and of a time after the polls had opened in approximately the following form:

PROXY

Know all men by these present

That I _____ of _____ Township, Carroll County, Iowa, do hereby constitute and appoint _____

_____
(Name of Agent)

attorney and agent for me and in my name place and stead, to vote as my Proxy at the election held January 16, 1971, by Drainage District No. 23, Carroll County, Iowa, for the election of one Trustee to represent Election District Number Two Division of Drainage District No. 23 of Carroll County, Iowa.

In Witness whereof I have set my hand and seal this _____ day of January, 1971.

_____
(Voter Sign Here)

Sealed and delivered in the presence of witness: _____

_____.

"The proxies did not bear the seal of a notary.

"Several questions have come up in regard to this election. Simply stated they are this:

"1. What law controls when the outcome of the election is a tie vote?

"2. Is the declared elected trustees qualified as a bonafide holder of agricultural land?

"3. Are the proxies in the form above valid proxies?

"4. What chapter controls the procedure for contesting an election such as a drainage election?

"In regard to choosing the candidate to be elected by lot, Section 43.75 deals with primary elections, Section 50.8 deals with a tie vote due to an error, and Section 50.44 deals with a tie vote, but does Chapter 50 deal with drainage elections?

"In regard to whether or not the selected candidate meets the qualifications of a trustee, your attention is brought to State ex rel Pieper vs. Patterson, 246 Iowa 1129, 90 N. W. 2d 838, in which the court found that the elected trustee was not a bonafide owner having been given one acre of land in order that he could qualify.

"In regard to the contesting of such election, Chapter 62 deals with the contest of elections for county officers. If this chapter controls, the contestant has twenty days in which to file his intention to contest the election. In this case the party was declared elected as of January 18 and February 8 would be the last date that he could file his written statement of intent to contest."

In reply to your questions, I am of the opinion that:

1. Trustees of drainage districts are not officers within the meaning of Chs. 50 or 62, Code of Iowa 1971. Therefore, there is no statutory authority for determining a tie vote by lot. Where rival candidates for an office receive an equal number of votes, neither is elected. In the absence of statutory authority, it is not permissible for the election officers to determine by lot which candidate shall be declared elected. 26 Am Jur 2d 140, §315.

2. A remainderman has an equitable ownership of property and is entitled to protect his interest therein in drainage proceedings precisely as any other owner. *Johnstone v. Robertson*, 1917, 179 Iowa 838, 162 N. W. 66. However, §462.7, Code 1971, which requires that each trustee "shall be a citizen of the United States not less than twenty-one years of age, a resident of the county, and a bonafide owner of agricultural land in the election district for which he was elected," has been held to exclude as eligible trustees persons who are not bonafide landowners within the spirit of the statute. *State ex rel Pieper v. Patterson*, 1955, 246 Iowa 1129, 70 N. W. 2d 838. The owner of three acres of platted land does not qualify under this section, 1960 OAG 99; nor does any person whose interests were created for the purpose of qualifying them as voters or to serve as trustee. 1968 OAG 509. It is my belief that a remainderman does not qualify because under §462.9 ownership depends upon title and a remainderman would be unable to show that title had vested in him.

3. Code §462.13 permits voting by proxy provided the voter's power of attorney is "signed and acknowledged by such person . . . and filed before such vote is cast in the auditor's office of the county in which such election held."

The power of attorney must specify the particular election for which it is to be used, indicating the day, month and year thereof. The proxy form set out above meets this requirement. It does not, however, follow the requirements for acknowledgment. See §558.37, Code. In substance a proper acknowledgment will be executed by a notary public or an officer empowered to acknowledge that the person is known to the officer to be the identical person whose name is subscribed to the instrument, or that

such identity was proved to him and that such person acknowledged the instrument to be his voluntary act. In my opinion the form described by your letter is not valid for the purposes of voting under Code §462.13.

4. None of the general statutory provisions relating to contesting elections, viz. Ch. 57.62, 1971 Code of Iowa, apply to drainage elections either directly or by reference. Further, courts exercising general equity powers are not generally available to settle election contests unless such determination can be made incidentally in order to grant other relief in matters of local concern. 26 Am Jur 2d 142, §317.

February 3, 1971

COUNTIES: Deputies. §341.4. Person who is not a citizen of the United States does not qualify as a deputy county officer. (Nolan to Smith, State Auditor, 2/3/71) #71-2-28

The Hon. Lloyd R. Smith, State Auditor: This replies to your letter requesting an opinion as to whether or not a person who is qualified, but is not a citizen of the United States, may serve in the capacity of deputy or second deputy auditor to a county auditor of the State of Iowa. Your letter indicates that it has been brought to your attention that a Canadian citizen is employed in such capacity in one of the county auditor's offices in this state.

Qualifications for a deputy or second deputy county auditor are set out in §341.4, Code of Iowa 1966. Those qualifications are as follows:

"Each deputy shall be required to give a bond in an amount to be fixed by the officer having the approval of the bond of his principal, with sureties to be approved by such officer. Such bond when approved shall be field and kept in the office of the auditor. Each deputy shall take the same oath as his principal, which shall be indorsed on the certificate of appointment."

The oath that is required of such employees reads as follows:

"I,_____, do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of Iowa, and that I will faithfully and impartially, to the best of my ability, discharge all the duties of the office of . . . in (naming township, town, city, county, district or state) as now or hereafter required by law, §63.10, Code of Iowa 1966."

It would appear that there is no requirement of U. S. citizenship from the above quoted statutory provisions.

In an opinion dated April 22, 1966, 1966 OAG 150, it was stated that deputy officers qualify as employees for group insurance programs whereas elected county officers do not qualify as employees for such purpose. This is but limited precedent, however, and not controlling on other matters with respect to the relationship between the county officer and his deputy.

1940 OAG 477, dealt with the question whether a minor could legally hold the position of deputy clerk of the court for an Iowa county. It was the opinion of the Iowa Attorney General that since a deputy clerk is required to act in the place of his principal in case of disability, §341.6, Code of Iowa 1966, such person is required to meet the qualifications set for his principal.

One qualification for the position of county auditor is United States

citizenship. In *Perine v. Van Beck*, 87 Iowa 569, 54 N. W. 525 (1893), the Iowa court held that even though there are no constitutional or statutory provisions stipulating as such, "it is a fundamental principle of our government that none but qualified electors can hold an elective office unless otherwise specially provided." In order to qualify as an elector one must be a United States citizen, Iowa Constitution, Article 11, §1.

We have been unable to find any statutory exemption permitting a non-citizen to serve as a deputy county officer and, therefore, we are of the opinion that it is necessary for the deputy auditor to meet the qualifications of his principal, and one who is not a United States citizen is therefore ineligible to hold such a position.

February 3, 1971

CITIES AND TOWNS: City Ordinance: §389.40 and 321.236, 1971 Code of Iowa. Cities and towns have the authority to regulate the driving of vehicles within their corporate limits if such regulation is consistent with state statutes. (Winders to Holden, State Representative, 2/3/71) #71-2-29

The Hon. Edgar H. Holden, State Representative: This is to acknowledge your request for an opinion wherein you asked these questions concerning the authority of cities and towns to adopt an ordinance for excessive acceleration:

1. Do cities and towns have the authority to adopt such an ordinance?

2. Is such an ordinance in conflict with any state law of Iowa?

3. Is such ordinance so vague and indefinite or otherwise illegal as to be unenforceable?

In accordance with Section 366.1 of the 1971 Code of Iowa, municipal corporations have the power to make ordinances not inconsistent with the laws of the state.

As stated in Section 389.40, cities and towns shall have power to restrain and regulate the driving of vehicles within the limits of the corporation, and prevent and punish fast or immoderate riding or driving within such limits.

Ordinances passed under this section must comply with the requirements of this section and Section 321.236 requiring traffic laws to be uniform, and such ordinances must be consistent with state statutes. *City of Vinton v. Engledow*, 1966, 258 Iowa 861, 140 N. W. 2d 857.

The ordinance in question is not specifically authorized by Section 321.236, Code of Iowa, but we feel the often used rule "expressio unius est exclusio alterius," the express mention of one thing implies the exclusion of others, is not applicable here. Section 321.235 says specifically that local authorities may adopt additional traffic regulations not in conflict with the motor vehicle chapter. Thus, it is our opinion that such an ordinance is not inconsistent and is not in conflict with the laws of the state.

The modern trend is to construe statutes liberally that are designed to promote safety upon our highways. *Danner v. Haas*, 1965, 257 Iowa 654, 134 N. W. 2d 534. As stated in Section 4.2 of the Code of Iowa, 1971, a

statute will be liberally construed with a view to promote its objects and assist in obtaining justice. While we can foresee certain factual situation where such an ordinance would be difficult to enforce, such as tire noise caused by friction under extremely hot weather conditions, it is our opinion that this type of ordinance is not patently vague and indefinite as to make it unenforceable.

February 3, 1971

FIRE DISTRICTS: §24.6, Code of Iowa 1971. Trustees of Fire Districts may not legally use the one-mill emergency tax provided by section 24.6 of the Code for the purpose of accumulating funds in anticipation of the future purchase of new fire equipment. (Bobenhouse to Albee, Franklin County Attorney, 2/3/71) #71-2-30

Mr. Richard Albee, Franklin County Attorney: This is in response to a letter from the former Franklin County Attorney, Mr. Lee B. Blum, wherein he stated:

"Franklin Rural Fire District Number 1 Trustees would like to make their next levy larger than the anticipated amount of the needs of the district for maintenance, operation, and debt service for the purpose of accumulating funds in anticipation of the future purchase of new fire equipment when present equipment wears out and needs to be replaced. Chapter 24 Iowa Code (1966) provides for an emergency levy under certain conditions, including the approval of the State Appeal Board. Your opinion is requested as to whether or not the State Appeal Board can legally authorize an emergency levy that is intended to be used for the said purposes and whether or not the Trustees may legally make such levy even if authorized by the State Appeal Board."

Section 24.6, Code of Iowa, 1971, provides that with the approval of the State Appeal Board first secured, a municipality may include in its estimate an estimate for an emergency fund, with power to levy a tax therefor at a rate of not more than one mill, and that monies may be transferred therefrom to any other fund of the municipality for the purpose of meeting deficiencies in any such fund arising from any cause, after written approval of the State Appeal Board, upon request by two-thirds of the governing body of said municipality.

The Iowa Supreme Court in *Mathewson* v. *City of Shanandoah,* 1943, 233 Iowa 1368, 11 N. W. 2d 571, said:

"An emergency levy is not a general substitute for other taxes. The purpose of the emergency fund is to supply deficiencies in any other fund arising from any cause. We think the statute contemplates that the deficiencies in a certain fund, which may be supplied from the emergency fund, should be occasional rather than continuous. A contrary interpretation would afford opportunity for the annual levy, for an unlimited period, of emergency-fund taxes intended to augment a certain other fund, in excess of the statutory tax limit for such fund."

In answer to your question, we are of the opinion that the one-mill emergency tax provided by section 24.6 of the Code of Iowa, 1971, may not be used for the said purposes. As you state the problem, the use of the emergency fund would not be to meet a deficiency, but for the purpose of accumulating funds for future purchase of a new fire equipment. This is not what the statute contemplates. Furthermore, the emergency levy statute contemplates an occasional rather than a continuous transfer. It appears that such transfer will probably continue to recur regu-

larly until enough is accumulated to purchase new equipment and until such old equipment wears out. Therefore, the State Appeal Board cannot legally authorize an emergency levy that is intended to be used for the said purposes.

February 3, 1971

COUNTIES: County Department of Social Welfare Workers; Tort Liability — §§613A.2 and 613A.8, Code of Iowa 1971; §321.494, Code of Iowa, 1971. The county welfare worker is personally liable for any tort claim occurring within the scope of his employment or duties. However, the county is under a statutory duty to defend any employee, and, except in cases of malfeasance in office or willful or wanton neglect of duty, shall save harmless and indemnify such employee against any tort claim occurring in the performance of duty. (Bobenhouse to Faches, Linn County Attorney, 2/3/71) #71-2-31

Mr. William G. Faches, Linn County Attorney: In your letter, you requested an opinion on the following questions:

"1. In the event of an accident is the welfare worker personally liable for any injuries caused to the welfare recipient or client as a result of the worker transporting the client to any particular destination?

"2. If a welfare worker, while in the course of employment, in transporting a client or welfare recipient to or from a destination and an accident occurs, does the Guest Statute apply?

"3. If a welfare worker is involved in an accident while transporting a client or welfare recipient to or from a destination, does the Tort Liability Act, Chapter 405 of the Acts of the 62nd General Assembly, apply?"

In answer to your questions 1 and 3, let me first say that the Iowa Supreme Court in *State ex rel. Fenton* vs. *Downing,* 1968, 261 Iowa 965, 155 N. W. 2d 517, said that county welfare workers are county employees and not state employees. The court stated:

"Statutes pertaining to department of social welfare create two separate employers, the state board and the county board, and two classes of employees, state board employees and county board employees. Sections 234.6 and 234.12, Code of 1966."

Section 2 of Chapter 613A, 1971 Code of Iowa, authorizes claims against a county for its torts and those of its officers, employees and agents acting within the scope of their employment or duties whether arising out of a governmental or proprietary function.

In addition, Section 8 of Chapter 613A, 1971 Code of Iowa, provides:

"The governing body shall defend any of its officers and employees, whether elected or appointed and, except in cases of malfeasance in office or willful or wanton neglect of duty, shall save harmless and indemnify such officers and employees against any tort claim or demand, whether groundless or otherwise, arising out of an alleged act or omission occurring in the performance of duty."

Therefore, it appears that the county welfare worker is personally liable for his torts that cause injuries to a welfare recipient, occurring within the scope of his employment or duties. However, the county is under a statutory duty to defend any employee, and indemnify such employee against any tort claim.

In answer to your second question, it is my view that a welfare recipient being transported by a welfare worker is a guest under the Guest Statute. In *Bodaken* vs. *Logan*, 1962, 254 Iowa 230, 117 N. W. 2d 470, the court quoted with approval the following from 4 Blashfield, *Cyclopedia of Automobile Law and Practice*, Perm. Ed., section 2292:

"One important element in determining whether a person is a guest within the meaning and limitations of such statutes is the identity of the person or persons advantaged by the carriage. If, in its direct operation, it confers a benefit only on the person to whom the ride is given, and no benefits, other than such as are incidental to hospitality, companionship or the like, upon the person extending the invitation, the passenger is a guest within the statutes. . . ."

The only benefit received in transporting a welfare recipient is upon the recipient himself. Any benefit to the driver (social worker) is only incidental. To this extent the recipient is a guest.

February 3, 1971

COURTS: Clerks: Vital Statistics: Divorce and Annulment Records. Clerk should not refuse to file a petition for dissolution of marriage on ground that information required by Registrar of Vital Statistics is not supplied but clerk should endeavor to obtain the necessary information on the proper form. (Nolan to Story, Jones County Attorney, 2/3/71) #71-2-32

Mr. Robert H. Story, Jones County Attorney: This is in answer to your letter of June 22, 1970, requesting an attorney general's opinion on the question involving the implementation of Ch. 1081 (H.F. 199), Acts of the 63rd G. A., Second Session, in the situation which you present. Your letter states:

"The Jones County Clerk of Court has requested that I seek your opinion on a question involving House File 199 in the Acts of the 1970 Regular Session of the Sixty-third General Assembly of Iowa. It is our understanding that this Act takes effect July 1, 1970, and specifically, we have questions about Section 38 therein which states that the information necessary to prepare the report to the State Registrar of Vital Statistics shall be furnished with any divorce petition to the Clerk of Court on forms supplied by the State Registrar. The Division of Vital Statistics in Des Moines, Iowa, has advised our Clerk that if the information is not supplied when the petition for divorce or dissolution of marriage is filed, that he must refuse to file the petition. The judges of our district have directed the Clerk that he must not refuse to file any such divorce petition. Would you please issue your opinion on this matter as soon as possible so that the Clerk of Court may know what to do."

§38 of the Vital Statistics Acts, supra provides as follows:

"For each divorce or annulment of marriage granted by any court in this state, a record shall be prepared by the Clerk of Court or by the petitioner or his legal representative if directed by the clerk and filed by the clerk of court with the state registrar. The information necessary to prepare the report shall be furnished with the petition, to the clerk of court by the petitioner or his legal representative, on forms supplied by the state registrar.

"The clerk of the district court in each county shall keep a record book for divorces. The form of divorce record books shall be uniform throughout the state and shall be prescribed by the state department. Divorce record books shall be provided at county expense. A properly indexed record of divorces upon microfilm, electronic computer or data processing equipment may be kept instead of divorce record books.

"On or before the tenth day of each calendar month, the clerk of court shall forward to the state registrar the record of each divorce and annul-

ment granted during the preceding calendar month and such related reports as may be required by regulations issued under this Act."

In 1968 OAG at page 687 this office advising that the clerks of the district court must, in the absence of a rule of court, accept for filing separate petitions from the parties to what is essentially the same matrimonial dispute stated:

"The Clerk's functions are ministerial, and the propriety of the actions, which are commenced is a legal question to be determined by the court."

Under §606.1, Code of Iowa 1971, the "Clerk of the District Court shall . . . keep the records, papers, and seal, and record the proceedings of the court as hereinafter directed, under the direction of the judge." By RCP 81 the court may order or permit any party to correct any pleading. Accordingly, it is our view that the Clerk should not refuse to receive petitions in marriage dissolution cases where the form prescribed by the State Registrar of Vital Statistics does not accompany the petition, but that the Clerk should endeavor to obtain the requisite information on the appropriate form.

February 3, 1971

SCHOOLS: Reimbursable Land Highways. §284.1. Conveyance of land to state for highway purposes by a document entitled easement is sufficient to qualify such lands for the reimbursement available to school districts under the provisions of §284.1, Code of Iowa 1971. (Nolan to Rodenburg, Pottawattamie County Attorney, 2/3/71) #71-2-33

Mr. Lyle Rodenburg, Pottawattamie County Attorney: This is in reply to a letter from your office requesting an opinion as to whether or not land conveyed under a document entitled "easement for public highway" would be reimbursable under §284.1, 1966 Code of Iowa.

The document in question provides that the grantors in consideration of a sum of dollars paid by the Iowa State Highway Commission "do hereby sell and convey unto the STATE OF IOWA" certain premises described therein and covenant with the STATE OF IOWA that grantors are lawfully seized in the premises and that they are free of incumbrance and that the grantors "do hereby covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever," and further that right of dower in the premises "hereinbefore conveyed" is relinquished.

Under §284.1, supra, which provides:

"When unplatted lands within the boundaries of a school district are owned by the government of the United States, by the state, by a county, or by a municipal corporation located wholly outside said school district, and such lands have been removed from taxation for school purposes, said school district shall be reimbursed, as hereinafter provided, in an amount which shall be computed by the county board of supervisors in the county in which such lands are located, which computation shall be made on or before the first day of September in the year in which said deductions are to be made."

In an opinion dated February 28, 1962, 1962 OAG 334, it was stated:

"Land purchased for interstate Highway System, which is now owned by the State of Iowa and which is unplatted land, qualifies the school district for reimbursement in accordance with Chapter 284, Code of 1958."

The term "owned" depends for its significance upon the connection in which it is used. It is a general term and therefore may be liberally construed — Words & Phrases, Vol. 30 page 599. As used in a statute exempting county owned property from taxation it means real or true ownership and not paper title only. *Mitchell Aero Inc. v. City of Milwaukee*, 42 Wis. 2d 656, 168 N. W. 2d 183.

It is our view that the conveyance of an easement by a document such as has been submitted for examination here is sufficient to divest the grantors of title to the land so conveyed and to qualify such land to be taken from the tax rolls (§427.2, Code 1966). See opinion of October 1, 1963, 1964 OAG 422, and as a consequence thereof such land qualifies for the reimbursement provided under §284.1, supra.

February 3, 1971

COUNTIES: Special Assessments: Compromise §445.16, Reclassification §455.72. 1) Board of Supervisors may compromise delinquent taxes on lands offered for sale for unpaid special assessment under §445.16. 2) Existing assessments may not be reclassified retrospectively under §455.72. (Nolan to Rodenburg, Pottawattamie County Attorney, 2/3/71) #71-2-34

Mr. Lyle A. Rodenburg, Pottawattamie County Attorney: This is in answer to your request for an opinion of the Attorney General on the question of whether the Board of Supervisors has authority or power to compromise drainage assessments. The question arises because the Pottawattamie County Board of Supervisors has been requested by the Chicago Rock Island and Pacific Railroad Company to compromise a drainage district assessment and levy on the ground that the railroad had abandoned part of its affected right-of-way but failed to object to the assessment and levy when imposed. You have stated it is your opinion that the Board of Supervisors has no authority to compromise drainage assessments for public improvements. Your letter further states that the attorney for the drainage district is of the opinion that such a compromise may be effected pursuant to §455.72, Code of Iowa 1971, which permits reclassification.

The specific questions now submitted are:

"1. Does Section 445.16 authorize the Board of Supervisors to compromise a drainage assessment?

"2. Can Section 455.72 be applied retrospectively to reclassify existing assessments?"

First, we are aware that a 1928 opinion of the Attorney General advises that the Board of Supervisors has no authority to compromise special assessments. 1928 OAG 226. There can be no compromise unless the land had been offered at tax sale and not sold. 1936 OAG 255. The case of *Campbell v. Bruce*, 1942, 231 Iowa 1160, 3 N. W. 2d 521, held that there may be a tax sale for unpaid special assessments as well as general taxes. Therefore, §445.16, Code, 1971, which allows compromise by the Board of Supervisors when property has been offered for sale for taxes, would include tax sales for special assessments such as drainage assessments as well as those held for general taxes. This is supported by the provisions of §455.62, Code, which state that "all drainage or levy tax

assessments shall become due and payable at the same time as other taxes, and shall be collected in the same manner with the same penalties for delinquency and the same manner enforcing collection by tax sales."

Your second question asks whether §455.72 can be applied retrospectively to reclassify existing assessments. We believe the answer is contained in the last paragraph of that section of the Code as follows:

"Such reclassification when finally adopted shall remain *the basis for all future assessments* unless revised as provided in this chapter." (Emphasis added)

The language of the statute is clear. The provisions for reclassification cannot be applied retroactively.

February 5, 1971

CITIES AND TOWNS: Appropriations for a youth service bureau — §§366.1 and 368.2, Code of Iowa, 1971, and Ch. 462, Acts of the 62nd G. A. Cities have the authority to provide partial funding for a youth services bureau under §§366.1 and 368.2 of the 1971 Code of Iowa and Ch. 462, Acts of the 62nd G. A., and to cooperate with other state and federal agencies in funding and operating a youth services bureau under Ch. 28E, Code, 1971. (Gors to Thordsen, State Senator, and Bray, State Representative, 2/5/71) #71-2-36

Hon. Harold A. Thordsen, State Senator; Hon. Daniel L. Bray, State Representative: Each of you has requested an opinion regarding the legailty of the City of Davenport providing a portion of the funds needed to finance a youth services bureau proposed by the Scott County Juvenile Advisory Commission. Under the proposed $75,000 project, $5,000 would come from the Davenport Community School District, $5,000 from the Scott County Board of Supervisors, and $5,000 from the Davenport City Council, with the remainder to be supplied by the federal government and other sources.

According to descriptive material you supplied with your request, the youth services program is designed to provide counseling and other assistance to potentially delinquent children, before they reach the juvenile courts. In our opinion the city can legally fund this proposed project, but we express no opinion as to the wisdom thereof.

Section 366.1, Code of Iowa, 1971, provides as follows:

"Municipal corporations shall have power to make and publish, from time to time, ordinances, . . . such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of such corporations and the inhabitants thereof. . . ."

The Iowa Supreme Court has said that a general "police power" is implied by the above section. This police power has been the basis for justifying flouridation of a public water supply. see *Wilson v. City of Council Bluffs*, 253 Iowa 162, 110 N. W. 2d 569 (1961), and city funding of a community action council. 1966 OAG Scalise to O'Malley.

Furthermore, §368.2 confers broad powers on municipal corporations as follows:

"It is hereby declared to be the policy of the state of Iowa that *the pro-*

visions of the Code relating to the powers, privileges, and immunities of cities and towns are intended to confer broad powers of self-determination as to strictly local and internal affairs upon such municipal corporations and should be liberally construed in favor of such corporations. *The rule that cities and towns have only those powers expressly conferred by statute has no application to this Code. Its provisions shall be construed to confer upon such corporations broad and implied power over all local and internal affairs which may exist within constitutional limits."* (Emphasis added.)

Since there is no specific prohibition against a city providing partial funding for a program such as a youth services bureau, the broad powers conferred by §368.2 would seem to grant authority to cities to provide funds for such projects.

The passage of the "home rule" amendment to the Constitution of Iowa, Chapter 462, 62nd G. A., further supports the conclusion that municipalities may provide funding for projects such as the proposed youth services bureau. The home rule amendment provides that municipalities may handle their government in any manner not inconsistent with the laws of Iowa and that no express statutory authority is necessary.

It is proper for more than one agency of state or local government to cooperate in a joint exercise of governmental powers. Chapter 28E of the 1966 Code of Iowa provides that any political subdivision of the State of Iowa may join with other political subdivisions of this State or the federal government. Sections 28E.1-3. Any political subdivision or agency which cooperates in a joint exercise of power may appropriate funds and provide personnel or services to promote the joint exercise. Section 28E.11. The powers granted by Chapter 28E are broad in nature and are to be liberally construed. Section 28E.1.

Therefore, it is our opinion that a city may provide partial funding, in cooperation with other State and federal agencies, for a program such as the youth services bureau.

February 9, 1971

STATE OFFICERS AND DEPARTMENTS: Board of Examiners for Nursing Home Administrators — §§17A.1(1), 17A.5, 147.121, 147.125, 147.119, Code of Iowa, 1971. The Board of Examiners for Nursing Home Administrators may submit rules and regulations directly to the attorney general and the Board may exercise its rule making authority without being subject to review by the State Department of Health. (Hughes to Campbell, Board of Examiners for Nursing Home Administrators, 2/9/71) #71-2-37

Mr. Robert V. Campbell, Iowa State Board of Examiners for Nursing Home Administrators: Receipt of your letter of January 21, 1971 hereby is acknowledged. In that letter you inquired of the Attorney General as follows:

"Do you concur that this Board is autonomous and independent of the State Department of Health, except for supplies and maintenance, and that filing of our rules and regulations is a proper function and duty of this Board?"

It is our opinion that the Board of Examiners for Nursing Home Administrators may directly "file" rules and regulations. Section 17A.1(1), Code of Iowa, 1971 states as follows:

" 'Administrative agency' or 'agency' means any state board, commission, bureau, division, officer, or department which has state-wide jurisdiction, except those in the legislative or judicial departments."

Section 17A.5, Code of Iowa, 1971, states as follows:

"Any agency empowered by law to make rules shall submit four copies with authorized signatures of each proposed rule, temporary or permanent, in the style and form prescribed by the Code editor, to the attorney general, and submit a copy of each proposed rule to each member of the departmental rules review committee at least ten days prior to that scheduled meeting of the committee at which consideration is desired and one copy to the Code editor."

Section 147.121, Code of Iowa, 1971, authorizes the Board of Examiners for Nursing Home Administrators to promulgate rules and regulations and is, in part, as follows:

"The board shall license nursing home administrators in accordance with rules and regulations issued, and from time to time revised, by it."

The aforementioned sections of the Code of Iowa provide ample authority for submission of rules to the attorney general and the departmental rules review committee independent of any and all supervision by the Department of Health.

It is our opinion that the Board of Examiners for Nursing Home Administrators is autonomous and independent of the State Department of Health except that the State Department of Health is bound by law to provide administrative facilities for the Board. Section 147.125, Code of Iowa, 1971, states as follows:

"The board shall have authority to determine the qualifications, skill, and fitness of any person to serve as an administrator of a nursing home under the provisions of this division, and the holder of a license under the provisions of this division shall be deemed qualified to serve as the administrator of a nursing home."

Section 147.119, Code of Iowa, 1971, provides in part as follows:

"The board shall be within the state department of health for administrative purposes. The department shall furnish the board with the necessary facilities and employees to perform the duties required by this division."

These sections clearly indicate that the authority to make rules which is delegated by law to the Board is not subject to review by the State Department of Health.

February 10, 1971

STATE OFFICERS AND DEPARTMENTS: State employees, legal holidays — §§4.1(23), 33.1, Code of Iowa, 1971. The designation of certain days as legal public holidays in Ch. 33, without specification as to what such designation means, merely means that they are days set apart for worship, reverence to the memory of a great leader and benefactor, to rejoice over some great national historical event, or to rekindle the flame of an ideal. Both exempt and non-exempt employees of the executive branch of government would continue to be governed by the executive council's decision as to holidays in line with its administrative practice of long standing. (Haesemeyer to Wellman, Secretary, Executive Council, 2/10/71) #71-2-38

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: Reference is made to your letter of February 8, 1971, in which you state:

"The Executive Council, in its meeting held this date, had granted to Mr. Bernard J. O'Malley, Attorney, the privilege of a personal appearance.

"Mr. O'Malley appeared representing the Iowa State Employees Association relative to legal public holidays for the calendar year of 1971.

"Mr. O'Malley contends that Chapter 33 of the Code of Iowa, 1971 makes it mandatory that State Employees be granted holidays on Lincoln and Washington's birthdays, which are Friday, February 12, 1971 and Monday, February 15, 1971, respectively.

"The Executive Council has directed this office to secure your opinion relative to the two aforementioned holidays being mandatory for the Executive Council to grant, and if the law is only applicable to certain groups, such as State Employees who are not exempt, or are exempt under Merit Rules and Regulations."

In 1969 the general assembly enacted Ch. 86, 63rd G. A., First Session, to be effective January 1, 1971. Such Ch. 86 in part now codified as Ch. 33, Code of Iowa, 1971, replaced Ch. 33 of the 1966 Code which had been repealed by Ch. 101, §1, 62nd G. A. (1966). The title of Ch. 86 describes it as "An Act to provide for uniform annual observances of certain legal public holidays on Mondays, and for other purposes." Ch. 33 of the 1971 Code merely provides:

"33.1 Legal public holidays. The following are legal public holidays:

"1. New Year Day, January 1.

2. Lincoln's Birthday, February 12.

3. Washington's Birthday, the third Monday in February.

4. Memorial Day, the last Monday in May.

5. Independence Day, July 4.

6. Labor Day, the first Monday in September.

7. Veterans Day, the fourth Monday in October.

8. Thanksgiving Day, the fourth Thursday in November.

9. Christmas Day, December 25."

It is to be observed that Ch. 33 gives no hint as to what consequences are to flow from a particular day being declared to be a legal public holiday. Certainly, it does not say that all public or private employees or both are supposed to be permitted to stay home from work. While we have been unable to find any Iowa cases which shed any light on the problem decisions from some other jurisdictions are of some general help. Thus, we find the statement that "at the common law a holiday was not, as in the case of Sunday, dies non juridicus, and holidays have only the sanctity attached to them by statute." *State v. Lewis*, 1903, 31 Wash. 515, 72 P. 121, 123. And in *Laubisch v. Roberdo*, 1954, 43 C. 2d 702, 277 P. 2d 9, the court observed that the "term 'holiday' has reference to days set apart for worship, reverence to the memory of a great leader and benefactor, and to rejoice over some great national or historical event, or to rekindle the flame of an ideal."

Some idea of the significance which is attached to the designation of a

day as a legal holiday in Iowa may be discerned from the other changes in the code made by Ch. 86. For example, such Ch. 86 amended §4.1, subsection 23 of the code so that it now reads:

"23. Computing time — legal holidays. In computing time, the first day shall be excluded and the last included, unless the last falls on Sunday, in which case the time prescribed shall be extended so as to include the whole of the following Monday, provided that, whenever by the provisions of any statute or rule prescribed under authority of a statute, the last day for the commencement of any action or proceedings, the filing of any pleading or motion in a pending action or proceedings or the perfecting or filing of any appeal from the decision or award of any court, board, commission or official falls on a Saturday, a Sunday, the first day of January, the twelfth day of February, the third Monday in February, the last Monday in May, the fourth day of July, the first Monday in September, the fourth Monday in October, the fourth Thursday in November, the twenty-fifth day of December, and the following Monday whenever any of the foregoing named legal holidays may fall on a Sunday, and any day appointed or recommended by the governor of Iowa or the president of the United States as a day of fasting or thanksgiving, the time therefor shall be extended to include the next day which is not a Saturday, Sunday or such day hereinbefore enumerated."

The amendment of §4.1(23) was necessary to conform its provisions to Ch. 33. Ch. 86 also amended §31.7 to read:

"31.7 Veterans' Day. The governor is hereby authorized and requested to issue annually a proclamation designating the fourth Monday in October as Veterans' Day and calling upon the people of Iowa to observe it as a legal holiday in honor of those who have been members of the armed forces of the United States, and urging state officials to display the American flag on all state and school buildings and the people of the state to display the flag at their homes, lodges, churches and places of business; that business activities be held to the necessary minimum; and that appropriate services and exercises be had expressive of the public sentiments befitting the occasion."

It is to be observed that §4.1(23) is quite explicit in specifying what consequences are to stem from the designation of a day as a legal holiday in that section. §31.7 while considerably less specific gives us to understand that Veterans' Day may be set apart to honor those who have been members of the armed forces, urges that business be held to a minimum, that the flag is to be displayed and appropriate ceremonies to be conducted. Ch. 33 on the other hand merely specifies what days are to be public holidays but is silent as to what such designation is supposed to mean. We find the statement in *Richter v. Chicago & E. R. Co.*, ..., 273 Ill. 625, 113 N. E. 153, that "A day made a holiday by statute for the purposes named therein is not a legal holiday for any other purposes." It would seem to follow from this that where no special purpose is specified none is intended other than the general ones of honor and remembrance.

Hence, in our opinion the designation of certain days as legal public holidays in Ch. 33 merely indicates as stated in *Laubisch v. Roberdo*, supra, that they are days set apart for worship, reverence to the memory of a great leader and benefactor, to rejoice over some great national historical event, or to rekindle the flame of an ideal.

While we have been unable to find what if any statutory authority has

existed for the practice, the executive council has historically and for many years determined on what days employees are given the day off and business suspended. Perhaps they have done so under their statutory authority to regulate the use by the public of the capitol building and grounds. §18.5. More recently insofar as employees covered by the merit system are concerned there does appear to be authority for the governor or executive council to make such a determination. Thus, §14.10 of the rules of the merit system, promulgated pursuant to §19A.9(18) of the code, provides:

"14.10 *Holidays* — Holidays shall be granted in accordance with State law and the Governor or Executive Council's proclamations as they are observed by the individual agencies in accordance with their work load policy and regulations."

Exempt employees of the executive branch of government would, it seems to us, continue to be governed by the executive council's decision as to holidays in line with its administrative practice of long standing.

In conclusion it is our opinion that Ch. 33 does not constitute a legislative mandate that state employees be granted holidays on the days specified in such chapter or any of them and that the executive council has authority to continue, as it has in the past, to designate on which days all state employees in the executive branch are to be granted days off in observance of particular holidays. We do not think, however, that the executive council could or should specify different days for the observance of any o fthe holidays described in Ch. 33 other than the particular day specified in such chapter. For example, it could not establish February 22nd as the day for the observance of Washington's Birthday if it wanted to grant a day off for Washington's Birthday in the face of the requirement of Ch. 33 that Washington's Birthday be observed on the third Monday in February.

February 15, 1971

CRIMINAL LAW: Latex Prophylactics — §§725.5 and 725.10, Code of Iowa, 1971. Sale or offer for sale of latex prophylactics by others than doctors and druggists in the practice of their regular profession is prohibited by §725.5, Code of Iowa, 1971, because although they may have the dual purpose of preventing conception and venereal diseases, they are designed or intended for preventing conception. (Turner to Reeve, Commissioner of Public Health, 2/15/71) #71-2-39

Arnold M. Reeve, M.D., Commissioner of Public Health: Your letter of February 8, 1971, in which you requested an opinion of the Attorney General hereby is acknowledged. Your question is as follows:

"If a latex prophylactic is offered for sale only for the prevention of venereal disease, is such sale or offer for sale illegal under this section (725.5) of the Code?"

Section 725.5, Code of Iowa, 1971, states as follows:

"Whoever sells, or offers for sale, or gives away, or has in his possession with intent to sell, loan, or give away any obscene, lewd, indecent, lascivious, or filthy book, pamphlet, paper, drawing, lithograph, engraving, picture, photograph, writing, card, postal card, model, cast or any instrument or article of indecent or immoral use, or any medicine, article, or thing designed or intended for procuring abortion or preventing conception, or advertises the same for sale, or writes or prints any letter,

circular, handbill, card, book, pamphlet, advertisement, or notice of any kind, giving information, directly or indirectly, when, where, how, or by what means any of the articles or things hereinbefore mentioned can be purchased, or otherwise obtained or made, shall be guilty of a misdemeanor and be fined not more than one thousand nor less than fifty dollars, or be imprisoned in the county jail not more than one year, or both."

While latex prophylactics may have a dual purpose — that of preventing both conception and social diseases — nevertheless they are intended and designed to prevent conception and thus their sale is unlawful under the clear terms of §725.5. The constitutionality of the relevant portion of §725.5 was upheld in *State of Iowa v. Social Hygiene, Inc.*, 1968, ... Iowa....., 156 N. W. 2d 288, at least on the theories therein presented. The only exception is that these devices may, under the provisions of §725.10, be sold by doctors and druggists in the practice of regular business. 1934 OAG 690.

February 16, 1971

WELFARE: Limitations on Public Assistance to Strikers — §§234.11, 239.3, 249C.6 and Ch. 252, Code of Iowa, 1971. Food stamps available, if otherwise eligible, pursuant to Federal Food Stamp Act; Iowa recognizes the food stamp program in §234.11; no ADC available under §239.3, if neither parent is incapacitated and both live in home; the single parent not entitled to assistance under §249C.6, but possible personal allowances available to child; a veteran on strike is not entitled to Soldiers Relief for the "indigent" under §250.1; a person on strike is not a "poor person" under Ch. 252, pertaining to general county relief. (Williams to Chalupa, Jasper County Attorney, 2/16/71) #71-2-40

Dennis F. Chalupa, Jasper County Attorney: You have requested an Opinion of the Attorney General as to:

"Whether or not persons would be eligible, depending on their particular circumstances, for food stamps, aid to dependent children, soldier's relief or general relief, if they have no wages due to the fact that they are on strike and receive only strike pay from their union."

DIVISION I — FOOD STAMPS

The Food Stamp Act of 1964 (P.L. 88-525, 78 Stat. 703), authorizes the U. S. Secretary of Agriculture to formulate and administer a Food Stamp Program for the purpose of encouraging the increased utilization of the nation's abundance of food by raising levels of nutrition among low-income households. (Regulations were published December 30, 1970 in Vol. 35, Federal Register No. 252.) The Food Stamp Program is financed solely by the Federal Government with no state or local funds involved, and, although administered by the Iowa Department of Social Services and County Welfare Boards, it is regulated by the Federal Government. Iowa has recognized the program (§234.11, Code of Iowa, 1971), but has enacted no laws regulating it.

Pursuant to the above-cited federal regulations, the Iowa Department of Social Services establishes the income and resource eligibility limitations with approval of the U. S. Secretary of Agriculture. Persons, whether on strike or not, having income or resources in excess of these standards, are not eligible to receive food stamps; and when they apply

or reapply for food stamps, the income which they received for the 30-day period prior to their application or reapplication is considered in maing the determination for eligibility, including wages or striker's pay.

However, persons who meet the income and resources eligibility requirements and are on strike, may be certified to participate in the federal food stamp program.

DIVISION II — ADC ASSISTANCE

This program is designed to aid families with needy children where there is only one parent in the home or where there is an incapacitated father under the Federal Social Security Act, Title 42 U.S.C., 602-644 and Chapter 239, 1971 Code of Iowa. Section 239.3, 1971 Code of Iowa defines a "dependent child" as:

". . . a needy child under the age of 16 or under the age of 21 and a student . . . who has been deprived of parental support and care by reason of death, continued absence from home, physical or mental incapacity, or unfitness of either parent . . ."

Therefore, if the child is living in the home where both the mother and father are residing, unless one is incapacitated, he is not eligible to receive ADC.

In the case of a single parent who is participating in a strike, that parent is disqualified from having access to any ADC funds. Section 249C.6, 1971 Code of Iowa, reads as follows:

"Participation required. Each eligible person shall . . . accept any reasonably suitable employment . . . as a condition of receiving public assistance. If he fails or refuses to do so, he shall not receive public assistance. His disqualification shall not disqualify other members of his family who are entitled to public assistance, but their public assistance shall not be paid to the disqualified person and shall be paid in a manner which will not permit the disqualified person to have access to the assistance fund."

A person who goes on strike cannot be deemed to be cooperating or accepting reasonably suitable employment, and thus becomes ineligible to receive ADC payments. The portion of ADC payments which are paid solely for the children in the ordinary case where the parent is eligible must be paid to a guardian, duly appointed as provided by §239.5, Code of Iowa, 1971.

DIVISION III — SOLDIERS RELIEF

The funds for Soldiers Relief are derived from county tax levies pursuant to Chapter 250, 1971 Code of Iowa, and this relief is jointly granted by the Board of Supervisors and the Soldiers Relief Commission for the purposes stated therein. Section 1, Chapter 250 provides that the fund shall be used:

". . . for the relief of and to pay the funeral expenses of honorably discharged, indigent men and women of the United States who served in the military or naval forces."

The word "indigent" as used in this chapter has been defined in two Attorney General's Opinions as follows:

1932 OAG, at page 164, reads in part:

". . . the term 'indigent' is used to refer to one's financial ability and ordinarily indicates one who is destitute of means of comfortable subsistence so as to be in want."

OAG 1919 — 1920 at page 702 reads in part:

". . . a person is indigent when they are not possessed of sufficient funds to comfortably provide for themselves . . .

"Public funds should not be expended in assisting those who are able to care for themselves."

A person who could work at his job, but goes on strike, cannot be deemed indigent or expect the public to support him and his strike.

DIVISION IV — GENERAL RELIEF

General County Relief is granted pursuant to the provisions of Chapter 252, 1971 Code of Iowa, to persons defined as "poor." Section 252.1 defines a "poor person" as follows:

"those who are unable because of physical or mental disability to earn a living by labor."

Persons on strike are not necessarily "poor," and they are not on strike because of physical or mental disability which prevents them from earning a living, but rather because they seek a better living. County General Relief is restricted to those who are unable, because of a physical or mental disability, to earn a living.

February 17, 1971

STATE OFFICERS AND DEPARTMENTS: Practice of medicine, physician's assistants — §148.1, Code of Iowa, 1971. An unlicensed physician's assistant may not practice medicine. (Haesemeyer to Hill, State Senator, 2/17/71) #71-2-42

Hon. Eugene M. Hill, State Senator: Your letter of December 14, 1970, asked consideration of a matter described in a news article about the service of a "physician's assistant" who handles "time consuming, routine matters — nursing home calls, physical exams for school children, laboratory work and who with permission from patients, hospital officials, and surgeons . . . has been allowed to assist in major surgeries . . ." (Des Moines Sunday Register, November 15, 1970) This "physician's assistant" is not licensed as a doctor or nurse although he had previous training and experience as an army medic.

The questions you present for an Attorney General's opinion are:

1. By whose authority is the so-called "physician's assistant engaging in the practice of medicine?

2. Is it legal for physicians to employ unlicensed persons as "physician's assistants" to practice medicine?

In answer to the questions stated above we advise:

1. There is no statutory authority for the practice of medicine by an unlicensed "physician's assistant." The term "practice of medicine" is defined in the case of *State v. Hughey*, 1929, 208 Iowa 842, 226 N. W. 371, where the Iowa Supreme Court said:

"It is not confined to the administering of drugs. Under this statute [Code §2538, now §148.1, Code 1971], one who publicly professes to be a physician and induces others to seek his aid as such is practicing medicine. Nor is it requisite that he shall profess in terms to be a *physician.* It is enough, under the statute, if he publicly profess to assume the duties incident to the practice of medicine. What are 'duties incident to the practice of medicine'? Manifestly, the first duty of a physician to his patient is to diagnose his ailment. Manifestly, also, a duty follows to prescribe the proper treatment therefor. If, therefore, one publicly profess to be able to diagnose human ailments and to prescribe proper treatment therefor, then he is engaged in the practice of medicine . . ."

In *State v. Howard,* 1932, 216 Iowa 545, 245 N. W. 871, the Iowa court dealing with a so-called healing art designated "Naprapathy," said:

"Our statute gives no recognition to such system. No recognition, therefore, can be given to it by the courts, nor by the administrative officers of the state. It must be deemed as a mere name and an evasion of the statute. To recognize the legality of the defendant's practice under such a name would defeat all the legislation that we have for the regulation of the practice of medicine and surgery."

Any person engaging in the practice of medicine in this state in violation of Code Chapters 146 and 147 is subject to the penalties of the law (§§146.22 and 147.86) 1968 OAG 13. The law clearly requires that a person obtain a license from the State Department of Health as a prerequisite for the practice of medicine. (§147.2) In 1954 OAG 122 it is stated that a corporation may not practice medicine because of its inability to obtain a license. The requirements for a license to practice medicine are set out in §148.3, Code, and include evidence of medical education approved by the medical examiners. The Medical Examiners Board reports that there is only one state, Colorado, which authorizes the licensing of "assistants" and that two bills on this subject have been filed in the 64 G. A. of Iowa (SF 78 and HF 92).

There are, of course, a certain limited number of functions which may be delegated by a physician to be done under his close supervision: Thus, a physician may delegate to those persons mentioned in §204A.2(8) the authority to administer and dispense dangerous drugs. OAG, Seckington to Crews, January 30, 1970. And a registered nurse may under the supervision of a physician administer anesthetics. 1946 OAG 189.

2. I am of the opinion that it is illegal for physicians to employ unlicensed persons designated "physician's assistants" to practice medicine in Iowa. No person is permitted to practice medicine without a license. §147.2. Section 147. 82, Code, provides:

"Any person engaging in any business or in the practice of any profession for which a license is required by this title without such license may be restrained by permanent injunction."

Code §147.87 places the responsibility for making the necessary investigation with the State Department of Health.

Under §147.55 a doctor's license "shall be revoked or suspended when the licensee is guilty of . . . 3. . . . unprofessional, or dishonorable conduct." Profiting by the acts of those representing themselves to be agents of the licensee is one of several acts which are termed "unprofessional conduct" by §147.56.

March 5, 1971

STATE OFFICERS AND DEPARTMENTS: State Fire Marshal, demolition of dangerous structures — §100.29, Code of Iowa, 1971; Chapter 68, 63rd G. A., First Session (1969). The Executive Council may advance funds from the biennial contingent fund to enable the fire marshal to demolish an abandoned building with the proviso that when the costs are recovered from the sale of the underlying real estate they shall be returned to the contingent fund. (Haesemeyer to Wellman, Secretary, Executive Council, 3/5/71) #71-3-1

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: Reference is made to your letter of February 22, 1971, in which you state:

"Mr. Wilbur R. Johnson, State Fire Marshal, has requested the Executive Council to allot from the General Contingent Fund, the amount of $18,300.00 to accomplish the demolition of the Monroe Hotel Building located at 802 Park Street, Grinnell, Iowa, in accordance with the provisions of Chapter 100.13 of the Code of Iowa, 1971.

"A copy of the Fire Marshal's request is forwarded herewith, as well as a copy of the recommendations of the State Comptroller.

"The Executive Council, in their meeting held this date, has approved this request subject to this office obtaining an opinion that all provisions of Chapter 100.13 of the Code of Iowa, 1971, and other applicable Sections of this Chapter have been legally followed.

"The Executive Council takes specific note of Section 29 of Chapter 100 of the Code of Iowa, 1971, which states, as follows:

100.29 Entry of tax. Said auditor shall enter said expense on the tax records of said county as a special charge against the real estate on which said building is or was situated, if in the name of such person, otherwise as a personal tax against such person, and the same shall be collected as other taxes and, when collected, shall, together with the penalty thereon, be refunded to the fire marshal, and by him paid into the state treasury where it shall be credited to the appropriation for expenses of the fire marshal's office.

"and has authorized this office to prepare a resolution to provide the funds needed in the amount of $18,300.00 with a clause in the resolution that clearly states that when collection is made for expenses incurred for the demolition of the building, the funds be credited to the General Contingent Fund of the State and not credited to the appropriation for expenses of the Fire Marshal's Office as Chapter 100.29 of the Code of Iowa, 1971, states, if this provision can be legally incorporate in the preparation of the resolution."

Chapter 68, 63rd General Assembly, First Session (1969) provides:

"Section 1. The general contingent fund of the state for the biennium beginning July 1, 1969, and ending June 30, 1971, is hereby created and said fund shall consist of the sum of five hundred thousand (500,000) dollars, hereby appropriated thereto from the general fund of the state. The contingent fund shall be administered by the executive council and allocations therefrom may be made only for contingencies arising during the biennium which are legally payable from the funds of the state. The executive council shall not approve allocation of any funds for any purpose or project which was presented to the general assembly by way of a bill and which failed to become enacted into law.

"Before any of the funds appropriated by this Act shall be allocated, a written recommendation shall first be obtained from the state comptroller and thereupon the executive council shall determine that the proposed allocation shall be for the best interest of the state. Any allocation

in excess of thirty-five thousand (35,000) dollars must be approved by the budget and financial control committee.

"Any balance in the contingent fund as of June 30, 1971, shall revert to the general fund."

It is to be observed that as is customary the legislation creating this biennial contingent fund provides that it may be used "only for contingencies arising during the biennium." We have repeatedly stated in the past that to be a contingency an event must be to some degree unforeseen. See OAG Haesemeyer to Wellman, Secretary to Executive Council 3/5/70, 68 OAG 552, 68 OAG 564 (two opinions), 68 OAG 652, 68 OAG 955. It seems to us that the need to demolish the Monroe Hotel Building in Grinnell would meet this requirement. While the ramshackle and dangerous condition of the building may well have existed for some time it could not reasonably have been foreseen that the owners would refuse to comply with the fire marshal's order to raze the building.

The nicer question, however, is whether or not under §100.29 the funds received from the sale of the real estate on which the building is located can be paid back to the contingent fund as you propose. While it does not say so specifically Ch. 100 apparently contemplates that where the fire marshal tears down or causes to be torn down a building he will pay for the expense of the demolition in the first instance from funds appropriated to his office and thereafter recover them either directly from the owner or through sale of the real estate pursuant to §100.29. Thus, §§100.27 and 100.29 provide respectively:

"100.27 Refusal to obey orders. If any person fails to comply with a final order of the marshal or of a court on appeal and within the time fixed, then such officers are empowered and authorized to cause such building or premises to be repaired, torn down, demolished, materials and all dangerous conditions removed, as the case may be, and at the expense of such person, and if such person within thirty days thereafter fails, neglects, or refuses to repay said officers the expense thereby incurred by them, such officers shall certify said expenses, together with twenty-five percent penalty thereon, to the auditor of the county in which said property is situated."

"100.29 Entry of tax. Said auditor shall enter said expense on the tax records of said county as a special charge against the real estate on which said building is or was situated, if in the name of such person, otherwise as a personal tax against such person, and the same shall be collected as other taxes and, when collected, shall, together with the penalty thereon, be refunded to the fire marshal, and by him paid into the state treasury where it shall be credited to the appropriation for expenses of the fire marshal's office."

Unfortunately the fire marshal did not budget any money for this type of activity and no appropriation was made specifically therefor. It is to be observed that §100.29 uses the term "refunded." As stated in *Cash v. Portland Railway Light & Power Company*, 1919, 92 Ore. 81, 179 P. 909, 910, " 'refund' means to give back, to repay, to restore, to supply again with funds, to reimburse, to return in payment or compensation for what has been taken, or the repayment or return of money." " 'Refund' means to give back; to restore; to repay." *First National Bank v. Wallace, 1923*, 50 N. D. 330, 196 N. W. 303, 305. Thus, we think that where the costs of demolition are recovered from the sale of the real estate §100.29 only requires that they be credited to the appropriation for the expenses of the fire marshal's office in those situations where the original cost of the

demolition was paid from that appropriation and that where as here the cost of the demolition is to be paid from the contingent fund the recovery should go to that fund or to the general fund. See also 1968 OAG 610.

March 9, 1971

STATE OFFICERS AND DEPARTMENTS: State judicial nominating commission, districts unchanged — §46.1, Code of Iowa, 1971. The judicial nominating commissioners appointed and elected from the state's seven former congressional districts continue to serve notwithstanding the reduction from seven to six congressional districts. (Turner to Murray, Executive Assistant, Office of the Governor, 3/9/71) #71-3-2

Mr. John S. Murray, Executive Assistant, Office of the Governor: Reference is made to your letter of March 3, 1971, propounding certain questions relative to the composition and continuity of the State Judicial Nominating Commission and appointments thereto pursuant to Section 46.1, Code of Iowa 1971.

After careful consideration, I find that the commission established pursuant to that statute is now and continues to be the State Judicial Nominating Commission until the General Assembly shall by law provide otherwise. Accordingly, commissioners should be appointed, or elected, as the statute provides, and the number and bounds of the districts for this purpose continue to be those of the districts existing when the law was enacted, regardless of subsequent changes in the number and bounds of the congressional districts of the state. As these findings dispose of the questions, I do not treat them seriatim.

The manifest purpose of the General Assembly was to provide a geographical distribution of the membership of the commission, and it was found convenient to indicate the *congressional districts* then existing as *judicial commission districts*. The latter districts, having been so indicated, continue to exist, there being no relationship whatever between the congress and the judicial commission; there is no reason for a subsequent change in districting for one purpose to carry with it a change for any other purpose.

There is a precise analogy familiar to us all: once the line between the states of Iowa and Nebraska was established by law as the center line of the Missouri river, the state line ran *permanently* where the river bed was when the compact became law, although the actual course of the river shifted many times.

March 17, 1971

CITIES AND TOWNS: Central Iowa Regional Planning Commission, Iowa Regional Transit Corporation — Amendment 2, Amendments of 1968, Constitution of Iowa; §§28E.1, 28E.2, 28E.3, 28E.4, 28E.13, 473A.1 and 473A.4, Code of Iowa, 1971. A joint planning commission, such as the Central Iowa Regional Planning Commission, may own and lease a public transit building, maintenance and equipment facilities to the Iowa Regional Transit Corporation. (Haesemeyer to Milligan, State Senator, 3/17/71) #71-3-3

The Hon. George F. Milligan, State Senator: You have requested an opinion of the attorney general with respect to the following:

"Does a joint planning commission as authorized by Chapter 473A of

the Code of Iowa, 1971, have authority to own and lease a building, maintenance and equipment facilities to the Iowa Regional Transit Corporation, a private corporation?

"The Central Iowa Regional Planning Commission, a joint planning commission as authorized by Chapter 473A of the Code of Iowa, 1971, is involved in preparing a 'Metropolitan Transportation Plan' which will include public transit for Polk County and the municipalities of Clive, Des Moines, Pleasant Hill, Urbandale and West Des Moines. This plan is a portion of the overall 'Study Design For a Comprehensive Plan For the Central Iowa Region,' which includes an 'Inventory of Public Transit' (1-6) and a 'Public Transit Plan' (111-2), and the plan includes a building, maintenance and equipment facilities.

"Section 473A.1 of the 1971 Code states in part:

" 'The joint planning commission shall be separate and apart from the governmental units creating it, may sue and be sued, contract for the purchase and sale of real and personal property necessary for its purpose * * *.'

"It is obvious that such a commission can own property necessary for its purposes. However, two questions arise hereunder.

"1. Does the power to sell include the power to lease?

"2. Is a building which includes public transit maintenance and equipment facilities, property 'necessary for its purposes'?

"First, as to the authority to lease, 'A municipal corporation is generally held to have the power to lease property which it is authorized to own in a private or proprietary capacity.' *38 Am. Jur. — Municipal Corporations* §489, page 169. See also 63 *C.J.S. — Municipal Corporations* §964, page 514. While a joint planning commisison is not per se a municipal corporation, most rules of construction of powers would apply. A commission has authority to sell — and it may 'sell' a lesser interest than the full fee title, by lease.

"Secondly, as to the purpose of such facilities, Section 473A.4 of the Code relates to the powers and duties of the commission. These include the preparation of a comprehensive plan for the development of the area it serves and to assist the governing bodies and other public authorities or agencies in carrying out any regional plan. The regional plan for the Central Iowa area includes such facilities.

"Therefore, a joint planning commission, such as the Central Iowa Regional Planning Commission, may own and lease a public transit building, maintenance and equipment facilities to the Iowa Regional Transit Corporation."

We do not believe it is necessary to consider for the purposes of this opinion whether the power to sell under §473A.1 includes the power to lease for the reason that there is respectable authority under Chapter 28E for the proposition that the Central Regional Planning Commission could lease the property you describe to the Iowa Regional Transit Corporation. Chapter 28E of the Code is entitled "Joint Exercise of Governmental Powers" and §§28E.1, 28E.2, 28E.3 and 28E.4 provide respectively:

"28E.1 Purpose. The purpose of this chapter is to permit state and local governments in Iowa to make efficient use of their powers by enabling them to provide joint services and facilities with other agencies and to cooperate in other ways of mutual advantage. This chapter shall be liberally construed to that end.

"28E.2 Definitions. For the purposes of this chapter, the term 'public agency' shall mean any political subdivision of this state; any agency of

the state government or of the United States; and any political subdivision of another state. The term 'state' shall mean a state of the United States and the District of Columbia. The term 'private agency' shall mean an individual and any form of business organization authorized under the laws of this or any other state.

"28E.3 Joint exercise of powers. Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed jointly with any other public agency of this state having such power or powers, privilege or authority, and jointly with any public agency of any other state or of the United States to the extent that laws of such other state or of the United States permit such joint exercise or enjoyment. Any agency of the state government when acting jointly with any public agency may exercise and enjoy all of the powers, privileges and authority conferred by this chapter upon a public agency.

"28E.4 Agreement with other agencies. Any public agency of this state may enter into an agreement with one or more public or private agencies for joint or co-operative action pursuant to the provisions of this chapter, including the creation of a separate entity to carry out the purpose of the agreement. Appropriate action by ordinance, resolution or otherwise pursuant to law of the governing bodies involved shall be necessary before any such agreement may enter into force."

Manifestly the political subdivisions which went together to form the Central Iowa Regional Planning Agency are "public agencies" within the meaning of §28E.2 and under §28E.3 they may exercise their powers jointly or by an agreement made under §28E.4 form a new independent agency to exercise the joint powers. Indeed, under §28E.12 if any of the public agencies has the power to perform some governmental service or activity it may contract with one or more other public agencies to perform the service whether or not the latter also possess the same powers.

It seems clear that a city could itself acquire and lease a building. At the general election held November 5, 1968, the people approved the following amendment to Article III of the Constitution of Iowa:

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

"The rule or proposition of law that a municipal corporation possesses and can exercise only those powers granted in express words is not a part of the law of this state." Amendment 2, Amendments of 1968, Constitution of Iowa.

The effect of this amendment was to abrogate the so-called Dillon rule the following statement of which is taken from *Richardson v. City of Jefferson*, 1965, 257 Iowa 709, 134 N. W. 2d 528:

"* * * a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation — not simply convenient, but indispensable; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation — against the existence of the power." Dillon, C.J., in Merriam v. Moody's Executors, 25 Iowa 163, 170.

The effect, therefore, of the 1968 home rule amendment was to give municipal corporations considerably more latitude in governing their own

affairs than they previously enjoyed. In other words unless expressly prohibited by statute from exercising some power or following a course of conduct a municipal corporation, after November 5, 1968, was free to do so.

In an opinion issued after the adoption of the home rule amendment we thus concluded that a city could under its power to "acquire" real estate lease purchase a building for use as an office building and lease a portion of the same to the county. OAG, Haesemeyer to Shepherd, State Representative, January 29, 1970. See also OAG, Haesemeyer to Henke, Office for Planning and Programming, February 3, 1971. In this connection consideration should be given also to §28E.13 which provides:

"28E.13 Powers are additional to others. The powers granted by this chapter shall be in addition to any specific grant for inter-governmental agreements and contracts."

Accordingly, it is our opinion that the Central Iowa Regional Planning Commission does have authority to own and lease a building, maintenance and equipment facilities to the Iowa Regional Transit Corporation.

As to your second question, we agree that a building which includes public transit maintenance and equipment facilities is property necessary for the purposes of a regional planning commission within the broad language of §473A.4 read in conjunction with §473A.1.

March 24, 1971

TAXATION: Use Tax on Interstate Commerce — §§422.45(1), 423.4(2), 423.4(6), Code of Iowa, 1971, and H.F. 406. A mere legislative repeal of §423.4(2) by enactment of H.F. 406 would not, in and of itself, impose a destructive, burdensome or discriminatory use tax on interstate commerce and thereby constitute an unconstitutional interference with that commerce. (Griger to Fischer, State Representative, 3/24/71) #71-3-4

Hon. Harold O. Fischer, State Representative: You have requested the opinion of the Attorney General on the question of whether a legislative repeal of §423.4(2), Code of Iowa, 1971, would, in effect, subject tangible personal property used in interstate commerce to the Iowa use tax and thereby constitute an unconstitutional interference with that commerce. Your question specifically concerns the constitutionality of H.F. 406 which provides:

"Section 1. Section four hundred twenty-three point four (423.4), Code 1971, is amended by striking subsection two (2)."

Section 423.2, Code of Iowa, 1971, imposes the Iowa use tax upon the use in Iowa of tangible personal property purchased for use in this state, at the rate of three percent of the purchase price of such property.

Section 423.1(1), Code of Iowa, 1971, defines the term "use" in relevant part to include the exercise by any person of rights or powers over tangible personalty incident to the ownership thereof.

Section 423.4, Code of Iowa, 1971, provides for seven classes of use tax exemptions, of which two are relevant to this opinion. Section 423.4(2) provides for the following use tax exemption:

"2. Tangible personal property used in interstate transportation or interstate commerce."

Section 423.4(6), Code of Iowa, 1971, provides for the following use tax exemption:

"6. Tangible personal property, the gross receipts from the sale of which are exempted from the retail sales tax by the terms of section 422.45."

Section 422.45, Code of Iowa, 1971, provides for certain enumerated sales tax exemptions, and §422.45(1) exempts from the sales tax the following gross receipts:

"1. The gross receipts from sales of tangible personal property, services rendered, furnished, or performed which this state is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this state."

Article I, §8, Clause 3, of the United States Constitution provides, in relevant part, that Congress shall regulate interstate commerce.

The above statutory provisions concerning the Iowa use tax clearly state the imposition of the use tax at a uniform rate of three percent of the purchase price of tangible personalty purchased for use in Iowa. Also, tangible personal property used in interstate transportation or interstate commerce is declared to be exempt from the tax as well as tangible personal property which the State of Iowa is precluded from taxing by reason of the provisions of the United States Constitution. H.F. 406 would not affect the statutory provisions [§423.4(6)] which state that the use tax is inapplicable to the use in Iowa of tangible personal property, which use cannot be taxed because of the Federal Constitution or the Iowa Constitution.

In the case of *Interstate Nurseries, Inc. vs. Iowa Department of Revenue,* supra, the Iowa Supreme Court stated with reference to §423.4(2), at 164 N. W. 2d 863:

"It is thus apparent, regardless of the constitutional doctrine requiring a showing that a tax on interstate commerce is destructive, burdensome or discriminatory, the aforesaid statutory exemption applies only where a showing is made that the use is an inseparable part of interstate commerce."

The effect of a mere repeal of §423.4(2) by enactment of H.F. 406 would not and could not be the imposition of the Iowa use tax on interstate commerce where such tax would be destructive, burdensome or discriminatory thereon. This is clear because §422.45(1) and §423.4(6) preclude the levy of either a sales or use tax upon the type of interstate activity which would violate the Commerce Clause of the United States Constitution, and, in any event, the use tax could not be levied upon a use in interstate commerce because of the constitutional requirement that the tax be based upon an intrastate activity or not be levied at all.

Whether tangible personal property is, in fact, in interstate commerce, is a factual question. The elimination of §423.4(2) will not, in and of itself, change the necessity for making such factual determination before deciding whether tangible personal property is exempt from Iowa use tax. Consequently, that portion of the "EXPLANATION" of H.F. 406 which states that the bill would "remove the exemption on all tangible personal

property used in interstate transportation or interstate commerce" is not a correct interpretation of the scope of this bill because no state has the power to levy the use tax where there is no "taxable moment" or intrastate use.

Therefore, it is our opinion that H.F. 406 would not, in and of itself, impose a destructive, burdensome or discriminatory use tax on interstate commerce and thereby constitute an unconstitutional interference with that commerce.

March 25, 1971

TAXATION: Assessment and Taxation of Telephone and Telegraph Companies — Ch. 433, Code of Iowa, 1971. The transmission distance between microwave relay stations is to be regarded as a telegraph or telephone "line" for the purposes of Ch. 433, and should be included in computing the allocation of value per mile or "pole mileage" to counties and other taxing districts. Underground cables buried parallel and two or more aerial cables strung upon the same pole system constitute a single "line" or "pole mile" for purposes of Ch. 433, Code of Iowa, 1971. (Murray to Briggs, Director of Revenue, 3/25/71) #71-3-5

Mr. D. G. Briggs, Director, Iowa Department of Revenue: Your predecessor, W. H. Forst, had requested an opinion of the Attorney General on several questions relating to the taxation of certain property of telegraph and telephone companies under Chapter 433, Code of Iowa, 1966, as amended by Chapter 342, §§172-79, Acts of the 62nd G. A. (now Chapter 433, Code of Iowa, 1971). His letter states the following questions:

"Microwave towers belonging either to a telephone company or a telegraph company are generally located miles apart with no wires extending between them. Is the distance of communication between two microwave towers of a company to be regarded as amounting to a 'telegraph line' or a 'telephone line' just as if there were lines of wire extending from one microwave tower to the other? If so, should such distance between two microwave towers of a company, in miles, rods or other similar linear measure, be included in the total 'miles of line' referred to in Sections 433.5 and 433.8, as amended, in the allocation of 'pole mileage' by counties and taxing districts?"

The other questions which Mr. Forst had posed will be dealt with in subsequent parts of this opinion. You have informed us that you now desire an opinion of the Attorney General on the questions originally submitted by Mr. Forst.

Chapter 433 provides the method of taxation of the property of telephone and telegraph companies and the apportionment of the revenues thus received among various counties and taxing districts of the State. Section 433.8, Code of Iowa, 1971, provides as follows:

"The director of revenue shall, for the purpose of determining what amount shall be assessed to any one of said companies in each county of the state into which the line of the said company extends, multiply the assessed or taxable value per mile of line of said company, as above ascertained, by the number of miles in each of said counties, and the result thereof shall be by the director certified to the several county auditors of the respective counties into, over, or through which said line extends."

It is apparent that the question of whether the distance of signal transmissions between microwave towers in the State constitute "lines" does not affect in any way the valuation of or the tax upon the companies' property under Chapter 433, but is important only in determining the

apportionment of the tax revenues thus received among the various taxing districts.

In determining whether microwave signals constitute "lines" as used in Chapter 433, it is essential that several well-settled rules of statutory construction be remembered. In construing a statute, the intent of the legislature as expressed in the statute is of primary importance. *In re Miller's Estate*, 1968, Iowa, 159 N. W. 2d 441. "In interpreting a statute we look to the object to be accomplished, the evils sought to be remedied, or the purpose to be subserved and place on it a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it." *Stevenson v. Sueppel*, 1967, 260 Iowa 1169, 1174, 152 N. W. 2d 281. The court should give effect to the spirit of the law rather than the letter, especially where adherence to the letter would result in defeating the plain purpose of the act. *Case v. Olson*, 1944, 234 Iowa 869, 873, 14 N. W. 2d 717.

It seems clear that the statute's purpose or object is to provide a method of valuation, taxation, and distribution of the receipts of such taxation of the property of telephone and telegraph companies. To strictly construe the words of the statute so as to defeat the apparent purpose thereof would be contrary to law.

Although there appear to be no precedents directly in point, there are several prior decisions and opinions of the Attorney General to which we may look to ascertain the general trends in this area.

The word "lines" was the subject of a 1909 opinion of the Attorney General. At 1909 O.A.G. 188, 189, it was held that the word "lines," as used in the statute taxing telephone and telegraph companies "means the wires and poles over which the telegraph or telephone company, as the case may be, operates its business." Again, the Attorney General did not apply a literal interpretation to the word, but referred to a combination of poles and the wires thereon to constitute the "lines" of the company. It appears that the opinion construed the word to mean the wire or line facilities of the company as a system of communication throughout the State, i.e. the poles and wires together constitute the system of "lines" of the company. It must also be remembered that these lines were the only communication system operated by the companies at the time of the Attorney General's opinion.

In 1938 O.A.G. 690, it was held that drop or service lines connecting homes or business places to the pole lines of a telephone company are not to be considered as part of the pole mileage of the company. In reaching that conclusion, the Attorney General reviewed the applicable rules of statutory construction and Chapter 336 of the 1935 Code, the predecessor to the chapter presently under consideration, to ascertain its meaning and relevant legislative history. The Attorney General speaking of the use of the word "lines" in this statute states the following at page 692:

"As we view the matter, the word 'lines' and the word 'miles of line' are technical terms and are to be considered as having been used in their technical sense as meaning 'pole lines.' All wires supported between poles constitute part of the pole mileage."

Thus the Attorney General had not construed the word "lines" in its literal commonly-understood meaning, but had limited the scope of the word as used in the statute.

In 1938, the Attorney General held that in computing value per mile, underground conduits carrying lines were to be added to the number of pole miles. At 1938 O.A.G. 433, 434, the Attorney General stated:

"Underground conduits are substitutes for poles carrying lines and therefore, for the purpose of arriving at value per mile are to be added to the number of 'pole miles.' "

Similarly, at 1930 O.A.G. 66, 67, it was stated:

"[W]e are of the opinion that the taxes must be based upon the miles of 'pole line' and not wire line. Lines in multiple conduit and aerial cables should be taxed on the same basis as though the cables or conduit were strung on poles."

Thus, in construing the word "lines," the Attorney General broadened the definition to include cable and conduits, arguing that as substitutes for lines on poles, they should be included in determining the amount of lines and value per line mile. Certainly it may not be disputed that microwave relays fall within the same category of substitutes for lines on poles, and would be included in the necessary computations to determine miles of line and value per line mile. The term "lines" is not construed narrowly in these previous opinions, but rather, a broad interpretation is given so as to make the purpose of the statute as effective as possible. "Line" is not the physical wire, but the transmission system or line of communication used by the company. As such, any substitutes for the wire-and-pole combination first used is to be included under the term "lines." It was also stated in 1938 O.A.G. 433, that the calculation of miles of lines was not affected by the number of wires strung on the poles. Again, the term was used not in a strict physical sense but as a reference to a system of lines constituting a method of communication.

Another indication that the term "lines" is not to be construed narrowly is the decision of *Iowa Union Tel. Co. v. Board of Equalization*, 1885, 67 Iowa 250, 25 N. W. 155. Plaintiff contended that, as a telephone company, its lines and property should be assessed in the manner provided for telegraph lines and property. The court, in sustaining that position, stated that the mode and principle of communication of each was the same. In effect, the court was expanding the scope of the terms "telegraph lines and property" to include telephone lines and property as well. Again, the court did not restrict the term to a mere physical definition but referred to a mode or line of communication used by the companies. The telephone at that time was a new invention, and the court included it under the taxation provisions for telegraph companies because of the basic similarity of function and operation, in spite of different designations given to the two methods of communication. The court's reasoning was also partially sustained by the decision of *Wisconsin Telephone Co. v. City of Oshkosh*, 1884, 62 Wis. 32, 21 N. W. 828, wherein the Wisconsin Supreme Court held that, as the telephone was a recent innovation similar in function to the telegraph, a statute expressly authorizing corporations to build and operate telegraph lines also included the authorization to build and operate telephone lines.

A helpful case of more recent vintage is *Brannan v. American Telephone & Telegraph Co.*, 1962, Tenn., 362 S. W. 2d 236. The main issue was the company's power of eminent domain for the construction of a microwave relay tower, but the court's reasoning is applicable to the problem before us. The Tennessee statute allowed corporations engaged in

the communications business a right of way, stating that the corporation could "construct, operate, and maintain such telegraph, telephone, or other lines necessary for the speedy transmission of intelligence . . ." T.C.A. §65-2105. The court held that although microwave transmission was unknown when the statute was enacted or amended, such facilities were included within the statute's scope. The court found specific language under which microwave towers might be permitted, but stated that the clear intent of the statute was to broadly construe the term "lines." The court stated at 362 S. W. 2d 239:

"Clearly the intent of this statute is to allow the taking of property for a public use, the construction of facilities for speedy communication. Towers like the one in the instant case make it unnecessary to have a row of poles carrying wires from one point to another. They transmit by means of electronically induced waves in the air rather than physical lines, *but the result is the same.* If a right of way for poles and cables or wires can be condemned under the statute, then so also should small plots for microwave relay towers be condemnable.

"The use of the word 'lines' in this statute *might also mean lines of communication in a sense that would include radio-telephone communications.* Obviously it means more than just wires, for it includes poles and supports, etc., or in other words, *a transmission system.*" (Emphasis added)

In light of the above authorities, it is the opinion of this office that the transmission distance between microwave relay stations is to be regarded as a telegraph or telephone "line" for the purposes of Chapter 433, and should be included in computing the allocation of value per mile or "pole mileage" to counties and other taxing districts. Transmission of the microwave signals across these distances is merely the substitute for a wire-and-pole operation, as are underground conduits. As such, they fall within the broad category of the companies' "lines." This is in keeping with the previous opinions and decisions discussed above which placed new methods of communication along with the old in the category of "lines." As the microwave signals travel only in one direction, much as if a wire were strung between the two stations, the distance must be added to the miles of actual pole mileage and miles of underground conduits to arrive at the total "miles of line." Thus the assessed value of the company's property, including the microwave relay towers, is to be apportioned among the counties and taxing districts on the basis of the total miles of line in that county, looking to all forms of transmission which constitute the company's "lines."

Mr. Forst's letter requesting this opinion also states several other questions as follows:

"Are telephone lines contained in underground cables or multiple underground conduit to be regarded as 'telephone lines' just as if they were lines strung on telephone poles? Are such lines to be included in the total 'miles of line' of the company in the allocation of 'pole mileage' to counties and taxing districts as provided for in Section 433.8 as amended?

"Is it to be regarded that there is one 'pole mile' or two 'pole miles' in cases where there are two separate telephone cables buried underground, which cables are parallel to each other and which are located on the same side of a highway reasonably close together, or in cases where there are two separate aerial telephone cables (on poles), which aerial cables are parallel to each other and are located reasonably close to each other?"

Several opinions of the Attorney General have addressed themselves to

these questions. 1938 O.A.G. 433, 434, held that:

"[T]he value per mile of telephone and telegraph line shall be ascertained by dividing the actual cash value . . . by the total miles of lines in the state and that the total miles of line is determined by adding the number of 'pole miles' to the number of underground conduits. Underground conduits are substitutes for poles carrying lines and therefore, for the purpose of arriving at value per mile, are to be added to the number of 'pole miles.' "

Similarly, at 1930 O.A.G. 66, 67, the Attorney General stated that "we are of opinion that the taxes must be based upon the miles of 'pole line' and not wire line. Lines in multiple conduit and aerial cables should be taxed on the same basis as though the cables or conduit were strung on poles." We see no reason why these opinions should not be followed, and therefore, it is the opinion of this office that telephone or telegraph lines contained in underground cables or multiple underground conduit are to be regarded as "lines" for the purposes of Chapter 433, and the miles of underground cable or conduit are to be included in the total "miles of line" of the company in the allocation to counties and taxing districts as provided in §433.8. It is the further opinion of this office that two or more separate aerial cables on the same pole system constitute a single "line" or "pole mile" for the purposes of Chapter 433. This follows from previous rulings noting that the number of wires strung on the poles do not affect its designation as a single "pole line." 1938 O.A.G. 433, 434. See also *Central States Electric Co. v. Pocahontas County*, 1929, Iowa, 223 N. W. 236. Therefore, if the underground cables are buried parallel and reasonably close to one another, extending from one point to another together, they constitute a single line or "pole mile." Similarly, two or more aerial cables strung upon the same pole system constitute a single "line" or "pole mile" for the purposes of Chapter 433.

March 25, 1971

TAXATION: Property Tax Exemption for Senior Citizens' Homes — §§427.1(9), 427.1(10), Code of Iowa, 1971. Senior citizens' homes can and do qualify as charitable or benevolent institutions and the use of their property for such appropriate nonprofit objects, as care of needy persons or those with low or moderate incomes, can entitle them to a property tax exemption. Whether the property is so used as to be either exempt or taxable is a question of fact to be initially determined by the local assessor. Each case must be decided according to its own merits. (Griger to Smith, O'Brien County Attorney, 3/25/71) #71-3-6

Mr. R. T. Smith, O'Brien County Attorney: You have requested an opinion of the Attorney General on the question of whether a certain nonprofit corporation whose stated purpose is to construct and operate economically provided rental facilities suited for elderly rural residents of low or moderate income would be entitled to have such property exempt from Iowa property taxes pursuant to §§427.1(9) and 427.1(10), Code of Iowa, 1971, on the theory that this corporation constitutes a charitable or benevolent institution.

Apparently, funds to construct this senior citizens' home will be obtained from the Farmers Home Administration of the United States Department of Agriculture. The occupant (or spouse) must be 62 years of age and their combined income (including social security benefits) cannot

exceed $8,000 annually, although no restriction for occupancy is placed upon the proposed occupant's "net worth." Excluding any charge to an occupant's "net worth." Excluding any charge to an occupant for his share of property taxes, if any, the projected rental per unit is $75-$85 per month.

The exact question which you have raised was considered by the Attorney General in an unpublished opinion, O.A.G. Binder to Tipton, July 20, 1966, a copy of which is attached to this opinion. The Attorney General opined that each case for exemption depends upon its own facts, the determination for exemption or taxation must be made in the first instance by the assessor, and that the assessor, in determining whether the property involved was used for charitable or benevolent purposes had to consider various factors listed on pp. 5-6 of the opinion as follows:

"In answer to your question it is the opinion of this office that senior citizens' homes of the kind you refer to do not qualify as charitable or benevolent institutions or societies, unless the property of said homes is actually used for charitable or benevolent purposes. It is our opinion that each case depends on its own specific facts and a determination whether such property is used for charitable or benevolent purposes requires consideration by the assessor of (1) the amount of admission fees; (2) monthly charges; (3) the amount of founders' fees; (4) age requirements for residents; (5) limited income requirement of residents; (6) whether needy residents charged less than normal rates; (7) whether medical care is provided; (8) the overall type of care provided; (9) whether partially supported by endowment funds; (10) if a corporation, its stated purposes and objects along with actual use and operation; (11) whether operated with a view to pecuniary profit; and (12) whether the home is actually operated at a profit.

"If upon consideration of the foregoing factors it can be determined that the use of the property results in the amelioration of persons in unfortunate circumstances, assistance to the needy, care and comfort of those in ill health and not pecuniary profit, it qualifies as property used by charitable or benevolent institutions or societies within the meaning of Section 427.1(9), Code of Iowa, 1962."

As you can discern, the *use* of the property by the tax exemption claimant determines the tax status of the property.

Since the opinion of the Attorney General, dated July 20, 1966, the Iowa Supreme Court has decided one case concerning a senior citizens' retirement home. *South Iowa Methodist Homes, Inc. vs. Board of Review*, 1970, Iowa, 173 N. W. 2d 526. In that case, the Court did not dispute or overrule the various factors listed above in the Attorney General's opinion. The Court did note that various occupants of the retirement home had financial substance, but that of the 127 residents, 62 did not have sufficient income to pay the rents. Although the monthly rental was $160 per resident, the evidence showed that without gifts and contributions, the home could not be operated. The Court, in interpreting §427.1(9), stated at 173 N. W. 2d 526:

"It should be kept in mind that the statute does not limit exemption to facilities used solely by or for the financially destitute."

The Court further stated that the use of the property by the institution (retirement home), not by its members, determines whether the property is exempt or taxable. The Court stated at 173 N. W. 2d 533:

"A church does not lose tax exemption because some of its members are wealthy or because it is built through subscriptions and contributions. A hospital does not lose tax exemption because it charges patients for care. A school does not lose exemption by charging tuition. Income producing property owned by a nonprofit corporation may be subject to property tax but that is not the kind of property involved here. Plaintiff should not lose its tax exempt status because many of the residents can and do make room gifts and pay a monthly charge.

"IV. We are not unaware of the multitude and diversity of pronouncements among jurisdictions. There is little discernible harmony. To use an overworked statement 'each case is decided according to its own merits.' In each case there is some distinguishing feature or statute. Those homes where admission is limited to the physically and financially independent are held taxable. There is no such limitation here."

It is our opinion that senior citizens' homes can and do qualify as charitable or benevolent institutions and that the *use* of their property for such appropriate nonprofit objects, as care of needy persons or those with low or moderate income, can entitle them to a property tax exemption. Whether the property is so used as to be either exempt or taxable is a question of fact to be initially determined by the local assessor.

March 26, 1971

CITIES AND TOWNS: City of Des Moines may not exact rental fee from telephone company for use of public streets for lines and poles. (Hughes to Anania, State Representative, 3/26/71) #71-3-7

Samuel F. Anania, State Representative: Receipt of your letter of February 23, 1971 in which you requested an opinion of Attorney General Richard C. Turner hereby is acknowledged. The question propounded in your letter is as follows:

"Can the City of Des Moines charge the telephone company a lease, rental, license fee or areaway permit fee for such use of its public streets and grounds while the company operates under its state-granted franchise in the City?"

The same question has been litigated before and decided by the Supreme Court of Iowa in the case of *City of Des Moines v. Iowa Telephone Co.*, 181 Iowa 1282, 162 N. W. 323 (1917). The ruling of the Court is as follows at pages 331 and 332 of 162 N. W.:

"To conclude a discussion already too long, we reach the conclusion that under no theory is the city entitled to recover from the telephone company the rental value of its streets used by said company with its poles and wires.

"Under our previous decisions the defendant was granted the right to use these streets without compensation to the city by a legislative body having authority to do so, and aside from any question regarding the power of the city to exact license fees, pass regulatory acts in virtue of its police power or to tax the company's property, it has no right to recover for the use and occupation of its streets against a public service corporation, such as a telegraph, telephone, or railway company, which it had given express legislative authority to use the streets and highways."

It is our opinion that the aforestated ruling remains controlling law. Reliable information indicates that Northwestern Bell Telephone Company, which provides service to Des Moines, is the successor in interest to the Iowa Telephone Company. Furthermore, there has been no specific

power granted to cities and towns which would permit them to exact rental fees for the use of public streets by telephone companies.

March 26, 1971

COUNTIES AND COUNTY OFFICERS: Constables and their duties in high speed chases — §§601.1, 601.121, 601.122, 321.232, 321.296, Code of Iowa, 1971. A constable is the executive officer of a justice court and has county-wide jurisdiction. It is the duty of the constable to enforce the law. A peace officer involved in a high speed chase is not necessarily reckless or negligent. It is the duty of a constable to arrest peace officers for manslaughter when a fatality occurs in a high speed chase *only* when the elements of manslaughter are clearly apparent. (Garretson to Goetz, Johnson County Attorney, 3/26/71) #71-3-8

Carl J. Goetz, Johnson County Attorney: Reference is made to your letter in which you forward to us a letter from a constable in your county. He requests through your office an opinion on several questions which you submit to us. The constable's questions are as follows:

"1. Am I restricted to performing my duties as constable in relation to law-enforcement in Sharon Township alone or does my jurisdiction in criminal matters coincide with the Justice of the Peace in Sharon Township (county-wide)?

"2. Is it my duty to arrest all drivers involved in a high-speed chase in my jurisdiction for reckless driving in any or all of the following situations:

a) One or more drivers are law enforcement officers?
b) High-speed chase is unnecessary?
c) High-speed chase is necessary?

"3. Is it my duty to arrest all drivers involved in a high-speed chase in my jurisdiction for manslaughter when a fatality is involved in any or all of the following situations:

a) One or more drivers are law enforcement officers?
b) High-speed chase is necessary?
c) High-speed chase is unnecessary?

"4. In the event that you decide there is a difference between a necessary and unnecessary high-speed chase, would you please define that difference."

In answer to his first question, §601.121, Code of Iowa, 1971, provides that:

"Constables are the ministerial officers of the justices of the peace, and shall serve all warrants, notices, or other process directed to them by and from any lawful authority, and perform all other duties now or hereafter required of them by law."

Furthermore, §601.122, Code of Iowa, 1971, states:

"The constable is the proper executive officer in a justice's court. . . ."

Section 601.1, Code of Iowa, 1971, states:

"The jurisdiction of justices of the peace, when not specially restricted, is coextensive with their respective counties; but does not embrace actions for the recovery of money against actual residents of any other county, except as provided in this chapter."

Therefore, a constable is the executive officer of a justice court and a justice of the peace has county-wide authority.

Furthermore, as cited from the above sections, a justice of the peace has county-wide jurisdiction unless otherwise restricted, which necessitates the concurrent existence of a justice court's executive officer, the constable. It therefore follows that the constable also must have county-wide jurisdiction in order to perform his ministerial functions for the justice court.

In answer to his second question, it is the duty of all peace officers to arrest a person who violates the law. Under §748.3(2), Code of Iowa, 1971, there is no question that a constable is a peace officer. However, the mere fact that another peace officer is involved in a high-speed chase does not necessarily mean that such officer is driving recklessly. *Thornbury v. Maley*, 1951, 242 Iowa 70, 45 N. W. 2d 576, held that speed alone does not amount to recklessness in the operation of an automobile, but the question of whether speed is dangerous depends on the surrounding and attendant circumstances. Furthermore, in *Peters v. Thomas*, 1942, 231 Iowa 985, 2 N. W. 2d 643, in order to establish recklessness there must be a conscious disregard for the rights of others on the part of the motorist. A police officer involved in a high-speed chase is trying to protect the rights of others by apprehending a known or suspected violator; not disregarding the rights of others. Sections 321.232 and 321.296, Code of Iowa, 1971, provide in essence that a peace officer when responding to an emergency, or in pursuit of an actual or suspected violator of the law can exceed the normal speed limits and assume special privileges.

It is therefore quite clear to our office that the fact a peace officer is involved in a high-speed chase does not necessarily constitute reckless driving as set out in your question. Secondly, a constable could not, in a situation such as a high-speed chase, arrest another peace officer for speeding if the peace officer was responding to an emergency or trying to apprehend a violator of the law. Sections 321.296 and 321.232, Code of Iowa, 1971, allows a peace officer to exceed the laws of this chapter (321) in the two above mentioned exceptions.

The crux of the problem boils down to what is manslaughter. 40 C.J.S. 35 defines manslaughter as: "the unlawful killing of another without malice and without premeditation and deliberation." In order to convict a person for manslaughter with a motor vehicle the plaintiff must prove the requisite elements:

1. Must prove beyond a reasonable doubt that the defendant acted unlawfully; and

2. That this operation was in wanton or reckless disregard for the safety of others.

The Code of Iowa sets out clearly that a person driving an emergency vehicle shall be liable for the consequences of his negligence if the driver of the emergency vehicle drives without due regard for safety of all persons using the streets. Therefore, we are of the opinion that it is the duty of every peace officer to uphold the laws of this state. However, we recommend that you check very carefully into facts surrounding each case before a constable issues a summons or arrests a peace officer for manslaughter. Make positive the elements of wanton and reckless with

disregard for the safety of others before you bring an action against a peace officer. If a peace officer is clearly guilty of acting wantonly and recklessly without regard for others and as a result a fatality occurs, you would be justified in arresting a person for manslaughter. But, take into consideration that as a peace officer he is trying to uphold our laws and protect our citizenry. Being involved in a high-speed chase to apprehend a suspected law violator may appear to be reckless and wanton conduct, when in fact it is completely justified and the officer is operating with total regard for others safety.

In answering his fourth question as to what is necessary and unnecessary, it is a decision which an officer must make at the instant the questionable violation occurs. Otherwise we would be requiring our officers to be making hindsight judgment which would be totally incompatible with their duty to uphold the law. They must have the authority to enforce the laws as the situation arises. If we were to have every officer debate in his mind the elements of "necessary" our police enforcement system would soon breakdown.

It is our belief that Iowa police, and especially the Iowa State Highway Safety Patrol, have sufficient training and education to make competent decisions as each situation arises.

April 1, 1971

TAXATION: Income tax on Iowa shareholders of non-Iowa Subchapter S Corporations — §§422.5, 422.8(1), Code of Iowa, 1971. Iowa resident shareholders, who receive distributions of earnings from a corporation which derives such income in a state where it, and not the shareholders, has paid income taxes thereon, and who have not paid tax on that income to that state, must pay Iowa income tax on such income actually distributed to them and cannot avail themselves of the tax credit provisions of §§422.8(1), Code of Iowa, 1971. Furthermore, such dividend income is taxable to the Iowa shareholders in the year of receipt. (Griger to Mollet, State Representative, 4/1/71) #71-4-1

Hon. Henry C. Mollet, State Representative: You have requested an opinion of the Attorney General with reference to Iowa income taxation of Iowa residents who receive income from a foreign corporation which has elected to be taxed, for Federal income tax purposes, under the provisions of §1372 through §1377 of the Internal Revenue Code.

According to your opinion request, certain Iowa residents own stock in a corporation located and doing 99% of its business in the State of Missouri. The corporation has four shareholders and, pursuant to §1372 of the Internal Revenue Code, the corporation elected not to be subject to Federal income taxes. In tax jargon, the corporation became commonly known as a "subchapter S corporation." As a subchapter S corporation, the corporation paid no Federal income taxes and the Federal tax on the income earned by the corporation must be paid by the shareholders. *Isaacson vs. Iowa State Tax Commission*, 1971, Iowa, 183 N. W. 2d 693. The State of Missouri does not recognize the concept of reporting and paying that state's income tax by means of subchapter S corporation taxation. Instead, Missouri requires the corporation to pay state income tax on its corporate income for the taxable year in which the income was earned. The corporation distributed its earnings as dividends, which it

had paid Missouri income tax thereon, to the Iowa resident shareholders. One of your questions is whether these Iowa residents are entitled to an income tax credit against their Iowa income tax on the earnings distributed to them by the Missouri corporation because of the fact that said corporation has paid corporate income tax on that income to the State of Missouri. Your other question is whether such income must be taxed to Iowa in the year earned by the corporation or in the year of receipt by the shareholders.

Section 1371 of the Internal Revenue Code defines a "subchapter S corporation" as a domestic corporation which does not have (1) more than 10 shareholders, (2) a shareholder (other than an estate) who is not an individual, (3) a nonresident alien as a shareholder, and (4) more than one class of stock. *Isaacson vs. Iowa State Tax Commission*, supra.

The corporation may elect, for Federal income tax purposes, not to be taxed on its income, and to have the shareholders pay such income taxes only if all shareholders unanimously consent to such election. See §1372 of the Internal Revenue Code.

Section 422.5, Code of Iowa, 1971, imposes the Iowa income tax upon every resident of this state. In *Palmer vs. State Board of Assessment and Review*, 1938, 226 Iowa 92, 283 N. W. 415, the Court held that income taxed to Iowa residents under the Iowa income tax law was not restricted to the location or source of that income, but included income received from all sources whether in or out of Iowa, unless otherwise exempt from taxation.

Section 422.8(1), Code of Iowa, 1971, provides for an income tax credit to Iowa residents as follows:

"Under rules and regulations prescribed by the director, net income of individuals, estates and trusts shall be allocated as follows:

"1. The amount of income tax paid to another state or foreign country by a resident taxpayer of this state on income derived from sources in another state or foreign country shall be allowed as credit against the tax computed under the provisions of this chapter, except that the credit shall not exceed what the amount of the Iowa tax would have been on the same income which was taxed by the other state or foreign country. The limitation on this credit shall be computed according to the following formula: Income earned in another state or country and taxed by such other state or country shall be divided by the total income of the taxpayer resident in Iowa. Said quotient multiplied times the net Iowa tax as determined on the total income of the taxpayer as if entirely earned in Iowa shall be the maximum tax credit against the Iowa net tax."

It is clear that this statute allows the Iowa individual income tax credit only if the tax is paid to another state or foreign country *by an Iowa resident taxpayer* on such income otherwise taxable to Iowa as distinguished from a situation whereby a corporate entity has paid the tax on that income. In short, the tax credit provisions of §422.8(1) are only applicable if the resident individual has paid income tax to another state or foreign country on income which is subject to taxation therein and also subject to taxation by Iowa pursuant to §422.5.

Of course, it necessarily follows that the Iowa shareholders of this corporation must report and pay to Iowa individual income taxes on

earnings distributed by the corporation to the shareholders during the taxable year of the shareholders. Such distribution to the shareholders of earnings derived by the corporation from sources in Missouri would be treated as dividends and taxable to the Iowa shareholders, for Iowa income tax purposes, only in the year of receipt. See §316 of the Internal Revenue Code and §422.7, Code of Iowa, 1971.

Therefore, it is our opinion that Iowa resident shareholders who receive distributions of earnings from a corporation which derives such income in a state where it, and not the shareholders, has paid income taxes thereon, and who have not paid tax on that income to that state, must pay Iowa income tax on such income actually distributed to them and cannot avail themselves of the tax credit provisions of §422.8(1), Code of Iowa, 1971. Furthermore, such dividend income is taxable to the Iowa shareholders in the year of receipt.

April 1, 1971

STATE OFFICERS AND DEPARTMENTS: Bonus board, merit employment system — §§19A.3, 19A.22, Chs. 35, 35A and 35B, Code of Iowa, 1971. All employees of the bonus board are subject to the merit system except the executive secretary and one stenographer or secretary for each member of the board. (Turner to Kaufman, Ex. Sec., Bonus Board, 4/1/71) #71-4-2

Mr. Ray J. Kauffman, Executive Secretary, Bonus Board: You have requested an opinion of the attorney general as to whether employees on the administrative staff of the Bonus Board are subject to the provisions of the State Merit System and whether the State Comptroller or the Iowa Merit Employment Department have authority to fix the salary of the Executive Secretary of the Bonus Board.

Section 19A.3, Code of Iowa, 1971, provides in pertinent part as follows:

"The merit system shall apply to all employees of the state and to all positions in the state government now existing or hereafter established except the following:

* * *

"2. All board members and commissions whose appointments are otherwise provided for by the statutes of the state of Iowa, and one stenographer or secretary for each member of each board and commission, and one principal assistant or deputy in each department.

* * *

Section 19A.22 provides:

"The provisions of this chapter, including but not limited to its provisions on employees and positions to which the merit system apply, shall prevail over any inconsistent provisions of the Code and all subsequent Acts unless such subsequent Acts provide a specific exemption from the merit system."

The Bonus Board is governed by the provisions of Chapters 35, 35A, 35B, Code of Iowa, 1971. While I find no provision therein for the Executive Secretary, it is quite proper for the Board to designate its principal employee or assistant as such. Of course the Board itself, consisting of the State Auditor, State Treasurer, the Adjutant General and the Adjutant of the Iowa Department of the American Legion (§35.1, Code of

Iowa, 1971) is exempt under the aforesaid provision of §19A.3. Similarly, one stenographer or secretary for each member of each board and commission, and one principal assistant or deputy in each department, are also exempt under the provisions of §19A.3(2). Thus, the Executive Secretary (as principal assistant or deputy) and one stenographer or secretary for each member of the board, are exempt from the provisions of the merit system, but all other employees thereof are subject thereto.

The Bonus Board, rather than the Merit Employment Department or the State Comptroller, properly fixes the salary of the Executive Secretary under the provisions of §35A.7.

April 12, 1971

TAXATION: Property Tax — Failure to make timely application for additional homestead tax credit — §§425.1(5), 425.6, Code of Iowa, 1971. The board of supervisors cannot allow additional homestead tax credits to persons who would qualify but who fail to file within the time limit prescribed by §425.1(5). (Pabst to Messerly, State Senator, 4/12/71) #71-4-4

Hon. Francis Messerly, State Senator: You have requested an opinion of the Attorney General on the question of whether county boards of supervisors have authority to allow additional homestead credits to elderly or disabled citizens who have failed to apply for said credits within the statutory time limit.

Section 425.1(5) allows an additional homestead credit to citizens who are over sixty-five or totally disabled and who meet minimum income requirements. In relevent part, §425.1(5) states:

"Each owner making application for credit because of age or total disability shall annually, on or before July 1, file on a form to be provided by the director of revenue a verified statement with the county assessor, . . ."

Section 425.6 states:

"If any person fails to make claim for the credits provided for under this chapter as herein required, he shall be deemed to have waived the homestead credit for the year in which he failed to make claim."

An elderly or totally disabled person who does not apply for the additional credit clearly waives the credit. As stated in *Ahrweiler v. Board of Supervisors*, 1939, 226 Iowa 229, 283 N. W. 889:

"It is a well-established principle that tax exemption statutes should be strictly construed and that those claiming exemptions must show themselves entitled thereto within the purview of the act."

In light of this case and 1946 O.A.G. 37 (a copy is enclosed for your convenience), the board of supervisors cannot allow additional tax credits to persons who would qualify but who fail to file within the time limits prescribed in §425.1(5), Code of Iowa, 1971.

April 13, 1971

CONSTITUTIONAL LAW: Road use tax fund, title registration and lien notation fees — Art. VII, §8, Constitution of Iowa; H.F. 12, 64th G. A. Neither the motor vehicle certificate of title fee nor the lien or encum-

brance notation fee are motor vehicle registration fees within the meaning of the constitution. Accordingly, such title and lien fees may be placed in the general fund rather than the road use tax fund. (Haesemeyer to Thompson, Ch., Iowa State Highway Commission, 4/13/71) #71-4-5

Mr. Derby D. Thompson, Chairman, Iowa State Highway Commission: Reference is made to your letter of April 2, 1971, propounding certain questions which arise, or might arise, from the provisions of House File 12, 64th General Assembly, as amended, a bill for an act relating to motor vehicles fees collected by county treasurers, and to the amount of such fees retained by the county, and to the filing of instruments pertaining to motor vehicles, which if finally enacted would become the law.

The bill as so amended would revise §321.145, Code of Iowa, 1971, as follows:

"Disposition. The money, except fines and forfeitures, and except operator's and chauffeur's license fees, *certificate of title fees and lien or encumbrance notation fees* collected pursuant to the provisions of this chapter shall be credited by the treasurer of state to the following funds:

"1. Three percent of the gross fees and penalties thereon to the general fund of the state.

"2. The balance of said money, less the collection fees retained by the county treasurer *pursuant to section* 321.152, and less the one percent received by the department as a reimbursement fund from which to pay refunds, to the road use tax fund.

"The treasurer of state shall credit certificate of title fees, and lien or encumbrance fees, to the general fund of the state, less the fees retained by the county treasurer pursuant to section 321.152."

Such §321.145 directs that, subject to certain deductions, money collected pursuant to Chapter 321 shall go to the road use tax fund, except money from certain indicated sources, to which exceptions the bill, H.F. 12, will add *certificate of title fees and lien or encumbrance fees.*

The Constitution of Iowa, as amended in 1942, reserves certain funds exclusively for highway purposes. The amendment is as follows:

"That Article Seven (VII) of the Constitution of the State of Iowa be amended by adding thereto, as Section eight (8) thereof, the following:

"All motor vehicle registration fees and all licenses and excise taxes on motor vehicle fuel, except cost of administration, shall be used exclusively for the construction, maintenance and supervision of the public highways exclusively within the state or for the payment of bonds issued or to be issued for the construction of such public highways and the payment of interest on such bonds."

This amendment was proposed by the general assembly in 1939; readopted by the general assembly in 1941; ratified by the voters at the election November 3, 1942, and adoption certified November 24, 1942.

The amendment earmarked *motor vehicle registration fees* (and certain levies on fuel, which do not concern us here), for highway purposes. This constitutional directive by no means was a barrier to allotment to the road use fund by the general assembly of other funds from other sources, e.g., sales tax receipts. Nor did the amendment preclude such allotment by governmental jurisdictions of such funds as they might at

the time feel properly might be dealt with as part of the constitutional road use tax fund.

Additional funds so allotted, however, do not travel a one-way road. The allotment is optional. The general assembly in its discretion at any time may withhold or divert that which formerly it chose to grant, e.g., Ch. 1205, §1, L1 30, 34 incl., 63rd G. A., Second Session (1970).

The questions now arising are propounded quite succinctly by your letter:

"1. Is the certificate of title fee part of the registration fee under Article VII, Section 8 of the Constitution of the State of Iowa?

"2. Is the notation of lien fee part of the registration fee under Article VII, Section 8 of the Constitution of the State of Iowa?"

Or still more closely *ad hoc:* May the general assembly withhold the title fees and lien fees from the road use fund and use them for other purposes?

In our opinion the provisions of the bill do not offend Article VII, §8, of the Constitution, as added in 1942.

When the general assemblies of 1939 and 1941 considered and approved the constitutional amendment in question, the concept of motor vehicle registration was well known to the law of Iowa. The Code of 1939, Chapter 251, Motor Vehicles and Law of the Road, contains twenty-eight sections (§§5001.1, 5001.28 inclusive) on Original and Renewal of Registration. These provide for the *registration of motor vehicles,* the issue and display of plates, identifying numbers and so forth. The payment of fees is also required. The 48th and 49th general assemblies, of course, were cognizant — and we are bound so to presume — of these twenty-eight sections of the Code.

We are bound also to presume that those legislatures were aware of the eight sections of the Code following immediately thereafter, under the general heading, Transfers of Title and Interest. *These* eight sections, as distinguished from those discussed in the foregoing, dealt with the registration *not of motor vehicles* but the *titles to them,* and these sections, too, levy certain fees.

Thus, the concept of ownership of automobiles and of recording evidence of such ownership in a central, public agency pursuant to law, *also* was known to the law of Iowa when the constitutional provision was considered, proposed and adopted by the people. There is no reason to suppose that the legislators confused one meaning of the word "registration" with another. Whenever there is occasion, our courts notice that many English words have more than one meaning or connotation and apply that which is reasonable and consistent with the context. So it must be here.

Accordingly, it is clear that the general assembly proposed by constitutional requirement to sequester *motor vehicle registration* fees for road use purposes, *and did so.* Equally, it is clear that the general assembly could have proposed *also* to sequester title registration fees, and lien fees, *but did not do so.* The amendment sequesters what it sequesters, and

that is all.

The distinction continued to be recognized. We find for instance in §321.67, Code 1950, the following:

"321.67 *Purchase or Sale — Relative Duties.* It shall be unlawful for any person or agent except as provided in section 321.68 to buy any second-hand or used motor vehicle, without requiring and receiving from the vendor thereof, *a certificate of registration, certificate of title if required in state of its registration,* and transfer from the officer whose duty it is to register motor vehicles in the state in which said motor vehicle is registered, showing the factory number, registration number, description, and *ownership of said motor vehicle* or to sell or offer for sale any second-hand or used motor vehicle without furnishing to the vendee of said motor vehicle, *a certificate of registration,* and transfer from the officer whose duty it is to register motor vehicles in the state in which said motor vehicle is registered, showing the factory number, description, registration number and *ownership of said motor vehicle.*" (Emphasis Added)

The motor vehicle registration fee includes a substantial element of taxation which is protected by the 1942 amendment. The certificate of title fee is for the purpose of covering the administrative costs of transferring and recording the ownership. This also is true of the lien or encumbrance notation fees. Such are not intended primarily as sources of revenue which would be protected if an attempt was made to evade the policy of the amendment.

From these provisions it is clear the law recognized that a certificate of registration is one thing and a certificate of title is another, and that some states do not require the latter. This statute recognizes that the registration number and the ownership of a vehicle are discrete data, and so the statute requires them both *inter alia* be set forth. The fact that the particulars of both motor vehicle registration and ownership may be certified in a single document does not convert title registration into vehicle registration, as any citizen will learn who produces his perfectly valid certificate of title when hauled to court for not having a current license plate! As one registration is not in legal character merged with the other, so for the application of the Amendment of 1942, neither are the fees so merged. What was sequestered is sequestered, what was not is at the disposal of the general assembly.

April 14, 1971

CITIES AND TOWNS: Municipal Ordinance — §368.7, Code of Iowa, 1971. Cities and towns have the authority to prohibit by ordinance the storage of junk motor vehicles within the city. (Hughes to Andersen, State Representative, 4/14/71) #71-4-6

The Hon. Leonard C. Andersen, State Representative: Your correspondence of February 12, 1971 in which you requested an opinion of the Attorney General hereby is acknowledged. Therein you stated:

"I would like to know if the city of Sioux City has the authority to enforce enclosed proposed ordinance. . . ."

The proposed ordinance to which you refer is captioned as follows:

"ORDINANCE NO. *S-16608*
"AN ORDINANCE PROHIBITING THE STORAGE OF JUNKED MOTOR VEHICLES WITHIN THE CORPORATE LIMITS OF THE

CITY OF SIOUX CITY, IOWA, DECLARING THE STORAGE OF SAID JUNKED MOTOR VEHICLES TO BE A NUISANCE, AND PRESCRIBING PENALTIES FOR VIOLATIONS THEREOF, TO BE CODIFIED AS CHAPTER 5.36 OF THE 1969 MUNICIPAL CODE OF SIOUX CITY, IOWA."

Section 368.7, Code of Iowa, 1971, states as follows:

"They (municipal corporations) shall have the power to restrain and prohibit:

* * *

"3. *Refuse, junk.* The deposit and removal of refuse, junk, offensive materials and substances and those engendering offensive odors and sights, so as to protect the public against the same." (parenthetical material added)

This statute invests municipal corporations with authority to prohibit the storage of junked motor vehicles in that they may be considered either junk, offensive material, or an offensive sight.

I have reviewed the proposed ordinance and discovered no defect so patent as to preclude enforcement of the proposed ordinance. This is not to say however, that under certain circumstances enforcement of the proposed ordinance in accordance with some of the definitions of a junked motor vehicle would not be unreasonable as being without the scope of that which the statute is intended to prevent.

April 14, 1971

CRIMINAL LAW: Dance Marathons — §732.15, Code of Iowa, 1971. Dance marathons conducted by a charitable organization are prohibited by §732.15, Code of Iowa, 1971. (Hughes to Millen, State Representative, 4/14/71) #71-4-7

Floyd H. Millen, State Representative: Your letter of March 24, 1971 in which you requested an opinion from Attorney General Richard C. Turner hereby is acknowledged. In that letter you inquired as to whether a dance marathon conducted by a charitable organization would be violative of Section 732.15, Code of Iowa, 1971.

Section 732.15, Code of Iowa, 1971 states as follows:

"It shall be unlawful for any person or persons, firm or corporation to advertise, operate, maintain, attend, promote or aid in the advertising, operating, maintaining or promoting any mental or physical endurance contest in the nature of a 'marathon,' 'walkathon,' 'skatathon,' or any other such endurance contest of a like or similar character or nature, whether under that or other names. Nothing in this section or section 732.16 shall apply to the continuance of the ordinary amateur or professional athletic events or contests, or high school, college, and intercollegiate athletic sports."

The activity prohibited must be a "contest" the object of which is to test "mental or physical endurances." A common definition of marathon is a long-distance contest or an endurance contest. For that reason it is our opinion that a dance marathon is prohibited by Section 732.15, Code of Iowa, 1971.

It should be noted, however, that Section 732.15, Code of Iowa, 1971, is an exercise of state police power to protect the health, safety, and welfare of the people. It is conceivable that under certain circumstances a

court might find that because so little effort was expended by the participants of a dance marathon, it would be unreasonable to hold that the activity constituted a physical endurance contest.

April 20, 1971

CITIES AND TOWNS: Law enforcement jurisdiction within a city or town — §§368.15, 748.4, Code of Iowa, 1971. A county sheriff and a peace officer of an incorporated city or town within the same county have concurrent jurisdiction within the particular city or town.(Winders to Tieden, State Representative, 4/20/71) #71-4-8

The Hon. Dale Tieden, State Representative: You have requested an opinion as to who has law enforcement jurisdiction within the corporate limits of a city or town.

As stated in Section 368.15 of the Code of Iowa, 1971, concerning police protection:

"They (police) shall provide for the preservation of the peace and enforcement of law within the corporate limits. . . ."

Section 748.4, pertaining to the duties of all peace officers, states in part:

"It shall be the duty of a peace officer and his deputy, throughout the county, township, or municipality of which he is such officer . . . to perform all duties pertaining to his office."

A county sheriff is responsible for law enforcement within the entire county, thus his jurisdiction would include the cities within the county.

It is our opinion that a county sheriff and a peace officer of an incorporated city or town within the same county have concurrent jurisdiction within that city or town.

April 20, 1971

TAXATION: Property Tax. Unplatted lands owned by a city located within a school district — §§284.1, 427.1(2), Code of Iowa, 1971. Since the city of Burlington is located within the Burlington School District, the provisions of §284.1 are inapplicable and the city of Burlington is not obligated to make reimbursement to the Burlington School District for loss of property tax revenues for school purposes by reason of the tax exempt status of the unplatted lands. (Griger to Monroe, State Representative, 4/20/71) #71-4-9

Hon. William Monroe, Iowa Representative: You have requested the opinion of the Attorney General regarding the interpretation of §284.1, Code of Iowa, 1971, pertaining to the following situation.

The Burlington School District has, over the years, received reimbursement from the City of Burlington, Iowa for the removal from taxation for school purposes of unplatted lands owned by the City of Burlington and located within the boundaries of said school district. However, the City of Burlington is not located "wholly outside" the Burlington School District. In fact, the boundaries of the Burlington School District contain not only the City of Burlington, Iowa, but also other portions of townships located outside the City of Burlington.

Section 284.1 provides for reimbursement to school districts for the re-

moval from taxation for school purposes of unplatted lands as follows:

"When unplatted lands within the boundaries of a school district are owned by the government of the United States, by the state, by a county, or by a municipal corporation *located wholly outside said school district,* and such lands have been removed from taxation for school purposes, said school district shall be reimbursed, as hereinafter provided, in an amount which shall be computed by the county board of supervisors in the county in which such lands are located, which computation shall be made on or before the first day of September in the year in which said deductions are to be made." (Emphasis supplied)

Section 427.1(2), Code of Iowa, 1971, provides for a general property exemption for the property of a city as follows:

"The property of a county, township, city, town, school corporation, levee district, drainage district or military company of the state of Iowa, when devoted to public use and not held for pecuniary profit."

You have raised the question of whether §284.1 is applicable and requires, based upon the above recited facts, the City of Burlington to reimburse the Burlington School District as set forth in the statute.

It is clear that the City of Burlington is not located "wholly outside" the Burlington School District. Webster's Seventh New Collegiate Dictionary, 1965 edition, defines the word "wholly" to mean "1: to the full or entire extent: Completely 2: to the exclusion of other things: Solely."

Therefore, it is our opinion that since the City of Burlington is located within the Burlington School District, the provisions of §284.1 are inapplicable and the City of Burlington is not obligated to make reimbursement to the Burlington School District for loss of property tax revenues for school purposes by reason of the tax exempt status of the unplatted lands.

April 21, 1971

STATE OFFICERS AND DEPARTMENTS: State Car Dispatcher — §21.2(5), Code of Iowa, 1971. State car dispatcher cannot donate a state owned vehicle to a city. (Gors to Crabb, State Car Dispatcher, 4/21/71) #71-4-10

Mr. Frank Crabb, State Car Dispatcher: We have received your letter in which you enclosed a letter received by you from the University of Iowa purchasing director asking whether the state car dispatcher may donate a fire truck used by Oakdale Hospital to the Coralville, Iowa fire department.

The power to dispose of state owned property rests in the legislature. See 81 C.J.S. *States* §107, at 1079 (1953). Without statutory authorization, express or implied, a conveyance of state property is void, unless specially ratified by the legislature. *Id.* The Code of Iowa contains no provisions empowering the state car dispatcher to donate state owned motor vehicles; nor are there any code provisions empowering state officials in general to donate state property. Furthermore, §21.2(5), Code of Iowa, 1971, requires all used vehicles turned in to the car dispatcher to be sold at public auction.

It is therefore our opinion that, in the absence of legislative authorization, the state car dispatcher has no power to donate a fire truck used by Oakdale Hospital to the Coralville fire department.

April 21, 1971

STATE OFFICERS AND DEPARTMENTS: State Car Dispatcher — Authority to grant exceptions — §§21.2(7) and 321.19, Code of Iowa, 1971, grant authority to either the car dispatcher or the executive council to issue regular registration plates to government vehicles used in law enforcement. (Gors to Crabb, State Car Dispatcher, 4/21/71) #71-4-11

Mr. Frank Crabb, State Car Dispatcher: This will acknowledge receipt of your letter of September 18, 1970, requesting an opinion on who may grant exceptions to §21.2(7) of the 1966 Code of Iowa.

Section 21.2 of the 1971 Code of Iowa provides in part:

"All state-owned motor vehicles shall display registration plates bearing the word 'official' except cars assigned for use in police work for which ordinary plates may be used when necessary but only upon order of the state car dispatcher. . . ."

Section 321.19 of the 1971 Code of Iowa contains a provision that all vehicles owned and used by a foreign government, the federal government, or by the state, a county, a municipality, or other subdivision are exempt from registration fees. Section 321.19 continues:

"The department shall furnish, on application, free of charge, distinguishing plates for vehicles thus exempted, which plates shall bear the word 'official,' and the department shall keep a separate record thereof. Provided that *the executive council may order the issuance of regular registration plates, for any such exempted vehicle, used by peace officers in the enforcement of the law and persons enforcing the drug and narcotic laws.*" (Emphasis added.)

It is clear that the legislature has seen fit to give both the car dispatcher and the executive council the authority to order issuance of regular registration plates for cars involved in law enforcement. It is important to note, however, that while the executive council has authority to grant issuance of regular registration plates to all vehicles owned and used for law enforcement purposes by state and local government, the car dispatcher's authority to grant exceptions is limited to state-owned motor vehicles. Section 21.2(7), Code of Iowa, 1971. *See also* 1968 O.A.G. 547.

April 21, 1971

TAXATION: Semi-annual tax on mobile homes — §§135D.18, 135D.22, Code of Iowa, 1971. The owner of a mobile home who fails to pay the semi-annual tax as provided in §135D.22 violates a provision of Chapter 135D and is subject to fine or imprisonment pursuant to § 135D.18. (Pabst to Faulkner, Mahaska County Attorney, 4/21/71) #71-4-12

Mr. Hugh V. Faulkner, Mahaska County Attorney: You have requested an opinion of the Attorney General on the proposition of whether the penalty provisions of §135D.18, Code of Iowa, 1971, apply to a mobile home owner who fails to pay his semi-annual tax imposed in §135D.22, Code of Iowa, 1971. Section 135D.18 states:

"Any person violating any provision of this chapter shall be fined not less than one hundred dollars nor more than one thousand dollars or be imprisoned in the county jail for not more than six months or by both such fine and imprisonment."

Section 135D.22, which was enacted by the legislature in 1963 as Ch. 188, Acts of 60th G. A., provides for and imposes a semi-annual tax which

must be paid by the owner of a mobile home. This section was a specific amendment to Chapter 135D, Code of Iowa, 1962. Thus, §135D.22 is an amendment to Chapter 135D.

It is a well established rule of statutory construction that an amendment or addition to a statute is to be construed as though it were a part of the statute when the statute was originally enacted. *Disbrow vs. Deering Implement Co.*, 1943, 233 Iowa 380, 9 N. W. 2d 378; *Spencer Publ. Co. vs. City of Spencer*, 1958, 250 Iowa 47, 92 N. W. 2d 633. Therefore, §135D.22 must be construed as an original part of Chapter 135D.

Section 135D.18 is an original part of Chapter 135D. Section 135D.18 states in relevant part:

"Any person violating any provision of this chapter. . . ."

Since §135D.22 is a provision of Chapter 135D, an owner of a mobile home who fails to pay the semi-annual tax as provided in §135D.22 violates a provision of Chapter 135D and thus is subject to fine or imprisonment pursuant to §135D.18.

April 21, 1971

MOTOR VEHICLES: Self-propelled Riding Lawnmowers — §§321.16, 321.1(17), 321.1(2), 321.18, 321.18(2), Code of Iowa, 1971. Self-propelled riding lawnmowers are not to be considered implements of husbandry, nor are they to be considered special mobile equipment. Self-propelled riding lawnmowers can not be driven down the street as if they were a licensed motor vehicle. (Garretson to Knoshaug, Wright County Attorney, 4/21/71) #71-4-13

Mr. Dewayne A. Knoshaug, Wright County Attorney: You have requested an opinion as to the legal status of self-propelled riding lawnmowers and ask the following questions:

"An opinion of your office is requested setting forth whether the operation of these machines is legal. Of particular interest is whether or not the machines would qualify as an implement of husbandry or would qualify for licensing as special mobile equipment."

First, under §321.16, Code of Iowa, 1971, an implement of husbandry is defined as:

". . . every vehicle which is defined for agricultural purposes and exclusively used, except as herein otherwise provided, by the owner thereof in the conduct of his agricultural operations."

We are of the opinion that self-propelled riding lawnmowers do not fall within the definition of implements of husbandry. Implements of husbandry are used for agricultural-farming purposes. Agriculture, as defined by Webster's Seventh Dictionary, is the "science or art of cultivating the soil, producing crops, and raising livestock: farming." Self-propelled riding lawnmowers are not used for the above mentioned purposes. Rather, lawnmowers are used for the personal operation of cutting the grass around a house. Therefore, self-propelled riding lawnmowers are not to be considered implements of husbandry.

Secondly, 321.1(17), Code of Iowa, 1971 defines Special Mobile Equipment as:

". . . every vehicle not designed or used primarily for the transportation of persons or property and incidentally operated or moved over the highways, including trailers and bulk spreaders which are not self-propelled having a gross weight of not more than six tons used for the transportation of fertilizers and chemicals used for farm crop production, and other equipment used primarily for the application of fertilizers and chemicals in farm fields or for farm storage, but not including trucks mounted with applicators of such products, road construction or maintenance machinery and ditch-digging apparatus. The foregoing enumeration shall be deemed partial and shall not operate to exclude other such vehicles which are within the general terms of this subsection; provided that nothing contained in this section shall be construed to include porable mills or cornshellers mounted upon a motor vehicle or semitrailer."

Again, our office is of the opinion that self-propelled riding lawnmowers are not special mobile equipment because they are not used for the application of fertilizer and chemicals in farm fields, etc. This particular class of riding lawnmowers does not fall within the definition of special mobile equipment because self-propelled lawnmowers are not used for farming purposes.

Lastly, you ask the question, "is the operation of self-propelled riding lawnmowers upon the streets legal?"

Section 321.1(2), Code of Iowa, 1971, defines motor vehicle as "every vehicle which is self-propelled but not including vehicles known as trackless trolleys which are propelled by electric power obtained from overhead trolley wires, but not operated upon rails. . . ."

Under §321.18, Code of Iowa, 1971, "every motor vehicle . . . when driven or moved upon a highway shall be subject to the registration provisions of this Chapter, except:

* * *

§321.18(2) "Any such vehicle which is driven or moved upon the highway only for the purpose of crossing such highway from one property to another."

It therefore appears that self-propelled riding lawnmowers can only be driven on the highways when they are being used to go from one property to another. Self-propelled riding lawnmowers can not be driven down the street as if it were a licensed motor vehicle. Their operation on the street is only incidental and can only be done to go across streets, not to travel laterally upon the streets.

April 21, 1971

LIQUOR: Manufacturer's License — §§123.5, 123.36, 123.37, Code of Iowa, 1971. One engaged in the process of bottling or blending wine brought in from outside the State of Iowa for the purpose of resale to the commission or customers outside the state must obtain a manufacture's license. (Essy to Adcock, Chairman, Iowa Liquor Control Commission, 4/21/71) #71-4-14

Mr. Homer R. Adcock, Chairman, Iowa Liquor Control Commission: You have requested an opinion as to whether a particular business should receive a wholesaler's or a manufacturer's license under Chapter 123, Code of Iowa, 1971. That business, located in Fairfield, Iowa, purchases wine in tank cars from out of the State of Iowa and in turn bottles and

blends this wine for sale to the Iowa Liquor Control Commission and to customers outside the State of Iowa.

The pertinent statutes are §123.36, Code of Iowa, 1971, which relates to a manufacturer's license, and §123.37, Code of Iowa, 1971, which relates to a wholesaler's license. In interpreting these statutes, it is important to give cognizance to definitions created by the legislature. Section 123.5, Code of Iowa, 1971, contains the definitions of certain words and phrases utilized in Chapter 123. Subsection 10 and 20 reads:

"10. 'Manufacture' means to distill, rectify, ferment, brew, make, mix, concoct, or process any substance or substances capable of producing a beverage containing more than one-half of one percent of alcohol by volume and includes '*blending*,' '*bottling*,' or the preparation for sale.'" (Emphasis added.)

* * *

"20. 'Wholesaler' means any person who shall sell, barter, exchange, offer for sale or have in possession with intent to sell, alcoholic liquors and wines to retailers for resale."

It appears that by the explicit terms of §123.5(10), manufacturing includes both blending and bottling. While at common-law the term "manufacture" meant to make by hand, the Iowa Legislature has expanded its meaning with respect to Chapter 123.

In *Wakem & McLaughlin v. Stelle*, 1937, 366 Ill. 499, 9 N. E. 2d 225, the issue concerned the construction of a statute relating to the manufacture of alcoholic beverages. There the applicant purchased alcohol and spirits in bulk containers and bottled the alcohol for resale. He contended that the addition of distilled water to the alcohol, during the bottling process, did not require him to obtain a manufacturer's license. The statute in question, similar to Iowa's, read in part: "The word 'manufacture' means to distill, rectify, ferment, brew, make, mix, concoct, process, blend, bottle or fill an original package with any alcoholic liquor." In upholding the determination that the applicant was required to obtain a manufacturer's license, the Supreme Court of Illinois stated:

"The statute does not mention or prohibit the mixing of distilled water with alcohol and spirits, but expressly includes those engaged in the bottling of any such mixture. It thus clearly appears, from legislative definition, that any person who bottles alcoholic liquors, regardless of their dilution with water or other liquid, is a manufacturer." 9 N. E. 2d at 226.

Similarly, the Iowa Legislature by express definition has determined that anyone who blends or bottles wine for certain distribution enumerated must obtain a manufacturer's license.

Therefore, it is my opinion as the business in Fairfield does blend and bottle, it must receive a manufacturer's license. They would be entitled to a wholesaler's license only where they receive the wine already bottled and merely resell it.

April 21, 1971

MOTOR VEHICLES: Operating a towed vehicle — §§321.218, 321.42,

321.44, Code of Iowa, 1971. A person who is in actual physical control of a towed motor vehicle is considered to be the operator of said vehicle. Operation of a towed vehicle without a license is in violation of §321.218, Code of Iowa, 1971. (Garretson to Allbee, Franklin County Attorney, 4/21/71) #71-4-15

Mr. Richard Allbee, Franklin County Attorney: Your office has requested an opinion of the attorney general with respect to the following:

". . ., who had no valid driver's license in the State of Iowa or any other state, was discovered by a Highway Patrolman in the driver's seat guiding a motor vehicle which was being towed on a public highway by another vehicle driven by another person. The connection between the two vehicles was a log chain. The motor on the towed vehicle being guided by . . . was not running.

"Your opinion is requested as to whether or not . . . was 'driving or operating' a motor vehicle within the contemplation of §321.218, Code of Iowa, 1971."

The Code of Iowa, 1971, defines operator as "every person, other than a chauffeur, who is in actual physical control of a motor vehicle upon the highway." The Code defines driver as "every person who drives or is in actual physical control of a vehicle."

Is driving a towed vehicle considered to be in actual physical control? We are of the opinion that when a person drives a towed vehicle he is in actual physical control. In *State vs. Tacey*, 1930, 150 A. 68, 70, 102 Vt. 439, 68 ALR 1353, the defendant who guided his automobile while it was being towed by another car "operated" it within the statute prohibiting the operation of an automobile by an intoxicated person. Similarly, in *Hewitt vs. Masters*, 1964, 386 S. W. 2nd 9, 12, a Missouri case, a person driving a towed vehicle is considered to be operator of the towed vehicle. Another Missouri case, *State vs. Edmonson*, 1963, 371 S. W. 2nd 273, 275, held that a person steering a car while it is being pushed by another may be deemed the operator of the pushed vehicle. It therefore appears that when a person steers a motor vehicle that is being towed he is in actual physical control of the vehicle. Furthermore, every person who is in actual physical control is considered to be the driver of the vehicle by definition (§§321.42 and 321.44.)

A person who operates a motor vehicle with a license that has been denied, canceled, suspended or revoked is in violation of §321.218, Code of Iowa, 1971.

Therefore, if a person is in the driver's seat guiding a vehicle that is being towed by another he is operating the vehicle and can be charged under §321.218, Code of Iowa, 1971, if he is without a valid drivers license.

April 21, 1971

MOTOR VEHICLE: Traffic signal right turn against red light—§§321.257, 321.211, Code of Iowa, 1971. Right turn against a red light after stopping is not allowed by Iowa law, even though a sign directs such. Turn being allowed only under §321.257(1) when the light is green, and §321.257(4) when light is red but with a green arrow. §321.211 does not deal with traffic lights but the portion of the road from which to turn. (Garretson to Kennedy, State Senator, and Wells, State Representative, 4/21/71) #71-4-16

The Hon. Gene Kennedy, Iowa State Senator; The Hon. James D. Wells, Iowa State Representative: This is in reply to your letter of February 12, 1971, in which you mention §§321.257 and 321.211, Code of Iowa, 1971, and ask for an Attorney General's Opinion on the following:

"There seems to be a question as to the legality of making a right turn, after stopping, on the red light of the traffic signals at intersections where a sign states 'Turn Right After Stopping' within the State of Iowa."

We are of the opinion that there is no provision in the Code of Iowa for such turning on a red light after stopping, despite the fact that there may be a sign directing such. Section 321.257, Code of Iowa, 1971, does not authorize same, and §321.311, Code of Iowa, 1971, which you cite, does not direct itself to the issue.

Section 321.257, Code of Iowa, 1971, reads as follows:

"Traffic-control signal legend. Whenever traffic is controlled by traffic-control signals exhibiting the words 'Go,' 'Caution' or 'Stop' or exhibiting different colored lights successively one at a time the following colors only shall be used and said terms and lights shall indicate as follows:

"1. Green alone or 'Go.'

"Vehicular traffic facing the signal may proceed straight through or turn right or left unless a sign at such place prohibits either such turn. But vehicular traffic shall yield the right of way to other vehicles and to pedestrians lawfully within the intersection at the time such signal is exhibited.

"Pedestrians facing the signal may proceed across the roadway within any marked or unmarked crosswalk."

"2. Yellow alone or 'Caution' when shown following the green or 'Go' signal.

"Vehicular traffic facing the signal shall stop before entering the nearest crosswalk at the intersection, but if such stop cannot be made in safety a vehicle may be driven cautiously through the intersection.

"Pedestrians facing such signal are thereby advised that there is insufficient time to cross the roadway, and any pedestrian then starting to cross shall yield the right of way to all vehicles."

"3. Red alone or 'Stop.'

"Vehicular traffic facing the signal shall stop before entering the nearest crosswalk at an intersection or at such other point as may be indicated by a clearly visible line and shall remain standing until green or 'Go' is shown alone.

"No pedestrian facing such signal shall enter the roadway unless he can do so safely and without interfering with any vehicular traffic."

"4. Red with green arrow.

"Vehicular traffic facing such signal may cautiously enter the intersection only to make the movement indicated by such arrow but shall not interfere with other traffic or endanger pedestrians lawfully within a crosswalk.

"No pedestrian facing such signal shall enter the roadway unless he can do so safely and without interfering with any vehicular traffic.

"The motorman of any streetcar shall obey all the above signals as applicable to vehicles."

A careful reading of the above will indicate that subsections 2 and 3 of said §321.257 do not deal with turning. A turn is permitted *only* under subsections 1 and 4 of said §321.257, being, to-wit, under subsection 1 when the light is green or "go," or under subsection 4 when the light is red but with a green arrow. There is no provision in §321.257 for a right turn against a red light unless there is an arrow allowing same. Such code section does not contain authority to establish a sign to allow a right turn after stopping. It should also be mentioned that the above interpretation is in line with a previous Attorney General's Opinion of July 30, 1959, page 18.

You further mention §321.311, Code of Iowa, 1971, which reads as follows:

"Turning at intersections. The driver of a vehicle intending to turn at an intersection shall do so as follows:

"Both the approach for a right turn and right turn shall be made as close as practical to the right-hand curb or edge of the roadway.

"Approach for a left turn shall be made in that portion of the right half of the roadway nearest the center line thereof and after entering the intersection the left turn shall be made so as to depart from the intersection to the right of the center line of the roadway being entered.

"Approach for a left turn from a two-way street into a one-way street shall be made in that portion of the right half of the roadway nearest the center line thereof and by passing to the right of such center line where it enters the intersection. A left turn from a one-way street into two-way street shall be made by passing to the right of the center line of the street being entered upon leaving the intersection.

"Local authorities in their respective jurisdictions may cause markers, buttons, or signs to be placed within or adjacent to intersections and thereby require and direct that a different course from that specified in this section be traveled by vehicles turning at an intersection, and when markers, buttons, or signs are so placed no driver of a vehicle shall turn a vehicle at an intersection other than as directed and required by such markers, buttons, or signs."

It is obvious from reading the above that same does not apply to stop lights, but only to the lanes of traffic or portion of the road that a motorist is required to be in when negotiating a turn. The fact that local authorities may specify a different course than that specified in "this" section, as recited therein, does not alter the fact that "this" section does not apply to stop lights but only to lanes of traffic in which a motorist may turn.

For all of the above reasons, we conclude that such right turn against a red light after a stop, even though a sign directs such, is not allowed.

April 21, 1971

COUNTIES AND COUNTY OFFICERS: Board of Supervisors — Board member holding two offices in the same county — §§473A.2, 473A.7, Code of Iowa, 1971. There is no incompatibility of office for a member of the Board of Supervisors on the regional planning commission. (Nolan to Folkers, Mitchell County Attorney, 4/21/71) #71-4-17

Mr. Jerry H. Folkers, Mitchell County Attorney: Your letter of December 17, 1970, has been received in the Attorney General's office. In your letter you asked for an opinion on the following question:

"May a member of the County Board of Supervisors also be a member of a regional planning commission organized under Chapter 473A when the region to be served by the planning commission is the county of which the office holder in question is a supervisor?"

In my opinion, there is no conflict or incompatibility present under the circumstances described in your letter.

A Regional Planning Commission established under Ch. 473A, Code of Iowa, 1971, "shall be separate and apart from the governmental units creating it." The membership requirements for such commission as set out in §473A.2 are:

"The commission shall have not less than five members, appointed by the governing bodies of the area served by the commission. A majority of the members of the commission shall be citizens who hold no other public office or position except appointive membership on a city or town plan commission or other planning commission, board or agency. Citizen members shall be appointed for overlapping terms of not less than three nor more than five years or thereafter until their successors are appointed. The appointing governing bodies shall determine the amount of compensation, if any, to be paid to the members of a commission. Any vacancy in the membership of a commission shall be filled for the unexpired term in the same manner as the initial appointment. The governing bodies shall have authority to remove any member for cause stated in writing and after a public hearing."

I find nothing which would make the actions of the planning commission subject to review of the board of supervisors or visa versa, the provisions of §473A.7 stating specifically:

"Nothing in this chapter shall be construed to remove or limit the powers of the cooperating cities, towns, counties, school districts, benefited water districts, benefited fire districts, sanitary districts, or similar districts as provided by state law. All legislative power with respect to zoning and other planning legislation shall remain with the governing body of the cooperative cities, towns, and counties. * * * The metropolitan or regional planning commission shall have the duty and function of promoting public interest and understanding of the economic and social necessity for long-term co-ordinated planning for the metropolitan or regional area, but its official recommendations shall be made to the governing bodies of the co-operating cities, towns, counties, school districts, benefited water districts, benefited fire districts, sanitary districts, or similar districts."

I am of the opinion that there is no inherent inconsistency in the functions of the two offices and, therefore, there appears to be no incompatibility of office. *State v. White*, 1965, 257 Iowa 606, 133 N. W. 903.

April 22, 1971

CITIES AND TOWNS: Sale of Community Building — §§368.18, 368.39, 368.40, 565.6, 618.3, 618.14, Code of Iowa, 1971. (1) Municipal corporations may, with the approval of the city or town council, sell real property owned by them for an amount not greatly less than the true market value of the property, and should provide public notice of the offer and proposed agreement by publication; (2) the money derived from the sale may be used by the municipality for any lawful and authorized purpose; (3) a municipality having less than 50,000 population may not lease real property for a community room; (4) a municipailty may use real property owned by others as a gift; (5) the sale and proposed donation should be set forth entirely in public notice to the people of the municipality. (Conlin to Story, Jones County Attorney, 4/22/71) #71-4-18

Mr. Robert H. Story, Jones County Attorney: You have requested an opinion of the attorney general with respect to the following:

"The Town of Onslow is the owner of a Community Building used for various public purposes and which is located next to the bank in the said town. The bank is proposing the construction of a new bank building and wants to buy the old Community Building and offer the Town the use of the basement of such new bank building for use as a community room."

The questions presented by your letter will be discussed as you raised them.

Question One. Can the town sell the said community building under Section 368.39 and if so, must there be a full publication of the offer and proposed agreement of the bank be made in the public notice?

The Town of Onslow has authority under Section 368.39, Code of Iowa, 1971, to sell the building. This provision states in relevant part:

"[Municipal Corporations] shall have power to dispose of the title or interest of such corporation in any real estate . . . owned or held by it . . . upon such terms as the council shall direct. . . ."

The Supreme Court of Iowa has interpreted this provision to forbid conveyances of real property for inadequate consideration. In *Gritton v. City of Des Moines*, 247 Iowa 326, 328, 73 N. W. 2d 813, 814 (1955) city conveyed land worth approximately $160,301 for $5,000. The conveyance was held void as being a gift, the court stating that it was irrelevant that the objects of the foundation were public and charitable. In the situation at hand, therefore, the Town of Onslow should receive an amount for the Community Building not greatly less than its fair market value.

In addition, it should be remembered that the sale of the building may be appealed to the District Court on the ground that it is not in the public interest. Section 368.40, Code of Iowa, 1971, provides:

"Whenever the council of any municipal corporation enters into an agreement for the sale, lease, or disposal by other means of any municipal property, any elector of such municipal corporation shall have the right to appeal from the action of the council to the district court, within thirty days of the final action thereon by the council, on the ground that such agreement is not in the public interest. All such agreements shall be voidable pending the decision of the court."

Notice of the complete offer and proposed agreement should be given in accordance with Section 368.39, Code of Iowa, 1971:

". . . Notice of any proposal to dispose of real property under the provisions of this section shall be given by publication, once each week for two consecutive weeks in the manner provided by section 618.14. The last of said publications shall appear not less than ten days before the meeting of the council at which said proposal is to be acted on."

Section 618.14, Code of Iowa, 1971, provides:

"The governing body of any municipality or other political subdivision of the state is authorized to make publication, as straight matter or display, of any matter of general public importance, not otherwise authorized or required by law, by publication in one or more newspapers, as defined in section 618.3 published in and having general circulation in such

municipality or political subdivision, at the legal or appropriate commercial rate, according to the character of the matter published.

"In the event there is no such newspaper published in such municipality or political subdivision or in the event publication in more than one such newspaper is desired, publication may be made in any such newspaper having general circulation in such municipality or political subdivision."

"Newspaper" is defined in Section 618.3, Code of Iowa, 1971, as folows:

"For the purpose of establishing and giving assured circulation to all notices and/or reports of proceedings required by statute to be published within the state, where newspapers are required to be used, newspapers of general circulation that have been established, published regularly and mailed through the post office of current entry for more than two years and which have had for more than two years a bona fide paid circulation recognized by the postal laws of the United States shall be designated for the publication of notices and/or reports of proceedings as required by law."

Question Two. If the Community Building is sold, can the money be used for any purpose desired by the town?

There is no mention of any case in any jurisdiction restricting the use of the proceeds of the lawful and authorized sale of the real property of a municipality. Accordingly, the funds are treated as other general municipal funds, to be used for lawful and authorized purposes.

Question Three. Can the Town of Onslow lease a room in the basement of the bank for community room purposes on a long term basis?

Section 368.18, section 3, Code of Iowa, 1971, gives the power to lease a building and grounds for a municipal auditorium only to municipal corporations having population of more than 50,000. This section states:

"[A]ny municipal corporation *having a population of 50,000 or more* . . . shall have power by a three-fourths majority vote of the council to lease a building and grounds for a municipal auditorium. The term of any lease for auditorium purposes shall not exceed twenty years." [Emphasis added].

In addition, grants of power to municipal corporations are construed by the maxim *Expressio Unius Est Exclusio Alterius* (the expression of one thing is the exclusion of another). The legislative grant of power to municipalities having 50,000 population to lease property for auditorium purposes thus implies an exclusion of that power to municipalities having less than 50,000 population.

Question Four. If the Town of Onslow may not lease space for a community room in the basement of the bank, may the bank simply donate the space for the room to the town as a public service?

Section 565.6, Code of Iowa, 1971, permits municipal corporations to receive gifts of property. This section states:

"[C]ities, towns . . . are authorized to take and hold property, real and personal, by gift or bequest, and to administer the same through the proper officer in pursuance of the terms of the gift or bequest . . . Conditions attached to such gifts or bequests become binding upon the corporation . . . upon acceptance thereof."

It is our opinion that this section permits the Town of Onslow to use

the basement of the proposed bank building as a community room.

Question Five. Can the Town of Onslow use town funds to repair or maintain a community room located in the basement of the bank?

Section 565.6, Code of Iowa, 1971, above, permits municipalities to "administer" the property they receive as a gift. It is our opinion that this includes the right to maintain or repair the proposed community room.

Question Six. In the event that all or any of the above things are legally possible, should the sale and proposed lease or donation of the use of said bank room be set forth entirely in any Public Notice to the people of the Town of Onslow and tied in as a part of the said sale proceedings?

The requirement of public notice has been strictly construed to require the printing of the entire proposal. In *McLaughlin v. City of Newton,* 189 Iowa 556, 178 N. W. 540 (1920), the Supreme Court of Iowa upheld the granting of an injunction against the holder of a franchise to operate an electrical light plant within the corporate limits of the city on the ground that the ballots on which the electorate was to record their approval or disapproval of the proposed electrical franchise did not fully set forth the terms of the agreement with the franchise. The court implied that insofar as a municipality proposes to undertake obligations, the populace of the municipality must be given complete and detailed notice of these obligations. The court stated at page 543:

"A franchise constitutes a contract. The most that the city could do would be to propose the contract, and formulate the terms and conditions upon which it was willing to enter into the contract. The proposition was to grant a franchise which involved, when granted and accepted, mutual contractual duties and obligations, duties and obligations to be assumed by the city for and in behalf of the citizen, and duties and obligations to be assumed and performed by the grantee in the franchise . . . Every detail of this contract, in so far as the ordinances were contractual, was a matter of concern to the citizens and electors of the city. When they were called to the election it was to express their approval or disapproval of the contract proposed by the city, every detail of which in so far as it involved contractual rights and duties — was essential to be known by the voter before he could intelligently approve or disapprove the same." 189 Iowa at 563, 564, 178 N. W. at 543.

In like manner in the problem at hand, the proposed sale and donation will entail obligations by the town of which the populace should be notified in detail.

It is therefore the opinion of the Attorney General that:

(1) Municipal corporations may, with the approval of the city or town council, sell real property owned by them for an amount not greatly less than the true market value of the property, and should provide public notice of the offer and proposed agreement by publication; (2) the money derived from the sale may be used by the municipality for any lawful and authorized purpose; (3) a municipality having less than 50,000 population may not lease real property for a community room under Section 368.18, subdivision 3, Code of Iowa, 1971, giving this power to cities and towns having 50,000 population; (4) the town may use the basement room of the new bank building as a community room as a gift of the bank; (5) the town may use town funds to repair or maintain the space donated as a community room; (6) the sale and proposed donation and

conditions should be set forth in full in public notice to the people of the municipality.

April 22, 1971

STATE OFFICERS AND DEPARTMENTS: Department of Health-Public Meetings — Chapter 28A, Code of Iowa, 1971. Iowa Board of Nursing may make closed consideration of certain matters at Board meetings. (Hughes to Illes, Executive Director, State Board of Nursing, 4/22/71) #71-4-19

Lynne M. Illes, R.N., Executive Director, Iowa Board of Nursing: You have requested an opinion of the attorney general as to whether discussions concerning revocation of licenses, accreditation of schools, and internal board matters such as personnel actions can be closed to the public.

Chapter 28A, Code of Iowa, 1971, deals with public meetings. Section three (3) thereof states in part as follows:

"Any public agency may hold a closed session by affirmative vote of two-thirds of its members present, when necessary to prevent irreparable and needless injury to the reputation of an individual whose employment or discharge is under consideration, . . ., or for some other exceptional reason so compelling as to override the general public policy in favor of public meetings."

It is our opinion that discussions concerning revocation of licenses and accreditation of schools might under certain circumstances be closed to the public. If allegations of misconduct or incompetence are made public prior to investigation and substantiation, the professional reputation of a licensee or school could be irreparably and needlessly damaged should the allegations be without merit. The statute grants your board the right to close a meeting on two-thirds vote "for some . . . exceptional reason so compelling as to override the general public policy in favor of open meetings," and we are not prepared to say that you could not reasonably make a good faith determination that situations of the foregoing type fall within this exception.

Similarly personnel actions involving employment or discharge appear to be a specific exemption in the law and may be properly closed to the public.

April 22, 1971

CITIES AND TOWNS: Board of Park Commissioners — §370.1, Code of Iowa, 1971. If a city in which a Board of Park Commissioners has been mandatorily created pursuant to §370.1 of the Code falls below a population of 30,000, the Board remains a *de jure* entity. (Hughes to Lawson, State Representative, 4/22/71) #71-4-20

Hon. Murray C. Lawson, State Representative: You have requested an attorney general's opinion and state that Mason City, Iowa has a park commission established in accordance with the mandatory provisions of §370.1, Code of Iowa, 1971. Mason City, according to the 1970 census, does not now have a population of 30,000 or greater. Your question is "whether or not the present board of park commissioners still retain the powers conferred upon them and whether they are still a legally constituted commission."

Section 370.1, Code of Iowa, 1971, states in part as follows:

"There shall be elected in all cities over thirty thousand population, three park commissioners whose terms of office shall be six years, one to be elected at each regular municipal election. At the first election following an official census enumeration wherein any city exceeds thirty thousand population three commissioners shall be elected and hold their offices respectively for two, four, and six years, their respective terms to be decided by lot, and their successors shall be elected for the full term of six years.

"All other cities under thirty thousand population and towns may, by ordinance provide for the election of such park commissioners, but such ordinance shall not be in force until it has been submitted to the voters at a special or regular municipal election and approved by a majority of the voters cast at such election. In the event that such ordinance is approved by a majority of the votes cast at such election, the city council shall have the power to appoint three park commissioners to hold such office until the next regular city election.

* * *

"Whenever a city or town having a population under thirty thousand provides for the election of park commissioners, it may by ordinance provide for the abolishment of such commission, but such ordinance shall not take effect until it has been submitted to the voters at a special or regular municipal election and approved by a majority of the votes cast at such election. The ordinance shall be published once each week for two consecutive weeks preceding the date of said election in a newspaper published in and having general circulation in such city or town. In the event there is no newspaper published in such city or town, publication may be made in any newspaper having general circulation in the county."

There is no provision in §370.1, Code of Iowa, 1971, which provides for automatic abolition of a board of park commissioners, mandatorily created pursuant to §370.1, Code of Iowa, 1971, if the city in which the board is created decreases in population below 30,000. In light of the foregoing, it is our opinion that the board of park commissioners of Mason City, Iowa remains a *de jure* entity at this time. However, we would say that the park commission is no longer mandatory and could now be abolished by an ordinance approved by the voters in accordance with §370.1.

April 23, 1971

STATE OFFICERS AND DEPARTMENTS: Accountancy, practice of construed — §§116.6 and 116.18, Code of Iowa, 1971. Signing a statement of the type described in section 6 of City of Ottumwa Ordinance No. 2096, as amended by Ordinance No. 2110, would amount to the "certification of financial facts." However, this is not to say that a bookkeeping agency or service which furnished such a statement would be in violation of Ch. 116 and subject to the penalties of §116.18 unless such bookkeeping agency or service designated itself or held itself out to the public as being registered or certified practitioners of accountancy. (Haesemeyer to Nichols, Sec., Iowa Board of Accountancy, 4/23/71) #71-4-21

Mr. E. C. Nichols, Secretary, Iowa Board of Accountancy: You have requested an opinion of the attorney general as to whether or not the statement required to be signed by a certified public accountant or bookkeeping agency or service pursuant to Section 6 of City of Ottumwa Ordinance No. 2096 as amended by Ordinance No. 2110 would fall within the definition of the practice of accountancy as set forth in §116.6, Code of Iowa, 1971.

Section 6 of such Ordinance 2096 as amended provides:

"Section 6 — Statement of Certified Public Accountant or Bookkeeping Agency or Service

"Any applicant applying for a license hereunder shall file with his application a statement signed by a certified public accountant or bookkeeping agency or service which statement shall contain the following representations:

"(a) That the goods listed in the application accurately sets forth the applicant's cost, including freight of the goods listed therein. If the goods were acquired or purchased by the applicant for a lump sum or under circumstances that in the judgment of the certified public accountant or bookkeeping agency or service make the listing of the cost price for each article or category impracticable, the statement shall set forth the total sum paid for said goods and the circumstances concerning the purchase of the same.

"(b) That all goods listed in the application were purchased by the applicant for resale; that, as concerns goods on order, the applicant did not as of the date of filing the application retain the right to cancel the purchase contract; and that none of the applicant's goods on order or in the applicant's possession were purchased on consignment.

"(c) That the cost, including freight, of additions to the applicant's stock of goods during the sixty day period immediately preceding the date of filing the application did not exceed ten percent of the cost, including freight, of the applicant's inventory as of the date of filing the application.

"(d) In the case of a renewal application the statement shall list the goods sold by the licensee during the sale and shall state that there have been no additions to the inventory filed with the original application."

Section 116.6 of the Code provides:

"116.6 Definitions. The term 'accountant' includes all persons engaged in the practice of accountancy, within the meaning and intent of this chapter, who, holding themselves out to the public as qualified practitioners, and maintaining an office for this purpose, either in their own names, or as office managers or as managing officers of assumed name, association or corporate organization, perform for compensation, on behalf of more than one client, a service which requires the audit or verification of financial transactions and accounting records; the preparation, verification and certification of financial, accounting, and related statements for publication or for credit purposes; or who in general and incidental to such work, render professional assistance in any and all matters of principal and detail concerning accounting procedure and the recording, presentation, and certification of financial facts.

"The practice of accountancy shall mean and include any person, firm, or corporation who practices as an accountant as defined in the next preceding paragraph."

Section 116.18 provides:

"116.18 Penalties injunction. Any person, firm or corporation who shall practice accountancy in this state in violation of the provisions of this chapter, or who shall in any manner hold themselves out to the public as practitioners of accountancy without having complied with all of the provisions of this chapter, shall for each such offense be guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail not exceeding thirty days, or by a fine not exceeding one hundred dollars, or by both such fine and imprisonment.

"Any person, firm or corporation who shall sign, execute, or publish any report, financial, accounting, or related statement, designating himself or themselves as registered or certified practitioners or knowingly

permit the printing and publication of any announcement in writing to the effect that such report or statement has been prepared by a registered or certified practitioner when in fact the person, firm or corporation preparing the same was not registered or certified as in this chapter provided, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not to exceed five hundred dollars or by imprisonment in the county jail for a term not exceeding one year.

"Any practitioner of accountancy who shall willfully or knowingly utter or certify to the correctness of any report, financial, accounting, or related statement, which is known to such practitioner to be false, misleading to the public, or designed to mislead any person, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine of not to exceed five thousand dollars, or by imprisonment in the state prison for a term not exceeding two years, or by both such fine and imprisonment in the discretion of the court.

"Any person, firm, or corporation who shall practice accountancy in this state as defined in this chapter in violation of the provisions of this chapter may be restrained by permanent injunction."

I think it is clear that signing a statement of the type described in Section 6 of the ordinance would amount to the "certification of financial facts." However, this is not to say that a bookkeeping agency or service which furnished such a statement would be in violation of Chapter 116 and subject to the penalties of §116.18 unless such bookkeeping agency or service designated itself or held itself out to the public as being registered or certified practitioners of accountancy.

April 27, 1971

COUNTY AND COUNTY OFFICERS: Institutional Fund — §444.12, 1971 Code of Iowa. Board of supervisors cannot pay for care of a patient after he is discharged from Oakdale Sanitorium unless he is an outpatient receiving care under the supervision of a tuberculosis sanitorium, from the institution fund, and cannot make payments from said fund for other members of the patient's family. (Williams to Knoke, State Representative, and Rodenburg, Pottawattamie County Attorney, 4/27/71) #71-4-22

Hon. George J. Knoke, State Representative and Lyle A. Rodenburg, Esquire, Pottawattamie County Attorney: You have requested an Attorney General's Opinion as to:

"1. Is the Institutional Fund liable for care, such as drugs, x-rays, doctor's calls, after the patient is discharged from the Oakdale Sanitorium?

"2. Does this also apply to members of his family?"

Section 444.12, 1971 Code of Iowa reads in part as follows:

"The board of supervisors for each county shall establish a state institution fund and shall at the time of levying other taxes, estimate the amount necessary to meet the expense in the coming year of maintaining county patients, including cost of commitment and transportation of patients at . . . the state sanatorium for the treatment of tuberculosis at Oakdale or any similar tuberculosis institution established and maintained by any county under the provisions of chapter 254, . . ."

In addition, this section permits the board of supervisors to authorize expenditures from the institutional fund for:

". . . Cost of outpatient care of tuberculosis patients administered under the supervision of a tuberculosis sanatorium may be paid from the

state institution fund. Said fund shall not be diverted to any other purpose except that if any patients are returned to a county from any of the four mental health institutes. . . ."

Institutional funds are derived from tax levies and the General Law concerning the use of funds derived from any tax levy is restricted. Section 85 C.J.S. Taxation, §1057 (b) states:

"Taxes set apart for particular uses by the state constitution, *or levied and collected for particular purposes*, cannot ordinarily be legally utilized for, or diverted to, any other purpose." (Emphasis added)

The county board of supervisors has restricted power and authority. The Supreme Court of Iowa in the case of *Mandicino v. Kelly*, 158 N. W. 2d 754 (1968) at page 760 states in this regard:

"(2) The legislative authority of this state is vested in a General Assembly, Article III, Section 1 of the Iowa Constitution, whereas boards of supervisors of a county have only such powers as are expressly conferred by statute or necessarily implied from the power so conferred. *Hilgers v. Woodbury County*, 200 Iowa 1318, 1320, 206 N. W. 660, 661."

Based upon the foregoing authorities, it is our opinion that unless the items mentioned in your Opinion Request can be classified as "outpatient care of tuberculosis patients administered under the supervision of a tuberculosis sanitorium," such expenditures cannot be paid from the institution fund.

In answer to your second question, we wish to state there is nothing in the statute which would permit the board of supervisors to use institutional funds to pay medical expenses for the family of a patient who has been discharged from the Oakdale Sanitorium, nor is there provision in the statute which permits such payments to be made for a patient who is discharged from the Oakdale Sanitorium, unless such payments are part of the "cost of outpatient care of tuberculosis patients administered under the supervision of a tuberculosis sanatorium. . . ."

April 27, 1971

WELFARE: Aid to Dependent Children — §239.5, 1971 Code of Iowa. Before ADC payments can be made, the county board, with advice of county attorney, must certify that the mother of an illegitimate child is cooperating in legal and other efforts to obtain support for said child from the person legally responsible for said support. Merely appearing before the county attorney without identifying the father if known and aiding in legal efforts to obtain support is not cooperation. (Williams to Ensign, Worth County Attorney, 4/27/71) #71-4-23

Craig G. Ensign, Esquire, Worth County Attorney: You have requested an Opinion of the Attorney General as follows:

"1. Whether or not a County Board of Social Welfare is legally obligated to grant aid to dependent children when the mother of an illegitimate child refuses to cooperate in legal actions and other efforts to obtain support money for said child from the person legally responsible for said support.

"2. Whether or not a County Board of Social Welfare can certify an Application for Aid to Dependent Children to the State Department of Social Services prior to the time the Board receives the referral and request for clearance signed by the County Attorney.

"3. Whether or not the Department of Social Services Employees' Manual, V-5-57 V-5-58 is in compliance with Chapter 239.5 of the Code; whether or not the Employees' Manual, V-5-57 V-5-58, was afforded Chapter 17A (Code of Iowa) treatment."

DIVISION I

With reference to your first question, the pertinent portion of §239.5, 1971 Code of Iowa, reads as follows, to-wit:

"No payment for aid to dependent children shall be made unless and until the county board of social welfare, with the advice of the county attorney shall certify that the parent receiving the aid for the children is cooperating in legal actions and other efforts to obtain support money for said children from the persons legally responsible for said support."

Therefore, not only is the County Board of Social Welfare "not legally obligated to grant aid to dependent children when the mother of an illegitimate child refuses to cooperate in legal action and other said matters from the person legally responsible for said support," but is legally liable if it does grant aid contrary to the above-quoted statute.

DIVISION II

In answer to your Question No. 2, it is our opinion that a County Board of Social Welfare cannot certify an application for aid to dependent children to the Department of Social Services prior to the time that the Board receives the referral contemplated in §239.5, Code of Iowa, and obtains the advice of the county attorney that the County Board should certify that the parent is cooperating as contemplated in said statute.

DIVISION III

You referred to certain Employees' Manual Material prepared by the Iowa Department of Social Services dated February 12, 1968 on pages V-5-57 and V-5-58, and ask if this was afforded Chapter 17A (Code of Iowa) treatment. The Manual Material referred to was not promulgated in accordance with the provisions of Chapter 17A, Code of Iowa. Pertinent portions of said Manual Material read as follows:

"V-5-57 . . . Willingness on the part of the client [mother of an illegitimate child] (1) for referral to be made, and (2) to appear before the County Attorney at his request, constitute cooperation. Approval of assistance shall not be delayed pending the return of the Referral and Request for Clearance from the County Attorney. . . .

"V-5-58 . . . While the County Department may, in the best interests of the client, encourage cooperation with the County Attorney beyond the two areas cited on page 57, a decision of the client to withhold cooperation in any additional areas shall be respected, and shall not constitute a basis for denying or discontinuing assistance."

The above-quoted paragraphs from said manual material do not conform to the above-cited provision in Chapter 239.5 of the 1971 Code of Iowa (which is identical to the same provision in the 1966 Code of Iowa). This code section was construed in an Attorney General's Opinion dated August 5, 1957 (A.G.O. 1958, 24.2) This prior Opinion is hereby approved and adopted *except* for the last paragraph. The last paragraph, referring to the guardianship, is hereby withdrawn for the reason that the statute does not so provide. The child may not be a "needy child" within the meaning of the statute when the facts are disclosed. After cooperation is certified with advice of the County Attorney, the child may be granted

ADC if the other statutory eligibility requirements are met.

DIVISION IV

The legislative and congressional intent is clear that the Department of Social Services has some responsibility in helping the mother of an illegitimate child receive support from the putative father.

Section 675.8 provides that the proceedings to determine paternity "may be brought by the mother, or other interested person, or if the child is or is likely to be a public charge by the authorities charged with its support."

In this same tenor, Congress in 1967 amended the Social Security Act. As amended, Title 42, Section 602(a) (17) (A) (i) now reads:

"(a) A State plan for aid and services to needy families with children must . . .

(17) provide-

(A) for the development and implementation of a program under which the State agency will undertake —

(i) in the case of a child born out of wedlock who is receiving aid to families with dependent children to establish the paternity of such child and secure support for him, and . . ."

CONCLUSION

To summarize, the County Board of Social Services should not certify a mother as being eligible for ADC benefits until so advised by the County Attorney she is cooperating "in legal actions and other efforts to obtain support money for said children from the persons legally responsible for said support."

April 27, 1971

STATE OFFICERS AND DEPARTMENTS: Compatibility of office, Justice of the Peace and Public Accounts Auditor in the office of Auditor of State — §§11.8, 11.10, 11.18 and 601.133, Code of Iowa, 1971. The offices of Justice of the Peace and Public Accounts Auditor assigned to the County Audit Division are compatible so long as neither the individual in question nor anyone subordinate to him audited his records as a Justice of the Peace. (Haesemeyer to Smith, Auditor of State, 4/27/71) #71-4-24

The Hon. Lloyd R. Smith, Auditor of State: This is in response to your letter of February 1, 1971, in which you stated:

"James Mounsden, of Toledo, Iowa, a Public Accounts Auditor assigned to the County Audit Division of the office of the Auditor of State, was elected by write in vote, as Justice of the Peace for his township. Your opinion as to whether there would be conflict or other impediment to his serving as Justice of the Peace as indicated is requested."

The rule in this jurisdiction as to incompatibility of office was set forth in *State ex rel Crawford v. Anderson*, 155 Iowa 271, 136 N. W. 128. The court there set forth the test as follows:

"[T]he test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other 'and subject in some degree to its revisory power,' and where the duties of the two offices 'are inherently inconsistent and repugnant.'"

The court continued:

". . . 'where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both.' " 155 Iowa 271, 273, 136 N. W. 128, 129.

With this test well in mind, one must now look at the duties that might conflict in reference to the two positions.

Section 11.18, Code of Iowa, 1971, states that the auditor of state shall cause to be examined the financial condition of all cities, towns, townships and schools at least once yearly.

Section 11.8, Code of Iowa, 1971, allows the auditor to appoint such assistants to the auditor as may be necessary.

Section 601.133 requires that the justice of the peace file a quarterly report with the county auditor.

Moreover, §11.10 states that the county records shall also be audited. This would be the area in which Mr. Mounsden would be working.

One of the purposes of the audit is to insure that complete and accurate records of funds and expenditures are being kept by the official having custody thereto. One purpose for having the auditor of state audit the records is to insure that there is no misappropriation of public funds. Public policy and common sense require that the person interested with the day to day handling of funds be audited and his records examined by someone other than himself.

Such being the case and applying the test of the *Anderson* case (supra) it would appear that the offices of justice of the peace and that of a public accounts auditor assigned to the county audit division are such as to render it improper from the standpoint of public policy for an individual to retain both offices.

However, if you took steps to insure that neither the individual in question nor anyone subordinate to him audited his records as a justice of the peace, it would be my opinion that there is no incompatibility.

April 27, 1971

SCHOOLS: Intersection lighting; school district funds — §§28E.2, 28E.12, Code of Iowa, 1971. A school district may contract with the county and the state highway commission to pay a portion of the cost of installation and energy for light fixtures placed at the entrance to its school property. (Haesemeyer to Harbor, Speaker of House of Representatives, 4/27/71) #71-4-25

The Hon. William H. Harbor, Speaker, House of Representatives: Reference is made to your letter of March 10, 1971, in which you ask for an attorney general's opinion as to the authority of the Nishna Valley Community School District to share in the installation costs and energy costs of certain luminair lighting installations to be placed at the present school entrance on U. S. 34 as part of a highway intersection reconstruction project.

The need for this project apparently arises because of a traffic problem existing at an intersection of a Mills County road and Highway No. 34 in Mills County. The Nishna Valley School District has built a new high school on the northwest quadrant of this intersection and heavy traffic to and from the school has caused the school district to become concerned for the safety of students when they enter and leave the high school. The highway commission has agreed to reconstruct the intersection and as a part of such reconstruction would install four all-weather lights to improve visibility. According to the proposal advanced by the highway commission it would pay for two of the lights and Mills County would pay for the other two. It is the feeling of the Mills County board of supervisors that the school board should absorb some of the financial responsibility for the lighting installations. However, the Nishna Valley Community School Board had some doubt as to their authority to use school funds for the purchase and maintenance of electric lights on property which is not owned by the school district.

Section 28E.12, Code of Iowa, 1971, provides:

"28E.12 Contract with other agencies. Any one or more public agencies may contract with any one or more other public agencies to perform any governmental service, activity, or undertaking which any of the public agencies entering into the contract is authorized by law to perform, provided that such contract shall be authorized by the governing body of each party to the contract. Such contract shall set forth fully the purposes, powers, rights, objectives, and responsibilities of the contracting parties."

It seems clear that the school district, the county and the state highway commission are all public agencies for purposes of such §28E.12. §28E.2, OAG Nolan to Tieden, State Representative, May 1, 1969. In line with the plain language of §28E.12 we have said in the past that the nature of the grant of authority contained in this section authorizes not only the joint exercise of mutually possessed powers, but also the exercise by one agency of the power of the other in accordance with the contract. OAG Turner to Coupal, Director of Highways, April 4, 1969; see also OAG Gors to Thordsen, State Senator, and Bray, State Representative, February 5, 1971; OAG Haesemeyer to Milligan, State Senator, March 17, 1971. This being so the fact that the school district has no express statutory authority to spend school funds for lighting fixtures on state property would not prevent it from entering into a §28E.12 agreement so long as one or more of the other contracting parties had the authority to construct such lighting installations.

Accordingly, it is our opinion that the Nishna Valley Community School District could spend school funds to share the cost of installing and maintaining the luminair lights at the entrance to the high school. It should be noted, however, that under §28E.12 that there must be a contract executed by all the parties which sets forth fully the purposes, powers, rights, objectives, and responsibilities of the various contracting parties. Moreover, the contract must be approved by the governing body of each party to the contract, in this case the school board, the board of supervisors and the highway commission.

April 27, 1971

MOTOR VEHICLES: Nonresident registration and Minnesota-Iowa Reciprocity Agreement — §§321.18(3), 321.1(16), 321.55, 321.54 and 326.5, Code of Iowa, 1971. Where the same truck is used in intrastate travel hauling merchandise in Iowa, though also used in interstate travel, said truck must be licensed and registered in Iowa. (Mowers to Ridout, Emmet County Attorney, 4/27/71) #71-4-26

Mr. William Ridout, Emmet County Attorney: Reference is made to the letter of August 11, 1970, requesting an opinion as to whether a Minnesota resident farmer owning land in Minnesota and Iowa would be required to license and register his farm truck in Iowa when he:

1) hauls grain or fertilizer from Minnesota to Iowa or Iowa to Minnesota; or

2) hauls grain from the Iowa farm to an Iowa elevator or fertilizer from an Iowa dealer to an Iowa farm.

We think clearly that if the same truck is used in all of the above operations, it must be licensed in Iowa.

The general licensing and registration provision of the 1971 Iowa Code is §321.18 which provides:

"Every motor vehicle, trailer, and semitrailer when driven or moved upon a highway shall be subject to the registration provisions of this chapter except:"

"(3) Any implement of husbandry."

* * *

An implement of husbandry is defined in §321.1(16) and in summary provides that all vehicles which are designed and exclusively used for agricultural purposes shall be of this class.

We have previously stated in an Attorney General's Opinion dated August 7, 1967, that an implement of husbandry under §321.1(16) is a vehicle which can have no other uses than agricultural. In other words, any vehicle that can be used for non-agricultural purposes, nothwithstanding that it is not so used, would not be an implement of husbandry.

Since the farm truck is not an implement of husbandry and therefore not within this exception to §321.18, we must look to the Code sections dealing with the nonresident registration requirements and exemptions. The applicable section is §321.55 and which provides:

"Every nonresident owner or operator, in addition to those mentioned in section 321.54, but not including a person commuting from his residence in another state or whose employment is seasonal or temporary, not exceeding ninety days, engaged in remunerative employment or carrying on business within this state and owning or operating any motor vehicle, trailer, or semitrailer within this state, shall be required to register each such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this state."

A close reading of this section indicates that if the motor vehicle is not operated on the Iowa roads when carrying on business within this state, it need not be licensed and registered here. We are, however, of the opinion that the farm truck is used on the Iowa roads to carry on business within Iowa.

Black's Law Dictionary (4th edition, 1957) states that "carrying on business" is:

"To conduct, prosecute or continue a particular avocation or business as a continuous operation. The repetition of acts may be sufficient."

Stated in *Beikler v. Guenther*, 1903, 121 Iowa 419, 96 N. W. 895, 896:

"To engage in business is uniformly construed as signifying to follow that employment or occupation which occupies the time, attention, and labor for the purpose of livelihood or profit."

This farmer, who owns land in Iowa, who actually farms it, and who in carrying on the farming operation hauls grain and fertilizer to and from the farm, is, in the opinion of this office, carrying on business within this state with his farm truck. Accordingly, he must license and register his truck in Iowa.

Chapter 326, 1971 Code of Iowa, Motor Vehicle Registration Reciprocity, could, since the farmer is a Minnesota resident, provide certain exceptions to this conclusion, depending upon the Iowa-Minnesota Reciprocity Agreement. Section 326.5 provides:

"The board may enter into reciprocity agreements with the duly authorized representatives of any jurisdiction exempting nonresidents of this state using the highways of this state from the registration requirements of Chapter 321 and payment of any fees to this state with such conditions, restrictions, and privileges or lack of same as the board deems advisable."

The relevant portions of said reciprocity agreements with Minnesota and Iowa provides:

"It is hereby agreed that any vehicle legally registered in one of the states signatory hereto may be operated within the reciprocating state without registering such vehicle in, or paying any fee to, the reciprocating state, except as otherwise herein provided."

* * *

"(2) This agreement shall apply to vehicles properly registered and licensed in the state of residence of the owner, which vehicles operate exclusively on an interstate basis, as defined herein."

* * *

"(4) For the purpose of this agreement 'interstate movement' shall mean commerce between states or transportation which originates in one state and passes into or through other states for delivery in a state other than the state of origin.

" 'Intrastate movement' shall mean commerce within the state or transportation which originates with a state for delivery in the same state regardless of route traversed."

Exceptions:

* * *

"(2) In accordance with the definition contained herein, reciprocity shall not be granted any person, corporation, or other organization operating motor vehicles engaged in intrastate movement."

Therefore, from this agreement it can readily be seen that said truck would be exempt from registering if no intrastate travel is done but

when he hauls grain and fertilizer to and from the Iowa farm to the elevator or dealer, he is traveling within intrastate commerce.

Accordingly, it is the opinion of this office that the Minnesota resident farmer who owns and farms land in both Iowa and Minnesota, who through his farming operations hauls grain and fertilizer from farm to farm, from the Iowa retailer to the Iowa farm, and from the Iowa farm to the elevator, engages in intrastate transportation thereby rendering ineffective the exemption granted to nonresidents by the reciprocity agreement, and as a consequence, requiring the truck to be licensed and registered in Iowa.

April 30, 1971

HIGHWAYS: Agreement with state for expenditure of farm-to-market road funds — Under the provisions of §§310.2 and 310.4, Code of Iowa, 1971, a county may legally enter into an agreement with the State of Iowa to construct a local farm-to-market road to primary standards. (Schroeder to Leonard, Fremont County Attorney, 4/30/71) #71-4-27

Mr. Robert F. Leonard, Fremont County Attorney: This will acknowledge receipt of your recent letter wherein you posed a factual situation, which I have summarized as follows:

Fremont County, through its Board of Supervisors, entered into an agreement with the Iowa State Highway Commission, wherein the County agreed to construct a road from Sidney west to an Interstate 29 interchange near Percival. The cost of construction is to be paid from farm-to-market funds held by Fremont County. The road is to be built to primary highway specifications, as approved by the Highway Commission. It is to be given a granular surface. The road will be opened to the public upon completion and is to be maintained by the County.

The Highway Commission has agreed that subsequently this road will be designated a part of the State's primary highway system. The Commission will then construct certain designated bridges, pave the road, and assume all maintenance costs thereon.

The question you have posed is: "Can the County legally enter into an agreement with the State of Iowa to construct a primary roadbed and use farm to market funds for the construction of same?"

Section 310.2, Code of Iowa, 1971, provides as follows:

"The county board of supervisors of any county is empowered, on behalf of the county, to enter into any arrangement or agreement with or required by the duly constituted federal or state authorities in order to secure the full co-operation of the government of the United States and of the state of Iowa, and the benefit of all present and future federal or state allotments in aid of secondary road construction, reconstruction or improvement."

Section 310.4, Code of Iowa, 1971, provides as follows:

"Said farm-to-market road fund is hereby appropriated for and shall be used in the establishment, construction, reconstruction or improvement of the farm-to-market road system, including the drainage, grading, surfacing, resurfacing, construction of bridges and culverts, the elimination, protection, or improvement of railroad crossings, the acquiring of additional right of way and all other expenses incurred in the construction, reconstruction or improvement of said farm-to-market road system under this chapter."

Your attention is also directed to 1963 OAG 204, which discussed the Code sections set forth immediately above, wherein it was determined that counties may enter into agreements with state authorities for expenditure of farm-to-market funds.

Section 310.10, Code of Iowa, 1971, provides as follows:

"The farm-to-market road system shall embrace those main secondary roads (not including roads within cities and towns) which connect rural areas with each other and with the towns, cities, and primary roads, and which have heretofore been designated as farm-to-market roads under section 310.9, as amended, and section 310.10, Code 1946. Said road system may, with consent of the state highway commission, be changed and modified by the board of supervisors.

"When all farm-to-market roads in any county have been built to establish grade, bridged and surfaced in a manner suited to the traffic thereon, additional mileage may be added to the farm-to-market road system in said county."

It would thus appear from a reading of the above-referenced Code sections that the Board of Supervisors of Fremont County has the authority to enter into an agreement with the Iowa State Highway Commission whereby farm-to-market funds are used for construction of the road in question. Your letter did not make reference to the requirements of Section 310.10, Code of Iowa, 1971. However, I am advised that the road in question had been designated as a farm-to-market road by the Fremont County Board of Supervisors, and that approval of such designation had been given by the Iowa State Highway Commission.

The quality of a farm-to-market road, in this instance one constructed to primary specifications, is dependent upon volume of traffic known or anticipated and is an engineering decision.

It is therefore my opinion that the language of the above-quoted statutes allows Fremont County to enter into an agreement with the Iowa State Highway Commission, whereby county farm-to-market funds are expended for the construction of a road previously designated and approved as a part of the Fremont County Farm-to-Market system and which is to be built to primary specifications.

May 3, 1971

CONSTITUTIONAL LAW: Primary road fund, Iowa highway safety patrol — Art. VII, §8, Constitution of Iowa; §§80.4, 80.9, 80.17, Code of Iowa, 1971. Use of the primary road fund to pay the salaries of the Iowa highway safety patrol would be unconstitutional. Among the constitutionally permitted uses of the fund is for the "*supervision* of the public highways" and the patrol's primary duty is to supervise the use of the highways. (Haesemeyer to Walsh, State Senator, 5/3/71) #71-5-1

The Hon. John M. Walsh, State Senator: Reference is made to your letter of April 28, 1971, in which you request an opinion of the attorney general with respect to the following question:

"Does Article VII, Section 8, which is the amendment of 1942 to the Constitution of Iowa, allow the payment of the salaries for the Iowa Highway Safety Patrol from the road use tax fund?"

Article VII, §8, of the Constitution of Iowa was added by the amendment of 1942. It provides:

"Motor vehicle fees and taxes. All motor vehicle registration fees and all licenses and excise taxes on motor vehicle fuel, except cost administration, shall be used exclusively for the construction, maintenance and *supervision* of the public highways exclusively within the state or for the payment of bonds issued or to be issued for the construction of such public highways and the payment of interest on such bonds." (Emphasis added)

Statutory authorization for the Iowa highway safety patrol is found in §80.4, Code of Iowa, 1971, which provides:

"80.4 Highway patrol. The Iowa highway safety patrol established in the department of public safety shall consist of a complement of not to exceed four hundred ten persons, not more than sixty percent of whom shall at any time be members of the same political party. Said patrol shall be under the direction of the commissioner."

Section 80.17 provides:

"80.17 General allocation of duties. In general, the allocation of duties of the department of public safety shall be as follows:

1. Commissioner's office.
2. Division of statistics and records.
3. Division of criminal investigation and bureau of identification.
4. Division of highway safety and uniformed force.
5. Division of fire protection.
6. Division of inspection.

"Nothing in the aforesaid allocation of duties shall be interpreted to prevent flexibility in interdepartmental operations or to forbid other divisional allocations of duties in the discretion of the commissioner of public safety."

Section 80.9 sets forth the duties of the department of public safety among which is the following:

"2(b) To enforce all laws relating to traffic on the public highways of the state, including those relating to the safe and legal operation of passenger cars, motor cycles, motor trucks and buses; to issue operators' and chauffeurs' licenses; to see that proper safety rules are observed and to give first aid to the injured;."

This particular statutorily imposed duty in fact is the responsibility of the Iowa highway safety patrol and the work to which it devotes virtually all of its time and attention.

We think that the function performed by the highway patrol may be fairly said to amount to "supervision of the public highways."

As you point out the limitations on the use of the primary road fund found in Article VII, §8, have in the past been given a somewhat liberal construction. Thus, the term "construction" within the provisions of such section requiring that motor vehicle registration fees and fuel excise taxes are to be used exclusively for construction, maintenance and supervision of public highways, was found to include the costs of relocating public utility facilities as part of the construction of highways. *Edge v. Brice*, 1962, 253 Iowa 710, 113 N. W. 2d 755; see also *Slapnicka v. City*

of Cedar Rapids, 1965, 258 Iowa 382, 139 N. W. 2d 179. Subsequently in an exhaustive and comprehensive opinion dated January 16, 1968, the attorney general concluded that Article VII, §8, did not bar use of the primary road fund for the construction of safety rest areas along the public highways of the state or for matching federal funds for the same. 1968 OAG 494.

Accordingly, it is our opinion that the term "supervision" as found in Article VII, §8, contemplates supervision of the use of the public highways as well as supervision of their construction and maintenance. Since supervision of the use of the highways is precisely the function of the Iowa highway safety patrol the primary road fund could be used for the payment of the salaries of such patrol.

May 3, 1971

COUNTY AND COUNTY OFFICERS: Hospital Trustees — Elections — §347A.1, Code 1971. Two to a township limitation does not apply to election of members to board of hospital trustees. (Nolan to Woodward, Muscatine County Attorney, 5/3/71) #71-5-2

Mr. Garry D. Woodward, Muscatine County Attorney: You have requested an opinion interpreting §347A.1, Code of Iowa 1971, as it pertains to the election of board of hospital trustees for the Muscatine General Hospital. The affairs of this hospital are conducted by a board of five trustees who are elected at large by the voters of the county.

At the last election two positions on the board were to be filled. The candidate who received the highest number of votes was declared elected to one of the positions by the Board of Supervisors. This person resides in the same township as one of the holdover trustees. The second position remains unfilled because the candidate receiving the next-highest number of votes resides in the same township as two other trustees and the supervisors are uncertain about how the act should be interpreted. The question to be determined is whether the language of §347A.1 precludes the election of more than two trustees having residence in the same township.

Several years ago the then Muscatine County Attorney advised that the limitation applied to bar more than two trustees from the same township. It appears that you do not give the statute in question the same interpretation. We concur in your view that the candidates receiving the most votes at the election should be declared elected, regardless of the fact that they both reside in the same township as another member of the board of trustees whose term has not yet expired.

Section 347A.1, Code of 1971, provides:

"Any county in the state of Iowa having a population less than one hundred fifty thousand is hereby authorized and empowered to acquire, construct, equip, operate and maintain a county hospital and, for the purpose of acquiring, constructing, equipping, enlarging or improving any such county hospital and acquiring the necessary lands, rights of way and other property necessary therefor, may issue revenue bonds all as in this chapter provided. All contracts for construction work or such county hospital shall be awarded by the board of supervisors on competitive bidding following such advertisement as may be prescribed by such

board. The administration and management of any county hospital acquired, constructed, equipped, enlarged or improved under this chapter shall be vested in a board of hospital trustees consisting of five members appointed by the board of supervisors from among the resident citizens of the county with reference to their fitness for such office, and not more than two of such trustees shall be residents of the same township. Such trustees shall hold office until the next succeeding election, at which time their successors shall be elected, two for a term of two years, two for a term of four years and one for a term of six years, and thereafter their successors shall be elected for regular terms of six years each. *Vacancies in the board of trustees shall be filled in the same manner as original appointments to hold office until the next succeeding general election.* Said trustees shall, within ten days after their appointment or election qualify by taking the usual oath of office, but no bond shall be required of them. The members of such board of hospital trustees shall receive no compensation but shall be reimbursed for all expenses incurred by them with the approval of said board in the performance of their duties." [Emphasis supplied]

While it may be said that whenever it is necessary to make an appointment to fill a vacancy on the board the "two to a township" limitation applies, I do not find that such a limitation is supported by the plain language of the statute as applied to the election of trustees. In fact it appears that the limitation applied only until "the next succeeding election" following the original appointments.

In the case of *Meyer v. Campbell*, 1967, 260 Iowa 1346, 152 N. W. 2d 625, the Iowa Supreme Court determined that the county board of education was subject to the "one-man, one-vote" rule:

"Where the election of those members is required, and where as here the legislature provides for the election of these representatives of the people whether their function be considered legislative, quasi-legislative, or primarily administrative, their election must be made on a population basis, not upon area."

Subsequently, in *Mandicino v. Kelly*, 1968, 158 N. W. 2d 754, the Iowa court held that a residency requirement which quaranteed rural districts a majority of the county board of supervisors and preserved a controlling influence to the less populous districts was per se invidiously discriminatory to the citizens of the most populous township.

We distinguish between the residence restrictions being applied where appointments are made and where the election procss is utilized. *Meyer v. Campbell*, supra, Page 1353. Accordingly, in the absence of a clear showing to justify deviation from equal representation, the election of members to the board of hospital trustees should be determined without limiting the members on a two to a township basis.

May 4, 1971

MOTOR VEHICLES: Combination of vehicles, maximum lengths — §§321.1, 321.457, Code of Iowa, 1971. A motor truck drawing a dolly coupled to a semitrailer is a "combination of three vehicles coupled together one of which is a motor vehicle" subject to an overall length limitation, inclusive of front and rear bumpers, of sixty (60) feet. (Haesemeyer to Griffin, State Senator, 5/4/71) #71-5-3

The Hon. James W. Griffin, Sr., State Senator: By your letter of April 21, 1971, you have requested an opinion of the attorney general as to whether or not the combination of vehicles described as follows would be subject to the 55 ft. length limitation set forth in §321.457(3), Code of

Iowa, 1971, or the 60 ft. limitation prescribed by §321.457(6):

"The first unit is considered to be a motor truck measuring thirty feet in length. The second unit is a twenty-five foot trailer attached to the first unit by a dolly. This approximately makes a combination of three vehicles by the definition of vehicles in Chapter 321.1, of the Iowa code.

"I would appreciate your opinion as to whether this combination comes under the doubles law of sixty feet."

Section 321.457 provides in relevant part:

"321.457. * * *

3. Except as to combinations of vehicles, provisions for which are otherwise made in this chapter, no combination of truck tractor and semitrailer, nor any other combination of vehicles coupled together, unladen or with load, shall have an over-all length, inclusive of front and rear bumpers, in excess of fifty-five feet.

* * *

"6. No combination of three vehicles coupled together one of which is a motor vehicle, unladen or with load, shall have an over-all length, inclusive of front and rear bumpers in excess of sixty feet."

Section 321.1 contains among other things the following definitions:

"321.1 Definitions of words and phrases. The following words and phrases when used in this chapter shall, for the purpose of this chapter, have the meanings respectively ascribed to them.

"1. 'Vehicle' means every devise in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks.

"2. 'Motor vehicle' means every vehicle which is self-propelled but not including vehicles known as trackless trolleys which are propelled by electric power obtained from overhead trolley wires, but not operated upon rails. . . .

* * *

"4. 'Motor truck' means every motor vehicle designed primarily for carrying livestock, merchandise, freight of any kind, or over nine persons as passengers.

* * *

"9. 'Trailer' means every vehicle without motive power designed for carrying persons or property and for being drawn by a motor vehicle and so constructed that no part of its weight rests upon the towing vehicle.

"10. 'Semitrailer' means every vehicle without motive power designed for carrying persons or property and for being drawn by a motor vehicle and so constructed that some part of its weight and that of its load rests upon or is carried by another vehicle.

"Wherever the word 'trailer' is used in this chapter, same shall be construed to also include 'semitrailer.'

"A 'semitrailer' shall be considered in this chapter separately from its power unit.

* * *

"23. 'Combination' or 'combination of vehicles' shall be construed to mean a group consisting of two or more motor vehicles, or a group con-

sisting of a motor vehicle and one or more trailers, semitrailers or vehicles, which are coupled or fastened together for the purpose of being moved on the highways as a unit."

The question then which we have to decide is whether or not the equipment you describe is a combination of three vehicles coupled together, one of which is a motor vehicle, thus falling within the sixty foot limitation of §321.457(6) rather than the fifty-five foot limitation of §321.457 (3). Plainly, the motor truck falls within the statutory definitions of "motor truck," "motor vehicle" and "vehicle" set forth in subsections (4), (2) and (1) of §321.1. Similarly, there can be no doubt that the semitrailer is also a "vehicle" as defined in §321.1(1) in that quite obviously it is a "device in, upon, or by which any . . . property is or may be transported or drawn upon a highway. . . ."

Insofar as the dolly is concerned, however, the answer is by no means quite so clear. Nevertheless, we are inclined to think that it meets the definition of "vehicle" set forth above, that is to say it is a device by which property is or may be drawn upon a highway. The property which it draws is the semitrailer.

Accordingly, it is our opinion that the unit you describe is a combination of three vehicles, one of which is a motor vehicle, and the sixty foot limitation applies. The dolly, while perhaps not a vehicle within the meaning of that term as it is commonly understood, nevertheless does fall within the statutory definition found in §321.1(1). See OAG Turner to Walsh, State Senator, April 29, 1970.

May 6, 1971

ELECTIONS: Benefited water districts, vote required, residence of voters, election procedures — §§357.1, 357.12, Code of Iowa, 1971. In case of a tie the proposed benefited water district fails but a new proposal may be immediately submitted. Supervisors may require bond for new election. Eligibility of voters is determined by their residence. (Haesemeyer to Lunn, Assistant Webster County Attorney, 5/6/71) #71-5-4

Mr. Richard C. Lunn, Assistant Webster County Attorney: Reference is made to your letter of March 19, 1971, in which you request an opinion of the attorney general and state:

"I am writing in regard to a problem which has arisen recently in Webster County regarding a proposed benefited water district. Said district was to be what was called the Riverdale Benefited Water District, and was comprised of an area northwest of Fort Dodge, Iowa. Those interested in the project fulfilled the proper procedures as set out in the Code, and the County Supervisors performed their function according to the law and all steps specified in the Code were carried out, including the appointment of judges to supervise the actual election. The results of the election were somewhat unique in that the vote resulted in a tie.

"With the foregoing in mind, we are requesting your opinion as to several points of law that have arisen as a result of this election.

"1. Would a tie vote mean that the proposed district was defeated?

"2. Assuming that the initial election resulted in a rejection of the district as proposed, may the interested parties propose a new benefited water district for the same area?

a. If so, are there any time restrictions which must be met? (i.e.: Is there a waiting period before another similar district can be proposed?)

b. If a new district proposal is acceptable immediately after the re-

jection of the first proposed district, may the County Supervisors require the sponsors of the second proposed district to post a bond covering the expenses involved in the new proposed district including the costs of a second election?

"3. What is the standard used in determining whether one is residing within the district? (i.e.: If one were working and living in two separate communities, part of the time in one and part of the time in another, would he be considered a resident for the purposes of voting in a benefited water district election? Also assume that the individual involved is the owner of the property in the water district but does not claim homestead exemption on the property within the district).

"A further problem we have had with this election is that at the time of the actual election the judges felt two individuals were not residents of the district. Their votes were set aside and not counted. Several days later, after the results had been announced in the newspaper and the County Supervisors had completed their canvass, the judges, upon protest by the two individuals, were not so sure that the individuals were not residents. On this point they wanted to change their minds and allow the votes counted. It has been our position that this was impossible — that the election was concluded and that the remedy of the individuals whose ballots were rejected was one of appeal through the courts. Is this position consistent with the law, in your opinion?"

1. Section 357.12, Code of Iowa, 1971, provides:

"357.12 Election. When the preliminary design and assessment have been approved by the board of supervisors, a date not more than thirty days after such approval shall be set for an election within the district to determine whether or not the proposed improvement shall be constructed and to choose candidates for the offices of trustee within the district. Except that where the benefited water district is wholly within the corporate limits of a city or town, the members of the city or town council shall be the trustees, and the provisions hereinafter referring to the election and terms of trustees are not applicable. Notice of the election, including the time and place of holding the same, shall be given in the same manner as for the public hearing heretofore provided for. The vote shall be by ballot which shall state clearly the proposition to be voted upon, and any legal voter residing within the district at the time of the election shall be entitled to vote. Judges will be appointed to serve without pay, by the board of supervisors from among the qualified voters of the district who will have charge of the election. The proposition shall be deemed to have carried if a majority of those voting thereon vote in favor of the same."

The answer to your first question is found in the last sentence of the foregoing statutory provision. Since a majority vote is required before the proposition shall be deemed to have carried a tie vote would mean that the proposed district was defeated.

2. We can find no provision of law which would prohibit the interested parties from proposing a new benefited water district for the same area immediately after rejection of their first proposal. However, they would have to start out by petitioning the board of supervisors in accordance with §357.1 and follow the entire procedure set forth in subsequent sections of Chapter 357. §357.1 provides in part, "The board of supervisors may, at its option, require a bond of the petitioners as provided in section 455.10," and in our opinion this clearly gives the supervisors authority to require the sponsors of a second proposed district to post a bond covering the expenses involved in the new proposed district including the cost of a second election.

3. Section 357.12 quoted above quite clearly states that, "any legal voter residing within the district at the time of the election shall be entitled to vote." Thus, it is residence that counts and the place where one

works is irrelevant in determining one's entitlement to vote in an election under Chapter 357. Similarly, whether or not one claims a homestead exemption on property is not pertinent, the standard is residence.

As stated in an earlier opinion of the attorney general, 1968 OAG 950:

"The answer to the question you have raised turns upon what is meant by the word 'resident' in Article II, §1, Constitution of Iowa. It is well settled in Iowa that the word 'residence' used in election statutes and in Article II, §1 of the Constitution means domicile. *Dodd v. Lorenz,* 210 Iowa 513, 231 N. W. 422 (1930); *Vanderpoel v. O'Hanlon,* 53 Iowa 246, 5 N. W. 119 (1880); *State v. Savre,* 129 Iowa 122, 105 N. W. 387 (1905). The acquisition of residence or domicile necessary to confer the right to vote is largely a matter of intent and the inquiry in each case necessarily becomes a subjective one. *Dodd v. Lorenz,* supra. Matters to consider in determining residence of a person in a particular case are: Where is his home, the home where he lives, and to which he intends to return when absent, or when sick, or when his present engagement ends. *Harris v. Harris,* 205 Iowa 108, 215 N. W. 661 (1927)."

In connection with residency requirements generally you should also take into consideration Chapter 49A, Code of Iowa, 1971, although I do not think it is especially relevant to the questions you raise.

We agree with your conclusion that it is not competent for the judges of election to change their minds and allow votes to be counted which they had previously refused to count after the supervisors have completed their official canvass. See e.g. *Stamos v. Gray,* 1936, 221 Iowa 145, 264 N. W. 919; *Dishon v. Smith,* 1859, 10 Iowa 212. On their face Chapters 57 and 62 dealing with contesting elections apply only to elections involving candidates rather than propositions. Thus, there is some question as to how those who are aggrieved by the outcome of your election should proceed. However, in *Patton v. Independent School District of Coggon,* 1951, 242 Iowa 941, 48 N. W. 2d 803, taxpayers were permitted to maintain a suit in equity to retrain the school district from selling bonds on the grounds of alleged irregularities in a special bond election because such taxpayers had no adequate remedy under election contest statutes.

May 6, 1971

MOTOR VEHICLES: Special permits for oversize vehicles — Chapter 321E, Code of Iowa, 1971. Truckers issued special permits by the Iowa State Highway Commission and county authorities are authorized only to operate their trucks on roads under the jurisdiction of the party issuing the permit; and when said trucks are operated on the roads not under issuing jurisdiction they violate the oversize laws of the Iowa Code. (Mowers to Allbee, Franklin County Attorney, 5/6/71) #71-5-5

Mr. Richard Allbee, Franklin County Attorney: Your office has requested an opinion of the attorney general regarding the following:

When a trucker has a state permit under [§321E.1] which allows him to operate legally on the highways under the jurisdiction of the State Highway Commission and an additional county permit which allows him to operate legally on the highways under the jurisdiction of that county, may the trucker be convicted of overweight and excessive length in another county when caught operating on a secondary road in that county?

We think clearly that the trucker committed a violation of the oversize and overweight laws.

Section 321E.1, Code of Iowa, 1971, provides as follows:

"321E.1 Permits by highway commission. The state highway commission and local authorities may in their discretion and upon application and with good cause being shown therefor issue permits for the movement of vehicles with indivisible loads carried thereon which exceed the maximum dimensions and weights specified in sections 321.452 through 321.466, but not to exceed the limitations imposed in sections 321E.1 through 321E.15. Permits so issued may be single-trip permits or annual permits. All permits shall be in writing and shall be carried in the cab of the vehi cle for which the permit has been issued and shall be available for inspection at all times. The vehicle and load for which the permit has been issued shall be open to inspection by any peace officer or to any authorized agent of any permit granting authority. When in the judgment of the issuing local authority in cities, towns, and counties the movement of a vehicle with an indivisible load which exceeds the maximum dimensions and weights will be unduly hazardous to public safety or will cause undue damage to streets, avenues, boulevards, thoroughfares, highways, curbs, sidewalks, trees, or other public or private property, the permit shall be denied and the reasons therefor endorsed upon the application. Permits issued by local authorities shall designate the days when the routes upon which loads may be moved within the county on other than primary roads."

Section 306.4, Code of Iowa, 1971, states:

"Jurisdiction of systems. Jurisdiction and control over the highways of the state are hereby vested in and imposed on (1) the state highway commission as to primary roads; (2) the county board of supervisors as to secondary roads within their respective counties; . . . ."

Section 306.3, paragraphs 1 and 3 of the 1971 Code define primary and secondary roads:

"1. The term 'primary roads' or 'primary road system' shall include those main market roads and highway traffic arteries, outside of cities and towns, which have been designated as primary roads under section 313.2 or which may hereafter be so designated as the law may provide.

* * *

"3. The term 'secondary roads' or 'secondary road system' shall include all public highways, outside of cities and towns, except primary roads and state park and institutional roads."

From the above it is apparent that the state and county have authority only to issue permits with respect to travel of oversize and overweight vehicles on their own particular roads.

Accordingly, it is the opinion of this office that truckers may operate overweight and oversize vehicles on the roads which are under the jurisdiction of the party issuing the special permit and that when he leaves that jurisdiction he violates the oversize and overweight laws pertaining to the new jurisdiction which he enters.

May 13, 1971

CITIES AND TOWNS: Compatibility. There appears to be no incompatibility between the offices of member of the city council and member of the local board of health. (Nolan to Sorg, State Representative, 5/13/71) #71-5-6

The Hon. Nathan F. Sorg, State Representative: This is in answer to your letter requesting an opinion as to whether there is a conflict of inter-

est when a man serves as a member of a city council and also as a member of the local board of health.

The duties and powers of the city council and the board of health are not subservient one to the other, nor is there a recognizable public policy against a person serving on both at the same time. Thus, under the tests set out in **State v. White,** 1965, 257 Iowa 606, 133 N. W. 2d 903, there appears to be no incompatibility between the offices of member of the city council and member of the local board of health.

May 19, 1971

NATIONAL GUARD: Section 1, Article 6, Constitution of Iowa; §§307.5, 306.3, Code of Iowa, 1971. The National Guard of the State of Iowa is a state institution and entitled to the services of the Highway Commission in the improvement of roads upon the Camp Dodge Reservation. (Strauss to May, Adjutant General of Iowa, 5/19/71) #71-5-7

Joseph G. May, MG, The Adjutant General: Reference is herein made to yours of January 19, 1971, in which you submitted the following:

"Construction of an additional access roadway for Camp Dodge has been programmed to accommodate the continually increasing traffic density in and out of the reservation resulting from operation of the Adjutant General's Office, and related staff activities, the Offices, Shops and Warehouses under the jurisdiction of the United States Property and Fiscal Officer, Headquarters of Organizations and Units stationed within the Reservation area, the Office of the Senior Army Advisor for the Iowa Army National Guard, and the flow of heavy vehicles serving the Iowa Liquor Control Warehouse. The inadequacy of the one existing access roadway is particularly acute during periods of ice and snow packed road conditions in the winter months.

"The requirement for an additional access roadway has been re-emphasized as a result of increased utilization of the Reservation for week-end and annual field training for the Iowa National Guard, stepped up tempo of the Iowa Military Academy Program, periodic operation of Highway Patrol training schools, and activities incident to operation of the recently established Iowa Law Enforcement Academy within the Reservation area.

"A topographical study of the area resulted in a determination that the most desirable location for the additional access road would be a thirty foot strip owned by the Des Moines and Central Iowa Railroad lying east of and parallel to the right of way of the said Railroad, from Grimes Road northwest to the intersection of the right of way with 5th Street within Camp Dodge, a distance of approximately 4,200 feet.

"The Executive Council, in their meeting held 27 July 1970, authorized the Office of the Adjutant General, to proceed with the construction of the additional access roadway into Camp Dodge, which transaction bore prior approval of the Attorney General's Office.

"The Adjutant General proposes to request action of the Highway Commission in construction of the roadway, as an institutional road, in accordance with the provisions of Section 307.5 (subsection 12) Code of Iowa 1971, which provides, in part, as follows:

" '307.5 DUTIES. Said Commission shall: * * * 12. Construct, reconstruct, improve and maintain state institutional roads and state park roads as defined in section 306.3 and bridges on such roads, upon the request of the State board, department or commission which has jurisdiction over such roads. This shall be done in such manner as may be agreed upon by the highway commission and the State board, department or commission which has jurisdiction.'

"Section 306.3 of the Code defines 'Institutional Roads' as follows:

" '2. The term "institutional roads" shall include those highway, either inside or outside of cities and towns, upon land belonging to the State at any institution.'

"Camp Dodge Military Reservation is a state owned facility, title thereto having been conveyed to the State of Iowa, by the Federal Government, in 1956, in accordance with authority in PL 50-84th Congress, and is under the jurisdiction of the Adjutant General of Iowa in accordance with the provisions of Sec. 29A.12 Code 1971.

"Opinion of the Attorney General is respectfully requested as to whether Camp Dodge Military Reservation may be considered an 'institution' for the purpose indicated."

In reply thereto I advise, Section 1 of Article 6 of the Constitution of Iowa, provides for the organization of the Militia of the State of Iowa, and provides further that such militia will be armed, equipped and trained as the General Assembly may provide by law. Under such Constitution provision, the General Assembly has heretofore and from time to time adopted statutes providing for the militia and for its training and equipment; specifically, §29A.2, Code of 1971, provides for the creation of an Army National Guard and an Air National Guard in the following terms:

"There is hereby created the Iowa national guard to consist of the Iowa army national guard and the Iowa air national guard. The Iowa army national guard shall be composed of such organized land forces, individual officers, state headquarters, and detachments, as may be prescribed from time to time by proper authority. The individual officers, state headquarters, and detachments, as may be prescribed from time to time by proper authority."

Whether such national guard so created is an institution within the terms of the statutes quoted by you has had no determination in Iowa. However, 18 Ruling Case Laws entitled Military, Paragraph 51, Page 1057 states:

"It may be laid down as a generally accepted rule that the organized militia of the states is a state institution — a governmental agency."

Moreover, it is so designated by other cases; Nebraska, in the case of *Bartling v. Wait*, 96 Neb 532, 148 N. W. 507, was held that the Nebraska National Guard was a part of the state government and as such a state institution. The Court stated in part:

"We have no difficulty in reaching the conclusion that the national guard of the state is a part of the state government. The Governor of the state is the Commander in Chief, and in times of peace the adjutant general and his assistants are paid a salary by the state, and an office is furnished for them * * *." 148 N. W. 507, 509.

The Court continued supra:

"The organized militia may also be considered to be a 'state institution' * * * Of course, the words 'state institution' in this connection may have two meanings; one the corporate, or in some instances the associated, body which carries on the activities for which it was organized, the other meaning the building or buildings in which that body exercises its proper functions and activities."

The Supreme Court of Kentucky in the case of *Commonwealth v. Sparks*, 201 Ky 5, 255 S. W. 859, held the national guard to be strictly a state institution in the following language:

"It will be of service at the beginning of the discussion to note that an organized state militia, by whatever name called, is strictly a state institution, and performs exclusively a state service."

Accordingly, in view of the foregoing, the Highway Commissioner upon request of the Adjutant General is authorized and directed to proceed in accordance with the provisions of §§307.5 and 306.3, Code of Iowa 1971.

May 19, 1971

ELECTIONS: Branch registration places; eighteen year old voters — §48.26, Code of Iowa, 1971. Eighteen year old persons are not entitled to vote in a school bond election. The establishment of branch registration places in those townships over 1000 population is required even though the school district only takes in parts of such townships. School districts may not be charged for the cost of branch registration places and for registration lists furnished for school elections. (Haesemeyer to Synhorst, Secretary of State, 5/19/71) #71-5-8

The Hon. Melvin D. Synhorst, Secretary of State: You have requested an opinion of the attorney general with respect to certain questions raised with you by Mr. Howard Gibbs, Black Hawk County Auditor. His letter to you sets forth the questions as follows:

"The Cedar Falls Community School District is having a School Bond Election May 24, 1971. This school district includes all of the City of Cedar Falls, which has permanent registration and also includes most of Cedar Falls Township and parts of 3 other townships, which are registered under County voter registration.

"Question 1. Do we still retain 18, 19, 20 year old registrations in separate files as per copy of attached letter by Attorney General, which we presume will be the case until such time as the necessary number of states ratify the amendment covering 18 year olds, and when this is ratified, will your office advise us as to when we can process these registrations?

"Question 2. Would we be correct to assume that 18, 19, and 20 year olds would not be able to vote in the above School Bond Election?

"Section 48.26 of the Code of Iowa states the County Auditor shall establish one branch registration place in every city, town, and township under his jurisdiction that has a population of one thousand or more during the 30 day period prior to the closing of the election registrar for any election for which registration is required. Days and time to be open to be determined by the Auditor.

"The area comprising the Cedar Falls Community School District covers 4 Townships or parts thereof, of which 3 are over 1000 population, as follows:

"

Population

Cedar Falls Township	1816	Covers approximately the entire district
Mt. Vernon Township	1367	Covers 3 sections out of 33
Washington Township	2235	Covers 6 sections out of 18
Union Township	691	

(See enclosed map of district)

"Presuming Section 48.26 covers School Bond Elections:

"Question 1. Are we required to establish branch registration places

in those townships over 1000 population, even though the School district only takes in parts of these townships as above?

"Question 2. Can we charge the cost of Branch registration places to the School District or is this an expense that has to be paid out of the County Voter Registration Fund?

"Question 3. Can we charge the School District the cost for registration lists for School elections, which we are required to furnish as per Section 48.8?"

As to the two questions concerning 18 year old voting the July 16, 1970, letter of the attorney general was written at the time when the constitutionality of the voting rights act amendments of 1970 to the voting rights act of 1965 had not been judicially determined. Since that time the United States Supreme Court has upheld the constitutionality of this enactment but only insofar as it authorizes 18, 19 and 20 year olds to vote for candidates for federal office. Hence, you should now proceed to process the registrations of individuals falling within these age brackets but in such a way that they are not commingled with the registrations of persons entitled to vote in all the elections. These individuals are only authorized to vote for candidates for United States Congress and for President and Vice President of the United States. They are not, of course, permitted to vote in a school bond election.

Turning next to your three questions concerning §48.26, Code of Iowa, 1971, it is our opinion that the establishment of branch registration places in those townships over 1000 population is required even though the school district only takes in parts of such townships. We have been unable to find any specific statutory or judicial pronouncements on this subject. However, §48.26 does provide, "The county auditor shall further establish at least one branch registration place in every city, town and township under his jurisdiction that has a population of 1000 or more during the thirty-day period prior to the closing of the election register for any election for which registration is required." In two recent opinions, 1970 OAG 698 and 1970 OAG 765, we have ruled that Chapter 48 including the provisions relative to branch registration apply to school elections. See also §48.2.

Your second and third questions relative to §48.26 suggest the possibility of charging the school district for the cost of branch registration places and for registration lists furnished for school elections. We have been unable to find any statutory basis for making these charges. On the contrary §48.18 would seem to indicate otherwise.

May 19, 1971

ELECTIONS: Mobile deputy registrars, age and residency requirements — Article II, §1, Constitution of Iowa, §48.27, Code of Iowa, 1971. Persons over 18, but under 21 years of age, may not serve as mobile deputy registrars. It is only necessary for appointment as a mobile deputy registrar that one be a resident of the county wherein he is appointed. The six months, sixty days, ten days residency requirements continue in effect until such time as the legislature sees fit to change them. (Haesemeyer to Synhorst, Secretary of State, 5/19/71) #71-5-9

The Honorable Melvin D. Synhorst, Secretary of State: You have requested an opinion of the attorney general with respect to certain questions which were raised with you by the Mayor of Spencer, G. H. Sonder-

gaard. In his letter to you Mayor Sondergaard asked:

"1. Considering the Voting Rights Act Amendments of 1970 as construed in *Oregon* vs. *Mitchell* (.....US.....), may persons over 18, but under 21 years of age, serve as Mobile Deputy Registrars?

"2. Considering the language of Section 48.27, Code of Iowa, 1971, must Mobile Deputy Registrars live within the jurisdiction of the Commissioner of Registration who appoints them, or is residence within the county sufficient?

"3. Considering the 1970 Amendment to Article II of the Constitution of Iowa, and the apparent lack of a statute enacted pursuant to that amendment to enumerate the qualifications of an elector, may election officials assume that the age and residency requirements for electors are the same as before the adoption of said amendments?"

Section 48.27, Code of Iowa, 1971, relating to mobile deputy registrars, provides among other things:

"The mobile deputy registrar shall be a person of known good character *who has reached the age of majority* and who is familiar with the registration laws of the state and shall be trained by the commissioner of registration in a manner he deems adequate." (Emphasis added).

Manifestly, the age of majority is still 21 irrespective of the fact that by Act of Congress persons 18 or more are permitted to vote in national elections. Ballentine's Law Dictionary, 3rd Edition, 1969, the Lawyers Co-operative Publishing Company, defines majority as being the age at which the person acquires contractual capacity. According to Webster's Third New International Dictionary, Unabridged, 1966, G. & C. Merriam Co., majority is, "the status of being of full legal age". Thus, in our opinion persons over 18, but under 21 years of age, may not serve as mobile deputy registrars.

On the question of residence requisite for appointment as a mobile deputy registrar §48.27 provides in relevant part:

"The commissioner of registration shall appoint at least six persons for each ten thousand inhabitants, or major fraction thereof, within his jurisdiction as mobile deputy registrars. . . . Mobile deputy registrars are authorized to secure registration of eligible voters anywhere in the jurisdiction of the commissioner of registration and shall make such reports of new registrations and changes as the commissioner of registration requests and shall take an oath of office administered by the commissioner of registration. . . . The mobile deputy registrar must be a resident of the county wherein he is appointed. . . ."

The language of the statute is quite clear and unambiguous. It is only necessary for appointment as a mobile deputy registrar that one be a resident of the county wherein he is appointed.

Article II, §1, Constitution of Iowa, as amended by the people at the 1970 general election provides:

"Section 1. Every citizen of the United States of the age of twenty-one (21) years, who shall have been a resident of this State for such period of time as shall be provided by law and of the county in which he claims his vote for such period of time as shall be provided by law, shall be entitled to vote at all elections which are now or hereafter may be authorized by law. The General Assembly may provide by law for different periods of residence in order to vote for various officers or in order to vote in various elections. The required periods of residence shall

not exceed six (6) months in this State and sixty (60) days in the county."

It is true as you point out that the law as it presently exists does not in so many words set down residency requirements for elections. However, one seeking to be permanently registered under Chapter 48 must on his oath swear that he has been a resident of the state of Iowa for at least six months, and of the county for at least sixty days, and of the precinct for at least ten days. And under §49.77 any person seeking to vote must sign a voter's declaration of eligibility containing a similar statement. Hence, it would seem that the six months, sixty days, 10 days requirements would continue in effect until such time as the legislature sees fit to change the required periods of residency.

May 24, 1971

COUNTY AND COUNTY OFFICERS: Conflict of Interest — Ch. 280A, 280A.12, §§331.1, 331.22, 332.3, Code of Iowa, 1971. The appropriation of county health funds for sheltered workshop operated by Area X Community College does not of itself give rise to claim of conflict of interest on part of college teacher who is elected to board of supervisors. (Nolan to Potter, State Senator, 5/24/71) #71-5-10

Hon. Ralph W. Potter, State Senator: This replies to your letter transmitting an undated clipping from the Cedar Rapids Gazette, which reports that Linn County Supervisor William Martin has been holding several public positions concurrently and there is a question of possible conflict of interest. The offices and positions presently held by Mr. Martin are: Trustee in bankruptcy, teacher at Kirkwood Community College and member of the board of supervisors.

Trustees in bankruptcy are required to be individuals who are competent to perform their duties and who reside in the judicial district within which they are appointed or corporations authorized by their charters to act as fiduciaries and having an office in the judicial district within which they are appointed. (11 U.S.C. §73) The appointment is made by the court pursuant to federal law.

Kirkwood Community College is an area college established under Ch. 280A, Code of Iowa. The area it serves includes the major portion of Benton, Linn, Jones, Cedar, Johnson, Iowa and Washington Counties and small portions of Tama, Poweshiek, Keokuk, Clinton, Delaware and Buchanan Counties. It is also known as Area X. In 1970 there were 127 persons employed on its professional staff. The governing board of an area college is a board of directors elected by the electors of the districts comprising the area. §280A.12.

Members of the board of supervisors are county officers elected by the qualified voters of the county. §331.1, Code 1971. They are compensated by salary for "all services rendered to the county" under §331.22. The supervisors have the general management of the business of the county including the power to examine all expenditures of county funds. §332.3.

There appears to be no statutory prohibition against an individual receiving simultaneous compensation from federal, area and county funds. Nor do the three positions described above fall in the class of incompatible offices under the tests set out in *State v. White*, 1965, 257 Iowa 606,

133 N. W. 2d 903, in that there is no inconsistency in the functions or revisory power involved in the duties.

It is my opinion that the fact that the county appropriates health fund money for the sheltered workshop operated by the area college is not sufficient ground to assert that a conflict of interest is created. Whether or not an individual has an illegal conflict of interest depends generally upon whether he uses the trust imposed upon him and the position he occupies to further his own personal gain. There is nothing of the sort indicated by the facts presented in connection with the request for this opinion.

May 24, 1971

TAXATION; Schools, Schoolhouse fund, use thereof — §278.1(7), Code of Iowa, 1971. The schoolhouse fund may not be used to construct a school bus garage and maintenance facility or to pay interest on stamped warrants. Such fund could be used to build a stadium, to build a Senior High Community College addition, to add rooms to an existing building, to buy mobile classrooms, to add a sprinkler to an existing building, to add an exit to the Senior High Fieldhouse, to revamp a playground and to purchase a lot 50 x 150 feet not adjoining a school property, and to pay architects' fees for work in the alteration of the Junior High Auditorium. (Haesemeyer to Davis, State Senator, 5/24/71) #71-5-11

The Hon. Wilson L. Davis, State Senator: You have requested an opinion of the attorney general with respect to a number of questions involving Keokuk's 2½ mill schoolhouse levy.

As I understand the matter a group of Keokuk citizens organized as the Keokuk Taxpayers Association, Inc. have challenged the 1970-1971 budget of the Keokuk Community School District because it contemplates using funds from the 2½ mill schoolhouse fund authorized by §278.1(7), Code of Iowa, 1971, for the construction of a school bus garage. Also, they raise questions as to the legality of the ballot used to authorize the imposition of the 2½ mill levy. Finally, they raise questions as to the use of the schoolhouse fund in the past to (a) build a stadium, (b) build a Senior High Community College addition, (c) add rooms to existing buildings, (d) buy mobile classrooms, (e) add a sprinkler system to an existing building, (f) add an exit to the Senior High Fieldhouse, (g) revamp playground, (h) purchase a lot 50 feet x 150 feet not adjoining a school property, and (i) pay interest on stamped warrants, and (j) pay architects' fees for work in the alteration of the Junior High Auditorium.

Because our reasonings and conclusions with respect to the school bus garage question will to a large extent determine our answers to questions (a) through (j) we shall deal with the school bus garage question in some depth and then answer the other questions somewhat more summarily.

Section 278.1(7) of the 1971 Code of Iowa is set forth in pertinent part as follows:

"The voters at the regular election shall have power to:

* * *

"7. Vote a schoolhouse tax, not exceeding two and one-half mills on the dollar in any one year, for the purchase of grounds, construction of schoolhouses, the payment of debts contracted for the erection of school-

houses, not including interest on bonds, procuring libraries for and opening roads to schoolhouses. . . ."

The ballot in question read:

"Shall the Board of Directors of the Keokuk Community School District, Lee County, Iowa, for the years 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, and 1977, be authorized to levy not to exceed 2½ mills on the dollar in any one year, for the purchase of schoolgrounds, construction of schoolhouses, *including the purchase of a school bus garage-maintenance building*, improvements to athletic fields and playgrounds, and the payment of debts contracted for the erection of schoolhouses, (*including purchase and rehabilitation of said school bus garage-maintenance building*, and improvements to athletic fields and playgrounds), not including interest on bonds, procuring libraries for and opening roads to schoolhouses." (Emphasis added)

The word "schoolhouse" as used in the statute must be defined in order to determine whether it includes a "school bus garage-maintenance building." Webster's Seventh New Collegiate Dictionary (1967) defines "schoolhouse" as "a building used as a school . . ." The Iowa Supreme Court, in *Livingston v. Davis*, 243 Iowa 21, 27, 50 N. W. 2d 592, 596 (1951), cited with approval *Alexander v. Phillips*, 31 Ariz. 503, 254 P. 1056, where the Supreme Court of Arizona held that stadiums for athletic games are included within the term "schoolhouse." However, there is no mention in this or other Iowa cases of "schoolhouse" encompassing a school bus garage-maintenance building.

60 OAG 341 dealt with the similar problem of whether a local school board could use some of the money from the 2½ mill school tax levy fund to purchase ground for the construction of a bus garage. The opinion cited Chapter 285 of the Code along with numerous other authorities for the proposition that the school district has a duty to provide transportation for its students. It concluded that monies from the school tax levy fund could be used to purchase grounds for the storage of buses without further approval of the electors. However, it went on to hold that the school was without authority to expend the funds for building a school bus garage. *Thus, when this opinion is read in conjunction with the statute, it seems reasonably clear that the money from the fund in question cannot be expended on a school bus garage-maintenance building with or without the voters' approval.* There simply is no statutory authority for the funds being used for that purpose.

The next question then is whether the inclusion of the statement referring to the purchase of a bus garage in the ballot invalidates that ballot, and in turn voids the election. A presumption in favor of the legality of an election exists. *Alexander v. Randall*, 257 Iowa 422, 133 N. W. 2d 124 (1965). Generally, a concluded election will not be overturned for an irregularity in the ballot unless the irregularity has interfered with the full and free expression of the popular will. 29 C.J.S. *Elections* §173(4) (1965). The Iowa Supreme Court has held similarly. In *State ex rel Schilling v. Community School District*, 252 Iowa 491, 106 N. W. 2d 80 (1961), it was stated that where mistakes of administrative officials are relied upon, prejudice must be shown to defeat an election fairly held. It was held in *Kirchoff v. Humboldt Community School District*, 253 Iowa 756, 113 N. W. 2d 706 (1962), that after an election has been held and the voters have spoken, the election will not be held invalid

and the voice of the people thwarted in the absence of fraud, prejudice or definite legislative pronouncement thereon. Here, the voters were given a clear choice and were not misled. *The full and free expression of the popular will seemingly has not been interfered with. At least no prejudice has been shown and, therefore, the election should stand.*

This does not mean, however, that because the election is valid that the schoolhouse fund can be used for a school bus garage-maintenance building or for any other purpose not specified in the statute.

Turning next to the other questions you raised it would be our opinion that the schoolhouse fund could be used to build a stadium. *Alexander v. Phillips*, 31 Ariz. 503, 254 P. 1056. The fund could be used to build a Senior High Community College addition, to add rooms to an existing building, to buy mobile classrooms, to add a sprinkler to an existing building, to add an exit to the Senior High Fieldhouse, to revamp a playground and to purchase a lot 50 x 150 feet not adjoining a school property, and to pay architects' fees for work in the alteration of the Junior High Auditorium. We think that construction of schoolhouses contemplates additions and improvements to school buildings and grounds and that architects' fees are necessary and part of such construction costs. As noted in an opinion of the attorney general dated May 20, 1958, Abels to Thomas, the word "grounds" in the statute is not modified by any limiting adjective, and it follows, therefore, that the section permits purchase of playgrounds or athletic fields as well as school sites. Hence, the schoolhouse fund could be used to purchase grounds not intended to be used or suitable for a schoolhouse site. It would be our opinion that use of the schoolhouse fund to pay interest on stamped warrants would be improper.

May 25, 1971

SCHOOLS: School officers — §§277.27 and 277.29, Code of Iowa, 1971. Secretary to School Board is a school officer and must reside in the school district. (Nolan to Stephens, State Senator, 5/25/71) #71-5-12

The Hon. Richard L. Stephens, State Senator: This letter is in reply to your letter of March 15, 1971, requesting an opinion on several questions relating to the qualifications of a school district secretary. The questions, which we have restated for brevity, are:

1. Is the secretary of the board of a local school district considered an officer of the board, and thus subject to the residency requirements and qualifications of §277.27 of the Code?

2. If the secretary must be a resident of the district and is not so qualified, what recourse and penalty is provided under the Code if the school board refuses to take remedial action to enforce the residency requirement?

In answer to the above questions I advise that the first question has been answered by an opinion of the Attorney General issued in 1956, which may be found at 1956 OAG 194 and which states that the secretary of the board of directors in a community school district must be a resident of such district. Secondly, the 1956 opinion further states that "the incumbent ceasing to be a resident" creates a vacancy in such office under §277.29. I am of the opinion that the 1956 opinion is correct and further as stated in 1928 OAG at Page 89, the proper remedy to test the right

of a school officer to hold office after such incumbent moves from the district is by Quo Warranto.

May 26, 1971

COUNTY AND COUNTY OFFICERS: Medical examiner's fee — §339.4, Code of Iowa, 1971. Medical examiner's fee is county expense. There is no authority for county auditor to file claim for medical examiner's fee against estate of decedent. (Nolan to Dillon, Louisa County Attorney, 5/26/71) #71-5-13

Mr. John L. Dillon, Louisa County Attorney: Reference is made to your letter in which it is stated that the county Auditor has been filing claims for $15.00 medical examiner's fee in all estates when applicable. The letter further states that the Auditor requested advice as to whether or not she should file such a claim, and if so under what authority. In answer to your request for assistance in this matter, we direct your attention to §339.4, Code of Iowa, 1971, which states in pertinent part:

"The death of any person shall be reported to the county medical examiner . . . The county medical examiner shall also regarding the cause and manner of death, reduce his findings to writing, promptly make a full report thereof to the state medical examiner on forms prescribed for such purpose, and deliver a copy of said report to the county attorney of his county. For each such preliminary investigation, including the making of the required reports, the county medical examiner shall receive a fee as set by the board of supervisors, plus his actual expenses, to be paid by the county for which the service was performed."

It appears from the above, the expense is a county expense and should not be charged against the estate of the deceased. Therefore, it is our opinion that the Auditor should not file a claim for medical examiner's fee in the estate. Section 339.13 makes further provision for the medical examiner to collect a fee as set by the board of supervisors when an application is made by person claiming the body for an examination certificate. However, there is no authority in the section cited for the Auditor to file a claim for such fee against the estate of the deceased.

May 27, 1971

LABOR: Military leaves of absence — §29A.43, Code of Iowa, 1971. A private employer must grant a military leave to an employee who is a member of the national guard or organized reserve only who is called upon to perform military service. There is no requirement that the employer continue to pay the individual concerned his full civilian salary. An employee ordered to active duty suffers no dimunition of his rights to vacation, sickness, bonus, or other employment benefits relating to his particular employment. There is no limitation on the period of service for which leave must be granted. (Haesemeyer to Hansen, State Representative, 5/27/71) #71-5-14

The Hon. Willard R. Hansen, State Representative: Reference is made to your letter of May 25, 1971, in which you state:

"I would like an opinion as to whether an employer has to grant only enough military leave to comply with the National Guard or military reserve requirements or whether he has to grant leave under any circumstances where orders are issued.

"It is my understanding that according to the Iowa Code an employer has to grant military leave at full pay when an employee is ordered to active duty. I had further assumed that this duty would only involve

that required to comply with the military rules and requirements in order to maintain a status of good standing or to qualify for retirement benefits and so forth. I was further under the impression that such requirements involved only two weeks' training each year."

Section 29A.43, Code of Iowa, 1971, provides:

"Discrimination prohibited — leave of absence. No person, firm, or corporation, shall discriminate against any officer or enlisted man of the national guard or organized reserves of the armed forces of the United States because of his membership therein. No employer, or agent of any employer, shall discharge any person from employment because of being an officer or enlisted man of the military forces of the state, or hinder or prevent him from performing any military service he may be called upon to perform by proper authority. Any member of the national guard or organized reserves of the armed forces of the United States ordered to temporary active duty for the purpose of military training or ordered on active state service, shall be entitled to a leave of absence during the period of such duty or service from his private employment, other than employment of a temporary nature, and upon completion of such duty or service the employer shall restore such person to the position held prior to such leave of absence, or employ such person in a similar position, provided, however, that such person shall give evidence to the employer of satisfactory completion of such training or duty, and further provided that such person is still qualified to perform the duties of such position. Such period of absence shall be construed as an absence with leave, and shall in no way affect the employee's rights to vacation, sick leave, bonus, or other employment benefits relating to his particular employment. Any person violating any of the provisions of this section shall be punished by a fine of not to exceed one hundred dollars, or by imprisonment in the county jail for a period of not to exceed thirty days."

Under this statutory provision a private employer must grant a military leave to an employee who is a member of the national guard or organized reserve only who is called upon to perform military service. There is no requirement that the employer continue to pay the individual concerned his full civilian salary although I understand some do after offsetting the military pay received. Under this code provision an employee ordered to active duty suffers no diminution of his rights to vacation, sickness, bonus, or other employment benefits relating to his particular employment. There is no limitation, two weeks or otherwise, on the period of service for which leave must be granted.

In the case of employees of the state or political subdivisions thereof they are entitled to be paid for up to thirty days during which they may be absent for military service. §29A.28, Code of Iowa, 1971.

May 28, 1971

MOTORCYCLES: PROTECTIVE HELMETS AND EYE DEVICES: PUBLIC SAFETY — §321.193 and Chapter 17A, Code of Iowa, 1971; Art. III, §1, Const. of Iowa. The General Assembly has power to require motorcyclists to wear protective headgear and eye devices if such are necessary to assure the safe operation of motorcycles for the protection of other users of the highway; and it may delegate this determination and the power to so restrict motorcycle operators' licenses to the Dept. of Public Safety. Such a restriction on licenses newly issued or renewed may be imposed by the department without rules or review by the Legislative Rules Review Committee under Ch. 17A. But the Commissioner's policy letter implementing the restriction constitutes rules and is not valid unless submitted for review under Ch. 17A. (Turner to Thordsen and Nicholson, State Senators, and Mayberry and

Small, State Representative, 5/28/71) #71-5-15

Hon. H. A. Thordsen, State Senator; Hon. Edward E. Nicholson, State Senator; Hon. D. Vincent Mayberry, State Representative; Hon. Arthur A. Small, Jr., State Representative: Each of you has requested an opinion as to the constitutionality of proposed action by the Department of Public Safety, through its Commissioner, Michael M. Sellers, to impose a restriction on all motorcycle operators' licenses issued on or after July 1, 1971, which would make it unlawful to operate a motorcycle on the public highways of Iowa without protective headgear and shatter-resistant safety glasses, goggles or face masks unless the motorcyclist still has a valid license not so restricted.

Senator Thordsen, you indicate you have received many requests from your constituents complaining about this requirement and that the general assembly has considered enacting such a requirement into law in each of the last two sessions but has failed to do so. You also submit that helmets make no contribution to the safe operation of a motorcycle; that they do no more than protect the head of the motorcyclist involved in an accident; that they impair the vision and hearing of the wearer; and that the helmet gives the operator a false sense of security and makes him less cautious. You also argue that goggles are obsolete and unnecessary because of the protection of fairings, windshields and bubble shields. And you contend that Commissioner Sellers' directive fails to provide specifications for helmets and eye protection.

Representative Small, you suggest that Mr. Sellers is usurping the authority and prerogatives of the general assembly and exercising legislative power constitutionally reserved to it.

I, too, have received numerous similar complaints and arguments from motorcyclists and others, including the American Motorcycle Association, that the proposed requirement is unwise, unnecessary and unconstitutional. It has been reported to me, for example, that California recently rejected mandatory helmets on the grounds that one's safety is an individual responsibility, not a matter for public law, and that a New Orleans appeal court held that the police power does not give a lawmaking body the right to force an individual to protect himself, such being contrary to the First and Fourteenth Amendments to the Constitution of the United States.

On the other hand, Commissioner Sellers informs me that thirty-three states have adopted such a requirement by law and that he has made a factual determination that his requirement is necessary not merely for the protection of the motorcyclist required to wear these devices, but for all others who use our highways. He finds that many of the new motorcycles have no windshields and at the relatively high speeds at which such vehicles often travel, the operator's vision may be suddenly impaired by wind, dust or the elements, or even by insects or stones. Of course, it is well known that automobile windshields are often cracked by rocks thrown up by other vehicles with great force. Mr. Sellers finds that motorcyclists struck in the head or eyes or suddenly blinded by dust, rain or even tears caused by the wind, too frequently lose control of their vehicles often doing injury to a passenger riding on the motorcycle or to other users of the highways. Thus, Mr. Sellers' requirement is not di-

rected toward compelling safety for the motorcyclist's own sake, but rather for the protection of the traveling public generally. Statistics of the department reveal that the popularity of motorcycles has increased enormously in recent years, as evidenced by the fact that there are now more than 60,000 motorcycles registered in this state. The department's projected estimate is that the figure will reach 75,000 by the end of 1971. In 1969, a total of 29 persons died in motorcycle accidents in Iowa, which figure rose to 41 in 1970. The public safety department therefore feels that the mandatory use of such helmets and eye protective devices is necessary to assure the public safety.

At the outset it may be questioned whether even the legislature has power to impose the requirement of helmet and goggles on a motorcyclist. I think it depends on the purpose of the requirement. In *Jacboson v. Massachusetts*, 197 U. S. 11, 25 S. Ct. 358, 49 L. Ed. 643, Justice Harlan, speaking for the United States Supreme Court in 1905, upheld a Massachusetts statute compelling vaccination for smallpox because smallpox was highly contagious and dangerous and while a person might properly refuse vaccination for his own sake he could not refuse when his vaccination would prevent not only his catching the disease but others catching it from him. This, notwithstanding that "quite often" or "occasionally" injury had resulted from vaccination and there was no way of determining with any certainty whether any particular person could safely be vaccinated. Absent showing that the person would be injured by the vaccination, it was compulsory. The court said:

"There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others."

Pointing out that liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will, but only freedom from restraint under conditions essential to the equal enjoyment of the same right by others, the court went on to say:

"Applying these principles to the present case, it is to be observed that the legislature of Massachusetts required the inhabitants of a city or town to be vaccinated only when, in the opinion of the board of health, that was necessary for the public health or the public safety. The authority to determine for all what ought to be done in such an emergency must have been lodged somewhere or in some body; and surely it was appropriate for the legislature to refer that question, in the first instance, to a board of health composed of persons residing in the locality affected, and appointed, presumably, because of their fitness to determine such questions. To invest such a body with authority over such matters is not an unusual, nor an unreasonable or arbitrary, requirement."

* * *

"There is, of course, a sphere within which the individual may assert the supremacy of his own will, and rightfully dispute the authority of any human government — especially of any free government existing under a written constitution — to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the

duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand."

While, of course, the danger of smallpox to the general public may be acknowledged to exceed that of bareheaded motorcyclists, the modern trend of our courts and legislatures has been to afford more and more protection to the general public whether individuals may like it or not. So, in *Wilson v. City of Council Bluffs*, 1961, 253 Iowa 162, 110 N. W. 2d 509, our Iowa Supreme Court upheld a city ordinance requiring fluoridation of water to prevent dental caries (a *non*-contagious disease) in children, under the general police power statute (§366.1, Code of Iowa) although fluoridation was not expressly authorized by statute and home rule was not then in effect. This notwithstanding a statute specifically prohibiting any person except a licensed pharmacist from selling certain enumerated poisons, including sodium fluoride, the ingredient the city proposed to inject into the water in a ratio of 1.2 parts to 1,000,000 parts of water (§205.5, Code).

While it may be conceived that a person in the free exercise of his individuality may not be compelled to wear a seat belt in his own automobile, to accept a blood transfusion when he is bleeding to death, or prevented from walking a tightrope across Niagara Falls, when his own life alone is at stake — interesting speculations about which I will not herein opine — he has no right either to endanger the lives of others or to interfere with the equal rights of others to enjoy the safety of the highways which he enjoys. Whether he drives a motorcycle, a tractor or a bobsled he must abide by rules calculated to prevent him from colliding with others or they with him. The power to make such rules is commonly delegated by the legislature to others, within the limits of proper guidelines, and all must abide by them for the common good and general welfare and safety of all.

§321.193, Code of Iowa, 1971, which Commissioner Sellers cites as authority for his action, provides in pertinent part as follows:

"Restricted licenses. The department upon issuing an operator's or chauffeur's license shall have authority whenever good cause appears to impose restrictions suitable to the licensee's driving ability with respect to the type of vehicle or special mechanical control devices required on a motor vehicle which the licensee may operate or such other restrictions applicable to the licensee, including licenses issued under section 321.194, *as the department may determine to be appropriate to assure the safe operation of a motor vehicle by the licensee.*" (Emphasis supplied)

This section of our law delegates to the department the power not only to "impose restrictions suitable to the licensee's driving ability with respect to the type of vehicle" but also such other restrictions "as the department may determine to be appropriate to assure the *safe operation*" of the motorcycle by the licensee. The section is not unlike many others in our Code which delegate such fact-finding power upon which the law makes, or intends to make, its own action depend. For example, §321.196 provides that the commissioner of public safety "may, in his discretion, authorize the renewal of a valid license upon application without an examination provided that * * * such person satisfactorily passes a vision test *as prescribed by the department.*" The question does arise,

however, whether the delegation contained in §321.193 is too broad or lacking in adequate guidelines. Our people have vested the power to make the law in the general assembly and this power cannot be delegated. Article III, Section I, Constitution of Iowa. *Lewis Consolidated School District v. Johnston,* 1964, 256 Iowa 236, 127 N. W. 2d 118; *Goodlove v. Logan,* 217 Iowa 98, 251 N. W. 39. But while the legislature may not delegate its power to make the law, it is well settled that it may make a law which delegates the power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. *Field v. Clark,* 143 U. S. 649, 12 S. Ct. 495, 36 L. Ed. 294. Application of these principles is difficult. On the one hand we are told that a statute which in effect reposes an absolute, unregulated, and undefined discretion in an administrative body bestows arbitrary powers and is an unlawful delegation of legislative power. The presumption that an officer will not act arbitrarily but will exercise sound judgment and good faith cannot sustain such a delegation of unregulated discretion. See the *Lewis* case, above, and the authorities cited therein at 127 N. W. 2d 126. On the other hand, in *Danner v. Hass,* 1965, 257 Iowa 654, 134 N. W. 2d 534, our Iowa Supreme Court held constitutional §321.210 of the Code which authorized the department of public safety to suspend the license of an operator upon showing that he has committed a "serious violation of the motor vehicle laws of this state." The question there was whether the words "serious violation" set up a sufficient or intelligible standard or guideline to permit the department to place its own interpretation upon them and our Court held they did. I am constrained to follow that decision and it seems to me that if the department has the power to suspend a driver's license upon its finding that the driver has committed a "serious violation" a determination by the department as to what is "appropriate to assure the *safe operation* of a motor vehicle" is a sufficient guideline for imposing restrictions upon a driver's license. Therefore, in my opinion, the department's action through Commissioner Sellers is not an exercise of legislative power but rather the imposition of a restriction already authorized by law on the department's determination that it was appropriate to the safe operation of a motorcycle.

The Commissioner of Public Safety is vested with a broad discretion to determine what is appropriate and necessary for the safe operation of motor vehicles upon our public highways. In the absence of any showing that he acted arbitrarily and capriciously in abuse of that discretion, his findings of fact in this regard are binding. In March and April, 1968, actions of a previous commissioner of public safety under authority of §321.193 were the subject of opinions of this office. In 1968 OAG 600, it was our opinion that under §§321.186 and 321.193, on due applications or license renewals, the department could require an operator to pass a test for motorcycle driving and that otherwise the department could restrict a motor vehicle operator's license to motor cars only, so that it was "not valid for motorcycles." We said, however, that operators holding current valid unrestricted licenses could continue to operate either cars or motorcycles without further examination until the date of expiration. The same is true in this instance and, in fact, the commissioner does not intend his restriction to become effective until July 1, 1971, and then only as to licenses issued after that date. A motorcyclist who has a license not now restricted may under the commissioner's requirement continue

to operate his motor vehicle without headgear or protective eye devices until that license expires. See also 1968 OAG 647 and 1968 OAG 672.

In the latter of these opinions, issued April 12, 1968 (at page 673) it was my opinion that although one or more legislators had attempted without success to effectuate the new motorcycle licensing policy by a specific law through bills introduced for the purpose of prohibiting persons from operating motorcycles without a valid motorcycle operator's license, failure to enact these bills could not amend the existing law or effect construction or interpretation of existing law. Thus, our legislature's failure to enact bills introduced in recent sessions for the specific purpose of requiring motorcyclists to wear headgear and eye protective devices does not invalidate the department's new requirement for an already existing law.

For all of these reasons, upon Commissioner Sellers' findings of fact, it is my opinion that the department of public safety may impose a restriction upon the licenses of motor vehicle operators that protective headgear and eye devices must be worn when operating a motorcycle. The wisdom and necessity of this requirement has long been vested in the commissioner of public safety. Of course, the legislature always has the opportunity to change this policy. But the attorney general does not make policy and questions of wisdom and necessity are not for him to decide.

Senator Thordsen, you stated that Commissioner Sellers' directive does not provide specifications for helmets and goggles. In my opinion, "protective headgear and eye devices" would probably be considered sufficient description by the court. Motorcyclists, as well as the general public, know what these devices are. And in a given case, whether a motorcyclist is wearing such devices and whether they are protective, are questions of fact with which reasonable people would have little difficulty. However, Commissioner Sellers in a proposed "policy letter" which he submitted to me on May 27, 1971, sets forth his specifications for both helmets and eye protective devices. A copy of that letter is hereto attached and made a part hereof.

Mr. Sellers has requested my opinion as to whether his policy letter, which he equates with the restriction he intends to impose upon motorcycle operators' licenses issued after July 1, 1971, must be submitted to the legislative rules review committee pursuant to Chapter 17A, Code of Iowa, 1971. The letter is not actually a matter of policy in the legislative sense but rather rules proposed by the department to implement the restriction under authority of §321.193. We have said that the department of public safety is not required to write rules restricting licenses for the operation of motorcycles when it is authorized to do so by statute (1968 OAG 647) and that it is not necessary in imposing such restrictions that the department make and promulgate a new rule or rules subject to the review provisions of Chapter 17A (1968 OAG 672). However, when a new rule *is* promulgated by any administrative agency, state board, commission, bureau, division, officer, or department which has state-wide jurisdiction, it is subject to review under the provisions of Chapter 17A unless it relates only to the internal operation of the agency or to the management, discipline or release of any person committed to any state

institution, or as a rule made necessary during emergencies such as floods, epidemics, invasion, or other disasters; or unless it comes within some other exception. §17A.1. The rules set forth in Mr. Sellers' policy letter do not appear to fall in any such exception. Thus, while the restriction may be imposed without rules and the scrutiny of a Chapter 17A review avoided, any rules, including these to implement the restriction, are nevertheless subject to the provisions of Chapter 17A as requisite to their validity. This is not an advisory opinion under §17A.6 with respect to the form or legality of the proposed rules set forth in the policy letter, since they have not been submitted to me for that purpose.

June 4, 1971

COUNTY AND COUNTY OFFICERS: Secondary roads — Chapter 28E, §306.4, Code of Iowa, 1971. County board of supervisors may enter into agreement with private agency for the construction and maintenance of secondary road under the jurisdiction of the county board. (Peterson to Straub, Kossuth County Attorney, 6/4/71) #71-6-1

Mr. Joseph J. Straub, Kossuth County Attorney: Reference is made to your letter of May 3, 1971, requesting an opinion upon the following set of facts:

"(a) Kossuth County Road No. FAS-78 fails to meet the requisite design standards for FAS improvement funds. Within the next five years it is anticipated that such road will be improved with FAS funds or State Aid Funds or both.

"(b) Oak Lake Properties Incorporated, a private developer, and the Kossuth County Board of Supervisors have entered into an agreement for the construction of a dam and a roadway over it. An engineering feasibility study determined that the plan was feasible and that improvement of the county road to meet the minimum standards would cost the county $70,000; whereas participation in this joint project with the private developer would cost approximately $35,000.

"(c) A Joint Maintenance Agreement would require the county to pay one-third for the maintenance of such dam.

"(d) The county's participation in the construction agreement (b) and in the maintenance agreement (c) are in exchange for the county's right to construct and maintain the road over the dam.

"(e) The construction of the dam, embankment and roadway which embody the entire joint project will be supervised by the county engineer and comply with federal design standards or better.

"(f) The Iowa Natural Resources Council has approved the project.

"(g) The Iowa State Highway Commission has approved the roadway design.

"(h) The private developer contemplates to sell 350 to 400 lots in the project area. Each lot owner would become a shareholder in a new and separate corporation established to maintain the dam and lake area and to control and construct a sewer, water, street, access and recreation areas in the project area. Such corporation shall be responsible for two-thirds of the maintenance cost of the project."

In essence, the question posed by your letter is whether a county board of supervisors may enter into an agreement with a private corporation for the joint construction and maintenance of a dam and embankment also serving as a secondary road.

Under the provisions of §306.4, Code of Iowa, 1971, county boards of supervisors have jurisdiction over secondary roads within the county.

The joint exercise of governmental power contemplated in this situation is authorized and governed by Code Chapter 28E. This Chapter authorizes any public agency (defined as including any political subdivision of the state) to enter into an agreement with any private agency (defined as any form of business organization authorized under the laws of this or any other state) for the joint exercise of powers capable of exercise by the public agency.

It seems clear that the segment of county road involved is part of the secondary road system within Kossuth County under the jurisdiction of the Kossuth County Board of Supervisors and we assume the "private agency" involved is duly incorporated under the laws of this or another state.

The purpose of Chapter 28E concerning the joint exercise of governmental powers is to provide for efficient use of public services through cooperation for mutual advantage with other public agencies and with private agencies. Too, it is axiomatic that public agencies cannot enter into agreements which exceed their statutory grant of authority.

In this instance, the grant of authority involved is §306.4 authorizing the Board of Supervisors to construct and maintain secondary roads and county participation in the joint undertaking must be limited to county highway purposes. Thus county participation in the joint undertaking should be limited to construction and maintenance of the dam and embankment which also serve as a secondary road and should not include the construction, maintenance and control of sewer, water, street, access areas, recreation areas, etc. planned for the remainder of the project.

The form of agreement furnished with your request for an opinion does not contain all of the provisions required by Chapter 28E. The authority granted by said Chapter can be exercised only in strict compliance therewith. Sections 28E.4 through 28E.10 list these requirements in detail.

In summary, we are of the opinion that a county board of supervisors may enter into an agreement with a private corporation for the joint construction and maintenance of a dam and embankment which also serve as a secondary roadway.

June 4, 1971

CONSTITUTIONAL LAW: Administrative searches — Amendments 4 and 14, U. S. Constitution; Constitution of Iowa, Article 1, §§8 and 9; §§136B.5(6), 206.6 and 455B.14, Code of Iowa, 1971. Except in certain emergency situations, administrative searches, without consent, may be conducted only pursuant to judicial process. (Peterson to Garrison, Director, Iowa Legislative Service Bureau, 6/4/71) #71-6-2

Serge H. Garrison, Director, Iowa Legislative Service Bureau: Reference is made to your request for an opinion of this office with regard to whether constitutional standards are met by specific Iowa statutes, as follows:

"1. Chapter 162, section 5, subsection 6, Acts of the Sixty-second Gen-

eral Assembly (§136B.5(6), Code 1971), which reads as follows:

"Section 5. The department shall:

"6. Enter at all reasonable times in and upon any private or public property except private dwellings for the purpose of investigating an actual or possible source of air pollution, or of ascertaining the state of compliance with this Act or rules and regulations promulgated hereunder.

"a. No person shall refuse entry or access to any authorized representative of the department who requests entry for the purpose of an investigation, and who presents appropriate credentials; nor shall any person obstruct, hamper, or interfere with any such investigation.

"b. If requested, the owner or operator of the premises shall receive a report setting forth levels of emissions and any other facts found which relate to compliance status.

"2. Section 206.6, subsection 3, Code of Iowa, which reads as follows:

"3. For the purpose of carrying out the provisions and the requirements of this chapter and the rules and regulations made and notices given pursuant thereto, the secretary or his authorized agents, inspectors, or employees may enter into or upon any place during reasonable business hours in order to take periodic random samples for chemical examinations of pesticides and devices and to open any bundle, package or other container containing or believed to contain a pesticide in order to determine whether the pesticide or device complies with the requirements of this chapter. Methods of analysis shall be those currently used by the Association of Official Agricultural Chemists.

"3. Section 455B.14, Code of Iowa, which reads as follows:

"Permission to enter lands or waters. The commission, its agents, and employees of the state department of health may enter upon any lands or waters in the state and bordering on the state, for the purpose of making any investigation, examination, survey, or study concerning the quality or pollution of such waters."

The constitutionality of administrative searches or civil inspections authorized by statutes similar to those quoted above has been explored often and in depth by both state and federal courts in the light of the fourth and fourteenth amendments to the Constitution of the United States and corresponding provisions in state constitutions. In pertinent part, these amendments to the United States Constitution provide as follows:

"Amendment 4. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause. . . .

"Amendment 14. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

Of similar import are Sections 8 and 9, respectively, of Article I of the Constitution of Iowa.

In essence, the test to be applied is the reasonableness of the search or inspection under proper authority. Each such search or inspection must be reviewed in the light of two basic constitutional protections: (1) the right to be secure from intrusion into personal privacy, and (2) the right to resist unauthorized entry. Assuming compliance with the terms of the statutes, the question becomes one of whether searches conducted, without consent or warrant, under the authority and mandate of the

statute, are constitutionally reasonable.

This question was before the Iowa Supreme Court in the case of *State of Iowa v. Warren J. Rees, Judge*, 1966, 258 Iowa 813, 139 N. W. 2d 406. Relying heavily on the leading federal case on this constitutional question, *Frank v. State of Maryland*, 359 U. S. 360, 79 Sup. Ct. 804, 3 L. Ed. 2d 877 (1959), the court held that a reasonable search, lawful and mandatory under legislative enactment, is clothed with as much dignity and is entitled to as much consideration as a search under a warrant issued by a justice of the peace.

Subsequent to *Rees*, supra, the U. S. Supreme Court heard and decided two cases involving warrantless searches or inspections made pursuant to statute, one case involving a private dwelling (*Roland Camara v. Municipal Court of the City and County of San Francisco*, 1967, 387 U. S. 523, 18 L. Ed. 2d 930, 87 Sup. Ct. 1727) and the other (*Norman See v. City of Seattle*, 1967, 387 U. S. 541, 18 L. Ed. 2d 943, 87 Sup. Ct. 1737) a commercial establishment.

The Court, in specifically overruling *Frank*, supra, held that the search of private commercial property, as well as the search of private houses, is unreasonable except in carefully defined cases, and therefore prohibited by the fourth amendment if conducted without consent and without a warrant. In the Camara opinion, the Court said:

". . . we hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reasons put forth in Frank v. Maryland and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment's protections. Because of the nature of the municipal programs under consideration, however, these conclusions must be the beginning, not the end, of our inquiry. The Frank majority gave recognition to the unique character of these inspection programs by refusing to require search warrants; to reject that disposition does not justify ignoring the question whether some other accommodation between public need and individual rights is essential. . . .

* * *

"Having concluded that the area inspection is a 'reasonable' search of private property within the meaning of the Fourth Amendment, it is obvious that 'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling. . . .

"Since our holding emphasizes the controlling standard of reasonableness, nothing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations. See North American Cold Storage Co. v. City of Chicago, 211 U. S. 306, 53 L. Ed. 195, 29 S. Ct. 101 (seizure of unwholesome food); Jacobson v. Massachusetts, 197 U. S. 11, 49 L. Ed. 643, 25 S. Ct. 358 (compulsory smallpox vaccination); Compagnie Francaise v. Board of Health, 186 U. S. 380, 46 L. Ed. 1209, 22 S. Ct. 811 (health quarantine); Kroplin v. Truax, 119 Ohio St. 610, 165 N. E. 498 (summary de-

struction of tubercular cattle). On the other hand, in the case of most routine area inspections, there is no compelling urgency to inspect at a particular time or on a particular day. Moreover, most citizens allow inspections of their property without a warrant. Thus as a practical matter and in light of the Fourth Amendment's requirement that a warrant specify the property to be searched, it seems likely that warrants should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reason for securing immediate entry. Similarly, the requirement of a warrant procedure does not suggest any change in what seems to be the prevailing local policy, in most situations, of authorizing entry, but not entry by force, to inspect."

In *See*, supra, the Court held that ". . . administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure. We do not in any way imply that business premises may not reasonably be inspected in many more situations than private homes, nor do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product. Any constitutional challenge to such programs can only be resolved, as many have been in the past, on a case-by-case basis under the general Fourth Amendment standard of reasonableness. We hold only that the basic component of a reasonable search under the Fourth Amendment-that it not be enforced without a suitable warrant procedure-is applicable in this context, as in others, to business as well as to residential premises."

We are, therefore, of the opinion that:

(1) Except in certain emergency situations, administrative searches, without consent, may be conducted only pursuant to judicial process.

(2) Section 136B.5(6)(a) is unconstitutional and therefore unenforceable.

(3) The remainder of the statutes cited above are consistent with prevailing local policy of authorizing entry, but not entry by force without judicial process, to inspect and therefore are not objectionable on constitutional grounds.

For an earlier opinion of this office on a similar question, consistent herewith, see also Opinion of the Attorney General, 1968, p. 399, Zeller to Barrett, Bureau of Labor, 11/9/67, #67-11-12.

June 7, 1971

TAXATION: Food stamps — §§422.43, 422.49, Code of Iowa, 1971. Purchases made with "food stamps" by recipients of a federal gratuity are taxable sales. No government immunity attaches even though part of the funds are from a government fund. (Murray to Gluba, State Representative, 6/7/71) #71-6-3

The Hon. William E. Gluba, State Representative: You have requested an Attorney General's opinion concerning the legality of charging sales tax on food stamp purchases. In your letter of February 19, 1971, you state:

"It is my understanding that sales tax should not be collected since the purchasing value of food stamps is substantially based on federal funds."

While it is true that in many cases a state cannot tax the Federal

Government or its instrumentalities, there are exceptions. In *Alabama v. King & Boozer*, 1941, 314 U. S. 1, 62 S. Ct. 43, 68 2. Ed. 3, the United States Supreme Court upheld the validity of a state sales tax which was charged on purchases made by a "cost plus-a-fixed fee" contractor. The contractor had ordered and paid for the lumber but was reimbursed for all costs by the Federal Government. Title of the lumber also vested in the Federal Government. The Supreme Court decided that the government was not immune from this kind of tax burden since the Alabama Sales Tax was on the *"purchaser."* The contractor, not the government, was deemed to be the *"purchaser"* since the contractor had ordered the lumber and paid for it.

The present situation is very similar to the above case. The Iowa statutes on sales tax, §§422.43 and 422.49, Code of Iowa 1971, state:

§422.43. "There is hereby imposed a tax of three percent upon the gross receipts from all personal property consisting of goods, wares, or merchandise . . . sold at retail in this state to consumers or users; . . ."

§422.49. "It shall be unlawful for any retailer to advertise or hold out or state to the public or to any consumer, directly or indirectly, that the tax or any part thereof imposed by this division will be assumed or absorbed by the retailer or that it will not be considered as an element in the price to the consumer, or if added, that it or any part thereof will be refunded."

The key words here are "consumers or users." The consumers or users pay the tax which is collected and remitted to the state by the retailer and the retailer is prohibited from absorbing said tax. While federal money is being expended eventually to pay the retailer, the Iowa tax is on the consumer or user.

The Federal Government is not the consumer or the user of the food purchased with food stamps. The people residing within the "eligible households" (Federal Food Stamp Program Regulation 270.2(s) and 270.1) are the ones who are selecting and consuming the food. A survey of the debates in the United States Congress preceeding the passage of the Food Stamp Act of 1964 shows the food stamp program was instituted to give people a chance to decide what they wanted to buy (within the domestic food limit), when they wanted to buy and where they wanted to buy instead of doling out allotments of surplus cornmeal, lard, peanut butter and the like. (Congressional Record, Vol. 110, Pt. 6, pp. 7124-7157, April 7, 1964) It is evident the Federal Government is not doing the selecting or consuming of the food stuffs purchased under the food stamp program. Governmental immunity from state taxation would, therefore, not apply to the purchases made following the reasoning put forward in *Alabama v. King & Boozer* (supra) and by examining the Iowa statutes.

It could be argued that the mere fact a grant of federal money is involved means immunity attaches. However, the value of the food stamps over and above the amount the eligible household pays, or the "free coupons" (Federal Food Stamp Program Regulations 270.2(q)) is simply a gratuity from the government. Mr. Justice Bradeis in *Lynch v. U. S.*, 1934, 292 U. S. 571 (Page 577), 54 S. Ct. 840, 78 L. Ed. 1434, stated:

"Pensions, compensation allowances, and privileges are gratuities. They involve no agreement of the parties; the grant creates no vested

right. The benefits conferred by gratuities may be redistributed or withdrawn at any time within the discretion of Congress."

The federal money in the food stamp program falls within this category. No governmental immunity from state taxation applies to these privileges once the money or in this case food stamps comes within the control of the ultimate user, who is in fact the recipient of a gratuity.

This freedom of choice in the use of gratuities and federal benefits was litigated in relation to Social Security payments. A court of Civil Appeals in *Texas Baptist Children's Home v. Corbitt,* 1959, 345 S. W. 2d. 339, held that "federal law does not attempt to assert any control over the disposition to be made of Social Security payments after such have been paid into the hands of the lawful receiver." These funds may be used as the receiver deems proper. Any purchase made with money obtained through Social Security or by other federal benefits is subject to state sales tax, as are the food stamp purchases in Iowa. We also fail to find any attempt to assert control over food stamps once they are in the hands of the consumer, under the provisions of the Food Stamp Act of 1964.

The State of Illinois, Department of Revenue in Administrative Ruling 200-554, September 9, 1970, decided that food stamp purchases were exempt from their "sales" tax. The applicable Illinois Law, Illinois Revised Statutes, 120.441, is not a tax on "consumers or users" as under §422.43, Code of Iowa 1971, but is a "Retailers Occupation Tax" 120.441, Ill. Rev. Stat.

"A tax is imposed upon persons engaged in the business of selling tangible personal property at retail at the rate of 4¼% of the gross receipts from such sales of tangible personal property made in the course of business . . ."

Since the retailers receive their money for the redemption of food stamps almost directly from a federal reserve bank, Illinois has decided this would be taxing the Federal Government. The retailers are taxed on the gross receipts from sales, part of which if dealing with food stamps would be of federal origin.

Iowa is in no way bound by this Illinois Department of Revenue ruling since, as previously stated, the Iowa tax is on "consumers and users" and the Illinois on "retailers." The Iowa tax falls within the scope of *Alabama v. King and Boozer* (supra). Finally, it has been asserted that by the very nature of the federal money expended it falls within the purview of Justice Brandeis' remarks in *Lynch v. U. S.* (supra) and *Texas Children's Home v. Corbitt.* Once this money, or as in this case "food stamps," is in the hands of the receiver, he is free to use it as he pleases, federal control and federal tax immunity cease. The Iowa sales tax on food stamp purchases is valid.

June 7, 1971

COUNTY AND COUNTY OFFICERS: Road Classification — §306.6, Code of Iowa, 1971 (Ch. 1126, Acts, 63rd G. A., Second Session). Classification board must file notice of proposed classification in office of county engineer. Publication costs of notice of hearing on the proposed classification may be paid either from street fund or secondary road fund according to the roads to be subject to classification. (Nolan to Dillon,

Louisa County Attorney, 6/7/71) #71-6-4

Mr. John L. Dillon, Louisa County Attorney: This is in answer to your letter requesting an opinion on subparagraph 3 of §5, Ch. 1126, Laws of the 63rd G. A., Second Session. The statute, now §306.6, Code of Iowa 1971, relates to the classification of highways, and requires that a functional classification board shall be appointed for each county to classify each segment of each rural public road and each municipal street in accordance with the classifications found in the Act, and establish continuity between the systems within the county and the systems of adjacent counties. It further provides that the board shall:

"File a copy of the proposed road classification in the office of the county engineer for public information, and hold a public hearing before final approval of any road classification action. Notice of the date, the time, and the place of such hearing, and the filing of such proposed road classification for public information shall be published in an official newspaper in general circulation throughout the effected area, at least twenty days prior to the established date of the hearing."

Your letter states that the Act does not provide from what fund the cost of such publication is to be made.

In the absence of an appropriation to the functional classification board (which board by statute shall serve without additional compensation) it is our view that the cost of publishing the required notice may be paid from the street fund pursuant to §404.7, Code 1971, which authorizes municipal corporations to allocate the proceeds of the street fund be spent for, among other things, any purpose having to do with streets specifically authorized by law, or from the secondary road fund, pursuant to §309.9, Code 1971, which permits the secondary road fund to be used for costs incident to the construction and reconstruction of secondary roads, whichever may be applicable to the situation at hand.

June 7, 1971

COUNTY AND COUNTY OFFICERS: Board of Supervisors — Road Employees — Overtime pay. County road employees may be paid on an hourly basis or on a set salary basis with additional overtime rate fixed prospectively by the board of supervisors. (Nolan to Thomas, Mills County Attorney, 6/7/71) #71-6-5

Mr. James A. Thomas, Mills County Attorney: You have requested an opinion of the Attorney General on the question of whether a county Board of Supervisors has statutory authority to pay time and a half overtime to county employees when they work in excess of a 40-hour week.

The board does not have power to determine the working hours of employees of the various county officers. 1950 OAG 111. Their duties and compensation are fixed by statute and no contract may be made to provide additional compensation for extra work hours required to perform the work of the office. 1911-12 OAG 379. Therefore, the general rule has been previously stated that overtime pay is not allowable to county employees. 1950 OAG 111.

It is the county Engineer's duty to direct and supervise county employees on road construction and maintenance work. 1948 OAG 150. But, it is the duty of the Board of Supervisors to establish the feasibility of

such work and to allocate funds. Consequently, the board has been deemed to have exclusive power to determine the sick leave, vacation time and work hours for such employees. 1970 OAG (Nolan to Smith, State Auditor, March 5, 1969)

In 1950 OAG 70 you will find the following:

"While we find no specific authority for boards of supervisors to allow their highway maintenance employees vacations with pay, and while it is true authority must be found to authorize the expenditure of tax funds by boards, we do not feel the allowance of paid vacations is to be classified as a gift or reward, but rather as a benefit to the employer. . . . It does not, of course, apply to the occasional or casual worker.

* * *

". . . in this regard the state itself has established a suitable standard for vacations and sick leave and specifically provided its conditions. This should be the limit of the expenditure of tax moneys for this purpose."

I am of the opinion that the Board of Supervisors has authority to provide that the county road employees be paid either on the hourly basis or on a set salary basis with additional compensation for overtime work at a rate determined prospectively. The Iowa State Highway Commission has been advised that it may pay its road employees in such manner. (Haesemeyer to Coupal, Director of Highways, Iowa State Highway Commission, 9/25/68) There appears to be no reason precluding the county Board of Supervisors from employing the same method of paying overtime to the county road employees under its jurisdiction.

June 7, 1971

SCHOOLS: Joint Board of Education — Acquisition of Building — §273.22, Code of Iowa, 1971. Joint county boards may acquire buildings for approved courses, programs and services and pay for such buildings from available state or federal funds. (Nolan to Atwell, Office of Auditor of State, 6/7/71) #71-6-6

Mr. H. E. Atwell, Public Accounts Audit Supervisor, Office of Auditor of State: This is in reply to your letter requesting an opinion of this office on the following:

"Does the Joint Board of Education have the authority to acquire, either by gift or purchase, land and to erect and equip a building thereon?

"If the answer is in the affirmative, what method can they use to finance the cost of acquiring, erecting and equipping the new building?"

Under §273.22(10), Code of Iowa 1971, the joint boards, subject to the approval of the state board of public instruction, are authorized to provide certain courses, programs and services, to "lease, acquire, maintain, and operate such facilities and buildings as deemed necessary to provide authorized courses and services and administer such authorized programs." The word acquire is not a term of art in the law of property but one in common use, which means to get as one's own, to obtain title to and the ownership of. *Boss v. Polk County*, 1945, 236 Iowa 384, 19 N. W. 2d 225. The funding for such activity may come from available state and federal funds (§273.22(11)). Otherwise, it appears that the joint board may only obtain adequate office facilities "by renting or leasing for a period not to exceed ten years." §273.22(7) Code, supra.

June 7, 1971

SCHOOLS: County Superintendent — Shared time services — County school system — desks — §§257.26, 273.13(5), Code of Iowa, 1971. Desks and equipment purchased for county school system personnel employed to provide services enumerated in Ch. 257 should be paid for from county board of education funds rather than general county funds. (Nolan to Green, Carroll County Attorney, 6/7/71) #71-6-7

Mr. David E. Green, Carroll County Attorney: You have requested an opinion of the Attorney General with respect to the following:

"[T]he Superintendent of the Schools, has ordered five desks and chairs and accessories which accompany these items of purchase plus filing cabinets for the additional county school employees which would be necessary because of the legislation passed by the 63rd General Assembly being specifically Senate File 1293 being an amendment to Section 257.26 of the 1966 Code of Iowa. He has asked that the Carroll County Board of Supervisors pay for this additional equipment out of the general fund and based upon the Attorney General's Opinion in the year 1944 at page 98 wherein the Attorney General stated that it is the duty of the County Board of Supervisors to furnish an office and necessary heat, light, stationery, etc. for the County Board of Social Welfare. The Board of Supervisors do not wish to pay for these desks and equipment from the general fund but believe that it should be paid from the County Board of Education's funds and requests an opinion if they must pay for this equipment from the County general fund.

"Their reasoning is that the County Board of Education's taxing district is different from the county's general taxing center, the County being limited to borders of the County and the school district being comprised of the entire area of the school district in which the administrative center is located. The Carroll County Board of Education encompasses the Manning District which includes, Audubon, Shelby, Crawford and Carroll County. The Coon Rapids portion of the Carroll County Board of Education encompasses Carroll, Audubon, Guthrie and Greene County. The Glidden school and the Carroll school just include Carroll and Greene County. It would be my understanding that the County Board of Education and the employees of the County School System would service all of these outlying areas as well.

"They further state that the County school budget is set up independently of the Board of Supervisors who represent Carroll County and thus Carroll County has no jurisdiction over the County Board of Education, nor is there any limit on the levy which can be made by the Carroll County Board of Education, whereas the County general fund is limited to a three mill levy and no funds have been allotted for purchase of additional equipment.

"They further distinguish the Attorney General's Opinion in the year 1944 in that this opinion referred to offices which were under the control of the Board of Supervisors of the County, wherein the County School System is a separate entity and has separate levying and taxing powers."

Under §273.13(5), Code of Iowa 1971, the county Board of Education is authorized "To purchase and provide such general school supplies and other materials as are necessary to the conduct of its office."

It is our view that the funds for the equipment added to the superintendent's office pursuant to §257.26 should be paid for from the county Board of Education funds pursuant to such §273.13(5).

June 10, 1971

CONSTITUTIONAL LAW: Budget and Financial Control Committee,

Contingent Fund — Art. III, §1, Constitution of Iowa; Senate File 572, 64th G. A., First Session. A statutory provision subjecting expenditures from a one and one-half million dollar contingent fund appropriation and the approval of the acquisition and sale of real estate to the budget and financial control committee would constitute an unconstitutional delegation of legislative power and would also amount to an exercise, by the legislature, of executive power. (Turner to Neu, State Senator, 6/10/71) #71-6-8

The Hon. Arthur A. Neu, State Senator: In your letter of June 8, 1971, you have requested an opinion of the attorney general as to the constitutionality of certain sections of Senate File 572, First Session, 64th General Assembly, a bill for an Act relating to the control and use of state funds, powers of the budget and financial control committee and providing an appropriation. This bill, a copy of which is hereto attached and made a part hereof, provides for the creation of a budget and financial control contingent fund to be administered by the budget and financial control committee with allocations to be made therefrom for certain enumerated purposes. One million five hundred thousand dollars, or so much thereof as may be necessary, is appropriated from the general fund for deposit in the budget and financial control contingent fund and it is provided in §3 that before expending any funds appropriated for the construction of new buildings, repairs, improvements, replacements, or alterations, or any other capital expenditures, the contracts, plans and specifications, or plan of operation for improvements, shall be submitted to the budget and financial control committee. "If the budget and financial control committee does not approve of the capital expenditure as being in the best interests of the state, the funds shall not be expended."

The bill also provides, in §5, that §218.94, Code of Iowa, 1971, is amended to provide that the commissioner of the department of social services shall have full power, subject to the approval of the executive council and, in addition, to the budget and financial control committee to secure options to purchase real estate and to acquire and sell real estate for the proper use of institutions of the department of social services. And, similarly, §262.9 of the Code is amended to subject disposal of real estate by the board of regents to approval of the budget and financial control committee in addition to approval of the executive council.

I notice that an amendment filed on June 9, 1971, by you and several other Senators, would not only substantially reduce the appropriation for each year of the biennium and limit the appropriation to salaries, support, maintenance and miscellaneous purposes, but would also delete requirement of approval by the budget and financial control committee from §§5 and 6 and would also strike §3 in its entirety.

In my opinion, subjecting the expenditure of the appropriation and the approval of the acquisition and sale of real estate to the budget and financial control committee would constitute an unconstitutional delegation of legislative power and would also amount to an exercise, by the legislature, of executive power. See 1964 OAG 44 and 1964 OAG 47, copies of which are hereto attached. The proposed amendment of June 9, 1971, referred to above, would appear to correct these constitutional defects.

June 14, 1971

INSURANCE: Credit Life, Accident & Health — §§515.48, 515.49 and 535.2, Code of Iowa, 1971. Commissioner of Insurance has general control, supervision and direction over all insurance business transacted in the state including credit. Companies selling such insurance may be required to show that the rate charged is fair in the light of the risk involved. However, there is not sufficient statutory guidelines to support a rule prescribing a maximum rate applicable to all companies. (Nolan to Fischer, State Representative, 6/14/71) #71-6-10

The Hon. Harold O. Fischer, State Representative: You have asked for an opinion as to whether or not the Commissioner of Insurance has authority to set maximum rates for credit life insurance coverage.

The general powers and duties of the Commissioner of Insurance are prescribed under §505.8, Code of Iowa 1971, as follows:

"The commissioner of insurance shall be the head of the insurance department, and shall have general control, supervision, and direction over all insurance business transacted in the state, and shall enforce all the laws of the state relating to such insurance.

"He shall supervise all transactions relating to the organization, reorganization, liquidation, and dissolution of domestic insurance corporations, and all transactions leading up to the organization of such corporations.

"He shall also supervise the sale in the state of all stock, certificates, or other evidences of interest, either by domestic or foreign insurance companies or organizations proposing to engage in any insurance business."

Provisions relating to credit life insurance are made under §§515.48 and 515.49, Code:

§515.48:

"Any company organized under this chapter or authorized to do business in this state may:

* * *

"8. Insure or guarantee and indemnify merchants, traders, and those engaged in business and giving credit from loss and damage by reason of giving and extending credit to their customers and those dealing with them, which business shall be known as credit insurance. Such insurance may cover losses, less a deduction of an agreed percentage, not to exceed ten percent, representing anticipated profits, and a further deduction not to exceed thirty-three and one-third percent, on losses on credits extended to risks who have inferior ratings, and less an agreed deduction for normal loss.

"Such coinsurance percentages shall be deducted in advance of the agreed normal loss from the gross covered loss sustained by the insured."

§515.49:

"No company authorized to transact business in this state as provided in this chapter, shall issue policies of insurance for more than one of the purposes or subsections enumerated in section 515.48, except as herein provided, as follows:

* * *

"6. Any domestic or foreign insurance company authorized in their state to transact the business specified in subsection 2 of section 515.48, if possessed of paid-up capital stock of five hundred thousand dollars,

may, in addition to transacting the business authorized by said subsection 2, transact the business of credit insurance as authorized by subsection 8 of said section."

Under the authority granted above, the Commissioner of Insurance has authority to supervise and direct credit life insurance business generally in this state.

Further, Code §535.2, provides in pertinent part:

"The insurance commissioner, after hearing where all interested parties shall be given an opportunity to be heard, shall approve a reasonable charge or premium for credit life and accident or health credit insurance. Such reasonable charge or premium shall allow a fair and reasonable return or profit for the risk involved in providing such coverage."

Under this section, a company submitting its credit life insurance policies for approval could be required to show that the rate charged for such coverage is fair in the light of the risk involved. However, there does not appear to be sufficient legislative guidelines for the Commissioner to mandate a maximum rate applicable to all companies selling such policies.

The power to make law is vested in the Legislature by Article III, Section 1, Constitution of Iowa. Decisions of what may best promote or be conclusive to the public good must be made by the General Assembly and cannot be delegated. *State ex rel Klise v. Town of Riverdale,* (1953) 244 Iowa 423, 57 N. W. 2d 63; *State v. Van Trump* (1937), 224 Iowa 504, 275 N. W. 569; *Lewis Consolidated School District v. Paul F. Johnson,* (1964) 256 Iowa 236, 127 N. W. 2d 118.

On the other hand, there can be some delegation of power to an administrative agency to be exercised in accordance with guidelines fixed by the Legislature. The rule in such cases is that the Legislature may delegate to an administrative tribunal power to find facts and prescribe rules not inconsistent with laws. *State v. Strayer,* 1941, 230 Iowa 1027, 299 N. W. 912. On finding a violation of laws an administrative agency may revoke or decline to renew a license issued by it. *Gilchrist v. Bierring,* 1944, 234 Iowa 899, 14 N. W. 2d 724. Also, an administrative agency may make findings of fact and impose restrictions which fill in the details for an already existing law. Opinion of Attorney General to Senators Thordsen and Nicholson, May 28, 1971.

While the Commissioner of Insurance, pursuant to §535.2, may find and determine that the rate of 65¢ per $100 credit life insurance coverage is a "reasonable charge" which allows "a fair and reasonable return or profit for the risk involved in providing such coverage" in a given case, I am of the opinion that there is presently no statutory guideline sufficient to support a "rule" within the meaning of Code Chapter 17A, whereby such maximum rate limitation can be imposed upon all companies selling credit life insurance coverage.

June 16, 1971

STATE OFFICERS AND DEPARTMENTS: Retirement Benefit—§294.15 and Ch. 97B, Code of Iowa, 1971. The foregoing numbered §294.15, Code of Iowa, creates a pension system and the foregoing designated Ch. 97B creates a retirement system. A pensioner eligible to the pen-

sion system §294.15 is entitled to the increase in such pension from the time of the increase from $75 to $100 per month (as well as her benefits under the Iowa Public Employees System), retroactive to the time of the increase. (Strauss to Bass, State Senator, 6/16/71) #71-6-9

The Hon. Earl G. Bass, State Senator: Reference is made to your request for an opinion on the allowance due and payable a retired school teacher who on November 1, 1957, qualified for a pension under the Teachers' Retirement Allowance Act (§294.25, Code of Iowa 1971) and on April 1, 1958, qualified for a retirement allowance pursuant to the IPERS Act of 1953 (Ch. 97B, Code 1971).

Our opinion is that this pensioner is entitled to the $100 a month provided by §294.15, has been so entitled since 1969 when this pension was increased from $75, and in consequence now is entitled to be paid an amount equal to the total sum in which the pension actually paid since the amendment of 1969 became effective fell short of the total at the rate of $100 a month. The pensioner's entitlement to an IPERS retirement allowance, which presently is $58.84 a month, is not, in our opinion, a barrier to pensioner's receiving the full $100 a month under §294.15.

The Iowa Public Employment Retirement System was established in 1953, the purpose being declared by the General Assembly as follows:

"The purpose of this chapter is to promote economy and efficiency in the public service by providing an orderly means whereby employees who become superannuated may, without hardship or prejudice, be replaced by more capable employees, and to that end providing a retirement system which will provide for the payment of annuities to public employees, thereby enabling the employees to care for themselves in retirement, and which by its provisions 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." §97B.2, Code 1971.

The IPERS Act provided for the creation of a special fund separate and apart from all other such money which system was financed by deductions from the wages of each member of the system by the employer. Specifically, the plan provides:

"Each employer shall deduct from the wages of each member of the system a contribution in the amount of three and one-half percent of the covered wages paid by the employer until the first of the month after the member's seventieth birthday or his termination or retirement from employment, whichever is earlier. The contributions of the member shall be matched by the employer." §97B.11, Code 1971.

The retirement annuities under this system were to be financed, and we are advised by the IPERS administrators they currently are financed, out of the deductions from the emoluments of the employees and the matching contributions of the employing government agencies. Thus the system is, as the General Assembly declared it was intended to be, actuarially sound. An exception to this must be noted, with reference to employees who were accorded retirement protection by reason of long service prior to 1953. However, we are advised that much, if not all the cost, of these annuities is covered by funds available from matching contributions retained by IPERS after refunds of deductions were made, and coverage withdrawn, in the case of employees leaving the public service.

It is clear and, indeed, beyond dispute that the IPERS plan is a *retirement system*, a leading definition and exposition of which was adopted and approved by our Supreme Court in deciding *Talbott v. Independent School District*, 1941, 230 Iowa 949, 299 N. W. 556.

"The distinction between pension and retirement pay is not artificial. The government and municipalities are interested in the faithful and effective discharge of duty by public servants, and a fund judiciously administered is an effective way to secure service of the highest type. * * * We said in Busser v. Snyder, 282 Pa. 440, 454 [128 A. 80, 85, 37 A.L.R. 1515], that the basis of retirement pay is neither charitable nor benevolent, but is the faithful, valuable service actually rendered over a long period of years. Retirement Acts, affecting many employees and officers, had been passed before the services were rendered, and the appropriations made, therefore, were for this 'delayed compensation for these years of [continued] service actually given in the performance of public duties in their respective capacities.' The court also states on pages 170, 177, 178 of 316 Pa., page 405 of 174A.: 'Where an allowance is made out of hand, gratuitously, and purely for past services, by the government, it is a pension, with all the attributes of a pension; but where the employee contributes a part of his salary or wages with a sum from the State or county under a quasi contractual relationship with the contributed reserve retirement system, the results are different, retirement pay made therefrom is not a pension; the contributions by the government, from their very nature, must be viewed in a different light. * * * The employee's contributions are as much wages or salary when deducted at the source as though they had been paid directly, * * *. But the funds the county or state contributes are absolutely vested in the system that has been created by it, except the right of withdrawal just discussed. To hold otherwise for the reason that employee contributions are not wages when compulsorily deducted would not only be unfair and unjust, but would circumvent all known equities. * * * To take an amount or to require an amount to be paid from a salary is a deduction of part of the salary and not a reduction of salary." *Retirement Board of Allegheny County v. McGovern*, 1934, 319 Pa. 161, at 168, 196, 174 A. 400.

That both retirement and pension programs are public purposes, for which public funds properly may be expended, seems to need no extended demonstration. Yet it is to be noted that the Iowa Supreme Court said in Talbott, *supra:*

"The conclusion to be deduced from all of these decisions holding that allowances paid to public employees from retirement funds, in part maintained by them, is that such allowances are not pure pensions, gratuities, or bounties, but are given in consideration of services which were not fully recompensed when rendered. And also that any contribution by the state, or any subdivision of it, by way of taxation or other public money, to such retirement or disability funds, is not a donation for a private purpose, but is a proper outlay for a public purpose, which purpose is to bring about a better and more efficient service in these various departments by improving their personnel and morale, through the retention of faithful and experienced employees."

The IPERS plan, however, did not provide adequate stipends for all the aging, deserving public servants who were not within its contemporary operation. The General Assembly in 1957 was asked to establish a pension plan for one class of such retirees, the situation being set forth in the Explanation to House File 165, 57th G. A., as follows:

"The purpose of this bill is to make a minimum retirement allowance for school teachers with 25 or more years of service who retired prior to July 4, 1953. These teachers whose average age is over 75 years are receiving an extremely low retirement allowance under the present law. The teachers with the most service (50 years or more) are allowed an

average of $25 per month and those with 30 years' service receive an average payment of $30 per month. This bill raises the minimum payments to be more in line with the lowest payments of other states."

The bill thus presented was duly enacted as Ch. 135, 57th G. A., with the title:

"An act to provide for minimum state retirement allowance payments to certain employees in the public schools in the State of Iowa who retired prior to July 4, 1953, and to make an appropriation therefor."

The Act of 1957 provided as follows:

"Section 1. Any person having attained the age of sixty-five who shall have been an employee, holding a valid teaching certificate, in the public schools of this state with a record of service of twenty-five years or more, including a maximum of five years out-of-state service followed by at least ten years service in this state prior to retirement and who shall have retired prior to July 4, 1953, shall be entitled to receive retirement allowance payments from the state of Iowa of not less than seventy-five (75) dollars per month. Such sums as are necessary to meet this minimum requirement shall be added to the retirement allowance payments, if any, now being received from the state of Iowa by individuals covered by the provisions of this Act.

"Applications for such retirement allowance payments shall be made to the employment security commission under such rules and regulations as the commission may prescribe. Eligible persons shall be entitled to receive such retirement allowance payments effective from the date of application to the commission, provided such application is approved, and such payments shall be continued on the first day of each month thereafter during the lifetime of any such person."

"Section 2. There is hereby appropriated from the general fund of the state of Iowa to the employment security commission an amount not to exceed two hundred fifty thousand dollars ($250,000.00), or so much thereof as may be necessary to carry out the provisions of this Act.

"Any balance remaining in the funds, to which appropriations are made by this Act, at the end of the ensuing biennium shall revert to the general fund of the state."

The evil to be remedied by this legislation, as outlined in the "Explanation," is the meagerness of the allowances to certain elderly school employees whose 25 or more years of service to education in this state was rendered many years ago, *before* the establishment of the now familiar retirement and disability funds built up by percentages deducted from wages with matching funds from employers. In the light of the opinion of the Supreme Court of Iowa quoted in the foregoing, this clearly is a *pension* act. More precise application of the terms of the act, and the later amendments, is aided by noting how these terms have been understood and defined by the General Assembly.

In the legislative charter of the Peace Officers Retirement System we find:

"The following words and phrases when used in this chapter shall, for the purpose of this chapter, have the meanings respectively ascribed to them in this section, except in those instances where the context clearly indicates a different meaning:

* * *

"15. 'Annuity' shall mean annual payments for life derived from the accumulated contributions of a member. All annuities shall be payable in

monthly installments.

"16. 'Pensions' shall mean annual payments for life derived from the appropriations provided by the state of Iowa. All pensions shall be paid in equal monthly installments.

"17. 'Retirement allowance' shall mean the sum of the annuity and the pension, or any benefits in lieu thereof granted to a member upon retirement." §97A.1, Code 1971.

The act providing for Retirement Systems for Policemen and Firemen contains the following, almost identical, definitions:

"17. 'Annuity' shall mean annual payments for life derived from the accumulated contributions of a member. All annuities shall be payable in monthly installments.

"18. 'Pensions' shall mean annual payments for life derived from appropriations provided by the said cities. All pensions shall be paid in equal monthly installments.

"19. 'Retirement allowance' shall mean the sum of the annuity and the pension, or any benefits in lieu thereof granted to a member upon retirement." §411.1, Code 1971.

Well known to the law since the inception of contemporary relief and welfare programs, and in general use by private charity organizations in prior years is the "floor" schedule of grants. The theory is that the beneficiary ought to have a certain number of dollars for his needs. If he has them from any source, then he is entitled to no grant. If he has income, but less than the specified amount, then he may be granted funds to make up the deficiency. An example of such a theory is found in the Federal law establishing benefits for certain aging or disabled veterans. Title 38, §521, USCA. The level is fixed at $110 a month. But, the grant will be diminished or withheld from a veteran otherwise eligible who gets certain specified amounts of income from any other source, e.g., social security payments.

The original Retired Teachers' Act appears to be an application of the "floor" theory, in that it established "this minimum requirement" of retirement allowance payments from the State of Iowa of "not less than $75 per month." Income from other sources than retirement allowances from the state is not considered in measuring the income of the pensioner against the "not less than $75." But any and all such allowances from the state would, as it appears, operate under the terms of the "not less than $75" provision.

The "floor" theory of the original act has been examined here, not because it now has application to this question, but because in our opinion *it does not.* The General Assembly by amendment has substantially modified that theory and the limitations implicit therein.

The General Assembly since 1957 has adopted amendments to this Act to define "employees," and establishing, then repealing, a $450,000.00 limit on the appropriation. Those amendments are not involved here. What concerns this question is the Act of 1961, the relevant portion of which follows:

"Section 2. Section two hundred ninety-four point fifteen (294.15), Code 1958, is amended by striking from line twelve (12) the words "not less than."

"Said section is further amended by striking from line fourteen (14) the word 'minimum.'" Session Laws, 59th G. A., Ch. 165.

This express enactment makes an end of the "not less" and the "minimum" provisions of the original act, and had the amendment gone no farther, that would have been the end of the "floor" theory in this act as well. However, there were further provisions which preserved the "floor" principle in a modified form. The section cited above continued as follows:

"No such person shall receive retirement benefits from the state of more than seventy-five dollars ($75) per month."

This provision was not part of the bill as it was introduced in and approved by the House of Representatives. The report filed in the Senate by the Appropriations Committee was as follows:

"Mr. President: Your committee on appropriations to which was referred House File 65, a bill for an act relating to the appropriation for teachers' retirement allowance and the amount of such allowance, begs leave to report it has had the same under consideration and recommends the same be amended as follows; and when so amended the bill do pass:

"Amend House File 65 by adding at the end of section 2 the following:

'Said section is further amended by adding at the end of the first paragraph the following:

'No such person shall receive from the state more than seventy-five (75) dollars.'"

Lawrence Putney, Chairman.

Journal of the Senate, Page 292, 1961.

That provision, of course, would have reinstated the "floor" principle in a quite rigid form. Before the bill was called up for action, however, the committee reconsidered and reframed the proposed limitation. The *Journal* reports (Senate, 1961, Page 580):

"Senator Putney asked and received unanimous consent to withdraw the amendments filed by him as chairman of the committee on appropriations and found on pages 108 and 292 of the Senate Journal.

"The following committee amendment was considered:

"Amend House File 65 by adding at the end of section 2 the following:

'Said section is further amended by adding at the end of the first paragraph the following:

'No such person shall receive retirement benefits from the state of more than seventy-five dollars ($75) per month.'

"On motion of Senator Putney, the amendment was adopted."

The committee chose, with the care implicit in a *re-examination and redraft* of the amendment, wording which narrowed application of the "floor" theory limit to *"retirement benefits."* We think this legislative history makes both the legislative intent and the enactment wholly clear. The committee withdrew the rigid limitation, recommended a more liberal clause, which became the law.

The point is that there was language which already had been employed, as in the statutes cited above, by means of which a dollar limit on *"retirement allowance payments"* could be imposed if that had been the purpose of the General Assembly. Instead the committee chose and the General Assembly enacted a limitation merely on *"retirement benefits,"* that is on pensions, bounties or gratuities.

From this it follows that the pensioner here concerned may not receive more than $100 a month in "retirement benefits," but may be paid both her IPERS stipend, in such amount as the applicable statute may provide, and the $100 a month to which she is entitled under §294.15. This entitlement has been, of course, co-terminous with the pensioner's qualification under applicable statutes since their enactment and, *mutatis mutandis*, with the amendments enacted from time to time. We are advised that the pensioner concerning whom this question arose, was duly paid the $75 provided by the original act, but was not allowed the increase to $100 a month when this teachers' retirement allowance was raised by the amendment of 1969. Thus, for the period prior to this increase the petitioner was paid the full amount of her entitlement. For the period since the effective date of the amendment of 1969 she now is due the additional $25 a month, up to the present.

June 16, 1971

PUBLIC MEETINGS AND PUBLIC RECORDS: School Board Meetings and Minutes — §§28A and 68A, Code of Iowa, 1971. Meetings of school board committees are open to the public just as are all school board meetings except for the Code's three authorized exceptions, §28A.3. *All* school board minutes are public records. The Code does not require an established agenda, but proper notification of meetings must be given to the news media by the Board. (Turner to Johnston, Dept. of Public Instruction, 6/16/71) #71-6-11

Mr. Paul F. Johnston, Superintendent, Department of Public Instruction: Reference is made to your letter of May 28, 1971, propounding certain questions of law deemed to arise under Chapter 28A, Code of Iowa 1971, as follows:

(1) "Section 28A.1 refers to 'meeting' or 'meetings' and the definitions thereof, and goes on to say, '. . . includes all meetings of every kind, regardless of where the meeting is held, and whether formal or informal.' *If a local board appoints a member or members of a committee — for example, a curriculum committee, a finance committee on a bond issue, or a salary schedule committee — would these type of committees then be construed to be a committee of such a board even though the makeup of the board might be heavily outweighed by personnel; and if said members of board accepted the responsibility, would this in effect make these meetings open to the public?*

(2) "In regard to closed sessions, Section 28A.3 indicates that such meetings can be held on two-thirds affirmative vote of the members 'when necessary to prevent irreparable and needless injury to the reputation of an individual whose employment or discharge is under consideration . . . or for some other exceptional reason so compelling as to override the general public policy in favor of public meetings." *Would either of these definitions be construed to be sufficient grounds to cover the discussion of a salary schedule or the development of general policies in regard to personnel?*

(3) "Section 28A.3 states in part, '. . . no regular or general practice or pattern of holding closed sessions shall be permitted.' *Would this*

be determined by the regularity or pattern of the number of meetings, and would it have to be determined not only by the number and regularity of meetings but by the stated purpose of such meetings? Would voting to go into a closed session on the grounds that it is 'for the purpose of discussing personnel or for the selection of sites' be sufficient to meet the requirements of going into closed session? Is there any requirement that minutes be kept of the discussion or proceedings by the board in closed session? If such minutes are kept, are such minutes then open to the public under Chapter 68A of the Code?"

(4) "Section 28A.4 requires each public agency to give advance public notice of the time and place of each meeting. *Is there any implication in this that would require the board to have an established agenda so that people could know what business might or might not be expected to be discussed at such a board meeting?"*

(5) "Section 28A.4 provides that advance notice of meetings shall be given the public 'by notifying the communications media.' *If a board can show that its secretary has notified the 'communications media,' is this sufficient compliance with the statute in cases where it develops that the 'media' had not deemed the event sufficiently newsworthy to mention in its publication or news broadcast? If, in adidtion to notifying the 'media,' the board has posted its schedule of meetings on bulletin boards or places accessible to the public, is it then sufficient compliance?"*

These questions are governed both by Chapters *28A* and *68A*, Code 1971, and by the public policy evident therein. So that it is appropriate and convenient here to set out both statutes *in extenso:*

Chapter 28A:

"28A.1. All meetings of the following public agencies shall be public meetings open to the public at all times, and meetings of any public agency which are not open to the public are prohibited, unless closed meetings are expressly permitted by law:

"1. Any board, council, or commission created or authorized by the laws of this state.

"2. Any board, council, commission, trustees, or governing body of any county, city, town, township, school corporation, political subdivision, or tax-supported district in this state.

"3. Any committee of any such board, council, commission, trustees, or governing body.

"Wherever used in this chapter, 'public agency' or 'public agencies' includes all of the foregoing, and 'meeting' or 'meetings' includes all meetings of every kind, regardless of where the meeting is held, and whether formal or informal.

"28A.2. Every citizen of Iowa shall have the right to be present at any such meeting. However, any public agency may make and enforce reasonable rules and regulations for conduct of persons attending its meetings and situations where there is not enough room for all citizens who wish to attend a meeting.

"28A.3. Any public agency may hold a closed session by affirmative vote of two-thirds of its members present, when necessary to prevent irreparable and needless injury to the reputation of an individual whose employment or discharge is under consideration, or to prevent premature disclosure of information on real estate proposed to be purchased, or for some other exceptional reason so compelling as to override the general public policy in favor of public meetings. The vote of each member on the question of holding the closed session and the reason for the closed session shall be entered in the minutes, but the statement of such reason need not state the name of any individual or the details of the matter

discussed in the closed session. Any final action on any matter shall be taken in a public meeting and not in closed session, unless some other provision of the Code expressly permits such action to be taken in a closed session. No regular or general practice or pattern of holding closed sessions shall be permitted.

"28A.4. Each public agency shall give advance public notice of the time and place of each meeting, by notifying the communications media or in some other way which gives reasonable notice to the public. When it is necessary to hold an emergency meeting without notice, the nature of the emergency shall be stated in the minutes.

"28A.5. Each public agency shall keep minutes of all its meetings showing the time and place, the members present, and the action taken at each meeting. The minutes shall be public records open to public inspection.

"28A.6. This chapter does not apply to any court, jury, or military organization.

"28A.7. The provisions of this chapter and all rights of citizens under this chapter may be enforced by mandamus or injunction, whether or not any other remedy is also available.

"28A.8. Any person knowingly violating or attempting to violate any provision of this chapter shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than one hundred dollars."

Chapter 68A:

"68A.1. Wherever used in this chapter, 'public records' includes all records and documents of or belonging to this state or any county, city, town, township, school corporation, political subdivision, or tax-supported district in this state, or any branch, department, board, bureau, commission, council, or committee of any of the foregoing.

"68A.2. Every citizen of Iowa shall have the right to examine all public records and to copy such records, and the news media may publish such records, unless some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential. The right to copy records shall include the right to make photographs or photographic copies while the records are in the possession of the lawful custodian of the records. All rights under this section are in addition to the right to obtain certified copies of records under section 622.46.

"68A.3. Such examination and copying shall be done under the supervision of the lawful custodian of the records or his authorized deputy. The lawful custodian may adopt and enforce reasonable rules and regulations regarding such work and the protection of the records against damage or disorganization. The lawful custodian shall provide a suitable place for such work, but if it is impracticable to do such work in the office of the lawful custodian, the person desiring to examine or copy shall pay any necessary expenses of providing a place for such work. All expenses of such work shall be paid by the person desiring to examine or copy. The lawful custodian may charge a reasonable fee for the services of the lawful custodian or his authorized deputy in supervising the records during such work.

"68A.4. The rights of citizens under this chapter may be exercised at any time during the customary office hours of the lawful custodian of the records. However, if the lawful custodian does not have customary office hours of at least thirty hours per week, such right may be exercised at any time from nine o'clock a.m. to noon and from one o'clock p.m. to four o'clock p.m. Monday through Friday, excluding legal holidays, unless the citizen exercising such right and the lawful custodian agree on a different time.

"68A.5. The provisions of this chapter and all rights of citizens under this chapter may be enforced by mandamus or injunction, whether or not

any other remedy is also available.

"68A.6. It shall be unlawful for any person to deny or refuse any citizen of Iowa any right under this chapter, or to cause any such right to be denied or refused. Any person knowingly violating or attempting to violate any provision of this chapter shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than one hundred dollars.

"68A.7. The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release information.

"1. Personal information in records regarding a student, prospective student, or former student of the school corporation or educational institution maintaining such records.

"2. Hospital records and medical records of the condition, diagnosis, care, or treatment of a patient or former patient, including outpatient.

"3. Trade secrets which are recognized and protected as such by law.

"4. Records which represent and constitute the work product of an attorney, which are related to litigation or claim made by or against a public body.

"5. Peace officer investigative reports, except where disclosure is authorized elsewhere in this Code.

"6. Reports to governmental agencies which, if released, would give advantage to competitors and serve no public purpose.

"7. Appraisals or appraisal information concerning the purchase of real or personal property for public purposes, prior to public announcement of a project.

"8. Iowa development commission information on an industrial prospect with which the commission is currently negotiating.

"9. Criminal identification files of law enforcement agencies. However, records of current and prior arrests shall be public records.

"10. Personal information in confidential personnel records of the military department of the state.

"11. Personal information in confidential personnel records of public bodies including but not limited to cities, towns, boards of supervisors and school districts.

"68A.8. In accordance with the rules of civil procedure the district court may grant an injunction restraining the examination (including copying) of a specific public record, if the petition supported by affidavit shows and if the court finds that such examination would clearly not be in the public interest and would substantially and irreparably injure any person or persons. The district court shall take into account the policy of this chapter that free and open examination of public records is generally in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others. Such injunction shall be subject to the rules of civil procedure except that the court in its discretion may waive bond. Reasonable delay by any person in permitting the examination of a record in order to seek an injunction under this section is not a violation of this chapter, if such person believes in good faith that he is entitled to an injunction restraining the examination of such record.

"68A.9. If it is determined that any provision of this chapter would cause the denial of funds, services or essential information from the United States government which would otherwise definitely be available to an agency of this state, such provision shall be suspended as to such agency, but only to the extent necessary to prevent denial of such funds,

services, or essential information."

Our General Assembly has by these enactments established and given force to a public policy of guaranteeing the people full and complete knowledge of governmental affairs. Now declared by statute to be public records are, not only those which were so at common law, but also all manner of contemporary files and archives. In like manner, the General Assembly has enacted a guarantee not known to the common law, that public bodies, boards, councils and commissions, shall deliberate, make their decisions and conduct their business in public. The Legislature has recognized that equity or the public interest will, from time to time, require confidentiality. But as the statutory requirements of public access and observation are precatory and broad, the exceptions are precise and narrow.

Respect for this public policy, and the operation of these statutes, depend upon the good sense and the good faith of those who apply them and are bound by them. The law presumes both of these; if the presumption were not valid, there would be little point in enactment of laws by the Legislature or of efforts to administer them by officials.

Before undertaking to reply *seriatim* to the questions, there is one subject applying to several of them, which ought to be cleared up. There appears to have arisen among boards and councils a notion which needs to be dispelled if the law is to be followed, that a "meeting" is one thing and a "session" another. As the dictionaries instruct us, "meeting" is a very broad word which, among many other applications, comprehends all "sessions." And, almost every "session" is a "meeting," except for some special uses, such as the "session" of the General Assembly.

The courts many times have considered these words; it is helpful to note a few of their holdings.

A "meeting" is an assembling of a number of persons for purpose of discussing and acting upon some matter or matters in which they have a common interest. *American Brass Co. v. Ansonia Brass Workers' Union Local 445, Intern. Union of Mine, Mill and Smelter Workers*, 1953, 101 A. 2d 291, 293, 140 Conn. 457.

Term "session" in act requiring that amount of county tax be determined at session of board of supervisors on second Tuesday of September is synonymous with "meeting" provided for by statute on such date. *People ex rel. Ward v. Chicago & E. I. Ry. Co.*, 1936, 6 N. E. 2d 119, 121, 365 Ill. 202.

"Sessions," as used in statute providing that no ordinances of third-class cities shall be effective until they shall have been read and passed at two "sessions" of council held on different days, embraces "sittings" as "meetings" and was meant to cover two "sittings" held on different days, whether of same or different "meetings." "Session" does not have a single, fixed, and definite meaning, but is variously used in statutes and constitutions, and may be used synonymously with "meeting," or it may be used in its literal sense of "sitting." . . . The "meeting" may embrace but one session, or the meeting, though extending over several days, may be called a session of the body which is meeting and it is in the

latter sense that reference is made to "sessions" of the Legislature. *Town of Hodgenville v. Kentucky Utilities Co.*, 1933, 61 S. W. 2d 1047, 1048, 250 Ky. 195.

Under statutes requiring four sessions of the board of county commissioners a year, the words "session" and "meetings" are synonymous. *Turpin v. Hagerty*, Ohio, 47 Wkly. Law Bull. 809.

The meaning of the word "session" largely depends upon the connection in which the word is used, and may mean one thing in one section or paragraph of a law and something else in another. *Bond v. Mayor, etc., of Baltimore*, 1909, 74.A. 14, 17, 111 Md. 364.

QUESTION 1.

If a local board appoints a member or members to a committee — for example, a curriculum committee, a finance committee on a bond issue, or a salary schedule committee — would these type of committees then be construed to be a committee of such a board even though the makeup of the board might be heavily outweighed by personnel; and if said members of board accepted the responsibility, would this in effect make these meetings open to the public?

"Public meetings open to the public at all times" are "*all meetings*" of "*any committee*" of "any board, . . . of any . . . school corporation, political subdivision, or tax supported district in this state." Section 2, 8A.1(2), (3). That is the law of Iowa. The committees of the board are squarely within the statute. The committees stipulated in the question are to deal with board business, *i.e., public business*, with curriculum, finances, the salaries of public employees. What makes these committees board committees, and brings their meetings within this statute, is the fact that they are *board committees*, set up to transact *board business*, and *not* the number of board members serving on them. They would, under the circumstances indicated, be *board committees*, and the public would have a *right* to attend their meetings, even if no board members served on them. It would be a strange construction, indeed, if a statute enacted to assure that board meetings would be open to the public could be frustrated by handing over the board's duties, or some of them, to be exercised in secret by the board's employees.

A "meeting" of the county board of education presupposes consultation and discussion by a deliberative body looking to the best interest of the school system. *Board of Education of Marshall County v. Baugh*, 199 So. 822, 825, 240 Ala. 391, 1941.

What the court said here of the board is true of its committees. And conversely, where there is consultation and discussion of public business there is a "meeting" subject to this statute.

Nor can the requirement of this Iowa public meeting statute be evaded by such devices as "just getting together to talk things over," or the like. The term "meeting" comprehends "informal sessions or conferences of county board members designed for discussion of public business" and includes "deliberative gatherings however confined to investigation and discussion." *Sacramento Newspaper Guild v. Sacramento County Bd. of Sup'rs*, 1968, App., 69 Cal. Rptr. 480, 485.

QUESTION 2, and in part QUESTION 3.

In regard to closed sessions, Section 28A.3 indicates that such meetings can be held on two-thirds affirmative vote of the members "when necessary to prevent irreparable and needless injury to the reputation of an individual whose employment or discharge is under consideration . . . or for some other exceptional reason so compelling as to override the general public policy in favor of public meetings." Would either of these definitions be construed to be sufficient grounds to cover the discussion of a salary schedule or the development of general policies in regard to personnel?

Would voting to go into a closed session on the grounds that it is "for the purpose of discussing personnel or for the selection of sites" be sufficient to meet the requirements of going into closed session?

The answer to these salary and personnel questions is, in our opinion, manifest in their terms. The law authorized secret meetings for only three reasons (§28A.3). How can anyone conceive that "irreparable and needless injury" could be done anybody's reputation by discussion in open meeting of a "salary schedule," "the development of general policies in regard to personnel" or simply "personnel."

And, what is there about matters of this sort that possibly could generate in favor of secrecy "some other exceptional reason so compelling as to override the general public policy in favor of public meetings"? It is fact that the Federal Constitution was drafted behind locked doors in the utmost secrecy. But, somehow it is difficult to equate framing general policy by a school board with the drafting of the fundamental law of the land.

A proposal to close a meeting "for the selection of sites" might be a different matter; the question is *ad hoc*, with the proper answer depending upon the facts. Do the board members know, or in good faith believe, that their discussion of "selection of sites" will, or there is reasonable ground to fear that it will, lead to a "premature disclosure of information on real estate proposed to be purchased"? That is what the statute requires, to justify a closed session.

QUESTION 3.

Section 28A.3 states in part , ". . . no regular or general practice or pattern of holding closed sessions shall be permitted." Would this be determined by the regularity or pattern of the number of meetings, and would it have to be determined not only by the number and regularity of meetings but by the stated purpose of such meetings? . . . Is there any requirement that minutes be kept on the discussion or proceedings by the board in closed session? If such minutes are kept, are such minutes then open to the public under Chapter 68A of the Code?

The answer to the first part of this question manifestly and unequivocally is, yes. Whether there is a practice or pattern necessarily would depend upon the regularity or pattern. Whether the meetings *are or are not in compliance with the law* is a question wholly *ad hoc*, which can be resolved only upon consideration of the facts in each case. "The stated purpose of such meetings" would not, in our view, have anything to do with whether or not there was a "regular or general practice or pattern of holding closed sessions."

With reference to the minutes, it is to be noted that the statute requires:

"Each public agency shall keep minutes of all its meetings showing the time and place, the members present, and the action taken at each meeting. The minutes shall be public records open to public inspection." §28A.5, Code 1971.

No requirement appears that minutes be kept of the discussion. What the law does provide is that "any final action on any matter shall be taken in a public meeting and not in closed session, unless some other provision of the Code expressly permits such action to be taken in a closed session." §28A.3, Code 1971.

As already noted, the "closed session" is a meeting, of which minutes must be kept and these minutes are open to public inspection. This would *include the minutes* of *actions* authorized by law to be taken *in closed meetings.* If the minutes of an *action* could be kept a secret, how could the action have any force or effect?

QUESTION 4.

Section 28A.4 requires each public agency to give advance public notice of the time and place of each meeting. Is there any implication in this that would require the board to have an established agenda so that people could know what business might or might not be expected to be discussed at such a board meeting?

There appears no requirement in these statutes that an agenda be published in advance. The acts establishing or authorizing the councils, boards and commissions may require an established agenda; we presume that in such case boards and other agencies will follow the law.

QUESTION 5.

Section 28A.4 provides that advance notice of meetings shall be given the public "by notifying the communications media." If a board can show that its secretary has notified the "communications media," is this sufficient compliance with the statute in cases where it develops that the "media" had not deemed the event sufficiently newsworthy to mention in its publication or news broadcast? If, in addition to notifying the "media," the board has posted its schedule of meetings on bulletin boards or places accessible to the public, is it then sufficient compliance?

The statement of the statute in this question is incomplete. The law requires that the advance notice be given in a manner *"which gives reasonable notice to the public."* Whether the law has been obeyed does not rest on whether "a board can show" that its secretary did or did not do something. The duty is imposed by the statute on *"each public agency"* and not on the secretary. Whether the requirement of reasonable notice was met would be *ad hoc,* depending on the facts in each case. The statute would not be satisfied by having the secretary, or even the president of the board, call up a radio station at 7:55 p.m. with the news that the board would meet at 8:00 p.m. Nor would placing the schedule of meetings on bulletin boards the afternoon of the day they were to be held be compliance with the law. However, if the practice is what we assume it to be, that timely advance notice is communicated to the various media, and posted in public places, we are of the opinion that is enough.

Relevant to the subject, and to the questions propounded, are certain

prior opinions, copies of which are appended hereto, 1968 OAG 237, 1968 OAG 281, 1968 OAG 656, 1968 OAG 963, 1970 OAG 387.

June 17, 1971

COUNTY AND COUNTY OFFICERS: Recorder — §554.9407, Code of Iowa, 1971. Fees for certified copy of any filed financing statement is fixed by statute and no exceptions are provided therein. (Nolan to Erhardt, Wapello County Attorney, 6/17/71) #71-6-12

Mr. Samuel O. Erhardt, Wapello County Attorney: This is in response to your request for an opinion interpreting §554.9407, Subsection 2 of the 1971 Code of Iowa. This subsection provides:

"Upon request of any person, the filing officer shall issue his certificate showing whether there is on file on the date and hour stated therein, any presently effective financing statement naming a particular debtor and any statement of assignment thereof and if there is, giving the date and hour of filing of each such statement and the names and addresses of each secured party therein. The uniform fee for such a certificate shall be two dollars if the request for the certificate is on a form conforming to the standards prescribed by the secretary of state; otherwise, three dollars. Upon request and the payment of the appropriate fee the filing officer shall furnish a certified copy of any filed financing statement or statement of assignment for a uniform fee of one dollar per page."

Your letter states that an agent for the Federal Internal Revenue Service has been requesting certificates and refuses to pay for the same. The recorders office interprets "request of any person" to include the Federal Internal Revenue Agent.

It is our view that the section of the Code cited provides no exceptions and should be applied equally to "any person" making a request for the available information.

June 17, 1971

COUNTY AND COUNTY OFFICERS: Clerk of Court — §606.7, Code of Iowa, 1971. A cardex file may satisfy the requirement of "lien book" if cards can be collected in a permanent volume at some time. Clerk is required to state the time the entry is made in the lien book. This may be done by time stamp. (Nolan to McNeal, Hardin County Attorney, 6/17/71) #71-6-13

Mr. Clark E. McNeal, Hardin County Attorney: We have received your request for an opinion on two questions relating to the duties of the clerk of court. The questions which have been restated for the sake of brevity are:

1. Does a Cardex File constitute a proper lien book as contemplated in Chapter 606.7(7) of the Code of Iowa?

2. Does the entry of the judgment on a card which is filed alphabetically in a file where each card is contained in a plastic holder and arranged in the tray so that the name of each judgment debtor is visible satisfy the requirements of Chapter 606 insofar as the Clerk of Court is concerned?

3. Should the Clerk of Court file stamp be used as the date of entry as the judgment in view of the provisions of §624.24, Code of Iowa 1971?

In answer to the first question, §606.7, Code of Iowa 1971, provides that:

"The records of said court shall consist of the original papers filed in all proceedings, and the books to be kept by the clerk thereof as follows:

* * *

"7. Lien book. One in which an index of all liens in said court may be kept."

In accordance with the rules of statutory construction set out in §4.1, Code of Iowa, words shall be construed "according to the context and approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, shall be construed according to such meaning." The word "book" is generally defined in Webster, Seventh New Collegiate Dictionary, as "a set of written, printed, or blank sheets bound together into a volume. . . . a volume of business records of any of various kinds." However, in *Town of Bennington v. Booth*, 140A157, 101 Vt. 24, 57 ALR 156, a town clerk was not required to discontinue recording instruments by photostatic process or to recopy records made on loose sheets which were not actually bound until later date and which were required by statute to be in "books."

If the cards in the card file can at some later date be collected in a permanent volume the statutory requirement that the clerk of court keep a index of all liens in the court in a "lien book" will be clearly satisfied. If this cannot be done, it would appear that a more permanent index system should be maintained.

In regard to your second question your letter states that the clerk enters on the index card the following information:

"a. name of judgment holder;
b. name of judgment debtor;
c. amount of judgment and interest due, if any;
d. date, hour and minute of entry of judgment;
e. book and page in the Appearance, Judgment Docket, and Fee Book (Combined Docket) where the judgment entry may be found."

Section 606.10, Code, states:

"When the clerk of the district court enters a lien, or indexes an action affecting real estate, on the records of his office, he shall, immediately in connection with the entry enter the year, month, day, hour and minute when the entry was made."

In *Gilbert v. Berry*, 1921, 190 Ia. 170, 180 N. W. 148, the Iowa court held that existence of the judgment lien is not dependent upon its entry in the index of liens. The index goes on to the question of notice to third persons. It is our view that §606.10 requires the clerk of the district court entering a lien in the lien book to state in connection therewith the exact time when the entry was made in the book. Since this apparently is not done under the present procedure in your county, we suggest that this additional information be added to the index. *Moreno v. Victor*, 1968, 261 Iowa 806, 156 N. W. 2d 305.

In answer to the third question, it is our view that the clerk's file stamp is an appropriate time record to use for the purpose of complying with §624.24, Code, which provides:

"When the real estate lies in the county wherein the judgment of the district court of this state or of the circuit or district court of the United States was entered in the judgment docket and lien index kept by the clerk of the court having jurisdiction, the lien shall attach from the date of such entry of judgment, but if in another it will not attach until an attested copy of the judgment is filed in the office of the clerk of the district court of the county in which the real estate lies."

June 18, 1971

COUNTY AND COUNTY OFFICERS: Recorders — §335.2, Code of Iowa, 1971. Instruments to complete on front page may be recorded as one page but if recorder acts on the directions of the person presenting such instrument for recording such instructions should be written and signed on the face of the instrument. (Nolan to Dutton, Black Hawk County Attorney, 6/18/71) #71-6-14

Mr. David J. Dutton, Black Hawk County Attorney: We have your request for an opinion on the question of what is the responsibility of the recorder when an instrument is presented to the County Recorder for recording with instructions that only the front page thereof be placed of record.

According to §335.2, Code of Iowa 1971:

"The recorder shall keep his office at the county seat, and shall record, and as speedily as possible, all instruments in writing which may be delivered to him for record, in the manner directed by law. All instruments filed for recordation or filing with the recorder shall have typed or legibly printed the names of all signers thereon including those of the acknowledging officers and witnesses, beneath the original signatures; provided, however, that in the event that such instrument does not contain such typed or printed names, the recorder shall accept such instrument for recordation or filing if accompanied by an affidavit, for record with the instrument, correctly spelling in legible print or type the signature appearing on said instrument. This requirement shall not apply to military discharges or military instruments, nor to wills or court records or to any other instrument dated prior to July 4, 1959. Failure to print or type signatures as herein designated shall not invalidate the instrument."

If an instrument is complete on the first page including the acknowledgment as prescribed by law, that page alone may be recorded at the request of the person delivering the same for record. In such case prudence dictates that such direction be written and signed on the face of the instrument by the person presenting the same for recording.

June 21, 1971

STATE OFFICERS AND DEPARTMENTS: Board of Regents — Retirement System — IPERS — §97B.42, Code of Iowa, 1971. The TIAA annuity retirement system in effect since 1944 is a statutory exception to the mandatory coverage provisions of IPERS. (Turner to Schroeder, State Representative, 6/21/71) #71-6-15

The Hon. Laverne Schroeder, House of Representatives: Reference is made to your letter of February 2, 1971, in which you state:

"I refer you to my letter dated February 24, 1970, requesting your opinion, and your answer dated April 2, 1970, from which I quote:

" 'You have also asked if TIAA and CREF could be construed to be a "retirement system" in the state which would meet the statutory definition of a valid alternate plan and thus be an exception to coverage under IPERS if a professor employed by the Board of Regents made an election to join said other "retirement system." You have further asked if TIAA and CREF are not valid retirement systems under the statutory exception whether or not all the individuals participating in those plans and not in IPERS since its inception date, July 4, 1953, should have been members of IPERS during the intervening years.'

"Your April 2, 1970, opinion replied that these issues would be resolved by an action pending in the Linn County District Court in which Merged Area X Community College filed an action for a Declaratory Judgment against the Iowa Employment Security Commission, and the Judgment of that court dated July 15, 1970, reads in pertinent part as follows:

" '3. That the exception to mandatory membership in the Iowa Public Employees' Retirement System provided by Section 97B.42, Code of Iowa for an employee who voluntarily elects to participate in another retirement system is limited to a public employee who voluntarily elects to participate in another statutory retirement system established and existing pursuant to express statutory authority.

" '4. That the alternate voluntary contributory pension and retirement annuity plan provided by the Plaintiff to its employees through the purchase of individual annuity contracts from the Teachers Insurance and Annuity Association of America and the College Retirement Equities fund is not a statutory retirement system within the intent and meaning of the exception to mandatory membership in the Iowa Public Employees' Retirement System provided under Section 97B.42, Code of Iowa and is not another statutory retirement system established and existing pursuant to express statutory authority.'

"The Judgment and Decree of the Linn County District Court holds: (1) That TIAA-CREF is not a statutory retirement system, and (2) that TIAA-CREF is not an alternative to the mandatory membership in IPERS required by §97B.42, Code of Iowa, 1971.

"For your information and examination, I wish to submit a comparison of contributions made by the State of Iowa for a member covered by IPERS and an employee at the same level covered by TIAA-CREF at a state university. You will note that the State of Iowa contributes the sum of $273.00 into your retirement fund as a member of IPERS, but the State of Iowa will contribute $2,339.68 into a retirement fund for a professor covered by the Board of Regents' alternative retirement plan and having a salary of $25,000.00 per year, and the State of Iowa will contribute $2,839.68 into a retirement fund for an employee covered by the Board of Regents' alternative retirement plan in the salary range of $30,000.00. In view of the difference in the contributions that the State is making for members of IPERS and members of TIAA-CREF, your answers to the following questions are imperative:

"1. As a result of the Linn County District Court opinion mentioned herein, should all employees of the Board of Regents be covered by IPERS?

"2. If the answer to question number 1 is in the negative, what authority does the Board of Regents have to establish an alternative retirement system to IPERS, and does this same authority extend to other state boards, commissions, agencies, or departments?

"3. If the Board of Regents and/or other state boards, commissions, agencies, or departments are entitled to establish TIAA-CREF as an alternate retirement plan to IPERS, is there any limitation on the amount of funds that the Board of Regents or other state boards, commissions, agencies, or departments can contribute as the employer's share to the employee's account in the alternative retirement plan?

"4. If there is such a limitation, has the Board of Regents exceeded this limitation by contributing the amounts shown in the enclosed attachment under the heading, 'State University, Employer's Contribution Rate'?

"5. If the answer to question number 1 herein is in the affirmative, what procedure should be taken to bring all employees of the Board of Regents under IPERS?"

Attached hereto is a copy of the schedule you submitted with your letter showing a comparison of the contributions made by the state for a member covered by IPERS and a regent's employee at the same salary level covered by TIAA-CREF. Also enclosed herewith are a copy of the April 2, 1970 opinion of the attorney general to which you make reference and a memo from the state comptroller's office received by you after the date of your letter of February 2, 1971. This memo indicates that TIAA-CREF eligibility is being expanded to allow 700 more persons to participate. I understand that these additional people are in non-academic positions and are, for the most part, student spouses. As noted, this expansion of the TIAA-CREF rolls will cost the state in terms of employer contributions an addtiional $40,000 just for the few months remaining in the current fiscal year which ends June 30, 1971.

Before answering your questions I would like to refer to my opinion to you dated April 2, 1970. You will recall that I said therein that in the opinion to Representative Holden, dated August 14, 1968, by Assistant Attorney General Elizabeth Nolan, we noted that the TIAA Pension Contract was available to employees of the University of Iowa because it was a plan which was in effect for approximately 9 years before the 1953 IPERS cut-off date. We also stated that because of this opinion, denying TIAA coverage to employees of the various area community colleges in the state, that the Area 10 Community College filed its petition for declaratory judgment asking the Linn County District Court to resolve the issue. We sent you a copy of this petition filed by the college and we called your attention to Paragraph 13 therein where it was alleged that the college had a retirement system authorized by §97B.42 and was an exception to the mandatory requirements of that section. We then said, "If the plaintiff college is to prevail in this action, it must introduce evidence that the above-mentioned retirement plans are those which are impliedly defined in §97B.42."

As you have mentioned in your request for an opinion, Judge Naughton held that TIAA-CREF was not a statutory retirement system and that it was not an alternative to the mandatory membership in IPERS required by §97B.42, Code of Iowa 1971. This office inquired into that decision and learned that the case was submitted to the judge on the basis of a stipulation of facts and conclusions of law; it was not tried on its merits, no evidence supporting an exemption was introduced, and the attorneys representing the parties mutually agreed upon a consent judgment and decree which was submitted to the court, signed by him and entered of record.

It was apparently a decree that both parties could live with since the effect of it was, after making certain allowances for refunds, that the employees of the area colleges would not be penalized and their contribu-

tions to the TIAA would be considered as validly made, but that from and after July 1, 1971, said employees must participate in IPERS.

You will also recall that in our opinion to you of April 2, 1970, we noted that the language in §97B.42 was ambiguous. We are still of that opinion. In addition, we not only think that the language referred to is ambiguous, but we are also of the opinion that the factual situation surrounding the acts of those parties interested in seeing to it that the TIAA Retirement System was exempt from the mandatory provisions of §97B.42, can also be said to be ambiguous and vague. We say this after a complete and thorough examination of the various steps, documents, minutes of meetings of the then Board of Education, opinions of the Attorney General, opinions of Social Security lawyers in their interpretations of the Iowa statutes and the TIAA Contracts, and review of the rather lengthy and thorough Legislative Study Committee Report and its recommendations to the Fifty-fifth (55th) General Assembly made by Senator Herman B. Lord as Chairman of the Iowa Old Age and Survivors Insurance System Special Study Committee. The Lord Report on the subject of TIA is of some interest, and we are attaching a copy of same for your information.

After reviewing all of the before-mentioned materials we are of the opinion that a valid argument can be made that the TIAA Retirement System, based upon the intent of the Legislature at the time IPERS was enacted, is a valid and legitimate alternate retirement system within the wording of §97B.42, and is another retirement system which was exempt from the mandatory provisions of said section.

We reach this conclusion for the following reasons:

(1) The words used by the Legislature when originally enacted §97B.42 are ambiguous and vague. Their ambiguity lies in the fact that they are susceptible to more than one interpretation. They are vague since the words used refer to a group or a class which must be determined by reference to extrinsic facts in order to properly identify the subject of their reference. It is a well known statutory rule of construction that when a statute is ambiguous we must necessarily look to legislative intent in order to clarify the ambiguity, and we must indulge in the presumption that all of the words used by the Legislature must be given their plain meaning in order to arrive at a conclusion which will give effect to the law as enacted. The Legislature is presumed not to have done a useless act. *Janson v. Fulton* (1968), 162 N. W. 2d 438, 443; *Dingman v. City of Council Bluffs* (1958), 249 Iowa 1121, 1126, 90 N. W. 2d 742, 746; *Palmer v. State Board of Assessment and Review* (1939), 226 Iowa 92, 95, 283 N. W. 415, 416; *Smith v. Sioux City Stock Yards Co.* (1935), 219 Iowa 1142, 260 N. W. 531, 535, 536; *Elks v. Conn* (1919), 186 Iowa 48, 54, 172 N. W. 173, 175.

(2) Great weight and consideration must be given to executive or administrative departments and their construction and practices under a statute over a lengthy period of time. *John Hancock Mut. Life Ins. Co. v. Lookingbill* (1934), 218 Iowa 373, 253 N. W. 604 (Secretary of State allowed foreign corporation to do business in state without permit for 20

years even though statute *required* permit, legislature presumed to know construction of statute); *In Re Stopps' Estate* (1953), 244 Iowa 931, 57 N. W. 2d 221, 224.

We have said that the language in §97B.42 is ambiguous. We set out the relevant provisions of said section in part as it was originally enacted by the 55th General Assembly:

"Each employee . . . who has not qualified for credit for prior service rendered prior to the effective date of this Act, . . . shall become a member upon the first date of the month following the month in which such employee is employed. He shall continue to be a member so long as he continues in public employment except that he shall cease to be a member if after making said election he joins another retirement system in the state which is maintained in whole or in part by public contributions or payments which has been in operation prior to the effective date of this Act and was subsequently liquidated and may have thereafter been reestablished. However, the participation in such other retirement system shall be voluntary and shall not be a condition for continuance of employment. * * *"

* * *

As we read the above language, it starts out by saying that each or all employees of the State of Iowa shall be subject to IPERS coverage. It then purports to create an exception to that coverage. The exception is created by proposing a right of election or a choice by a certain class of employees not defined. In other words we must look to some other source to determine what class of employees is the class to which the Legislature is referring. We then must next determine what "other retirement system" existed in the state which is maintained in whole or in part by public contribution or payments. At the time of its enactment there were several retirement systems in operation throughout the State of Iowa, and one in particular was the TIA contract.

Our next determination, to attempt to resolve the ambiguity in the language, is that we must then determine whether the retirement system "has been in operation," we assume from the tense of the verb that the Legislature was referring to a system that was in existence, prior to the effective date of the act and "was subsequently" liquidated and reestablished. Our query here is to the meaning of "subsequently," that is, whether it refers to a period of time after the effective date of the act or a period of time after the referred to retirement system was established.

In attempting to abide by the rules of statutory construction, namely that we must give words used their plain and ordinary meaning, our examination of the documents referred to above have led us to the conclusion that the Legislature, at the time it enacted the exception to the coverage from IPERS, could have had in mind no other plan than the plan approved by Attorney General Larson in his July 7, 1948, opinion to the then President of the Board of Education. You will note in the attached copy of the Lord Committee Report that the Legislature was perfectly aware that this "other retirement system" was not a creature of statute but was in existence and had been approved by Attorney General Larson. You will also note in Senator Lord's report to the Legislature

that he specifically stated that the payments to the TIA Retirement System "have been made from the support funds appropriated by each general assembly." We can find no other retirement plan under the statutes of the State of Iowa which meet the qualifications for an exception from IPERS coverage other than the TIAA Retirement System. This "system" was in effect prior to the effective date of the IPERS law, it was liquidated and later reestablished, and it was funded out of the wages of the employees of the Board of Education and appropriations made by each general assembly prior to the effective date of the IPERS law and we assume ever since that date.

We have also concluded that the Legislature is presumed to know the interpretation of a law given to it by an executive or administrative body which interpretation has existed for a long period of time. The interpretation placed upon this law by the Board of Education and its successor the now Board of Regents has been in existence since 1944, with minor modifications since 1953, a period of approximately 27 years. In our opinion this is a long period of time.

The original section of 97B.42, which was enacted in 1953, remains substantially unchanged; but, in 1967 the 62nd General Assembly, in Chapter 121, §10, added three new paragraphs to said section. These amendments are set out as follows:

"Nothing in this chapter shall be deemed to exclude from coverage, under the provisions of this chapter, any public employee who was not on or as of July 4, 1953, a member of another retirement system supported by public funds. All such employees and their employers shall be required to make contributions as specified as to other public employees and employers. Nothing in this chapter shall be deemed to prohibit the reestablishment of a retirement system supported by public funds which had been in operation prior to July 4, 1953, and was subsequently liquidated.

"Persons who are members of any other retirement system in the state which is maintained in whole or in part by public contributions other than persons who are covered under the provisions of Chapter 97, Code 1950, as amended by the Fifty-fourth General Assembly on the date of the repeal of said chapter, under the provisions of sections 97.50 through 97.53 shall not become members.

"Nothing herein contained shall be construed to permit any person in public employment to be an active member of the Iowa public employees' retirement system and of any other retirement system in the state which is supported in whole or in part by public contributions or payments except as heretofore provided."

Paragraph 2 of this amendment clearly recognizes and adopts the practice of the Board of Regents in our opinion.

With the foregoing comments in mind, I will answer the specific numbered questions asked by you.

1. You have asked whether, as a result of the Linn County District Court opinion, mentioned herein, all employees of the Board of Regents should be covered by IPERS? Our answer must be in the negative. As we have pointed out, the judgment entered in that case was by a stipulation of facts between the parties litigant and a consent judgment was drafted by said parties and entered by the court. There was no trial on the merits and no evidence was introduced to show that by virtue of an

Attorney General's opinion the Board of Education had established a retirement plan, which was well known to the Legislature that had enacted the original IPERS Act. Senator Lord's extensive report to the 55th General Assembly clearly shows that the Legislature must have had some "other retirement system" in mind when it created the exception to the IPERS coverage. None of these facts were before the court who entered the judgment by consent of the parties. A judgment by consent of the parties is in substance only a contract of record made by the parties and approved by the court. *Timmons v. Holmes,* 1958, 249 Iowa 888, 89 N. W. 2d 371, Citing 49 CJS Judgments, Sec. 173. Since this is so, it is binding only upon the parties who were parties to the action. As we view that judgment, it can only determine the rights of the parties to the action and it cannot, without a thorough hearing on the merits of the factual situation, bind employees of a different employer. Nor could that consent judgment be the basis of either a res judicata or collateral estoppel plea in any action which might be brought against the Board of Regents. We say this since the parties would not be the same nor could they be considered to be in privity with the plaintiff in the Linn County Case. *Hawkeye Life Ins. Co. v. Valley-Des Moines Co.,* 1935, 220 Iowa 556, 260 N. W. 669, 672, 105 ALR 1018. The duties of managing the State Universities and the authority to fix the compensation of their employees is vested in an appointed Board of Regents under the provisions of Chapter 262, while the management of and the related duties of administering the Area Schools are found in Chapter 280A and such authority is vested in an elected Board of Directors.

2. In answer to your second question, we have stated that the authority to establish the "other retirement system" was based upon Attorney General Larson's opinion of July 7, 1948. You will note he held that the then Board of Education had the right to pay part of the compensation to the employee in the form of wages and part of the compensation could be withheld and paid to a company of the employees' choice for the purpose of establishing a retirement plan. While no Iowa cases have dealt with this subject matter, the payment of salary derived from tax produced revenue by means of withholding for pension purposes of part of that salary amounts merely to a "salary reduction," and the funds so withheld are public funds. *Bedford v. White,* 106 P. 2d 469, 473, 106 Colo. 439. We have already pointed out that the other provisions of the exception to IPERS coverage found in §97B.42 were complied with and, therefore, the authorization granted by Attorney General Larson to establish the retirement system was recognized and confirmed by the Legislature who created the IPERS Retirement System for other state employees. We view this exception to IPERS coverage in favor of the Board of Regents as a grandfather clause which means that the other state agencies' boards and commissions have no authority to create or establish another retirement system and are bound by the mandatory provisions of §97B.42. Other state agencies and their employees must participate in IPERS and that retirement system only.

3. Our answer to your question 2, above, avoids necessity of answering your questions numbered 3 and 4.

5. Since the answer to question number 1 was in the negative, there is no need to answer your question 5. However, any retirement or pension

plan for state employees is always under the control of the Legislature, and the Legislature may at any time modify, change or otherwise establish an alternate system. *Talbott v. Independent School District of Des Moines*, 1941, 230 Iowa 949, 299 N. W. 556, 137 A.L.R. 234. The only limitation on that right is that situation which resulted when Chapter 97, the Old Age and Survivors Insurance System, was abolished and was replaced by the present retirement provisions for state employees found in Chapter 97B. It was considered a necessity that the rights of those employees who had participated under the old plan must necessarily be protected, and so they were by establishing a trust fund to be administered by the Employment Security Commission solely for the purpose of paying benefits to those who had vested rights in the abolished system.

We trust that you will excuse the delay in our getting this opinion to you, but I know that you are aware that we have examined a myriad amount of materials and records plus researching the law on the related questions arising from your request.

June 21, 1971

SCHOOLS: Student Enrollment — §257.26, §442.8, Code of Iowa, 1971; H.F. 121, 64th G. A., 1st Session. Part time students who are not simultaneously enrolled in an other school are not specifically referred to in H.F. 121, 64th G. A., 1st Session, and they may be counted in 1971 enrollment determinations in the same manner as in previous years. (Nolan to Smith, Dept. of Public Instruction, 6/21/71) #71-6-16

Mr. Richard N. Smith, Deputy Superintendent, Department of Public Instruction: You have requested an opinion as to whether the phrase "number of pupils in fall enrollment" in §442.8, Code 1971, includes dual enrollees enrolled in the public schools under the provisions of §257.26, Code. Your letter also poses the following questions:

1. If it does include such part-time students, are they to be included according to the proportion that the work for which they are enrolled bears to the normal workload of a full-time student, or are they to be included simply as enrollees without reference to the number of courses for which they are enrolled in the public school?

2. Are part-time students who are not simultaneously enrolled in any other school to be counted in the total enrollment figure on the same basis as dual enrollees, or on a different basis?

In the light of H.F. 121, recently enacted by the 64th General Assembly of Iowa (effective April 16, 1971), I advise that the phrase "number of pupils in fall enrollment" includes students enrolled in public schools in the fall of 1971 under Code §257.26 programs of dual enrollment, and that they should be counted according to the number of hours of instruction they receive in the public school.

Section 7 of the legislation recently enacted provides:

"Shared-time students shall be computed on the 1971 public school fall enrollment, and shall participate in the forty-five dollars for each pupil enrolled in a public school in each school district as appropriated in section six (6) of this Act. Shared-time student participation shall be counted on the basis of number of hours of instruction in a public school, proportionate to a full-time student enrolled in the district."

Since H.F. 121 makes specific reference to "shared-time" students and does not make specific reference to part-time students not simultaneously

enrolled at a nonpublic school, I am of the opinion that such part-time students should be treated in the 1971 enrollment determinations as they have been in prior years.

June 21, 1971

SCHOOLS: Special Education — §§280.22, 281.2, Code of Iowa, 1971. All school districts are required to provide special education services to those children requiring special education as provided in §281.2. School districts may contribute to the cost of area residential care programs conducted as part of county system. There is no requirement as to pre-enrollment training in special education programs. (Nolan to Kauffman, Jackson County Attorney, 6/21/71) #71-6-17

Mr. Ralph M. Kauffman, Jackson County Attorney: Your request for an opinion on questions relating to the special services for handicapped children has been received. Your letter presents six questions set out below:

"1. Is there any handicap which would not be covered by S.F. 409, Acts 63rd, 1st Session G. A.?

"2. Is there any dollar limitations per pupil per year for such special education as may be required?

"3. Must the special programs needed be within the State of Iowa, or if not available in Iowa, could the child be sent out of the state with fees paid by school district?

"4. Can school districts pay the costs of programs or help pay the costs of programs if the programs are furnished by agencies other than schools? For example, the care and training of severely mentally retarded in an institution like Area Residential Care?

"5. Can school districts pay the salaries of teachers for the training of retarded youngsters in an Area Residential Care facility?

"6. Must a child be toilet trained to be accepted into any special program for the handicapped in public schools?"

I am of the opinion that although the word handicapped is not defined in S.F. 409, Acts of the 63rd G. A., 1st Session, which may now be found as §280.22, Code of Iowa 1971, the special education services are to be extended to all children requiring special education as defined by §281.2, Code of Iowa. The latter section excludes children who are blind, deaf, or otherwise physically and mentally handicapped children attending special schools or institutions provided by the state.

In answer to your second question, I find no dollar limitation for pupil per year for such special education as may be required. Section 281.9 provides for reimbursement to school districts providing special education for the amount of the cost of educating children in special programs where the cost exceeds the cost of general education.

The answer to your third question is that in certain cases appropriate agreements might be entered into pursuant to Chapter 28E, Code of Iowa. Section 282.8 also provides the authority for school districts located near the state boundaries to designate schools of equivalent standing across the state line for attendance of pupils where the public school in the adjoining state is nearer than any appropriate public school in the district.

The answer to your fourth question may be found in §282.23, Code of Iowa. This section provides that where a child is a public charge and being cared for in a childrens boarding home licensed by the state, the child shall be entitled to attend the school in the district where the boarding home is located; and if such district does not maintain a school offering instruction (special educational services), the child may attend any school that will receive it and the tuition and transportation, when required of such child, shall be paid by the treasurer of the state from funds in the state treasury not otherwise appropriated upon requisition by the Superintendent of Public Instruction. If, on the other hand, the area residential care institution is located in a school district where special educational services are provided as part of the county system, the school district may contribute to the cost of the program in accordance with the authority set out above.

The answer just given applies to your fifth question and in addition we call your attention to §281.4, Code of Iowa, which requires school districts to employ qualified teachers for the children requiring such special education.

In answer to your sixth question, the term "children requiring special education" includes children under five years of age (§281.2, Code), but I find no specific requirement in either statute or regulation defining the amount of training required before a child is accepted into any special program.

June 30, 1971

SCHOOLS: Teachers — §279.40, Ch. 85, Code of Iowa, 1971. 1) School district cannot recover salary paid to teacher as sick leave from Workmen's Compensation insurance carrier; nor 2) may the school district deduct Workmen's Compensation benefits from full sick leave pay. (Nolan to Berkland, Palo Alto County Attorney, 6/30/71) #71-6-18

Mr. Roger A. Berkland, Palo Alto County Attorney: This is in reply to your letter requesting an Attorney General's opinion interpreting §279.40, Code 1971, as it applies to the Emmetsburg School District. Your letter states:

"The Code of Iowa, Chapter 85, requires that employees of the school district be covered under the Iowa Workmen's Compensation Law. Section 279.40 requires public schools to pay employees full pay for absence with personal illness or injury.

"An employee who had accumulated 90 days of sick leave was injured. The injury was also covered by workmen's compensation and the insurance company paid the medical bills, but refused to pay the employee her weekly benefits because she was receiving full pay. It is the contention of the school district, that the employee should not receive both sick leave pay and workmen's compensation benefits, but that the insurance company should be required to reimburse the employer in the amount of the weekly benefits. The insurance company disagrees.

"I would like these two questions answered: (1) Can the school district recover part of the salary paid from insurance carrier? (2) If they cannot, would it be contrary to law to pay sick leave in the amount of full pay less workmen's compensation weekly benefits, so as to assure the employee of receiving full pay during the period of accumulated sick leave."

The amount which the school district can recover from the insurance carrier depends upon the provisions of the contract of insurance coverage. Ordinarily, this would be limited to reimbursement for the amount paid under the Iowa Workmen's Compensation Act. The Workmen's Compensation Law is to be liberally construed for the employee. *Snook v. Hermann,* 1968, 161 N. W. 2d, 185, *Beuhner v. Hauptly,* 1968, 161 N. W. 2d 170.

The Workmen's Compensation Law fixes liability of the employer and permits recovery for injuries sustained by an employee arising out of and in the course of employment. *Whitney v. Rural Independent School District No. 4,* 1942, 232 Iowa 61, 41 N. W. 2d 394, held that a teacher is an employee entitled to the benefits of the compensation statute. The employer is not relieved of statutory liability by carrying insurance. No contract shall operate to relieve the employer of statutory liability, §85.18, 1936 OAG 274.

The grant of sick leave at full pay is not dependent upon receipt of Workmen's Compensation but may be applied for any sickness or injury where necessity for absence from duty occurs.

Payment of Workmen's Compensation for temporary disability does not begin until the eighth day of disability after the injury. Section 85.32, Code 1971. Thereafter the compensation payable during the healing period is determined by §85.37. These provisions have no dependency on the availability of sick leave and cannot be reduced by contribution from employees. Section 85.38.

Provisions for sick leave for teachers are also statutory, Code §279.40 provides:

"Public school employees are granted leave of absence for personal illness or injury with full pay in the following minimum amounts . . ."

If a teacher is not present for duty because of injury, the teacher is entitled to the benefits of the sick leave statute as well as such Workmen's Compensation as may be warranted. When sick leave is exhausted the employee may or may not be entitled to continued Workmen's Compensation Benefits while taking a reduction in pay under his contract for continued absence from duty.

Accordingly, neither question presented in your request can be answered affirmatively.

July 6, 1971

SCHOOLS: Anticipatory Warrants — §74.2, Code of Iowa, 1971. There is no statutory authority for a school treasurer to sell warrants by sealed bid at a rate of interest higher than 5%. (Nolan to Wehr, Scott County Attorney, 7/6/71) #71-7-1

Mr. Edward N. Wehr, Scott County Attorney: I have a request for an opinion from Mr. Ottesen of your office seeking an interpretation of §74.8, Code of Iowa, 1971, and asking whether the treasurer of a school district can sell warrants at a rate higher than that specified in Section 72.2 of the Code of Iowa, after he has received the Certificates of Refusal from the banks or other business entities authorized to loan money which have refused to purchase the warrants.

The statutory rate of interest for all warrants drawn on a public treasury is 5%. The warrants must be sold at the statutory rate of 5% interest "unless the treasurer arranges for the sale of said warrant at par at a lower rate of interest." (Code §74.2).

The legislature by Ch. 96, Acts of the 63rd G. A., First Session, in addition to raising the statutory interest rate from 4% to 5% also permitted municipalities to draw one or more anticipatory warrants payable to a bank or banks in an amount believed sufficient to cover the anticipated deficiencies.

Chapter 1043 (63rd G. A., 2nd Session) further amended Ch. 74 by adding a new section, applicable to school districts only, which permits sale of warrants by sealed bid to others than banks or loan institutions and which provides in pertinent part:

"The treasurer of a school district may sell warrants at the maximum rate of interest provided in section seventy-four point two (74.2) of the Code or at a lower rate of interest.

"Each bank or other business entity authorized by law to loan money which refuses to purchase such warrants at the rate of interest provided in this section or at a lower rate of interest, shall submit a certificate of refusal to the treasurer of the school district.

"If the treasurer of a school district is unable to sell the warrants at the maximum rate of interest provided in this section or at a lower rate of interest and receives at least two certificates of refusal, the treasurer may offer the warrants for public sale, by publishing notice of the sale for two consecutive weeks in a newspaper of general circulation in the jurisdiction of the governing body issuing the warrants giving not less than ten days notice of the time and place of the sale. The notice shall include a statement of the amount of the warrants offered for sale.

"Sealed bids may be received at any time up to the time all bids are opened. The treasurer shall sell the warrants to the lowest bidder, however, the treasurer may reject all bids and readvertise the sale of such warrants pursuant to the provisions of this section.

"This provision shall apply only to school districts whose anticipated receipts allocable to the current budget are at least equal to their legally approved budget for the current year."

I find nothing in the above language to authorize the treasurer of a school district to sell warrants at a rate of interest higher than the statutory rate set out in §74.2, supra. Nor is it logical that the legislature would permit such warrants for sale by sealed bid to the general public at higher rates of interest than that authorized to be paid to lending institutions thereby creating a situation whereby a lending institution might refuse to take warrants at the statutory maximum rate of interest and subsequently obtaining the same at a higher rate of interest by sealed bid.

Particular consideration has been given to the following language of Ch. 1043, supra:

"If the treasurer of a school district is unable to sell the warrants at the maximum rate of interest provided in this section or at a lower rate of interest . . . the treasurer may offer the warrants for public sale . . .

". . . the treasurer shall sell the warrants to the lowest bidder, however, the treasurer may reject all bids and readvertise the sale . . ."

In 1948 OAG at page 82 it was stated that "the power of the treasurer does not extend to making a contract for the sale of such stamped warrants." By the recent legislation set out above the treasurer is now authorized to make such contract.

July 6, 1971

SCHOOLS: Schoolhouse fund — §453.10, §453.7(2), Code of Iowa, 1971. Unexpired interest collected on investment of school bond funds may be expended for schoolhouse purposes when bonded indebtedness is retired. (Nolan to Straub, Kossuth County Attorney, 7/6/71) #71-7-2

Mr. Joseph J. Straub, Kossuth County Attorney: This replies to your letter requesting an opinion on the question of whether the school treasurer would be held liable if he permits warrants to be issued against the school house fund in excess of the bond issue proceeds as voted? Your letter further states that the school corporation voted a bond issue some years ago and the proceeds of the bond sale were invested until the money was required for the work to be done. Most of the money was expended, but a few thousand dollars plus interest on the investment remained in the school house fund. The school board now desires to make some additional improvements for which they intend to use the remaining proceeds of the bond issue and the interest which has accumulated.

We have examined Code §453.10, which authorizes the investment of funds created by direct vote of the people. Interest thereon shall be credited as provided in §453.7(2): "Such interest or earnings on any fund created by direct vote of the people shall be credited to the fund to retire any such indebtedness after which the fund itself shall be credited."

It is my view that the interest in question was properly placed in the school house fund. Accordingly, the interest is available to be expended for school house purposes when the bonded indebtedness is retired.

July 6, 1971

COUNTY AND COUNTY OFFICERS: Assessors — Section 331.21, Code of Iowa, 1971, requiring itemization and notarization of claims does not apply to claims for items included in Assessor's budget. (Nolan to Atwell, Office of Auditor of State, 7/6/71) #71-7-3

Mr. H. E. Atwell, Public Accounts Audit Supervisor, Office of Auditor of State: This is in answer to your request for an Attorney General's opinion on the following question:

"Does Section 331.21 of the Code, in regard to itemization and notorization, apply to the claims which are processed through the county assessor and city assessor offices?"

Section 331.21, Code of Iowa (1971) is as follows:

"All unliquidated claims against counties and all claims for fees or compensation in excess of twenty-five dollars, except salaries fixed by statute, shall, before being audited or paid, be so *itemized* as to clearly show the basis of any such claim and whether for property sold or furnished the county, or for services rendered it, or upon some other account, and shall be *duly verified by the affidavit of the claimant,* filed with the county auditor for presentation to the Board of Supervisors; and no action shall be brought against any county upon any such claim until the same has been so filed and payment thereof refused or neglected." [Em-

phasis Supplied]

It is only claims which are unliquidated that must be verified, such verification being a condition precedent to an action brought against the county. The word "liquidated" means the amount due has been ascertained and agreed upon by the parties or fixed by operation of law. *State ex rel Fletcher v. Naumann*, 1931, 213 Iowa 418, 239 N. W. 93.

In an opinion dated October 29, 1949, at 1950 OAG 99, 102 the Attorney General advised that warrants for the payment of expenses for the county assessor's office "require a recorded vote of the board of supervisors or a resolution of an authorization of the several warrants required to pay the expenses of the assessor before the auditor is authorized to sign and issue a county warrant therefor." The law in effect at that time, Ch. 240, Sec. 7, Laws of the 52nd G. A., provided for payment of expenditures by the county board of supervisors. This is not the case under the present laws.

Under §441.16, Code 1971, all expenses of the assessor shall be paid from the county assessor's fund. The county auditor keeps a complete record of the funds and issues warrants *only* on *requisition* of the *assessor.*

All expenditures are subject to the budget provisions of Code Chapter 24 and are certified by the conference board. Section 441.16 prohibits the assessor from increasing the budgeted amounts. The items covered in the budget are "agreed upon" when the certification is made for the tax levy and such items are thereby taken from the "unliquidated" category.

Therefore, it is our opinion that §331.21 does not apply to claims processed through the county and city assessors' offices.

July 15, 1971

STATE OFFICERS AND DEPARTMENTS: Department of Soil Conservation — §97C.3, 1971 Code of Iowa. Soil Conservation District Clerks are state employees for social security and other purposes under federal, as well as state, guidelines. (Davis to Greiner, Director, Dept. of Soil Conservation, 7/15/71) #71-7-4

Mr. William H. Greiner, Director, Department of Soil Conservation: We are in receipt of your opinion request concerning questions paraphrased as follows:

1. Is the Department of Soil Conservation the employer of the individuals employed as District Clerks in Soil Conservation District offices throughout the state or are the various districts their employers?

2. Review the Opinions of the Attorney General dated August 12, 1965, and March 29, 1967, to determine if there is a conflict, and if so, which opinion prevails.

Employees of the State of Iowa are exempt from coverage under the Federal Social Security Act unless the State enters into an agreement for coverage. U. S. Code Annotated title 42 §410(7)(a).

Such an agreement was entered into between the State of Iowa and the Secretary of Health, Education and Welfare, on July 1, 1953, pursuant to said Law of the United States and the State act now codified at §97C.3, 1971 Code of Iowa.

Said agreement establishes two classes of covered individuals within the area considered by this opinion: "Employees of the State," and "employees of those political subdivisions (of the State) listed in the appendix attached hereto."

In the intervening eighteen years, the practice has been to add and delete entities in the appendix as status and procedures changed, with the State proposing such changes and the Federal Government agreeing thereto.

Virtually all state agencies now use a single employer's identification number through the Centralized Payroll system of the State Comptroller's office. The Clerks and other state employees (as now designated) in District Soil Conservation offices are paid under this system and number, through the Comptroller.

The State has the sole option, established by eighteen years of practice, to change the status of the state employees (as presently designated) servicing the district offices and does not wish to do so. Under the agreement, the State cannot be forced to change these employees' status, unless, under State law and federal law incorporated in such State law and the agreement, the Districts meet the definition of "employers."

The Courts of the United States have defined employer-employee relationships in many cases. The later cases deal with the distinction between an employee and an independent contractor. These opinions shed little light on this problem.

The cases closest to this problem are the "Dance Band" cases of the 1940's. The issue in these cases was whether the Band Leader or the Ballroom owner was the "Employer" of the band members.

The cases are:

Bartels v. Birmingham, 1947, 332 U. S. 126, 67 S. Ct. 1547, 91 L. Ed. 1947

General Wayne Inn v. Rothensies, 1942, 47 F. Supp. 391

Williams v. U. S., 1942, 126 F. 2d 129

The guidelines set for determination of this question, as adopted by the United States Supreme Court in *Bartels v. Birmingham*, supra, are (citations omitted):

(1) Who actually exercised control of the means and manner of performance of the employees?

(2) Who has the exclusive right to hire and discharge the employees?

(3) Who determines the amount of wages and the manner of payment thereof?

(4) Is the putative employer engaged in an independent business for profit?

(5) Who furnishes the tools with which the work is done?

The questions above are necessarily fact questions, not questions of law, hence inquiry was made of you as Director of the Department of Soil Conservation of the State of Iowa.

Upon consideration of the facts furnished by your department, it is determined that:

(1) The clerks and other state employees (as now designated) are directed in the means and manner of performance of their duties by memoranda and directives from the headquarters of the Department of Soil Conservation. These memoranda and directions establish working hours, relationship to local and federal personnel and policies to be observed in dealing with the public.

(2) The power to hire and discharge rests solely in the State of Iowa, Department of Soil Conservation under rules established by the Merit Employment Department of the State. Further, *General Wayne Inn* v. *Rothensies*, supra, cited with approval in *Bartels*, holds that the power to hire and fire is the most significant factor in determining upon whom, as "employer," the economic burden of the social security program is placed.

(3) The State of Iowa, Department of Soil Conservation, determines the amount of wages of said employees, within guidelines and ranges established by the Merit Employment Department and the State Comptroller determines the manner of payment of said wages.

(4) Guideline 4 under "*Bartels*" is inapplicable to the question herein.

(5) The State of Iowa, Department of Soil Conservation furnishes all materials and supplies used in the District offices either by shipment of such supplies or payment out of said department's appropriation for locally purchased supplies.

The evidence enumerated above decisively determines that the employees in question are employed by the State of Iowa, Department of Soil Conservation and not by the various soil conservation districts.

Concerning question two raised by your inquiry, we find no conflict between the opinions. The 1965 opinion relates to temporary employees of the local Soil Conservation District paid by money contributed to the district by local farmers, and employed to work on the local flood control levees during times of high water. Such employees were hired by the local agency for a local purpose and paid by locally donated funds. The State Department of Soil Conservation had no part in such employment. Under these facts, these levee workers clearly were employees of the District Committee.

In contrast, the 1967 opinion considers exactly the same question considered in this opinion. Citing prior Attorney General Opinion on similar questions concerning other state employees, that opinion reached the same conclusion reached herein: that District Soil Conservation Clerks are state employees.

We find no conflict in the two cited opinions and, as it directly relates to the principal question here, reiterate and confirm the 1967 opinion thereon.

This is the second official opinion of this office regarding this question. We have reached identical conclusions using both state precedent and federal precedent, which we trust will lay this question to rest.

July 15, 1971

STATE OFFICERS AND DEPARTMENTS: Iowa Development Commission; travel expenses of non-employees — §§28.7, 28.8 and 28.9, Code of

Iowa, 1971. The Iowa Development Commission may legally reimburse a member of its agricultural promotion board for his reasonable travel expenses in promoting the sale of Iowa meat where the promotional trip is at the direction and under the auspices of the Iowa Development Commission. (Haesemeyer to Shearer, Deputy Secretary, Executive Council of Iowa, 7/15/71) #71-7-5

Mrs. Colleen Shearer, Deputy Secretary, Executive Council of Iowa: Reference is made to your letter of July 12, 1971, in which you state:

"The Executive Council, in meeting held this date, deferred approval of a travel request submitted by the Iowa Development Commission, for Mr. D. R. Davidson, a member of the Agricultural Promotion Board of the Development Commission, to travel to several eastern states to promote the sale of Iowa red meat, and directed this office to obtain from you an opinion as to whether or not the Development Commission can legally reimburse Mr. Davidson for the expense of the trip since he is not a state employee."

The duties and powers of the Iowa development commission are set forth in §§28.7 and 28.8, Code of Iowa, 1971. Among the duties of the commission as set forth in §28.7(6) is to:

"6. Do such other and further acts as shall, in the judgment of the commission, be necessary and proper in fostering and promoting the industrial and agricultural development and economic welfare of the state of Iowa."

Section 28.9 provides:

"28.9 Warrants. The comptroller is authorized and directed to draw warrants on the treasurer of state for the several sums and for the purposes specified in this chapter upon duly itemized and verified vouchers that have been approved by the chairman or director of the commission."

Since the promotion of the sale of Iowa red meat is in our opinion well within the scope of the purposes and duties of the Iowa development commission it would be our view that it could legally reimburse a non-state employee for his reasonable travel expenses in undertaking such a promotional trip at the direction and under the auspices of the Iowa development commission.

July 16, 1971

SCHOOLS: Directors — §§279.6 and 279.7, Code of Iowa, 1971. A school district director may resign as of a date certain at which time the remaining members of the board have 10 days in which to make an appointment to fill the vacancy. If the vacancy is not thus filled the county superintendent shall call an election to fill the vacancy. The date of the election may in certain circumstances coincide with the date of the regular school election. (Nolan to Pellett, State Representative, 7/16/71) #71-7-8 (A portion of this opinion was withdrawn by opinion of 7/27/71, Turner to Pellett)

The Hon. Wendell C. Pellett, State Representative: This is in response to your oral request for an opinion on the matter of whether a school district director may properly resign from the office of director, his resignation to become effective on a date certain in the future (either the date of the regular school election in September, or some other date such as when his successor has qualified to fill a vacancy and take the office).

Public policy requires that there be no uncertainty as to who are and who are not public officers. A public officer who has freely tendered an

absolute and unconditional resignation to take effect in the future may not withdraw the resignation after it has been duly accepted by the proper authority, even though the time at which it is to take effect has not arrived. 43 Am. Jur. 25 (Public officers §170). There is no doubt that a public officer has a right to resign his office. In *Cowles v. Independent School District*, 1927, 204 Iowa 689, 216 N. W. 83, the Iowa Supreme Court discussing resignations states:

"The resignation involves the intent on the part of the resigning official whether to make a present immediate resignation or to make one to take effect when accepted, or on some other event. His intent to resign with immediate effect involves a question of public interest, whether the necessary performance of the duties of the office which he holds and the interest of the public will permit an immediate effective resignation. The resignation involves also the understanding and intent of the officer or board to whom it is made, whether they are advised of it, whether they accept it, and upon what condition as to time of taking effect."

In the case cited all parties understood that the resignation was intended to take effect upon the election and qualification of the successor-director and the interim action of the Board, including the resigning member, was upheld.

The next question you presented is whether a successor can be elected to fill the vacancy at the regular election in September. Section 279.6, Code of Iowa 1971, provides that generally vacancies occurring among the members of the school board shall be filled by the board by appointment. The person appointed to fill the vacancy will hold office for the remainder of the unexpired term. However, §279.7 provides that if the vacancy is not filled within ten days after the occurrence thereof the county superintendent shall call a special election in the district to fill the vacancy. It is possible the date of the special election may coincide with the date of the regular election on the first Monday of September, if the times set forth in the statute are strictly observed.

July 22, 1971

EMINENT DOMAIN — Appointment of persons eligible to serve on compensation commissions — §472.4, Code of Iowa, 1971. Appointment of persons eligible to serve on compensation commissions shall be made by county boards of supervisors substantially every 12 months beginning July 1, 1970, the effective date of the statute providing for such appointment. (Peterson to McNeal, Hardin County Attorney, 7/22/71) #71-7-6

Clark E. McNeal, Hardin County Attorney: Reference is made to your letter of June 14, 1971, wherein you request an opinion of this office as to the proper date for the appointment of persons eligible to serve as members of a compensation commission.

Appointment of persons eligible to serve on compensation commissions is governed by Chapter 1225, Acts of the 63rd General Assembly, which became effective on July 1, 1970, and is now codified as §472.4, Code of Iowa, 1971, which provides in pertinent part as follows:

"472.4 Commission to assess damages. Annually the board of supervisors of a county shall appoint not less than twenty-eight residents of the county and the names of such persons shall be placed on a list and they shall be eligible to serve as members of a compensation commission. . . ."

The word "annually" is defined as "occuring once a year, yearly." *Horne v. Kenosha Lincoln-Mercury, Inc.*, 1953, 265 Wis. 496, 61 N. W. 2d 893.

The word "annual" means "yearly" or "once in a year." But the word "annual" does not signify what time in a year. *Rolerson v. Standard Life Insurance Company*, 1922, Tex. Civ. App., 244 S. W. 845. *Sahlin v. American Casualty Company of Reading, Pennsylvania*, 1968, 103 Ariz. 57, 436 P. 2d 606.

Under a statute providing that a Board of Health shall "annually" appoint a health physician, a duly adopted resolution making such appointment entitles the appointee to the office for one year. *City of Buffalo v. Mackay*, 1878, 15 Hun. 204.

In requiring an "annual" election of trustees the evident purpose of the Legislature was to limit the term of office to 12 months, or as near to that period as is practicable, and the uniform rules should be adopted so that trustees should hold office for one year, and the election for such trustees should take place substantially every 12 months. *Curtis v. McCullough*, 1867, 3 Nev. 202.

We are therefore, of the opinion that appointment of persons eligible to serve on compensation commissions shall be made by county boards of supervisors substantially every 12 months beginning July 1, 1970, the effective date of the statute providing for such appointment.

July 22, 1971

STATE OFFICERS AND DEPARTMENTS: Merit System, Auditor of State; confidential assistants — §19A.3(3), Code of Iowa, 1971, as amended by §2, House File 399, Acts, 64th General Assembly, First Session (1971). All of the employees of the Auditor of State's office fall within the term "all supervisory employees and their confidential assistants" as found in §19A.3(3), as amended, and therefore are exempt from the merit system. (Haesemeyer to Fischer, State Representative, 7/22/71) #71-7-7

The Hon. Harold O. Fischer, State Representative: Reference is made to your letter of July 7, 1971, in which you request an interpretation of the term "confidential assistants," as found in House File 399, Acts, 64th G. A., 1st Session (1971). In your letter you state:

"It has been brought to my attention that Mr. Keating, Chairman of the Merit Commission has questioned the legislative intent of this legislation as it relates to employees of the office of Auditor of State.

"Under Section 2 of the bill, which amends Section 19A.3, subsection 3, of the 1971 Code providing:

" '3. Three principal assistants or deputies for each elective official and one stenographer or secretary for each elective official and each principal assistant or deputy thereof *also all supervisory employees and their confidential assistants.*'

"In visiting with the Director of the Legislative Service Bureau about the confidential responsibilities of the Office of Auditor of State prior to passage of the bill, I know, full well the legislative intent of the bill. This was also my personal intent in participating as one of the authors of the BILL. Since the question regarding application has been raised by Mr. Keating, it is apparent that an official opinion from you is neces-

sary and desirable at this time.

"It is requested that you furnish me with an official opinion as to whether or not all of the employees of the office of Auditor of State having access to confidential records, audit reports, schedules, and the printing or handling thereof are exempt from the authority and requirements of the Merit Commission as a result of the existance and application of the following sections of the 1971 Code of Iowa:

"In Chapter 11, Section 11.8, the Auditor of State shall appoint such additional assistants to the auditors as may be necessary, etc. In Section 11.9, those persons assigned as auditors are referred to as 'assistants.' The confidential nature of the operations of the office of Auditor is well stated in Section 11.46. If the reports which are prepared by the personnel is confidential, then certainly those persons having the responsibility of preparation are confidential employees.

"The confidential nature of the entire operation of this office is further emphasized and the responsibilities of the personnel charged with the responsibilities is re-stated in Sections 534-5 and 536A.15.

"Because of the over-all confidential nature of the operations of the Office of Auditor of State, it would seem impossible to isolate or segregate any personnel so that they could not have access to items of a confidential nature so as to make it possible to include them under the provision of the Merit System.

"Your prompt attention to furnishing the above requested opinion will be deeply appreciated."

From conversations with representatives of the Auditor of State's office we have ascertained that for organizational purposes the office is broken down into six departments. These are:

1. General office (responsible for auditing all state agencies and departments).
2. County audits.
3. Municipal and school audits.
4. Savings and Loan Associations.
5. Industrial loans.
6. Typing and Printing.

Each of the first five departments has a director, a personal secretary to the director and auditors of various types such as field auditors who gather basic and preliminary information. The Typing and Printing Department is headed by a supervisor and a staff of various other personnel who are responsible for typing and reproducing confidential reports and other material for the five functional departments. It is to be observed that §11.4, Code of Iowa, 1971, provides in part as follows:

"The state auditor is hereby authorized to obtain, maintain, and operate, under his exclusive control such offiset printing machinery as may be necessary to print *confidential* reports and documents originating in the auditor's office."

While Chapter 11 of the code generally contains rather extensive provisions concerning the publicity to be given to audit reports it would seem that until the audit is completed and the report finalized the Auditor of State and his employees are obliged not to make any disclosures of

the results of any investigation or audit. Thus, §11.17 provides:

"11.17 Disclosures prohibited. No such auditor shall make any disclosure of the result of any investigation, except as he is required by law to report the same or to testify in court. Any violation of this provision shall be ground for removal."

Sections 534.5 and 536A.15 deal specifically with the confidential nature of the work respectively of the Savings and Loan and Industrial Loan Departments of the Auditor of State's office.

In actual practice all the employees of the Auditor of State's office have access to and work regularly with confidential material. It is plain that serious and possibly irreparable injury could stem from the premature disclosure of preliminary reports, unverified findings or fragments of reports taken out of context. Thus, it has always been the Auditor's practice to maintain tight security over the operations of his office until such time as the Auditor's official report is made public as required by law.

We have been unable to find any cases specifically construing the term "confidential assistants." However, under the National Labor Relations Act the term "confidential employee" has been considered and the National Labor Relations Board has said it would be an injustice if an employer had to deal with a union which included people who had access to company files and information concerning labor relations matters. Thus, in *N.L.R.B. v. Quaker City Life Insurance Co.*, 1963, 319 F. 2D 690, the exclusion from the union of an office clerk was deemed proper where the clerk was privy to confidential communications concerning labor negotiations between insurance agents and the employer. The clerk in question was considered a "confidential employee" because she had access to all the files and spent most of her time dealing with information of this type. Similarly, the employees of the Auditor of State's office regularly and routinely deal with information and reports of a confidential character.

In Iowa the supreme court has had occasion to deal with the meaning of the term "confidential relationship." *Klatt v. Akers*, 1942, 232 Iowa 1312, 5 N. W. 2d 605, 146 A.L.R. 808; *Neargard v. Akers*, 1942, 232 Iowa 1337, 5 N. W. 2d 613; *Warner v. Akers*, 1942, 232 Iowa 1348, 5 N. W. 2d 603. In these cases plaintiffs who had been employed as examiners in the Auditor of State's office were found not to be entitled to the protection of the Soldier's Preference Law because they held positions of "strictly confidential relationship" to the Auditor. In the *Klatt* case the court concluded as a matter of law that the confidential relationship did exist. In doing so the court noted that Mr. Klatt was working with confidential materials and was bound by law to keep the results of some of the investigations secret. He held a position of trust and it was part of his duty to see that none of the reports he was working on leaked out prematurely before the examinations had been finally concluded.

Premature disclosure of preliminary audit results whether by an auditor or a typist or clerk would carry with it equal potential for harm. Accordingly, it is our opinion that all of the employees of the Auditor of State's office fall within the term "all supervisory employees and their

confidential assistants" as found in §2 of the Act, and therefore are exempt from the merit system.

July 23, 1971

CONSERVATION: County conservation boards and county board of supervisors, museums — §§111A.4(11) and 332.3(24), Code of Iowa, 1971. Funds may not be appropriated by county conservation boards or county boards of supervisors pursuant to §§111A.4(11) and 332.3(24) for use of local historical society where the society is not organized pursuant to Chapters 504 or 504A. (Peterson to Norpel, State Representative, 7/23/71) #71-7-9

Richard J. Norpel, Sr., State Representative: Reference is made to your letter of June 14, 1971, wherein you request an opinion of this office as to whether Chapter 1068, Laws of the Sixty-third General Assembly, Second Session, authorizes the appropriation of funds for the use of the "Joe Young Historical Museum Antique Institute" in the City of Bellevue, Jackson County, Iowa.

Section 1, Chapter 1068, Laws of the 63rd General Assembly, Second Session, [codified as §111A.4(11), Code of Iowa 1971] authorizes and empowers county conservation boards "to appropriate from the county conservation fund created pursuant to section 111A.6 of this chapter an amount, not to exceed two thousand dollars per annum, for the use of a local, nonprofit historical society, *organized pursuant to chapter 504 or 504A* . . ." (Emphasis supplied)

Section 2 of said Chapter 1068 [now codified as §332.3(24) Code of Iowa 1971] authorizes such an appropriation by the board of supervisors from the general fund in counties with no county conservation board.

A search of the records of the Office of the Secretary of State of Iowa, corporations division, on June 16, 1971, disclosed no record of the incorporation of the "Joe Young Historical Museum Antique Institute" pursuant to Chapter 504, 504A or any other chapter of the Code.

Since said Institute is not "organized pursuant to chapter 504 or 504A," an appropriation to it by the county conservation board or the county board of supervisors is not authorized by said chapter 1068.

July 23, 1971

ELECTIONS: School and city and town elections, moved voters — §§49A.3 and 49A.4, Code of Iowa, 1971. At school elections and city and town elections a person who moves from his domicile and has not had time to establish residency at his new domicile and if the new domicile is one at which he would be able to vote for any of the issues and candidates contained on the ballot at his former domicile, may vote the entire ballot at his former domicile. (Haesemeyer to Hill, State Representative, 7/23/71) #71-7-10

The Hon. Philip B. Hill, State Representative: Reference is made to your letter of July 16, 1971, in which you state:

"A question has arisen with regard to the residence requirement for citizens who wish to vote in school board and city or town elections. Code sections 49A.3 and 49A.4 recite as follows:

" '49A.3 School election. For the purposes of any school election, any resident of Iowa who remains a resident of the same school district but

who has moved to a different county or precinct shall be presumed to be and remain a resident immediately preceding such move, until he meets the residence requirements for electors in the place to which he has moved.

" '49A.4 City or town election. For the purposes of any city or town election, any resident of Iowa who remains a resident of the same city or town but who has moved to a different precinct shall be presumed to be and remain a resident of the precinct of which he was a resident immediately preceding such move, until he meets the residence requirements for electors in the place to which he has moved.'

"In an opinion from the Attorney General, dated August 24, 1970, addressed to Melvin D. Synhorst, Secretary of State, it is stated on page 11, the first full paragraph, as follows:

" 'Moreover, to give §§3, 4 and 5 a literal interpretation would in all probability result in their being found unconstitutional and void on the ground of unworkability. . . . Bearing in mind the manifest purpose running throughout S.F. 665 that everyone should be permitted to vote somewhere and the practical difficulties which would be created in attempting to sever these sections from the rest of the statute it is our opinion that citizens who move out of their county or precinct to another location within the state may vote on all propositions and for all offices on the ballot in the place of their former residence and that they may do so either in person or by absentee ballot.'

"There appears to be a question as to whether a person who moves from a school district or from a city or town to another location within the State of Iowa is permitted to vote in the school board or city or town election of his former residence in the event that he has not met the residence requirements in the place to which he has moved. I would appreciate your reviewing this question and resolving the apparent conflict."

Sections 3, 4 and 5 of S.F. 665 referred to in the above quoted opinion of August 24, 1970, are now codified as §§49A.3, 49A.4 and 49A.5 of the 1971 code.

We think that your question with regard to the eligibility of residents to vote in school elections and city or town elections can be clarified as follows.

In the event a person moves from his domicile and has not had the opportunity to establish residency at his new domicile, if the new domicile is one in which he would be able to vote for any of the issues or candidates contained on the ballot at his former domicile, then he would be able to vote for all of them. If, however, his new domicile is one which would not qualify him to vote for any of the issues or candidates contained on the ballot at his former domicile, then he may not vote in that election. For example, if a person moves from Des Moines to Cedar Rapids within sixty days of the city election, he would not then be able to vote for Mayor of the City of Des Moines, nor any of the other city candidates. If a person moves from one side of Des Moines to the other side of Des Moines, he would still be able to vote for Mayor and the at-large councilmen, so, therefore, he could return to the former polling place and cast his ballot not only for those offices, but also for the ward councilmen on the ballot at his former polling place.

This construction is consistent with the express language of §§49A.3 and 49A.4, which indicate that for the purpose of those sections, the resident should remain a resident of the same school district or the same city or town, in order to vote in that school district election or city or town

election. It is also in harmony with the interpretation that we have given to §49A.2.

July 23, 1971

MOTOR VEHICLES: Certificate of title — H.F. 12, 64th G. A., 1st Session. Provisions of §10, H.F. 12, 64th G. A., 1st Session, which require the holder of a security interest in a motor vehicle to have such interest noted on the certificate of title by the county treasurer operates prospectively and does not apply to certificates held in the possession of a lender on the effective date of the Act. (Nolan to Kyhl, State Senator, 7/23/71) #71-7-11

The Hon. Vernon H. Kyhl, State Senator: Reference is made to your letter requesting an opinion whether the provisions of H.F. 12, Acts of the 64th G. A., First Session, are retroactive or whether such provisions apply only to security interest transactions arising after the effective date of the Act. Your questions have special reference to §10 of H.F. 12, which provides as follows:

"Section three hundred twenty-one point fifty (321.50), Code 1971, is amended by adding thereto the following new subsection:

"Any person obtaining possession of a certificate of title for a vehicle not already subject to a perfected security interest, except new or used vehicles held by a dealer or manufacturer as inventory for sale, who purports to have a security interest in such vehicle shall, within thirty days from the receipt of the certificate of title, deliver such certificate of title to the county treasurer of the county where it was issued to note such security interest and, if such person fails to do so, his purported security interest in the vehicle shall be void and unenforceable and such person shall forthwith deliver the certificate of title to the county treasurer of the county where it was issued. If no security interest has been filed for notation on the certificate of title, the certificate shall be mailed by the treasurer to the owner of the vehicle. For purposes of determining the commencement date of the thirty-day period provided by this subsection, it shall be presumed that the purported security interest holder received the certificate of title on the date of the creation of his purported security interest in the vehicle or the date of the issuance of the certificate of title, whichever is the latter. Any person collecting a fee from the owner of the vehicle for the purpose of perfecting a security interest in such vehicle who does not cause such security interest to be noted on the certificate of title by the county treasurer shall remit such fee to the department of revenue of this state."

The significance of §10 quoted above is clearly contingent upon an interpretation of the words "obtaining possession of a certificate of title for a vehicle not already subject to a perfected security interest."

It is my view that such language creates a prospective requirement only and has no application to such certificates of title which may have already been in the hands of a lender prior to the effective date of the act. Generally, all statutes are construed to operate prespectively unless purpose and intent of the legislature to give a retroactive effect is clearly expressed in the act or necessarily implied therefrom. *Schnebly v. St. Joseph Mercy Hospital of Dubuque, Iowa,* 1969, 166 N. W. 2d 780. There is no indication that H.F. 12 is intended to operate retroactively. Retrospective operation will not be given to a statute which interferes with antecedent rights unless that is the manifest intent of the legislature. *Ginsberg v. Lindel,* 1939, 107 F 2d 721.

However, if, for example, an auto repairman relied on information

from the Treasurer's Office that the owner of the automobile had clear title to the vehicle and no notation of any security interest had been made, he would have a statutory artisan's lien (§577.1, Code 1971) on the property since no other security interest appeared of record. Further, it would seem that such repairs or improvements might be made without the assent of any person holding a security interest which is not noted on the certificate of title as provided by the new legislation. Consequently, a lender who merely holds the certificate of title without complying with the provisions of the act may find that the vehicle has been effectively transferred to another who has a superior right to possession.

July 23, 1971

SCHOOLS: Records — §68A.7(1), Code of Iowa, 1971. A roster of students of a public high school is not a confidential record within the meaning of §68A.7(1) of the Code. However, the addresses of students and their parents which are kept on personal information cards are confidential records. (Nolan to Carstensen, Office of the Citizens' Aide, 7/23/71) #71-7-12

Mr. Lawrence D. Carstensen, Office of the Citizens' Aide: This replies to your letter requesting an opinion regarding Ch. 68A, Code of Iowa 1971. Specifically, you ask whether the confidential exception of §68A.7 (1) applies to any of the following:

1. Roster of students of a public school.

2. The addresses of students of a public school.

3. The names and addresses of the parents of the students of a public school.

Section 68A.7(1) provides:

"The following public records shall be kept confidential unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release information.

"(1) Personal information in records regarding a student, prospective student, or former student of the school corporation or educational institution maintaining such records."

The Attorney General of California has advised that under the law of that state "names and addresses of public high school students are not public writings and hence district schools need not furnish lists upon request by members of the public although such lists should be available for public inspection." (16 Ops Atty Gen 163)

In New York State, in the case of *Marmo v. New York City Board of Education*, 1968, 289 NYS 2d 51, 56 Miss. 2D 517, while directing the schools to furnish a student with names and addresses of his classmates to permit him to prepare defense in a criminal prosecution, the court stated that the policy of the board of education prohibiting such release "is sound" and ordinarily should be given sanction even if it defeat the common law of right to inspect.

The school policy approved there by the court was:

"No information may be given to private detectives, solicitors, collectors, or investigators for mercantile agencies and the like seeking to trace families through the medium of school records. . . ."

The roster of students of a public high school is clearly not a confidential record within the meaning of §68A.7(1). However, the addresses of the students and their parents which are kept on a personal information card could be afforded the confidential record status under §68A.7(1), Code.

July 26, 1971

TAXATION: Filing of federal tax liens — §335.18, Code of Iowa, 1971, §15 of H.F. 12, Acts of 64th G. A., 1st session. Section 15 of H.F. 12 is inconsistent with the provisions of §6323 of the Internal Revenue Code pertaining to the filing requirements for federal tax liens and determination of priority of such liens with reference to security interests in motor vehicles, and therefore is invalid. As a consequence, the Federal Government should be allowed to file its tax liens pertaining to personal property pursuant to the provisions of §335.18, Code of Iowa, 1971 and the provisions of §15 of H.F. 12 should be ignored. (Griger to Sellers, Commissioner, Department of Public Safety, 7/26/71) #71-7-13

Mr. Michael M. Sellers, Commissioner, Department of Public Safety: You have requested an opinion of the Attorney General on the question of whether §15 of H.F. 12 Acts 64th G.A. is valid insofar as it purports to amend §335.18, Code of Iowa, 1971, to require the filing of a federal tax lien with the county recorder or the secretary of state, and, in the case of a tax lien against a motor vehicle of the taxpayer, to also file a lien with the county treasurer. H.F. 12 also purports to determine the priority of the federal tax lien in relationship to security interests in motor vehicles.

House File 12 amends §335.18 of the Code as follows:

"Sec. 15. Section three hundred thirty-five point eighteen (335.18), Code 1971, is amended as follows:

335.18 REAL ESTATE LIENS FILED WITH RECORDER.

1. Notices of liens upon real property for taxes payable to the United States, and certificates and notices affecting the liens shall be filed in the office of the recorder of the county in which the real property subject to a federal tax lien is situated.

2. Notices of liens upon personal property, whether tangible or intangible, *other than vehicles for which a certificate of title is required under the provisions of chapter 321,* for taxes payable to the United States and certificates and notices affecting the liens shall be filed as follows:

a. If the person against whose interest the tax lien applies is a corporation or a partnership whose principal executive office is in this state, as these entities are defined in the internal revenue laws of the United States, in the office of the secretary of state.

b. In all other cases, in the office of the recorder of the county where the taxpayer resides at the time of filing of the notice of lien.

3. *In the event a lien encumbers a vehicle for which a certificate of title is required under the provisions of chapter 321, a security interest in such vehicle is perfected by the delivery of federal notice of attachment to the county treasurer of the county where the certificate of title was issued and it shall take priority according to the order of time in which the same is placed on the certificate of title for the vehicle to which*

said lien applies by the county treasurer and as provided in sections 321.45 and 321.50. The county treasurer shall note such lien without fee. (amendment underlined)

The relevant federal statute is §6323 of the Internal Revenue Code. Section 6323(a) states a general rule that the federal tax lien which has been filed will take priority over any subsequent holder of a security interest. Section 6323(f)(1) provides as follows:

"(f) Place for Filing Notice; Form —

(1) Place for Filing — The notice referred to in subsection (a) shall be filed —

(A) Under State Laws. —

(i) Real property — In the case of real property, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated; and

(ii) Personal Property — In the case of personal property, whether tangible or intangible, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated; or

(B) With Clerk of District Court — In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State has not by law designated one office which meets the requirements of subparagraph (A); or

(C) With Recorder of Deeds of the District of Columbia — In the office of the Recorder of Deeds of the District of Columbia, if the property subject to the lien is situated in the District of Columbia."

Section 6323(f)(1) provides for the place for filing of federal tax liens. In the case of personal property, this federal statute provides that the federal tax lien is to be filed in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such state, in which the property subject to the lien is situated. In the absence of the state designating one such office, the federal law states that the federal tax lien may be recorded in the office of the Clerk of the United States District Court for the Judicial District in which the property subject to the tax lien is situated. Section 6323(f)(3) states that the form and content of the federal notice of tax lien shall be prescribed by the secretary of the treasury or his delegate, and that such notice shall be valid notwithstanding any other provisions of law regarding the form or content of a notice of lien.

Section 335.18, prior to amendment by H.F. 12, properly designated "one office" within the state in which federal liens on personal property were to be filed. The "one office" was the secretary of state if the taxpayer was either a corporation or partnership whose principal executive office was in Iowa. In all other instances, the "one office" was that of the appropriate county recorder. Thus, no matter who the taxpayer was, §335.18, Code of Iowa, 1971, designated "one office" in which to file the federal tax lien concerning personal property as required by §6323(f)(1)(A)(ii) of the Internal Revenue Code. Section 15 of H.F. 12 purports to add an additional office to file federal tax liens on personal property, to-wit, the office of the county treasurer. It is also clear that H.F. 12 purports to determine the priorities of the federal tax lien as it would

relate to security interests in motor vehicles by stating that when the federal government delivers a notice of attachment to the county treasurer of the county where the certificate of title to the motor vehicle was issued, the security interest becomes perfected and will take priority according to the order of time in which that interest is placed on the certificate of title. Thus, if the federal tax lien is not noted on the certificate of title, the effect of §15 of H.F. 12 is to deny priority of the federal tax lien against a holder of a subsequently recorded security interest.

The United States Supreme Court has held, in construing §6323 of the Internal Revenue Code, that if the state law does not designate one place in which the federal tax lien can be filed, then the federal government may file its lien with the Clerk of the United States District Court. *United States vs. Union Central Life Insurance Company*, 1961, 368 U. S. 291, 82 S. Ct. 349, 7 L. Ed. 2d 294; *United States vs. Estate of Donnelly*, 1970, 397 U. S. 286, 90 S. Ct. 1033, 25 L. Ed. 2d 312.

In the *United States Union Central Life Insurance Company* case, supra, a Michigan statute required that the federal government file notice of tax lien with a register of deeds in the county and denote on its lien the description of the real estate upon which the lien was claimed. The federal government contended that it would not have to follow this requirement of Michigan law and that it could file its notice of tax liens with the clerk of the United States District Court. The United States Supreme Court agreed with this contention and held that the federal tax lien would not lose its priority by reason of the Michigan law filing requirements and that no state office was designated for the filing of the federal tax lien within the meaning of the federal statute.

The courts have held that states cannot require the federal government to make a notation of its tax liens upon a certificate of title to a motor vehicle. *Yellow Motors Credit Corp. vs. Boling*, 1965, 2 Ohio App. 2d 7, 206 N. E. 2nd 27; *Union Planters National Bank vs. Godwin*, 1956, E.D. Ark., 140 F Supp. 528. If a state statute attempts to do more than merely designate a place where the federal tax lien may be filed several lower federal courts have held that the state statute will not be recognized or given effect so as to preclude the priority of the federal tax lien otherwise valid under other portions of state law not inconsistent with the federal law. *Desert Air Conditioning, Inc. v. Wood*, D.C. Ariz. 1960 60-2 U.S.T.C. par 9632; *Merchants Loan Company vs. United States*, 1957, D.C. Ariz. 169 F Supp. 227. In these cases, the courts held that federal tax liens filed in the county recorder's office pursuant to state law were perfected notwithstanding that they were not filed or deposited with the Motor Vehicle Division of the Arizona State Highway Department pursuant to state law. The latter state statute was held to be in derogation of §6323 and, thus, not given effect so as to defeat federal tax lien priority over security interests in motor vehicles.

In Union Planters National Bank vs. Godwin, supra, Arkansas adopted the Uniform Federal Tax Lien Registration Act as did Iowa in 1970 by the adoption of what is now §335.18 of the 1971 Code. See Ch. 1168, Acts 63rd G. A., 2nd session. Arkansas amended their Federal Lien Registration Act to require that federal liens be perfected by having them noted on the certificate of title. The Federal District Court for Arkansas held that the amendment was not valid and that the filing by the federal

government of its tax lien under the Arkansas law as it existed prior to amendment was proper and would constitute a single filing of said tax lien.

It is the opinion of this office that §15 of H.F. 12 is inconsistent with the provisions of §6323 of the Internal Revenue Code and, as the cases cited herein hold, is invalid. As a consequence, the Federal Government should be allowed to file its tax liens pursuant to the provisions of §335.18, Code of Iowa, 1971 and the provisions of §15 of H.F. 12 should be ignored.

July 27, 1971

TAXATION: Dutch Elm Disease — §§368.3 and 368.4, Code of Iowa, 1971. If a city council certifies the cost of removing trees infected with Dutch Elm disease to the county auditor without statutory authority, the resulting liens are void. The county treasurer cannot collect the tax and must remove the void liens from the tax rolls. (Pabst to Faulkner, Mahaska County Attorney, 7/27/71) #71-7-14

Mr. Hugh V. Faulkner, Mahaska County Attorney: You have requested an opinion of the Attorney General on the following matter. The City of Oskaloosa has removed trees infected with Dutch Elm disease from parking owned by the city of Oskaloosa. The cost of the tree removal was assessed against the abutting property owners. The City Clerk has certified the cost to the County Auditor pursuant to §§368.3 and 368.4, Code of Iowa, 1971. The assessments now appear on the tax rolls of Mahaska County. None of the property owners have attacked the assessment as provided by law. In your letter you ask what procedure should be followed by the Mahaska County Treasurer with respect to these liens.

The first issue raised by your letter is whether or not the assessment against the abutting property owner for the cost of removal of trees infected with Dutch Elm disease is valid. In 1970 OAG 165, 167, it is stated:

"It is therefore the opinion of this office that the city of Council Bluffs may not levy an assessment against the abutting property owner for the expense of removing a diseased elm tree from the city parking in front of his residence."

Thus, the assessment against the abutting property owners is void.

Because the assessment is void, the tax lien is also void. In the case of *Lanbersheimer v. Huiskamp* the Supreme Court stated:

"Unless there is a valid assessment there can be no valid tax or obligation from the taxpayer. Security Trust & Savings Bank v. Mitts, 220 Iowa 271, 277, 261 N. W. 625; Bennett v. Finkbine Lumber Co., 199 Iowa 1085, 1088, 1090, 198 N. W. 1; Galusha v. Wendt, 114 Iowa 597, 604, 87 N. W. 512. Moneys and credits are assessed against the owner thereof. Section 429.2; Branch v. Town of Marengo, 43 Iowa 600, 601." 1967, 260 Iowa 1340, 1343, 152 N. W. 2d 625.

If there is no tax, no lien can be placed on the property. *In re Frentress' Estate*, 1958, 249 Iowa 783, 89 N. W. 2d 367.

Because the liens are void, the treasurer cannot collect the tax, and must remove the void liens from the tax rolls.

July 27, 1971

SCHOOLS: Directors — §§69.11, 279.6, Code, 1971. 1) If a vacancy on the school board is filled by appointment the person appointed serves only until the third Monday in September following the next regular election rather than for the remainder of the unexpired term. Person elected at such regular election to fill the vacancy serves for the unexpired term originally vacated. 2) Last paragraph of opinion of 7/16/71, Nolan to Pellett withdrawn. (Turner to Pellett, 7/27/71) #71-7-15

The Hon. Wendell C. Pellett, State Representative: In an opinion issued by this office on July 16, 1971, Assistant Attorney General Elizabeth A. Nolan said that §279.6, Code of Iowa, 1971, provides that generally vacancies occurring among the members of the school board shall be filled by the board by appointment and that the "person appointed to fill the vacancy will hold office for the remainder of the unexpired term."

We now recognize that this statement was clearly erroneous. School board members are of course elected. When a vacancy occurs, a "person so appointed to fill a vacancy in an elective office shall hold until the organization of the board the third Monday in September immediately following the next regular election and until his successor is elected and qualified." §279.6, Code of Iowa, 1971.

Thus, if a vacancy occurs and the board fills the vacancy by appointment within ten days, the person appointed serves only until the third Monday in September immediately following the next regular election rather than for the residue of the unexpired term. A person then elected at the next regular election following the appointment, is elected to fill the vacancy and serves for the unexpired term originally vacated. §69.11, Code of Iowa, 1971. See also, 1964 OAG 354.

Accordingly, the last paragraph of Miss Nolan's opinion is hereby withdrawn.

July 29, 1971

STATE OFFICERS AND DEPARTMENTS: State car dispatcher, purchase of motor vehicles for political subdivisions — §§21.2(4), 404.18 and Ch. 28E, Code of Iowa, 1971. Political subdivisions having the power to purchase motor vehicles may arrange with the state car dispatcher for the latter to purchase vehicles on their behalf. (Haesemeyer to Crabb, State Car Dispatcher, 7/29/71) #71-7-16

Mr. Frank Crabb, State Car Dispatcher: By your letter of July 13, 1971, you have requested an opinion of the attorney general on the question of whether or not there is any statutory authority for your office to undertake to purchase motor vehicles and accessories for local governmental units such as municipalities.

Chapter 21, Code of Iowa, 1971, confers upon the state car dispatcher broad duties with respect to state owned motor vehicles including the specific responsibility of purchasing all new motor vehicles for all branches of the state government. Section 21.2(4). Section 404.18, provides in part:

"Municipal corporations shall have power to establish and maintain a revolving fund to be used for the central purchasing of city or town stores, supplies, motor vehicles, or other equipment. . . .

". . . purchases of motor vehicles and equipment and replacements therefor; and administrative costs incurred in the operation of such fund,

may be paid therefrom."

In a recent opinion of the attorney general, Haesemeyer to Henke, Office for Planning and Programming, February 3, 1971, we concluded that municipalities had not only the power to purchase motor vehicles but the power to lease them.

Chapter 28E, entitled "Joint Exercise Of Governmental Powers" provides in §28E.1:

"28E.1 Purpose. The purpose of this chapter is to permit state and local governments in Iowa to make efficient use of their powers by enabling them to provide joint services and facilities with other agencies and to co-operate in other ways of mutual advantage. This chapter shall be liberally construed to that end."

Sections 28E.2 and 28E.3 provide respectively:

"28E.2 Definitions. For the purposes of this chapter, the term 'public agency' shall mean any political subdivision of this state; any agency of the state government or of the United States; and any political subdivision of another state. The term 'state' shall mean a state of the United States and the District of Columbia. The term 'private agency' shall mean an individual and any form of business organization authorized under the laws of this or any other state.

"28E.3 Joint exercise of powers. Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed jointly with any other public agency of this state having such power or powers, privilege or authority, and jointly with any public agency of any other state or of the United States to the extent that laws of such other state or of the United States permit such joint exercise or enpoyment. Any agency of the state government when acting jointly with any public agency may exercise and enjoy all of the powers, privileges and authority conferred by this chapter upon a public agency."

It is clear that a municipality being a political subdivision of this state would be a public agency as that term is used in Chapter 28E. The state car dispatcher is an agency of state government and accordingly would also meet the statutory definition of "public agency."

Accordingly, it would be our opinion that since both the state car dispatcher and a municipality have the power to purchase motor vehicles and both are public agencies they could jointly exercise their powers under Chapter 28E.3. The same would be true of any other political subdivision which has the power to purchase motor vehicles. Sections 28E.4 et seq. spell out the manner in which the joint powers are to be exercised and the specifications of any agreement entered into between the parties.

July 29, 1971

STATE OFFICERS AND DEPARTMENTS: Executive Council, review of decision of Merit Employment Commission not authorized — §19A.14, Code of Iowa, 1971; R.C.P. 306. An employee aggrieved by a decision of the Merit Employment Commission may obtain review of the commission's decision by way of writ of certiorari to the district court. The Executive Council is without jurisdiction or power to grant him relief. (Haesemeyer to Wellman, Ex. Cl., 7/29/71) #71-7-17

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: By your letter of July 28, 1971, you have requested an opinion of the attorney general with respect to the following:

"Forwarded herewith are copies of the complete file relative to a request received from a . . . former employee of the Iowa Civil Defense Division, asking for a hearing before the Executive Council relative to his dissatisfaction with the hearing recently held by the Iowa Merit Employment Department in connection with the reduction in force of the said Iowa Civil Defense Division which resulted in his recent dismissal.

"The Executive Council, in their meeting held July 26, 1971, after reviewing [the former employee's] request for a personal appearance before the Executive Council, directed this office to refer same to your attention for the purpose of securing your opinion that [he] has exhausted all avenues of appeal and should be granted the privilege of a personal appearance before the said Executive Council of Iowa."

Section 19A.14, Code of Iowa, 1971, provides:

"19A.14 Appeal to appointing authority. Any employee who is discharged, suspended, or reduced in rank or grade, except during his probation period, may appeal to the appointing authority and if not satisfied, may, within thirty days after such discharge, reduction, or suspension appeal to the commission for review thereof. Upon such review, both the appealing employee and the appointing authority whose action is reviewed shall, within thirty days following the date of filing of the appeal to the commission, have the right to a hearing closed to the public, unless a public hearing is requested by the employee, and to present evidentiary facts thereat. Technical rules of evidence shall not apply at any hearing so held. If the commission finds that the action complained of was taken by the appointing authority for any political, religious, racial, national origin, sex, age or nonmerit reasons, the employee shall be reinstated to his former position without loss of pay for the period of the suspension. In all other cases the merit employment commission shall have jurisdiction to hear and determine the rights of merit system employees and may affirm, modify, or reverse any case on its merits. *The employee or the state may obtain judicial review of the commission's decision by writ of certiorari as provided by division XIV of the rules of civil procedure.*" (Emphasis added)

It is to be observed that under the statute an employee who is aggrieved by a determination of the merit employment commission may obtain judicial review of the commission's decision by a writ of certiorari to the district court in accordance with Division XIV of the rules of civil procedure. In our opinion this is his exclusive remedy and the executive council is without jurisdiction or power to grant him any relief.

July 29, 1971

COUNTIES AND COUNTY OFFICERS: Assistant county attorneys, expenses for attending course of instruction — S.F. 37, Acts, 64th G. A., First Session, (1971). A county board of supervisors could pay the expense of sending a member of the county attorney's staff to a Short Course for Prosecuting Attorneys sponsored by the Northwestern University School of Law. (Haesemeyer to Faches, Linn County Attorney, 7/29/71) #71-7-18

Mr. William G. Faches, Linn County Attorney: You have orally requested an opinion of the attorney general as to whether or not the enactment of Senate File 37, Acts, 64th G. A., First Session (1971) operates to preclude you from sending a member of your staff to the 1971 Short Course for Prosecuting Attorneys sponsored by the Northwestern University's School of Law and to be held in Chicago, Illinois the first part of next month.

Section 2 of such Senate File 37 provides:

"Sec. 2. No county funds may be expended for membership fees or for attendance expenses for any county officers association other than the Iowa state association of counties."

It is to be observed that the prohibition on the expenditure of county funds applies only to membership fees or attendance expenses for county officers associations other than the Iowa state association of counties. The Northwestern University School of Law is not a county officers association. Hence, it would be our opinion that the supervisors could pay your assistants expenses in attending the 1971 Short Course for Prosecuting Attorneys. Expressio unius est exclusio alterius.

July 30, 1971

CITIES AND TOWNS: Residency of municipal utility trustee — §§386B.6, 397, 398.8, 399.14 and 420.297, Code of Iowa, 1971. A potential appointee as trustee for a municipal utility must be a resident of that municipality. (Blumberg to Hansen, State Representative, 7/30/71 #71-7-19

Hon. Willard R. Hansen, State Representative: In your letter of June 28, 1971, you requested the following:

"I would appreciate an opinion on whether there are any territorial or geographical limitations imposed on a potential appointee as a trustee for a municipal utility. Does the law require the appointee to live within the incorporated city limits of said municipal utility or merely live within the franchise territory served by the municipal utility?"

There are several Chapters of the 1971 Code of Iowa concerning trustees of municipal utilities. Section 420.297 states, in part:

"In special charter cities having a population of less than twenty-five thousand owning two or more public utility plants and works, as provided for under chapter 397, such works and plants shall be managed, operated, extended and controlled by a co-ordinated board of trustees which shall be composed of five *resident electors* appointed for the term of five years by the mayor of said city." [Emphasis added]

It appears from this section that trustees of municipal utilities for cities under special charter must be residents of that city.

Chapter 397 contains general powers with respect to all public utilities appearing in its title. *Hansen v. Henderson,* 244 Iowa 650, 663, 56 N. W. 2d 59 (1953). It allows municipalities to have boards of trustees appointed for the management of municipal utilities. See sections 397.29 through 397.35. However, there is no indication as to whether the trustees must be residents of the municipalities. Therefore, we must look to statutes dealing with specific utilities.

Chapters 398 and 399 concern waterworks in cities over ten thousand and fifty thousand, respectively. Section 398.8 states that the board of trustees shall consist of three *resident electors,* while section 399.14 states that the board of trustees shall consist of five *resident voters.* In addition, section 386B.6, requires that the board of trustees for municipal transit systems consist of "three members appointed by the mayor from among the *resident voters* of the municipal corporation . . ." [Emphasis added]

General provisions for other utilities are contained in Chapter 397. However, there is no specific language as to the residency of the trustees.

This does not mean that the trustees of those utilities not specifically mentioned need not be residents of the municipality. On the contrary, it appears from the above sections that the trustees of municipal utilities must be residents of the municipality.

Accordingly, we are of the opinion that the trustees must be residents of the municipalities.

July 30, 1971

CRIMINAL LAW: Protective eyeglass lens and frames — Senate File 289, Acts, 64th G. A. Senate File 289 which became law effective July 1, 1971, applies to both prescription and nonprescription eyeglasses and sunglasses. (Bobenhouse to Walsh, State Senator, 7/30/71) #71-7-20

Mr. John M. Walsh, State Senator: Reference is herein made to your letter in which you have requested an opinion on the following questions:

"1. Does Senate File 289 apply to anything other than prescription eyeglasses?

"2. Do the words in the first sentence 'unless they are fitted with plastic lenses or laminated lenses or heat-treated glass lenses' exempt these things, plastic lenses, laminated lenses, and heat-treated glass lenses from the act?"

In answer to your question number one, your inquiry is whether Senate File 289 applies to anything other than prescription eyeglasses. The first sentence of the bill states:

"Section 1. No person shall fabricate, distribute, sell, exchange or deliver, *any eyeglasses or sunglasses* unless they are fitted with plastic lenses, or laminated lenses or heat-treated glass lenses, . . ."

The phrase "any eyeglasses or sunglasses" is plain and unambiguous and does not permit any narrower interpretation than what it says. If the drafters of the bill, as enacted into law, had intended that it only apply to prescription eyeglasses and sunglasses they would have said so. Since words should be construed according to the context and the approved usage of the language, the word "any" must be construed to mean "any."

Therefore, Senate File 289, as enacted into law on July 1, 1971, applies to any eyeglasses or sunglasses, whether they be prescription or nonprescription.

In answer to your question number two, your inquiry is whether the phrase "unless they are fitted with plastic lenses or laminated lenses or heat-treated glass lenses" exempts these three types of lenses from the provisions of the act. It is our opinion that this phrase does not exempt these types of lenses from the act. Instead, the purpose of this Act is to make it a criminal offense to "fabricate, distribute, sell, exchange or deliver, or have in his possession with the intent to distribute, sell, exchange, or deliver, any eyeglasses or sunglasses" that do not have either plastic, laminated, or heat-treated lenses. The Act goes on and provides for minimum safety standards that these three types of lenses must meet. For instance, "all plastic and heat-treated glass lenses shall be capable of withstanding an impact test of a five-eighths inch steel ball dropped fifty inches" at room temperature. The whole purpose of this Act is to insure that the public can only obtain impact-resistant lenses, and no

other kind. Thus, in construing the words according to the context of the bill, the phrase that you mention does not exempt plastic, laminated or heat-treated lenses from the Act. Instead, it specifically includes them into the Act. To construe the newly enacted law any other way would leave it entirely void of usefulness and meaning.

July 30, 1971

CRIMINAL LAW: Protective Eyeglass Lens and Frames Act enforcement — Senate File 289, Acts, 64th G. A. A violation of S.F. 289 is an indictable misdemeanor and should be enforced in the same manner as any public offense. (Bobenhouse to Dr. Reeve, Commissioner of Public Health, 7/30/71) #71-7-21

Dr. Arnold M. Reeve, Commissioner of Public Health, State Department of Health: This is in answer to your request for an opinion of the Attorney General with respect to your following letter:

"The session of the General Assembly which adjourned on June 18, 1971 enacted legislation concerned with the quality of glass in spectacles. The title of this bill was Senate File 289, an Act relating to protective eyeglass lens and frames and providing a penalty.

"This bill requires certain action in the dispensing of eyeglass lenses. The bill, however, is silent as to the agency responsible for the enforcement of the provisions of this bill.

"This is a request for your opinion as to how this bill, Senate File 289, will be enforced. Does any state agency have responsibility for the enforcement of the provisions of this bill? If so, which agency? If not, how does enforcement occur?"

Your letter asks whether any state agency has responsibility for the enforcement of this new law, and if so, which agency. The legislature which passed this bill did not designate the enforcement of Senate File 289 to any specific agency. If they had intended that a specific agency be responsible for enforcing this bill, they would have made provisions for such.

The bill provides a penalty for violating any provision of not less than five hundred dollars upon conviction. This makes the statute criminal in nature and a violation of it is a public offense or more specifically an indictable misdemeanor. Thus, the enforcement of a violation of this law comes about when a complaint or preliminary information is made in writing, under oath, and before a magistrate accusing someone of the commission of a public office. Chapter 754 of 1971 Code of Iowa. Peace officers have the duty, under Chapter 748 of the Code of Iowa, to file information against persons who have violated the laws of this state. Therefore, enforcement of this statute is done in the same manner as enforcement of any public offense.

Furthermore, subsection (1) of Section 135.11 of the 1971 Code of Iowa, places upon the State Department of Health the power and duty to exercise general supervision over the public helath and to enforce the laws relating to the same. Thus, the Iowa Legislature has given the State Department of Health the general authority to enforce laws relating to the public health of citizens of the state. Senate File 289 is related to public health in that its primary purpose and intent is to protect the consumer public against eye injury caused by inferior quality eyeglass lens and frames. Inasmuch as this statute relates to public health, the

State Department of Health does have the authority if it so chooses to enforce Senate File 289.

July 30, 1971

STATE OFFICERS AND DEPARTMENTS: Iowa Development Commission, membership in U. S. Feed Grains Council authorized — §§28.7 and 28.9, Code of Iowa, 1971. The promotion of the role of Iowa feed grains is within the scope of the purposes and duties of the Iowa Development Commission and such commission could legally expend commission funds for membership in the U. S. Feed Grains Council. (Haesemeyer to Wellman, Secretary, Executive Council, 7/30/71) #71-7-22

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: Reference is made to your letter of July 29, 1971, in which you state:

"Forwarded herewith is a copy of a purchase order received from the Iowa Development Commission, asking Executive Council approval for Membership in the U. S. Feed Grains Council, as well as a copy of a letter received from Mr. Chad A. Wymer, Director of the Iowa Development Commission, enumerating the benefits to be derived by the said Commission from this membership.

"The Executive Council, in their meeting held July 26, 1971, approved the request of the Iowa Development Commission, providing that this office receive from you, a favorable opinion stating that this is a proper expenditure of Commission funds."

The duties and powers of the Iowa development commission are set forth in §§28.7 and 28.8, Code of Iowa, 1971. Among the duties of the commission as set forth in §28.7(6) is to:

"6. Do such other and further acts as shall, in the judgment of the commission, be necessary and proper in fostering and promoting the industrial and agricultural development and economic welfare of the state of Iowa."

Section 28.9 provides:

"28.9 Warrants. The comptroller is authorized and directed to draw warrants on the treasurer of state for the several sums and for the purposes specified in this chapter upon duly itemized and verified vouchers that have been approved by the chairman or director of the commission."

Since the promotion of the sale of Iowa feed grains is in our opinion well within the scope of the purposes and duties of the Iowa development commission it would be our view that it could legally expend commission funds for membership in the U. S. Feed Grains Council.

August 2, 1971

LABOR: Checkoff of Union Dues — Title 29 U.S.C. §186(c)4, §302, §736A.5, Code of Iowa, 1971. Under Labor Management Relations Act valid checkoff agreements are legal and enforceable, and shall not be revocable for a period of more than one year or beyond the termination of the contract, whichever occurs sooner. (Garretson to Kennedy, State Senator, 8/2/71) #71-8-1

State Senator Gene Kennedy: This letter is in response to your request for an Opinion. Below is a portion of your letter in which is stated the basic elements of your request.

"In practice in this state, some employers withhold dues for unions in checkoffs. I am under the impression the National Labor Relations Act provides, and courts have held, that employees could not revoke, under a

state right to work law the assignment of that portion of their wages at will, as the state law is pre-empted by the federal provisions permitting irrevocability of written checkoff authorizations for a period of a year or less."

We would point out that §736A.5, Code of Iowa, 1971, provides as follows:

"It shall be unlawful for any person, firm, association, labor organization, or corporation to deduct labor organization dues, charges, fees, contributions, fines or assessments from an employee's earnings, wages or compensation, unless the employer has first been presented with an individual written order therefor signed by the employee, which written order shall be terminable at any time by the employee giving at least thirty days' written notice of such termination to the employer."

Nevertheless we feel that your impression of the National Labor Relations Act is correct in that employees cannot revoke checkoffs if a valid collective bargaining contract has been created.

Support for this belief is found in the case of *W. R. Grace, SeaPak Division v. Maritime Union*, 1970, 400 U.S. 985, 91 S.Ct. 63, 27 L.Ed 2d, 432, F.2d 1129, 300 F. Supp. 1197, and in National Labor Relations Act decisions. The Labor-Management Relations Act allows employers to pay labor organizations money which it has received from employees, who sign a written assignment which shall not be revocable for a period of more than one year, or beyond the termination date of the applicable collective agreement whichever occurs sooner, Title 29 U.S.C. §186(c)4. Under Title 29 U.S.C. §302 (Taft-Hartley Act) a union is permitted to bargain for and receive a checkoff of dues under authorization which may be irrevocable for as long as one year.

In the *SeaPak case*, supra, the District Court, Court of Appeals and the U.S. Supreme Court all held that federal law has pre-empted this area of the law from the state governments and such actions are valid. Therefore, an employee's assignment of wages is not revocable at will or on thirty days' written notice and checkoff agreements in union-management contracts are valid and enforceable.

August 4, 1971

ELECTIONS: Eighteen year old voting — 26th Amendment, U. S. Constitution; Art. II, §1, Constitution of Iowa; §§277.12, 277.27, 363.26, Code of Iowa, 1971. (1) With the adoption of the 26th Amendment to the U.S. Constitution an 18 year old is now considered a general elector in the State of Iowa. (2) 18 year old electors who have met the residency requirements elsewhere set forth in Ch. 277 may vote in the school election in September, 1971. (3) 18 year olds may vote in the municipal elections in November, 1971. (4) To run for school or municipal office an individual must be a "qualified voter" and where registration is required this means he must be registered to vote. (5) Since 18 year olds may now vote in all elections known to the law and not merely for candidates for federal office there is no longer any need to keep their names separate and apart from the regular list of general electors. (6) Generally speaking there are no restrictions on the 18 year old voter in the state of Iowa, insofar as voting is concerned. But provisions of law fixing minimum age requirements to hold office remain in effect. (Turner to Buck, Marshall Cty. Atty., 8/4/71) #71-8-2

Mr. Max H. Buck, Marshall County Attorney: Reference is made to your letter of July 13, 1971, requesting an opinion of the attorney gen-

eral with respect to the following questions:

"1. With the ratification of 38 states on the 26th constitutional amendment, is an 18-year old now considered a general elector in the State of Iowa?

"2. May 18-year olds vote in the school election in September, 1971?

"3. May 18-year olds vote in the municipal election in November, 1971?

"4. May 18-year olds run for school, municipal or other public offices as a general elector?

"5. May 18-year olds, if now general electors, be inserted in the regular list of general electors submitted to the voting polls in cities and counties having permanent registration?

"6. What are the restrictions of the 18-year old voter in the State of Iowa, if any?"

1. The short answer to your first question is "yes". An 18-year old is now considered a general elector in the state of Iowa. With respect to the term "elector" in the supreme court of Iowa has said in *Buckmeier v. Pickett*, 1966, 258 Iowa 1224, 142 N.W.2d 426:

"The meaning of 'electors' is not subject to arguments, it is a word of art which we have construed to refer to the definition in Article II, section 1, of the Iowa Constitution. Edmonds v. Banbury, 28 Iowa 267, 4 Am. Rep. 177; Piuser v. City of Sioux City, 220 Iowa 308, 262 N. W. 551, 100 A.L.R. 1298."

And Article II, §1, Constitution of Iowa, provides:

"Every citizen of the United States of the age of twenty-one years who shall have been a resident of this State for such period of time as shall be provided by law and of the county in which he claims his vote for such period of time as shall be provided by law, shall be entitled to vote at all elections which are now or hereafter may be authorized by law. The General Assembly may provide by law for different periods of residence in order to vote for various officers or in order to vote in various elections. The required periods of residence shall not exceed six months in this State and sixty days in the county."

The recently adopted 26th amendment to the Constitution of the United States provides:

"Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

"Sec. 2. The Congress shall have power to enforce this article by appropriate legislation."

The effect of this amendment to the United States Constitution is to substitute the word "eighteen" for the words "twenty-one" in Article II, §1, of the Iowa Constitution.

The situation is not dissimilar from that which existed at the time of the adoption of the 19th amendment to the United States Constitution. At that time Article II, §1, of the Iowa Constitution limited the right of suffrage to males. After the ratification of the 19th amendment (extending the right of suffrage to women) the Iowa Supreme Court in *State v. Walker*, 1921, 192 Iowa 823, 185 N. W. 619, noted that:

"By the inherent force of the language of the Nineteenth Amendment,

as a part of the supreme law of the land, women are included and made a part of the electorate of this state, and no further legislation pursuant to this amendment is required by Congress or by the General Assembly of the state of Iowa. The amendment is self-executing."

I think we may safely conclude that the 26th amendment to the United States Constitution also possesses this "inherent force" as a part of the supreme law of the land. And that the word "electors" now includes all citizens of the United States 18 years of age or older who otherwise qualify under our Article II, §1, of the Iowa Constitution.

2. Section 277.12, Code of Iowa, 1971, provides in relevant part:

"To have the right to vote at a school election a person shall have the same qualifications as for voting at a general election . . . "

Accordingly, 18-year old electors who have met the residency and registration requirements elsewhere set forth in Chapter 277 may vote in the school election in September, 1971.

3. It seems clear that a municipal election is an election which is "authorized by law" within the meaning of Article II, §1, of the Iowa Constitution. Moreover, §363.26, provides:

"363.26 Municipal election procedure. The municipal election shall be conducted in the manner provided by law for conducting general elections."

Thus, 18-year olds may vote in the municipal elections in November, 1971.

4. Section 277.27 provides:

"277.27 Qualification. A school officer or member of the board shall, at the time of election or appointment, be a qualified voter of the corporation or subdistrict."

In this case it is not enough for an 18-year old, or for that matter anyone else seeking a school office, to be merely a general elector. He must also be a "qualified voter" at the time of election, and the terms "voter" and "eligible voters" have been construed by the Iowa Supreme Court to mean registered voters and not mere electors. *Buckmeier v. Pickett,* 1966, 258 Iowa 1224, 142 N.W.2d 426. Of course where registration is not required the terms "elector" and "qualified voter" are synonymous.

A candidate in a municipal election is also required to be a qualified voter. Section 363.14 requires a candidate for a municipal office to furnish with his nomination petition an affidavit containing the statement that he is a qualified voter.

Generally speaking insofar as other elections and other offices are concerned one would have to look at the language of the relevant statutes to determine whether it is sufficient for an 18-year old to be merely an elector or whether he must be a qualified voter or meet some other requirement to run for public office.

5. The ratification of the 26th amendment to the Constitution of the United States has lifted all restrictions that were formerly placed on 18-year old voting by the United States Supreme Court's decision in *United States v. Arizona,* 1970, ... U.S. ....., 27 L.Ed.2d 272, 91 S.Ct.

_____. Since 18-year olds may now vote in all elections known to the law and not merely for candidates for federal office there is no longer any need to keep their names separate and apart from the regular list of general electors.

6. Generally speaking there are no restrictions on the 18-year old voter in the state of Iowa *insofar as voting is concerned.* Again, as a general proposition they are now in essentially the same position occupied by persons 21 years old. This is not to say, however, that all age limitations are cast aside. For example, to be eligible for the office of governor or lieutenant governor a candidate must have been a resident of the state for two years prior to the election and have attained the age of 30 years at the time of the election. Article IV, §6, Constitution of Iowa. A state representative must have attained the age of 21 years and have been a resident for one year preceding his election. Article III, §4. The same requirements apply with respect to state senators except that the minimum age is 25 years. None of these requirements are changed by the adoption of the 26th amendment. There may be other provisions in the law fixing various age requirementes which do not depend on an individual's status as an elector or voter and as a general proposition in our view these sections are not changed by the 26th amendment.

August 4, 1970

ELECTIONS: Branch and mobile registrars — §§48.26, 48.27, Code of Iowa, 1971. The Cedar Rapids city clerk may establish a branch registration place and mobile deputy registrars may operate on the Kirkwood Community College campus but they are under no obligation to do so. (Turner to Faches, Linn County Attorney, 8/4/71) #71-8-4

Mr. William G. Faches, Linn County Attorney: Reference is made to your letter of July 23, 1971, in which you state:

"We are forwarding a request by the city of Cedar Rapids, for an opinion concerning voter registration prior to a September 13, 1971 School Board election. Kirkwood Community College is located in the city of Cedar Rapids. These questions are as follows:

"Must the city of Cedar Rapids furnish mobile registrars and/or branch registrars on the campus of Kirkwood Community College prior to the election of September 13, 1971?

"May the city of Cedar Rapids furnish mobile registrars and/or branch registrars on the Kirkwood Community College campus prior to the election of September 13, 1971?"

Chapter 48, Code of Iowa, 1971, dealing with permanent registration provides in §48.2 thereof:

"48.2 Definitions. For the purposes of this chapter, the word 'elections' shall be held to mean general, municipal, special, *school,* or primary elections, and shall include state, county, and municipal elections." Emphasis added)

Sections 48.26 and 48.27 contain respectively the statutory provisions for the establishment of branch registration places and the appointment of mobile deputy registrars. Nowhere in either of these two sections do we find any requirement that branch registration places be established at or mobile registrars furnished for any particular place. Accordingly, it is our opinion that the City of Cedar Rapids is under no obligation to establish branch registration places on or furnish mobile registrars for

the campus of Kirkwood Community College.

This is not to say, however, that the City of Cedar Rapids may not if it wishes to do so establish a branch registration place on the Kirkwood Community Campus. The statute §48.26, appears to give the city clerk considerable latitude in determining where branch registration places are to be established. Section 48.27 provides that, "Mobile deputy registrars are authorized to secure registration of eligible voters anywhere in the jurisdiction of the commissioner of registration . . . ".

Accordingly, it is our opinion that both branch and mobile deputy registrars appointed by the Cedar Rapids city clerk could be established or operate, as the case may be, on the Kirkwood Community College Campus. Doubtless the clerk will wish to consider that the overwhelming majority of college students are residents of their home towns and should properly register and vote there rather than in the community where the campus is located. See 1970 OAG 741, a copy of which is herewith enclosed. Perhaps, in this instance, Cedar Rapids is the some town of enough students and faculty members to justify branch or mobile registration on campus.

This opinion is predicated on the assumption that the election in question is not one which would come within the exemption provisions of §48.28. Such §48.28 provides:

"48.28 Chapter not applicable to certain community school districts. The provisions of this chapter shall not apply to any election conducted by community school districts which have been divided into director districts and in which each member of the board of directors is elected by the voters of the director district of which he is a resident, unless the board of directors of any such community school district shall by resolution make the provisions of this chapter applicable to elections within the said district."

August 6, 1971

SCHOOLS: Reimbursement: Tax free lands—§284.1, 284.2, Code of Iowa, 1971. Computation of reimbursement for tax free land can be determined pursuant to the formula prescribed by statute and the language of the statute is not so vague as to render such computation impossible. (Nolan to Rodenburg, 8/6/71) #71-8-5

Mr. Lyle A. Rodenburg, Pottawattamie County Attorney: This is in answer to your request for an Attorney General's opinion interpreting §§284.1 and 284.2, Code of Iowa 1971, under which school districts may claim reimbursement for lands removed from taxation and the computation of such payment.

Section 284.1, Code 1971, provides:

"When unplatted lands within the boundaries of a school district are owned by the government of the United States, by the state, by a county, or by a municipal corporation located wholly outside said school district, and such lands have been removed from taxation for school purposes, said school district shall be reimbursed, as hereinafter provided, in an amount which shall be computed by the county board of supervisors in the county in which such lands are located, which computation shall be made on or before the first day of September in the year in which said deductions are to be made."

Section 284.2, Code 1971, provides:

"The computation provided for in section 284.1 shall be made: (1) On the basis of the proportion that the assessable value of the total number of acres owned by the government of the United States, by the state, by the county, or by the municipal corporation, as the case may be, in such school district bears to the assessable value of the total number of acres in said school district. The average assessable value per acre of the lands so owned within the school district shall, for the purposes of the computation provided for in this chapter, not exceed thee average assessable value per acre of the taxable lands in said district, or (2), if said land or any part thereof is being operated by a municipal corporation for veterans or public housing purposes, and said municipal corporation does not furnish school facilities for tenants' children of school age, then the municipal corporation shall be obligated to provide its proportionate share of the education and building costs of the school district in which said project is located and the computation provided for in section 284.1 shall be made on the basis of the proportion the number of pupils attending said school district from said land bears to the total number of pupils attending said school district. The use of either computation provided for in this section shall be determined on the basis of whichever is the greater."

I

From the material submitted with your letter it appears that the county officers are concerned with a proper determination of tax-free land in 1971 and have asked you whether July 4, 1933, is the starting date for tax-free land reimbursement to the school district by the county.

Chapter 125, Acts of the 45 G.A. (1933), enacted the provisions of what is now codified as §284.1, supra. This Act went into effect on July 4, 1933. Prior to this enactment only the agricultural lands owned by the state and located outside cities and towns were certified for school tax reimbursement. (Acts 43 G.A., Ch. 115 (1929))

Under the 1933 Act, as now, the computation was to be made according to the proportion that the assessable value of the tax-free land (acres) bears to the assessable value of the land (acres) in the school district. The acts have always comtemplated that an assessed valuation be placed on the tax-free land. Until quite recently there appears to have been no question that the proper way to value the tax-free lands was to give them the valuation which they had when taken over by the government. In an opinion dated October 25, 1933, Attorney General O'Conner advised the State Auditor:

" . . . It was the apparent object of the legislature to reimburse school districts where such lands had been taken by the government . . . out of the school districts for taxation purposes. If there were buildings on the land when it was taken over by the government . . . then such buildings should be taken into consideration. In many instances where such lands have been taken over by the state or county, large buildings such as hospitals and schools have been erected thereon and paid for by public taxation. It certainly could not be the intent of the legislature to have such buildings included in figuring the value of this land for taxation purposes.

* * * * * *

"Where unimproved land was taken out of a school district and given to the state, county, or municipal corporation or federal government, such improvements should not be considered in fixing the valuation of this property for taxation purposes for the support of the schools. It is the intent of the legislature to restore to the school district for taxable purposes the equivalent of what was actually taken from the school district."

1934 OAG 395-396.

From the 1934 opinion it appears that there was a general consenus that some valuation should be placed on all tax-free land covered by the Act. Until recently there seems to have been little doubt that the assessable value of unplatted land acquired by the county prior to July 4, 1933, was to be fixed as of that date and that subsequent assessable valuation of such land would remain based on the status of the land when first assessed for this purpose. As to land acquired by the county subsequent to 1933, the valuation is the valuations placed on the lands immediately prior to the date they were taken off the tax rolls. 1934 OAG 395, supra.

The same principle applies to the proper determination of assessable value of state-owned lands before and after the year 1929, which is the date when reimbursement was made available for such lands.

II

The second question presented by the Pottawattamie Supervisors is whether the North Omaha Bridge Company is a municipality within the meaning of Code §284.3.

Generally speaking "municipalities" are public bodies or corporations in Iowa having power to certify or levy a tax or sum of money to be collected by taxation. See Ch. 24, Code of Iowa 1971.

The North Omaha Bridge Company is not registered as a domestic or foreign corporation by the Iowa Secretary of State. Nor does there appear to be any road district by this name organized under Iowa law.

Consequently, we must presume that any lands owned by such company properly belong on the tax rolls and that such company is not a municipality within the meaning of §284.3, supra.

III

The supervisors also asked whether the statute contains such ambiguous language as to render computation impossible thereby requiring clarification.

While it may be difficult to make the computation according to the formula prescribed by Code §284.2, particularly where the school district comprises lands in more than one county, it is our view that the language of the statute is sufficiently clear to permit such computation to be made. In this light we offer the following suggestions:

1. Assessable value of county lands — the 1933 value of lands taken off the tax rolls prior to that time; lands removed subsequently have the assessable value they had when removed from the tax rolls.

2. The total number of unplatted acres owned by the county should be determined next. At this point it is immaterial that the school district may include lands located in other counties.

3. Next an average assessable valuation is made by dividing the total assessable valuation by the total number of county-owned acres of unplatted tax-free lands. However, the assessable valuation of the county

lands as determined above may not exceed the average per acre assessable of all taxable lands in the school district. It may then become necessary to obtain assessment valuations for taxable lands located in other counties in order to determine the average per acre valuation of all taxable lands within the school district.

4. The Board of supervisors makes the same computation for lands owned by federal and state governments and also for municipal corporations and certifies to the county Auditor the amount due the school district after the school tax levies have been spread.

The procedure outlined above may be used in all instances unless the non-taxable lands are being used for veterans or public housing by a municipal corporation which does not furnish school facilities for tenant's school-age children, in which case the municipal corporation is obligated to pay a proportionate share of school building and education costs according to the ratio of public school pupils from such land to the total number of pupils in the school district.

August 6, 1971

SCHOOLS: School Board — §§275.12, 275.35, Code of Iowa, 1971. Whether or not a petition for a change of the method of election of school board members, would, if approved, meet the requirements of the one-man, one-vote principle involves a determination as to whether a deviation from population equality is justified, a factual question which the Attorney General should not decide. (Nolan to Johnston, Superintendent of Public Instruction, 8/6/71) #71-8-6

Mr. Paul F. Johnston, Superintendent of Public Instruction: This is in reply to your letter submitting a request for an opinion on the legality of a petition for the redistricting of the Marshalltown Community School District. The Board of this district is presently made up of seven Directors all elected at large. This arrangement fully complies with §275.12, Code of Iowa 1971, and one-man one-vote requirements. However, a petition has been filed pursuant to §275.35, Code of Iowa 1971, to provide for the election of all board members from Director-Districts. The petition appears to have been signed by the required number of voters residing in the school district, but its legality is questioned because it appears that the Director-Districts described in the petition are of unequal population and therefore cannot meet "one-man one-vote" tests.

As proposed by the petition, six of the school districts would be the same as the six wards in the City of Marshalltown as they existed on March 1, 1971. The seventh district would include all remaining rural area in the school district.

According to the official 1970 Census the population of the entire school district is 29,947. The population of each of the six wards of the City of Marshalltown is as follows:

Ward	Population
1	4605
2	3736
3	5001
4	4313
5	4484

6	4080
Total Population of Marshalltown	26,219

The population for the proposed seventh Director-District (rural) is 3,728. Thus, it appears that there is a population variance ratio of 34% between the high and low populations of the proposed districts. Assuming that the City of Marshalltown will redraw its city ward boundaries in compliance with H.F. 632 of the 64th G.A., First Session, to equalize the population for each of the wards, and the Director-Districts redrawn accordingly, there would still be a population difference of 552 between the lowest populated district (rural) and the six equalized districts (city), or a deviation of 12.3% from the mean population.

The Iowa Supreme Court has held that the one-man one-vote principle applies to the election of members to the County Board of Education, *Meyer v. Campbell,* 1967, 152 NW 2d 217, and also applies to the election of directors for merged area community colleges. *Stanley v. Southwestern Community College Merged Area,* 1971, 184 NW 2d 29. This office advised in an opinion dated March 1, 1968, that the one-man one-vote principle applies to the Director-District established pursuant to §275.12(2)(b). 1968 OAG 574.

In *Abate v. Mundt,* decided June 7, 1971, by the United States Supreme Court (39LW 4663), an apportionment of the County Board of Supervisors in Rockland County New York was upheld although the plan contained an 11.9% deviation from equality, because by the long-established tradition, the county supervisors of Rockland County were not elected separately but the Board was made up of elected town supervisors who then served in the dual capacity. The case recognizes that the particular circumstances and needs of a local community as a whole may sometimes justify departures from strict equality. It is also observed that the desire to preserve the integrity of political subdivision may justify an apportionment plan which departs from numerical equality. However, the Abate case does not break the established principle that deviations from population equality of districts must be justified.

Whether or not there is justification is a factual determination which we cannot and should not make. Moreover, if the plan were presented to the voters, the question might be mooted by the electorate. Hence we cannot say that the Board should not present the proposition to the voters.

August 6, 1971

COUNTY AND COUNTY OFFICERS: A justice of the peace may use to pay for office space only those criminal fees he is not required to pay the county treasury under §601.131, Code of Iowa, 1971. (Cullison to Gottschald, Warren County Attorney, 8/6/71) #71-8-7

Mr. Robert A. Gottschald, Warren County Attorney: You requested our opinion whether a justice of the peace in Washington Township of Warren County may use criminal fees to pay for office space.

Washington Township has 8,000 people. Section 601.131, Code of Iowa, 1971, requires a justice of the peace in a township of 8,000 people to pay the county treasury all criminal fees in excess of an amount equal

to $1,200 of criminal fees plus 50% of criminal fees over $1,200. This amount must in all instances be paid the county treasury. Section 601.131, Code of Iowa, 1971, states in relevant part:

"2. Justices of the peace and constables in townships having a population of under ten thousand shall pay into the county treasury all criminal fees collected in each year in excess of the following sums: a. In townships having a population of four thousand and under ten thousand, justices one thousand two hundred dollars plus an amount equal to fifty percent of fees collected in excess of one thousand two hundred dollars. . . . "

It is our opinion that a justice of the peace may use to pay for office space only those criminal fees he is not required to pay the county treasury.

August 6, 1971

HIGHWAYS: Relocation of Secondary Roads by Highway Commission— §§306A.3 and 306A.6. The Highway Commission may relocate an existing secondary road without consent of the county board of supervisors when such relocation is a realignment to eliminate grade crossings done in conjunction with construction of a controlled access primary highway. (Schroeder to Allbee, Franklin County Attorney, 8/6/71) #71-8-8

Mr. Richard A. Allbee, Franklin County Attorney: This is in response to a request for an Opinion from the former Franklin County Attorney, Mr. Lee Blum, wherein an opinion was requested as to whether a highway under the jurisdiction of a Board of Supervisors can be relocated by the Highway Commission under the authority contained in Chapter 306A, Code of Iowa, 1966, without the consent of the Board.

The Opinion request stated further that "relocation" is to be done in connection with elimination of grade crossings along Interstate 35. Assuming, therefore, we are speaking of a realignment of an existing county road in proximity to the interstate for the purpose of over or underpassing it across the interstate, then in our opinion the answer is yes.

Chapter 306A.3, Code of Iowa, 1971, authorizes the Highway Commission to plan, designate and establish Interstate 35 as a controlled access facility. In connection with this authorization, Chapter 306A.6 states in part:

" . . . The state . . . shall have authority to provide for the elimination of intersections at grade of controlled-access facilities with existing . . . county roads . . . by grade separation . . . , or by closing off such roads at the boundary line of such controlled-access facility. . . . "

The Iowa Supreme Court in *Warren v. Iowa State Highway Commission*, 1959, 250 Iowa 473, 93 NW2d 60, a road closure case, said Section 306A.6, " . . . . was enacted for a particular purpose and to facilitate the building of controlled access highways." The opinion held the State can effect a closure on their own authority with or without agreements with other political subdivisions. The Court further held Chapter 306A in its entirety is a special statute governing controlled-access facilities and where there is conflict with Chapter 306, which generally treats the establishment and jurisdiction of highways, Chapter 306A will control.

A fortiori, the State can also provide for a grade separation on their own authority due to the specific wording and the Supreme Court's interpretation of the Section.

Therefore, insofar as an existing county road requires realignment or reconstruction incident to the construction of a grade separation over or under Interstate 35, the Highway Commission's authority to effect such changes as are necessary to the county road is necessarily implied to carry out the purpose and intention of Chapter 306A.

Additionally, the request raises a question regarding terminology which should be addressed to avoid possible future misunderstanding. The opinion request stated "The Commission says it will eliminate grade crossings by relocating intersection roads, paying for the right of way and construction costs and then 'turn back' the relocated roads to become part of the County Road System. . . . "

Again assuming the statement is in relation to realignment or reconstruction of an existing county road relating to a grade separation, "turning back" which also contemplates "taking over" should not be construed to mean a change in the control or designation of the road. In other words, the portion of the county road that is being realigned or reconstructed does not become a primary highway during the construction and then revert back to a secondary status even though the State makes any necessary acquisitions and does the construction.

Precisely on point, this concept was touched upon in *Warren, supra.* The Supreme Court said at Page 64 of the Northwestern Reporter:

"It was suggested in oral argument that the Commission might declare any secondary road to be a primary road for the purpose of vacation; but we doubt the intent of the legislature to compel *taking over* numbers of secondary roads into the primary highway system for this purpose alone." (Emphasis added)

Again, *a fortiori* this same reasoning should hold true for all the options authorized by Section 306A.6 to effect grade crossing eliminations. While the Commission may exercise a possessary "take over" and "turn back", it is only for construction purposes necessary for the overall design and construction of the controlled-access facility.

August 10, 1971

STATE OFFICERS AND DEPARTMENTS: Printing Board, public bidding required — §§15.7 and 15.11, Code of Iowa, 1971. A contract covering only composition would be a process which the printing board could in its discretion exclude from the bidding process, but where the contract also includes the actual printing it would have to be submitted to bids. (Haesemeyer to Moore, Superintendent of Printing, 8/10/71) #71-8-9

Mr. J. C. Moore, Superintendent of Printing: Reference is made to your letter of August 3, 1971, with which you enclose certain correspondence from a printing company relative to a proposal that the state printing board enter into a contract for certain printing which would include computerized composition. One of the letters states the proposal as follows:

"(1) That over the next few years, a number of carefully considered

printing jobs be selected for computerized composition.

"(2) Because the real economies of computerized composition are realized on repeat printings, a contract should include both the original and one or two reprints.

"(3) If the cost suggested by the printer is not in the range of a competitive price, which can be determined easily if the job has been printed before, then the job is opened to competitive bids.

"(4) The State is protected by:

(a) the terms of the contract.

(b) retaining ownership of the tapes produced.

(c) dealing with printers who have demonstrated knowledge in this area.

"(5) The printer is protected in that no one can come in and low-bid a job that he has spent the time and effort necessary to research and develop."

You have indicated that the members of the printing board are in accord on the desirability of a pilot or exploratory program of this type but question the legality of entering into such an arrangement without going through the bidding process.

Section 15.11, Code of Iowa, 1971, provides:

"15.11 Advertisements for bids. The secretary of the board shall, from time to time as directed by the board, advertise for bids for the doing of the public printing. Such advertisements shall be published once each week for three consecutive weeks in seven newspapers in seven different cities of the state, one of which newspapers shall be published in Des Moines."

It is to be observed that this section requires that the public "printing" be subject to the bidding process. §15.7, provides:

"15.7 'Printing' defined. As used in this chapter and chapters 16 and 17, 'printing' means the reproduction of an image from a printing surface made generally by a contact impression that causes a transfer of ink or the reproduction of an impression by a photographic process and shall include binding and may include material, processes, or operations necessary to produce a finished printed product, but shall not include binding, rebinding or repairs of books, journals, pamphlets, magazines and literary articles by any library of the state or any of its offices, departments, boards and commissions held as a part of their library collection.

"For the purposes of this chapter, the reproduction of ten or more copies from one original on any convenience office copier located in the city of Des Moines is printing and shall not be permitted without the approval of the superintendent of printing."

In interpreting what is now §15.7 an earlier opinion of the attorney general concluded:

"The provisions of the above statutes are not mandatory with respect to 'processes.' The question as to whether or not any certain process would come within the provisions of this section of the Code is one in which a sound discretion can and should be exercised." 1934 OAG 594.

In a more recent opinion we followed this 1934 ruling. 1970 OAG 411.

If we were dealing here with a proposed contract covering only composition it would be our opinion that this would be a process which the

printing board could in its discretion exclude from the definition of printing and thereby avoid the requirement for going through the bidding procedure. However, it is clear that the proposal you have before you includes not only the composition but also the reproduction of an image on paper. Indeed, the proposal suggests that unless the printing is included with the computerized composition the contract would not be economically feasible from the printer's standpoint.

Nevertheless, we must conclude that a contract of the type described which includes not only the composition but the printing, i.e. reproduction of the image on paper, would have to be submitted to bids.

August 10, 1971

CONSTITUTIONAL LAW: Effective date of S.F. 297, Acts, 64th G.A., First Session (1971) — Art. III, §26, Constitution of Iowa; §3.7, Code of Iowa, 1971. Subsections 12 and 13 of §1 of S.F. 297 become effective December 31, 1971, and the remaining sections became effective July 1, 1971. (Haesemeyer to Lane, Secretary of the Senate, 8/10/71) #71-8-10

Mr. Carroll A. Lane, Secretary of the Senate: Reference is made to your letter of August 5, 1971, in which you state:

"I would like to request a ruling from your office on Senate File 297, a bill for an Act relating to motor vehicle inspection and safety and relating to registration certificates and containers, and providing penalties for violation of the Act, passed by the First Session of the Sixty-fourth General Assembly, and signed by the Governor on June 19, 1971.

"There seems to be some discrepancy in the text of the bill in regard to the effective date of the entire bill. Under Section 1, subsections 12 and 13 specify that 'After December 31, 1971 . . . '; however, there is no further reference made to that date in the remainder of the Act. We are particularly concerned with Sec. 3 of Senate File 297, and whether it becomes effective July 1, 1971, or whether the specified date for the subsections is the effective date for the entire bill."

Senate File 297 was signed by the governor on June 19, 1971 and thus became a law. As stated in 1968 OAG 379:

"A bill passed during a regular session, which becomes a law before July 1, takes effect on July 1 after its passage, under the provisions of §3.7, Code of Iowa, 1966, as amended by H.F. 57 (Ch. 83) Acts 62nd G.A., unless:

"a. A specified time is provided in the act, or in another law, as to when it is to take effect on or after July 1, or

"b. Being deemed of immediate importance, it is published in more than one newspaper in the State.

"Art. III, §26, 1948 OAG 31."

Thus, subsections 12 and 13 of section 1 of Senate File 297 become effective December 31, 1971, and the remaining sections became effective July 1, 1971.

August 11, 1971

STATE OFFICERS AND DEPARTMENTS: Commerce Counsel, subject to merit system — Ch. 19A, Ch. 475, §§490A.2, 490A.10, Code of Iowa, 1971. The office of the commerce counsel is not exempt from the merit employment provisions of Ch. 19A of the 1971 Code and the salary of

this office may be fixed in accordance therewith. There are no funds available to executive council to supplement the commerce commission's appropriation to pay for the commerce counsel. The commerce commission would be entirely justified in charging for services of its regular permanent employees under the charge back provisions of Ch. 490A, but any funds received would be deposited in the general fund and unavailable to augment the commission's regular appropriation. (Haesemeyer to Mowry, State Senator, 8/11/71) #71-8-12

The Honorable John L. Mowry, State Senator: Reference is made to your letter of July 31, 1971, in which you state:

"The Joint Legislative Committee making inquiry as to the Iowa Commerce Commission by motion on July 29 directed that I request of your office a formal opinion on the following subjects.

"1. Under Chapter 475 Commerce Counsel, which office is presently vacant, does the commerce commission have the power to fix the salary for commerce counsel and if it does is there any limitation on the amount of salary under the merit system, and if the commerce commission has inadequate funds to pay for commerce counsel can the Executive Council provide money from any contingency fund? If the Executive Council can provide funds from a contingency fund can the Executive Councilin doing so impose a limitation on the commerce counsel's salary more or less different from the salary either requested or fixed by the commerce commission?

"2. Under Chapter 490A.2, paragraph 2, does the merit system have the power to fix salaries for professional personnel, etc. under the second paragraph, or does the commerce commission have the power to fix such salaries "consistent with current standards in industry" irrespective of any other standards, particularly those dealing with the merit system? Stated another way, did the statutes dealing with the merit system specifically repeal or by implication repeal paragraph 2 wherein it is stated 'the commission shall employ at rates of compensation consistent with current standards of industry etc.'?

"3. Under Chapter 490A.2 paragraph 2 and Chapter 490A.10 are public utilities required to pay the 'expenses reasonably attributable to investigation, appraisal or services' only through the employment of consultants for these services or can these services be done by permanent employees of the commission with a charge-back to the several utilities for the 'expenses reasonably attributable to such investigation, appraisal, or service'? If the commission can engage its permanent employees with a charge-back for such services, is it possible for these employees to be paid out of the general fund of the State of Iowa and the charge-back when collected be deposited in the general fund? Stated another way, can not the public treasury be used as a revolving fund for the purpose of performance of Chapter 490.A as same relate to 'public utility regulations'?"

As you point out Chapter 475, Code of Iowa, 1971, contains statutory provisions relative to the office of commerce counsel. Section 475.1 thereof provides:

"475.1 Appointment — term. Within sixty days after the general assembly convenes in 1927, and every four years thereafter, the state commerce commission shall appoint a competent attorney to the office of commerce counsel, subject to the approval of two-thirds of the members of the senate. His term of office shall be for four years and till his successor is appointed, and shall begin on the first day of july of the year he is appointed."

It is to be observed that there is no reference in this section nor elsewhere in Chapter 475 to the manner in which the compensation of the commerce counsel is to be determined. Moreover, it has not been the

practice for the legislature to make a line item appropriation for the salary of the commerce counsel.

Section 490A.2 provides in relevant part:

"The commission shall employ at rates of compensation consistent with current standards in industry such professionally trained engineers, accountants, attorneys, and skilled examiners and inspectors, secretaries, clerks, and other employees as it may find necessary for the full and efficient discharge of its duties and responsibilities as required by this chapter." Ch. 286, §2, 60th G.A. (1963).

Were it not for the existence of the merit system and the statutes concerning the same this language from §490A.2 would appear to furnish ample authority for the commerce commission to fix and determine the salary of the commerce counsel "consistent with current standards in industry". Accordingly, we must next consider and determine whether the office of commerce counsel is suject to the merit system law.

The present merit system was established by Chapter 95, 62nd G.A. (1967), now codified as Chapter 19A of the 1971 Code. Chapter 19A provides for an Iowa merit employment commission and a director of the merit employment department.

The merit system law also makes provision for certain exemptions which are found in §19A.3. This section starts out by saying, "The merit system shall apply to all employees of the state and to all positions in the state government now existing or hereafter established except the following:". Thereafter are listed some sixteen categories of employees who are not subject to the coverage of the merit system. Among thse are:

"2. All board members and commissions whose appointments are otherwise provided for by the statutes of the state of Iowa, and one (1) stenographer or secretary for each member of each board and commission, and one (1) principal assistant or deputy in each department.

"3. Three (3) principal assistants or deputies for each elective official and one (1) stenographer or secretary for each elective official and each principal assistant or deputy thereof.

* * *

"10. Part-time professional employees who are paid a fee or who are under contract for service basis and are not engaged in administrative duties.

* * *

"14. All appointments which are by law made by the governor or executive council; one (1) stenographer or secretary for each; one (1) principal assistant or deputy for each; and all administrative assistants or deputies employed by the director of the Iowa Development Commission."

The commerce counsel is not a board member or commission and thus would not fall within the exemption created by 19A.3(2), nor is he a principal assistant or deputy for an elective official and therefore exempt under §19A.3(3). Inasmuch as §475.4 requires that the commerce counsel devote his entire time to the duties of his office he could not qualify for the exemption given to part-time professional employees, §19A.3(10), and since he is appointed by the commerce commission the commerce counsel would not come under the exemption given to all appointments which are by law made by the governor or executive council under §19A.3(14).

As originally enacted what is now §19A.3 of the code contained the following additional exemption: "Any other position or positions excluded by law." §3(15), Chapter 95, 62nd G.A. (1967). Similar language is still found in §19A.9(1). In part because of this language in §3(15) of the original act we stated in three earlier opinions that it was our opinion that the merit system did not apply to employees of the conservation commission, the department of public safety and the highway commission. 1970 OAG 120, 1970 OAG 78 and 1970 OAG 104. However, there were other reasons for the conclusions we reached in these earlier opinions. They were founded in part on the general rule that repeals by implication are not favored and will not be upheld particularly when public statutes of long standing are under consideration, unless the intent to repeal clearly and unmistakably appears from the language used. *Radosevich v. City of Ottumwa*, 1970, ...Iowa....., 173 N.W.2d 522; *Kruse v. Gaines*, 1966, 258 Iowa 983, 139 N.W.2d 535; *Taschner v. Iowa Electric Power and Light Company*, 1957, 249 Iowa 673, 86 N.W.2d 915. At the time those opinions were written the only specific section of law repealed by Chapter 95 was §8.5(6). In *Smaha v. Simmons*, 1953, 245 Iowa 163, 60 N.W.2d 100, the supreme court observed: "It is hard to draw an implied legislative intent to repeal an unmentioned law from the statutes specifying certain numbered statutes that are amended and repealed. As bearing thereon see Bennett v. Greenwalt, 226 Iowa 1113, 286 N.W. 722; Hahn v. Clayton County, 218 Iowa 543, 255 N.W. 695."

Subsequent to the issuance of these opinions, however, the 63rd General Assembly enacted Chapter 79, effective July 1, 1969, §6 of which deleted §3(15) of Chapter 95 and §8 of which added the following new section to Chapter 95:

"The provisions of this Act, including but not limited to its provisions on employees and positions to which the merit system apply, shall prevail over any inconsistent provisions of the Code, including the Acts of the Sixty-second General Assembly, and all subsequent Acts unless such subsequent Acts provide a specific exemption from the merit system."

Thus, we no longer have a situation where we are seeking to find a legislative intent to repeal an unmentioned law from a statute specifying a specific statute which was amended and repealed. The 1969 addition of a new section to Chapter 95 amounted to an express repeal of all prior and subsequent inconsistent acts except those containing a specific exemption from the merit system.

Moreover, the three prior attorney general's opinions were grounded primarily on the proposition that subsequent to the enactment of Chapter 95 the general assembly had amended the pertinent provisions of law relating to the department of public safety, the highway commission and conservation commission, and that these provisions of law were repugnant to and inconsistent with Chapter 95. Because of this it was our opinion that the statute last passed or amended must prevail observing in the March 27, 1969 opinion, for example, that:

"In the case of *Casey v. Harned*, 5 Iowa 1, 5 Clark 1 (1857), the Supreme Court, at page 9, had the following to say with regard to enactments at the same session of the general assembly:

" 'Where two acts of the general assembly are repugnant to, or in conflict with each other, the last *passed*, being the latest expression of the legislative will, must govern. But this rule is no better settled than the

further one, that if by any fair and reasonable construction, a prior and later statute can be reconciled, both shall stand. Under these two rules the act of the 24th of January, if in conflict with that of the 22d of the same month, would govern, unless by some fair and legitimate reasoning, any seeming conflict may be reconciled.'"

In the case you presented there has been no amendment to Chapter 475 or §490A.2 since the enactment of Chapter 95 and certainly there has been none since the matter of implied repeal was disposed of by the 1969 enactment of Chapter 79. Accordingly, it is our opinion that the office of the commerce counsel is not exempt from the merit employment provisions of Chapter 19A of the 1971 Code.

Concluding as we have that the office of commerce counsel is subject to the merit system, we next must consider what provision is made in the law for establishing a pay scale for the office. Section 19A.9 provides in part:

"The merit employment commission shall adopt and may amend rules for the administration and implementation of this chapter in accordance with chapter seventeen A (17A) of the Code. The director shall prepare and submit proposed rules to the commission. The rules shall provide:

"1. For the preparation, maintenance, and revision of a position classification plan from a schedule by separate department for each position and type of employment not otherwise provided by law in state government as approved by the executive council for all positions in the merit system, based upon duties performed and responsibilities assumed, so that the same qualifications may reasonably be required for and the same schedule of pay may be equitably applied to all positions in the same class, in the same geographical area.

"2. For a pay plan within the purview of an appropriation made by the general assembly and not otherwise provided by law for all employees in the merit system, after consultation with appointing authorities and after a public hearing held by the commission. Such pay plan shall become effective only after it has been approved by the executive council after submission from the commission. Review of the pay plan for revisions shall be made in the same manner at the discretion of the director, but not less than annually. Each employee shall be paid at one (1) of the rates set forth in the pay plan for the class of position in which employed and, unless otherwise designated by the commission, shall begin employment at the first step of the established range for his class.

* * * "

Under this provision of law the pay plan is formulated by the director after consultation with appointing authorities, the latter's role apparently being only advisory. It is then submitted to the commission which, although the statute does not say so, presumably may then approve or disapprove of the pay plan. If the commission approves the plan it must next be approved by the executive council. Finally the pay plan goes to the legislative rules review committee pursuant to Chapter 17A. Review of any pay plan may be undertaken at any time in the discretion of the director subject, however, to the requirement that he must review all pay plans at least annually. Thus, in answer to your first question the commerce commission does not have the power to *fix* the salary of the commerce counsel. The director does have that power after consultation with the commerce commission and subject to the several layers of approval described above. There is no fixed dollar limitation on the amount the merit system director may establish as a salary of any particular position although as noted above the pay plan must be "within the pur-

view of an appropriation". Additional guidelines are found in §19A.9(1) which should guide the director in his pay plan deliberations. Thus, the rules prepared by the director should be "based upon duties performed and responsibilities assumed, so that the same qualifications may reasonably be required for and the same schedule of pay may be equitably applied to all positions in the same class, in the same geographical area."

You next inquire if the commerce commission has inadequate funds to pay for commerce counsel can the executive council provide money from any contingency fund. There is a standing contingency fund established by §19.7 of the Code but this fund would clearly be unavailable. It is designed to be used to meet unexpected expenses arising out of events of the character of *force majeure*. The executive council also has at its disposal the general contingent fund created by Senate File 556, Acts, 64th G.A., First Session, 1971. As is customary the legislation creating this biennial contingent fund provides that it may be used "only for contingencies arising during the biennium". We have repeatedly stated in the past that to be a contingency an event must be to some degree unforeseen. See e.g. 68 OAG 552, 68 OAG 564 (two opinions), 68 OAG 652, 68 OAG 955, 1970 OAG 485. The need for a higher salary for the commerce counsel can hardly be said to have been unforeseen considering the length of time the office has gone unfilled and the difficulty the commission has had in finding a qualified appointee. In our opinion the biennial contingent fund is also unavailable to supplement the budget of the commerce commission. So far as we can ascertain there are no other contingent funds available to the executive council.

As noted above the power to fix the salary for the commerce counsel rests with the director of the merit employment system subject to the various approvals which the statute, §19A.9, requires, and consistent with the guidelines set forth in that section. However, while Chapter 19A operates to take away the commission's power to fix the compensation of its non-exempt professional staff we are not prepared to say that the director of the merit employment department could not consider "current standards in industry" in establishing pay plans for such personnel in accordance with §19A.9.

Finally, we come to your question concerning the availability to the commerce commission of the charge-back funds described in §490A.10. This section of the Code provides in relevant part:

"490A.10. Investigations — expense. Whenever the commission shall deem it necessary in order to carry out the duties imposed upon it by this chapter for the purpose of determining rate matters to investigate the books, accounts, practices, and activities of, or make appraisals of the property of any public utility, or to render any engineering or accounting services to any public utility, such public utility shall pay the expense reasonably attributable to such investigation, appraisal, or service. The commission shall ascertain such expenses, and shall render a bill therefor, by certified mail, to the public utility, either at the conclusion of the investigation, appraisal, or services, or from time to time during its progress, which bill shall constitute notice of said assessment and demand payment thereof. . . .

"The commission shall annually, within ninety days after the close of each fiscal year, ascertain the total of its expenditures during each year, excluding the total sum necessary to pay the salaries of the commissioners but including all other expenses which are reasonably attributable to the performance of its duties under this chapter and shall deduct

therefrom all amounts chargeable directly to any specific utility under any law. The remainder shall be assessed by the commission to the several public utilities in proportion to their respective gross operating revenues during the last calendar year derived from intrastate public utility operations. . . .

" . . . All amounts collected by the commission pursuant to the provisions of this section shall be deposited with the state treasurer and credited to the general fund of the state. Such amounts shall be spent in accordance with the provisions of chapter 8."

There is nothing in the language of this section which would limit the charge-back authority to amounts paid to outside consultants and experts. In our opinion the commission would be entirely justified in charging for services of its regular permanent employees. However, the statute also plainly requires that any amounts collected by this process are to be deposited in the general fund of the state, there to be spent in accordance with Chapter 8 of the Code. The commerce commission receives a biennial appropriation in the same manner as other state departments and the establishment of a revolving fund such as you suggest would in our opinion require a special legislative enactment to conform to the requirements of Article III, §24 of the Constitution of Iowa which provides: "No money shall be drawn from the treasury but in consequence of appropriations made by law."

August 12, 1971

ELECTIONS: Re-registration by residents of county area annexed to city — §§48.1, 48.3, 48.6, 48.14, 53.2, Code of Iowa, 1971. Voters residing in a rural area of a county which has been annexed to a city who were properly registered with the county auditor under the permanent registration law must now re-register with the city clerk. A person cannot request an absentee ballot to be voted by a person (except servicemen) other than the one making the request. A printed signature is as valid as a script signature on an absentee ballot. (Haesemeyer to Schweiker, Deputy Secretary of State, 8/12/71) #71-8-11

Mr. J. Herman Schweiker, Deputy Secretary of State: You have requested an opinion of the attorney general with respect to certain questions which have been presented to your office by the Black Hawk County Auditor, Howard Gibbs. In his letter to you Mr. Gibbs states:

"The City of Cedar Falls has just completed the annexation of 13 square miles into their city. The City of Cedar Falls has permanent voter registration. The area annexed is now rural and under county voter registration maintained by the County Auditor, Commissioner of Registration, however, this area now becomes a part of the City of Cedar Falls and registration will be under their jurisdiction.

"We would presume those residents in this annexed area would have to re-register in the City of Cedar Falls and would assume that our records are not transferable and if this being the case we would maintain our files and we believe proceed under Chapter 48.14, Revision of Lists.

"We have searched and reviewed Chapter 48, covering voter registration and we do not find any section covering this situation; therefore, we present the following questions.

"Question 1. Do those residents who have registered under county voter registration and who reside in the area annexed have to re-register in the City of Cedar Falls? Would it be permissible for the City Clerk to have those re-registering fill out a card authorizing the County Auditor to remove their registrations or would the County Auditor maintain his file and follow Section 48.14, Revision of Lists? In any case, what

method or procedure would be necessary for us to follow as far as our records are concerned?

"Question 2. If the answer to Question 1 is in the negative, are voter registration records transferable from county permanent registration to a city permanent registration, and if such is the case, who has the responsibility to furnish the information necessary (list of residents involved, etc.) in order to carry out such a transfer of records?

"Relative to Chapter 53, Absent Voters Law, in the General Election, November 3, 1970, we received a card requesting an absentee ballot from a person out of state, in which we numbered the required materials according to statute of the Code and application and ballots were mailed. However, when we received said ballot back, the application and affidavit had the same number, but were signed by a person other than the one sending the card requesting the ballot. We attached a notation of this fact to the ballot envelope, the Election Board on the day of election did not vote this ballot. However, we had a contest of election on one office and the Contest Board ruled this ballot qualified and should be voted. Section 53.2 states in part such application may be made in person or in writing as provided by Section 53.10. We would like to know what the correct ruling and judgment would be in a case such as this? We would also like to present the following questions.

"Question 1. Can a person request an absentee ballot to be voted by a person other than the one making the request? (Excluding servicemen)

"Question 2. When a person makes a request for a ballot does the signature on such request have to be a written signature or will a printed name qualify for mailing of ballot?"

The provisions of law relative to permanent registration are found in Ch. 48, Code of Iowa, 1971. Sections 48.1 and 48.3 provide respectively:

"48.1 Commissioner of registration. The office of commissioner of registration is hereby created in all cities having a population of more than ten thousand inhabitants. The city clerk of each such city is hereby constituted such commissioner of registration. There is further created the office of commissioner of registration in all counties that have a population of fifty thousand or more. The county auditor of each such county is hereby constituted the commissioner of registration in his county. *The county auditor shall register only those residents of his county who reside outside of the corporate limits of all cities in his county with a population of ten thousand or more. The city clerk of all cities with a population of ten thousand or more shall register the residents of his city.* (Emphasis added)

* * *

"48.3 Registration required. In any such city or county *no qualified voter shall be permitted to vote at any election unless such voter shall register as provided in this chapter.*" (Emphasis added)

As is apparent from the foregoing provisions of law the county auditor is the commissioner of registration outside the corporate limits of any cities in his county with a population of ten thousand or more and the city clerk is the commissioner of registration within the corporate limits of any such city, and that the area recently annexed to Cedar Falls now falls within the jurisdiction of the city clerk rather than the county auditor as formerly. It also is evident that in order to vote in a city election electors residing in this annexed area will have to be registered with the city clerk.

We are not unmindful of the overriding purpose of permanent registration statutes that a voter once registered should not be obligated to

re-register so long as he votes with some regularity. In Iowa the requirement is that an individual vote once every four years in order to keep his registration current. Section 48.14 provides:

"48.14 Revision of lists — report. At the close of each calendar year after the fourth year of the registration under this chapter, clerks of registration shall check up the original registration list for the purpose of eliminating excess names and, to that end, they shall examine the election registers and whenever it appears that a registered voter has not voted at least once in four calendar years wherein elections are held, his card shall be taken from the original and duplicate registration lists and placed in a transfer file, and a printed postal card notice of that fact with the information that his vote has been challenged, and that the voter must re-register to remove such challenge, shall be sent to the last known address of said voter. When removal notices are received by the clerks, they shall examine the signatures and compare them with the original and, if they are not similar, a postal card notice specifying a refusal to transfer for that cause, shall be sent to the applicant at the new address given.

"The commissioner of registration shall make, on August 1 of each year, a report to the secretary of state showing the number of registered voters by party affiliation for his jurisdiction."

While we are reluctant to say that a duly registered voter ought to be obliged to re-register other than for failure to vote once every four years the practical difficulties which would be encountered in attempting to identify and transfer voter records from the county auditor's office to the city clerk's office mandate the conclusion that persons in the annexed area will have to re-register with the city clerk. For example, from oral communications with the Black Hawk County Auditor it appears that his records are maintained on a township basis and that the annexed area does not follow township lines. Thus, there is virtually no way he can identfy with certainty which electors' registration records should be transferred to the city clerk's office. Moreover, it appears there might be considerable difficulty in integrating county records into the city clerk's record keeping system. At a recent meeting of registration officials at which your question was discussed some commissioners of registration indicated that when faced with similar problems they required re-registration in the effected area but made a special effort to establish branch registration places and sent out mobile deputy registrars to give those required to re-register every opportunity to do so. It strikes us that this would be a desirable practice to follow in the case you describe.

Under §48.6, as amended by H.F. 713, §3, Acts, 64th G.A., First Session (1971), the form completed at time of registration must contain in addition to the signature of the registrant, "an expressed authorization to cancel all other registrations to vote" and under §48.11, as amended by §8 of such H.F. 713, a registrant at the time of registering must execute an affidavit containing a statement in substantially the following form, "I hereby authorize the cancellation of any and all of my previous registrations to vote in this or any other place." This it seems to us would constitute sufficient authorization for the county auditor to remove the registrations of persons re-registering with the city clerk. The latter could either send copies of the affidavits or if it would be more convenient to do so obtain a separate card containing essentially the same statement and send these to the county auditor. The Iowa Supreme Court in *Ellsworth College v. Carleton,* 1916, 160 N.W. 222, 178 Iowa

845 at 853 stated:

"By 'cancel' is meant, according to Webster, 'to cross out and deface, as the lines of a writing, or as a word or factor . . . ; to mark out by a cross line; to strike out . . . to annul or destroy; to revoke or recall'."

In light of this definition, the county auditor upon receipt of the "voter cancellation cards" from the city clerk's office, could then "cancel" or make void the registration of said voters in the county permanent registration records.

Concluding as we have that persons in the annexed area will have to re-register it is unnecessary to answer your Question No. 2.

Turning next to your last two questions it is our opinion that a person cannot request an absentee ballot to be voted by a person (except servicemen) other than the one making the request. Section 53.2 provides:

"53.2 Application for ballot. Any voter, under the circumstances specified in section 53.1, may, on any day not Sunday, election day, or a holiday and not more than forty days prior to the date of election, make application to the county auditor, or to the city or town clerk, as the case may be, for an official ballot to be voted at such election. Such application may be made in person or in writing as provided in section 53.10."

Applying the maxim "expressio unius est exclusio alterius" we must conclude that it is not permissible for a voter to request an absentee ballot for another. In 1934 OAG 533 we find the following statement:

" . . . it is not permissible for someone else to request the application for the voter, even though he is absent from the county. The voter must request it himself, ... ".

If the voter does not request the application for an absentee ballot he cannot vote. In another attorney general's opinion 1958 OAG 115 we stated: "If no application is on file, absentee ballots may not be voted, opened or counted."

However, it appears that the county auditor has no authority to refuse the unauthorized absentee ballot. The ballot must be challenged. 1962 OAG 198. The procedure of attaching a note to the ballot stating that no application is on file for the person voting the ballot, or the other irregularity that has occurred should be sufficient to alert the election board of the need for challenge. In the case where no application for the ballot is on file these ballots as stated before, may not be voted.

In our opinion a printed signature is just as valid as a script signature on an application for an absentee ballot. In 1946 OAG 133 which dealt with the question of signatures, the attorney general quoted from *Cummings v. Landes*, 1908, 117 N.W. 22, 140 Iowa 80:

"Looking at the original meaning of the word (signature), in connection with the usage since the people generally have become able to write their own names, we have no trouble in reaching the conclusion that, as employed in the statute, no more is exacted than that the name of the plaintiff or that of his attorney be attached to the notice by any of the known methods of impressing the name on paper, whether this be in writing, printing, or lithographing, provided it is done with the intention of signing or be adopted in issuing the original notice of service."

Whether printed or in script the signature should be the same both on the application and on the ballot envelope. Otherwise the absentee voter may have his ballot disqualified. §53.23.

August 16, 1971

STATE OFFICERS AND DEPARTMENTS: Board of Regents, Appropriations — H.F. 724, 64th G. A., First Session. Regents are permitted by "Shaff Amendment" to H.F. 724, 64th G. A., First Session, to shift appropriated funds among the institutions under jurisdiction of the board. (Nolan to Conklin, State Senator, 8/16/71) #71-8-13

The Hon. W. Charlene Conklin, State Senator: This is in reply to your letter requesting an Attorney General's Opinion relative to the "Shaff" amendment to the biennium appropriations to the Board of Regent institutions. Your letter states you wish to know if the Regents are permitted to shift funds between Universities or only within the University to which the Legislature appropriated funds.

The Shaff amendment to which you refer is an amendment to H.F. 724, 64th G. A., First Session. This amendment filed and adopted by the Senate on June 11, 1971, provided:

"The board of regents may allocate funds appropriated by the Act among the institutions under its jurisdiction as long as the reallocation does not exceed the grand total figure appropriated to the board of regents by this Act."

The total amount appropriated to the Board of Regents and institutions under the Board of Regents by H.F. 724 is $100,417,000 for fiscal year 1971-72 and $104,583,000 for fiscal year 1972-73. Of this total, the amounts appropriated by the Act to the three universities are as follows:

	1971-72	*1972-73*
State University of Iowa	$50,536,000	$52,461,000
Iowa State University	36,200,000	37,257,000
University of Northern Iowa	11,234,000	12,095,000

The language of the Shaff amendment as it now appears in the enrolled H.F. 724 is found in Section 2 thereof as follows:

"The board of regents may reallocate funds appropriated by paragraph "a" of subsection 2(2) of section 1(1), paragraph "a" of subsection 3(3) of section 1(1), and subsection 4(4) of section 1(1), of this Act among the institutions under its jurisdiction as long as reallocation does not exceed the grand total figure appropriated to the board of regents by this Act."

The subparagraphs specifically referred to by the language of Section 2 as set out above, are as follows:

"2. STATE UNIVERSITY OF IOWA.

"a. General university, including lakeside laboratory.

"For salaries, support, maintenance, equipment and miscellaneous purposes:

"

1971-72	*1972-73*
$35,688,000	$37,347,000

* * *

"3. IOWA STATE UNIVERSITY OF SCIENCE AND TECHNOLOGY.

"a. General university.

"For salaries, support, maintenance, equipment and miscellaneous purposes:

"

1971-72	*1972-73*
$28,685,000	$29,626,000

* * *

"4. UNIVERSITY OF NORTHERN IOWA.

"For salaries, support, maintenance, equipment and miscellaneous purposes:

1971-72	*1972-73*
$11,234,000	$12,095,000"

After considering all of the language in H.F. 724, supra, I am of the opinion that the Board of Regents is permitted to shift funds between universities as provided by Section 2, and the Board may also use university funds as needed for the institutions named in §262.7, Code 1971.

August 16, 1971

STATE OFFICERS AND DEPARTMENTS: Fire Marshal's authority to issue guidelines for fire safety in nurseries — §100.35, Code of Iowa, 1971. Fire Marshal has the authority to adopt, promulgate and enforce regulations and standards pertaining to fire safety which may be used by the Department of Social Services in the licensing of nurseries. (Beamer to Sellers, Commissioner of Public Safety, 8/16/71) #71-8-14

Mr. Michael M. Sellers, Commissioner, Department of Public Safety: Reference is made to your letter in which you requested an opinion on the following question:

"1971 *Code of Iowa*, section 100.35, states in part 'the fire marshal shall adopt . . . rules, . . . relating to fire protection, fire safety in the elimination of fire hazards in . . . all other buildings or structures in which persons congregate from time to time, whether publicly or privately owned.'

"Day care centers and pre-schools and nursery schools are licensed under the authority of chapter 237, 1954 *Code of Iowa*. The rules and regulations promulgated under the Iowa Department of Social Services pursuant to chapter 17A of the *Code of Iowa* provide in part as follows:

"*Section 40.* The nursery, before a license is issued, must be inspected by the local fire department or the state fire marshal. All recommendations for fire safety as determined by the inspection of the nursery and approved by the state department of social welfare must be carried out.

"The Department of Social Services has made a request to the State

Fire Marshal that said Division develop guidelines which the Department of Social Services could use in determining whether applicants for a license to operate a day care center or pre-school or nursery school are occupying facilities which are safe for the children who will be occupying them after issuance for the applied-for licenses.

"Does the State Fire Marshal have the authority to issue such guidelines for the use of the Department of Social Services for the above stated purpose?"

On page 656 of the 1966 Iowa Departmental Rules, under the Child Welfare Services section, the following definition and licensing procedure is set forth:

"1. The term "Nursery" shall mean and include the facilities of any home, institution or organization, whether known as a day care center, day nursery, co-operative day nursery, co-operative day nursery school or nursery school, which for profit or nonprofit, receives for temporary care, during part or all of the day, six or more children, over two years of age."

"3. A license for operating a nursery shall designate the type of operation — "Preschool" or "Day Care."

The question then becomes whether the State Fire Marshal has the authority to issue guidelines regarding these facilities, even though nurseries are not specifically included within Section 100.35, 1971 Code of Iowa:

"The fire marshal shall adopt, amend, promulgate and enforce rules, regulations and standards relating to fire protection, fire safety and the elimination of fire hazards in churches, schools, hotels, theaters, amphitheaters, hospitals, health care facilities as defined in section 135C.1, boarding homes or housing, rest homes, dormitories, college buildings, lodge halls, club rooms, public meeting places, places of amusement, and all other buildings or structures in which persons congregate from time to time, whether publicly or privately owned. . . ."

The State Fire Marshal's duties are clearly included within the grant of authority from the people to their governmental agencies for the protection of the health, safety, comfort and welfare of the public. *State* v. *Emery*, 178 Wis. 147, 189 N. W. 564 (1922). The police power includes everything essential to public safety, health and morals. *Davis, Brody, Wisniewski* v. *Barrett*, 253 Iowa 1178, 115 N. W. 2d 839 (1962). In fact, public safety, public health, and law and order are some of the more conspicuous examples of the traditional application of the police power. *Berman* v. *Parker*, 348 U. S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954).

It must be remembered that police powers are very broad and comprehensive. See 16 C.J.S., *Constitutional Law* §175 and the cases cited thereunder. It is a governmental function, an inherent attribute of sovereignty, and the greatest and most powerful quality of government. The policy of the courts has been to afford general welfare legislation a liberal construction with a view toward the accomplishment of highly beneficial objectives. 3 Sutherland on Statutory Construction §7201 (3rd ed. 1943); *Curtis* v. *Michaelson*, 206 Iowa 11, 219 N. W. 49 (1928). It has been held that "no rule of statutory construction is more readily applied by the courts than that public statutes dealing with the welfare of the whole people are to have a liberal construction." *Hall v. Union Light, Heat & Power Co.*, 53 F. Supp. 817, 818-819 (1944). Thus, statutes enacted for the protection and preservation of the public under police power statutes

are subject to liberal interpretation. *United States* v. *Sullivan*, 332 U. S. 689, 92 L. Ed. 297, 68 Sup. Ct. 391 (1948). Statutory law concerning public safety to insure the protection of children against possible harm or injury has assumed an ever increasing significance. *State* v. *Hay*, 257 Iowa 51, 131 N. W. 2d 452 (1964).

In your letter you have indicated that the operators of the day care centers, pre-school or nursery schools are occupying facilities that must be licensed by the Social Services Department. Certainly an important aspect of supervision of the Department would be to insure that fire regulations pertaining to these establishments are met before a license is issued. It is apparent by the scope of the areas designated in Section 100.35 that the intent of the Legislature was to include as many facilities as possible. To delegate to the fire marshal the authority to promulgate and enforce rules relating to fire safety in boarding homes, dormitories, club rooms and schools and not include those facilities of a commercial nature where young children are left without parental care or supervision would appear to flaunt the intention of the Legislature.

The broad statutory language authorizing the fire marshal to adopt, amend, promulgate and enforce rules "in all other buildings or structures in which persons congregate from time to time, whether publicly or privately owned," in light of the liberal construction given such statutes, includes day care centers, pre-schools and nursery schools. It is my opinion that the State Fire Marshal does have the authority to issue rules which can serve as guidelines for the Department of Social Services in licensing. Such rules may be adopted only as permitted by regulations set forth in Chapter 17A, 1971 Code of Iowa.

August 19, 1971

TAXATION: Lease of privately owned property to an exempt institution — §427.1, Code of Iowa, 1971. When a private fee owner of real property leases to an exempt institution, the property is not exempt because of the lease to said exempt institution. (Pabst to Hoth, Assistant Des Moines County Attorney, 8/19/71) #71-8-15

Mr. Steven S. Hoth, Assistant County Attorney, Des Moines County: You have requested an opinion of the Attorney General on the following matter.

The fee simple owner of a tract of land leased the land to the Southeastern Iowa College for five years. You posed the question of whether or not the property is exempt from taxation. Section 427.1, Code of Iowa 1971 provides that specific entities are tax exempt. For purposes of this opinion it will be assumed Southeastern Iowa College is a tax exempt organization.

The issue is whether or not the lease of real property to a tax exempt organization exempts the property from taxation. The theory of property tax in Iowa as stated in the case of *Laubersheimer* v. *Huiskamp*, 1967, 260 Iowa 1340, 1344, 152 N. W. 2d 625, 627:

"Land taxes are against the land and unpaid taxes are a lien against that particular tract of land. §445.28"

In the case of *Crews v. Collins*, 1961, 252 Iowa 863, 868-869, 109 N. W. 2d 235, 238 the Court stated:

"Somewhat analogous are decisions with reference to life estates. In White v. City of Marion, 139 Iowa 479, 117 N. W. 254, 256, this court said: 'A life estate in land is not subject to taxation as such. The land itself is taxed, and the only question which may arise, with reference to the taxation thereof, is who should pay the taxes, the life tenant, or the owner of the fee?'

In 51 Am. Jur., Taxation, Section 435, Page 451 we find this general statement: 'Although it is generally held that a lease-hold interest for a term of years is a chattel real, and that for the purpose of taxation the whole of the land is assessed against the owner of the fee, which covers the value of the leasehold interest as well as the reversionary interest, in some jurisdictions provision is made for * * * leasehold interests being held to be real property within the tax law, under statutes specifically defining "real property" for the purposes of taxation. * * *'

In 84 C.J.S. Taxation §95, page 212, appears this statement: 'As a general rule property under lease for a term of years is taxable to the owner, not to the tenant * * *.' Certain exceptions shown, not applicable under our statutes."

Therefore, in Iowa the property tax is imposed upon the fee owner. Because a private individual owns the fee title and not the exempt organization, the land is not exempt from taxation. In conclusion, when, the private fee owner of real property leases to an exempt institution, the property is not exempt from property taxation because of the lease to said exempt institution.

August 20, 1971

ELECTIONS: Duplicate registration lists — §§48.8, 48.21, 49.78, 49.79, 49.80, 49.81, Code of Iowa, 1971. A voter who has in fact registered to vote but whose name through error of election officials is left off the duplicate registration list delivered to the polls, should upon execution of the required certificate of registration be permitted to vote. (Haesemeyer to Synhorst, Secretary of State, 8/20/71) #71-8-16

The Hon. Melvin D. Synhorst, Secretary of State: Reference is made to your letter of August 10, 1971, in which you state:

"Last week at the meeting of Iowa Commissioners of Registration, which you attended in part, the following question was raised: Suppose that a person registers to vote in full compliance with voter registration requirements. Because of a clerical error in the Commissioner's office that registrant's name is omitted from the election register which is delivered to the judges of election in compliance with the provisions of Sec. 48.8, Code of Iowa, 1971. The prospective voter presents himself at the polls and states that he would like to vote. The judges tell him his name doesn't appear on the election register. The prospective voter produces a duplicate registration slip showing that he is duly registered.

"What shall be done at this point? Should the judges call the office of the Commissioner of Registration? What should the Commissioner do if he finds that an error was made in the preparation of the list?"

Section 48.8, as amended by H.F. 713, Acts, 64th G. A., First Session (1971), provides:

"48.8 Election Register. The commissioner shall compile and shall deliver to the judges of election in each precinct the duplicate registration list of voters in that precinct, which shall be known as the election register. The election register shall contain the name and address of every registered voter in that election precinct, indexed alphabetically by surname, together with a space following each name in which shall be recorded the words 'voted' or 'not voted,' the date, and if a primary elec-

tion, the party, as the case may be. A space shall also be provided for remarks in which shall be recorded any challenges, affidavits or other information as may be required. The entry of the words 'voted' or 'not voted,' challenge, affidavit, or other information, shall be made by the judges of election immediately after approving the declaration of eligibility. Duplicate registration lists may be prepared by electrical, mechanical or similar data processing methods. When the election register is prepared by data processing methods, symbols may be used for all entries required by this section, providing a legend explaining all such symbols is printed upon each page of the election register."

Section 49.78 states:

"49.78 Voting under registration. In precincts where registration is required, if such name is found on the register of voters by the officer having charge thereof, the voter shall sign a voter's declaration as provided in sections 48.21 and 49.77 and provided to the voters by the judges of the election. In precincts where the judges of the election are furnished with computerized voter registration lists, the person desiring to vote, except a person legally blind, shall then provide some form of identification upon which the signature or mark of such person appears. If identification is established to the satisfaction of the judges of the election, the person may then be allowed to vote.

"If the voter has no identification, his identity may be attested to by a judge of the election.

"All voters' declarations may then be seen by the challengers of each political party, at the request of such challengers.

"In precincts where chapter 48 is applicable, *if the name of the person desiring to vote is not found on the register of voters, his ballot shall not be received until he shall have complied with the law prescribing the manner and conditions of voting under sections 48.11 and 48.12.*" (Emphasis added)

The voter you describe has done all in his power to secure his voting rights. He has registered under §48.11 or §48.12 as required by §49.78. But through a clerical or computer error his name has been left off the election register. In our opinion this error should not deprive him of the right to vote. In two previous attorney general's opinions, 1936 OAG 640 and 1938 OAG 594 we held that defects in registration lists which were beyond the voter's control would not bar a duly registered elector from voting.

The Iowa supreme court in *Younkers v. Susong*, 1916, 173 Iowa 663, 670, 156 N. W. 24, stated:

"Legislative restrictions upon the exercise of the right of suffrage are enforced by the courts without hesitation to the very letter, so long as they relate to matters within the control of the individual voter. But, with respect to regulations regarding the conduct of others, the effort is to seek such a construction of the laws as will accomplish, rather than defeat, the expressed wishes of the people. Peabody v. Burch, (Kan.), 89 Pac. 1016."

The Iowa court also cited with approval *People ex rel Johnson v. Earl*, 94 Pac. 294, in which the court held:

"Statutes prescribing the manner, form, and time within which public officers are required to discharge public functions are regarded as directory, unless there is something in the statute which shows a different intent. Hence, as a general rule, statutes prescribing the power and duties of registration officers should not be so construed as to make the right to vote by registered voters dependent upon a strict observance by such officers of all the minute directions of the statute in the preparation

of registration lists, and thus defeat the constitutional right of suffrage, without the fault of the elector; for, if an exact compliance by these officers in matters of manner, form, and time shall be held to be essential to the right of the elector to vote, elections would often fail, and electors would be deprived, without their fault, of the opportunity to vote. . . . The rule is well established that those requirements of a statute which are mandatory must be strictly construed, while those requirements which are directory should receive a liberal construction, to the accomplishment of the intent and purpose of the law. Those requirements are mandatory which affect the results or merits of the election. Others are directory."

and finally concluded:

"The rule is stated in Cyc. thus:

" 'Statutes prescribing the mode of proceeding of public officers are regarded as directory unless there is something in the statute which shows a different intent. Hence, as a general rule, a statute prescribing the powers and duties of registration officers should not be so construed as to make the right to vote by registered voters depend upon a strict observance by the registrars of all the minute directions of the statute in preparing the voting list, and thus render the constitutional right of suffrage liable to be defeated, without the fault of the elector, by the fraud, caprice, ignorance, or negligence of the registrars; for if an exact compliance by these officers with all statutory directions should be deemed essential to the right of an elector to vote, elections would often fail, and electors would be deprived without their fault of an opportunity to vote.' 15 Cyc. 307 (H.)."

It is evident from the above authority that election rules dealing with matters outside the individual voter's control should be construed liberally to enable a duly registered voter to exercise his right of suffrage.

In the instant situation the following procedure could be used. If a voter appears at the polls stating he wishes to vote and he is registered to vote, but his name is not on the election register, the election judges should telephone the commissioner of registration. If the voter is in fact a registered voter the commissioner of registration will then inform the judges. The voter should then execute the certificate of registration as required by §48.21 and be permitted to vote. This certificate of registration should then be specially marked and set aside in order to alert the commissioner of registration of the need to revise his duplicate registration list. It must be noted that the election judges should call the commissioner of registration for confirmation of a voter's status, whether or not the voter has a duplicate registration slip. Duplicate registration slips are only required when mobile registrars register voters under §48.27. Thus, all duly registered voters might not have a duplicate registration slip.

The challenge oath affidavit procedure set forth in §§49.79 through 49.81 would not seem to be appropriate in a situation such as you describe. Under §49.81 where registration is required the person challenged must be duly registered before the affidavit can be tendered.

An earlier opinion of the attorney general, 1968 OAG 26, to the extent that it is inconsistent herewith is withdrawn.

August 20, 1971

STATE OFFICERS AND DEPARTMENTS: Educational leave for highway commission employee — §7, S.F. 573, Acts, 64th G. A., First Ses-

sion (1971); Iowa merit employment department rule 14.7. Expenditure of highway commission funds to send an employee to Texas A & M University for two semesters of advanced study is authorized. (Haesemeyer to Shearer, Executive Council, 8/20/71) #71-8-17

Mrs. Colleen Shearer, Deputy Secretary, Executive Council of Iowa: We have your letter of August 16, 1971, in which you state:

"The Executive Council, in anticipation of a Request for Travel Authorization from the Highway Commission, to be acted upon at the next Council meeting, scheduled for August 23, 1971, requests from you an opinion as to whether or not the expenditure of funds as outlined in the travel request is legal and permissible under Iowa law.

"As you will see from the attached copies of correspondence, it is the intention of the Highway Commission to provide Mr. Raymond L. Kassel with two semesters of advanced college training in transportation planning at Texas A & M University to prepare him to assume the position of Chief Engineer with the Highway Commission. It is the question of using the funds for purposes of education that prompts the request for the opinion from you."

Senate File 573, Acts, 64th G. A., First Session (1971), "An Act to Appropriate from the Primary Road Fund to the State Highway Commission, and Relating to Employees of the State Highway Commission under the State Merit System," provides in Sec. 7 thereof:

"Sec. 7. Appropriated funds may be used for the granting of educational leave upon approval of the commissioners."

Moreover, Rule 14.7 of the Iowa merit employment department rules provides:

"14.7 *Educational leave* — Educational leave, either with or without pay, may be granted at the discretion of the Appointing Authority for a period not to exceed one year. Provided, however, the Appointing Authority may grant such extensions as may appear best to serve the interests of the agency not to exceed one year. When additional leave is granted, the classified employee need not be required to first exhaust his vacation leave."

Such Sec. 7 and Rule 14.7 would appear to furnish ample authority for the expenditures you describe.

August 23, 1971

COUNTIES AND COUNTY OFFICERS: Secondary road weight embargo — §§321.471-.472, 321.255, Code of Iowa, 1971. (1) A sign erected for purpose of limiting traffic which states the substance of the ordinance authorizing it may be a proper sign under §321.472 notwithstanding the fact that the name of the authorizing body does not appear on the sign. (2) Public intersections segment a road into portions and signs should be posted accordingly. (Nolan to Groves, Hamilton County Attorney, 8/23/71) #71-8-18

Mr. Gary J. Groves, Hamilton County Attorney: Your letter of recent date requesting an opinion on questions arising in connection with §§321.471-472, Code of Iowa 1971, is hereby acknowledged. In your letter you state that on or about the 10th day of March, 1971 the Hamilton County Board of Supervisors adopted a resolution prohibiting the operation of motor vehicles upon certain county black-top roads in accordance with §321.471, Code of Iowa 1971. A sign and an attached red flag was posted at each end of the county roads so designated by resolution. The posted signs read:

"10 Ton Weight Limit"

Your questions with regard to the requirement of such notice are:

1. Does the failure to name on the posted road sign, the Hamilton County Board of Supervisors as the official authorizing body constitute insufficient notice as contemplated by §321.472 of the Code of Iowa, 1971?

2. Has sufficient notice been given to those persons who approach and enter upon the designated weight limit road at an intersection between the posted signs located at each end of that road?

I

It is well settled that the Board of Supervisors has the power under §321.471 to prohibit the operation of vehicles or to limit the weight of vehicles using designated highways for a period not to exceed 90 days where in their judgment such use will seriously damage or destroy the roads. 1948 OAG 173, 174. 1968 OAG 757, 761.

Section 321.472, provides:

"The local authority enacting any such ordinance or resolution shall erect or cause to be erected and maintained signs designating the provisions of the ordinance or resolution at each end of that portion of any highway affected thereby, and the ordinance or resolution shall not be effective unless and until such signs are erected and maintained."

We have given special attention to the provisions of §1B.36 of the Manual on Uniform Traffic and Control Devices on Iowa Streets and Highways, which states "that said sign shall carry the name of the official body authorizing the same . . ." and which also makes specific reference to §321.471-321.472, supra.

Under §321.255 of the Code, local authorities may place and maintain traffic control devices on highways under their jurisdiction as they deem necessary to indicate and to carry out the provisions of local traffic ordinances or "to regulate, warn or guide traffic." Section 321.255 also provides that such traffic control devices shall conform to the state manual and specifications.

It is my opinion that any properly authorized sign erected for the purpose of limiting traffic, which is otherwise consistent with the size, form, shape and legend of signs as indicated by the Uniform Traffic and Control Device Manual and which clearly states the substance of the limiting ordinance or resolution is a proper sign within the meaning of §321.472 notwithstanding the fact that the name of the authorizing body is not posted on such sign. A motorist may assume that highway signs having the appearance of regularity are placed by proper authority and will be obeyed. *King v. Gold*, 1938, 224 Iowa 890, 276 N. W. 774.

II

Section 321.472 requires that the signs designated in the provisions of the ordinance or resolution restricting traffic on such highways be placed "at each end of that portion of any highway affected thereby." It is my view that the segment between intersections is a "portion" of such highway and that the weight limit signs should be posted accordingly.

August 23, 1971

STATE OFFICERS AND DEPARTMENTS: Secretary of State — Ch. 496A, §524.107(2), Code of Iowa, 1971. The word "trust" as part of a corporate name is not available unless the corporation proposing such name shows it comes within the exceptions stated in §524.107(2). (Nolan to Bianco, Corporation Division, Secretary of State's office, 8/23/71) #71-8-19

Mr. Frank D. Bianco, Director, Corporation Division, Office of Secretary of State: This is in response to your letter requesting an opinion as to whether or not proposed articles for a corporation to be known as Colonial Trust Inc. can be accepted by your office. The preamble of the article states as follows:

"We, the undersigned persons acting as incorporators of a corporation organized under the Iowa business corporation act Chapter 496-A, Code of Iowa, and under the regulations governing Service Corporations for Federal Savings & Loan Associations, promulgated by the Federal Home Loan Bank Board, do hereby adopt the following articles of incorporation for such corporation."

I am of the opinion that use of the word "trust" as a part of the corporate name in this instance is prohibited by §524.107(2), Code of Iowa 1971, which provides:

"No person doing business in this state shall use the words 'bank' or 'trust' or use any derivative, plural or compound of the words 'bank,' 'banking,' 'banker' or 'trust' in any manner which would tend to create the impression that such person is authorized to engage in the business of banking or to act in a fiduciary capacity, except a state bank authorized to do so by the provisions of this chapter, or a national bank to the extent permitted by the laws of the United States, or, . . . insofar as the word 'trust' is concerned, an individual permissibly serving as a fiduciary in this state, pursuant to section 633.63, or, insofar as the words 'trust' and 'bank' are concerned, a nonresident corporate fiduciary permissibly serving as a fiduciary in this state pursuant to section 633.64."

Since the incorporators do not show that they come within the exceptions provided in §524.107, the name selected for such corporation appears to be unavailable.

August 23, 1971

SCHOOLS: Distribution of Equalization Funds — §§442.8, 442.13, Code of Iowa, 1971; H.F. 654, Acts, 64th G. A., First Session. (1) Out of state students attending a public school in Iowa on tuition basis should be counted in determining the number of pupils in full enrollment in the district for purposes of computing the school district's share of county basic equalization funds. (2) Under the state school foundation program which goes into effect July 1, 1972, such students will not be counted. (Nolan to DeKoster, State Senator, 8/23/71) #71-8-20

The Hon. Lucas J. DeKoster, State Senator: Your letter requesting an Attorney General's opinion on the question of proper distribution of school equalization funds has been received. Your letter submits an inquiry as to whether it is legal for a public school receiving students from a neighboring state on tuition basis to also share in the county basic equalization funds of that county for the out-of-state students. Section 442.8, Code of Iowa 1971, provides:

"The state comptroller shall compute the distribution of the monies in the basic school tax equalization fund as follows: Distribute to each

school district in the basic school tax unit its share on the basis of number of pupils in fall enrollment in the district to the total number of pupils in fall enrollment for the basic school tax unit. For those districts which were limited in their expenditures by the school budget review committee for sharing of state equalization aid, there shall be deducted from their share of the distribution of the basic school tax equalization fund forty percent of such limitation; the amounts so disallowed shall be distributed to the other school districts. . . ."

Section 442.13:

"State aid payable to each public school district shall be computed by the state comptroller on the basis of a financial support factor. The financial support factor for the state is the relationship between total pupils in the state, determined by adding the average daily membership and school census for all districts and dividing the sum by two, and total wealth in the state, determined by adding the adjusted gross income and the adjusted real value of all taxable property. The adjusted real value of taxable property is the actual real value modified so that it is on a seventy to thirty ratio to the adjusted gross income.

"The financial support factor for each district is determined in the same manner, based upon the relationship between total pupils and total wealth in the district, except that the adjusted real value of taxable property in the district is determined by modifying the actual real value by the same percentage that the actual real value of taxable property in the state was modified."

The tax equalization statutes further provide that the school shall deduct from the total of sums determined from the computation of the formula set out above the "general fund receipts from the following: Tuition paid by individuals or by the state; transportation; services; rents; income on investment securities; other general fund revenue receipts; general fund non-revenue receipts; and transfers to the general fund other than those resulting from clearing accounts, reorganization and the return of principal of invested securities."

Inasmuch as the schools must deduct the tuition received from tuition-paying students, it is my opinion that these students may and should be counted in computing the formula for tax equalization fund payment pursuant to §§442.11, 442.12, and 442.13, Code of Iowa 1971.

It should be further noted that all provisions of Ch. 442 (basic school tax equalization fund) are repealed effective July 1, 1972 and the state school foundation program established by H.F. 654, Acts 64th G. A., First Session, will then go into effect. Under §4 of the new legislative program only *resident* pupils who are enrolled on the second Friday in September in the public schools of the district and those in certain special education classes are to be counted in determining the number of pupils in fall enrollment. Accordingly, when the foundation program goes into effect, those students who reside in another state and come into the school district on a tuition basis will not be counted in computing the formula on which the district receives state aid.

August 23, 1971

COUNTIES AND COUNTY OFFICERS: Supervisors — Ch. 358, Code 1971. County Board of Supervisors does not have authority to refuse to implement request for establishment of a sanitary district but must hold hearings on the petition, fix boundaries and direct that an election be had on the question. (Nolan to Schebler, Assistant Scott County Attorney, 8/23/71) #71-8-21

Mr. Thomas G. Schebler, Assistant Scott County Attorney: This responds to your request for an opinion concerning the extent of the authority of a County Board of Supervisors under Chapter 358 of the Iowa Code relating to sanitary districts. You ask specifically:

"Does the County Board of Supervisors have authority to refuse to implement a request for a Sanitary District, or is their authority limited to the establishment of the boundaries of such proposed district as described in the petition?"

The answers to your questions are found in §358.4, Code of Iowa 1971 and subsequent sections. In §358.4 it is stated:

"It shall be the duty of the board of supervisors to whom said petition is addressed, at its next regular, special, or adjurned meeting, to set the time and place when it will meet for a hearing upon said petition, and it shall direct the county auditor in whose office said petition is filed to cause notice to be given to all persons whom it may concern, . . .

§358.5 provides:

"The board of supervisors to whom the petition is addressed shall preside at the hearing provided for in section 358.4 and shall continue the same in session, with adjournments from day to day, if necessary, until completed, without being required to give any further notice thereof. Proof of the residence and qualifications of the petitioners as qualified voters shall be made by affidavit or otherwise as the board may direct. Said board shall have power and authority to consider the boundaries of any proposed sanitary district, whether the same shall be as described in such petition or otherwise, and for that purpose may alter and amend such petition and limit or change the boundaries of the proposed district as stated in the petition. The boundaries of any proposed district shall not be changed to incorporate therein any property not included in the original petition and published notice until the owner or owners of said property shall be given notice thereof as on the original hearing. All persons in such proposed district shall have an opportunity to be heard touching the location and boundaries of the proposed district and to make suggestions regarding the same, *and said board of supervisors, after hearing the statements, evidence and suggestions made and offered at the hearing, shall enter an order fixing and determining the limits and boundaries of such proposed district and directing that an election be held for the purpose of submitting to the qualified voters resident within the boundaries of the proposed district the question of organization and establishment of the proposed sanitary district as determined by said board of supervisors.* The order shall fix a date for the election not more than sixty days after the date of the order, establish voting precincts within the proposed district and define their boundaries and specify the polling places therein as in the board's judgment will best serve the convenience of the voters, and shall appoint from residents of the proposed district three judges and two clerks of election for each voting precinct established." [Underscored]

August 23, 1971

PUBLIC RECORDS: Library, call slips — §68A.7, Code of Iowa, 1971. Library call slips are not confidential information within the meaning of §68A.7 and making such records public information does not violate any constitutional right. (Nolan to Samore, Woodbury County Attorney, 8/23/71) #71-8-22

Mr. Edward F. Samore, Woodbury County Attorney: This refers to your request for an opinion interpreting Chapter 68A of the 1971 Code of Iowa, in connection with the confidentiality of information contained on public library call slips prepared for people who check out various

books. According to your letter the opinion is requested as to whether or not such records are confidential information and falling within Chapter 68A.7 of the 1971 Code of Iowa, and whether or not the making of records public information would violate the provisions of the First Amendment of the Constitution.

I am of the opinion that library call slips are a type of record maintained to keep a proper inventory of the books of the public library and the circulation of such books. The identity of any person checking out the books of the public library is merely incidental to the effective control of such circulation and inventory. The books of the public library are public property. The provisions of the First Amendment of the Constitution do not give an individual the power to borrow public property in secret. Nor do the limited exceptions to the public records law appear to have application in this case. Therefore, I am of the opinion that library call slips are not confidential information within the meaning of §68A.7 of the Code of Iowa, and that making such records public information would not violate any constitutional right of freedom of speech.

August 23, 1971

COUNTY & COUNTY OFFICERS: Clerk of Court — §§625.1, 625.14, Code of Iowa, 1971. Taxation of court costs is duty of Clerk and is a legally binding act even where judgment entered does not direct such act. (Nolan to Buck, Marshall County Attorney, 8/23/71) #71-8-23

Mr. Max H. Buck, Marshall County Attorney: Reference is herein made to your letter to the Attorney General in which you submitted the following:

"I am writing to request an Attorney General's opinion on a problem that has developed in Marshall County regarding taxing of costs in a criminal action to the Defendant when he is sentenced to serve his sentence in the County Jail or Pnitentiary and the Judge has omitted mentioning the costs in the court entry.

"It has been the practice of the Clerk of Court in Marshall County to tax the costs to the Defendant in a situation like that above whether or not they are mentioned in the calendar entry."

The question that has been raised is whether when such costs are taxed by the clerk against the property of a defendant he will be required to pay the costs to give a clear title when conveying the real estate.

Chapter 625, Iowa Code, 1966, is a general statute devoted to the question of costs. This chapter is applicable to all types of actions including those of a criminal nature. *City of Ottumwa v. Taylor*, 1960, 251 Iowa 618, 102 N. W. 2d 376.

§625.1. "Costs shall be recovered by the successful party against the losing party."

§625.14. "The clerk shall tax in favor of the party recovering costs the allowance of his witnesses, the fees of officers, the compensation of referees, the necessary expenses of taking depositions by commissionor or otherwise, and any further sum for any other matter which the court may have awarded as costs in the progress of the action, or may allow."

A taxation of costs against the losing party follows as a matter of course in absence of unusual circumstances. *Eller v. Needham*, 1956, 247 Iowa 565, 73 N. W. 2d 31. In actions in the district court it is the duty

of the clerk thereof to tax the costs. *Hart v. Delphey*, 1922, 194 Iowa 692, 190 N. W. 14.

It has been noted that the Iowa Supreme Court did not make a ruling concerning the issue in *Hayes v. Clinton County*, 1902, 118 Iowa 569, 92 N. W. 860, a case involving a similar fact situation. However, I would refer you to *Young v. Rutheford*, 1920, 190 Iowa 414, 176 N. W. 241, which held that, "the judgment in a case is rendered or ordered by the court. Primarily, it has nothing to do with the taxation of costs. This duty devolves upon the clerk."

Accordingly, it is our opinion that in a criminal case where judgment has been rendered against the defendant, the taxation of costs against the defendant follows as a matter of course and constitutes a legally binding act. It follows, therefore, that the defendant will be required to pay costs taxed by the clerk, to give clear title, regardless of the fact that the costs may not have been mentioned in the calendar entry.

September 1, 1971

ELECTIONS: Vacancy appointee, term of office — Article XI, §6, Constitution of Iowa; §§69.11, 69.12 and 69.13, Code of Iowa, 1971. A person appointed to fill a vacancy in a city council created by the resignation of the incumbent must run in the next regular municipal election for the unexpired portion of the term. (Haesemeyer to Lawson, State Representative, 9/1/71) #71-9-1

The Hon. Murray C. Lawson, State Representative: You have requested an opinion of the attorney general with respect to the question which has been presented to you by Mayor Thomas E. Jolas of Mason City. The question as stated by Mayor Jolas is as follows:

"The problem has to do with the question of whether or not, under the circumstances hereinafter set forth, it is necessary for a particular City Councilman to run for re-election at the next regular municipal election which will be held in November of 1971. The tenure of office for City Councilmen in this city is four years. One of our regularly elected City Councilmen, after serving one year of his four-year term, resigned. Upon such resignation the City Council appointed an individual to fill this vacancy as required by law. At the time of the appointment of the vacancy appointee there remained three years of the unexpired term of the City Councilman who resigned. My inquiry is whether or not it is necessary for the vacancy appointee to stand for election at the next regular municipal election in November of 1971, or whether he need not stand for election until expiration of the full term of the individual for whom he was appointed a successor."

Article XI, §6, Constitution of Iowa, provides:

"How vacancies filled. Sec. 6. In all cases of elections to fill vacancies in office occurring before the expiration of a full term, the person so elected shall hold for the residue of the unexpired term; and all persons appointed to fill vacancies in office, shall hold until the next general election, and until their successors are elected and qualified."

Sections 69.11, 69.12 and 69.13, Code of Iowa, 1971, provide respectively:

"69.11 Tenure of vacancy appointee. An officer filling a vacancy in an office which is filled by election of the people shall continue to hold until the next regular election at which such vacancy can be filled, and until a successor is elected and qualified. Appointments to all other offices, made under this chapter, shall continue for the remainder of the

term of each office, and until a successor is appointed and qualified.

"69.12 Officers elected to fill vacancies — tenure. Officers elected to fill vacancies, either at a special or general election, shall hold for the unexpired portion of the term, and until a successor is elected and qualified, unless otherwise provided by law.

"69.13 Vacancies — when filled. If a vacancy occurs in an elective office in a city, town, or township ten days, or a county office fifty days, or any other office sixty days, prior to a general election, it shall be filled at such election, unless previously filled at a special election."

Under §363.8 regular municipal elections are required to be held on the Tuesday next after the first Monday in November of odd numbered years. In our opinion in view of the clear language of the foregoing constitutional and statutory provisions the vacancy appointee you describe must stand for election at the regular municipal election in November of 1971 for the unexpired portion of the term for which he was appointed.

September 2, 1971

CITIES AND TOWNS: Proposed Code of Fair Practices — Art. III, Constitution of Iowa; §§23.18, 105A.7, 105A.12 and 368.2, Code of Iowa, 1971. A municipality has the authority to include a code of fair practices in its contract specifications, and same will not be in material variation with Chapter 23, Code of Iowa, 1971. (Blumberg to Dutton, Black Hawk County Attorney, 9/2/71) #71-9-2

Mr. David J. Dutton, Black Hawk County Attorney: I am in receipt of your letter of July 26, 1971 in which you request an opinion regarding a proposed Code of Fair Practices for the City of Waterloo. You stated:

"It appears that the request is for an Executive Order similar to the Executive Order signed by President Johnson following the passage of the Civil Rights Act in 1964 barring discrimination in employment in all government contracts. The proposed Code for Waterloo would mean that Code discrimination in employment would be one of the specifications which all contractors bidding on City business would have to include and comply with. The question seems to boil down to whether such additional requirement would constitute a material variation in the chapter on Public Contracts, Chapter 23 of the 1971 Code of the State of Iowa.

"Would you please tell us in your opinion whether the Mayor of Waterloo has the power to require all contractors bidding on City contracts to comply with the proposed Code of Fair Practices."

Chapter 105A of the 1971 Code of Iowa, entitled "Civil Rights Commission" has a provision for unfair employment practices. See §105A.7. Section 105A.12 states:

"Nothing contained in any provision of this chapter shall be construed as indicating an intent on the part of the general assembly to occupy the field in which this chapter operates to the exclusion of local laws not inconsistent with this chapter that deal with the same subject matter."

Section 368.2, 1971 Code of Iowa provides, in part:

"It is hereby declared to be the policy of the state of Iowa that the provisions of the Code relating to the powers, privileges, and immunities of cities and towns are intended to confer broad powers of self-determination as to strictly local and internal affairs upon such municipal corporations and should be liberally construed in favor of such corporations. The rule that cities and towns have only those powers expressly conferred by statute has no application to this Code. Its provisions shall be construed

to confer upon such corporations broad and implied power over all local and internal affairs which may exist within constitutional limits. No section of the Code which grants a specific power to cities and towns, or any reasonable class thereof, shall be construed as narrowing or restricting the general grant of powers . . . unless such restriction is expressly set forth in such statute. . . ."

It was held in *Richardson* v. *City of Jefferson*, 257 Iowa 709, 134 N. W. 2d 528 (1965), that section 368.2 did not grant the City of Jefferson powers without reference to another statute. This appeared to limit the application of the liberal rule of construction to local and internal affairs of cities and towns. The court felt that this section contained no grant of power, but at most provided a rule of construction of other Code provisions. However, in the 1968 Amendments to the Iowa Constitution, Amendment 2 added the following new section to Article III (in pertinent part):

"Municipal Home Rule. Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the General Assembly, to determine their local affairs and government. . . .

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

Accordingly, a municipality may, in its own discretion, determine for itself its method of exercising powers conferred upon it. In other words, unless restrained by statute, a municipality exercises its powers to make an improvement or a contract by acting through its council by ordinance or resolution. *Baird* v. *City of Webster City*, 256 Iowa 1097, 130 N. W. 2d 432 (1964).

It appears from the above-cited statutes that a municipality may implement a Fair Practices Code. Such a Code, the provisions of which would be included in the specifications of a contract, do not appear to be in conflict with Chapter 23 of the 1971 Code of Iowa. There are no provisions in that chapter for the contents of specifications. The only indication is in Section 23.18 which allows the municipality to "let the work to the lowest *responsible* bidder. . . ." (Emphasis added.)

The question thus becomes one of how to implement such a Code. Pursuant to the provisions of Sections 105A.12 and 368.2, it is obvious that a municipality could implement such a Code by ordinance. We find no authority permitting a Mayor to exercise such authority.

For the above-stated reasons, it is our opinion that the municipality, rather than the Mayor, has the power to pass a Fair Practices Code; and the inclusion of it in contract specifications is not a material variation of Chapter 23 of the 1971 Code of Iowa.

September 7, 1971

STATE OFFICERS AND DEPARTMENTS: Public officers and employees law — §68B.7, Code of Iowa, 1971. Section 68B.7 limits former state officers and employees from appearing before the state agency in which they previously served, with respect to activities before such agency with which they were concerned. (Beamer to Sellers, Chairman, Iowa Reciprocity Board, 9/7/71) #71-9-3

Mr. Michael M. Sellers, Chairman, Iowa Reciprocity Board: This is in

reply to your recent inquiry on behalf of the Iowa Reciprocity Board concerning the applicability of the conflict of interest provisions of the Iowa Code in regard to former employees of the Board. You have raised the question of whether former employees may enter private industry and deal with cases, applications or proceedings in which they were concerned during their period of employment with the state. In particular, you have asked whether the former Executive Secretary of the Reciprocity Board or other former state employees of that Board may file claims for refunds on behalf of individuals in the trucking industry based on the decisions of *Consolidated Freightways* vs. *Nicholas, et al.*, and *General Expressways, Inc., et al.* vs. *Iowa Reciprocity Board*, if said employees were involved in these cases. Specifically, your question is whether Section 68B.7, 1971 Code of Iowa limits former state officers and employees with respect to actiivties involving the state agency in which they previously served, the limitations and penalties, if any.

Section 68B.7, 1971 Code of Iowa provides as follows:

"No person who has served as an official or employee of a state agency shall within a period of two years after the termination of such service or employment appear before such state agency or receive compensation for any services rendered on behalf of any person, firm, corporation, or association in relation to any case, proceeding, or application with respect to which such person was directly concerned and in which he personally participated during the period of his service or employment.

"No person who has served as the head of or on a commission or board of a regulatory agency or as a deputy thereof, shall within a period of two years after the termination of such service receive compensation for any services rendered on behalf of any person, firm, corporation, or association in any case, proceedings, or application before the department with which he so served wherein his compensation is to be dependent or contingent upon any action by such agency with respect to any license, contract, certificate, ruling, decision, opinion, rate schedule, franchise, or other benefit, or in promoting or opposing, directly or indirectly, the passage of bills or resolutions before either house of the general assembly."

It is my opinion that Section 68B.7 bars a former official or employee of a state agency from appearing before that agency for a period of two years following the termination of employment, or receiving compensation for services, conditioned on the circumstances that the appearance involves a matter "with respect to which such person was directly concerned and in which he personally participated during the period of his service or employment." Had the legislature intended to impose an outright and unqualified ban, that is, one resting solely on the mere fact of prior service, it seems it would have so provided in language leaving no doubt as to its purpose. The provision, taken as a whole, requires the conclusion that the legislature had in mind appearances in cases or matters in which the former officer or employee participated during his tenure. *United States* vs. *Standard Oil Co.*, 136 F. Supp. 345 (S.D.N.Y. 1955).

The State of New York has a statute similar to Section 68B.7. Subdivision 7 of Section 73 of the Public Officers Law of New York, entitled "Business of professional activities by state officers and employees and party officers," has a two year limitation after the termination of service with the state. In two opinions the Attorney General of New York applied the section to former state employees or officers, but limited the

application to those matters with which said individuals participated during their employment. 1962 Op. Atty. Gen. 49, 1959 Op. Atty. Gen. 109.

The problem of conflict of interests is most prevalent among attorneys. Therefore, the American Bar Association, in its Canons of Ethics and Code of Professional Responsibility, has promulgated canons to prohibit such activities. In conjunction with this, the issue of conflicts of interest has reached the courts. In *United States* v. *Trafficante*, 328 F. 2d 117 (5th Cir. 1964), the government brought an action to disqualify an attorney from representing clients on income tax claims which the attorney had handled during his government employment. The court noted that the attorney had handled income tax claims of the government against some of the Trafficantes. The court found that the conduct of the attorney constituted a violation of the Canons of Ethics of the American Bar Association which disqualified him from the representation he had undertaken in the case citing Canon 36:

"36. Retirement from Judicial Position or Public Employment.

"A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ." *United States* vs. *Trafficante*, 328 F. 2d at 119.

The rationale of the Canons of Ethics and Section 68B.7 is to forbid the former public employee to act in relation to any matter he passed upon while in government service. It reaches to prevent even the appearance that the government servant may take a certain stand in the hope of later being privately employed to uphold or upset what he had done. *Thatcher* vs. *United States*, 212 F. 801 (6th Cir. 1914).

The broad and basic purposes of conflicts of interest statutes as well as the Canons of Ethics are noted by the court in *Allied Realty of St. Paul, Inc.* vs. *Exchange National Bank of Chicago*, 283 F. Supp. 464 (D. Minn. 1968) aff'd., 408 F. 2d 1099, cert. denied, 90 S. Ct. 64, 396 U. S. 823. The court recognized that when a government employee resigns and enters private practice, and if permitted to seek employment concerning a matter he previously handled for the government, he is in a position either to charge a client a fee because of his former office, in which event he is being remunerated twice, or if he does not charge a fee, the individual who obtains services without compensation is at an advantage economically and strategically. "Even when neither of these results transpire, there is certainly an 'appearance of evil' which this court finds justifies the disqualification of such attorneys." *Allied Realty of St. Paul, Inc.* vs. *Exchange National Bank of Chicago*, 283 F. Supp. 464, 469. Furthermore, it has been repeatedly held by the courts and ethics commitees which have considered these canons, that the knowledge of one member of a firm will be imputed by inference to all members of that firm. *United States* v. *Standard Oil Co.*, 136 F. Supp. 345, 360; *Laskey Brothers of West Virginia* vs. *Warner Brothers Pictures, Inc.*, 224 F. 2d 824 (2nd Cir. 1955).

The limitations of this doctrine of conflict of interest have also been noted by the courts. In *United States* vs. *Standard Oil Co.*, supra, the government failed to prove that the individual had access to, investigated, rendered opinions on, advised or worked on documents substantially re-

lated to the subject matter of that case. However, in *Hilo Metals Co.* vs. *Learner Co.*, 258 F. Supp. 23 (D. Hawaii 1966), the court found that the individual concerned had had access to relevant confidential material, and actually investigated the subject matter. The court disqualified the former government employee from further participation in the action because of his past employment.

The specific limitations of section 68B.7 as applied to the position of the former Executive Secretary concern the appearance before the agency on matters in which she personally participated in relation to any case, proceeding or application. The former Executive Secretary, along with the then members of the Iowa Reciprocity Board, was a named defendant in both *Consolidated Freightways Corporation* vs. *Nicholas*, 258 Iowa 115, 137 N. W. 2d 900 and *General Expressways, Inc.* vs. *Iowa Reciprocity Board*, 163 N. W. 2d 413 (Iowa 1968). In my opinion, involvement in cases of this nature would be exactly the type of conflict the legislature intended to prohibit by the enactment of section 68B.7. In adidtion, the Executive Secretary, members of the Board, or employees of the Board who have terminated their employment with the state are thereby barred from representing or receiving compensation from any of the groups or individuals designated in section 68B.7 on any case, proceeding or application in which they personally participated during their tenure.

Section 68B.7 is a two part statute. The second paragraph of the statute concerns a regulatory agency. The definition of "regulatory agency" is given in section 68B.4 and does not include the Iowa Reciprocity Board. Therefore, the provisions of the second paragraph are not applicable to a former employee or official of the Iowa Reciprocity Board under the doctrine of *expressio unis est exclusio alterius* — expression of one thing in the exclusion of another. *Richardson* vs. *City of efferson*, 257 Iowa 709, 134 N. W. 2d 528 (1965).

No penalty is provided in Chapter 68B for a violation of §68B.7. When an act is prohibited by statute and no penalty is imposed either in title or in the statute itself, the act is a misdemeanor. Section 687.7, 1971 Code of Iowa, *State* vs. *Cowen*, 231 Iowa 1117, 3 N. W. 2d 176.

Accordingly, it is our opinion that the former Executive Secretary and other former employees of the Reciprocity Board are prohibited for a period of two years from the date of termination of their employment from representing the same applicants, persons, firms or corporations, or their successors or assigns, in cases, proceedings or applications with which they were concerned while in state service. In other words, such former secretary and employees can have nothing to do with any refund claim based upon applications previously processed by them. They can represent parties not previously involved or parties previously involved but with reference to another subject matter.

September 10, 1971

STATE OFFICERS AND DEPARTMENTS: Board of Medical Examiners — §148.3, Code of Iowa, 1971. The State Board of Medical Examiners may not waive the license requirement of §148.3(1)(c) which requires a recommendation of the educational council for foreign medical graduates, in lieu of a diploma issued by an approved medical college.

Bobenhouse to Conklin, State Senator, 9/10/71) #71-9-4

Mrs. W. Charlene Conklin, State Senator: This is in response to your letter of July 7, 1971, in which you request an opinion of the Attorney General with respect to the following:

"Specifically, I am desirous of knowing whether or not the medical examiners have the power to waive the requirement of the Educational Council for Foreign Medical Graduates in the licensing of a graduate of a foreign school. If so, what requirements must be met in lieu of this requirement?"

Section 148.3(1) of the 1971 Code of Iowa, provides as follows:

"Each applicant for a license to practice medicine shall:

1. Present a diploma issued by a medical college approved by the medical examiners, or present other evidence of equivalent medical education approved by the medical examiners. The medical examiners may accept, *in lieu of a diploma from a medical college approved by them, all of the following:*

a. A diploma issued by a medical college which has been neither approved nor disapproved by the medical examiners; *and*

b. The completion of three years of training as a resident physician which training has been approved by or is acceptable to the medical examiners; *and*

c. The recommendation of the educational council for foreign medical graduates, incorporated or similar accrediting agency." [Emphasis added]

From the obvious construction of the above statute, it is seen that the board of medical examiners may not waive the requirement of subsection (c) of section 148.3(1) when following the procedure outlined in subsections (a), (b) and (c), which may be used in lieu of a diploma from an approved medical college. The clear intent of this procedure is that all three subsections (a), (b) and (c) must be satisfied in order for the application to be acceptable in lieu of a diploma from an approved medical college. Witness the emphasized phrase "all of the following" and the word "and" found in subsections (a) and (b) in the statute quoted above.

However, it should be noted that subsection (1) of section 148.3 provides two other procedures which the applicant may follow to satisfy the requirement of subsection (1). The first, and most satisfactory procedure is for the applicant to "present a diploma issued by a medical college approved by the medical examiners." If the applicant presents such a diploma, section 148.3(1) has been satisfied and nothing else is necessary. The second alternative procedure is for the applicant to "present other evidence of equivalent medical education approved by the medical examiners." This procedure was inserted into section 148.3(1) of the Code by the Acts of the 60th G. A. (Chapter 122, section 18; House File 378). Previous to the amendment section 148.3(1) already contained the other two alternative procedures; namely by presenting an approved medical school diploma or, in lieu of such satisfying subsections a, b and c of section 148.3(1). Clearly the 60th General Assembly introduced another alternative procedure, independent of the two already set forth by statute.

The statute does not define what is meant by "other equivalent medical education." The failure to do so places such a determination wtihin the discretion of the Board of Medical Examiners.

In summary there are the following three separate procedures which an applicant may follow, any one of which could satisfy the requirement of subsection (1) of section 148.3: present a diploma from an approved medical college; or present evidence of equivalent medical education; or in lieu of an approved medical college diploma present evidence that he has satisfied all the requirements of subsection a, b, and c.

In addition to fulfilling the requirement of subsection (1) of section 148.3 each applicant for a medical license must also fulfill the requirements of subsections 2, 3 and 4.

September 14, 1971

SCHOOLS: Cities and Towns — §§297.15-20, 297.23, 297.24, Code of Iowa, 1971; §2, H.F. 37, Acts of the 64th G. A., First Session. The school board may give free of charge an old schoolhouse site to a town under the provisions of §2, H.F. 37, Acts of the 64th G. A., First Session. (Nolan to Thomas, Mills County Attorney, 9/14/71) #71-9-8

Mr. James A. Thomas, Mills County Attorney: This letter is in reply to your request for an opinion on the following question:

"Can the School Board give free of charge an old high school site with the building situated thereon to the Town of Malvern without appraisal or a vote of the electors of said School District, under the provisions of House File No. 37 of the 64th General Assembly?"

Your letter states that this school district is owner of a tract of real estate located within the Town of Malvern upon which is situated the old high school building, which will no longer be used. A new school has been erected on another site. The Town of Malvern seeks the site of the old school for a swimming pool and if the town acquires the site, it would raze the old building at no expense to the school district.

The provisions of §2 of H.F. 37, Acts of the 64th G. A., First Session, are applicable to this situation. This section provides:

"The board of directors of any school corporation may sell, lease, exchange, give or grant and accept any interest in real property to, with or from any county, municipal corporation, school district or township if the real property is within the jurisdiction of both the grantor and grantee. The provisions of sections two hundred ninety-seven point fifteen (297.15) to two hundred ninety-seven point twenty (297.20), inclusive, sections two hundred ninety-seven point twenty-three (297.23) and two hundred ninety-seven point twenty-four (297.24) of the Code, and the property value limitations and appraisal requirements of this section shall not apply to any such transaction between the aforesaid local units of government."

Your question may be answered affirmatively.

September 17, 1971

ELECTIONS: 18 year old voters, holding public office — §§63.1, 64.2, Chapter 367, §368A.2, Code of Iowa, 1971. With the recent adoption of the 26th amendment to the Constitution of the United States an 18 year old is now considered a general elector in the state of Iowa and in those places where registration is required if he is in fact registered

he is also a qualified voter. If a minor is elected to a public office, for example, mayor, he can execute contracts where doing so is within the scope of his duties. A mayor under the age of 21 can post a bond and can hold mayor's court. (Haesemeyer to Kehe, State Representative, 9/17/71) #71-9-6

The Hon. L. W. Kehe, State Representative: You have requested an opinion of the attorney general with respect to the following:

"According to Iowa Law all public elected officials have to be qualified voters or electors. When these requirements were established a person reached majority and voting eligibility at the same time.

"The recent lowering of the voting age to 18 creates several interesting and important questions. Some of these are:

"1. Does a qualified voter have to be of legal age?
"2. Can a minor execute a contract for a public agency?
"3. Can a minor post the required surety bond?
"4. Can a minor hold Mayor's Court?

"The questions are important because several men under 21 years of age have filed for the office of Mayor.

"If my information is correct, adulthood and all the rights and privileges are attained on the 21st birthday. Accordingly we have minors who are qualified voters. A rather confusing situation.

"I would appreciate your opinion on these questions, and whether or not a person under 21 can file for public office. With municipal elections this fall an early opinion is necessary."

Your questions on whether or not a qualified voter has to be of legal age and whether or not a person under 21 years of age may hold public office have been answered by recent opinions of the attorney general. In an opinion to Marshall County Attorney Max H. Buck, dated August 4, 1971, we pointed out that with the recent adoption of the 26th amendment to the Constitution of the United States an 18 year old is now considered a general elector in the state of Iowa and in those places where registration is required if he is in fact registered he is also a qualified voter. In that opinion we said that an 18 year old voter is as a general proposition insofar as voting is concerned in essentially the same position formerly occupied by persons 21 years of age or older. We also pointed out in that opinion that an 18 year old who is a qualified voter may run for municipal office. See also OAG Turner to Synhorst, Secretary of State, August 4, 1971.

In our opinion if a minor is elected to a public office, for example, mayor, he can execute contracts where doing so is within the scope of his duties. §368A.2, Code of Iowa, 1971, provides:

"368A.2 The mayor. In all municipal corporations, the mayor *shall have the following powers and perform the following duties* except when otherwise provided by laws relating to specific forms of municipal government.

"1. Executive officer — magistrate. He shall be a conservator of the peace, and, within the limits of the corporation, shall have all the powers conferred upon sheriffs to suppress disorders. He shall be the chief executive officer thereof, and it shall be his duty to enforce all regulations and ordinances; he may, upon view, arrest anyone guilty of a violation thereof, or of any crime under the laws of the state, and shall, upon information supported by affidavit, issue process for the arrest of any person charged with violating any ordinance of the corporation; shall supervise the conduct of all corporate officers, examine into the grounds of

complaint made against them, and cause all neglect or violation of duty to be corrected, or report the same to the proper tribunal, that they may be dealt with as provided by law.

"2. Office. He shall keep an office at some convenient place in the city or town, to be provided by the council, and provide for the keeping of the corporate seal thereof.

"3. Signature. *He shall sign all commissions, licenses, and permits granted by the authority of the council, and do such other acts as by law or ordinance may require his signature or certificate.*

"4. Treasurer — appointment. He shall appoint the treasurer and such appointment shall be subject to approval by the council. However, in lieu of such appointment, the council may, by ordinance, provide for the election at large of the treasurer at the regular municipal election.

"5. Other duties. He shall also perform such other duties compatible with the nature of his office *as the council may from time to time require.*

"6. Presiding officer — vote. He shall be the presiding officer of the council with the right to vote only in case of a tie.

"7. Mayor pro tem. He shall designate one member of the council as mayor pro tempore subject to the approval of a majority of the council. Said mayor pro tempore shall be vice-president of the council and give bond in the sum of five hundred dollars. In case of absence or inability of the mayor to act he shall perform all of the duties of the mayor except as otherwise herein provided. In case of the absence or inability of the mayor to act, the mayor pro tempore may hold mayor's court in cases of ordinance violations. If, at any meeting of the council, the mayor is not present, the mayor pro tempore shall act as presiding officer pro tempore and his acts as presiding officer pro tempore shall have the same force and legality as though performed by the duly elected mayor and he shall have the power to sign all resolutions and ordinances and execute all contracts or other documents finally adopted or approved at such meeting. The mayor pro tempore shall have no power to employ or discharge any officer or employee that the mayor has power to appoint or employ but said mayor pro tempore shall have the right to cast a vote as member of the council." (Emphasis added)

Under this section any person regardless of age elected to the office of mayor could sign contracts and other documents where authorized to do so by law, ordinance or by the city council. Presumably, similar statutes exist with respect to various other public offices and in those cases any persons holding those offices would be authorized to execute appropriate documents and contracts.

Section 63.1, Code of Iowa, 1971, provides:

"Each officer, elective or appointive, before entering upon his duties as such, shall qualify by taking the prescribed oath and by giving, when required, a bond, which qualification shall be perfected unless otherwise specified, before noon of the second secular day in January of the first year for which such officer was elected."

The form of the bond is set forth in §64.2. Nowhere in either of these sections is there any requirement that a public officer be 21 years of age or older. Moreover, under §64.19 it is to be observed that the mayor, for example, must approve the bonds of city and town officers. Thus, if a mayor under 21 has the duty of approving bonds of others it would only seem logical that he could post one.

Chapter 367 contains provisions with respect to mayors and police courts. Nothing in such Chapter 367 could be construed as prohibiting an 18 year old mayor from holding mayor's court. The office of mayor

carries with it certain powers and duties and the person elected to that office assumes those powers and duties by law no matter what his age.

September 27, 1971

STATE OFFICERS AND DEPARTMENTS: Secretary of State, cancellation of corporate charters — §§504A.54 and 504A.87, Code of Iowa, 1971. Secretary of State is authorized to cancel charters of corporations organized under Chapter 504A for failure to file annual reports regardless of whether or not a list of such delinquent corporations was sent to the Attorney General on or before July 1, 1971. (Haesemeyer to Synhorst, Secretary of State, 9/27/71) #71-9-7

The Hon. Melvin D. Synhorst, Secretary of State: Reference is made to your letter of August 20, 1971, in which you state:

"Pursuant to the requirements of Sec. 504A.54, Code of Iowa 1971, we transmit herewith a list of corporations organized under Chapter 504A that have failed to file annual reports. This office has sent each such corporation two (2) notices of it's delinquent status. Copies of these notices are enclosed.

"You will note that this list should have been submitted to you on or before July 1, 1971. If this delay on our part deprives us of the authority to cancel the certificate of incorporation of those corporations that are still delinquent thirty (30) days hereafter, please let us know."

It is true as you point out that under §504A.54 the Secretary of State is required on or before the 1st day of July each year to certify to the Attorney General the names of all corporations which have failed to file their annual reports in accordance with the provisions of Ch. 504A. However §504A.87 having to do with cancellation of certificates of incorporation merely provides in relevant part as follows:

"The secretary of state may cancel the certificate of incorporation of any corporation that fails or refuses to file its annual report for any year prior to the first day of June of the year in which it is due by issuing a certificate of such cancellation at any time after the expiration of thirty days following the mailing to the corporation of notice of the certification to the attorney general of the failure of the corporation to file such annual report as required by section 504A.54, provided the corporation has not filed such annual report prior to the issuance of the certificate of cancellation. Upon the issuance of the certificate of cancellation, the secretary of state shall send the certificate to the corporation at its registered office and shall retain a copy thereof in the permanent records of his office."

In our opinion the failure of the Secretary of State to certify the names of the delinquent corporations to the Attorney General on or prior to July 1, 1971, would not affect his authority to cancel the certificate of incorporation of delinquent corporations under §504A.87.

September 30, 1971

CONSTITUTIONAL LAW: Gubernatorial Succession — Seat of Government: Article XI, §8 and Article IV, §19, as amended, Constitution of Iowa; Section 38A.5 and §38C.1, Code of Iowa, 1971. Section 38A.5 is not in conflict with the Iowa Constitution in providing for additional interim successors to the Office of Governor in case of vacancy. Section 38C.1 is in accord with the State's police power in providing the Governor with the authority to remove the seat of government from the city of Des Moines in the face of an enemy attack. (Corcoran to Maricle, Director, Iowa Civil Defense, 9/30/71) #71-9-9

Mr. Albert R. Maricle, Director, Iowa Civil Defense Division: This is in response to your letter of August 2, 1971, in which you refer to apparent discrepancies between certain provisions in the Code of Iowa and the Iowa Constitution. You described said discrepancies as follows:

"ITEM 1. Reference Constitution of Iowa, Amendments of 1952, Gubernatorial Succession, Section 19, paragraph 38A.5, Code of Iowa.

DISCUSSION: The cited reference in the Code of Iowa specifies additional State officials not mentioned in the Constitution.

QUESTIONS: (1) Is there a conflict between the Code and the Constitution?

(2) If so, which department of government has the responsibility to inform the Legislative Assembly of the conflict and recommend correction?

"ITEM 2. Reference Constitution of Iowa, Article XI, Seat of Government Established — State University, Section 8; paragraph 38C.1, Code of Iowa.

DISCUSSION: The Constitution spekcifies two exact locations of government, while the Code provides the Governor with authority to designate emergency seat of government at any location.

QUESTIONS: (1) Same as above.
(2) Same as above.

Item 1 above refers to Article 4 Section 19, as amended, of the Iowa Constitution, which provides for the line of succession to the Office of Governor if such office is vacated for any specified reason. The last person in line, as provided by Section 19, is the Speaker of the House of Representatives. If said Speaker is incapable of performing the duties of the Office of Governor then the Justices of the Supreme Court are to convene the General Assembly and immediately proceed to the election of a Governor and a Lt. Governor. In such an event, the Constitution does not designate any other person to take over the duties of the Office of Governor from the time the vacancy is created until the time when a new Governor and Lt. Governor are elected by the General Assembly. In confronting the above contingency Chapter 38A, Subsection 5 of the Iowa Code, 1971, provides as follows:

". . . the Attorney General, Secretary of State, State Treasurer and State Auditor, shall, in the order named if the preceding named officers be unavailable, exercise the powers and discharge the duties of the office of governor until a new governor is elected and qualifies, or until the preceding named officer becomes available, provided however, that no emergency interim successor to the aforementioned office may serve as governor."

The above Code section provides for a succession of individuals to exercise the powers and discharge the duties of the Office of Governor *only* if those persons named by the above constitutional provision are unavailable. The Legislature did not pre-empt the Constitution but only implemented it to provide for an interim successor in the event the Speaker of the House is unavailable, and only until the new Governor is elected as specified by the Constitution. Therefore, Chapter 38A, Subsection 5 does not seem to be in contradiction with Article 4, Section 19, as amended, of the Iowa Constitution. It is well settled that the General Assembly has the power to enact any legislation it sees fit provided it is not clearly and plainly prohibited by some constitutional provision. *Becker*

vs. Board of Education of Benton Co., 1965, 258 Iowa 359, 138 N. W. 2d 909.

In answer to Subsection 2 of Item 1 any person may inform the Legislature of any apparent conflicts between the Constitution and the statutory law and recommend correction. However, to test the constitutionality of a law in the courts, the contesting party must have standing. A showing of public interest in general is not sufficient to warrant exercise of judicial power to determine the constitutionality of a statute. *Lee Enterprises, Inc. vs. Iowa State Tax Commissioner*, 1968, ...Iowa....., 162 N. W. 2d, 730.

Item 2 of your letter deals with Article XI, Section 8, of the Iowa Constitution which provides as follows:

"SEAT OF GOVERNMENT ESTABLISHED — STATE UNIVERSITY. Section 8. The seat of government is hereby permanently established as now fixed by law, at the city of Des Moines, in the county of Polk; and the State University, at Iowa City, in the county of Johnson."

Chapter 38C, Subsection 1 of the Iowa Code, 1971, provides in substance, that in the face of an emergency situation where it is impossible to carry on the function of government in Des Moines, that the Governor shall declare an emergency temporary location for the seat of government at such place or places within or without this state as he may deem advisable under the circumstances.

The apparent conflict arises from the fact that the above constitutional provision provides for the permanent seat of government and Section 38C(1), Iowa Code, 1971, provides for the removal of that seat of government to a temporary emergency location designated by the Governor. Regardless of the permanency in which Article XI, Section 8 establishes the seat of government, there nevertheless is reserved to the State its police power which is founded on the duty of the State to protect its citizens and provide for the safety and good order of society. *Des Moines Joint Stock Land Bank vs. Nordholm*, 1934, 217 Iowa 1319, 253 N. W. 701. The Iowa Supreme Court in the above case reviewed at length the General Assembly's authority, derived from the State's police power, to pass emergency legislation necessary to maintain and sustain itself. In that case the Iowa Legislature, on March 18, 1933, passed a law which extended the periods of redemption in mortgage contracts. The fact that the State Constitution contained a provision against impairment of obligation of contracts and a provision that the Constitution should be the supreme law of land, did not render the new statute unconstitutional, since such an exercise of police power was necessary to restore state government in an economic emergency.

Section 1 of Chapter 38C deals with an emergency situation, similar to that in the *Des Moines Joint Stock Land Bank* case, supra. The said Section provides only that the Governor has the authority to temporarily remove the seat of government from the City of Des Moines, in the event of an enemy attack or anticipated enemy attack and it is imprudent, inexpedient or impossible to conduct the affairs of state government. The Court in the *Des Moines Joint Stock Land Bank* case, supra, cited the case of *Home Building and Loan Association vs. Blaisdell*, 1934, 290 U. S. 398, 54 S. Ct. 231, 239, 78 L. Ed. 413, 88 ALR 1481, in which the court

stated as regards to emergency legislation as follows:

"The only question is: (1) Whether the proper occasion exists to exercise such power; (2) Whether the legislation is appropriate enough in its terms and limitations to be within the scope of such power."

It is my opinion that Section 1, Chapter 38C clearly describes the emergency situation under which the Governor may act and that such legislation is appropriate enough in its terms and limitations to be wthin the scope of such police power.

The answer to Subsection (2) of Item 2 is the same as that provided in the above paragraph relating to Subsection (2) of Item 1.

September 30, 1971

CITIES — COUNTIES — Assessors: Chapter 28E, §441. 51, Code of Iowa, 1971. Offices of city assessor and county assessor may be combined by appropriate ordinance and in conformance with joint governmental services agreement if the population of the city is less than 125,000. (Nolan to Wehr, Scott County Attorney, 9/30/71) #71-9-10

Mr. Edward N. Wehr, Scott County Attorney: This is in answer to your request for an opinion in regard to the combining of the offices of city and county assessors. Your questions are:

"First, can one person be named by the Davenport Conference Board and by the Scott County Conference Board to serve simultaneously as both Davenport City Assessor and Scott County Assessor? If such an arrangement is permissible, would it then be possible for the two assessor's offices to enter into an agreement for an interchange or cross-utilization of personnel?

"Second, can a city which has elected under Iowa statutes to have an office of city assessor thereafter abandon that office, and if so, what is the procedure for doing so?"

In an opinion dated August 19, 1947, 1948 OAG 73, this office stated:

"When a county assessor is appointed city assessor, then in truth and in fact the assessment of the city and the county is made by the county assessor and his work is reviewed by the county board of review, and the city board of review is eliminated. The result and affect is that the county assessor assesses the entire county under such an arrangement the same as any county assessor assesses any other complete county.

* * *

"The city asessor in a city with a population of more than one hundred twenty-five thousand is a full time employee under the provisions of Chapter 405 and the law provides that he shall be furnished with deputies to assist him in carrying out his duties. If his duties do not require his full time, then a necessity for deputies automatically vanishes, and if he is required to devote his full time to the city as said city assessor, we believe to be the intent of the law, then he does not have any time to serve as deputy county assessor and if such city assessor were appointed deputy county assessor, he would not be in a position to comply with the provisions of Section 11, Paragraph 1, Chapter 240 . . . It is our judgment that no man can serve two masters and devote his entire time to each at the same time."

Subsequent to the time the 1948 opinion was issued, Chapter 28E, Code of Iowa 1971 was enacted. (Acts 1965, 61 G. A., Ch. 83) This chapter of the code specifically authorizes the joint exercise of governmental powers

and has been interpreted by this office to permit cities and counties to enter into joint ventures for such things as appointment of civil defense and emergency planning director, 1966 OAG 52, (although the nature of the duties of certain county officers are incompatible with appointment to a part-time salaried county-municipal director position, 1966 OAG 145) jointly improve secondary roads and secondary bridge systems, 1966 OAG 307; provide joint ambulance service, 1970 OAG 349; engage in joint health project for rubella inoculation, 1970 OAG 413; provide for a joint operation of county and city hospitals, 1970 OAG 571; establishment of a sanitary disposal commission, opinion February 3, 1971, Nolan to McNeal, Hardin County Attorney.

In light of the foregoing it is our view that both of your questions may be answered affirmatively since the population of the City of Davenport does not exceed 125,000. Any agreement between the city and county for joint exercise of governmental powers must be in strict conformance with the provisions of Chapter 28E, Code of Iowa 1971. Further, any city electing by ordinance to provide for the office of city assessor pursuant to §441.51 may under its home rule powers eliminate such office in the same manner by appropriate ordinance.

September 30, 1971

STATE OFFICERS AND DEPARTMENTS: Comptroller of State, ADC warrants sent direct to bank. A proposal whereby the ADC warrants of selected recipients who agreed to the procedure would be sent directly to a designated bank for deposit to the account of the recipient would be legal. (Haesemeyer to Selden, State Comptroller, 9/30/71) #71-9-12

Mr. Marvin R. Selden, State Comptroller: Reference is made to your letter of September 24, 1971, in which you state:

"The State of Iowa has experienced an increasing incident of forgeries of state warrants in recent years. The problem is much greater in the area of Social Services than any other area of issue. Most of these forgeries are due to warrants being stolen or lost in the mails. It is felt by Social Services, the Treasurer of State and this Office that this problem could be solved, at least in part, by delivering these warrants directly to a financial institution, i.e., a bank, which would be selected by the recipient. Since there no doubt will be problems connected with this type of arrangement, we feel it is highly desirable to test a random sample of fifty ADC recipients. This would involve contacting the recipients to obtain permission, in the form of a signed authorization in which they would select the financial institution, i.e., a bank, of their choice. The warrants would be pulled from the issue by Social Services and delivered directly to the bank named in exchange for a detailed receipt. The Department of Social Services would develop an identification card for each recipient, including a color photograph. The questions we have are as follows:

"1. Can a department make a binding legal agreement with a payee for delivery of a state warrant to a bank selected by said payee in the written agreement?

"2. When the warrant so delivered is made payable to the payee and the bank deposits it in the payee's account by endorsing as follows "Credited to the account of the within named payee," does this endorsement and proof of credit to the payee's account constitute for us legal proof of payment?

"3. With a signed agreement for delivery of the warrant to a bank

selected by the payee, and when we hold a receipt from the bank for the payee's warrant, what is our legal position in the event the payee's account does not receive the money at all or if it is received late?"

As I understand the matter this would be an experimental procedure entirely voluntary on the part of those recipients participating in it and that the authorization to send the warrants to the selected bank could be cancelled at any time. In this context it would be my opinion that the department could make a binding legal agreement with the payee for delivery of a state warrant to the bank selected by the payee and that deposit of the warrant to the payee's account with the endorsement you describe would constitute legal proof of payment.

In answer to your third question I would think that your exposure to liability in the event the payee's account does not receive the warrant money at all or if it is received late would be very slim.

October 6, 1971

STATE OFFICERS AND DEPARTMENTS: Public Defense — Executive Council — Gifts to the state — §§565.3, 565.4, Code of Iowa, 1971. Conditional gift of property to the State of Iowa and acceptance thereof is authorized by the Executive Council under provisions of §§565.3 and 565.4, Code of Iowa, 1971. (Strauss to May, MG, Adjutant General, 10/6/71) #71-10-1

Joseph G. May, MG, The Adjutant General: Reference is herein made to yours of September 7, 1971, in which you have submitted the following:

"The 64th General Assembly (1st Session) enacted S.F. 542 and Sections 1 and 2 are quoted verbatim as follows:

" 'Section 1. There is appropriated from the General Fund of the state of Iowa to the department of public defense, the sum of four hundred eighty thousand ($480,000) dollars, or so much thereof as may be necessary, to be used for the state's share of the armory construction program made available to the state by the federal government for the acquisition, construction, expansion, rehabilitation and converting facilities of the administration and training units of the national guard and state guard; for repairs, replacements, alterations, equipment and rehabilitation of armories in connection with which federal funds may be accepted; and for repairs, replacements, alterations, equipment and rehabilitation of grounds, buildings and roads at Camp Dodge, Iowa.

" 'Section 2. Before any of the funds appropriated by this Act shall be expended, it shall be determined by the department of public defense that the expenditures shall be for the best interests of the state.'

"The appropriation is identified in the State Comptroller's Account structure as 1-72-9-367-001.

"The State Comptroller has agreed to application of $178,300.00 of this Appropriation for Armory Construction, identified as 1-72-9-367-001-0001, with an Appropriational scope that will provide state funding support for the acquisition, construction, expansion, and conversion of armory facilities, and the State's share of funding support for armory construction projects authorized by the National Defense Facilities Act of 1950 (P.L. 783-81st Congress) whereby the Secretary of Defense is authorized to contribute 75% of the construction of approved armory projects for the State.

"The Division Facilities Construction Program for the 64th Biennium proposes commencement of construction of the Cedar Rapids Armory and a Davenport Armory-Army Airfield complex in FY 1972. These projects

have been approved by the National Guard Bureau, for Federal Funding support, as indicated.

	TOTAL COST	FEDERAL FUNDS
Cedar Rapids Armory	$434,400.00	$319,400.00
Davenport Armory	272,800.00	200,900.00
Davenport AAMS (#3)	562,400.00	526,400.00

"It should be explained that the programmed Davenport Armory Project will only support the 1105th Aviation Company, a helicopter unit, based at the Davenport Municipal Airport, as this armory facility must be available to the aircraft maintenance facilities, located and entirely supported by Federal Requirements and funding. The other Army National Guard units at Davenport consist of Headquarters and a supporting unit of the 185th Field Artillery Battalion garrisoned in an armory located on Brady Street, title to which will be in the State of Iowa in 1973 as a result of a purchase-option lease agreement.

* * *

"Accepting this interpretation of Section 29A.57, the attention of the Attorney General is invited to the provisions of Sections 565.3 and 565.4, Code of 1971, pertaining to 'Gifts to the State' and quoted verbatim hereafter:

"565.3 *Gifts to state.* A gift, devise, or bequest of property, real or personal, may be made to the state, to be held in trust for and applied to any specified purpose within the scope of its authority, but the same shall not become effectual to pass the title in such property unless accepted by the executive council in behalf of the state. (C73, S1387; C97, S2903; C24, 27, 31, 35, 39, S10185; C46, 50, 54, 58, 62, 66, S565.3).

"565.4 *Management of property.* If gifts are made to the state in accordance with section 565.3 for the benefit of an institution thereof, the property, if accepted, shall be held and managed in the same way as other property of the state, acquired for or devoted to the use of such institution; and any conditions attached to such gift shall become binding upon the state, upon the acceptance thereof. (C97, S2904; C24, 27, 31, 35, 39, S10186; C46, 50, 54, 58, S565.4).

"All negotiations with both cities have established that they are both adamant with respect to the matter of return of title, to the respective cities, in the event the property concerned is abandoned for military purposes in the future. This Department is convinced that if this requirement cannot be met and the projects initiated in FY 1972, the State will lose the $1,046,700.00 Federal funding support indicated heretofore.

"May we respectfully suggest that Sections 565.3 and 565.4, cited above, present a possible solution to this problem in that the statutes permit acceptance of title with conditions binding upon the State. The Iowa National Guard, and Camp Dodge, have by previous Attorney General's Opinion been determined to be a State Institution, and one of the conditions of a gift of the required conveyance would be reversion of the title in the event property concerned is not used for National Guard purposes."

Excluding the portions thereof not pertinent to your inquiry, the foregoing involves the conditional giving of city property to the state. This unconditional grant is authorized under the provisions of §368.39, Code of Iowa 1971, in which, among other powers vested in cities, states: "any city or town may donate real estate to the state for public purposes." Acceptance of such gift of real estate is vested in the Executive Council under the provisions of §§565.3 and 565.4, Code 1971, each providing as follows:

§565.3:

"A gift, devise, or bequest of property, real or personal, may be made to the state, to be held in trust for and applied to any specified purpose within the scope of its authority, but the same shall not become effectual to pass the title in such property unless accepted by the executive council in behalf of the state."

§565.4:

"If gifts are made to the state in accordance with section 565.3, for the benefit of an institution thereof, the property, if accepted, shall be held and managed in the same way as other property of the state, acquired for or devoted to the use of such institution; and any conditions attached to such gift shall become binding upon the state, upon the acceptance thereof."

The foregoing numbered sections of the 1971 Code appeared, so far as the State of Iowa is concerned, is named thereof as §§2903 and 2904 of the Code of 1897.

Acceptance by the Executive Council of a gift of property on condition as authorized by the foregoing statutes, was the subject of opinion of the department appearing in the Report for 1922 at page 59, where it was stated:

"If a general rule were to be laid down it might be said that if the condition is one which the executive council might enter into independent of the question of the conveyance itself then they would undoubtedly have authority to accept subject to such condition; otherwise not. It is hardly necessary from what has been said to further consider this matter. It will become apparent to you that the executive council does not have authority to accept donations of real estate to be used for park purposes subject to conditions of every kind. It is easy to imagine conditions which are illegal in their nature. Under such circumstances the donations could not be accepted. There are other conditions which are lawful in their nature and yet such that the executive council would not be permitted to enter into on behalf of the state of Iowa. Under such circumstances the executive council would not be authorized to accept the conveyance subject to such conditions.

"It will therefore be apparent, first that the executive council may accept donations or real estate for park purposes subject to certain conditions which are lawful and the terms of which the council would under the law be authorized to accept on behalf of the state as a contract; second, the executive council cannot accept donations of real estate subject to all conditions but only as to those conditions which as stated, are lawful and which they have authority under the statutes, to accept.

"We would suggest that where a donation is offered subject to said conditions that it would be advisable to consider each particular case from the facts and circumstances of such case rather than to depend upon a general rule."

In view of the foregoing conclusion, the conditional acceptance of the gift is the prerogative of the Executive Council. It is clear that reversion of the gift to the city if not used for national guard purposes, would result in unjust enrichment in the amounts of hundreds of thousands of dollars, if not limited in time. By way of suggestion, it seems that an agreement of the city of such right of reversion may not be exercised by the city for a period of 25 years from the date of the conveyance to the state.

October 6, 1971

STATE OFFICERS AND DEPARTMENTS: Executive Council, authorization of out of state travel — §8.13, Code of Iowa, 1971; House File 129, Acts, 64th G. A., First Session (1971). The Executive Council continues to have responsibility for the supervision and authorization of requests for travel notwithstanding the recent creation of a Department of General Services. (Haesemeyer to Wellman, Secretary, Executive Council, 10/6/71) #71-10-2

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: We are in receipt of your letter of October 5, 1971, in which you request an attorney general's opinion as to whether the executive council or the department of general services created by House File 129, Acts, 64th G. A., First Session (1971), shall be responsible for the supervision and authorization of request for travel.

The requirement that prior executive council approval be obtained for out of state travel rests for the most part on §8.13, Code of Iowa, 1971, the relevant portions of which provide:

"The state comptroller shall be limited in authorizing the payment of claims, as follows:

* * *

"2. Convention expenses. No claims for expenses in attending conventions, meetings, conferences or gatherings of members of any association or society organized and existing as quasi-public association or society outside the state of Iowa shall be allowed at public expense, unless authorized by the executive council; and claims for such expenses outside of the state shal not be alowed unless the voucher is accompanied by so much of the minutes of the executive council, certified to by its secretary, showing that such expense was authorized by said council.

* * *"

This provision of the code was unaffected by the enactment of House File 129. Moreover, House File 129 vests no powers or duties in the department of general services with respect to travel by state employees except such as may be incidental to the department's functions with respect to state owned motor vehicles.

Accordingly, it is our opinion that the executive council continue to have responsibility for the supervision and authorization of requests for travel.

October 6, 1971

STATE OFFICERS AND DEPARTMENTS: Department of General Services — §§15.7, 15.9 and 15.11, Code of Iowa, 1971, as amended by H.F. 129, Acts, 64th G. A., First Session (1971). A contract for public printing which includes not only composition but printing, i.e. reproduction of the image on paper, would have to be submitted to bids. (Haesemeyer to McCausland, Dept. of General Services, 10/6/71) #71-10-3

Mr. Stanley L. McCausland, Director, Department of General Services: Reference is made to your letter of September 28, 1971, in which you state:

"I have taken my oath of office as Director of the Department of General Services and it is on file with the Secretary of State. I will officially begin my duties either October 18, 1971, or, October 25, 1971.

"You have previously received a letter dated August 3, 1971 with accompanying correspondence from Mr. J. C. Moore, Superintendent of

Printing, in regard to a proposal that would permit the State Printing Board to enter into contracts for certain printing which would include computerized composition. Your opinion dated August 10, 1971, stated that 'We must conclude that a contract of the type described which includes not only the composition but the printing, i.e. reproduction of the image on paper, would have to be submitted to bids.' I would like a further opinion as to the authority that the Director of General Services has under HF 129, Section 25, (15.9) to enter into the type of contractual agreement as outlined in the correspondence you received from Mr. Moore.

"I am well aware of the sensitive nature of my position in regard to this matter and if your ruling is favorable, I intend to make my policies public before any contracts are negotiated."

Our opinion of August 10, 1971, was based on the language of §15.7 and §15.11, Code of Iowa, 1971, neither of which was amended in any significant way by H.F. 129, Acts, 64th G. A., First Session, (1971).

Section 25 of H.F. 129, to which you mke reference, makes no significant changes in §15.9 of the code. It merely substitutes the word "director" for "printing board" in the first sentence and deletes the words "In all such cases" in the second sentence. The substance of §15.9 remains unchanged.

Accordingly, it is our opinion that the enactment of H.F. 129 in no way alters the conclusions reached in our prior opinion of August 10, 1971.

October 8, 1971

CITIES AND TOWNS: Municipal assistance fund — annexed areas use of census figures — §4.1(26), §26.6, Code of Iowa, 1971; House File 654, Acts, 64th G. A., First Session (1971). To the extent that there is a conflict between §4.1(26) and §26.6, as amended by §45 of H.F. 654, the latter section prevails and must govern the dsitribution of municipal aid under Division IV of H.F. 654. (Haesemeyer to Baringer, Treasurer of State, 10/8/71) #71-10-4

The Hon. Maurice E. Baringer, Treasurer of State: Reference is made to your letter of October 5, 1971, in which you state:

"Please be referred to Section 4.1, paragraph 26 Code of Iowa 1971, which reads in part 'However the population figure disclosed for any city or town as the result of a special federal census as modified as the result of consolidation or annexation in the manner provided in sections 312.3 and 123.50, shall be considered for no other purposes than the application of sections 123.50 and 312.3.'

"Please be further referred to Section 26.6 Code of Iowa, which reads in part as follows: 'However, the population figure disclosed for any city or town as the result of a special federal census as modified as the result of consolidation or annexation in the manner provided in sections 312.3, and 123.50, shall be considered for no other purposes than the application of sections 123.50 and 312.3.'

"House File 654, Section 45 amends Section 26.6 1971 Code of Iowa by striking the last 'and' in the above and adding 'and the provisions of this division.' Since House File 654 fails to amend Section 4.1, paragraph 26 in the same manner as it amends Section 26.6, which of these sections governs distribution of municipal aid?"

House File 654, Acts, 64th G. A., First Session (1971), is a multipurpose bill entitled:

"An Act relating to financing of governmental programs by providing

state aid to schools, school district property taxes, imposing a school district income tax including administration by the Director of Revenue and adoption of administrative provisions for the state individual income tax including penalties and interest, relating to the state individual and corporate income tax, relating to sales and use tax exemptions, providing property tax relief for the elderly and totally disabled, relating to the taxation of municipal interstate toll bridges, and providing aid to cities, towns, and counties."

The bill is divided into seven divisions, Division IV of which creates the municipal assistance fund and provides for the manner of distribution thereof. Such Division IV consists of Secs. 41 through 45. I am informed by the code editor that the language "and the provisions of this division" added to §26.6, Code of Iowa, 1971, by Sec. 45 of House File 654, will when they appear in the code be editorially changed to read "and the provisions of [whatever code sections are assigned to Secs. 41 through 44 of H.F. 654]." If the legislative intent is not plain enough from the amendment to §26.6 of the code accomplished by §45 of House File 654 it is certainly clear from §44(3) of House File 654 which provides:

"In any case where an incorporated city or town has annexed any territory since the last regular or special federal census, the mayor and council shall certify to the treasurer of state the actual population of the annexed territory as determined by the last certified federal census of the territory and the apportionment of funds under this subsection shall be based upon the population of the city or town as modified by the certification of the population of the annexed territory until the next regular or special federal census enumeration."

It is certainly true as you point out that the failure of the framers of H.F. 654 to amend §4.1(26) of the code to conform to the amendment to §26.6 results in a conflict between the two sections. The Iowa supreme court on a number of occasions has stated that it is the duty of the court to construe two statutes upon the same subject so that they both shall stand and to give each of them force according to the intention of the legislature; but where they are in conflict the one last passed being the latest expression of the legislative will must prevail. *State v. Smith,* 1858, 7 Iowa 244, 7 Clarke 244; *Curlew Consolidated School District v. Palo Alto County Board of Education,* 1955, 247 Iowa 112, 73 N. W. 2d 20.

Accordingly, it is our opinion that to the extent that there is a conflict between §4.1(26) and §26.6, as amended by §45 of House File 654, the latter section prevails and must govern the distribution of municipal aid under Division IV of House File 654.

October 14, 1971

TAXATION: Destroying dogs — §§351.26 and 332.3(21), Code of Iowa, 1971. A county Board of Supervisors which contracts to have dogs destroyed pursuant to §§351.26 and 332.3(21), cannot create a tax lien on the dog owner's property for the cost of destroying said dogs. (Pabst to Atwel, Auditor's Office, 10/14/71) #71-10-5

H. E. Atwell, Public Accounts Audit Supervisor, Auditor's Office: You have requested an opinion of the Attorney General on the issue of whether a county Board of Supervisors which contracts to have dogs destroyed pursuant to §§351.26 and 332.3(21), Code of Iowa, 1971, can create a tax lien on the dog owner's property for the cost of destroying said dogs.

Section 351.26, Code of Iowa, 1971, states:

"Right and duty to kill unlicensed dog. It shall be lawful for any person, and the duty of all peace officers within their respective jurisdictions unless such jurisdiction shall have otherwise provided for the seizure and impoundment of dogs, to kill any dog for which a license is required, when such dog is not wearing a collar with license tag attached as herein provided."

Section 332.3(21), Code of Iowa, 1971, states, that a county Board of Supervisors has the power to:

"To provide, by contract or otherwise, for the seizure, impoundment and disposition of dogs in accordance with chapter 351."

Section 351.26 provides for the legal disposal of dogs and §332.3(21) specifically empowers the Board of Supervisors to contract for the disposal of the dogs. No statute gives the Board of Supervisors the power to create a tax lien on the dog owner's property for the cost of the disposal of said dogs. In *In Re Frentress' Estate*, the court stated:

"The law is well settled that a County is a creature of statute, a quasi-corporation, and its officials have only such powers as are expressly conferred by statute, or necessarily implied from the powers so conferred." 1958, 249 Iowa 783, 786 89 N. W. 2d 367, 368.

Continuing the court stated:

"53 C.J.S. Liens §2, states, "A lien may be created only by contract, * * *, or by some statute or fixed rule of law; it cannot be created by the court merely from a sense of justice."

"As before stated, Section 252.13 provides the sole basis for recovery by the County. The fact that the homestead is made liable for the liability created by said section, does not in any sense of the word create a lien upon the homestead or any other property until such liability has been placed in judgment or approved as a claim in an estate." 1958, 249 Iowa 783, 790 89 N. W. 2d 367, 370-371; *Woodbury County v. Anderson* 1969, Iowa, 164 N. W. 2d 129.

There is no specific statutory authority for the creation of a tax lien on the dog owner's property, nor can the power to create the lien, be necessarily implied from §332.3, Code of Iowa, 1971. Therefore a county Board of Supervisors which contracts to have dogs destroyed pursuant to §§351.26 and 332.3(21) cannot create a tax lien on the property of the dog owner for the cost of disposing of said dogs.

October 14, 1971

CITIES AND TOWNS: Curfews. There are no prohibitions against a municipality or governing body from imposing a curfew on those under nineteen years of age. (Blumberg to McGuire, Howard County Attorney, 10/14/71) #71-10-7

Mr. Kevin C. McGuire, Howard County Attorney: In your letter of October 7, 1971, you requested an opinion as to whether there is any prohibition against a municipality or governing body setting a curfew over minors under the age of nineteen. You specifically directed this question to eighteen-year olds now that they have voting rights.

In answer to your question, we can find no prohibition against setting a curfew over eighteen-year olds. This takes into consideration the new voting laws. It is true that eighteen-year olds, as office holders, have certain privileges that are normally reserved for those reaching the age of 21. See, OAG, Haesemeyer to Kehe, September 17, 1971, enclosed herein.

But, it is our opinion that these privileges only apply to those eighteen-year olds who are office holders.

This is evidenced by Attorney General Turner in his opinion to Max Buck, Marshall County Attorney, August 4, 1971, enclosed herein:

"Generally speaking there are no restrictions on the 18-year old voter in the state of Iowa *insofar as voting is concerned.* . . . There may be other provisions in the law fixing various age requirements which do not depend on an individual's status as an elector or voter and as a general proposition in our view these sections are not changed by the 26th Amendment [to the United States Constitution]."

This last statement was with reference to age requirements for certain offices. However it is also applicable here. The 26th Amendment to the United States Constitution only changed the age limitation for the privilege of voting. It did not affect the authority of a governing body for setting a curfew.

Accordingly, it is our opinion that a municipality or governing body may impose a curfew on those under nineteen years old.

October 14, 1971

CITIES AND TOWNS: Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 — §§28E.1, 28E.2, 28E.4 and 330.13, Code of Iowa, 1971. Municipalities have the authority to receive and distribute federal funds pursuant to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. (Blumberg to Berlin, Director, Iowa Aeronautics Commission, 10/14/71) #71-10-6

Mr. Frank W. Berlin, Director, Iowa Aeronautics Commission: I am in receipt of your letter of September 21, 1971, with reference to "The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970," enacted by the Federal Government. Your question is whether the municipalities of Iowa have the authority to disperse funds for relocation pursuant to this legislation. Your question is directed specifically to sections 210 and 305 of the Act.

The purpose of the Act is to provide for uniform and equitable treatment of persons displaced from their homes, businesses or farms by federal and federally assisted programs, and to establish uniform and equitable land acquisition policies for federal and federally assisted programs. The "Uniform Relocation Assistance Policy," Title II of the Act, was propounded "in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole." Section 201. The "Uniform Real Property Acquisition Policy," Title III of the Act, was propounded "to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many federal programs, and to promote public confidence in federal land acquisition practices . . ." Section 301.

Sections 210 and 305 of the Act state:

"REQUIREMENTS FOR RELOCATION PAYMENTS AND ASSISTANCE IN FEDERALLY ASSISTED PROGRAMS; ASSURANCES OF AVAILABILITY OF HOUSING

"Sec. 210. Notwithstanding any other law, the head of a Federal agency shall not approve any grant to, or contract or agreement with, a

State agency, under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the displacement of any person on or after the effective date of this title, unless he receives satisfactory assurances from such State agency that —

"(1) fair and reasonable relocation payments and assistance shall be provided to or for displaced persons, as are required to be provided by a Federal agency under sections 202, 203, and 204 of this title;

"(2) relocation assistance programs offering the services described in section 205 shall be provided to such displaced persons;

"(3) within a reasonable period of time prior to displacement, decent, safe, and sanitary replacement dwellings will be available to displaced persons in accordance with section 205(c)(3)."

* * *

"REQUIREMENTS FOR UNIFORM LAND ACQUISITION POLICIES; PAYMENTS OF EXPENSES INCIDENTAL TO TRANSFER OF REAL PROPERTY TO STATE; PAYMENT OF LITIGATION EXPENSES IN CERTAIN CASES

"Sec. 305. Notwithstanding any other law, the head of a Federal agency shall not approve any program or project or any grant to, or contract or agreement with, a State agency under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the acquisition of real property on and after the effective date of this title, unless he receives satisfactory assurances from such State agency that —

"(1) in acquiring real property it will be guided, to the greatest extent practicable under State aw, by the land acquisition policies in section 301 and the provisions of section 302, and

"(2) property owners will be paid or reimbursed for necessary expenses as specified in sections 303 and 304."

A problem arises upon reading these sections. They both apply only to state agencies. "State agency" is defined in Section 101(3) as follows:

"(3) The term 'State agency' means the National Capital Housing Authority, the District of Columbia Redevelopment Land Agency, and any department, agency, or instrumentality of a State of a political subdivision of a State, or any department, agency, or instrumentality of two or more States or of two or more political subdivisions of a State or States."

As can be seen by this definition, political subdivisions of a state are not included as state agencies. This can be interpreted to mean that municipalities, i.e., political subdivisions, are not covered by these sections. Upon reading the entire Act, it becomes evident that its provisions apply only to federal and state agencies. Thus, applying the above reasoning, this can be interpreted to mean that political subdivisions are not covered by the Act. This problem is solved, however, if the municipalities have a department or agency concerned with projects for which the federal funds are requested.

The question as presented is twofold. First, do the municipalities have the authority to receive federal funds which are to be distributed for relocation and acquisition; and second, do the municipalities have the authority to distribute funds and provide other assistance and services for relocation and acquisition pursuant to the Act?

The first question is answered in the affirmative. Chapter 28E, 1971 Code of Iowa is entitled "Joint Exercise of Governmental Powers." Its purpose, as set forth in section 28E.1, "is to permit state and local governments in Iowa to make efficient use of their powers by enabling them to provide joint services and to cooperate in other ways of mutual advantage. *This chapter is to be liberally construed to that end.*" (Emphasis added.) Section 28E.4 provides that any public agency of the state may enter into an agreement with other public or private agencies. "Public agency" is defined in section 28E.2 to include a political subdivision of this state and an agency of the United States. Thus, municipalities have the authority to enter into agreements with federal agencies. This would include the acceptance of federal funds pursuant to such an agreement. See, 1966 O.A.G. 28.

It must be remembered, however, that appropriate action "by ordinance, resolution or otherwise pursuant to law of the governing bodies involved shall be necessary before any such agreement may enter into force." Section 28E.4. Thus, we must look to section 330.13, 1971 Code of Iowa, which provides:

"Any subdivision of government is authorized to accept, receive, and receipt for federal moneys . . . for the acquisition, construction, enlargement, improvement, maintenance, equipment or operation of airports and other air navigation facilities, and sites therefor, and to comply with the provisions of the laws of the United States and any rules and regulations made thereunder for the expenditure of federal moneys upon such airports. . . ."

This section not only authorizes municipalities to receive federal funds, but also gives them the authority to distribute said funds pursuant to federal legislation and rules governing the agreement. Thus, municipalities possess the authority to provide for the acquisition of property and relocation of individuals pursuant to the Federal Act. In summary then, the answer to both questions is yes.

It must be added that this opinion does not go to the issue inferentially raised by it of whether municipalities acting without agencies, departments, commissions and the like fall within the provisions of the Act.

October 15, 1971

ELECTIONS: REFERENDUM: PUBLIC OPINION POLL: HOME RULE — Article III, §40, Constitution of Iowa. In absence of constitutional or statutory authority, submission of a question of public opinion to the voters at a regular municipal or school election is unlawful. The municipal home rule amendment does not permit a city to alter or add to statewide election laws of uniform application, particularly by submission of an issue not directly related to municipal or school government nor pertaining to local affairs. (Turner to Riley, State Senator, 10/15/71) #71-10-8

The Hon. Tom Riley, State Senator: You have requested an opinion of the attorney general as to whether what you describe as "an advisory referendum," for the purpose of making a recommendation to the President of the United States and to the Congress, may lawfully be submitted to the electorate of the City of Cedar Rapids either in conjunction with a regular school board election or a municipal election. The issue to be submitted in the proposed public question is not directly connected

with municipal or school government. But you state that voting would be by machines so, presumably, there would be no expense for ballots.

Actually the proposed public question is not a referendum at all. A "referendum" involves the right of the people to have submitted, for their approval or rejection, an act passed by a legislative body. On the other hand, an "initiative" involves the power of the people to propose bills and laws and to enact or reject them at the polls, independent of legislative assembly. What you describe is rather in the nature of a public opinion poll. Some states do, in fact, provide by statute for the expression of an opinion by electors on questions of public policy. *City of Litchfield v. Hart*, 306 Ill. App. 621, 29 N. E. 2d 678. See also 76 ALR 1053 and the Iowa cases cited on page 1054. And for what is encompassed within the meaning of the word "elections," see *Coggeshall v. City of Des Moines*, 1908, 138 Iowa 730, 117 N. W. 309.

I find no authority, express or implied, for the submission of such an issue to the people of this State or to any municipality, school district or other political subdivision thereof. All governmental elections in Iowa are authorized by statute. *Iowa-Illinois Gas & Electric Co. v. City of Bettendorf*, 1950, 241 Iowa 358, 41 N. W. 2d 1; 1968 OAG 591 and informal OAG June 25, 1957. Since our election laws are so carefully detailed and prescribed, I must conclude that in absence of constitutional or statutory authority, such submissions to the voters are unlawful. Expressio unius est exclusio alterius. *State v. Claussen*, 1933, 216 Iowa 1079, 250 N. W. 195.

This appears to be the majority rule. 26 Am. Jur. 2d 13, Elections §183, states:

"It is fundamental that a valid election cannot be called and held except by authority of the law. There is no inherent right in the people, whether of the state or of some particular subdivision thereof, to hold an election for any purpose. Accordingly, an election held without affirmative constitutional or statutory authority, or contrary to a material provision of the law, is a nullity, notwithstanding the fact that such election was fairly and honestly conducted."

And in 29 C.J.S. 156. Elections §66, I find:

"In all popular forms of government the power of a majority to bind the minority by a popular vote depends on the fact that the elections are held by virtue of some legal authority. There is no inherent right or power in the people to hold an election, and the system of elections in this country is not of common-law origin, since it was unknown to the common law.

"The right or power to hold an election must be based on authority conferred by law, and an election held without affirmative constitutional or statutory authority, or contrary to a material provision of the law, is universally recognized as being a nullity, even though it is fairly and honestly conducted. An election purporting to have been held under a statute which by its terms had not then gone into effect is void, as is also an election called under a void statute."

In addition to the many authorities cited under the above legal encyclopedia quotations, *Meredith v. Monahan*, 1969, 60 Misc. 2d 1081, 304 N. Y. S. 2d 638, specifically holds that in absence of express statutory authority, an advisory referendum, even in a home rule municipality, is not permitted. In that case, a taxpayer won an injunction against plac-

ing of a certain local law on the ballot which would have required the city council to draft a new charter in direct conflict with the provisions of the city charter and the municipal home rule law. The municipal home rule law of New York expressly stated the instances where it is mandatory to hold a referendum. Thus, the case is not directly analogous.

There have been no decisions in Iowa as to whether the 1968 Municipal Home Rule Amendment, Article III, §40, Constitution of Iowa, would allow a city to authorize either an expression of opinion by the electors or advisory referendums for ordinance making purposes. Under that amendment, municipal corporations are granted home rule power and authority, "not inconsistent with the laws of the general assembly, *to determine their local affairs and government*, except that they shall not have power to levy any tax unless expressly authorized by the general assembly." (Emphasis added). But I am inclined to believe that because elections are so carefully prescribed by our constitution and laws, for state-wide and uniform application to all communities, an individual city cannot alter them for its own purposes. *Municipal Home Rule In Iowa*, 49 I.L.R. 826-827. Moreover, as I pointed out in the first paragraph, the issue suggested for submission here is not directly connected with municipal or school government. Nor does it pertain to local affairs. Thus, whether the home rule power might alter what has formerly been both the general and Iowa rule as to what governmental elections are authorized, this particular issue is simply not within the home rule power.

October 15, 1971

STATE OFFICERS AND DEPARTMENTS: Moving expenses for transferred agriculture department inspector — §79.1, Code of Iowa, 1971. The expenses of moving a department of agriculture inspector at the request and for the convenience of the department of agriculture is a "governmental" rather than a "personal" expense which may be properly repaid or reimbursed by the department of agriculture. (Haesemeyer to Wellman, Secretary, Executive Council, 10/15/71) #71-10-10

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: Reference is made to our opinion to you of September 30, 1971, in which we stated that the department of agriculture could not legally pay the moving expenses of an inspector in that department whose duties necessitated a move from Muscatine to Onawa.

This opinion was based in large part upon another opinion of the attorney general, 1970 OAG 48. However, this opinion differs from the circumstances of the case you present in that it involved paying moving expenses of a newly employed director of the conservation commission rather than an existing employee and it involved an officer whose salary was fixed by statute rather than an employee. More in point are two other opinions of the attorney general, 1968 OAG 984 and 1970 OAG 367. These opinions involve respectively existing employees of the employment security commission and the banking department and as in the case of the agriculture department the moves were required for the convenience of the state rather than the employees in question. As stated in the 1968 opinion:

"Where the convenience of the employer requires intrastate transfer of employees in such a situation, the payment of reasonable moving expenses for affected employees most assuredly would fall within the cate-

gory of 'governmental,' rather than 'personal' expenses. Gallarno vs. Long, 1932, 214 Iowa 805, 243 N. W. 719."

Accordingly, upon reconsideration it is our opinion that the expenses of moving the department of agriculture inspector at the request and for the convenience of the department of agriculture is a "governmental" rather than a "personal" expense which may be properly repaid or reimbursed by the department of agriculture. Our earlier opinion of September 30, 1971, is hereby withdrawn.

October 18, 1971

APPROPRIATIONS: MEDICAL SCHOOL: PRIVATE OR PUBLIC PURPOSE — Article III, §31, Constitution of Iowa; S.F. 593, 64th G. A. (1st Session). An appropriation to be paid by the executive council to a private college of osteopathic medicine and surgery for planning, constructing and equipping a new medical school on land owned by the college is for a public, rather than a private, purpose and a two-thirds vote in each house of the General Assembly is not required. (Turner to Harbor, Speaker of the House of Representatives, 10/18/71) #71-10-9

The Hon. William H. Harbor, Speaker of the House of Representatives:
By your letter of September 30, 1971, you requested an opinion of the attorney general as to the constitutionality of Senate File 593, which passed the senate in the first session of the 64th General Assembly (1971), but which has not yet been passed by the house or approved by the governor.

Senate File 593 is "A Bill for an Act to make an appropriation to the executive council for the construction and equipping of a medical school in counties of over two hundred thousand (200,000) population" and provides an appropriation of $500,000 from the state general fund to the executive council for the biennium ending June 30, 1973, to be paid by the executive council to an existing medical school for the development of plans and construction and equipping of a new medical school upon land owned by the medical school within any county with 200,000 or more population and which grants a degree of doctor of medicine and surgery or osteopathic medicine and surgery recognized pursuant to the laws of the state of Iowa. See §2 of the bill for other requirements not pertinent to this opinion. An explanation attached to the bill says that it is for development of plans for construction and equipping a new osteopathic teaching facility for training more family doctors by the college of osteopathic medicine and surgery. To my knowledge the only existing medical school in any county of 200,000 or more is the college of osteopathic medicine and surgery here in Des Moines. You state that it is a private organization and specifically inquire whether an appropriation can be made to a private organization.

Article III, §31, Constitution of Iowa, provides:

"No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered, or the contract entered into; nor, shall any money be paid on any claim, the subject matter of which shall not have been provided for by pre-existing laws, *and no public money or property shall be appropriated for local, or private purposes,* unless such appropriation, compensation, or claim, be allowed by two-thirds of the members elected to each branch of the General Assembly." (Emphasis added)

Thus, it seems clear that the money can be appropriated and the real question is whether the appropriation is for a private purpose and therefore must be allowed by two-thirds of the members elected to each house of the general assembly.

In my opinion, this bill is clearly for a public purpose and the limitations imposed by Article III, §31, are not applicable. The principles involved are fully discussed in *Dickinson v. Porter*, 1948, 240 Iowa 393, 35 N. W. 2d 66 at pages 79 to 81. See also, *Carroll v. City of Cedar Falls*, 221 Iowa 277, 283, 261 N. W. 652; and *Grout v. Kendall*, 195 Iowa 467, 477, 192 N. W. 529, 533, which latter case unanimously upholds a Soldier's Bonus Act under which it was proposed to issue $22,000,000 of state bonds and levy a tax to retire them in order to pay a "bonus" to Iowa soldiers and sailors of World War I. The *Dickinson* case points out that the authorities agree not only that the legislature has the broadest discretion as to what is a public purpose but also that such question is a changing one. The case says that a law may serve the public interest although it benefits certain individuals or classes more than others.

It is a matter of common knowledge that there is a serious shortage of doctors in Iowa and that the college of medicine at the University of Iowa is unable to train enough medical doctors who will stay in the state to improve the situation. Thus, it is clear that this bill is obviously calculated for the benefit of the general public rather than for the benefit of the osteopathic college in Des Moines.

October 19, 1971

COURTS: District judicial nominating commissioners, eligibility for judicial appointment — §46.14, Code of Iowa, 1971; §4, S.F. 417, Acts, 64th G. A., First Session (1971). A man who is presently a nominating commissioner and was heretofore elected for a term which would not otherwise expire until July 1, 1973, but whose term will be shortened by reason of the enactment of Senate File 417 to expire on December 31, 1971, would be eligible for nomination as a judge of the district court in 1972 or thereafter. (Haesemeyer to Mowry, State Senator, 10/19/71) #71-10-11

The Hon. John L. Mowry, State Senator: Reference is made to your letter of October 5, 1971, in which you state:

"Section 46.14 of the 1971 Code of Iowa provides in part as follows: 'No person shall be eligible for nomination by a commission as judge during the term for which he was elected or appointed to that commission.'

"Section 4, of Senate File 417 passed during the last sesstion of the General Assembly, and having to do with judicial redistricting, provides as follows: 'Termination of office of present commissioners. The terms of office of all district judicial nominating commissioners in Iowa who are in office on December 31, 1971, shall terminate on that date.'

"My question is this:

Would a man who is presently a nominating commissioner and was heretofore elected for a term which would not otherwise have expired until July 1, 1973, but whose term under the above mentioned law will expire on December 31, 1971, be eligible for nomination as a judge of the District Court in 1972?"

The term of office of members of the state and district judicial nominating commissioners are fixed by the Constitution of Iowa in Article V, §16, which provides in relevant part:

"Appointive and elective members of Judicial Nominating Commissions shall serve for six year terms, shall be ineligible for a second six year term on the same commission, shall hold no office of profit of the United States or of the state during their terms, shall be chosen without reference to political affiliation, and shall have such other qualifications as may be prescribed by law. As near as may be, the terms of one-third of such members shall expire every two years."

While it might be urged that the existence of this provision has the effect of precluding any change in terms of judicial nominating commissioners by statute, we are persuaded that the terms of district judicial nominating commissioners may be shortened when it is necessary to do so by reason of a reduction in the number of districts. In the first place Article V, §16, says that "*as near as may be*," one-third of the terms shall expire every two years. More importantly, however, the constitution elsewhere provides that the number of districts may be increased or diminished by legislative enactment. Art. V, §10. This power to reduce the number of districts plainly albeit inferentially carries with it the power to cut short the terms of district judicial nominating commissioners.

Article V, §16, is in many respects comparable to Art. III, §21, which provides:

"Members not apointed to office. Sec. 21. No senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office of profit under this State, which shall have been created, or the emoluments of which shall have been increased during such term, except such offices as may be filled by elections by the people."

Under this section a previous attorney general ruled that where the compensation of the office of insurance commissioner was increased by the 44th General Assembly, a senator elected for the term of the 44th General Assembly was ineligible to accept appointment as insurance commissioner. 1934 OAG 313.

In reaching the conclusions he did the former attorney general considered the purpose for Article III, §21 and similar provisions and described them as follows:

"This provision is clearly designed to prevent any member of the legislature being influenced in his vote as a legislator by any personal consideration and to prevent his being a beneficiary of his own vote or influence. It is designed to preserve and protect the purity of legislative deliberations, and its clear intent and purpose is to make it impossible for any senator or representative to personally benefit from any action of the legislature to which he was elected a member, and its result is to disqualify every senator and representative from holding any office for profit which was created during the term for which he was elected or the salary of which was increased during said term."

It is well settled in Iowa that in construing a legislative act it is proper to take into consideration the object which the legislature sought to attain and the evil it intended to remedy together with the surrounding circumstances. *State v. Claiborne*, 1919, 185 Iowa 170, 170 N. W. 417; *State v. Robinson*, 1969, ____Iowa____, 165 N. W. 2d 802. In looking at §46.14 of the code it is manifest that the evil which the legislature sought to prevent was for a nominating commissioner upon the occurrence of a judicial vacancy to resign his membership on the nominating commission and then offer himself for nomination by the body whose company he had

just left. This would be similar to a legislator voting to create an office and then resigning to accept appointment to that office, a situation which Article III, §21, quite clearly would prohibit. However, in the case of §46.14 there is nothing to prevent a judicial nominating commissioner from being nominated for a vacancy after his term has expired. And this would be true it seems to us whether or not he served a full six year term or whether his term was shortened by law.

It is to be observed too that there is distinction between §46.14 and Art. III, §21, which is of significance. In the former case the ineligibility extends only during the *term* for which the commissioner was elected or appointed. Whereas, in the latter case it is during the *time* for which he shall have been elected. Thus, in construing a provision similar to Art. III, §21, which used the expression "term" the Kentucky Supreme Court held that "during the term for which he was elected" meant only the period an official was actually in the general assembly rather than the entire time for which he was elected. *Meredith v. Kauffman*, 1943, 293 Ky. 395, 169 S. W. 2d 37. In *State ex rel Ferris v. Bish*, 1912, 22 Ohio Dec. 480, 12 Ohio N.P. (n.s.), 369, the word "term" when used in reference to term of office was stated to mean:

". . . a fixed and definite time, that is a specific period of time during which the incumbent is certain of holding the position, provided the position itself be not abolished by the creating power."

In the case of judicial nominating commissioners §4 of Senate File 417 did not abolish the office but it did cut short the terms of the commissioners and in our opinion the effect is the same. In other words for purposes of §46.14 the "terms" of all district judicial nominating commissioners will end December 31, 1971.

If there still remained any doubt about the matter it would be laid to rest by the fact that there is a presumption in favor of the eligibility of the one appointed, and any doubt must be resolved in favor of the official. *State v. Gray*, 1947, 158 Fla. 465, 28 So. 2d 901.

Under §4 of Senate File 417, Acts, 64th G. A., First Session, (1971) the terms of office of all district judicial nominating commissioners will be terminated on December 31, 1971, by operation of law. These terminations of office are not within the power of the judicial nominating commissioners as in the case of a resignation. Thus, the situation presented is not one in which a judicial nominating commissioner might resign his office to make himself eligible for appointment to a judicial vacancy.

Accordingly, and in answer to your specific question it is our opinion that a man who is presently a nominating commissioner and was heretofore elected for a term which would not otherwise expire until July 1, 1973, but whose term will be shortened by reason of the enactment of Senate File 417 to expire on December 31, 1971, would be eligible for nomination as a judge of the district court in 1972 or thereafter.

October 19, 1971

STATE OFFICERS AND DEPARTMENTS: Vacations, state employees — §79.1, Code of Iowa, 1971, as amended by House File 666, Acts, 64th G. A., First Session (1971). A state employee with less than one year of service earns one week vacation during the first year of employment at the rate of 3 hours for the first month, 3 hours for the second month,

and 4 hours for the third month of each quarter and may take such leave as he earns it at the discretion and convenience of the agency involved. (Haesemeyer to Freeman, State Representatiive, 10/19/71) #71-10-12

The Hon. Dennis L. Freeman, State Representative: Reference is made to your letter of October 12, 1971, in which you state:

"The General Assembly passed HF 666, an act pertaining to vacations of state employees. Would you give me your opinion as to when an employee with less than one year of time on the job is entitled to vacation time? Is an employee allowed to take a day of vacation as he earns it or does he have to take the time after he has completed one full year on the job?"

House File 666, Acts, 64th G. A., First Session (1971), amended §79.1, Code of Iowa, 1971, so that such §79.1 now provides in relevant part:

". . . All employees of the state including highway maintenance employees of the state highway commission shall earn one-week vacation during the first year of employment and two weeks' vacation per year during the second and through the fourth year of employment, and three weeks' vacation per year during the fifth and through the eleventh year of employment, and four weeks' vacation during the twelfth year and all subsequent years of employment, with pay. One week vacation shall be equal to the number of hours in the employee's normal workweek. *Vacation allowance shall be accrued on a pay period, monthly, or quarterly basis as provided by the rules and regulations of the Iowa merit employment department. Said vacations shall be granted at the discretion and convenience of the head of the department, agency or commission, except that in no case may an employee be granted vacation in excess of the amount earned by him.* . . . (Emphasis added)

* * *"

Following the enactment of House File 666, the merit employment department amended its rule 14.2 to provide that employees earn one week during the first year of employment at the rate of 3 hours for the first month, 3 hours for the second month, and 4 hours for the third month of each quarter and that he may take such leave as he earns it as the discretion and convenience of the agency involved.

In our opinion this rule by the merit employment department correctly and accurately gives effect to House File 666.

October 22, 1971

CITIES AND TOWNS: Justice of the Peace, jurisdiction in mayor's court — §§367.6, 367.7, 367.9, 420.38, 601.128, 601.131, 601.133, 762.40, Code of Iowa, 1971. A Justice of the Peace, presiding in Mayor's Court, has jurisdiction over matters involving criminal violations including city ordinances. (Blumberg to Hill, State Senator, 10/22/71) #71-10-13

Eugene M. Hill, State Senator: You requested an opinion of the Attorney General on the following questions regarding situations in which a Justice of the Peace is presiding over a mayor's court, to wit:

"First, there is the question of jurisdiction. It appears that the jurisdiction of a justice court extends to towns with regard to civil and criminal matters, but there is the question of actions and prosecutions for violations of town ordinances. Does a justice-of-the-peace have jurisdiction in such matters?

"Second, there is the question of compensation. It appears that a

justice-of-the-peace would be compensated in civil matters from statutory fees charged. In criminal matters the town would pay the statutory fee. In what manner could a justice-of-the-peace be compensated for handling actions or prosecutions for violations of town ordinances?

"Third, under the arrangement herein proposed is it correct to assume that the fines levied in connection with criminal cases within the town and violations of town ordinances would be remitted by a justice-of-the-peace to the county treasurer and that the town could recover from the county?

"Fourth, under the arrangement herein proposed would a justice-of-the-peace include in his quarterly report to the county auditor the transcript of criminal proceedings, and actions or prosecutions for violations of town ordinances that occurred within the town and were adjucicated by the justice court?"

In answer to your first question, Section 367.6 of the Code of Iowa provides:

"If the mayor or judge of the superior, municipal or police court is absent or unable to act, the nearest justice of the peace shall have jurisdiction and hold court in criminal cases, and receive the statutory fees to be paid by the city or county as the case may be."

Furthermore, Section 367.7 of the Code provides:

"When an information is filed before the mayor for the violation of an ordinance of the city or town, he may, upon his own motion only at any time before trial, transfer the case for further proceedings to any justice of the peace court within such city or town, and such justice of the peace shall have jurisdiction thereof to the same extent and with the same power as the mayor. The fees taxable after the transfer of the case, fixed by ordinance, shall be paid by the city or town to such justice."

In addition, in an Attorney General Opinion of May 29, 1968 contained in 68 O.A.G. 747, 748, this office said:

"If there is no mayor's court because of the absence of the mayor or because the mayor is unable to act then, then it is our opinion that the provisions of Chapter 367.6 are applicable and the nearest Justice of the Peace has jurisdiction to hold court in *criminal* cases which *includes* violations of city ordinances." (Emphasis Supplied)

It is readily apparent that justices of the peace do have authority in matters involving violations of city ordinances, either on a motion by the mayor removing said case to the justice of the peace court or in the absence or inability of the mayor to act. In the former case the justice would retain jurisdiction to the same extent as the mayor, and in the latter case the justice would have his normal jurisdiction in criminal matters.

In regard to your second question, it is clear from the aforementioned Attorney General's opinion of May 29, 1968 that ordinance violations are criminal matters. Compensation would be by statutory fee as in all criminal cases.

Regarding your third question, the justice of the peace must pay over all fines collected to the county treasurer. Section 762.40 of the 1971 Code of Iowa states: "If a fine is imposed and paid before commitment, it shall be received by the justice and paid over to the county treasurer within thirty days after receipt thereof." However, provisions are made for recovery by a city or town of all fines or penalties levied in ordinance violation cases. Section 367.9, 1971 Code of Iowa provides:

"Fines and penalties may in all cases . . . be recovered by action before a justice of the peace or other court of competent jurisdiction, in the name of the proper municipal corporation, for its use."

Section 420.38, 1971 Code of Iowa is the same except that it applies to special charter cities. Therefore, the answer to your third question is yes. The justice of the peace will remit all fines collected to the county treasurer and the city may then recover.

Section 601.133 provides the answer to your final question. It requires a justice of the peace to file quarterly reports, including "a true and correct transcript of all criminal proceedings which have been instituted or adjudicated in their courts. . . ."

In summary, we are of the opinion that a justice of the peace has jurisdiction in a mayor's court over violations of city ordinances; his compensation is by statutory fee; the city may recover the fines or penalties levied for ordinance violations; and, the justice of the peace quarterly reports must include transcripts of his criminal proceedings.

October 28, 1971

STATE OFFICERS AND DEPARTMENTS: Travel expenses, unsalaried members of boards and commissions. §8.13, Code of Iowa, 1971. A member of a state board or commission who is not receiving a state salary or per diem would be entitled to receive expenses for trips made on behalf of the board or commission of which he is a member, provided (1) the purpose of the trip is specifically within the scope of the statute creating the commission or board; (2) the trip was specifically authorized by the board or commission concerned (and by the executive council where out-of-state travel is involved, §8.13, Code of Iowa 1971); and (3) there is an appropriation to the commission or board from which the expenses can be paid. (Haesemeyer to Wellman, Secretary, Executive Council, 10/28/71) #71-10-14

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: Reference is made to your letter of September 9, 1971, in which you state:

"The Executive Council, in their meeting held September 7, 1971, in reviewing the requests for travel authorization, directed this office to request your opinion as to whether a member of a State Board or Commission, who is not receiving a State salary or per diem, is entitled to receive expenses for trips made on behalf of the Board or Commission of which he is a member."

At the outset it must be recognized that it is difficult and perhaps dangerous to generalize in an area such as this because the statutes creating various state boards or commissions frequently differ to a substantial degree. However, with this *caveat* in mind we do think it is possible to arrive at some broad conclusions which may be of some assistance to you.

In a recent opinion of the attorney general we concluded that because of the rather wide latitude given the Iowa development commission by Chapter 28 of the 1971 Code that certain travel expenses of a member of the agriculture promotion board of that commission could be paid from the commission's appropriation. OAG, Haesemeyer to Shearer, Deputy Secretary, Executive Council of Iowa, July 15, 1971. However, that was a somewhat easier problem than that which you now present because of the language of §28.9 which explicitly authorized the comptroller to issue warrants for purposes contemplated by Chapter 28 upon

vouchers approved by the chairman or director of the development commission. There are instances in the Code where specific provision is made for payment of the expenses of unpaid board and commission members. For example:

1. *State Board of Health:* §136.9, Code of Iowa 1971:

"Members of the board shall receive no compensation as such, but the traveling expenses shall be paid from any funds in the state treasury not otherwise appropriated."

2. *Iowa Civil Rights Commission:* §105A.4 in pertinent part:

"Commissioners shall serve without compensation but shall be reimbursed for necessary travel and other expenses incurred while on official commission business. . . ."

3. *State Eugenics Board:* §145.20, Code of Iowa 1971, in part:

". . . state shall be liable . . . for actual traveling expenses for members of the board incurred in the performance of their duties, and the actual and necessary expense incident to the investigations of such board, either on original case or on appeal therefrom."

Most boards or commissions with unpaid members do not have similar statutes. In the usual case such commission or boards would have their powers, duties and purposes spelled out by law but would have no specific authority with respect to approving vouchers for the issuance of warrants. They would, however, have the customary line item in their appropriation, "For support, maintenance and miscellaneous purposes."

This, it seems to us, is sufficient and in our opinion a member of a state board or commission who is not receiving a state salary or per diem would be entitled to receive expenses for trips made on behalf of the board or commission of which he is a member, provided (1) the purpose of the trip is specifically within the scope of the statute creating the commission or board; (2) the trip was specifically authorized by the board or commission concerned (and by the executive council where out-of-state travel is involved, §8.13, Code of Iowa 1971); and (3) there is an appropriation to the commission or board from which the expenses can be paid.

This, it seems to us, would be consistent with the rule enunciated in *Hill v. City of Clarinda,* 1897, 103 Iowa 409, 72 N. W. 542, that:

"When a duty is required of an officer, and no provision is made for expenses, they are properly charged to the public body for whose benefit it is done."

See also *Schanke v. Mendon,* 1958, 250 Iowa 303, 93 N. W. 2d 749; *Cobb v. City of Cape May,* 1971, 113 N. J. Super. 598, 274 A 2d 622.

October 28, 1971

COUNTIES AND COUNTY OFFICERS: County Attorney expenditures. §§332.9, 332.10, 340.9, 341.1, 444.9, Code of Iowa, 1971. There is no authority for a county attorney to draw a lump sum from the county treasury to pay the employees of his office or to make such expenditures without approval of the board of supervisors. (Nolan to TeKippe, Chickasaw County Attorney, 10/28/71) #71-10-15

Mr. Richard P. TeKippe, Chickasaw County Attorney: This is in an-

swer to your letter requesting an Attorney General opinion on the question of whether or not it is legal for the County Board of Supervisors to make a lump sum payment to the county attorney per month for "office expenses" if the amount in fact does not allow and prevents the county attorney from paying what he considers to be necessary office expenses, including stenographer, office rent, stationary supplies and those other necessities provided for by statute. Your letter states that you have submitted a budget for calendar year 1972 which designates specific areas of expense and asks for specific allocations for stenographic help, office rental, machine upkeep, etc., in an amount larger than that which is currently being paid; and further, that the Chickasaw County Board of Supervisors have indicated that they would not agree to the increases.

It appears that the following sections of the 1971 Code of Iowa are applicable to the situation you have presented:

"§332.9. The board of supervisors shall furnish the . . . county attorney . . . with offices at the county seat, but in no case shall any such officer except the county attorney, be permitted to occupy an office also occupied by a practicing attorney."

"332.10. The board of supervisors shall also furnish each of said officers with fuel, lights, blanks, books and stationary necessary and proper to enable them to discharge the duties of their respective offices, but nothing herein shall be construed to require said board to furnish any county attorney with law books or library."

"340.9. Each county attorney shall receive as his annual salary in counties having a population of * * *

"(3) fifteen thousand and less than twenty thousand population, eight thousand dollars.

"* * *

"The county attorney shall also receive his necessary and actual expenses incurred in attending upon his official duties other than his residence and the county seat which shall be audited and allowed by the board of supervisors of the county."

"341.1. Each county auditor, treasurer, recorder, sheriff, county attorney, clerk of the district court, may, with the approval of the board of supervisors, appoint one or more deputies or assistants, respectively, not holding a county office, for whose acts he shall be responsible. A number of deputies, assistants and clerks for each office shall be determined by the board of supervisors, and such number together with the approval of each appointment shall be by resolution made of record in the proceedings of such board."

The expenditures in question are payable from the county general fund under §444.9, Code of Iowa 1971. 1948 OAG 224, 229.

In an opinion of this office bearing the date April 16, 1938, 1938 OAG 714, 716, it is stated:

"It is accordingly the opinion of this department that there is express statutory authority (without regard to the implied authority resting in the provisions of subsection 6 of section 5130, supra,) for a board of supervisors, in the exercise of its discretion, to furnish stenographic assistance for the county attorney to the extent that such assistance is required in the discharge of the official business of that office.

"However, as a condition precedent to the incurring of a legal obliga-

tion on the part of a county for the expense of stenographic assistance in the office of the county attorney, the appointment of such an assistant or clerk must have the approval of the board by resolution made of record in the proceedings of the board. At such time of approval of the appointment it would be incumbent upon the board of supervisors to fix the compensation to be paid the appointee. What the amount of such compensation should be is necessarily a question that alone can be determined by the board dependent upon the extent to which service will be rendered the county in aid of the discharge of the official duties arising in the office of the county attorney."

In our judgment while it is proper to speak in terms of lump sum payments for budget purposes, it is the duty of the Board of Supervisors to purchase the supplies for the office of the county attorney and to pay from county funds such persons as may be employed by the county to work there in the performance of county business. There is no authority, express or implied, that we are aware of to permit the county attorney to draw a lump sum from the county treasury to pay the employees of his office or to make such expenditures without approval of the Board of Supervisors.

October 28, 1971

COUNTIES: Jurors parking. §§333.3, 607.5, Code of Iowa, 1971. There is no statutory authority to support paying parking fees for jurors. However, the board of supervisors may reserve parking spaces for them on the courthouse grounds. (Nolan to Fenton, Polk County Attorney, 10/28/71) #71-10-16

Mr. Ray A. Fenton, Polk County Attorney: This reply is to your letter questioning the payment of parking fees of members of the Grand and Petit Juries. Your question makes reference to §333.3, Code of Iowa 1971, which provides in part as follows:

"The county auditor is hereby authorized to issue warrants as follows before bills for same have been passed upon by the board of supervisors:

"1. For jury fees and mileage on certificate of the clerk of court upon which they were in attendance, which certificate shall be issued when the juror entitled thereto shall have been discharged or excused by the court.

* * *

"5. For expense of the grant jury upon order of the judge of the district court."

The fees authorized for jurors are specified in §607.5 of the Code:

"Petit jurors shall receive the following fees:

"1. For each day's service or attendance in courts of record, including jurors summoned on special venire, five dollars, and for each mile traveled from his residence to the place of trial for each day's service and attendance, ten cents.

"2. For each day's service before a justice of the peace, one dollar.

"3. No mileage shall be allowed talesmen or jurors before justices.

"Grand jurors shall receive for each day's service or attendance, seven dollars, and for each mile traveled each day from his residence to the place of attendance and in the performance of their duties, seven cents, provided, however, that grand jurors shall be entitled to mileage for travel from the place of their residence to the county seat for the purpose of being impaneled. No grand juror shall receive mileage for travel in the performance of his duties when he travels in a vehicle for which

another juror is receiving mileage."

In an opinion of November 2, 1959, this office advised that §607.5 does not authorize payment of round trip mileage (1960 OAG 86). Previously, other opinions had narrowly construed the section providing for the fees and mileage to be paid to jurors as follows: Where the compensation of a juror is fixed by statute he cannot receive any other compensation than that fixed by statute but the court has the power to order that the cost of board and lodging be paid during the time they are kept together, 1904 OAG 313; jurors summoned before a justice of the peace who are not used are not entitled to compensation, 1912 OAG 465; jurors appearing in justice of peace court are not entitled to same fees as those appearing in a court of record, 1958 OAG 102.

While there appears to be no explicit authority for the payment of parking fees for jurors, the board of supervisors may reserve parking space on the court house grounds, 1966 OAG 54. Such space might be reserved for the use of jurors and daily parking permits issued to them.

October 28, 1971

STATE OFFICERS AND DEPARTMENTS: Travel expenses of public officials and employees. §68B.5, Code of Iowa, 1971. Payment of travel expenses of state officials and employees by outside interests are in most cases prohibited. (Haesemeyer to Wellman, Secretary, Executive Council, 10/28/71) #71-10-17

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: Reference is made to your letter of October 26, 1971, in which you state:

"The Executive Council, in meeting held this date, considered a request from the Health Department for seven members of the Water Pollution Control Commission, the Commissioner of Public Health, the Chief of the Environmental Engineering Service, and the Principal Limnologist from the Hygienic Lab to travel to Cordova Nuclear Power Plant, said trip to be made in a plane furnished by the Iowa-Illinois Gas & Electric Company, which company intends also to pay the incidental expenses of travel.

"The Council reviewed your opinion issued November 4, 1969, which discusses whether or not travel for state employees is permissible under the provisions of Chapter 107, Section 5, 62nd G. A., 1967 (now Chapter 68B.5, 1971 Code of Iowa) and directed this office to secure from you an opinion as to whether or not the proposed travel presently under consideration would be permissible as detailed."

In our opinion, the trip you describe falls squarely within the prohibition of Ch. 68B, Code of Iowa 1971. Section 68B.5, provides:

"No official, employee, member of the general assembly, or legislative employee shall, directly or indirectly, solicit, accept, or receive any gift having a value of twenty-five dollars or more whether in the form of money, service, loan, travel, entertainment, hospitality, thing, or promise, or in any other form. No person shall, directly or indirectly, offer or make any such gift to any official, employee, member of the general assembly, or legislative employee which has a value in excess of twenty-five dollars. Nothing herein shall preclude campaign contributions or gifts which are unrelated to legislative activities or to state employment."

In the earlier opinion of the Attorney General, to which you make reference, 1970 OAG 319, we considered and discussed the application of such §68B.5 and concluded that §68B.5, "means what it says and that

payment of travel expenses of state officials and employees by outside interests would in the usual case be prohibited by such [§68B.5]."

October 29, 1971

STATE OFFICERS AND DEPARTMENTS: Public Health. Employees of private firms working for the State of Iowa pursuant to Social Service Leave Programs. §§135.11 and 135.39, Code of Iowa, 1971. Department of Public Health may participate in Social Service Leave Program and use federal funds to reimburse participants' travel expenses. (Corcoran to Wellman, Secretary, Executive Council, 10/29/71) #71-10-18

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: Reference is made to your letter of October 12, 1971, in which you request an opinion from this office regarding the authority of the Department of Public Health to participate in a program sponsored by the Xerox Corporation, known as the 'Social Service Leave' program. This is a program under which the Xerox Corporation will grant leave to employees, paying them their full pay, letting them retain all their company benefits, including vacation time, sick leave, profit sharing and union seniority. This program is designed to allow employees of the Xerox Corporation to participate in social activities for the benefit of mankind.

You also raised a second question regarding the authority of the Department of Public Health to reimburse said Xerox employee for travel expenses at the same rate incurred by state employees, using federal funds made available to the State Department of Public Health for consultant fees.

In answer to your first question, it is the opinion of this office that the State Department of Public Health may participate in the above program. There is no statutory or case law in Iowa which would prevent such participation. The 'Social Service Leave' program would be a benefit to the Department of Public Health and to the State of Iowa. Said program is in compliance with the basic purpose and intent of the Department of Public Health as set out in Section 135.11, 1971 Code of Iowa.

In answer to your second question, the Commissioner of Public Health has discretion to use federal funds available to his Department to reimburse said Xerox employee for travel expenses, at the same rate incurred by state employees. Pursuant to Section 135.39, 1971 Code of Iowa, the State Department of Health is authorized to accept financial aid from the United States Government for the purpose of assisting and carrying out Public Health work in the State of Iowa. The Department has received various grants from the Environmental Protection Agency of the federal government pursuant to the Air Quality Control Act of 1970 and the Water Quality Control Act of 1970. According to the budget approved for said grants, the Commissioner has the authority to use a designated amount of said funds for the purpose of consultant fees. According to the letter from Dr. Arnold M. Reeve, Commissioner of Public Health, to the Executive Council, State of Iowa, dated October 5, 1971, the particular Xerox employee in question will be used in a consulting capacity. Therefore, he would be entitled to reimbursement of travel expenses from said federal funds.

In conclusion, it is the opinion of this office that the State Department

of Public Health may participate in the 'Social Service Leave' program outlined above and that any individual hired pursuant to said program may be reimbursed for travel expenses from federal funds made available to the State Department of Public Health for consultant fees.

November 2, 1971

STATE OFFICERS AND DEPARTMENTS: Secretary of State, Deputy authorized to act — Chapters 10, 27 and 759, Code of Iowa, 1971. In the absence or disability of the secretary of state the deputy secretary of state, unless otherwise provided by law, is authorized all duties of the secretary including those relating to extraditions and the issuance of patents to real property. (Haesemeyer to Schweiker, Deputy Secretary of State, 11/2/71) #71-11-1

Mr. J. Herman Schweiker, Deputy Secretary of State: You have asked whether or not in the absence from the state of the Secretary of State you as Deputy Secretary of State are authorized to attest the signature of the Governor in connection with extradition matters and the issuance of patents to real property.

In our opinion you have such authority. Chapter 27, Code of Iowa, 1971 provides:

§27.1:

"The secretary, auditor, treasurer of state, and secretary of agriculture may each appoint, in writing, any person, except one holding a state office, as deputy, for whose acts the appointing officer shall be responsible, and from whom the appointing officer shall require bond, which appointment and bond must be approved by the officer having the approval of the principal's bond, and such appointment may be revoked in the same manner. The appointment and revocation shall be filed with and kept by the secretary of state. The state shall pay the reasonable cost of the bonds required by this section."

§27.2:

"The deputy shall qualify by taking the oath of the principal, to be endorsed upon and filed with the certificate of appointment, and when so qualified he shall, in the absence or disability of the appointing officer, unless otherwise provided, perform all the duties pertaining to the office of the appointing officer."

Section 27.2 is quite unambiguous. Unless otherwise provided, the deputy, in the absence or disability of the appointing officer, shall perform *all* the duties of the appointing officer. We have examined Chapter 10 dealing with the issuance of patents and Chapter 759 relating to extraditions and find nothing which would preclude the Deputy Secretary of State from acting for the Secretary of State in those areas.

November 2, 1971

TAXATION: Assessors — §441.21, Code of Iowa, 1971. Assessors must provide *within a reasonable length of time* information as to any formula or method he used to determine the actual value of the taxpayer's property after such request has been made by the taxpayer. *Reasonable time* for such disclosure need not extend beyond the time it takes to process the inquiry, consult the records, record the information and dispatch the information for delivery to the interested taxpayer. (Murray to Schmeiser, State Representative, 11/2/71) #71-11-2

Hon. Lloyd F. Schmeiser, State Representative: You have requested an

opinion of the Attorney General on Section 441.21, Code of Iowa, 1971 which states:

"* * * The assessor and department of revenue shall disclose at the written request of the taxpayer all information in any formula or method used to determine the actual value of his property. * * *"

You are inquiring as to the amount or length of time that an assessor has to provide the above information to the taxpayer. The Code of Iowa does not set forth the amount of time an assessor has to provide such information after it is requested by the taxpayer, nor does the statute provide guidelines for determining how long the taxpayer must wait to receive such information once he requests it from the assessor.

Generally, where statutes are lacking in specificity, they are given the most reasonable and natural interpretation that is possible, subject to clear legislative intentions to the contrary, i.e. "General terms in a statute should be so limited in their applications not to lead to unreasonable or absurd consequences." 50 AM JUR Sec. 377.

Thus, such matters as the length of time for disclosure are judged by the test of reasonableness. Reasonable time is an illusive term which defies precise definition. Courts have refrained from attempting to lay down a fixed rule for determining what is a reasonable time. *Clarinda Sales Co. v. Radio Sales Pavillion* 288 N. W. 923, 926, 227 Iowa 671.

Reasonable time has been variously defined as meaning as soon as circumstances will permit, such time as may fairly be required, such promptitude as the situation will allow, and even as soon as is convenient. 75 C.J.S. 634.

A taxpayer would be entitled to prompt disclosure because under the attendant circumstances, there seems to be no justification for undue delay. The assessor is merely being asked to divulge information accumulated by him in the performance of his job. He is not being asked to do additional work, but merely to disclose information which is available to him and which he has used previously in going about his business of property valuation. The reasonable time for such disclosure need not extend beyond the time it takes to process the inquiry, consult the records, record the information, and dispatch the information for delivery to the interested taxpayer.

The only variable factor which might intercede would be the assessor's volume of work at the time the request is made by the taxpayer.

It may be concluded that the Code provision on disclosure of information on property valuations contemplates timely disclosures, and accordingly disallows undue delays in disclosure. The promptitude of the reply under §441.21 need not be any less than that of the general correspondence which accompanys the assessor's regular course of business.

In reference to your question concerning "written formula" under provisions of Section 441.21, as you know, the matter of the assessor's formula is presently at issue by the levy and drainage districts in both Louisa and Des Moines County. Until this matter is resolved either by the State Board of Tax Review or the District Court, we do not think it proper to express our opinion on this issue at this time.

November 3, 1971

INSURANCE: Notice of Cancellation — §§515.80, 515D.2, 515D.5, Iowa Code 1971. The notice given to an insured by an insurer that an automobile insurance policy will be cancelled for nonpayment of premium should state the amount of the installment or assessment due and also the amount required to keep the policy in effect. If an insurer sends a cancellation notice as to part of the coverage only the insured may require a written statement of the reason for such cancellation and may request a hearing before the Commissioner of Insurance. (Nolan to Huff, Commissioner of Insurance, 11/3/71) #71-11-3

Mr. William H. Huff, III, Commissioner of Insurance: This is in reply to your letter requesting an opinion on several questions arising out of the provisions of Ch. 515D, Code of Iowa 1971. The questions you raise are as follows:

"1. In the event of cancellation by the insurer for the reason of nonpayment of premium, of an insurance policy of the kind defined in Section 515D.2(1), Code of Iowa, 1971, do the provisions of Section 515.80, Code of Iowa, 1971, apply unless expressly modified by the provisions of Section 515D.5? We specifically solicit your opinion as to whether the notice of such cancellation:

"a) Must state that the premium assessment or installment is due or to become due and the amount due or to become due.

"b) Must state the amount necessary to pay the customary short rates to the time of cancellation.

"c) Must be served in person or by mailing in a certified mail either to the named insured at the address shown in the policy."

Section 515.80, Code of Iowa 1971, provides:

"No policy or contract of insurance provided for in this chapter shall be forfeited or suspended for nonpayment of any premium, assessment, or installment provided for in the policy, or in any note or contract for the payment thereof, unless within thirty days prior to, or on or after the maturity thereof, the company shall serve notice in writing upon the insured that such premium, assessment, or installment is due or to become due, stating the amount, and the amount necessary to pay the customary short rates, up to the time fixed in the notice when the insurance will be suspended, forfeited, or canceled, which shall not be less than thirty days after service of such notice, which may be made in person, or by mailing in a certified mail letter addressed to the insured at his post office as given in or upon the policy, and no suspension, forfeiture, or cancellation shall take effect until the time thus fixed and except as herein provided, anything in the policy, application, or a separate agreement to the contrary notwithstanding."

Section 515D.4(1) provides:

"No policy may be canceled except by notice to the insured as provided in this chapter. No notice of a cancellation of a policy shall be effective unless it is based on one or more of the following reasons:

"1. Nonpayment of premium.

"* * *"

Section 515D.5, provides:

"Notwithstanding the provision of section 515.81 no notice of cancellation of a policy shall be effective unless mailed or delivered by the insurer to the named insured at least twenty days prior to the effective date of cancellation, or, where the cancellation is for nonpayment of premium

notwithstanding the provisions of section 515.80 at least ten days prior to the date of cancellation. A post-office department certificate of mailing to the named insured at the address shown in the policy shall be proof of receipt of such mailing. Unless the reason accompanies the notice of cancellation, the notice shall state that, upon written request of the named insured, mailed or delivered to the insurer not less than fifteen days prior to the date of cancellation, the insurer will state the reason for cancellation, together with notification of the right to a hearing before the commissioner within fifteen days as provided herein.

"When the reason does not accompany the notice of cancellation, the insurer shall, upon receipt of a timely request by the named insured, state in writing the reason for cancellation. A statement of reason shall be mailed or delivered to the named insured within five days after receipt of a request."

Based on the above statutory provisions, it is my opinion that the language of §515.80, except where expressly modified by §515D.5, does apply to cancellation of automobile insurance contracts. Accordingly, a cancellation notice for nonpayment of premium should state that the premium assessment and installment is due or to become due and should also state the amount required to keep the policy in effect. Short rates where applicable should be stated and the notice must be delivered at least ten days prior to the date of cancellation by certified mail or personal delivery to the insured as provided above.

You further ask for an opinion as to whether any required notice and hearing are applicable where only the physical damage coverage or of the coverages stated in §515D.2(1) is cancelled. In such case it appears that the second paragraph of §515D.5 is pertinent and that the insured may require the insurer to state in writing the reason for cancellation of his policy and he can subsequently request a hearing before the Commissioner of Insurance pursuant to §515D.10.

November 3, 1971

COUNTY AND COUNTY OFFICERS: County attorney. There is no authority for a Board of Supervisors to contract with an attorney to serve as county attorney while the elected county attorney is on vacation. (Nolan to Irvin, Page County Attorney, 11/3/71) #71-11-4

Mr. J. C. Irvin, Page County Attorney: This opinion is written in response to your request for advice with respect to the following situation:

"There is no assistant county attorney in Page County, however, one of the attorneys in the county does serve as county attorney when I am unavailable. Rather than having the Board of Supervisors pass a Resolution appointing this attorney to act each time I leave the area, we have adopted the practice of having the Board issue such a Resolution at the beginning of the year and such Resolution states that the attorney shall serve as county attorney when the duly elected county attorney is on vacation or otherwise unavailable.

"The attorney serving when I am absent is paid according to the amount of time spent on county business and receives no set salary or other compensation. Experience indicates that he is called upon three or four times a year in this capacity.

"As a practicing attorney in Page County, the individual involved is often called upon to present defendants in criminal cases in Page County. The question posed is whether by virtue of the fact that this attorney does serve on a limited basis as Page County Attorney he should thereby be precluded from accepting court appointments to represent indigent

defendants in criminal matters in Page County."

I find no authority for the Board of Supervisors to contract with an attorney to serve "as county attorney when the duly elected county attorney is on vacation or otherwise unavailable." Section 336.3, Code of Iowa, provides for the appointment by the Court of an attorney "to act as county attorney" in case of absence, sickness or disability of the county attorney and his deputies. I also find authority for the county Board of Supervisors to employ special counsel on an annual basis to act soley as a legal adviser to the Board regardless of the consent of the county attorney. 1919 OAG 619, 1928 OAG 442. In addition, there is authority for the county attorney to apoint one or mroe deputies or assistants (§341.1 and §341.7) to be paid in accordance with the provisions for compensation contained in Ch. 340 of the Code.

To avoid conflict of interest or possible ground for appeal by a defendant who enters a plea of guilty or is convicted in the county, the statutory authority referred to above should be followed whenever an assistant county attorney is required.

November 4, 1971

COUNTY AND COUNTY OFFICERS: Condemnation power — §471.4, Code of Iowa, 1971. Section 471.4, Code of Iowa, 1971, does not authorize the condemnation of land by the county for a landfill disposal operation. (Nolan to Thomas, Mills County Attorney, 11/4/71) #71-11-5

Mr. James A. Thomas, Mills County Attorney: This is in answer to your request for an opinion on the question of whether or not the County Board of Supervisors has power of condemnation under §471.4(1), Code of Iowa 1971, to take private property for public use as a county-wide landfill disposal operation.

The provisions of the section of the Code of Iowa questioned are as follows:

"§471.4 Right conferred. The right to take private property for public use is hereby conferred:

"1. Counties. Upon all counties for such lands as are reasonable and necessary for the erection of courthouses or jails or any other buildings or additions to buildings which the county has statutory power to erect, construct or make additions, and the construction, improvement or maintenance of highways, and for the carrying out of plans for the acquisition of land advanced by a county conservation board, and approved by the state conservation commission as provided in section 111A.4; providing further, it would not completely prevent development of the conservation project, this authority shall not apply to any improved private property used as a residence or living quarters for a period of one year, not to exceed two acres, or if jointly owned, not to exceed two acres per residential unit, unless subsequently abandoned for use for such purposes. Temporary unoccupancy shall not be construed as abandonment. Wherever the county has the right to take private property for public use, it also has the right to contract for options for the purchase of said land."

I find no authority to condemn land for the purpose of the landfill under this section of the Code of Iowa. The purposes enunciated therein are for the erection of county court houses or jails or other buildings, highways, and land approved by the state conservation board for projects such as public museums, parks, preserves, parkways, playgrounds, recreation centers, county forests, county wild life areas, and other county con-

servation and recreation purposes. The principle of expressio unius est exclusio alterius applies in this situation and it is my view that power of conrdemnation to acquire site for landfill purposes may not be premised on the authority set forth in §471.4(1), Code of Iowa 1971.

November 4, 1971

COUNTY AND COUNTY OFFICERS: Recorder — §§409.12, 409.14, Code of Iowa, 1971. A county recorder should accept plats and accompanying documents for filing if they conform to law regardless of whether or not the recorder has a preference for size and type of paper. (Nolan to Vogel, Poweshiek County Attorney, 11/4/71) #71-11-6

Mr. Richard J. Vogel, Poweshiek County Attorney: You have requested an opinion concerning the filing of plats and accompanying documents in the office of the County Recorder. The question you present is whether County Recorder has authority to require that a particular size or type of paper be used in filing plats, and if so, may refuse to accept anything other than what he specifies?

I have examined §409.12, Code of Iowa 1971, which provides that the signed and acknowledged plat and the attorney's opinion, together with the certificates of the clerk, recorder, and treasurer, and the affidavit and bond, if any, together with the certificate of approval of the council, shall be entered of record in the proper record books in the office of the County Recorder. This section further provides that no plat shall have any validity until filed in both the offices of the recorder and of the County Auditor.

Section 409.14, Code, provides that it shall be the duty of the County Recorder to examine each plat tendered for recording in his office "to ascertain whether the endorsement of approval by the city council, as herein provided for, shall appear thereon. If it shall, and the plat otherwise conforms with the provisions of law, said officers shall accept the same for recording."

I find nothing which empowers the County Recorder to refuse to accept the document which does not meet his standards as to size or type of paper. The statute has provided the expressed standards for accepting such plat for recording. Expressio unius est exclusio alterius.

November 4, 1971

WAGES; PRICES; FREEZE: Federal wage price freeze is constitutionally effective as it applies to academic year employment contracts of the Board of Regents. Whether it does apply in specific cases should be ascertained from the federal government. (Turner to Richey, Ex. Sec., Board of Regents, 11/4/71) #71-11-7

Mr. R. Wayne Richey, Executive Secretary, State Board of Regents: By your letter of October 27, 1971, you have requested an opinion as follows:

"The Board of Regents seeks an Attorney General's opinion on the constitutional effectiveness of the Federal Wage-Price Freeze as it applies to the academic year employment contracts entered into by the Board of Regents.

"This Office will be happy to furnish you any information that you require in this matter."

In my opinion the Federal Wage-Price Freeze is constitutionally effective as it applies to the academic year employment contracts entered into by the Board of Regents. Enclosed is a seven-page pamphlet prepared and distributed by the Cost of Living Council which may be of help to you. To ascertain its effect on specific contracts which give rise to questions you are unable to answer, you should direct your inquiries to The Office of Emergency Preparedness, Internal Revenue Service, Federal Building, Des Moines, Iowa.

November 4, 1971

CITIES AND TOWNS: Publication of proceedings; Clerk's duties — §368A.3(3), Code of Iowa, 1971. It is the duty of the city or town clerk to publish the complete minutes of each regular or special meeting of the town council and, although the statement should be condensed, it should show each motion or resolution acted upon, a summary of all receipts and a list of all claims as specified. It is a gross violation and a misdemeanor to show simply that the council met and adjourned when in fact it acted. (Turner to Smith, State Auditor, 11/4/71) #71-11-8

The Hon. Lloyd R. Smith, State Auditor: You have requested an opinion of the attorney general as to the duty of a city or town clerk to publish proceedings of a regular or special meeting of a city or town council and have suggested that some clerks, on the theory that they can legally condense their statement of the proceedings and thereby save newspaper publication costs, are over-condensing their statements even to the point of saying, in some instances, that the council "met and adjourned" and nothing more.

Section 368A.3, Code of Iowa, 1971, provides:

"In all municipal corporations the clerk shall perform the following duties:

* * *

"3. Immediately following a regular or special meeting of the city or town council, the clerk shall prepare a condensed statement of the proceedings of said council, including the total expenditure from each municipal fund, and cause the same to be published in a newspaper of general circulation in the city or town. Said statement shall include a list of all claims allowed and a summary of all receipts, and said statement shall show the gross amount of the claim, providing, however, that in cities having more than one hundred fifty thousand population the council shall each month print in pamphlet form a detailed itemized statement of all receipts and disbursements of the city, and a summary of its proceedings during the preceding month, and furnish copies thereof to the state library, the city library, the daily newspapers of the city and to persons who shall apply therefor at the office of the city clerk, and such pamphlet shall constitute publication as required herein. Failure by the clerk to make such publication shall constitute a misdemeanor. The provisions of this subsection shall be fully aplicable in towns in which a newspaper is published or in towns of two hundred population or over but in all other towns the posting of such statement in three public places shall be sufficient compliance herewith."

The foregoing subsection was derived from §§363.19 and 366.10, Code of Iowa, 1950, which latter section at that time provided:

"Immediately following a regular or special meeting of the city or town council, the clerk shall prepare a condensed statement of the proceedings of said council, including the list of claims allowed and from what funds appropriated, and cause the same to be published in one or more newspapers of general circulation, published in said city or town; provided,

however, that in cities and towns in which no newspaper is published, such statement and list of claims shall be posted in at least three public places on the business streets of said city or town."

In 1951, the section was amended to read substantially as it does now. Chapter 147, 54th G. A., page 183. The last sentence of the present subsection was added in 1961, as was the clause "and said statement shall show the gross amount of the claim." Chapter 203, 59th G. A., pages 211-212.

Thus, the history and development of the law regarding publication of council proceedings has tended toward more, rather than less, public disclosure of municipal affairs. In fact, this has been generally true in all areas of Iowa government. See, for example, Chapters 28A and 68A, Code of Iowa, 1971, with reference to open meetings and a citizen's right to examine public records. The current trend is toward the belief that all areas of Iowa government should operate in a glass house, open for all to see, except in those limited areas where the legislative and judicial branches have determined that disclosure is not in the public interest. Generally, there is no limitation on disclosure of official acts and proceedings of city or town councils and this has been true, and a practice of many years standing in Iowa.

In my opinion, while the clerk may condense the statement of the proceedings, and need not publish every detail, he must nevertheless publish every motion or resolution voted upon at every regular or special meeting and show whether it was adopted or failed. In other words, he should show the complete minutes of the council meeting. And while such does not seem to be specifically required, he should preferably, in addition, show the members who were present or absent and how or whether they voted on each such action, if a vote was not unanimous.

Clearly, the statute requires showing, not only of the total expenditures from each municipal fund, but a statement summarizing all receipts and a list of all claims and disbursements. This means the clerk should set up a list of every claim allowed under each municipal fund, showing to whom the claim was allowed, what it was for, in what amount and the total of the claims from each fund. If a claim is allowed in less than the gross amount, the gross amount of the claim as well as the part allowed must be shown.

Special provisions, not relevant to this opinion, are made in the statute for cities and towns of certain sizes or without newspapers, but generally the same information is required.

Failure of the clerk to make such publication constitutes a misdemeanor and, accordingly, a city or town clerk should seriously strive to fully perform this duty as one of his most important. Obviously, any clerk who simply publishes the fact that the council "met and adjourned," when as a matter of fact the council acted, grossly violates this law.

November 8, 1971

STATE OFFICERS AND DEPARTMENTS: Department of Health—Reciprocity re: Nursing Home Administrators — §§147.44, 147.45, 147.48, 147.118 through 147.130, Code of Iowa, 1971. It is not mandatory that

the Board of Examiners for Nursing Home Administrators enter into reciprocity agreements with other states. The Board may also accept P.E.S. scores for purposes of qualification. (Corcoran to Campbell, Board Member, Iowa State Board of Examiners for Nursing Home Administrators, 11/8/71) #71-11-9

Mr. Robert V. Campbell, Board Member, Iowa State Board of Examiners for Nursing Home Administrators: This is in response to your opinion request dated August 18, 1971, in which you stated the following:

"Pursuant to authority to Chapter 1085, Acts of the Second Session of the 63rd General Assembly:

"1. Is it mandatory that this Board enter into reciprocity agreements with other states?

"An explanation. It is the consensus of this Board that we would rather examine each out of state applicant's credentials on an individual basis, and grant a license for those that qualify, rather than to grant licenses through the reciprocity process.

"2. May this Board accept the P.E.S. [Professional Examination Services] scores on examinations that are given in other states since this is an examination that is national in scope?"

The above Chapter referred to is now incorporated in Chapter 147 of the Code of Iowa, 1971, subsections 147.118 through 147.130.

In answer to question one, it is not mandatory for the Board to enter into reciprocity agreements with other states. Section 147.44 states as follows:

"For the purpose of recognizing licenses which have been issued in other states to practice any profession for which a license is required by this title, the department shall enter into a reciprocal agreement with every state which is certified to it by the proper examining board under the provisions of section 147.45 and with which this state does not have an existing agreement at the time of such certification."

It is evident from the reading of the above section that it is not the Board who enters into reciprocity agreements, but the Department of Health. The Board has the responsibility of examining other state's requirements and such other inquiries as it deems necessary in determining whether or not it desires this state to enter into reciprocal relations. Section 147.45 reads as follows:

"The department shall at least once each year lay before the proper examining board the requirements of the several states for a license to practice the profession for which such examining board conducts examinations for licenses in this state. Said examining board shall immediately examine such requirements and after making such other inquiries as it deems necessary, shall certify to the department the states having substantially equivalent requirements to those existing in this state for that particular profession *and with which said examining board desires this state to enter into reciprocal relations.*" (Emphasis added.)

A reading of the last sentence of the above section would indicate that the examining board has the discretion to either certify or not to certify a particular state for reciprocity treatment. The above statement is further supported by section 147.126 which empowers the board to develop, impose, and enforce standards which must be met by individuals in order to receive a license as a nursing home administrator and to develop and

apply appropriate techniques, including examination and investigations, for determining whether an individual meets such standards. However, if the board wishes to examine an out-of-state applicant on an individual basis and if that applicant's state is currently under a reciprocal agreement with Iowa, then the board would have to terminate the relationship with that state in order to examine the applicant on his own individual merits.

Section 147.48 provides that reciprocal agreements may be terminated in the event the reciprocal state changes its law therein so that such requirements are no longer substantially as high as those existing in this state. Reciprocal agreements may also be terminated according to the procedures set out in the agreement itself.

In answer to question two, the board may accept Professional Examination Services scores for the purpose of qualifying applicants. Section 147.126 describes the duties and responsibilities of the board, in part, as follows:

"The board shall have the duty and responsibility to:

"1. Develop, impose, and enforce standards which must be met by individuals in order to receive a license as a nursing home administrator, which standards shall be designed to insure that the nursing home administrators will be individuals who are of good character and are otherwise suitable, and who, by training or experience in the field of institutional administration, are qualified to serve as nursing home administrators.

"2. Develop and apply appropriate techniques, including examination and investigations, for determining whether an individual meets such standards."

The above section empowers the board with the authority to determine its own standards of qualification and, therefore, the board would have the discretion to accept P.E.S. scores for the purpose of qualifying applicants.

In conclusion, it is the opinion of this office that it is not mandatory that the Board of Examiners for Nursing Home Administrators enter into reciprocity agreements with other states. If the Board wishes to terminate existing reciprocal agreements in order to examine each applicant on an individual basis, they may terminate either pursuant to section 147.48 or pursuant to the termination provisions in the written agreements themselves. The Board may also choose to accept P.E.S. scores for purposes of qualification of licensees according to the authority invested in it by section 147.126.

November 8, 1971

CITIES AND TOWNS: Park Commissioners — §§363.28 and 370.3, Code of Iowa, 1971. Section 370.3 rather than section 363.28 pertains to the tenure and office of park commissioners. (Blumberg to Barbee, Dickinson County Attorney, 11/8/71) #71-11-10

Mr. Walter W. Barbee, Dickinson County Attorney: In your letter of October 5, 1971, you express concern over an apparent inconsistency between sections 363.28 and 370.3, 1971 Code of Iowa. You wish to know which section pertains to the tenure of the offices of park commissioners.

Chapter 370, 1971 Code of Iowa mandates the election of park commissioners for those cities over thirty thousand population, and provides for ordinances setting up park commissions in those cities under thirty thousand. Section 370.3, provides: "The commissioners shall, within ten days after their election, qualify by taking the oath of office and organize as a board by the election of one of their number as chairman and one as secretary . . ." In conjunction with this, Chapter 363, 1971 Code of Iowa, entitled "Municipal Organizations And Officers" establishes the guidelines for election of municipal officers. Section 363.28 holds: "All elected municipal officers shall take office on or before noon of the second secular day of January following their election."

The issue becomes one of the difference between general and special statutes. A brief analysis in 82 C.J.S., Statutes §163, on page 277 states:

"A statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special."

Accordingly, section 363.28 is a statute of general application relating to all municipal offices and elections, while section 370.3 is special in nature applying only to park commissioners.

The Supreme Court of Iowa considered the question of general versus special statutes in *Liberty Consolidated School District* v. *Schindler*, 246 Iowa 1060, 1064, 70 N. W. 2d 544, 547 (1955):

"It is a fundamental rule that where a general statute, if standing alone, would include the same matter as a special statute and thus conflict with it, the special Act will be considered an exception to or qualification of the general statute and will prevail over it, whether it was passed before or after such general enactment. Yarn v. City of Des Moines, 243 Iowa 991, 998, 54 N. W. 2d 439, 443, and citations; Iowa Mutual Tornado Ins. Assn. v. Fischer, 245 Iowa 951, 955, 65 N. W. 2d 162, 165; 82 C.J.S. Statutes, section 369, pages 843, 844. See also State ex rel. Michael v. McGill, 265 Wis. 336, 61 N. W. 2d 494, 496."

See also, *Warren* v. *Iowa State Highway Commission*, 250 Iowa 473, 93 N. W. 2d 60 (1958).

Applying these cases to your situation, it is our opinion that section 370.3 is controlling and pertains to the tenure of office of park commissioners.

November 8, 1971

CITIES AND TOWNS: Withholding for credit unions, employees of boards of water and light trustees — §§397.34, 398.9, 533.30, Code of Iowa, 1971. Employees of the board of water and light trustees in the City of Muscatine are governmental employees within the meaning and intent of §533.30 and may authorize withholding from their salary or wages of amounts to be paid over to a credit union. (Haesemeyer to Drake, State Representative, 11/8/71) #71-11-11

The Hon. Richard F. Drake, State Representative: Reference is made to your letter of September 20, 1971, in which you state:

"Do the provisions of Chapter 533.30, Iowa Code, which reads as follows:

'533.30 Governmental employees — payments withheld. When a credit union has been organized by the employees of the state or of any political

or municipal subdivision of the state, the officer who writes warrants for the state or other governmental body by which any public employee credit union member is employed, may withhold from the salary or wages of such employee, and pay over to such credit union, such sums as may be designated by written authorization signed by such employee. The provisions of section 539.4 shall have no application hereto;'

"apply to the Board of Water and Light Trustees of the City of Muscatine which is not a governmental body and has no officer who writes warrants for the state or other governmental body."

Chapter 397, Code of Iowa, 1971, as amended by Chapter 234, 64th G. A., First Session, (1971), relates generally to the power of cities and towns to purchase, establish, erect, maintain, and operate heating plants, waterworks, gasworks, or electric light or power plants.

Sections 397.29 through 397.35 provide the manner in which the electorate can decide to place the operation of the untilities in the hands of a board of trustees, and §397.34 in particular provides:

"397.34 Powers of trustees. The board of trustees shall have all the power and authority in the management and control of the utilities mentioned in the question submitted to the voters at such election as is conferred upon waterworks trustees appointed as provided in chapter 398."

Chapter 398 deals with the operation of waterworks in cities having a population of over 10,000 and §398.9 provides:

"398.9 Powers — waterworks fund — how disbursed. The said board of trustees shall have the power to carry into execution the contract or contracts for the purchase or erection of such waterworks, and to employ a superintendent and such other employees as may be necessary and proper for the operation of such works, for the collection of water rentals, and for the conduct of the business incident to the operation thereof. The said board of trustees shall require of the superintendent, and of the other employees as they may deem proper, good and sufficient bonds, the amount thereof to be fixed and approved by said board, for the faithful performance of their duty, such bonds to run in the name of the city and to be filed with the city treasurer and kept in his office. All money collected by the board of waterworks trustees shall be deposited at least weekly by them, with the city treasurer; and all money so deposited and all tax money received by the city treasurer from any source, levied and collected for and on account of the waterworks, shall be kept by the city treasurer as a separate and distinct fund. The city treasurer shall be liable on his official bond for such funds the same as for other funds received by him as such treasurer. Such moneys shall be paid out by the city treasurer only on the written order of the board of waterworks trustees, who shall have full and absolute control of the application and disbursement thereof for the purposes prescribed by law, including the payment of all indebtedness arising in the construction of such works, and the maintenance, operation, and extension thereof."

In view of the foregoing I cannot concur in your conclusion that the board of water and light trustees is not a governmental body. Indeed, waterworks employees may by appropriate resolution of the board of trustees be placed under civil service as provided in Chapter 365. §398.13.

Although you state that the board of water and light trustees of the City of Muscatine has no officer who writes warrants for it you do not state how the board's funds are disbursed. However, it is clear under §398.9 that all of the board's funds must be deposited with the city treasurer and paid out only on the written order of the trustees. I discussed the matter with the office of the auditor of state and am informed that

the practice varies between boards of light and water trustees in various cities. In some communities the board has a secretary who writes warrants and in others the same are written by the city clerk. However, in our opinion it does not make any difference which practice is followed and employees of the board of water and light trustees in the City of Muscatine are governmental employees within the meaning and intent of §533.30 and may authorize withholding from their salary or wages of amounts to be paid over to a credit union.

November 11, 1971

STATE OFFICERS AND DEPARTMENTS: Department of Agriculture, Use and Disposal of Dead Animals — Chapters 167 and 189A, Code of Iowa, 1971. There is no conflict between Chapters 167 and 189A. Ch. 189A permits an additional method of disposing of dead animal bodies for pet and dog food manufacturers under proper regulations. (Murray to Liddy, Secretary of Agriculture, 11/11/71) #71-11-12

The Hon. L. B. Liddy, Secretary of Agriculture: You have requested an opinion from this office on the following question:

"When Chapter 167, Code 1971, 'Use and Disposal of Dead Animals," was enacted, the accepted method of disposal of dead animals was to either destroy the animal or to cook it down so that the rendered contents could be sold and used in commercial feeds.

"Subsequently, Chapter 189A was amended to comply with the Wholesome Meat Act of 1967. The practice of slaughterhouses to 'bone out' meat of an animal carcass which has been brought in for slaughter, denature the same and sell it to pet food companies for their product has brought up a question as to whether or not Chapter 189A and the enclosed Federal regulations are broad enough to cover a situation in which a rendering company may 'bone out' dead animals, denature the product and sell it to pet food companies."

We do not think it necessary to set out the various provisions of Chapter 167, to which you refer, except to say that it covers the disposal of the bodies of dead animals and the licensing of those who engage in said occupation. In our opinion it is a general statute covering the regulation of those licensed persons, their buildings, and the vehicles in which the dead animals are transported. It is our understanding that your department has interpreted this chapter and its provisions over a long period of time as being the sole and exclusive method under which the dead bodies of animals could be disposed.

Chapter 189A was enacted by the 61st General Assembly and became effective July 1, 1966. As you mention, Chapter 189A was subsequently amended to comply with the Federal "Wholesome Meat Act." We have examined the provisions of Chapter 189A as amended and the Federal regulations you have furnished us governing the meat inspection regulations pursuant to the Wholesome Meat Act (Federal Register Vol. 35, No. 193, Part II). We see no reason to set out the lengthy provisions of the Wholesome Meat Act or the regulations governing the inspection, handling and shipping of food not for human consumption, but we have reviewed §318.12 — Manufacture of Dog Food or Similar Uninspected Articles at Official Establishments, and §324.11 — Inedible Articles: Denaturing and Other Means of Identification; Certificates; Exceptions. These Federal regulations clearly contemplate the handling of dead animal bodies where the rendering company is handling dog and pet food sub-

stances.

In our opinion, Chapter 189A, as amended, also provides that bodies of dead animals who have died other than by slaughter may be used for the manufacture of dog and pet foods or for other than human consumption under proper regulations administered by your office. The following provisions of Chapter 189A clearly provide for an additional method of handling dead animal bodies for dog or pet food:

§189A.2:

"Definitions. As used in this chapter except as otherwise specified:

* * *

"6. 'Animal food manufacturer' means any person engaged in the business of preparing animal food, including poultry, derived wholly or in part from livestock or poultry carcasses or parts or products of such carcasses."

§189A.3:

"License — fee. No person shall operate an establishment without first obtaining a license from the department. The license fee for each establishment, excluding restaurants and grocery stores, per year or any part of a year shall be:

"1. For all meat and poultry slaughtered *or otherwise prepared* not exceeding twenty thousand pounds per year for sale, resale, or custom, twenty-five dollars.

"2. For all meat and poultry slaughtered *or otherwise prepared* in excess of twenty thousand pounds per year for sale or resale, fifty dollars." [Emphasis added]

§189A.7:

"Powers of secretary of agriculture. In order to accomplish the objective stated in section 189A.3 the secretary may:

* * *

"7. By regulations require that every person engaged in business in or for intrastate commerce as a broker, renderer, *animal food manufacturer*, or wholesaler or public warehouseman of livestock or poultry products, or engaged in the business of buying, selling or transporting in intrastate commerce any dead, dying, disabled, or diseased livestock or poultry or parts of the carcasses of any such animals, including poultry, that died otherwise than by slaughter shall register with the secretary his name and the address of each place of business at which and all trade names under which he conducts such business." [Emphasis added]

It is obvious that the above provisions of Chapter 189A refer to a different method of handling the dead animal bodies than that which is referred to in Chapter 167. As we have earlier stated, Chapter 167 is a general statute. The provisions of Chapter 189A, the latter enactment, is a specific statute. Under the accepted rules of statutory construction these chapters deal with the same subject matter and therefore are in parimateria, *Northwestern Bell Telephone Company v. Hawkeye State Telephone Company*, 1969, 165 N. W. 2d 771. When statutes deal with the same subject matter, they must be harmonized so that both shall be given force and effect. If said statutes cannot be harmonized and may be said to be in conflict, they should be construed as mentioned above; but if they cannot be harmonized, effect must be given to the latter enactment, in this instance Chapter 189A. *Fitzgerald v. State*, 1935, 220 Iowa 547, 260 N. W. 681. *Wallace v. Foster*, 1932, 213 Iowa 1151, 241 N. W. 9.

We see no conflict in the provisions of the two sections of the Code referred to, even if we did, 167 is a general statute and Chapter 189A is a specific statute, the specific statute would control. *City of Vinton v. Engledow*, 1966, 140 N. W. 2d 857.

It is our opinion that by enactment of Chapter 189A, as amended, the Legislature did not by implication repeal Chapter 167 but only provided an adidtional method whereby the bodies of dead animals may be used for the manufacture of pet or dog food under proper regulations by your office. Chapter 189A and the Federal regulations governing this method of disposing of dead animal bodies are broad enough to permit a rendering company to "bone out" dead animals, denature the product and sell it to pet food companies.

November 12, 1971

CRIMINAL LAW: Contributing to Juvenile Delinquency — §§233.1, 233.2, Code of Iowa, 1971, and Article I, Section 11, Constitution of the State of Iowa. Legislative changes required to vest justice of the peace with jurisdiction to try the charge. (Hughes to Norpel, State Representative, 11/12/71) #71-11-13

Richard J. Norpel, Sr., State Representative: In your letter of March 23, 1971, you requested an opinion as to what legislative changes would be required to permit a justice of the peace to hear cases involving contributing to juvenile delinquency as defined in §233.1, Code of Iowa, 1971.

Section 233.2, Code of Iowa, 1971, provides that "a violation of Section 233.1 shall be punishable by a fine of not exceeding one hundred dollars or by imprisonment in the county jail not exceeding thirty days, or by both such fine and imprisonment."

Article I, Section 11 of the Constitution of the State of Iowa is as follows:

"All offences less than felony and in which the punishment does not exceed a fine of One hundred dollars, or imprisonment for thirty days, shall be tried summarily before a Justice of the Peace, or other officer authorized by law, on information under oath, without indictment, or the intervention of a grand jury, saving to the defendant the right to appeal; *and no person shall be held to answer for any higher criminal offence, unless on presentment or indictment by a grand jury,* except in cases arising in the army, or navy, or in the militia, when in actual service, in time of war or public danger."

It is my opinion that a justice of the peace would have jurisdiction of a violation of §233.1 if the punishment for the crime were either a fine not exceeding one hundred dollars or thirty days imprisonment in the county jail, but not both.

November 16, 1971

ELECTIONS: Discrepancy between pollbooks and ballots cast — §§50.6, 50.7, 50.8 and 363.26, Code of Iowa, 1971. Where there is a discrepancy between the canvass and the pollbooks as to number of persons voting and the difference could change the outcome of the election the town council can in its discretion order a new election in the precinct or precincts where the discrepancy occurred. (Haesemeyer to Vogel, Poweshiek County Attorney, 11/16/71) #71-11-14

Mr. Richard J. Vogel, Poweshiek County Attorney: Reference is made

to your letter of November 8, 1971, requesting an opinion of the attorney general with respect to a problem presented to you by the Montezuma city clerk in a letter dated November 4, 1971, which states:

"I am setting out in this letter a problem of extreme urgency for the Town of Montezuma involving their recent election.

"Upon the canvass of the votes for Mayor, there were 229 ballots for one candidate, 227 ballots for another candidate, one ballot for a third candidate and two spoiled ballots. Total ballots cast, 459. Upon checking the poll books and the affidavits of eligibility filed by the voters, this total is 456. We, therefore, have three more ballots than people who should have voted, and these extra ballots could change the results of the election.

"Sections 50.6, 7, and 8 of the Iowa Code are the only sections I can find bearing on this problem. In effect, these sections say that when the ballots exceed the number of votes on the poll book lists, in the case of the County office, the Board of Supervisors can order a new election. In a Township office, the trustees can order a new election or not in their discretion. Section 363.26 states that municipal elections should be conducted in the manner provided by law for conducting general elections.

"Section 49.16 states that in city and town elections, the power given in this chapter and duties herein made incumbent upon the Board of Supervisors shall be performed by the Council.

"I would appreciate it if you would forward this letter to the Attorney General's office with the request of an immediate opinion authorizing the Town Council of Montezuma to take action in ordering a new election if they so desire."

In our opinion the city clerk has cited all of the relevant provisions of the code and correctly concluded that the town council has the authority in their discretion to order a new election in the precinct or precincts where the errors occurred.

Section 363.26, Code of Iowa, 1971, provides:

"363.26 Municipal election procedure. The municipal election shall be conducted in the manner provided by law for conducting general elections."

Sections 50.6 and 50.7 provide respectively:

"50.6 Ballots in excess of poll list. If the ballots for any office exceed the number of voters in the poll lists, such fact shall be certified, with the number of the excess, in the return.

"50.7 Error on county office — township office. If, in case of such excess, the vote of the precinct where the error occurred would change the result as to a county office if the person appearing to be elected were deprived of so many votes, then the eelction shall be set aside as to him in that precinct, and a new election ordered therein; but no person residing in another precinct at the time of the general election shall be allowed to vote at such special election. If the error occurs in relation to a township office, the trustees may order a new election or not, in their discretion."

Section 50.8 contains provisions similar to those in §50.7 but relates to state or district offices. Section 49.16 provides:

"49.16 Council to act in cities and towns. In city and town elections, the powers given in this chapter and duties herein made incumbent upon the board of supervisors shall be performed by the council."

While by its term §49.16 relates only to the powers given in Chapter 49 we think that §363.26 is sufficient to authorize a town council to order a new election in the same manner that township trustees are authorized to order a new election in a situation such as that described in §§50.6 and 50.7.

November 18, 1971

CITIES AND TOWNS: Zoning Board of Adjustment — §§414.7, 414.12 and 414.15, Code of Iowa, 1971. A city council may not reserve to itself the power to issue special permit uses exclusive of a zoning board of adjustment. (Blumberg to Groves, Hamilton County Attorney, 11/18/71) #71-11-15

Gary J. Groves, Hamilton County Attorney: In your letter of September 22, 1971, you asked the following question:

"Therefore, the question to be resolved is whether or not a City Council can reserve to itself the power to issue special permit uses exclusive of the Zoning Board of Adjustment as provided by Chapter 414, Code of Iowa and with particular reference to the following two (2) cases:

Depue v. City of Clinton — 160 N. W. 2d 860; (1968)

Anderson v. City of Cedar Rapids — 168 N. W. 2d 739 (1969)"

Section 15c of the zoning ordinance in question permits the city council to issue special permits, while section 19 creates a Zoning Board of Adjustment. Included in the Board's powers is the power to permit special exceptions to the ordinance.

Chapter 414, 1971 Code of Iowa, entitled "Municipal Zoning" is controlling. It authorizes a city council to adopt zoning plans and regulations. Section 414.7 mandates the appointment of a board of adjustment. Said section provides, in part:

"The council shall provide for the appointment of a board of adjustment and in the regulations and restrictions adopted pursuant to the authority of this chapter shall provide that the said board of adjustment may in appropriate cases and subject to appropriate conditions and safeguards *make special exceptions* to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained. . . ." (Emphasis added.)

Section 414.12 provides that the board of adjustment shall have the following powers:

* * *

"2. To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance.

"3. To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where owing to special conditions a literal enforcement of the provisions of the ordinance will result in unnecessary hardship. . . ."

Section 414.15 provides for a review of the decisions of a board of adjustment by a "court of record," not by the city council.

Depue v. *City of Clinton*, 160 N. W. 2d 860 (Iowa 1968), had a fact situation comparable to the one here. There, the Supreme Court of Iowa found the creation of a board of adjustment to be mandatory. Therefore,

its jurisdiction is fixed by statute and not by city ordinance. The Court also held that the term "special exception" included the term "special use," and concluded that both must be placed within the jurisdiction of the board of adjustment. This means that the "Special Permit Uses" section of your ordinance comes within the power of your board of adjustment under section 19. The Court then concluded that special uses and exceptions are within the jurisdiction of the board of adjustment, not the city council.

The second case you cited, *Anderson* v. *City of Cedar Rapids*, 168 N. W. 2d 739 (Iowa 1969), dealt with constitutionality of a change in a zoning ordinance, and has no application here. Accordingly, we are of the opinion that a city council may not reserve to itself the power to issue special permit uses exclusive of the board of adjustment.

November 22, 1971

SCHOOLS: Acquisition of land for recreational facility — §297.3, Code of Iowa, 1971. Statute imposing 30 acre limitation on land for playground, stadium or other purposes for each school site may be interpreted to permit acquisition of land which is not contiguous to the school site. (Nolan to Eller, Crawford County Attorney, 11/22/71) #71-11-16

Mr. Thomas R. Eller, Crawford County Attorney: This is in answer to your request for an opinion with respect to a proposed school real estate purchase in the Town of Denison. As we understand it, the Denison Community School District wishes to acquire by purchase and gift a ten acre tract of ground as a recreational site for the junior high school. This tract of ground is contiguous to the high school site, which presently has forty acres of land including recreational facilities for the students. The present junior high school site is the old high school building located near the downtown area and occupying approximately one block. In addition, the junior high school utilizes the old high school football field, which is approximately four acres in size; and also the use of a square block called West Brick under a lease with the Town of Denison.

The total area apparently used by the junior high school including the football field is approximately six and one-half acres. The school board proposes to acquire the ten acres adjacent to the new high school as a junior high school recreational facility.

Section 297.3, Code of Iowa 1971, applies in this case. This section provides:

"Thirty acre limitation. Any school corporation including a city, town, or village, may take and hold an area equal to two blocks exclusive of the street or highway, for *a schoolhouse site*, and not exceeding thirty acres for school playground, stadium or fieldhouse, or *other purposes for each such site*. (Emphasis added)

Under the circumstances you have described, I am of the opinion that the school district may acquire an additional ten acres of land for junior high school recreational purposes, regardless of the fact that such land is not adjacent to the junior high school tract. The language of the statute may fairly be interpreted to provide for the necessary amount of land for such schools as are required by the school corporation. It is well known that many school playgrounds in this state are separated by streets or other property from the main school site.

Further, it is well established that all school laws are to be given liberal interpretation for the purpose of carrying out the policy of equal opportunity for all of the school children of this state. Inasmuch as the statute under consideration does not require that all land be used for a school site to be compact and contiguous in character, I am of the opinion that the statute is not violated by the purchase of ten acres for recreational purposes to be used in conjunction with a school site provided that the total limitation of two blocks plus thirty acres is not exceeded.

November 22, 1971

BOARD OF REGENTS: PAYROLL AND WAGE DEDUCTIONS; LABOR UNION DUES; WAGE ASSIGNMENTS; SET-OFFS; CONTRIBUTIONS; UNIVERSITIES. §§8.16, 8.17, 8.18, *539.4*, 536.17, 533.30, 79.15, 509A.3, 514.16, 736A.5, Code of Iowa, 1971. Even without express statutory authority, it is within the discretion of the Board of Regents to permit universities and institutions under their control to deduct labor union dues, AAUP dues, U. S. Savings Bonds, and contributions to such things as Health Science Library, Art Gallery, Old Gold Development Fund, Martin Luther King Fund and united fund, from the salary or wages of an employee, upon written request signed by the employees, provided the employee may cancel authorization for the deduction at any time. Such deductions have been an administrative practice of long-standing at the University of Iowa. Neither statutory authority nor consent of the employee is required for set-offs against salary or wages for debts owed by an employee to the employer institution. The wage assignment limitations of §539.4 do not apply to deductions for labor union dues, deductions properly required as a condition of employment or to payroll deductions specifically authorized by statute, but otherwise the written assent of the employees' spouse must be obtained in the manner provided in §539.4. OAG Nolan to Richey, 9-10-71 is withdrawn. Turner to Richey, Executive Secretary, Board of Regents, 11/22/71) #71-11-17

Mr. R. Wayne Richey, Executive Secretary, State Board of Regents: At the instance of President Willard Boyd of the University of Iowa and others, we have agreed to reconsider an opinion of the attorney general issued to you on September 10, 1971 (Nolan to Richey, Executive Secretary, State Board of Regents, 9/10/71, #71-9-5) in which we said that deduction of union dues from the pay of employees at board of regent institutions is prohibited even where the employee voluntarily requests such withholding of dues, and directs payment over to the union, in writing.

That opinion was based in large part upon previous opinions holding that deductions from the salaries of various governmental employees could not be made without statutory authority. For example, 1968 OAG 445, with reference to state officers and employees paid by warrant from the state comptroller, said that payment of anything less than an officer's or employee's salary is not payment of salary; that statutory authority was required and that the legislative policy was demonstrated by specific statutory authorizations for deductions from wages such as those for the cost of hospital insurance and IPERS contributions. And in 1970 OAG 573, we held that there was no present statutory authority for a teacher and a school board to agree by contract to make deductions from the teacher's salary for united fund, teachers' organization dues or credit union deposits or loan payments. In still another opinion, 1970 OAG 584, we had said that deduction of union dues from salary or wages of county

employees was improper because we could find no statutory authority, express or implied, to authorize withholding of such dues.

Also, 1962 OAG 367, had said that wage assignments of state employees are unauthorized since every warrant must be drawn to the order of the person who performed the service, citing §§8.16 and 8.17, Code of 1962. Some of the deductions herein considered are, in effect, the consequence of an assignment by the employee of a part of his wages. An attempt has been made by a former attorney general to distinguish between an employee's assignment of wages and his written request or "order" to an employer to deduct from salary for certain purposes because §536.17 mentions both "valid assignments or orders." 1948 OAG 28, 30. He said §539.4 does not apply to a mere order for a deduction because an order is revocable and not actionable. But we do not consider this a valid distinction nor do we think it makes any difference whether an assignment or order is delivered initially to the employer or to the assignee. Both have the effect of an assignment in any event and we find no basis for any such distinction in the cases. *Metcalf v. Kincaid,* 1893, 87 Iowa 443, 54 N. W. 867; *Coyle v. Des Moines Gately's,* 1941, 230 Iowa 511, 298 N. W. 797; *Bishop v. Baird & Baird,* 1947, 238 Iowa 871, 29 N. W. 2d 201; *Van Laningham v. Chicago, M and St. P. Ry. Co.,* 1914, 164 Iowa 161, 145 N. W. 464. See also, 1966 OAG 226. We believe §539.4 applies to wage assignment payroll deductions and the significance will be seen in the caveat hereto.

So, in our September 10 opinion, we believe that to honor voluntary deductions of union dues for some state employees and not to honor all such requests would be unfair. We had ample authority for the conclusion we reached, especially when we pointed out that voluntary authorization for withholding wages is specifically permitted by statute for credit union payments (§533.30); united fund (§79.15); and group insurance (§§509A.3 and 514.16), Code of Iowa, 1971. Expressio unius est exclusio alterius. We found no statutory authorization for the withholding of union dues from salaries of any governmental employees, state, county, municipal or school, and of course none such for employees of board of regent institutions.

Furthermore, we had checked with the business office of the University of Iowa at Iowa City and were informed that no payroll deductions had ever been allowed for anything, including union dues, not specifically authorized by statute. Our opinion was based, in part, upon that misinformation.

Now we are told and have found as fact that we had been misinformed and that it has been an administrative practice of long-standing that the University of Iowa has permitted payroll deductions on request of the employee for many different purposes, including the following, none of which are specifically authorized by statute:

Retirement Plans
Parking
Accounts Receivable
American Association of University Professors (AAUP) dues
AFL-CIO union dues
Health Science Library contributions

Art Gallery contributions
Old Gold Development Fund contributions
Martin Luther King Scholarship contributions
U. S. Savings Bonds

State Comptroller Marvin Selden says that payroll deductions create accounting problems; that it is questionable whether the state should undertake this bookkeeping responsibility for its employees; and that he has repeatedly fought against both executive and legislative extension of this practice. Nevertheless, payroll deductions for U. S. Savings Bonds have been allowed without express statutory authority throughout state government, probably at least since World War II, and doubtless to the great benefit of employees who otherwise might save nothing. But the question arises as to where the line should be drawn and the practice stopped if specific statutory authorizations are not the limit.

Obviously, deductions for such things as parking in university lots, accounts owed to the university, and library, art gallery and Old Gold Development contributions, all benefit the university (and the state) as well as simplifying the employee's bookkeeping and payment problems. And the university has a legal right to set-off against salary actual debts owed by an employee to it, even without statutory authorization or the employee's consent. But an employee's spouse and family can suffer from his over-extensions and generosity as is recognized by §539.4, Code of Iowa, 1971.

Great weight and consideration must be given to executive or administrative departments and their construction and practices over a lengthy period of time. This was largely the basis for upholding the deduction for the TIAA annuity retirement system. See OAG Turner to Schroeder, 6/21/71, and authorities cited therein. Because the practice of making these voluntary deductions on the request of employees at the University of Iowa now appears to be very widespread and to affect a very large number of employees, we believe our September 10 opinion should be reconsidered in that light. Administrative practices of long-standing, which affect many people, should where possible be curtailed by the legislature rather than the attorney general. Moreover, there is an important distinction between salary payments to employees of our state institutions and to state employees generally.

Ordinarily, the salaries of state employees are paid on warrants issued by the state comptroller ordering payment from the state treasurer and must be directed to the person entitled to payment or compensation. §§8.16, 8.17 and 8.18, Code of Iowa, 1971. §8.18 provides that no warrant shall be drawn in the name of an employee of any certifying office, department, board, or institution, except for personal service rendered or expense incurred by said employee, "unless there be express statutory authority therefor." Since §8.17 provides that all warrants shall be drawn to the order of the person entitled to payment it appears that in absence of express statutory authority, union dues cannot properly be deducted and paid over to the union from the pay of most state employees.

But employees of an institution under the board of regents are not paid by the state comptroller's warrant. Rather, they are paid by checks drawn against an advance account of the respective institution. §§8.6(7),

8.31 and 8.32. Although these advance accounts must be carefully accounted for and are subject to the supervision and control of the governor and comptroller, as well as the board of regents, the funds therein seem to be subject to less statutory restriction on their use than are the funds in the state treasury which the comptroller disburses by warrant. The limitations of §§8.16, 8.17 and 8.18 do not appear to apply to checks, but only to warrants. Thus, there is no statutory direction or prohibition against a regent institution's payroll deductions as there is for the state comptroller.

As we noted in our September 10 opinion, the Iowa Supreme Court has recognized broad power in the board of regents:

"The power to hire employees, fix their salaries and wages, direct expenditures and money and to perform all other acts necessary and proper for the execution of the powers and duties conferred upon the Regents carries with it the power and authority to confer and consult with representatives of the employees in order to make its judgment as to wages and working conditions. We hold the Regents have authority to engage in collective bargaining in this context." *State Board of Regents v. United Packinghouse Food & Allied Workers Local No. 1258*, 1970 Iowa 175 N. W. 2d 110, 112.

The operation and functions of our universities and other board of regent institutions are very complex and of a nature not susceptible to detailed statutory guidelines. Our legislature has drawn the laws governing our universities and prescribing the powers and duties of our regents in broad terms from which much must necessarily be implied. In absence of an express statutory direction or prohibition, the attorney general cannot say that certain voluntary payroll deductions long authorized by the regents and its institutions must cease. He should, rather, assume that those deductions are authorized by implication from the broad power to hire employees and fix their salaries. It is the prerogative of our general assembly, which presumably is aware of these long-standing deduction practices, to change them.

Accordingly, the opinion of September 10, 1971, is hereby withdrawn. In our opinion, even in absence of statutory authority, the board of regents may permit its institutions, on voluntary written request signed by an employee, to deduct union dues or any of the other above listed deductions for savings or contributions which have heretofore been withheld from salaries by any one of the institutions as an administrative practice of long-standing, provided the employee may cancel authorization for the deduction at any time. Or the regents may end the practice as to any deduction which is not either expressly authorized by statute or a proper set-off.

CAVEAT

This opinion must not be construed to relieve board of regent institutions from statutory obligations with respect to either deduction of union dues or other wage assignments. Thus, such institutions are bound the same as any other employer, as to the deduction of union dues, by the provisions of §736A.5, which provides:

"It shall be unlawful for any person, firm, association, labor organization or corporation to deduct labor organization dues, charges, fees, contributions, fines or assessments from an employee's earnings, wages or

compensation, *unless the employer has first been presented with an individual written order therefor signed by the employee,* which written order shall be terminable at any time by the employee giving at least thirty days' written notice of such termination to the employer." (Emphasis added).

§539.4 pertaining to assignment of wages, is also binding upon regent institutions:

"No sale or assignment, by the head of a family, of wages, whether the same be exempt from execution or not, shall be of any validity whatever unless the same be evidenced by a written instrument, and if married, *unless the husband and wife sign and acknowledge the same joint instrument before an officer authorized to take acknowledgments.* Provided, however, that no such assignment or order shall be effective or binding upon the employer unless the employer has in writing agreed to accept and pay said assignment or order. This section shall not apply to a wage assignment by an employee to an organization which represents the employee in labor relations with his employer." (Emphasis added).

Since, as mentioned earlier, some payroll deductions are wage assignments (as distinguished from set-offs), it may be necessary that the spouse of the employee also execute the necessary authorization. But this is not true of those wage assignment deductions authorized by statute. Nor is it true of a wage assignment required as a condition of employment. 1947 OAG 28.

§533.30 specifically provides that the provisions of §539.4 have no application to payments to a credit union organized by employees of the state or of any political or municipal subdivision thereof, and which payments are withheld from the salaries or wages of an employee upon his written authorization. §736A.5 originally contained a provision requiring signature of the spouse "in the manner set forth in §539.4" but signature of the spouse is no longer required for deduction of union dues. Chapter 370, 58th G. A.

§79.15 allows a payroll deduction for united fund on the written request of the employee alone and it appears that assent of the spouse is not necessary thereunder.

§536.17 contains provisions similar to §539.4 with respect to assignment of wages to secure a chattel loan. It too requires the written assent of the spouse unless the "husband and wife have been living separate and apart for a period of at least five months prior to the making of such assignment."

Thus, except as to labor union dues, united fund, credit union payments and group insurance, board of regent institutions must in the future have the written assent of the spouse of the employee, as well as the employee himself, for all wage assignment payroll deductions, including U. S. Savings Bonds and AAUP dues. Signature of the spouse is not required for deductions resulting from set-offs, where the employee owes a debt to the institution. §539.4 is intended to protect the spouse and family of the employee and is applicable except as provided by statute or where the deduction is a condition of employment. *Van Laningham v. Chicago, M. and St. P. Ry. Co.*, 1914, 164 Iowa 161, 145 N. W. 464.

Furthermore, we do not feel it incumbent upon us to withdraw, at this

time, 1968 OAG 445, with respect to payroll deductions from other state employees, 1970 OAG 573, with respect to deductions on teacher's contracts or 1970 OAG 584, with respect to deduction of union dues from salaries or wages of county employees. The second of these last three mentioned opinions has apparently been modified by statute (§533.30, Code of Iowa, 1971). But otherwise, deductions considered in those opinions do not appear to have been administrative practices of long-standing with respect to school, state or county government and §§8.16 to 8.18 are applicable to employees paid by warrant of the state comptroller. Such deductions are for the legislature to authorize, not the attorney general. In other words, this opinion applies to board of regent institutions only, and even as to them it approves only those deductions specifically mentioned as having been withheld under statutory authority or as a practice of long-standing.

November 24, 1971

SCHOOLS: Area Schools — Investment of Funds — Chs. 452, 453, 453A, 454, Code of Iowa, 1971. Statutory limitations upon the investment of public funds apply to area schools and preclude investments of their funds in mutual funds. (Nolan to Miller, State Senator, 11/24/71) #71-11-18

The Hon. Charles P. Miller, State Senator: This refers to your request for an Attorney General's opinion on three questions as follows:

1. Can a community college invest its idle funds in a mutual fund?

2. What would be the difference as compared to investing in Bank & Loan Company Savings to accumulate a dividend by a governmental subdivision?

3. Would it be advisable to amend our present law to allow this type of investment, if this cannot be done under existing law?

The funds of a community college are public funds which are required by statute to be deposited in banks or in bonds or other evidences of indebtedness which are obligations of or guaranteed by the United States of America or in time deposits of banks as provided in Ch. 453 of the Code of Iowa 1971, as amended by Ch. 221, Laws of the 64th G. A., First Session. The limitations upon the investment of such public funds are clearly provided in the Code of Iowa Chs. 452, 453A and 454. Expressio unius est exclusio alterius.

It should be noted that a degree of security is guaranteed to all deposits made in accordance with the statutory provisions. This degree of security is either in the form of a deposit insurance, federal guarantee, or that afforded by the state sinking fund. Participation in a mutual fund, on the other hand, is to say the least a speculative venture. This, as we see it, is an essential difference and fully answers your second question.

Whether or not it would be advisable to amend the present law is a policy matter solely within the province of the General Assembly. Accordingly, no attempt is made to answer your third question here.

November 24, 1971

COUNTY AND COUNTY OFFICERS: Recording fees — §335.14, Code of Iowa, 1971; Ch. 197, Acts, 64th G. A., First Session (S.F. 38). Each

separate assignment is an "instrument" within the meaning of §335.14, Code 1971, and the fee for recording should be charged accordingly. (Nolan to Kennedy, State Representative, 11/24/71) #71-11-19

The Hon. Michael K. Kennedy, State Representative: This is an answer to your letter request for an opinion on the question of whether §335.14, Code of Iowa 1971, as amended by Ch. 197, Acts of the 64th G. A., First Session, (S.F. 38) should be interpreted as permitting the County Recorder to charge more than $2.50 for recording a one-page document on which two contract assignments appear.

The pertinent language of the amended section is:

"The recorder shall charge and collect the following fees:

"1. For recording each instrument two dollars and fifty cents for the first page or fraction thereof."

Each of the two contract assignments is a separate "instrument" within the meaning of the statutory language set out above. 1942 OAG 70. It is immaterial that the two assignments were presented for recording at the same time. The word "instrument" is generally defined in the law as a writing which contains some agreement, and has been so called because it was prepared as a memorandum of what has taken place. 21A Words and Phrases 523. An assignment of a real estate mortgage, securing a negotiable promissory note to the indorsee of such note is a recordable instrument. *Mulligan v. Snavely*, 1929, 117 Neb. 765, 223 N. W. 8.

If, on the other hand, a single assignment assigns several contracts, the assignment should be treated as one instrument and a separate recording fee should not be charged for each of the contracts covered by the assignment. 1940 OAG 445.

November 24, 1971

ELECTIONS: Low Rent Housing — §403A.25, Code of Iowa, 1971. Statute requiring that a petition for an election on a low-rent housing question be signed by 2% of electors of the municipality voting for governor means that percent of the total number of votes actually cast in the municipality at the last election for that office and not the number of citizens who were eligible to cast such vote. (Nolan to Dutton, Black Hawk County Attorney, 11/24/71) #71-11-20

Mr. David J. Dutton, Black Hawk County Attorney: This is in response to a request from your office for an interpretation of the election requirements of the low-rent housing laws and in particular §403A.25, Code of Iowa 1971, which provides in pertinent part:

"Such election may be called by the governing body of the municipality, and shall be called when a petition asking for such election signed by at least two percent of the electors of the municipality voting for governor at the last preceding general election has been filed with the clerk of the municipality."

The question raised is whether the language specifying two percent of the electors means the actual voters of the last election or whether it means two percent of those eligible to vote. Such language has generally been interpreted as meaning that definite number representing the total numbers of votes cast for the Office of Governor at the election designated. This language is probably derived from in §49.2 of the Code.

November 24, 1971

SCHOOLS: Gifts — §§279.42, 23.2, 23.18, Code of Iowa, 1971. A gift of money for the construction of an auditorium, received and placed in the schoolhouse fund, must be treated as public money with respect to the necessity of following public bidding procedures in contracting for the construction of the building. (Nolan to Allen, Monona County Attorney, 11/24/71) #71-11-21

Mr. Stephen W. Allen, Monona County Attorney: Reference is hereby made to your request for an Attorney General's opinion on the question of whether a community school district must follow the public bidding requirements and also obtain the approval of the State Department of Public Instruction prior to constructing an auditorium on school-owned land when cost of the construction is to be totally covered by a gift to the community school district. As we understand the situation, Mrs. Calvin C. Ooten has offered to make a gift of about a quarter of a million dollars for the construction of an auditorium to be begun as soon as possible and to utilize certain products manufactured by the Corning Glass Company, Corning, New York. We further understand that the donor has had some contact with a construction company but that an architect has not prepared specifications for such buildings as of the date of this writing.

It is well established that the donor of the gift may impress upon such gift such conditions and limitations as the donor sees fit. Whether or not a school board may reasonably accept a gift impressed with limitations and conditions is a matter of policy and not a legal question. Statutory authority for the acceptance of gifts by a school board may be found in §279.42, Code of Iowa 1971, which provides:

"The board of directors of any school district which receives funds through gifts, devises and bequests may utilize the same, unless limited by the terms of the grant, in the general or schoolhouse fund expenditures."

If a building such as an auditorium were to be constructed on land owned by a private individual and the completed building and site offered to the school board, there would be no need for a consideration of whether or not the public bidding procedures must be followed. However, that is not the case here and it is my view that following the procedures set out in §§23.2 and 23.18, Code of Iowa 1971, is proper for the protection of the board, the donor, and the people of the school district.

§23.2:

"Before any municipality shall enter into any contract for any public improvement to cost five thousand dollars or more, the governing body proposing to make such contract shall adopt proposed plans and specifications and proposed form of contract therefor, fix a time and place for hearing thereon at such municipality affected thereby or other nearby convenient place, and give notice thereof by publication in at least one newspaper of general circulation in such municipality at least ten days before said hearing."

§23.18:

"When the estimated total cost of construction, erection, demolition, alteration or repair of any public improvement exceeds five thousand dollars, the municipality shall advertise for bids on the proposed improve-

ment by two publications in a newspaper published in the county in which the work is to be done, the first of which shall be not less than fifteen days prior to the date set for receiving bids, and shall let the work to the lowest responsible bidder submitting a sealed proposal; provided, however, if in the judgment of the municipality bids received be not acceptable, all bids may be rejected and new bids requested. All bids must be accompanied, in a separate envelope, by a deposit of money or certified check in an amount to be named in the advertisement for bids as security that the bidder will enter into a contract for the doing of the work. The municipality shall fix said bid security in an amount equal to at least five percent, but not more than ten percent of the estimated total cost of the work. The checks or deposits of money of the unsuccessful bidders shall be returned as soon as the successful bidder is determined, and the check or deposit of money of the successful bidder shall be returned upon execution of the contract documents. This section shall not apply to the construction, erection, demolition, alteration or repair of any public improvement when the contracting procedure for the doing of the work is provided for in another provision of law."

Such procedure should be followed in all construction exceeding $5,000, which is to be paid for from schoolhouse funds. Where funds are given to the district for construction purposes and are commingled with the schoolhouse fund, the statutory requirements impressed upon the use of such funds also limits the use of gift funds commingled therewith, since such funds once accepted are funds of the school district regardless of the fact that they may be earmarked for a specific use.

Accordingly, your specific questions and our answers thereto are as follows:

"1. May the donor of the funds, by the terms of his grant thereof, specify that his gift of funds, the same being sufficient therefor, be utilized by payment thereof as an expenditure from the schoolhouse fund to a designated corporation to construct the auditorium on a schoolhouse site owned by the district according to plans and specifications set forth in a contract between the Board and the designated corporation?"

Yes. The donor of funds may specify the use of funds and thereby create a constructive trust, but the board in accepting such a donation must act within the limits of its authority.

"2. If the estimated total cost of construction of the auditorium (same to include classroom facilities and administrative offices) exceeds Five Thousand Dollars ($5,000.00), must the school board advertise same for bids, under Section 23.18 of the Code, despite the terms of the grant limiting the construction of the building to a specified corporation using specified materials manufactured by a designated corporation (Corning) in which the donor has a family and financial interest?"

I am of the opinion that where a board accepts funds rather than a completed building, the board is accountable for the expenditure of such funds and must handle such funds in the same manner as any other funds under their control and follow the statutory procedures for public bids, etc.

"3. If the answer to the foregoing questions numbered 1 and 2 is yes, may the auditorium be constructed by the expenditure of schoolhouse funds, not to exceed the total amount of the gift in said fund, to construct said building upon a site acquired by condemnation as a schoolhouse

site?"

A board may acquire land by condemnation pursuant to §297.6, Code of Iowa 1971, if needed and subject to the acreage limitation fixed by §297.3, Code. Once the land is acquired by the school corporation the board may determine how it is to be used.

"4. If the answers to questions herein numbered 1 and 2 is yes, may said site be utilized, despite the fact that more than 50% vote but less than 60% vote was received in two referenda for the issuance of bonds for construction of a new high school building on said site?"

Our answer to question three also answers this.

"5. Does the fact that the funds received by the school district through said gifts are commingled in the schoolhouse fund with funds derived by annual one mill and two and one-half mill levies prevent the donor of the gift limiting, as heretofore set forth, the terms of his grant, if the cost of the building does not exceed the total of the funds granted by gift?"

No. The funds may be earmarked and spent for the purpose for which the gift was made.

November 24, 1971

COUNTY AND COUNTY OFFICERS: County Officers — Ch. 137, Code of Iowa, 1971. A member of the County Board of Supervisors, or a clerk of district court may also serve on a local board of health as there is no incompatibility of these offices. Members of local board of health serve without compensation but may be reimbursed for expenses. (Nolan to Lynch, Winneshiek County Attorney, 11/24/71) #71-11-22

Mr. Thomas C. Lynch, Winneshiek County Attorney: This is in answer to your request for an opinion interpreting Ch. 137, Code of Iowa 1971. Your specific questions are:

(1) Is it incompatible for one person to hold at the same time positions on the Board of Supervisors and the Board of Health?

(2) Is it incompatible for one person to hold at the same time positions as Clerk of the District Court and member of the local Board of Health?

(3) May the Board of Health make provision for compensation to its members for attendance at meetings, including compensation to the above named county officials?

A board of health may be either a county board, city board or a district board, all of which are generally termed "local board of health." Proceeding on the assumption that your inquiry relates to any one of the local boards of health, I am of the opinion that the positions of county supervisor and member of a local board of health are not incompatible. Under §137.3, supra, the county board of health in each county consists of five members, at least one of whom is licensed as a dotcor of medicine or an osteopathic physician. The county board members are appointed by the county board of supervisors. The mere fact that the board of supervisors make such appointments does not in and of itself create an incompatibility in the positions. See *State Ex Rel LeBuhn v. White,* 1965, 257 Iowa 606, 133 N. W. 2d 903.

If the board is a city board, the law specifically provides in §137.5 that

the city council "may appoint itself to act as a city board of health." Such language we believe is a clear indication that the legislature approves such action as a public policy. We conclude a similar standard applies to counties.

In answer to your second question, I see no incompatibility for persons simultaneously serving as Clerk of the District Court and member of the local board or health. The duties are neither inconsistent nor one subordinate or dependent upon the other. *State v. White*, supra.

In answer to your third question, there appears to be no provision in the law for compensation to members of the board of health. Code §137.12 specifically provides that members of district boards shall serve without compensation but shall be reimbursed from the local health fund for necessary expenses in accordance with rules and regulations established by the state board. This is the only statutory reference to compensation in the Code chapter pertaining to local boards of health. However, it is a well established rule of law that compensation is not indispensable to a public office and a law creating an office without provision for compensation carries the implication that the services are to be rendered gratuitously. 43 Am. Jur. Public Officers, §340. Former Ch. 137 of the 1966 Code of Iowa, which allowed members of a local board of health to be compensated at the rate of three dollars per diem and to be reimbursed for expenses, was repealed when Ch. 163, Acts of the 62nd G. A., now Ch. 137, Code of Iowa 1971, was enacted.

December 2, 1971

STATE OFFICERS AND DEPARTMENTS: Department of Health — Iowa Board of Nursing — §§147.12, 147.15, 152.1, 152.3, Code of Iowa, 1971. A licensed practical nurse may be appointed to the Iowa Board of Nursing, provided the qualifications are met. (Blumberg to Gaudineer, State Senator, 12/2/71) #71-12-1

Hon. Lee H. Gaudineer, Jr., State Senator: In your letter of August 30, 1971, you requested an opinion as to "whether or not a practical nurse, licensed pursuant to the laws of the State of Iowa, is eligible to be appointed by the Governor to the Iowa Board of Nursing." The answer to this question is in the affirmative.

Section 152.1, 1971 Code of Iowa defines the practice of nursing as follows (in pertinent part):

* * *

"For the purpose of this title the practice of nursing as a licensed practical nurse shall mean the performance of such duties as are required in the physical care of a convalescent, a chronically ill or an aged or infirm patient, and in carrying out such medical orders as are prescribed by a licensed physician or nursing services under the supervision of a registered nurse, requiring the knowledge of simple nursing procedures but not requiring the professional knowledge and skills of a registered nurse."

Furthermore, section 152.3 provides that "[l]icenses to practice nursing shall be issued in two classifications, (1) a license to practice nursing as a registered nurse; and (2) a license to practice nursing as a licensed practical nurse."

Section 147.12, 1971 Code of Iowa, gives the Governor the authority to appoint boards of examiners for the professions covered within the chap-

ter. Section 147.15 lists the requisite professional qualifications for members of examining boards. It provides, in pertinent part, that "[e]very . . . nurse . . . shall be a person licensed to practice the profession for which the board, of which he is a member, conducts examinations for licenses to practice such profession."

Upon reading these sections it is evident that a practical nurse is a member of the nursing profession, and therefore, is licensed by the board of nursing examiners if qualified. Thus, it is our opinion that a licensed practical nurse may be appointed to the Iowa Board of Nursing if the qualifications listed in Chapter 147 are met.

December 2, 1971

STATE OFFICERS AND DEPARTMENTS: Liability Insurance — §517A.1, Code of Iowa, 1971. State departments have authority to purchase broad form comprehensive personal liability insurance coverage. (Haesemeyer to Shearer, Executive Council, 12/2/71) #71-12-2

Mrs. Colleen Shearer, Deputy Secretary, Executive Council of Iowa: Reference is made to your letter of November 23, 1971, in which you state:

"The Executive Council, in meeting held November 22, 1971, deferred approval of purchase order #151867, submitted by the Iowa State Commerce Commission, detailed as follows:

"Vendor: Sturges, Bragg & Kister, Inc. (The Western Casualty & Surety Co.)

Amount: $1,682.00

For: Renewal of comprehensive general liability policy 100/300BI 50/50 PD (employees included as additional insureds) as of November 15, 1971.

"Further, this office was directed to request from you an opinion as to whether or not this could be considered a permissible expenditure by a state agency. For your information, a copy of the purchase order and an explanatory letter from the vendor is enclosed."

Section 517A.1, Code of Iowa, 1971, provides:

"517A.1 Authority to purchase. All state commissions, departments, boards and agencies and all commissions, departments, boards, districts, municipal corporations and agencies of all political subdivisions of the state of Iowa not otherwise authorized are hereby authorized and empowered to purchase and pay the premiums on liability, personal injury and property damage insurance covering all officers, proprietary functions and employees of such public bodies, including volunteer firemen, while in the performance of any or all of their duties including operating an automobile, truck, tractor, machinery or other vehicles owned or used by said public bodies, which insurance shall insure, cover and protect against individual personal, corporate or quasi corporate liability that said bodies or their officers or employees may incur.

"The form and liability limits of any such liability insurance policy purchased by any commission, department, board, or agency of the state of Iowa shall be subject to the approval of the attorney general."

In an earlier opinion of the attorney general, 1968 OAG 929, we concluded that §517A.1 did furnish sufficient authority for a state department to purchase broad form comprehensive personal liability coverage. A copy of this earlier opinion is attached for your convenience.

December 3, 1971

COUNTIES AND COUNTY OFFICERS: County employees organizations memberships — S.F. 37, Acts, 64th G. A., First Session (1971). A board of supervisors, if it wished to do so could pay membership expenses of a county to belong to an organization or association which is not an association of county officers. (Haesemeyer to Smith, Auditor of State, 12/3/71) #71-12-3

The Hon. Lloyd R. Smith, Auditor of State: By your letter of November 10, 1971, you have asked for an opinion of the attorney general on the question of whether or not under Senate File 37, Acts, 64th G. A., First Session, (1971), a county employee can be a member of an organization such as the welfare association, conservation association, sheriffs association or any organization other than the Iowa state association of counties.

Section 2 of Senate File 37 provides:

"Sec. 2. No county funds may be expended for membership fees or for attendance expenses for any county officers association other than the Iowa state association of counties."

In a recent opinion of the attorney general, Haesemeyer to Faches, Linn County Attorney, July 29, 1971, in which a similar question was presented we stated with respect to such Sec. 2 of Senate File 37, "It is to be observed that the prohibition on the expenditure of county funds applies only to membership fees or attendance expenses for county officers associations other than the Iowa state association of counties."

Thus, if the association in question were not an association of county officers it would be our opinion that a board of supervisors could, if it wished to do so, pay membership expenses of a county employee.

December 8, 1971

STATE OFFICERS AND DEPARTMENTS: Department of Health — Senate File 1, Acts of the 64th General Assembly; §155.3(9), Code of Iowa, 1971. A medical practitioner may not delegate his right to prescribe. He may delegate his right to administer control substance drugs, but only pursuant to the Act. (Blumberg to Illes, Executive Director, Iowa Board of Nursing, 12/8/71) #71-12-4

Lynne M. Illes, Executive Director, Iowa Board of Nursing: In your letter of August 25, 1971, you asked the following questions:

"1. Can a medical practitioner delegate to his nurse, aide or technician the right to prescribe or dispense prescription drugs for his patients.
"2. Can a medical practitioner delegate the administration of prescription drugs for his patients to any person other than a nurse or intern, when not in his presence."

From your letter and further conversation with you it is apparent that your questions are directed toward an interpretation of Senate File 1, Acts of the 64th General Assembly. Therefore, this opinion will have reference only to Senate File 1 and the controlled substances enumerated therein.

In answer to the first part of your first question, it is our opinion that a practitioner cannot delegate his right to prescribe drugs. Senate File 1, hereinafter designated as the "Act," is an act relating to the regulation and control of certain drugs and other substances, designated as controlled substances. Section 308 entitled "Prescriptions," provides:

"1. Except when dispensed directly by a practitioner, other than a pharmacy, to an ultimate user, no controlled substance in schedule II may be dispensed without the written prescription of a practitioner.

"2. In emergency situations, as defined by rule of the board, schedule II drugs may be dispensed upon oral prescription by the pharmacy. . . .

"3. Except when dispensed directly by a practitioner, other than a pharmacy, to an ultimate user, a controlled substance included in schedule III or IV, which is a prescription drug as determined under section one hundred fifty-five point three (155.3), subsections nine (9) and ten (10) of the Code, shall not be dispensed without a written or oral prescription of a practitioner."

The definition of "prescription" as used in the Act is found in Section 155.3(9), which states:

" 'Prescription' means a written order, or an oral order later reduced to writing, of a medical practitioner for a prescription drug or medicine."

We interpret these to mean that only a practitioner may prescribe drugs.

The answer to the second part of your first question and the second question is more detailed. Section 101 of the Act contains the definitions requisite to answer your questions. "Dispense," as defined in section 101(9), "means to deliver a controlled substance [defined in sections 204 through 212, inclusive] to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, *administering*, packaging, labeling, or compounding necessary to prepare the substance for that delivery." (Emphasis added.)

"Practitioner" is defined, in part, in section 101(22) as a physician, dentist, veterinarian, pharmacy and hospital. Section 101(1) defines "Administer" as:

"the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means, to the body of a patient or research subject by:

a. A practitioner, or in his presence, by his authorized agent. . . ."

"Agent" is defined in section 101(2) as "an authorized person who acts on behalf or at the direction of a manufacturer, distributor, or dispenser." A "dispenser includes a practitioner. Section 101(10).

A liberal interpretation of these definitions leads one to the conclusion that any authorized person, including those other than nurses, can administer the drugs referred to in the Act while in the presence, and at the direction of, the practitioner. However, other issues are apparent. Section 101(1) states:

"Nothing in this Act shall be construed to prevent a physician, dentist, or veterinarian from delegating the administration of controlled substances under this Act to a *nurse* or *intern*, or as to veterinarians, to an orderly or assistant, under his direction and supervision. . . ." (Emphasis added.)

Does the inclusion of just "nurse or intern" mean that others, i.e. agents, are excluded from administering the drugs?

In conjunction with this, the prior opinions on this question dealt with Chapters 204 of the 1966 Code of Iowa (1968 O.A.G. 637), and 204A of

the 1971 Code of Iowa (1970 O.A.G. 418), both of which were repealed by the Act. Section 204.7 provided that narcotic drugs could be administered by a nurse or intern under a physician's supervision. Thus, the opinion read that only nurses and interns could administer these drugs. Section 204A.2(8) provided that a nurse, medical technician, employee or agent of a practitioner were exempt from the sanctions of the Chapter. Thus, the later opinion was issued to read that those other than nurses could administer the drugs. Does the fact that "medical technician," included in Chapter 204A, is excluded in the Act mean that it was the intent of the Legislature to allow only nurses and interns, as employees of physicians, to administer controlled substances? We think not.

We must return to Section 308, discussed above, and apply its general rules. The general rule in subsection one is that unless dispensed directly by a practitioner, no controlled substance in schedule II may be dispensed without a writen prescription. Referring back to our definitions, we are concerned with "dispense" in this situation as it refers to administering. Thus, unless administered directly by a practitioner, no schedule II drug may be administered without a written prescription. Such is the general rule. However, the fourth paragraph of the definition of "administer" provides for an exception to this rule. See Section 101(1). There, it is stated that nothing in the Act shall be construed to prevent a physician from delegating the administration of controlled substances to a nurse or intern under his direction and supervision. Thus, a practitioner may delegate the administration of a schedule II drug to a nurse or intern under his direction and supervision without a written prescription.

Conversely, if there is a written prescription, the schedule II drug may be administered by the practitioner's agent, other than a nurse or intern, *while in the practitioner's presence.* The nurse or intern need not administer in the practitioner's presence since the only limitation set forth in the fourth paragraph is that they be under his direction and supervision, which need not include "presence."

The general rule in Section 308(3) is that unless dispensed (administered) directly by a practitioner, schedule III and IV drugs cannot be dispensed (administered) without a written *or oral* prescription. Applying the above reasoning here, it is evident that a written prescription is not necessary for someone other than a nurse or intern to administer the drugs. However, as before, if other than a nurse or intern, the administration must be in the presence of the practitioner.

In summary, then, the answers to your questions are as follows. A medical practitioner (physician) may not delegate his right to prescribe those drugs contained in the Act. He may delegate his right to dispense the drug, but only as to its administration (This is not to say that a practitioner may not allow someone else to compound, label, or deliver a controlled substance. You are concerned about the administration of drugs, therefore we are limiting our opinion to that only), and only as to the following:

1. He may delegate the administration of schedule II drugs to a nurse or intern under his direction and supervision, without the need of a written prescription. This administration need not be done in his presence.

2. He may delegate the administration of schedule II drugs to his authorized agents, other than a nurse or intern, but only upon a written prescription and only in his presence.

3. He may delegate the administration of schedule III and IV drugs to his authorized agents or a nurse or intern with either an oral or written prescription. The agents must administer in his presence, but the nurse or intern need not.

Because Chapter 204A is repealed by this Act, the opinion of January 30, 1970, with reference to this Chapter is hereby withdrawn.

December 8, 1971

STATE OFFICERS AND DEPARTMENTS: Department of Health — Ch. 138, 64th G. A., First Session — Advertising by Chiropractors — U. S. Constitution, Amendment 1; Iowa Constitution, Art. 1, §7; Chapter 147, §153.32, Code of Iowa, 1971. That part of Ch. 138, 64th G. A., First Session, prohibiting price advertising by chiropractors is a valid exercise of the state's police power, and is not violative of free speech and press rights under the United States and Iowa Constitutions. (Blumberg to Miller, State Senator, 12/8/71) #71-12-5

Mr. Charles P. Miller, State Senator: We are in receipt of your letter of November 9, 1971, wherein you make reference to Senate File 199 which can be found in Chapter 138, Acts of the 64th G. A., first session. Your letter reads in part:

"One portion of the bill reads as follows: 'or that such licensee advertised in any publication or through any communication media the prices for which his services are available.'

"I ask your opinion on the constitutionality of this passage in view of the 1st Amendment of the U. S. Constitution, and Art. 1, Section 7 of the Iowa Constitution."

The First Amendment to the United States Constitution reads:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press. . . ."

Article 1, section 7 of the Iowa Constitution reads in part:

"Every person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech, or of the press. . . ."

It is well established that statutes regulating the practice of medicine are within the police powers of the state. *State ex rel. Zimmer* v. *Clark*, 1961, 252 Iowa 578, 107 N. W. 2d 726; *Craven* v. *Bierring*, 1936, 222 Iowa 613, 269 N. W. 801; and *State* v. *Hueser*, 1927, 205 Iowa 132, 215 N. W. 643. In addition, the practice of medicine, a profession pursuant to Chapter 147, 1971 Code of Iowa, which includes chiropractic, is a privilege and not a right. *State* v. *Otterholt*, 1944, 234 Iowa 1286, 15 N. W. 2d 529; *State* v. *Edmunds*, 1904, 127 Iowa 333, 101 N. W. 431. Thus, the state may constitutionally regulate the practice of medicine and chiropractic. *State* v. *Otterholt*, supra, and citations therein.

There is no case law in Iowa concerning prohibitions of advertising placed upon chiropractors. However, section 153.32(1), (2), (3) prohibits all advertising by dentists. *Craven* v. *Bierring*, 1936, 222 Iowa 613,

269 N. W. 801, is a case concerning advertising by a dentist. There, the Court cited to *Fevold* v. *Board of Supervisors*, 202 Iowa 1019, 1026, 210 N. W. 139, 142, which held that neither the "Fourteenth Amendment nor any other amendment was designed to interfere with the police power of the state to prescribe regulations to promote health, peace, morals, education, and good order of the people." The Court also cited to *State* v. *Hanson*, 201 Iowa 579, 207 N. W. 769, with approval, for the proposition that "[t]he delegation by the legislature to inferior tribunals of authority to revoke certificates or licenses to practice medicine has been uniformly sustained by the courts of this country, as within the police power."

In addition, the Court quoted from *Semler* v. *Oregon State Board of Dental Examiners*, 1935, 294 U. S. 608, 55 S. Ct. 570, 79 L. Ed. 1086. There, the State of Oregon had a statute prohibiting dentists from advertising their prices. Mr. Chief Justice Hughes, speaking for the court, stated: "That the State may regulate the practice of dentistry, prescribing the qualifications that are reasonably necessary, and to that end may require licenses and establish supervision by an administrative board is not open to dispute." 294 U. S. at 611, 79 L. Ed. at 1089. The lower court held that while there was nothing harmful, in itself, in merely advertising prices, it was reasonable to assume that practitioners not willing to abide by their professional ethics often resorted to such advertising methods to "lure" ignorant members of the public to their offices. In effect, the legislature had aimed at "bait advertising."

Chief Justice Hughes continued (294 U. S. at 612, 79 L. Ed. at 1090):

"We do not doubt the authority of the State to estimate the baleful effects of such methods and to put a stop to them. The legislature was . . . dealing . . . with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the 'ethics' of the profession is but the consensus of expert opinion as to the necessity of such standards."

He concluded by stating that the legislature was entitled to consider the general effects of the practices which it described and counteract them by a general rule if necessary.

Other courts have dealt with the problem of advertising. In *Levine* v. *State Board of Registration and Examination in Dentistry*, 1938, 121 N.J.L. 193, 1 A. 2d 876, it was held that the practice of dentistry was a privilege and therefore subject to state regulation to prevent licensed dentists from resorting to the practices of charlatans and quacks. Therefore, the statute prohibiting advertising of prices was upheld. Similarly, in *State Dentists, Inc.* v. *Gifford*, 1937, 168 Va. 508, 191 S. E. 787, the court held that the act in question which prohibited advertising prices, was not in contravention of either the Federal or State Constitutions. See also, *Rust* v. *Missouri Dental Board*, 1941, 348 Mo. 616, 155 S. W. 2d 80.

Supermarkets General Corporation v. *Sills*, 1966, 93 N. J. Super. 326, 225 A. 2d 728, is helpful to our situation. The statute in question there prohibited pharmacists from advertising prices. It was contended that the statute was violative of the first amendment freedoms of the United States Constitution. The New Jersey court held:

"Supermarkets' contention that the prohibitions upon price dissemination contained in chapter 120 are violative of the First Amendment freedoms of speech and press is also without merit. Such guaranties impose no such restrainst upon governmental regulation of purely commercial advertising. United Advertising Corp. v. Borough of Raritan, 11 N. J. 144, 152, 93 A. 2d 362 (1952); Valentine v. Chrestensen, 316 U. S. 52, 62 S. Ct. 920, 86 L. Ed. 1262 (1942); New York Times Co. v. Sullivan, 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)."

In *Valentine* v. *Chrestensen*, 1942, 316 U. S. 52, 54, 62 S. Ct. 920, 86 L. Ed. 1262, 1265, cited by the New Jersey Court, the United States Supreme Court was faced with a first amendment issue in relation to advertising prohibitions, and held "that the Constitution imposes no such restraint on government as respects purely commercial advertising.

In addition, still other Courts have held that prohibitions on advertising by medical practitioners were valid and constitutional. Prohibitions of advertising by dentists, *Sherman* v. *State Board of Dental Examiners*, 116 S. W. 2d 843 (Tex. Civ. App. 1938), and optometrists, *Economy Optical Co.* v. *Kentucky Board of Optometric Examiners*, 310 S. W. 2d 783 (Ky. 1958), have been held not to be violative of first amendment rights. A prohibition of discount price advertising by chiropractors has been held to be a constitutionally valid exercise of a state's police power. *Cozad* v. *Board of Chiropractic Examiners*, 1957, 153 Cal. App. 2d 249, 314 P. 2d 500. See also, *Davis* v. *State*, 1944, 183 Md. 385, 37 A. 2d 880; and *New Mexico Board of Examiners in Optometry* v. *Roberts*, 1962, 70 N. M. 90, 370 P. 2d 811.

These cases do not all concern situations involving chiropractors. However, they are applicable here because the principles of law they expound are applicable beyond their fact situations. They are general principles which would hold true whether the advertising prohibition applied to physicians, osteopaths, dentists, chiropractors or the like. Accordingly, we are of the opinion that the section of the statute in question is a valid exercise of the state's police power, and not violative of first amendment rights of the United States Constitution or Article 1, section 7 rights of the Iowa Constitution.

December 8, 1971

COUNTIES AND COUNTY OFFICERS: Board of Supervisors—§§111A.4, 111A.6, 332.3(6), Code of 1971. Board of Supervisors cannot make a loan or temporary transfer of funds from general fund to county conservation board, may not take custody and control of county conservation and recreation property in counties with conservation boards, but may make one direct appropriation to conservation board at the time of its creation. (Peterson to Faches, Linn County Attorney, 12/8/71) #71-12-6

Mr. William G. Faches, Linn County Attorney: Receipt is hereby acknowledge of your letter of November 30, 1971, wherein you request the opinion of this office on the following questions:

"1. Can the Conservation Board authorize the County Auditor to stamp warrants on anticipated revenue for the first five or six months of the year 1972 when in effect this would amount to a loan or temporary transfer of funds by the Board of Supervisors?

"2. If the answer to question number one is in the negative, then, due to the fact that the Conservation Commission in Linn County has control over approximately seven million dollars worth of real and personal property, is it possible for the Board of Supervisors to take control of this property to protect the Public's interest in same for the first five or six months of the year 1972, or until such time as the Conservation Commission has sufficient funds to run the same on its own?"

We are of the opinion that both questions must be answered in the negative.

The answer to your first question is found in Section 111A.6, Code of Iowa, 1971, which, in pertinent part, states:

"The county conservation board shall have no power or authority to contract any debt or obligation in any year in excess of the *moneys in the hands of the county treasurer immediately available for such purposes . . .*"

The legislature has, in clear and unambigious terms, thereby limited the power and authority of the county conservation board to contract any debt or obligation to those funds actually in the hands of the county treasurer and available for such purposes. Thus the board has no power or authority to requisition warrants to be drawn by the county auditor in excess of available funds then in the county conservation fund.

We have reviewed the prior opinion of this office cited in your letter (1968 OAG 486, Nolan to Blum, Franklin County Attorney, 1/11/68) and hereby affirm the conclusions reached therein and stated above.

The conservation board having clearly and expressly been prohibited from incurring any indebtedness, the board of supervisors may not make a temporary transfer of funds or loan of any kind to the conservation board.

Authority of the board of supervisors to make a direct appropriation to the conservation board is governed by §111A.6, which, in pertinent part, states as follows:

§111A.6 Funds . . . Upon the adoption of any county of the provision of this chapter, the county board of supervisors of such county may by resolution appropriate an amount of money from the general fund of the county for the payment of expenses of the county conservation board in carrying out its powers and duties . . ."

In our prior opinion, supra, we concluded that the board of supervisors is thereby authorized to make one direct appropriation to get the conservation board started. The authority of the board of supervisors to make such direct appropriations is controlled by the meaning ascribed to the word "upon" as used in §111A.6.

In *Rolfs* v. *Mullins*, 1917, 180 Iowa 472, 163 N. W. 232, the Iowa supreme court reviewed the various meanings of the word "upon" and case authority therefor, concluding, at page 475 of the Iowa Reports, as follows:

"from these authorities, it is apparent that the meaning to be attached to the word depends largely on the connection in which found. Though

sometimes signifying literally up and actually on, it is more often employed as indicating proximity, or 'the time of' . . ."

We are advised that this funding provision has been uniformly so construed since its enactment by the Fifty-sixth General Assembly and we are not disposed at this time to construe the meaning thereof other than as now established by long-standing administrative interpretation. The remedy for any defects in the statute as thus construed is by legislative action.

Pertinent portions of Code sections determinative of your second question with regard to the authority of the county board of supervisors to take control over county property used for conservation and recreation purposes, are as follows:

"§332.3 General Powers. The board of supervisors . . . shall have power:

* * *

6. To represent its county and have the care and management of the property and business thereof in all cases where no *other provision is made.*

"§111A.4 Powers and duties. The county conservation board 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 . . ."

A county is a creature of statute and a quasi corporation and its officials have only such powers as are expressly conferred by statute or necessarily implied from the powers so conferred. *In Re Fentress' Estate*, 1958, 249 Iowa 783, 89 N. W. 2d 367; *Hilgers v. Woodbury County* 1925, 200 Iowa 1318, 206 N. W. 660. Other provisions having been made for the custody and control of county property used for county conservation and recreation purposes, the board of supervisors is without authority to take custody and exercise control over such properties.

December 16, 1971

CITIES AND TOWNS: Municipal Christmas Decoration — Home Rule Amendment, Amendments of 1968, Amendment 2; Amendment 1, U. S. Constitution; Article I, §3, Constitution of Iowa; §§404.6(1), 33.1(9), Code of Iowa, 1971. A city may use general funds to cover expenses of Christmas decorations. (McGrane to Van Gilst, State Senator, 12/16/71) #71-12-7

The Hon. Bass Van Gilst, State Senator: You requested an opinion of the Attorney General on the following question:

"I would like an Attorney General's opinion as to what funds a municipality can use to:

1. Purchase street decorations
2. Furnish electricity for the same
3. The erection and dismantling of street decorations
4. Provide for storage when not in use.

"This question came to my attention regarding the Christmas decorations and lighting of our streets."

There is no specific authority for a city to provide funds for holiday decorations, however the need for such a provision is negated by the municipal home rule amendment to the Constitution of Iowa, Amendments of 1968, Amendment 2, which states:

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

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

The proper fund to provide for the expenditures cited in the request would be the general Fund, under §404.6(1), Code of Iowa, 1971, which states:

"General government. Municipal corporations shall have power to annually cause to be levied for a fund to be known as the general fund a tax on all taxable property within the corporate limits and allocate the proceeds thereof to be used for the following purposes:

1. General and incidental expenses."

The problem of a city providing funds for Christmas decorations is further complicated because of the religious nature of the holiday. However, Christmas is also a legal public holiday, §33.1(9), Code of Iowa, 1971, so there would appear to be no bar to the provision of funds by a city for appropriate decorations. Any city which desires to provide for holiday decorations from municipal funds should take care to insure that such decorations are of a non-religious nature. This is essential to provide for the proper separation of church and state called for by Amendment 1, U. S. Constitution and Article I, §3, Constitution of Iowa.

December 31, 1971

LIQUOR AND BEER: Chapter 131, §128(1)(b), 64th G. A., First Session, 1971. Baseball parks, athletic fields and raceways holding Class B beer permits and such other permits as may be required by law, may legally sell beer from a concession stand if they otherwise comply with the requirements of the Iowa law pertinent thereto, including the requirement that they have sufficient tables and seats to accommodate twenty-five persons at one time. (Turner to Sinning, Commissioner, Iowa Liquor Control Commission, 12/31/71) #71-12-8

Mr. Carl G. Sinning, Commissioner, Iowa Liquor Control Commission: You have requested an opinion of the attorney general as to whether "several baseball parks, athletic fields, and raceways that currently hold Class B beer permits which have been issued by the local authorities" can "legally sell beer from a concession stand in light of the present beer laws," citing §§124.9(1)(f) and 124.12, Code of Iowa, 1971, the pertinent provisions of which have been repealed and re-enacted in Chapter 131, §128(1)(b), 64th G. A., First Session (1971) as follows:

"Sec. 128. A class "B" permit shall be issued by the director to any person who:

1. Submits a written application for such permit, which application shall state under oath:

a. * * *

b. That the premises for which the permit is sought is and will continue to be *equipped with sufficient tables and seats to accommodate twenty-five persons at one time,* and is located within a business district or an area now or hereafter zoned as a business district." (Emphasis added)

You state that "from telephone calls and applications received" you find that most of these places have only concession stands from which they will sell beer. Evidently you are concerned as to whether the places are equipped with sufficient tables and seats to accommodate twenty-five persons at one time. This, of course, is a fact question which may be determined by the license issuing authorities from the application and by investigation.

In my opinion, baseball parks, athletic fields and raceways holding Class B beer permits and such other permits as may be required by law, may legally sell beer from a concession stand if they otherwise comply with the requirements of the Iowa law pertinent thereto, including the requirement that they have sufficient tables and seats to accommodate twenty-five persons at one time. See 1964 OAG 251. Of course, the application for the Class B beer permit must show on its face and on oath of the applicant, that the premises are and will continue to be equipped with sufficient tables and seats to accommodate twenty-five persons at one time whether the spectators may reasonably be expected to use them or not. And sufficient tables and seats must actually be on the premises if beer is sold, regardless of whether tables are actually needed or how ridiculous the requirement may appear.

December 31, 1971

COUNTIES AND COUNTY OFFICERS: Board of Supervisors — Distribution of recovered county funds — §342.1, Code of Iowa, 1971. Insurance money received by the county in reimbursement of county funds lost by embezzlement should be placed in the county general fund there to be distributed by the board of supervisors. (Strauss to Baldrige, Washington County Attorney, 12/31/71) #71-12-9

Mr. John E. Baldrige, Washington County Attorney: Reference is made to your letter dated September 30, 1971 in which you state:

"Enclosed find request for opinion regarding payment of partial recovery of embezzled funds."

Your request for opinion states:

"Recently Washington County recovered $10,000.00 from the bonding company upon an approximate $23,000.00 shortage in the office of Clerk of Court. It is very unlikely that any further recovery can be made.

"Two types of moneys were involved in the embezzlement:

"1. County funds of approximately $15,000.00.

"2. Moneys due others . . . totaling approximately $8,000.00 of items which were not 'public moneys' although they were moneys which the clerk handled as a part of his office.

"The present Washington County Clerk of Court wishes to pay the 'moneys due others' (approximately $8,000.00) in full and pay the balance remaining of approximately $2,000.00 over to the county. This action would meet with the approval of the Board of Supervisors of Washington

County.

"It is the opinion of this writer that the $10,000.00 must be apportioned on a pro-rata or percentage basis of approximately forty-three percent to all . . ."

It was stated in the 1926 Report of the Attorney General, at page 354, that:

"In the absence of statutory provisions all fees collected for a county are to be credited to the county general fund."

Also, §342.1 of the 1971 Code of Iowa, states:

"Except as otherwise provided, all fees and charges of whatever kind collected for official service by any county auditor, treasurer, recorder, sheriff, clerk of the district court, and their respective deputies or clerks, shall belong to the county."

Therefore, from the above opinion and statute, we are of the opinion that the embezzled funds belonged to the county and your attempt to distinguish a portion of the funds as "moneys due others" is erroneous. The money in the hands of the Clerk of the District Court is money collected by the clerk in his official capacity and possibly some money that was appropriated to his office by the county. In either case, the money can be said to belong to the county. There is no support to the notion that a portion of this money is "moneys due others."

While these funds are in the hands of the clerk, they are county "moneys," and they would not become "moneys due others" until a claim is made upon them and they are paid out as such. Therefore, it is our opinion that all the money involved here was county money, and that the recovered funds must be credited to the county general fund.

Finally, with the recovered funds being placed in the county general fund, the Board of Supervisors can apportion them in any manner as a matter of their power to represent the county in the management of the business of the county and their power to settle all claims against the county (§332.3(5) and (6) of the Iowa Code).

December 31, 1971

TAXATION: Real Estate Transfers — Tenements — §428A.1, Code of Iowa, 1971. The transfer tax is applicable to all transfers of buildings located on leased land, unless the consideration is below the statutory minimum or the transaction is otherwise exempt by another provision of the Iowa Code. (Kuehn to Barbee, Dickinson County Attorney, 12/31/71) #71-12-10

Mr. Walter W. Barbee, Dickinson County Attorney: You have requested an Attorney General's Opinion concerning the applicability of the transfer tax created by §428A.1, Code of Iowa 1971, to the sale of cottages, fisherman's shacks and other houses and buildings on leased real estate, the sale being accomplished by means of a bill of sale from the owner thereof to the buyer, neither party being the fee title holder of the real property.

The use of the bill of sale would not affect the applicability of the transfer tax because §428A.1, states that:

"there is hereby imposed on each deed, *instrument or writing* . . ." (em-

phasis added)

A bill of sale would be an instrument or writing.

The issue raised by your letter is whether or not a building located on leased land falls within the wording of the statute which imposes a tax on the transfer of ". . . any lands, tenements or other realty . . ."

Section 428A.1 states that:

"there is hereby imposed on each deed, instrument, or writing by which any lands, *tenements*, or other realty in this state shall be granted, assigned, transferred, or otherwise conveyed, a tax determined in the following manner . . ." (emphasis added)

Black's Law Dictionary, (4th Edition) states that tenement can be defined in this manner:

"Tenement. This term, in its *vulgar* acceptation, is only applied to houses and other buildings, . . ." (emphasis added)

Webster's Seventh New Collegiate Dictionary based on Webster's Third New International Dictionary states that the word "vulgar" can be defined in this manner:

". . . la: generally used, applied or accepted b: having or understanding in the ordinary sense . . . c: of the usual, typical, or ordinary kind . . ."

Black's Law Dictionary cites an Iowa Case, *Oskaloosa Water Co. v. Board of Equalization*, 1893, 84 Iowa 407, 51 N. W. 18, 15 LRA 296. The Iowa Court defined the word "tenement" in its more restricted sense as a house or building but also said it can include much more than a building if a more liberal interpretation is applied. This case is still good Iowa law.

The Iowa Court's definition of the word "tenement" has been cited by other courts for authority on the proposition that the word tenement means a house or building but can mean to include even more if the broader interpretation is applied. The Oklahoma Court cites the Iowa Court in *Hughes v. Milby, & Dow Coal & Mining Co., 1927, 259 P. 559.*

The Missouri Court in *Orchard v. Wright — Dalton — Bell — Anchor Store Co. et al.*, 1910, 225 Mo. 414, 125 S. W. 486 has defined tenement as follows:

"Blackstone (2B.1. Com. 16) says:

'tenement is a word of still greater extent than lands . . . in its vulgar acceptation, it is only applied to houses and other buildings . . .' "

The Missouri Court also emphasizes that the word "tenement" can include more than houses and other buildings if the broader or more liberal meaning is given to the word.

The Ohio Court in the case of *Wood v. Galpert*, 1965, 1 Ohio App. 2d 202, 204 N. E. 2d 384 cites two dictionary definitions defining the word "tenement" to mean in its more restricted sense to be a house or other building but to include much more if a more extensive, broader, or liberal meaning is given to the word. The two dictionarys cited to are *Black's*

Law Dictionary (4th Ed.) and *Ballentine Law Dictionary With Pronunciations* (Second Ed.).

Since the legislature chose to use the word "tenement" as per §428A.1, Code of Iowa 1971, a transfer of a house or other buildings located on leased land is subject to the tax imposed by this section, unless the consideration is below the statutory minimum, or is otherwise exempt by another provision of the Code.

December 31, 1971

TAXATION: Taxation of Buildings on Leased Land — §428.4, Code of Iowa, 1971. All buildings on leased land are to be taxed, assessed, and listed as real property to the owner of the land. (Pabst to Faches, Linn County Attorney, 12/31/71) #71-12-11

Mr. William G. Faches, Linn County Attorney: You have requested an opinion of the Attorney General on the following matter. Section 428.4, Code of Iowa, 1971 states:

"Property shall be taxed each year, and assessed each year in the name of the owner thereof on the first day of January. Real estate shall be listed and valued in 1971 and every four years thereafter, and in each year in which real estate is not regularly assessed, the assessor shall list and assess any real property not included in the previous assessment, and also any buildings erected since the previous assessment, with a minute of the tract or lot of land whereon the same are situated, and the auditor shall thereupon enter the taxable value of such buildings on the tax list as a part of the real estate to be taxed; but if such buildings are erected by another than the owner of the land, they shall be listed and assessed to the owner as real property."

You have asked whether all buildings on leased land are to be assessed and taxed to the owner of the land.

Section 428.4 states that the taxable value of buildings shall be listed as part of the real estate.

The last clause of §428.4 states:

"But if such buildings are erected by another than the owner of the land, they shall be listed and assessed to the owner as real property."

Buildings erected on land by another than the owner are listed and assessed to the owner of the land. In 1970 OAG 541, 542 it is stated:

"The clear and legislative intent as so amended by House File 686 was to eliminate the personal tax on buildings erected on leased ground and to impose upon the owner of the land the obligations to pay the tax upon the land and include any building regardless of the fact that the building was erected upon the land by a lessee of the land."

1968 OAG 319 as it conflicts with the above is overruled.

In conclusion, all buildings on leased land are to be taxed, assessed, and listed as real property to the *owner of the land.*

January 4, 1972

LIQUOR, BEER AND CIGARETTES: Liquor licenses and beer permits — §§6, 20, 30, 34, 39, 123, 126, 129, 146, Chapter 131, 64th G.A., First Session (1971). Licenses and permits issued under the old liquor and beer laws (Chapters 123 and 124, Code of Iowa, 1971) continue in effect until their normal expiration dates unless sooner surrendered prior there to and a holder wishing to obtain a combination license

under the new law (Chapter 131, 64th G.A.) can time his application therefor and the surrender of existing licenses and permits in such a way as to maximize any refunds to which he may be entitled. The determination as to what is the "principal business" of an "establishment" making application for a class "C" beer permit would have to be made by the issuing authority. Where the holder of a class "C" beer permit issued under §129 of Chapter 131 ceases to have as his principal business the sale of food or food products for consumption off the premises such class "C" beer permittee may have his permit revoked. The holder of a combination license may not also obtain a class "C" beer permit under §129 of Ch. 131. (Haesemeyer to Gallagher, Ia. Beer & Liq. Control Dept., 1/4/72) #72-1-1

Mr. Rolland A. Gallagher, Director, Iowa Beer and Liquor Control Dept.: *Reference* is made to your letter of December 27, 1971, in which you state:

"Chapter 131, Acts of the First Regular Session, 64th General Assembly, reorganizes the Iowa Liquor Control Commission and makes several other changes in Iowa's liquor laws. The efforts to implement this law have been hindered by the vague and ambiguous nature of several sections of the statute.

"Your legal opinion is, therefore, requested to answer or clarify the following questions:

"1. Under the old statutes a person selling liquor was required to obtain a class 'B' permit as well as a liquor license. The new law provides that a combination liquor and beer license will be issued so that a separate beer permit will not be needed. Presently about 80% of all liquor licensees have beer permits whose expiration date does not coincide with that of the liquor license. Since the combination license replaces both the old liquor license and the beer permit, at what time shall the combination license be issued? If refunds are to be made, on what basis shall they be granted?

"2. Section 129 of the law states that 'No Class "C" permit shall be issued to any person except the owner or proprietor of a grocery store or pharmacy.' A grocery store is defined as 'any retail establishment, the *principal* business of which consists of the sale of food or food products for consumption off the premises.' There is considerable doubt as to the legal definition of the term 'principal.' Does it mean 50% of the volume must be groceries? If this is so, must an establishment not meeting this criterion be closed immediately?

"3. Section 126 says 'It shall be unlawful for any person or persons to be either directly or indirectly interested in more than one class of beer permit.' It is obvious that this section would prohibit a person from holding both a class 'B' and a class 'C' beer permit. But can a person holding a combination beer and liquor license be considered as having a class 'B' beer permit? If the answer is no, then the law clearly favors the person who can afford a liquor license and restricts one who cannot.

"4. Section Six (6) establishes the terms of office for the council members. If their terms begin in January and are to run for one, two, three, four, and five years, how can they expire on July first? This would appear to mean that the one year term must be either one-half year or one and one-half years in length. Which shall it be?"

The question you raise shall be considered in the order in which you have presented them.

1. The answer to this question is essentially that the determination of the time when the combination licenses is to be issued is to a considerable extent within the control of the affected licensee; that is to say, he can to some extent select the date on which he wishes to obtain his new

combination license and surrender any old liquor license and/or beer permit in such a way as to maximize any refund to which he is entitled. However, he must, of course, at all times be covered by either a still valid old license and/or permit or a new combination license covering the products he wishes to sell.

Sections 123.29 and 124.6, Code of Iowa, 1971, provide in relevant part respectively:

"123.29. A permit or liquor control license shall be a purely personal privilege and shall expire on the anniversary date following date of issuance and shall be revocable for cause. * * *

"Any liquor control licensee or his executor, administrator or any person duly appointed by the court to take charge of and administer the property or assets of such permittee for the benefit of his creditors, may voluntarily surrender any permit, issued under this chapter, to the issuing authority and when so surrendered the issuing authority shall refund to the person so surrendering the permit a proportionate amount of the permit fee paid for such permit as follows: If surrendered during the first three months of the period for which the permit was issued the refund shall be three-fourths of the amount of the permit fee; if surrendered more than three months but not more than six months after issuance the refund shall be one-half of the amount of the permit fee; if surrendered more than six months but not more than nine months after issuance the refund shall be one-fourth of the amount of the permit fee. No refund shall be made, however, for any permit surrendered more than nine months after issuance. * * *"

"124.6. Tenure — character of permittee — voluntary surrender of permit — refund. All permits provided for in this chapter shall expire at the end of one year from the date of issuance, and may be renewed for a like period upon application being made therefor to the proper authorities as in this chapter provided. * * *

"Any permittee or his executor, administrator or any person duly appointed by the court to take charge of and administer the property or assets of such permittee for the benefit of his creditors, may voluntarily surrender any permit, issued under this chapter, to the issuing authority and when so surrendered the issuing authority shall refund to the person so surrendering the permit a proportionate amount of the permit fee paid for such permit as follows; if surrendered during the first three months of the period for which said permit was issued the refund shall be three-fourths of the amount of the permit fee; if surrendered more than three months but not more than six months after issuance the refund shall be one-half of the amount of the permit fee; if surrendered more than six months but not more than nine months after issuance the refund shall be one-fourth of the amount of the permit fee. No refund shall be made, however, for any permit surrendered more than nine months after issuance. * * *"

Section 146 of Chapter 131, 64th G.A., First Session (1971) provides:

"Sec. 146. Saving clause. This Act shall not impair or affect any act done, offense committed or *right accruing, secured or acquired,* or penalty, forfeiture, or punishment incurred prior to the time this Act takes effect, but the same may be enjoyed, asserted, enforced, prosecuted, or inflicted, as fully and to the same extent as if this Act had not been passed." (Emphasis added)

Thus, it is apparent that licenses and permits issued under Chapters 123 and 124 of the Code continue in effect until their expiration or unless surrendered prior thereto. In the latter event, of course, the refund provisions of the old law would continue to apply. Section 30 of Chapter 131 specifies the classes of liquor control licenses which may be issued there-

under among which is a Class "C" liquor control license which authorizes the sale of liquors and beer to persons by the individual drink for consumption on premises and beer for sale for consumption off premises. This is the combination license to which you refer. Section 34 of Chapter 131 provides that all liquor control licenses and beer permits are to expire one year from date of issuance. Thus, one who holds both a liquor license and a beer permit with different expiration dates would have to determine when it was in his best interest to apply for a new combination liquor and beer license. For example, if he held a liquor license which expired January 31, 1972, and a beer license which expired September 30, 1972, he would probably want to obtain a new combination liquor and beer license effective February 1, 1972, and obtain a refund of the pro rata portion of the permit fee for his old beer permit in accordance with the provisions of §124.6 of the Code.

2. Section 129 of Chapter 131 provides in relevant part:

"No Class 'C' permit shall be issued to any person except the owner or proprietor of a grocery store or pharmacy.

" 'Grocery store' means any retail establishment, the principal business of which consists of the sale of food or food products for consumption off the premises. * * *"

This language is practically identical to that which is found in §124.10 of the Code and which was considered and construed in an earlier opinion of the attorney general. 1968 OAG 505. In this earlier opinion we said:

"It is well settled that the issuing authority has the discretion to determine whether or not beer permit applicants meet the stautory qualifications set forth in Chapter 124 of the Iowa Code. Lehan v. Greigg, 1965, 257 Iowa 823, 135 N.W.2d 80. * * *

"I am of the opinion that only the issuing authority may determine what is the 'principal business' of an 'establishment' for which a class 'C' beer permit has ben requested. * * *"

Accordingly, it is our opinion that the determination as to what is the "principal business" of an "establishment" making application for a class "C" beer permit would have to be made by the issuing authority.

Where the holder of a class "C" permit issued under §129 of Chapter 131 ceases to have as his principal business the sale of food or food products for consumption off the premises such class "C" beer permittee may have his permit revoked under either §20 or §39.4 of Chapter 131. Such sections of the new Act provide respectively:

"Sec. 20. The director, in executing departmental functions, shall have the following duties and powers: * * *

"6. To grant and isue beer permits, special permits, liquor control licenses, and other licenses; and to suspend or revoke all such permits and licenses for cause under this Act. * * *

"Sec. 39. Any liquor control license or beer permit issued under this Act may, after notice in writing to the license or permit holder and reasonable opportunity for hearing, and subject to section fifty (50) of this Act where applicable, be suspended for a period not to exceed one year or revoked by the local authority or the director for any of the following causes: * * *

"4. An event which would have resulted in disqualification from receiving such license or permit when originally issued. * * *"

3. As you point out §126 of Chapter 131 provides:

"It shall be unlawful for any person or persons to be either directly or indirectly interested in more than one class of beer permit."

However, §123 of Chapter 131 provides:

"All applicable provisions of this division relating to class "B" beer permits shall apply to liquor control licensees in the purchasing, storage, handling, serving, and sale of beer."

In our opinion such §123 would operate to preclude the holder of a combination license issued under §30(3)(c) from also obtaining a class "C" beer permit under §129 of Chapter 131.

4. As you point out there is a conflict in §6 of Chapter 131 as to the terms of office of the council members. Such §6 provides in part:

"The governor shall appoint the initial members of the council for respective terms of one, two, three, four, and five years, all of which shall commence January 1, 1972. Appointments thereafter shall be for five years and shall be made by the governor, subject to confirmation by two-thirds of the senate, within sixty days after the convening of the general assembly each year for the member whose term is to expire on the following July 1."

There is absolutely no basis on which we could make a determination as to whether or not a half year should be added to or subtracted from the initial terms. However, there is every reason to believe that the matter will be resolved before July 1, 1972. The legislative service bureau has prepared a corrective bill which would provide for initial terms of one and one-half, two and one-half, three an done-half, four and one-half, and five and one-half years. Presumably this measure or something like it will be enacted by the next session of the general assembly and should dispose of the question. If the general assembly does not act with respect to this matter sometime before July 1, 1972, there will be time enough then to try to arrive at some solution to the problem.

January 5, 1972

STATE OFFICERS AND DEPARTMENTS: Department of Public Safety, peace officers exempt from merit employment system—§§19A.3(15), 80.9, 748.3 and Ch. 100, Code of Iowa, 1971. Peace ofifcers employed by the department of public safety, including the arson investigators of the state fire marshal's office, are exempt from the merit employment system. (Haesemeyer to Sellers, Commisioner, Dept. of Public Safety, 1/5/72 #72-1-2

Mr. Michael M. Sellers, Commissioner, Department of Public Safety: Reference is made to your letter of December 1, 1971, in which you state:

"Section 19A.3 of the *Code of Iowa* (1971) provides in part as follows:

" 'The Merit System shall apply to all employees . . . except . . . (Section 15) members of the Iowa Highway Safety Patrol and other peace officers employed by the Department of Public Safety.'

"Our interpretation of the aforementioned section of the Code is that any peace officer employed by the Department of Public Safety or any Divisions employing peace officers within the Department of Public Safety are exempt from the rules and regulations of the Merit System.

"Apparently, the arson investigators of the Iowa Fire Marshal's Office

and certain other employees of this Department, deemed by this Department to be peace officers, are included in the Iowa Merit Employment System.

"We are seeking your Official Opinion as to whether or not the above-mentioned employees who are peace officers within the Department of Public Safety, who are presently included within the operation of the Merit Employment System, are, in fact, specifically excluded from the operation of that System by law."

Section 748.3, Code of Iowa, provides in relevant part:

"The following are 'peace officers': * * *

"4. All special agents appointed by the commissioner of public safety and all members of the state department of public safety excepting the members of the clerical force. * * *"

Section 80.9, Code of Iowa, 1971, provides in part:

"* * * The members of the department of public safety, except clerical workers therein, when authorized by the commissioner of public safety shall have and exercise all the powers of any peace officer of the state. * * *"

It is clear that the state fire marshal's office is a part of the department of public safety. Chapter 100, Code of Iowa, 1971.

In view of the foregoing it would be our opinion that unless the arson investigators of the Iowa fire marshal's office are considered part of the clerical force of the department of public safety they would be "peace officers" and therefore exempt from the merit system.

January 5, 1972

ELECTIONS: Nomination papers — §§43.10 and 43.14, Code of Iowa, 1971. A candidate for office who has his own nomination papers printed may also have such papers serially numbered. (Haesemeyer to Schweiker, Deputy Secretary of State, 1/5/72) #72-1-3

Mr. Herman Schweiker, Deputy Secretary of State: This will confirm our telephone conversation today during which I advised you that a candidate for office who has his own nomination papers printed may also have such papers serially numbered.

Section 43.10, Code of Iowa, 1971, provides:

"43.10 Blanks furnished by others. Blank nomination papers which are in form substantially as provided by this chapter may be used even though not furnished by the secretary of state or county auditor."
The form referred to in such §43.10 is that which is set forth in §43.14.

So long as nomination papers comply substantially with §43.14 there is nothing wrong with having a number printed in the lower right hand corner of such forms or elsewhere thereon.

January 5, 1972

STATE OFFICERS AND DEPARTMENTS: State traveling library, purchase of materials — §§303.18 and 303.19, Code of Iowa, 1971; §99, Ch. 84, 64th G.A., First Session, 1971. The state traveling library has the sole authority to determine what library materials may be purchased for it. (Haesemeyer to Travillian, Acting Director, Iowa State Traveling Library, 1/5/72) #72-1-4

Mr. J. Maurice Travillian, Acting Director, Iowa State Traveling Library: You have requested an opinion of the attorney general with respect to the following:

"The Board of Trustees of the Iowa State Traveling Library requests an opinion from the Attorney General on the following question:

"Does Section 19.18, Code of Iowa, 1966, give the Executive Council authority to determine which library materials (e.g. books, periodicals, microforms, audio-visuals, etc.) may be purchased by the State Traveling Library with state or federal funds or does this authority reside with the Board of Trustees under sections 303.18 and 303.19?"

Section 19.18, Code of Iowa, 1971, was repealed by §99, chapter 84, 64th G.A., First Session (1971) effective August 15, 1971. Hence, it would be our opinion that the state traveling library has the sole authority to determine what library materials may be purchased for it.

January 5, 1972

STATE OFFICERS AND DEPARTMENTS: State traveling library, maximum salaries — §25, Senate File 576, Acts, 64th G.A., First Session (1971); Chapter 19A, Code of Iowa, 1971. The legislature, through its power to appropriate funds, can establish a maximum salary that may be paid by a state department that is lower than the authorized salaries of the Merit Commission for employees covered by the Merit Commission regulations. (Haesemeyer to Travillian, Acting Director, Iowa State Traveling Library, 1/5/72) #72-1-5

Mr. J. Maurice Travillian, Acting Director, Iowa State Traveling Library: You have requested an opinion of the attorney general with respect to the following:

"The Board of Trustees of the State Traveling Library requests an opinion from the Attorney General on the following question:

"Does the Constitution of the State of Iowa permit the Legislature, through its power to appropriate funds, to establish a maximum salary that may be paid by a state department that is lower than the authorized salaries of the Merit Commission for employees covered by the Merit Commission regulations?

"This question refers particularly to the following action of the legislature regarding this department during the last session:

"Senate File 576 . . . 25. LIBRARY, IOWA STATE TRAVELING — For salaries, support, maintenance and miscellaneous purposes, provided that no employee shall be paid more than the salary set for the director of the state traveling library."

We are unaware of any constitutional provision which would in any way restrict the legislature's power to limit the salaries paid to employees of the Iowa state traveling library. To the extent that there might be a conflict between the provisions of the merit system law, chapter 19A, Code of Iowa, 1971, and §25 of Senate File 576, Acts, 64th G.A., First Session (1971), the latter would prevail for a number of reasons. First, it is a special as opposed to a general statute; second, it is the later enacted of the two statutes; and finally it is a limitation on the use which may be made of the appropriation to the Iowa state traveling library.

January 12, 1972

TAXATION: Parking lots — §§422.43, 422.45(5), Code of Iowa, 1971.

Campgrounds which provide facilities for the parking of motor vehicles are "parking lots" and are subject to the sales tax. Said parking facilities if owned by the state or civil subdivisions are not exempt from taxation under §422.45(5), Code of Iowa, 1971. (Pabst to Thordsen, State Senator, 1/12/72 #72-1-6

Senator Harold A. Thordsen, State Senator: You have requested an opinion of the Attorney General on the following matters.

Section 422.43, Code of Iowa, 1971, states in part:

"The following enumerated services shall be subject to the tax herein imposed on gross taxable services: ***parking lots***

Section 422.45(5), Code of Iowa, 1971, states:

"There are hereby specifically exempted from the provisions of this division and from the computation of the amount of tax imposed by it, the following:

The gross receipts or from services rendered, furnished, or performed and of all sales of goods, wares or merchandise used for public purposes to any tax-certifying or tax-levying body of the state of Iowa or governmental sub-division thereof, including the state board of regents, state department of social services, state highway commission and all divisions, boards, commissions, agencies or instrumentalities of state, federal, county or municipal government which derive disbursable funds from appropriations or allotments of funds raised by the levying and collection of taxes, except sales of goods, wares or merchandise or from services rendered, furnished, or performed and used by or in connection with the operation of any municipally-owned public utility engaged in selling gas, electricity or heat to the general public."

You have requested an opinion on whether the term "parking lot" includes public or private campsites where a motor vehicle is parked and if campsites are parking lots whether a public campsite is exempted from the sales tax under §422.45(5) Code of Iowa, 1971.

Section 422.43, Code of Iowa, 1971, is a tax imposition statute. Tax imposition statutes are construed strictly against the sovereign and liberally in favor of the taxpayer. As stated in *General Expressways, Inc. v. Iowa Reciprocity Board,*, Iowa, 1968, 163 N.W.2d 413 the court stated:

"Although courts give weight to administrative interpretation of statutes where meaning admits of doubt, in the interpretation of statutes doubtful language is to be resolved in favor of the taxpayer and against the taxing body."

Section 4.1(2) Code of Iowa, 1971, states:

"Words and phrases shall be construed 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, shall be construed according to such meaning."

Webster's new Third International Dictionary defines a parking lot as an outdoor lot for the parking of motor vehicles. This definition is supported by the following cases: (1) *Bedford v. Johnson*, 1938, 102 Colo. 203, 78 P.2d 373; (2) *State v. Gruber*, 1942, 201 La. 1068, 10 So.2d 899; and (3) *City of Newark v. Martin*, 1952, 22 N.J. Super 32, 91 A.2d 497. Campgrounds which provide facilities for the parking of automobiles, mobile homes and other motor vehicles are subject to the sales tax as "parking lots."

Since the first question has been answered in the affirmative, the

second question of whether a publicly or governmentally owned campsite is exempt from the sales tax must be discussed. The Iowa sales tax is imposed on the consumer. (See O.A.G. Murray to Gluba; June 7, 1971).

In the case of campsites the tax is usually imposed on the driver of the driver of the motor vehicle usually a private individual. These services are not rendered for the state or a civil subdivision and do not come within the exemptions of §422.45(5) Code of Iowa, 1971.

In conclusion, campgrounds which provide facilities for the parking of motor vehicles are "parking lots" and subject to the sales tax. Said parking facilities if owned by the state or civil subdivisions are not exempt from taxation under §422.45(5) Code of Iowa, 1971.

January 12, 1972

COUNTIES: COUNTY RELIEF: LEGAL SETTLEMENT: RESIDENCE: §§252.16, 252.22, 252.23, 252.24, 1971 Code of Iowa. The legal settlement provisions of Ch. 252 do not prohibit the granting of welfare to a person who has not established legal settlement as defined in §252.16 but are applicable as to which of two Iowa counties is liable for general relief and in requiring the county of settlement to reimburse the county of residence which has paid such relief to a person who has not established legal settlement. (Turner to Sarcone, Director, Budget Department, 1/12/72) #72-1-7

Mr. James V. Sarcone, Director, Budget Dept., Polk County Courthouse: You have asked that this office express an opinion as to the interpretation of §252.16, 1971 Code of Iowa.

Specifically you ask:

"If a person moves from one Iowa county to another county in Iowa, is he barred from receiving general relief in the second county on the ground that he has not established legal settlement as defined in §252.16, 1971 Code of Iowa."

The answer is no. No state can require a person to have lived in that state for a given length of time before granting him welfare. This was the holding by the United States Supreme Court in *Shapiro v. Thompson*, 394 U.S.618, 89 S.Ct.1322, 22 L.Ed2d 600, decided in April 1969.

In November 1971, the United States Supreme Court held a Montana statute unconstitutional which related to county relief funded by local money. In that case, *Pease v. Hansen*, 92 S.C.R. 318, the Supreme Court, in reversing the Montana Court, said:

"Whether a welfare program is or is not federally funded is irrelevant to the constitutional principles enunciated in *Shapiro v. Thompson*, supra."

Any statute in Iowa which requires a person to reside within a county or state a given length of time before receiving welfare is unconstitutional under the Supreme Court decisions hereinbefore cited.

The section of the Code which you refer to in your question is found in the chapter relating to county relief funded by county money. In view of *Pease v. Hansen*, supra, any statute in that chapter requiring a person to live in a county for a certain period of time or have legal settlement in a county before being able to obtain county relief is clearly unconstitutional.

It is my opinion that §252.16, 1971 Code of Iowa, cannot be interpreted as imposing an eligibility requirement. That section must be read in conjunction with §§252.22, 252.23 and 252.24 of the 1971 Code of Iowa.

Pertinent portions of these sections read:

"252.16 Settlement — how acquired. A legal settlement in this state may be acquired as follows:

1. Any person continuously residing in any county in this state for a period of one year acquires a settlement in that county.

2. Any person having acquired a settlement in any county of this state shall not acquire a settlement in any other county until such person shall have continuously resided in said county for a period of one year.

3. * * * ."

"252.22 Contest between counties. When relief is granted to a poor person having a settlement in another county, the auditor shall at once by mail notify the auditor of the county of his settlement of such fact, and, within fifteen days after receipt of such notice . . ."

"252.23 Trial. If the alleged settlement is disputed, then, within thirty days after notice thereof as above provided, a copy of the notices sent and received shall be filed in the office of the clerk of the district court . . ."

"252.24 County of settlement liable. The county where the settlement is shall be liable to the county rendering relief for all reasonable charges and expenses incurred in the relief and care of a poor person . . ."

Reading these statutes together, one can really observe that the county of legal settlement must reimburse the county of the residence of a poor person for county relief extended by the residence county and that said §252.16 defines "legal settlement" solely for reimbursement purposes.

This Attorney General, in 1970, stated his interpretation of the §252.16, Code of Iowa, in *Pletka v. Black Hawk County Relief Department, et al,* (Civil No. 69-C-529-EC) U.S. District Court, Northern District of Iowa, in the stipulation filed therein reading:

"That the provision pertaining to legal settlement as set forth in §252.16 (1) Code of Iowa 1966 is neither a condition nor a bar, to the granting of relief to the poor as provided under Chapter 252 of the Code of Iowa 1966."

Conclusion

Therefore, there is no statute in Chapter 252, 1971 Code of Iowa, which denies general relief to a person residing in one county but having legal settlement, as defined in said §252.16, 1971 Code of Iowa, in another.

January 12, 1972

COUNTIES: County officers; Supervisors; Elections; Redistricting and Reapportionment — §§331.8 and 331.9, Code of Iowa, 1971. A plan for election of supervisors put into effect without an election under §331.8, may be amended by special election, upon petition, under §331.9, and the holding of such an election, properly petitioned for before January 1 on any general election year within 6 years, is mandatory. The plan adopted at the special election shall remain in effect for at least 6 years. (Turner to Neu, State Senator, 1/12/72) #72-1-8

The Honorable Arthur A. Neu, State Senator: This is in reply to your request for an opinion interpreting the statutes relating to the reapportionment of County Boards of Supervisors, and, in particular, §§331.8 and 331.9, Code of Iowa 1971, concerning election of County Supervisors.

Specifically, you ask,

"whether the selection of a plan by the board of supervisors pursuant to 331.8, where no petition is filed under 331.9, is in effect for six years, or whether a petition can be filed by a subsequent January 1 of a general election year.

And,

"whether the language of 331.8(2) in providing that that section is subject to the provisions of Section 331.9 means that the plan shall only be in effect six years from the date a plan is selected by referendum or whether the six year limitation applies to any plan, whether selected by referendum or by the board of supervisors."

The cited statutory provisions as they appear in the 1971 Code of Iowa are:

§331.8.

"1. Each county board of supervisors shall, by November 1, 1969, select one of the following alternative supervisor representation plans:

"a. Plan one. Election at large and without district residence requirements for members.

"b. Plan two. Election at large but with equal population district residence requirements for members.

"c. Plan three. Election from single-member equal-population districts in which the electors of each district shall elect one member who shall be required to reside in that district.

"2. The plan so selected and any plan thereafter selected by the board shall, subject to the provisions of section 331.9, remain in effect for at least six years."

§331.9.

"The board of supervisors, when petitioned by ten percent of the number of qualified electors of the county having voted in the last previous general election for the office of governor, *shall* cause a special election to be held within the county for the purpose of selecting the supervisor representation plan enumerated in section 331.8 under which such county board shall thereafter be elected.

"Such petition shall be filed with the county auditor by January 1 of any general election year. However, the plan selected by such special election and any plan thereafter selected by special election shall remain in effect for at least six years. Said special election shall be held at least one hundred days prior to the primary election. Notice of such special election shall be published once each week for three successive weeks in an official newspaper of the county and shall state the alternative representation plans to be submitted to the electors and that the election will be held not less than five nor more than twenty days from the date of last publication. (Emphasis added)

If the initial plan was put into effect by the supervisors without an election in accordance with the provisions of §331.8, then the plan is to remain in effect for six years unless, before the expiration of that time, a petition is filed for a special election prior to January 1 of any general

election year, pursuant to §331.9. The clause, "subject to the provisions of §331.9" is an exception which appears in §331.8(2). Once an election is petitioned for in accordance with §331.9, the board of supervisors *shall* cause a special election to be held within the county for the purpose of selecting one of the alternative plans enumerated in §331.8. The word "shall" is mandatory and the board of supervisors has no discretion in the matter. They must conduct the election and it must be held at least one hundred days prior to the primary election and notice published once each week for three successive weeks in an official newspaper of the county, all as provided in §331.9. *Gibson v. Winterset Community School District*, 1965, 258 Iowa 440, 138 N.W.2d 112.

Once such special election is held, the plan selected shall remain in effect for at least six years.

January 13, 1972

STATE OFFICERS AND DEPARTMENTS: State employees, fringe benefits — §§509A.1, 509A.11, Code of Iowa, 1971. Any decision as to what group insurance programs are to be purchased for state employees rests with the executive council. (Haesemeyer to Van Drie, State Senator, 1/13/72 #72-1-9

The Honorable Rudy Van Drie, State Senator: You have asked for an opinion of the attorney general concerning a decision by the executive council as reflected in its minutes that the organization of Iowa highway commission employees should be advised that an expenditure for disability income protection would have to be authorized by the legislative branch of government.

As I understand the situation at the time the governor's budget recommendations were being formulated for submission to the first session of the 64th General Assembly it was decided to build into the budget askings a figure of $15.00 per employee to be used for employee fringe benefits and this was in fact done. This $15.00 was not a line item in any appropriation bill. It was simply included in the usual general terms for salaries, support, maintenance and miscellaneous purposes.

Under Ch. 509A, Code of Iowa, 1971, any decision as to what group insurance programs are to be purchased for state employees rests with the executive council. 509A.1 provides:

"509A.1 Authority of governing body. The governing body of the state, county, school district, city, town or any institution supported in whole or in part by public funds may establish plans for and procure group insurance, health or medical service for the employees of the state, county, school district, city, town or tax-supported institution."

Under §509A.11, the definitions section, "governing body" means among other things the executive council of the state.

While as pointed out previously the $15.00 per employee per month was not spelled out in any line item of appropriation bills the comptroller's office made it clear to the various members of the respective appropriation committees of the house and senate that $12.00 would be used as the state's contribution to one or the other of the health insurance plans and the other $3.00 would be used for a state paid life insurance program. In view of this the executive council's decision not to take a portion of the $3.00 set aside for life insurance and use it for disability

insurance is consistent with the representations which were made to members of the general assembly. In other words the council's decision amounts to nothing more than a conclusion that it ought not to violate an unwritten commitment to the legislature.

By reason of the president's wage-price freeze implementation of the life insurance program was delayed but I understand that it is expected to be implemented in the very near future.

Since the $15.00 per employee per month was simply lumped into the broad language of the various appropriations statutes the employees neither collectively nor individually have any vested right in the $15.00 per month per person. Moreover, they are not entitled as a matter of right to have the entire amount of $180 per person per year be spent at all let alone for any particular purpose.

January 13, 1972

TAXATION: Repeal of manufacturer's excise tax as affecting Iowa use tax. Section 423.1(3), 423.2, 423.6, 423.7 and 423.8, Code of Iowa, 1971. In the absence of a contractual discount between the dealer and the ultimate purchaser of the federal excise tax-repealed articles, the State of Iowa is not required to refund Iowa use tax paid on that portion of the purchase price which was attributable to the repealed tax, notwithstanding that the ultimate purchaser has had refunded to him the amount of such excise tax. (Griger to Griffin, State Senator, 1/13/72) #72-1-10

Honorable James W. Griffin, Sr., State Senator: This will acknowledge receipt of your letter of January 9, 1972, wherein you requested an opinion of the Attorney General as follows:

"Since the United States Congress has passed and President Nixon has signed into law the Revenue Act of 1971, which in part repeals the excise tax on new automobiles, I am respectively requesting an opinion from your office as to the fact if there should be a refund of the Iowa State Sales tax that was collected on that portion of excise tax on new automobile transactions between the dates of August 15 to November 15, 1971."

In Iowa, the tax imposed upon the sale of motor vehicles subject to registration is the Iowa use tax, not the sales tax. Sections 423.6, 423.7 and 423.8, Code of Iowa, 1971, as amended by Ch. 213, Acts of 64th G.A., first session.

Section 423.2, Code of Iowa, 1971, imposes the Iowa use tax in relevant part as follows:

"An excise tax is hereby imposed on the use in this state of tangible personal property purchased for use in this state, at the rate of three percent of the *purchase price* of such property." (Emphasis supplied)

Section 423.1(3), Code of Iowa, 1971, as amended by §6 of Ch. 213, Acts of 64th G.A., first session, defines "purchase price," for use tax purposes, as follows:

"3. 'Purchase price' means the total amount for which tangible personal property is sold, valued in money, whether paid in money or otherwise; provided that cash discounts and trade-in allowances taken on sales shall not be included."

On December 10, 1971, President Nixon signed into law the Revenue

Act of 1971. Pub. Law 92-178. A portion of this Act repealed the seven percent manufacturer's excise tax on automobiles and the ten percent manufacturer's excise tax on small trucks. Such repeals were retroactive to August 16, 1971, for automobiles and September 23, 1971, for small trucks. The relevant portion of the Revenue Act of 1971 provides as follows:

"(c) REFUNDS WITH RESPECT TO CERTAIN CONSUMER PURCHASES.

(1) IN GENERAL. — Except as otherwise provided in paragraph (2), where —

(A) after August 15, 1971, with respect to any article which was subject to the tax imposed by section 4061(a) (2) of the Internal Revenue Code of 1954 (as in effect on the day before the date of the enactment of this Act), or

(B) after September 22, 1971, with respect to any article which was subject to the tax imposed by section 4061 (a) (1) of such Code (as in effect on the day before the date of the enactment of this Act),

and on or before such date of enactment, a tax-repealed article (as defined in subsection (e) has been sold to an ultimate purchaser, there shall be credited or refunded (without interest) to the manufacturer, producer, or importer of such article an amount equal to the tax paid by such manufacturer, producer, or importer on his sale of the article.

(2) LIMITATION ON ELIGIBILITY FOR CREDIT OR REFUND. — No manufacturer, producer, or importer shall be entitled to a credit or refund under paragraph (1) with respect to an article unless —

(A) he has in his possession such evidence of the sale of the article to an ultimate purchaser and of the reimbursement of the tax to such purchaser, as may be required by regulations prescribed by the Secretary of the Treasury or his delegate under this subsection;

(B) claim for such credit or refund is filed with the Secretary of the Treasury or his delegate before the first day of the 10th calendar month beginning after the day after the date of the enactment of this Act based upon information submitted to the manufacturer, producer, or importer before the first day of the 7th calendar month beginning after the day after the date of the enactment of this Act by the person who sold the article (in respect of which the credit or refund is claimed) to the ultimate purchaser; and

(C) on or before the first day of such 10th calendar month reimbursement has been made to the ultimate purchaser in an amount equal to the tax paid on the article."

Therefore, the Act provides that, if a tax-repealed article (automobile or small truck) has been sold to the ultimate purchaser after the dates specified therein, and the manufacturer has refunded to the purchaser the amount of excise tax included in the purchase price of said articles, the manufacturer may obtain a credit or refund of such tax upon application to the United States Secretary of the Treasury or his delegate.

Although the ultimate purchaser of an automobile or small truck has or will receive a rebate of the amount of fedral excise tax included in the "purchase price" of such articles purchased during the retroactive period, that does not mean that the State of Iowa must refund Iowa use tax paid on that portion of the purchase price attributable to the excise tax. As noted, the Iowa use tax is based upon the purchase price as defined

in §423.1(3). This purchase price is determined by contract between the dealer and the ultimate purchaser, not by any act on the part of the manufacturer or the federal government. Consequently, unless the purchase price of the tax-repealed articles have been discounted by the dealer to the ultimate purchaser for the amount of the excise tax included therein, there can be no refund of Iowa use tax. In *Benner Tea Company v. Iowa State Tax Commission*, 1961, 252 Iowa 843,109 N.W.2d 39, the Iowa Court, in construing the meaning of "discount" in a provision of the sales tax law (§422.42(6)) similar, in context, to that found in §423.1(3), held that the term meant an allowance or reduction in price.

In our opinion, in the absence of a contractual discount between the dealer and the ultimate purchaser of the federal excise tax-repealed articles, the State of Iowa is not required to refund Iowa use tax paid on that portion of the purchase price which is attributable to the repealed tax, notwithstanding that the ultimate purchaser has had refunded to him the amount of such excise tax. The Attorney General of South Carolina has issued a ruling in accord with this opinion and said ruling is attached hereto.

January 14, 1972

COUNTIES AND COUNTY OFFICERS: Inheritance Tax Appraisers — Retired District Court Judges — §§450.24, 450.25, 605A.10, Code of Iowa, 1971. An Inheritance Tax Appraiser is not a state officer or employee but is instead a county officer and a retired judge may serve in the capacity of Inheritance Tax Appraiser without any loss or diminution of his annuity under the judicial retirement system. (Haesemeyer to Mowry, State Senator, 1/14/72) #72-1-11

The Honorable John L. Mowry, State Senator: Reference is made to your letter of January 4, 1972, in which you request an opinion of the attorney general with respect to the following:

"Section 450.24 of the Code provides for the appointment of inheritance tax appraisers in the several counties of the State.

"Section 450.25 of the Code provides for compensation of appraisers, which appears to be by fees taxed as costs in the individual estates.

"Section 605 of the Code covers judicial retirement and judges pensions or annuities, and Section 605A.10 provides as follows: 'No annuity shall be paid to any person entitled to receive an annuity hereunder while he is serving as a state officer or employee.'

"My question is this: Is an inheritance tax appraiser under Section 605A.10 a 'state officer or employee,' and can a retired district judge receiving his retirement pension be appointed and act as an inheritance tax appraiser and receive the compensation contemplated in Section 450.25 without affecting payment of his pension?"

It is to be observed that the disqualification from receiving any annuity applies only to situations where a retired judge is serving as a *state* officer or employee.

In our opinion an inheritance tax appraiser is a county officer or employee and a retired judge may legally serve in that capacity and continue to receive an annuity under the judicial retirement system.

Sections 450.24 and 450.25, Code of Iowa, 1971, to which you make reference provide respectively:

"450.24 Appraisers. In each county the court shall, on or before January 15 of each year, appoint three competent residents and freeholders of said county to act as appraisers of all property within its jurisdiction which is charged or sought to be charged with an inheritance tax. Said appraisers shall serve for one year, and until their successors are appointed and qualified. They shall each take an oath to faithfully and impartially perform the duties of the office, but shall not be required to give bond. They shall be subject to removal at any time at the discretion of the court. The court may also in its discretion, either before or after the appointment of the regular appraisers, appoint other appraisers to act in any given case. Vacancies occurring otherwise than by expiration of term shall be filled by appointment of the court. No person interested in any manner in the estate to be appraised may serve as an appraiser of such estate.

"450.25 Compensation of appraisers. Each of said appraisers shall be entitled to receive as compensation a minimum of five dollars and not to exceed ten dollars per day of eight hours each for making each such appraisement. If the claim of any appraiser in connection with the appraisement of one estate is for more than thirty dollars, it shall be itemized and verified and filed with the clerk of the district court in which the estate is pending and notice of hearing on such claim shall be given as shall be prescribed by the court. Upon hearing on any such claim the court shall fix the amount of compensation to be allowed and enter an order therefor in the records of such estate, which allowance shall be taxed as part of the costs of probate."

Although depending for their appointment upon a state officer, a district judge, it is clear from §450.24 that the appraisers are appointed in each county and must be residents and freeholders of the county. Moreover, the inheritance tax appraisers generally perform their duties within the county of their appointment. On the general question of what is or is not a county office we find the following statement in 20 C.J.S., Counties, §100, p. 888:

"While it has been said that whether or not a person is to be classified as a county officer it may depend somewhat upon the particular question involved and that it might be impossible to lay down any general rule, the term 'county officers,' in its most general sense, applies to officers whose territorial jurisdiction is coextensive with the county for which they are elected or appointed, and it has been held that an officer is nonetheless a county officer because he exercises certain powers, in particular instances, outside the county, does he exercise the sum duties on behalf of the state, or because, by virtue of statutory restrictions, his district is less than the whole county."

Relying on the absence of any statute prohibiting the practice an earlier opinion of the attorney general, 1930 OAG 237, ruled that a superior court judge could also act as an inheritance tax appraiser. Of course, this opinion is of doubtful relevance as to your question because §605A.10 was not in existence at the time it was rendered. Nevertheless, in view of the language of §450.24 and the general rule as enunciated in Corpus Juris Secundum it is our opinion that an inheritance tax appraiser is not a state officer or employee but is instead a county officer and that a retired judge may serve in the capacity of an inheritance tax appraiser without any loss or diminution of his annuity under the judicial retirement system. Cf. *State v. Downing*, 1968, 261 Iowa 965, 155 N.W.2d 517; *Hjerleid v. State*, 1940, 229 Iowa 818, 295 N.W. 139.

January 20, 1972

CITIES AND TOWNS: Restitution to abutting property owners for re-

moval of diseased elm trees — Art. III, Iowa Constitution. The city of Muscatine may appropriate public funds to reimburse abutting property owners for removing diseased trees from the city parking. (Blumberg to Drake, State Representative, 1/20/72) #72-1-12

Richard F. Drake, State Representative: I am in receipt of your letter of December 7, 1971, wherein you request an opinion concerning restitution to abutting property owners for the removal of diseased elm trees. It appears from your letter that the city of Muscatine enacted an ordinance requiring abutting property owners to remove diseased elms from the city parking. Failure to do such would constitute a misdemeanor. On October 13, 1971, the Supreme Court of Iowa, in *Shriver* v. *City of Jefferson*, 190 N.W.2d 838 (Iowa 1971) declared void ordinances similar to the one in question on the basis that a city can only require property owners to remove diseased trees from their own property. Your question is:

"Since it is now apparent that the City was without authority to compel the abutting property owners to remove these trees, the City Council is considering reimbursing those persons who removed diseased trees from the parking. I am requesting your opinion as to the legality of such a program."

We are faced with the problem of a city's powers. To state it more clearly, are a city's powers limited solely to those enumerated by statute? We think not. The Home Rule Amendment, added to Article III of the Iowa Constitution in 1968, states:

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

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

What we are referring to here is basic law regarding restitution. The general rule gives recovery to one, not a volunteer, who performs a duty which the law has imposed upon another — in this case the city. The requirements are that the prompt performance of the duty is of grave public concern; the person upon whom the duty rests must have failed or refused to act; and the person who intervenes must not be a mere intermeddler, but a proper person to perform the duty. We believe that these elements exist in the instant situation. Generally, a person who has conferred a benefit upon a municipal corporation under mistake of law is entitled to restitution. 3 Antieau, *Municipal Corporation Law* §§30.00 and 30.06. Thus, municipal corporations have been awarded restitution as against other governments, based upon mistakes of law. *City of Milwaukee* v. *County of Milwaukee*, 1965, 27 Wis.2d 53, 133 N.W.2d 393, citing to Restatement of Restitution §46.

Case law also exists where individuals were allowed restitution from municipalities. In *Gordon* v. *Village of Wayne*, 1963, 370 Mich. 329, 121 N.W.2d 823, the defendant village had passed an ordinance requiring subdividers to donate property or its monetary equivalent and to pay engineering inspection charges to the village in order to obtain approval of plats. The Supreme Court of Michigan declared the ordinance to be invalid, and required the village to pay restitution to the subdividers.

The court reasoned that the amounts were recoverable since the village was charging the subdividers, in part, for what the village was obliged to perform. See also *Theatre Control Corp.* v. *City of Detroit*, 1963, 370 Mich. 382, 121 N.W.2d 828. In *Beachlawn Building Corp.* v. *City of St. Clair Shores*, 1965, 376 Mich. 261, 136 N.W.2d 926, it was held that a builder could recover fees paid by it to the city for building permits under an invalid ordinance. The present situation is analogous, and it would seem that the city might be liable to the abutting property owners for restitution.

However, you have stated in your letter that claims against the city by the abutting property owners are barred by the statute of limitations for special charter cities. See Sections 420.44 and 420.45, 1971 Code of Iowa. If that is the case, the property owners would not have a cause of action against the city to recover their costs of removing the trees from the city parking. However, this does not necessarily mean that the city may not reimburse these property owners.

There is case law to the effect that a municipality may appropriate public money, by ordinance, where an equitable or moral obligation exists. "Moral obligation" has been defined as

"one 'which cannot be enforced by action, but which is binding on the party who incurs it, in conscience and according to natural justice,' or as 'a duty which would be enforceable by law, were it not for some positive rule, which, with a view to general benefit, exempts the party, in that particular instance, from legal liability' . . ." *Harbold* v. *City of Reading*, 1946, 355 Pa. 253, 49 A.2d 817, 820.

We feel that the present situation fits the definition. The abutting property owners had a right to claim payment for their services rendered to the city, but for the fact that the statute of limitations precluded them. The city had the obligation to remove the trees from its property at its own expense. However, it illegally attempted to pass this burden and cost onto others. The property owners rendered a service to the city by removing the trees at their own expense.

The Supreme Court of Pennsylvania, in *Harbold* v. *City of Reading*, supra, held that a moral obligation or claim founded on equity and justice may be recognized by a legislature. It stated (49 A.2d at 820):

"[I]t is well established in our own State, as well as generally elsewhere, that a claim supported by such a moral obligation and founded in equity and justice, even though not legally enforceable, may be recognized by the legislature and made collectible either from the State itself or any of its political divisions; the legislature may compel municipalities to adopt and discharge such obligations and to exercise the power of taxation for that purpose."

As examples of situations where a legislature has accepted a claim supported by a moral obligation, the court listed the following: Reimbursing citizens who had advanced money to pay bounties to volunteers; repay subscriptions made by citizens to pay for recruits; validating a street improvement contract made under an ordinance which was defective because unrecorded; providing for the payment of a school teacher for services rendered under an unauthorized appointment; ordinance for the payment of a municipal contractor for work done under an allegedly illegal contract; providing for payment for construction work done under

an act which had been held unconstitutional; and resolution of the salary board of a county paying a tax assessor for services rendered under an illegal appointment. If a legislature can authorize payments to individuals based upon moral obligations, may not a city do the same under its home rule powers? We think it may.

A discussion in 56 Am. Jur.2d *Municipal Corporations*, §804 concerns moral or equitable claims or obligations. There it is stated that the right of a municipal corporation to pay such claims or obligations, although not legally bound to do so, has been recognized in some jurisdictions. The citation is to *Evans* v. *Berry*, 1933, 262 N.Y. 61, 186 N.E. 203, 89 A.L.R. 387, wherein the court held:

"The extent to which moral and equitable claims against the city should be recognized is primarily for the city itself to determine . . . provided only that it may not expend the city money for other than a city purpose or give it away. . . . *Prior to the Home Rule Amendment, the state might have imposed such liability on the city. Now the city may self-impose such a liability, if it sees fit to assume the burden.*" (Emphasis added; citations omitted)

Thus, it appears that under a home rule provision of a state constitution a municipality may, by local law, recognize such moral or equitable claims.

Accordingly, we are of the opinion that the city of Muscatine may, if it desires, appropriate public funds to reimburse abutting property owners for removing diseased trees from the city parking. This must be done by ordinance.

January 20, 1972

CITIES AND TOWNS: Conflict of Interest — §368A.22(2), Code of Iowa, 1971. A husband-councilman, who has no legal interest in a non-profit corporation of which his wife is a director and part-time employee, has no conflict of interest when that non-profit corporation makes a competitive bid on city urban renewal property. (Blumberg to Goen, Dubuque County Attorney, 1/20/72) #72-1-13

Mr. John J. Goen, Dubuque County Attorney: I am in receipt of your letter of January 13, 1972, in which you request an opinion from this office as to a possible conflict of interest. You state in your letter that the wife of a Dubuque City Councilman is a director and part-time employee of a non-profit corporation which has submitted a bid to the city to purchase urban renewal property. Your question is whether this husband-wife relationship constitutes a conflict of interest as to the husband-councilman voting on this bid.

Chapter 368A.22(2), 1971 Code of Iowa, states:

"No municipal officer or employee shall have an interest, direct or indirect, in any contract or job of work or material or the profits thereof or services to be furnished or performed for his municipality."

In a 1966 opinion, 660 A.G. 38 (a copy of which is enclosed), which dealt with the same section, the question submitted concerned a wife-alderman whose husband was the principal stockholder and manager of a car dealership which sold and repaired vehicles on competitive bids to the city. We concluded at that time that the wife-alderman had no interest, either direct or indirect, in her husband's business, on the basis

that a familial relationship did not constitute a direct or indirect interest.

We find that the same reasoning should apply to the present situation. The husband-councilman does not have such an interest as to become a conflict merely by the fact that his wife is a director and employee of an organization that has made a bid to the city for urban renewal property.

January 27, 1972

SCHOOLS: Leases — §297.9, Code of Iowa, 1971. In the absence of a primary benefit to the school district or a joint community purpose a school board is not authorized by statute to lease the school gymnasium to an individual who would conduct private classes for profit, even though such classes would be held at times that would not interfere with regular school use. (Nolan to Camp, State Representative, 1/27/72) #72-1-14

The Honorable John Camp, State Representative: We have received your letter requesting an opinion on behalf of the Northeast Community School District as to whether the board has authority to rent or lease a portion of the school premises to a gymnast for the purpose of teaching gymnastics to children within the school district. According to your letter the individual is self-employed and will be charging for her services. The fee will be paid by each child that is enrolled in the class. The proposed contract would allow the gymnast the use of a portion of the school building and the school gym equipment for a fixed amount of compensation.

The questions posed in your letter are set out as follows:

"(1) Is it permissable for the Board of Education to grant the use of a portion of the school building and certain school equipment to a private individual who intends to use the same for profit making purposes?

"(2) Is it permissable for the Board of Education to grant the use of a portion of the school building and certain equipment to a private individual who will be using the same to teach gymnastics to children who are residents of the School District, when such activity does not interfere with school activities and the school district will be paid compensation for such use?

It is the opinion of this department that the school board does not have authority to enter into a proposed contract with the gymnast. Section 297.9, Code of Iowa 1971, is controlling in this respect:

"The board of directors of any school corporation may authorize the use of any schoolhouse and its grounds within such corporation for the purpose of meetings of granges, lodges, agricultural societies, and similar rural secret orders and societies, for parent-teacher associations, for community recreational activities, for public forums and similar community purposes; provided, however, that the board may not grant such permission to any organization known or believed to hold views that are in conflict with the republican form of government as set forth in the Constitution of the United States; and for election purposes, and for other meetings of public interest; provided that such use shall in no way interfere with school activities; such use to be for such compensation and upon such terms and conditions as may be fixed by said board for the proper protection of the schoolhouse and the property belonging therein, including that of pupils."

There have been numerous cases and Attorney General's opinions interpreting §297.9, Code of Iowa, and in each instance the maxim

expressio unius est exclusio alterius prevails. It is therefore well settled that with respect to §297.9, the enumeration of certain specific things operates as an exclusion of things not mentioned. In 1970 OAG 498 this office advised that the power of the school board did not include making school facilities available for lunches for senior citizens. Opinions at 1966 OAG 292, 1928 OAG 146, 1926 OAG 203 state that the power of the school board does not include the authority to rent classroom space to a parochial school board to be used for the purpose of religious instruction at times which would not interfere with the normal school activities of the school district. In 1932 OAG at 209 the Attorney General advised that neither the board nor electors have authority to authorize the use of school buildings for public or private dances not connected with school activities. The rationale for the limitation on the electors of the district is that their power (See §78.1(4), Code of 1971) is limited to meetings of public interest. That opinion further states:

"A public dance is not a matter of public interest. This would be especially true if a charge were made by those who were conducting it."

On the other hand, a subsequent opinion found in 1936 OAG at 196 advises that although no one has the right to demand the free use of the gymnasium or auditorium of a public school, the board may authorize its use anytime that such use does not interfere with regular school activities. However, this opinion does not refer to the Code section cited above, nor does it indicate the type of use prompting the request.

A distinction was made between proprietary and governmental function in the use of school buildings in 1940 OAG 232, wherein the question considered was whether or not there would be liability on the part of the school district for an injury received by an individual attending a grange meeting held in a rural school building. That opinion advised that since grange meetings were among those specified by the Code, there would be no liability.

In 1945, the case of *McLang v. Harper*, 236 Iowa 1006, 20 N.W.2d 454, held that a non-profit organization could lease an unused school building for a community center. The court construed the statute to permit the use on the ground that it would afford entertainment and give an opportunity to obtain educational and cultural improvement to both adults and juveniles and it would also result in an indirect benefit to the entire community. The power to sell or lease any schoolhouse or property acquired for school purposes when in the opinion of the board such sale is for the benefit of the district is now found, with limitations, in §297.22, Code of Iowa 1971. Under present statutory authority a school board and the city council may enter into a lease which provides that school land shall be used as a playground or recreational center. 1968 OAG 891. Such lease would also be authorized under §28E.3, Code of Iowa 1971, to effectuate the joint exercise of governmental powers.

In the situation you have presented there appears to be no primary benefit flowing to the public school district, no community purpose, nor use specifically authorized by statute. It is my opinion that use of the school gymnasium and equipment for private gym classes, even though such activity does not interfere with the ordinary activities of the school district, is not authorized.

January 28, 1972

STATE OFFICERS AND DEPARTMENTS: Department of Health — Sections 401 and 409.2 of Ch. 148, Acts of the 64th G.A. All medical facilities must be approved by the State Department of Health that are used for rehabilitative services pursuant to Section 409.2. (Corcoran to Reeve, Commissioner of Public Health, 1/28/72) #72-1-15

Arnold M. Reeve, M.D., M.P.H., Commissioner Public Health, State Department of Health: This is in response to your letter of November 11, 1971, in which you request the opinion of this office regarding the interpretation of Section 409.2 of Chapter 148, Acts of the 64th G.A. Your question regards whether approval by the State Department of Health of a medical facility is required before the Court can commit a violator of Section 401 of the Above Act to said facility.

Section 409.2 of the above Act states in part:

"[I]t may be ordered that he be committed as an in-patient or out-patient to a facility approved by the State Department of Health for such medical treatment and rehabilitative services. . . ."

A clear reading of the above-quoted section infers that the Court may commit a violator of Section 401 for medical treatment only to a facility approved by the State Department of Health.

You also ask the question of whether or not the requirement for approval by the State Department of Health applies to all facilities in the State providing such medical treatment and rehabilitative services. The above section does not distinguish any such facilities in the state, and therefore, it is our opinion, that all facilities require approval before they can be used pursuant to Section 409.2. Since the above section does not specify any particular qualifications, it is within the discretion of the department to set the requirements necessary to qualify a facility. This approval is only required for purposes of Section 409.2 and this opinion does not purport to effect the status of any such medical facilities as they operate outside Section 409.2.

January 28, 1972

CITIES AND TOWNS: Condemnation for Sanitary Disposal Projects — §§394.1 and 471.19, Code of Iowa, 1971. §394.1 provides authority for cities, towns, counties and sanitary districts to condemn land for sanitary disposal projects and §471.19 does not limit that authority. (Corcoran to Reeve, Commissioner of Public Health, 1/28/72) #72-1-16

Arnold M. Reeve, M.D., M.P.H., Commissioner of Public Health, State Department of Health: This is in response to your letter of November 12, 1971, in which you request the opinion of this office concerning whether Section 391.1 of the 1971 Code of Iowa provides authority for cities, towns, counties and sanitary districts to condemn land for sanitary disposal projects taking into consideration Section 471.19.

Section 394.1 provides in part:

"Cities, towns, counties and sanitary districts incorporated under the provisions of chapter 258 are hereby authorized and empowered to, . . . acquire by gift, grant, purchase, *or condemnation,* or otherwise, all necessary lands, right-of-way, and property thereof, within or without the said city, town, county or sanitary district, to purchase and acquire an interest in such sanitary disposal project. . . ." (Emphasis added.)

It appears from the above statute that the appropriate cities, towns, counties and sanitary districts have the authority to condemn private property, unless that authority is limited by some other section of the code.

Chapter 471 of the Iowa Code specifies the general rules and requirements of the applicability of eminent domain proceedings. Said chapter does not limit section 394.1 and, in fact, section 471.19 provides that:

"A grant in this chapter of a right to take private property for a public use shall not be construed as limiting a like grant elsewhere in the code for another and different use."

It is our opinion that the power of condemnation is authorized by section 394.1 and that the provisions of chapter 471 do not serve to limit that authorization.

February 1, 1972

ELECTIONS: Nomination papers — §§43.11 and 43.14, Code of Iowa, 1971. In the event the June, 1972, primary election is deferred because the supreme court's reapportionment plan is not completed in time, nomination papers containing the words "at the primary election to be held in June, 1972" would still be valid. (Haesemeyer to Harbor, Speaker of the House of Representatives, 2/1/72) #72-2-1

The Honorable William H. Harbor, Speaker of the House of Representatives: Reference is made to your letter of January 31, 1972, in which you state:

"With there being a distinct possibility that the June primary date might have to be changed, I am this date asking you to issue an Attorney General's Opinion as to signatures on nomination papers being valid. You will recall the date indicated on papers being issued by the Secretary of State is 'June 1972'. Should the date be changed, would the names on said nomination papers be valid, or could this be legalized through legislative action."

Section 43.14, Code of Iowa, 1971, sets forth the language found on the nomination papers furnished by the secretary of state and requires that nomination papers be in substantially that form. The language set forth in such §43.14 does conclude with the words "at the primary election to be held in June, 19....." However, §43.11 which specifies when nomination papers must be filed does not speak in terms of June or any other particular month and merely requires that nomination papers for various federal and state elective offices must be filed "not more than eighty-five days nor less than sixty-five days prior to the day fixed for holding said primary election."

In view of the foregoing and since §43.14 only requires that nomination papers be in *substantial* compliance with the specified form it seems to us that the secretary of state could if he had seen fit to do so have left out the word "June" in the forms he has furnished and in that event the month could have been filled in after it is ascertained when the primary election will in fact be held. As a practical matter, of course, the secretary of state no doubt had substantial supplies of the forms with the June date already printed on them and we have no way of being certain that the court will in fact set back the date of the 1972 primary beyond June.

In any event I do not think it is necessary that the date be changed on any nomination papers although there would be nothing wrong with doing this either. In either case the nomination papers would be valid and it does not appear to me that it is necessary that an act legalizing nomination papers bearing the June, 1972, language be passed should the supreme court defer the June, 1972, primary.

February 2, 1972

LIQUOR: BEER: PRIVATE CLUBS: CIVIL RIGHTS: LICENSES — §§ 105A.6 and 105A.2(10), Code of Iowa, 1971; Ch. 131, 64th G.A., First Session. Iowa Beer and Liq. Con. Department may issue and renew liquor and beer licenses of private clubs although membership is restricted to caucasians, because such clubs are not public accommodations except during times open to general public or where supported by public funds and state action in licensing is not involvement in discrimination. (Turner to Freeman and Gallagher, 2/2/72) #72-2-2

The Honorable Dennis L. Freeman, State Representative; Mr. Rolland A. Gallagher, Director, Iowa Beer & Liquor Control Department: Each of you have requested opinions, separately, as to whether the liquor license of a private club, such as an Elks Club, may be lawfully renewed by the Iowa Beer & Liquor Control Department, if the club restricts its membership to caucasians or otherwise discriminates by refusing or denying accommodations or services to a person because of race, creed, color, sex, national origin, or religion.

This question is further complicated by a conciliation agreement entered between the Iowa Civil Rights Commission and the Iowa Liquor Control Commission, on or about October 8, 1971, wherein it is provided as follows:

"THAT the Iowa Liquor Control Commission will not issue licenses to any private club whose membership is restricted to Caucasians only. This is in compliance with Executive Order Number Nine. A copy of said Order is enclosed,"

Executive Order No. Nine was executed by Governor Harold E. Hughes on or about May 14, 1964, and Article VII thereof provides as follows:

"Pursuant to the provisions of the 14th Amendment of the Constitution of the United States of America, all state licensing agencies shall insure that no license is granted, denied, or revoked on the basis of race, color, religion, national origin or ancestry. Where a duly constituted state authority, in an official and lawful proceeding, determines that a licensee has, in his capacity as such, *engaged in unlawful discriminatory practices under the Iowa Civil Rights Act,* any licensing authority responsible to the Governor shall institute such disciplinary action, including revocation of license, as may be provided by statute or other regulation. In the event of such determination by a duly constituted state authority, the licensing agency concerned shall consider prior to re-issuance of a state license whether said licensee has made a bona fide effort to comply with Iowa law." (Emphasis added).

The executive order purports to forbid the granting, denial or revocation of licenses "on the *basis* of" race, color, etc. "Basis" would appear to connote the "principal reason" for the granting, denial or revocation. I have no evidence that a liquor license has ever been granted, denied or revoked for any of those reasons. But assuming that it means "if the licensee discriminates" in these areas, it is clear that only *unlawful* discriminatory practices under the Civil Rights Act are meant.

For this reason and for reasons which hereinafter appear, it is unnecessary to consider herein the power of a governor to issue an executive order, or what its force or effect may be during his or a succeeding administration or upon agencies not yet in existence at the time the executive order is issued. It is also unnecessary to consider here whether the conciliation agreement itself is binding upon the new Iowa Beer and Liquor Control Department and its director when it was not executed by that department but rather by its predecessor, the Iowa Liquor Control Commission, which commission was "abolished and all rights, functions, and duties pertaining to the commission and its members" ceased on December 31, 1971. Chapter 131, §153(2), page 286, 64th G.A., First Session. See also §146 of said chapter at page 285.

In my opinion, the above quoted provision in the conciliation agreement was void ab initio as too broad in its force and effect and as an unconstitutional exercise of legislative power. The Iowa Civil Rights Act, Chapter 105A, Code of Iowa, 1971, specifically §105A.6 makes it an unfair or discriminatory practice for nearly anyone connected with a "public accommodation" to discriminate on the basis of race, creed, color, etc. §105A.2(10) defines "public accommodation" to mean:

"each and every place, establishment, or facility of whatever kind, nature, or class that caters or offers services, facilities, or goods *to the general public* for a fee or charge, provided that any place, establishment, or facility that caters or offers services, facilities, or goods to the general public gratuitously shall be deemed a public accommodation if the accommodation receives any substantial governmental support or subsidy. *Public accommodation shall not mean any bona fide private club or other place, establishment, or facility which is by its nature distinctly private,* except when such distinctly private place, establishment, or facility caters or offers services, facilities, or goods to the general public for fee or charge or gratuitously, it shall deemed a public accommodation during such period." (Emphasis added).

Clearly, the conciliation agreement has attempted to amend the statutory definition of "public accommodation" to include private clubs which the legislature expressly excluded from the definition. Such amendment is beyond the power of either commission and that provision of the agreement was void from its inception. Even the Federal Civil Rights Act excludes private clubs from the definition of public accommodation. Title 42 U.S.C.A. §2000a.(e).

Neither Congress nor any state legislature has, to my knowledge, attempted to regulate racial prejudice in such non-economic personal and social relationships and associations, as selection of a spouse, choice of friends or party guests, or membership in private clubs, nor have they for further example, prohibited private schools from discriminating on the basis of religion in admitting students. In my opinion such regulation, even by those *legislative* bodies, would be unconstitutional. 56 Iowa Law Review 473, 511, 526. It is unthinkable that the *executive* branch of government would so enter the social thicket by such use of its licensing power. Cf *Seidenberg v. McSorley's Old Ale House,* 1969, 308 F.Supp. 1253 (N.Y.), concerning a public bar catering only to men, and *Irvis v. Scott,* 1970, 318 F.Supp. 1246 (Pa.), where state regulations required every licensed club to adhere to all of the provisions of its constitution and by-laws.

This is not to say, however, that a private club which opens its doors to the public may not be regulated against such discrimination. Indeed, the Iowa Civil Rights Act defines "public accommodation" to include a private club which "caters or offers services, facilities, or goods to the general public for fee or charge or gratuitously — during such period." Thus, it is a discriminatory practice subject to the sanctions of Chapter 105A, for a private club to refuse or deny accommodations or services or otherwise to discriminate against any person because of race, creed, color, sex, etc. during any party to which the general public, as well as club members, has entree'. Moreover, a private club may become a public accommodation if it "receives any substantial governmental support or subsidy" (public funds). §105A.2(10).

There may also arise a question of fact, or a mixed question of fact and law, as to whether a private club created for the sole purpose of excluding members of a particular race or sex is a *bona fide* private club as specifically required to come within the public accommodations section. Such questions are for the liquor department and the courts, not the attorney general.

But in my opinion, when the legislature excepted bona fide private clubs from the definition of public accommodations, it intended to exclude the ordinary private clubs, such as Elks Clubs, so common in Iowa at the time the law was enacted. Whether such clubs do restrict their membership to caucasians, men or women, or members of certain religious denomination, or otherwise engage in discriminatory practices, is a question of fact which I am not prepared to decide. It is quite possible that all or some have quit such practices whether their national or local charters, constitutions and by-laws require them or not. Whether they do or not, the State is simply not legally concerned unless the general public or public funds are involved. The State's action in issuance or renewal of a State liquor license cannot be said to endorse, reject, support or condone any particular position on a question of pure morality. There is no State involvement in the discrimination merely because the liquor departmnet issues a license authorized under the Beer and Liquor Control Act. At least in absence of statute or court decision expressly requiring it, the new Iowa Beer and Liquor Control Department or its director need not refuse issuance or renewal of a liquor or beer license to a bona fide private club merely because it excludes non-caucasions from its membership.

February 2, 1972

CONSERVATION: Drawing for special deer hunting licenses — Article III, §28, Constitution of Iowa; §§109.38, 109.39, 726.8, Code of Iowa, 1971. Drawing for special deer hunting licenses where license fee is returned to unsuccessful applicants does not constitute illegal lottery. (Peterson to Small, State Representative, 2/2/72) #72-2-3

The Honorable Arthur Small, Jr., State Representative: Receipt is hereby acknowledged of your request for an opinion of the Attorney General as to whether:

". . . the present lottery method of awarding deer hunting licenses in Iowa could be considered a violation of the state's constitutional prohibition against lotteries."

Pertinent to your question is Section 28, Article III, Constitution of Iowa, which states:

"Sec. 28. No lottery shall be authorized by this State; nor shall the sale of lottery tickets be allowed."

Lottery schemes are also prohibited by Section 726.8, Code of Iowa, 1971, which defines a lottery in the following terms:

"When used in this section, lottery shall mean any scheme, arrangement, or plan whereby a prize is awarded by chance or any process involving a substantial element of chance to a participant who has paid or furnished a consideration for such chance."

Statutes governing issuance of special deer hunting licenses are, in pertinent part, as follows:

"§109.38 Prohibited acts — deer, raccoon and rough fish regulations. . . .

2. If following an investigation the commission finds that the number of hunters licensed to take deer should be limited or further regulated, the commission shall conduct a drawing to determine which applicants shall receive a license. Applications for licenses shall be received and accepted during a fifteen-day period established by the commission. At the end of such period the drawing shall be conducted. If the quota has not been filled, licenses shall then be issued in the order in which such applications are received and shall continue to be issued until such quota has been met or until a date fifteen days prior to the opening day of the season, whichever first occurs. If an applicant fails to receive a license by either of the methods provided herein, such applicant shall receive a certificate at the time his application and monetary remittance is returned to him which shall entitle him to a license the following year before the drawing is conducted by the commission.

"§109.39 Biological balance maintained. The open seasons, closed seasons, bag limits, size limits, catch limits, possession limits and territorial limitations set forth herein pertaining to fish, game and various species of wildlife are based upon a proper biological balance as hereinafter defined being maintained for each species or kind. The seasons, catch limits, bag limits, size limits, possession limits and territorial limitations set forth herein shall prevail and be in force and effect for each and every species of wildlife to which they pertain as long as the biological balance for each species or kind remain such as to assure the maintenance of an adequate supply of such species. The commission is hereby designated the sole agency to determine the facts as to whether such biological balance does or does not exist. If the commission, after investigation finds that the number and/or sex of each or any species or kind of wildlife is at variance to aforesaid condition, the commission shall be administrative order extend, shorten, open or close seasons and/or change catch limits, bag limits, size limits, and/or possession limits or areas in accordance with said findings. For the purpose of this section, biological balance is defined as that condition when all losses to population are compensated by natural reproductive activity or artificial replenishment, replacement or stocking. . . ."

We are advised that many more applications for special deer hunting licenses are received each year than can be issued consistent with the requirements of §109.39, and that a drawing is therefore necessary under §109.38, for example, investigation by the commission resulted in its adoption of an administrative order. Temporary Rule No. 6, effective September 1, 1971, restricting the number of special deer hunting licenses for the 1971 season to 18,000 for all zones (not including landowner-tenant licenses issued pursuant to §110.17, as amended).

The authorities uniformly agree that the three elements necessary to constitute a lottery are a prize, the element of chance, and a valuable consideration for the chance. *St. Peter v. Pioneer Theatre Corporation,* 1940, 227 Iowa 1391, 291 NW 164; *Brenard Mfg. Co. v. Jessup and Barrett Co.,* 1919, 186 Iowa 872, 173 NW 101.

Section 109.38, supra, requires the return of the license fee to unsuccessful applicants, and the applicants therefore do not provide consideration for the chance to receive a license.

We are, therefore, of the opinion that the present statutory method of awarding special deer hunting licenses by lot does not constitute an illegal lottery since the applicant for a license does not provide any consideration for the chance to receive such license.

February 2, 1972

COUNTIES AND COUNTY OFFICERS: Sanitary disposal projects — Chapters 394 and 471, Code of Iowa, 1971. Counties have the authority to condemn property for self-liquidating sanitary disposal projects under Chapter 394, but do not have the power of eminent domain for non-self-liquidating projects under Chapter 471. (Haesemeyer to Kruse, State Representative, 2/2/72) #72-2-4

The Honorable Walter W. Kruse, State Representative: I am writing in response to your oral inquiry today as to the necessity for the enactment of House File 1044 in view of a recent opinion of the Attorney General, Corcoran to Reeve, January 28, 1972.

House File 1044 would amend §471.4, Code of Iowa, 1971, as amended by §1 of Chapter 229, 64th G.A., First Session (1971), to add as one of the specified purposes for which counties could use the power of eminent domain the acquisition of lands as are necessary for public use as a county sanitary landfill. The January 28, 1972, opinion referred to above deals not with Chapter 471 but with Chapter 394 of the Code which is concerned with *self-liquidating* improvements. The opinion correctly concludes that cities, towns, counties and sanitary districts incorporated under the provisions of Chapter 258 do have the power under that chapter to condemn property for sanitary disposal projects. It is not in conflict with an earlier opinion of the Attorney General, Nolan to Thomas, November 4, 1971, which states that a county does not have the authority *under Chapter 471 of the Code* to condemn land for a county-wide landfill disposal operation because this is not one of the enumerated purposes for which the power of eminent domain is conferred under that chapter.

Thus, while counties already have the power of eminent domain under Chapter 394 to condemn property for a self-liquidating sanitary disposal project an amendment such as that contemplated by House File 1044 would be necessary to give counties the power of eminent domain with respect to a sanitary disposal project which is not self-liquidating.

February 3, 1972

TOWNSHIP TRUSTEES: Sale of land — §360.9, Code of Iowa, 1971. The sale of land located in the limits of a city or town and no longer needed for township purposes is authorized by §360.9, Code of Iowa, 1971. (Nolan to Buck, Marshall County Attorney, 2/3/72) #72-2-5

Mr. Max H. Buck, Marshall County Attorney: This letter responds to your request for an opinion on two questions:

"1. Have township trustees the authority to sell real estate?

"2. If they do have the authority to sell real estate, what section of the Iowa Code provides the township trustees with the proper procedure for said sale?"

We udnerstand that the subject of your inquiry is a parcel of land located in the town of Albion, Township of Iowa, Marshall County, Iowa. Therefore, we direct your attention to §360.9, Code of Iowa 1971, which provides in pertinent part as follows:

" * * *

"Any real estate including improvements thereon, situated within a city or town, owned by a township and heretofore used for township purposes and which is no longer necessary for township purposes, may be sold by the township trustees at public auction for the best bid.

" * * *

"Sales at public auction contemplated herein shall be made only after the township trustees advertise for bids for such property. Such advertisement shall definitely describe said property and shall be published by at least one insertion each week for two consecutive weeks, in some newspapers having general circulation in the township.

"The township trustees shall not, prior to two weeks after the said second publication, nor later than six months after the said publication, accept any bid. The township trustees may accept only the best bid received prior to acceptance. The township trustees may decline to sell if all the bids received are deemed inadequate."

Accordingly, your first question is answered affirmatively. The procedure requested as an answer to your second question is set out in the portions of the statute quoted above.

February 3, 1972

COUNTIES AND COUNTY OFFICERS: Board of Supervisors — open meetings — §§28A.1, 309.10, 309.22, 333.1(1), Code of Iowa ,1971. Meetings of the board of supervisors with township trustees pursuant to Code §309.10 and for the adoption of a comprehensive road program (§309.22) must be open to the public and the Auditor is required to take minutes of such meetings. Incidental exchanges of information between the board and the county engineering staff are not necessarily prohibited under §28A.1. (Nolan to Goetz, Johnson County Attorney, 2/3/72) #72-2-6

Mr. Carl J. Goetz, Johnson County Attorney: Your letter requesting an opinion on the application of the Public Meetings Law to three situations in Johnson County has been considered. The situations you present are:

"1. In most Iowa Counties, the Board of Supervisors will confer with the County Engineer and his staff, obtaining information, data, and advice prior to the adoption of a comprehensive road program under Section 309.22 of the Code of Iowa. The information received from the Engineering staff, together with the advice received from the Township Trustees, under Section 309.10 of the 1971 Code of Iowa, will eventually be reflected in the specific road program adopted by the Board of Supervisors.

"Our local County Engineer states that the Iowa Highway Commission regularly confers with its Engineering staff in private, and that such meetings are not open to the public, nor are minutes necessarily kept of such meetings. Our question is - - - is the receipt by the Board, of the type of information outlined above, a part of the 'deliberative process' which requires the Board of Supervisors to meet with its staff in a public meeting, and which requires the County Auditor present to keep minutes of such meetings?

"2. The Board of Supervisors, as a body, regularly conducts inspection trips of road projects, work progress, examines road conditions, and during the course of such inspection trips, confers and receives advice from the County Engineer and his staff. This advice often results in decisions by the Board of Supervisors concerning road matters. It is impossible to predict when the Board of Supervisors will be receiving information which may eventually lead to some type of action by the Board. Is the receipt of this type information a part of the deliberative process? Should the Board of Supervisors notify the Press of such inspection trips and must the County Auditor accompany the Board during these trips to take minutes of these inspection trips?

"3. Section 28A.5 requires that minutes be kept of all meetings of the bodies defined in Section 28A.1 of the Code of Iowa. Section 333.1(1) indicates that the County Auditor is required to record all proceedings of the Board of Supervisors in the proper books. Must the County Auditor be present at all meetings of the Board of Supervisors in order to take minutes?"

The statute in question here, §28A.1, Code of Iowa 1971, provides in pertinent part:

"All meetings of the following public agencies shall be public meetings open to the public at all times, and meetings of any public agency which are not open to the public are prohibited, unless closed meetings are expressly permitted by law:

* * *

"2. Any board, council, commission, trustees, or governing body of any county . . . . .

* * *

"Wherever used in this chapter . . . 'meeting' or 'meetings' includes all meetings of every kind, regardless of where the meeting is held, and whether formal or informal."

In previous opinions interpreting this section of the Code, we have said that meetings of committees of a board are open to the public except for the Code's three authorized exceptions. "The exceptions are precise and narrow . . . and the operation of these statutes, depend upon the good sense and the good faith of those who apply them and are bound by them. The law presumes both of these . . ." Op. Turner to Johnston, 6/16/71.

The opinion, supra, also pointed out that a "meeting" is an assembling of a number of persons for purpose of discussing and acting upon some matter of common interest. "Where there is consultation and discussion of public business there is a 'meeting' subject to this statute." Devices such as "just getting together to talk things over" cannot legally be used to avoid the scope of the statute.

With respect to §§309.10 and 309.22, Code of Iowa 1971, which are set out below, it is my opinion "meetings" held pursuant to either section are deliberative sessions and must be open to the public.

§309.10:

"In the preparation of the county secondary road program required by section 309.22 the board of supervisors shall meet and consult with the township trustees as to the improvements needed for the secondary roads in the various townships."

§309.22:

"On or before the first day of December of each year the board of supervisors shall, subject to the approval of the state highway commission, adopt a comprehensive program for the next calendar year based upon the construction funds estimated to be available for such year. . . ."

Thus, the meeting at which the road program is discussed with the township trustees and the meeting where the comprehensive program for the ensuing calendar year is adopted by the supervisors are *open meetings*. However, mere exchange of incidental information between the supervisors and the county engineering staff are not necessarily a part of the deliberative process culminating in the adoption of such plan by the board.

Accordingly, in answer to your first and second questions, neither the press nor the Auditor is required to be advised of or attend a staff meeting or an inspection trip.

The answer to your third question is affirmative. The Auditor is required to be present and take minutes of the meetings (i.e. public and open meetings) of the Board of Supervisors in order to perform the duties prescribed by §§333.1 and 331.19, Code of Iowa 1971.

February 3, 1972

CITIES AND TOWNS: County operation of city hospitals; and lease of equipment for city hospitals — §§347.13, 347.14, 347.23 and Ch. 380, Code of Iowa, 1971. Counties may take over the operation of city hospitals pursuant to §347.23. Trustees of Ch. 380 hospitals may lease hospital equipment. (Blumberg to McNeal, Hardin County Attorney, 2/3/72 #72-2-7

Mr. Clark E. McNeal, Hardin County Attorney: I am in receipt of your letter of January 23, 1972, in which you request an opinion from this office. You asked:

"1. Would Chapter 347.23 of the 1971 Code of Iowa authorize Hardin County to take over the ownership and operation of the Municipal Hospitals presently located at Eldora, Iowa, and Iowa Falls, Iowa?

2. Can the Trustees of the hospitals being operated under the provisions of Chapter 380 of the 1971 Code of Iowa enter into a contract for leasing of hospital equipment for a term of four (4) years or more?"

Section 347.23, 1971 Code of Iowa, provides that a city hospital, organized under Chapter 380 of the Code, may become a county hospital. In order to do so, a request of five percent of the voters at the last gubernatorial election must be made to the county board of supervisors, who will then put forth a proposition to the electors of the county. This proposition must be approved by a majority of the electors in both the city and the county. This means that the proposition must be passed by the city.

Three hypotheticals can be used to explain this further. In the first,

the voters of the city do not pass the proposition. At this point the proposition fails, regardless of what the entire county vote is. In the second, the vote passes the city, but the entire county vote (including the city) is against the proposition. In this instance, the proposition also fails. The third hypothetical involves the city passing the proposition with the same result for the entire county. Here, and only here, can the proposition pass. Thus, a county may take over operation of a city hospital, organized under Chapter 380, if the voters so desire.

Chapter 380 hospitals are those provided for by section 368.27 of the Code. Section 380.6 provides that the trustees of the hospital are vested with the authority to provide for its management, control and government. Section 380.16 extends this by granting to the trustees "all of the powers and duties necessary for the management, control and government of such institutions, specifically including but not limited to any applicable powers and duties granted boards of trustees under other provisions of the Code relating to hospitals, nursing homes, and custodial homes . . . ." Thus, if the power to lease is vested with other boards of trustees, then the same is applicable here.

Section 347.13(1) and (2) provides that the county board of hospital trustees shall:

"(1) Purchase, condemn, or lease a site for such public hospital, and provide and equip suitable hospital buildings.

"(2) Cause plans and specifications to be made and adopted for all hospital buildings and equipment, and advertise for bids, as required by law for other county buildings, before making any contract for the construction of any such building or the purchase of such equipment."

Section 347.14(10) provides:

"Do all things necessary for the management, control and government of said hospital and exercise all the rights and duties pertaining to hospital trustees generally, unless such rights of hospital trustees generally are specifically denied by this chapter, or unless such duties are expressly charged by this chapter."

Accordingly, this office has held that county hospital trustees may lease equipment for a hospital. 70 O.A.G. 542. Thus, pursuant to section 380.16, trustees of Chapter 380 hospitals may lease equipment for the hospitals, even on a lease purchase agreement. See O.A.G. 542.

From further conversations with you, we find that the equipment intended to be leased would take four years to pay for under a lease purchase agreement. The question thus becomes whether the lease can extend for this four year period. Section 380.1 provides that the terms of the trustees thereunder shall be for six years. Therefore, there does not appear to be a problem of binding future boards since this lease is for only four years.

In summary then, we are of the opinion that (1) counties may take over the operation of city hospitals pursuant to section 347.23; and (2) trustees of Chapter 380 hospitals may enter into a lease purchase agreement for hospital equipment, which lease shall be of a period of four years.

February 8, 1972

STATE OFFICERS AND DEPARTMENTS: State Vehicle Dispatcher, unauthorized use of state cars — §§ 21.2, 21.4, 21.5, Code of Iowa, 1971, as amended by Chapter 84, 64th G.A., First Session (1971) and §740.20, Code of Iowa, 1971. A "client" or other inmate of a state institution is not ordinarily considered to be a state employee. There is no authority for the use of state vehicles by anyone other than a state officer or employee and it is within the power of the state vehicle dispatcher to revoke the assignment of a state car anytime he finds it being used by someone else. (Turner to Crabb, State Car Dispatcher, 2/8/72) #72-2-8

Mr. Frank Crabb, State Car Dispatcher: By your letter of August 3, 1971, and your follow-up letters of November 16, 1971 and February 3, 1972, you have requested an official opinion of the attorney general as follows:

"We have had some problems with a vehicle assigned to the Half-Way House here in Des Moines. This vehicle has been driven by one of their 'clients', who of course is not a state employee.

"We shall appreciate you giving us an opinion regarding other than state employees driving state vehicles."

§21.2, Code of Iowa, 1971, as amended by Chapter 84, §73, 64th G.A., First Session, prescribes the duties of the State Car Dispatcher, among which is the following:

"He shall assign to a state officer or employee or to a state office, department, bureau, or commission, one or more motor vehicles which may be required by the officer or department, after the officer or department has shown the necessity for such transportation. The state vehicle dispatcher shall have the power to assign a motor vehicle either for part time or full time. He shall have the right to revoke the assignment at any time."

§21.4, as so amended by §75, provides as follows:

"No state officer or employee shall use any state-owned motor vehicle for his own personal private use, nor shall he be compensated for driving his own motor vehicle except if such is done on state business and in such case he shall not receive more than ten cents per mile."

§21.5, as so amended by §76, provides:

"Any state officer or employee found guilty of violating the rules and regulations of the state vehicle dispatcher shall, upon conviction, be fined not to exceed $100.00 or imprisonment not to exceed thirty days in the county jail."

§740.20, Code of Iowa, 1971, provides:

"No public officer, deputy or employee of the state or any governmental subdivision, having charge or custody of any automobile, machinery, equipment, or other property, owned by the state or a governmental subdivision of this state, shall use or operate the same, or permit the same to be used or operated for any private purpose."

Under the first of the above quoted sections, it is readily apparent that the car dispatcher can not assign a state motor vehicle to anyone except a state officer or employee or to a state office, department, bureau, or commission. While it does not appear improper for a state officer or employee to permit use of such vehicle by another state officer or employee for state business, there appears no authority for use of such a

vehicle by anyone other than a state officer or employee and it is clearly within the power of the car dispatcher to revoke the assignment at any time he finds the state officer or employee allowing the vehicle to be used by someone else.

Moreover, the car dispatcher has powers under the statute to make rules and regulations under which he could so restrict the use.

Beyond that, under §740.20 cited above, and under §740.22, it is a misdemeanor for a public officer, deputy or employee to use a state automobile, or permit its use by another, for any private purpose.

A "client" or other inmate of a state institution is not ordinarily considered to be an employee. Thus, any use of a state vehicle by any such client or inmate should be allowed only under the most careful supervision, and then only for state business. If the car dispatcher finds the vehicle is not being so used, he should revoke the assignment thereof and report the matter to the county attorney for investigation and possible prosecution.

February 8, 1972

CITIES AND TOWNS: Bonding for improvements and repairs to swimming pools. Chapter 394, Code of Iowa, 1971. A city may issue revenue bonds for improvements and repairs to a city swimming pool. (Blumberg to Harbor, Speaker of the House, 2/8/72) #72-2-9

Honorable William H. Harbor, Speaker of the House, House of Representatives: I am in receipt of your letter of January 31, 1972, wherein you requested an opinion as to whether a city has within its powers the power to issue bonds or go into a bonding situation for park improvements. Your question is specifically directed to swimming pools.

Chapter 394, 1971 Code of Iowa, entitled "Self Liquidating Improvements," appears to be controlling. Section 394.1 states that cities and towns are authorized and empowered to "own, acquire, establish, construct, purchase, equip, *improve*, extend, operate, maintain, *reconstruct* and *repair* . . . works and facilities" for the treatment and collection of wastes, and "also swimming pools . . . ." [Emphasis added.] Cities are also given the power here to "issue revenue bonds to pay all or any part of the cost of establishing, acquiring, purchasing, constructing, equipping, *improving*, extending, *reconstructing*, *repairing* . . . such works and facilities . . . ." [Emphasis added.] "Works" and "facilities" as used in Chapter 394 are not limited to sanitary disposal projects. Section 394.1.

Section 394.6 provides that cities and towns may borrow money from the federal government by issuing revenue bonds, borrow money by issuing revenue bonds, or sell such bonds at a public sale as provided for in Chapter 75, for the payment of any costs of any of the projects or improvements referred to in Chapter 394. Therefore, it is apparent that a city may issue revenue bonds for improvements and repairs to a city swimming pool. This opinion does not make any reference to bonding for other park or recreational repairs.

February 8, 1972

SCHOOLS: Employees sick leave and retirement — §§ 279.12, 279.13 and 279.40, Code of Iowa, 1971. The school board has no discretion to pay

accumulated sick leave at termination of the employee's service as a retirement or death benefit for the employee or the family of the employee. The board has no authority to pay such amount at any rate other than "full pay". (Nolan to Ottesen, Assistant Scott County Attorney, 2/8/72) #72-2-10

Mr. Realff H. Ottesen, Assistant Scott County Attorney: Your letter requesting an Attorney General's opinion on the legality of a policy established by the Bettendorf Community School District has been received in this office. A copy of the Memorandum of School Policy on Personal Illness enclosed with your letter states:

"Certified Personnel shall be granted leave of absence for personal illness or injury not covered by Workmen's Compensation, in the following minimum amounts:

"1. The first year of employment ..... 10 days
2. The second year of employment ..... 11 days
3. The third year of employment ..... 12 days
4. The fourth year of employment ..... 13 days
5. The fifth year of employment ..... 14 days
6. The sixth and subsequent years of employment ..... 15 days

"Accumulative to 90 days, with 5 days per year accumulative each year thereafter.

"Accumulated personal illness accumulated to age 65 may be drawn as a lump sum at time of retirement or as a death benefit to members of family at the prevailing substitutes rate. Accumulated personal illness leave accumulated after age 65 is not allowed as a retirement and/or death benefits."

Where a school board has acted pursuant to law, its action must be regarded as at least being primafacie correct. *Board of Directors of Independent School District of Waterloo v. Green,* 1967, 258 Iowa 1260, 147 NW 2d 854. The operation of the public schools is vested in the duly elected directors of the local school board. Power to fix the terms and conditions of public employment is a legislative function. *Board of Regents v. United Packing House Workers,* 1970, 175 N.W.2d 110. The school board is vested with the power to make all necessary and proper contracts. §§ 279.12 and 279.13, Code of Iowa 1971.

In previous Attorney General opinions it has been stated that the aggregate amount of leave granted or any unused portion thereof may be used by the employee at any time during his employment in the same school district. 1952 OAG 84. Such leave of absence is deemed a privilege granting to the employee a benefit during the time of his employment. 1952 OAG 92. A teacher may continue to earn sick leave while on a leave of absence. 1954 OAG 154.

It appears to be an established administrative practice of long standing that accumulated sick leave expires on the date of separation from public employment and employees are not reimbursed for unused leave.

Section 279.40, Code of Iowa 1971, provides:

"Public school employees are granted leave of absence *for personal illness or injury* with full pay in the following minimum amounts:

"1. The first year of employment ..... 10 days.
"2. The second year of employment ..... 11 days.
"3. The third year of employment ..... 12 days.

"4. The fourth year of employment ..... 13 days.
"5. The fifth year of employment ..... 14 days.
"6. The sixth and subsequent years ..... 15 days.

"The above amounts shall apply only to consecutive years of employment in the same school district and unused portions shall be cumulative to at least a total of ninety days. The school board shall, in each instance, require such reasonable evidence as it may desire confirming the necessity for such leave of absence.

"Nothing in this section shall be construed as limiting the right of a school board to grant more time than the days herein specified.

"Cumulation of sick leave by virtue of this section shall not be affected or terminated by reason of the organization of a community school district or districts which include all or the portion of the district which employed the particular public school employee for the school year previous to such organization, if such employee is employed by one of such community school districts for the first school year following its organization." [Emphasis added]

I am of the opinion that although the statute permits a board in its discretion to grant more sick leave time than the number of days stated, it clearly limits the granting of such sick leave to employees for "personal illness or injury". Expressio unius est exclusio alterius. Consequently, the board may not pay an employee or his family for unused accumulated "sick leave" as a retirement or death benefit.

Further, §279.40, Code of Iowa, requires that sick leave shall be granted "with full pay". Accordingly, any payment "at the prevailing substitutes rate" would be inconsistent with this section of the Code.

February 15, 1972

COURTS: Justice of the peace — §601.131, Code of Iowa, 1971. A justice of the peace in a township of less than ten thousand population may not recover his office expenses under §601.131. (Blumberg to Yenter, Deputy State Auditor, 2/15/72) #72-2-11

Mr. Ray Yenter, Deputy State Auditor: In your letter of January 25, 1972, you requested an opinion relative to expenses recoverable by a justice of the peace. Specifically, your question is whether a justice of the peace in an Iowa township of less than ten thousand population and who is maintaining his office at his home is entitled to office rental or office space, other than as provided for by section 601.131(4) of the Code.

Section 601.131(4), 1971 Code of Iowa, provides:

"Justices and constables in all townships having a population of ten thousand and over shall retain such civil fees as may be allowed by the board of supervisors, not to exceed five hundred dollars per annum . . . for expenses of their offices actually incurred and shall pay into the county treasury all the balance of the civil fees collected by them."

There does not appear to be any other section of the Code which would authorize the Board of Supervisors to pay office expenses. In fact, by specifically limiting the payment of office expenses to those townships which have populations of ten thousand or above, the legislature appears to have prohibited the payment of office expenses in townships below that population. "Where in a statute the performance of an act is limited to a particular form or manner, it excludes every other form or manner." *District Tp. of City of Dubuque* vs. *City of Dubuque*, 1858, 7 Iowa (7

Clarke) 262; *State v. Hanson,* 1930, 210 Iowa 773, 231 N.W. 428.

On the basis of the above, we are of the opinion that the Board of Supervisors may not authorize payment of the office expenses of a Justice of the Peace in a township with a population below ten thousand.

February 15, 1972

ELECTIONS: Precincts required in cities and towns — §49.5, Code of Iowa, 1971, as amended by Chapter 98, §22 and Chapter 99, §2, 64th G.A., First Session (1971). A city having a population in excess of 3500 must form election precincts. (Haesemeyer to Synhorst, Secretary of State, 2/15/72) #72-2-12

The Honorable Melvin D. Synhorst, Secretary of State: Reference is made to your letter of January 27, 1972, in which you request an opinion of the attorney general with respect to the matter which was presented to you by Mr. Earl T. Klay, Orange City, Iowa. In a letter to you dated January 24, 1972, Mr. Klay said:

"The city of Orange City has been contacted by a commercial company offering to assist the city in identifying precincts within the city to comply with the above-titled Section. Be advised that the city of Orange City has elected all of its elected officials at large and has never been divided into wards or precincts.

"In reading the opening paragraph of Section 49.5 as amended, it is indicated that the dividing of the city into election precincts is permissive and not mandatory. I should be pleased for you to advise me as to whether or not Section 49.5 is being considered as mandatory and that the City of Orange City would be required to divide itself into precincts or whether it is permissive and that the city of Orange City can continue to elect its officials on an at large basis. You are also advised that the population of the city of Orange City does now exceed 3,000 people."

Section 49.5, Code of Iowa, 1971, as amended by chapter 98, §22 and chapter 99, §2, 64th G.A., First Session (1971) provides:

"49.5 City Precincts. The council of a city may, from time to time, by ordinance definitely fixing the boundaries, divide the city into such number of election precincts as will best serve the convenience of the voters.

"Election precincts shall be as nearly equal population as possible within the limitations of reliable data on the populations of various parts of such city, and the boundaries of each precinct shall follow the boundaries of areas for which official population figures are available from the most recent federal decennial census. Every precinct shall be contained wholly within an existing legislative district. No election precinct shall have a total population in excess of three thousand five hundred, as shown by the most recent federal decennial census, except that:

"1. If in any area of the city it is not possible to devise a contiguous precinct having a population of less than three thousand five hundred by the most recent federal decennial census, because one or more of the smallest population units for which census data are available are composed of noncontiguous territory, the city council may utilize other reliable and documented indicators of population distribution in establishing precincts within that area.

"2. Where an unavoidable conflict arises between the requirements of this section relating to population of precincts and the requirement that each precinct be contained wholly within an existing legislative district, the latter requirement shall take precedence.

"The council shall make any changes necessary to comply with this

section no earlier than July first and not later than December thirty-first of each year immediately following a year in which the federal decennial census is taken, unless the general assembly by joint resolution establishes different dates for such compliance. Any or all of the publications required by section 49.11 may be made after December thirty-first if necessary.

"Nothing in this section shall prohibit a city council which has complied with the applicable requirements of this section by December thirty-first of any year following a year in which the federal decennial census is taken, from thereafter changing the boundaries of any precinct in the manner and within the limitations provided by this section, at any time prior to or during the year in which the next federal decennial census is taken, if the council concludes that the changes in precinct boundaries are necessary to best serve the voters affected.

"The secretary of state shall be notified when precinct boundary lines are changed and a map delineating the new boundary lines supplied."

It is to be observed that the maximum size of any election precinct is 3,500. You indicate that the poplation of Orange City now exceeds 3,000 but you do not state whether or not it exceeds 3,500. However, the secretary of state's office advises that according to the 1970 census the population of Orange City is 3,572. This being so it is our opinion that at least two election precincts would have to be formed in the city of Orange City.

February 15, 1972

ELECTIONS: Political party precinct caucuses — §43.4, Code of Iowa, 1971. The office of the Secretary of State has no statutory authority, duty or responsibility to intercede in the internal affairs of any political party. (Haesemeyer to Synhorst, Secretary of State, 2/15/72) #72-2-13

The Honorable Melvin D. Synhorst, Secretary of State: Reference is made to your letter of February 2, 1972, in which you state:

"In the last few days there have been news stories published about problems arising in certain political party precinct caucuses in Des Moines. An editorial writer has asked me what this office is doing about it. No complaint has been filed with this department.

"What authority does this department have to intercede in matters of this kind, and in general what statutory duty, responsibility or authority does this office have in intra political party affairs?

"We are, of course, aware of our duties relating to primary, general and special elections."

Section 43.4, Code of Iowa, 1971, provides:

"43.4 Political party precinct caucuses. Delegates to county conventions of political parties and party committeemen shall be elected at precinct caucuses held not later than the second Monday in May of each election year. The state central committee of each political party shall set the date for said caucuses. In accordance therewith, the county central committee of each political party shall issue the call for said caucuses. The county chairman shall file with the county auditor the meeting place of each precinct caucus at least seven days prior to the date of holding such caucus.

"There shall be selected among those present at a precinct caucus a chairman and a secretary who shall forthwith certify to the county central committee and the county auditor the names of those elected as party committeemen and delegates to the county convention.

"The central committee of each political party shall notify the delegates and committeemen so elected and certified of their election and of the time and place of holding the county convention. Such conventions shall be held either preceding or following the primary election but no later than ten days following the primary election and shall be held on the same day throughout the state."

The actual conduct of political party precinct caucuses is a matter which the legislature has left largely to the discretion of the political parties involved. While §43.4 sets forth some general requirements with respect to the holding of such caucuses it does not purport to regulate the minutia of their operation.

We have been unable to find any statutory provisions which would require or permit you to intercede in the internal affairs of any political party.

February 15, 1972

ELECTIONS: Candidate as election judge — §49.13, Code of Iowa, 1971. A councilman who is a candidate for election is not disqualified from serving as a judge of the election. (Haesemeyer to Bradley, Keokuk County Attorney, 2/15/72) #72-2-14

Mr. Glenn M. Bradley, Keokuk County Attorney: You have requested an opinion of the attorney general on the question of whether or not a councilman who is also a candidate for election is disqualified from serving as a judge of the election.

Section 49.13, Code of Iowa, 1971, provides:

"49.13 Judges in cities and towns. In cities and towns, the councilmen shall be judges of election; but in case more than two councilmen belonging to the same political party or organization are residents of the same election precinct, the county board of supervisors may designate which of them shall serve as judge."

In an earlier opinion of the attorney general, 1930 OAG 357, it was held that a candidate for county office at the general election could serve as a judge or clerk at the election. And in 1962 OAG 202, it was found that there is no statute preventing a candidate for precinct committeeman from working as a judge or a clerk at a primary election.

Accordingly, it is our opinion that since §49.13 clearly contemplates that city councilmen shall serve as judges of election then the legislature must have known that some councilmen would from time to time run for reelection. A councilman who is a candidate for election is not disqualified from serving as a judge of the election.

February 15, 1972

COUNTIES AND COUNTY OFFICERS: County Officers — §§39.21, 332.2, 601.15, Code of Iowa, 1971. The board of supervisors is not required to provide courtroom facilities for the Justice of the Peace. (Nolan to Gottschald, Warren County Attorney, 2/15/72) #72-2-15

Mr. Robert A. Gottschald, Warren County Attorney: Reference is made to your request for an opinion. Your letter states:

"According to Section 39.21 of the Code of Iowa (1971), Justices of the Peace and Constables are to hold office for two years and be county officers. According to Section 332.2(11) and (15), the Board of Supervisors

are to provide suitable rooms for county purposes and to build, equip and keep in repair the necessary rooms of the county and of the Court.

"The question I need answered is whether or not the county Board of Supervisors has an obligation to provide courtroom facilities for the Justice of the Peace, and also whether or not a Justice of the Peace is considered a county officer."

In answer to your question we advise that the Justice of the Peace is clearly a county officer under §39.21, Code of Iowa, 1971, and the Justice of the Peace has jurisdiction coextensive with the county when not specially restricted. Section 601.1, Code of Iowa 1971. Hwoever, to retain fees the proceedings must be held in the township where the Justice of the Peace is elected. 1962 OAG 178.

There is no obligation for the county Board of Supervisors to provide courtroom facilities for the Justice of the Peace. The obligation of the Board is specified in §601.15, Code, as follows:

"The board of supervisors of each county shall furnish to each justice of the peace thereof a well-bound blank record book of not less than four quires, with index, suitable for a docket, upon his certificate that the same is necessary for the business of the office."

There appears to be no statutory requirement that the supervisors provide courtroom facilities for the Justice of the Peace, and the general provisions of §332.2 should not be interpreted as enlarging the specific provisions of §601.15.

February 16, 1972

COUNTIES AND COUNTY OFFICERS: Zoning Commission — §358A.8, Code of Iowa, 1971. A majority of seven members of a 12 member zoning commission is required to hold a valid meeting for the purpose of adopting recommendations pursuant to Code §358A.8. Actions taken when there is no quorum are neither valid nor final. The offices of county supervisor and zoning commissioner are incompatible. (Nolan to Avery, Clay County Attorney, 2/16/72) #72-2-16

Mr. Stephen F. Avery, Clay County Attorney: Reference is made to your request for an opinion concerning certain action by a county zoning board. Your letter states:

"On November 18, 1968, the Clay County Zoning Board met to consider the rezoning of a tract of agricultural property from 'A' Agricultural District to 'I' Industrial District to allow the City of Spencer to construct a sewage waste treatment plant. The meeting on November 18, 1968, was attended by six of the twelve members of Zoning Board, and one of those six was also a member of the Board of Supervisors of Clay County. I would respectfully like your opinion as to whether or not the six of twelve members of the Zoning Commission was a quorum; whether or not they can legally transact business with six of twelve present; and whether or not the office of a member of the Board of Supervisors and a member of the County Zoning Commission are compatible offices; and whether or not action taken by that body on November 18, 1968, rezoning from agricultural to industrial is legal and binding action."

Answering your first question, it is my opinion that six members of a twelve member board are not a sufficient number to constitute a quorum to do business. The general and well established rule, recently restated by the 64th General Assembly of Iowa is that:

"A quorum of a public body is a majority of the number of members fixed by statute." (Ch. 77, Sec. 14(5), Acts, 64th G.A., 1 Session)

Although the statute providing for the County Zoning Commission (§358A.8, Code of Iowa 1971) does not prescribe a given number of members, it does state how they are to be appointed. Thus, a number is made certain:

§358A.8:

"In order to avail itself of the powers conferred by this chapter, the board of supervisors shall appoint a commission, to be known as the county zoning commission, to recommend the boundaries of the various original districts, and appropriate regulations and restrictions to be enforced therein. Such commission shall, with due diligence, prepare a preliminary report and hold public hearings thereon before submitting its final report; and the board of supervisors shall not hold its public hearings or take action until it has received the final report of such commission. After the adoption of such regulations, restrictions, and boundaries of districts, the zoning commission may, from time to time, recommend to the board of supervisors amendments, supplements, changes or modifications."

Whether or not such commission can legally transact business with six of the twelve members present, is in my estimation, a different question and depends upon what they attempt to do. If their action is to hold hearings and work on preliminary reports, I would say that the commission could legally designate any number of their members to perform this function. However, the adoption of a final report to be submitted to the Board of Supervisors requires the action of the commission as a whole and a quorum of seven members would be required at the meeting where the commission adopts its final report.

Secondly, the offices of supervisor and zoning commissioner are not, in my opinion, compatible offices for the reason that the Code §358A.8 establishes a public policy that the county board of supervisors shall not act in zoning matters without the independent recommendations of the zoning commission as to the boundaries of the various original districts and appropriate regulations and restrictions to be enforced therein. Two public offices are incompatible where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both. *State v. White*, 1965, 257 Iowa 606, 133 N.W.2d 903.

In answer to your last question, action by the Zoning Board in the form of recommendations to the Board of Supervisors is neither valid nor final if there was no quorum of the Zoning Board when such recommendations were adopted.

February 16, 1972

STATE OFFICERS AND DEPARTMENTS: Board of Examiners for Nursing Home Administrators — 45 C.F.R. §252.40; §§147.118 and 147.126, Code of Iowa, 1971. The Iowa State Board of Examiners for Nursing Home Administrators has the power and duty to investigate proprietary, nonprofit and governmental nursing homes. Such an investigation does not require a search warrant. (Blumberg to Campbell, Iowa State Board of Examiners for Nursing Home Administrators, 2/16/72) #72-2-17

Mr. Robert V. Campbell, Board Member, Iowa State Board of Examiners for Nursing Home Administrators: In your letter of February 3, 1972, you requested an opinion regarding Chapter 1085, Acts of the 63rd General Assembly, second session, now sections 147.118 through 147.130, Code of Iowa, 1971. You specifically asked:

"1. May members of this Board enter profit, not for profit, state and local government licensed nursing homes to examine all records, methods of operation, and facilities for the evaluation of the administrators performance?

"2. May the above be done without the use of a search warrant?"

The statutes in question are patterned after federal rules promulgated under the Social and Rehabilitation Service of the Department of Health, Education and Welfare. 35 Fed. Reg. 3968 (1970). 45 C.F.R. §252.40(a) states that the purpose of the rules is to establish procedures for states to follow to comply with the requirement for states participating in a Title XIX program of the Social Security Act to establish programs for the licensure of administrators of nursing homes.

Section 147.118(1), 1971 Code of Iowa, defines "Board" as "the Iowa state board of examiners for nursing home admiinstrators." The definition for "Nursing Home" is basically the same in both the federal rules and the Iowa Code. Section 147.118(3) provides:

" 'Nursing home' means any institution or facility, or part thereof, defined as such for licensing purposes under state law or pursuant to the rules and regulations for nursing homes established by the state department of public health, whether proprietary or nonprofit, including but not limited to, nursing homes owned or administered by the federal or state government or an agency or political subdivision thereof."

The federal rules set forth the functions and duties of such agency or board. These duties are the same as those enumerated in section 147.126, Code of Iowa. Section 147.126(6) states that it shall be the duty of the board to:

"Conduct a continuing study and investigation of nursing homes and administrators of nursing homes, in this state with a view to the improvement of the standards imposed for the licensing of such administrators and of procedures and methods for the enforcement of such standards with respect to administrators of nursing homes who have been licensed as such."

45 C.F.R. §252.40(c)(2)(vi) is similar. From this section it is obvious that the Board has the power and authority to investigate proprietary, nonprofit and governmental nursing homes.

Webster's New World Dictionary defines "investigate" as "to search into; examine in detail; inquire into systematically." Black's Law Dictionary defines "investigation" as "[t]o follow up step by step by patient inquiry or observation; to trace or track mentally; to search into; to examine and inquire into with care and accuracy; to find out by careful inquisition; examination . . . ." Thus, it is apparent that by its investigation, the Board may examine records, methods of operation, and facilities for the evaluation of the administrator's performance.

Your second question concerns the need for a search warrant while making these investigations. It must be remembered that these investi-

gations are statutory and mandatory, and are not of a criminal nature. If an investigation reveals that an administrator has not followed the prescribed standards, criminal sanctions will not, nor cannot be imposed. An abundance of court decisions relating to administrative inspections without search warrants exist, the most recent being *Wyman* v. *James*, 1971, 400 U.S. 309, 91 S.Ct. 381, 27 L.Ed.2d 408. In that case, a recipient of ADC benefits refused to permit a caseworker to visit her home in compliance with New York statutory and administrative provisions. The Supreme Court of the United States held that such an investigation cannot be equated with a search in the traditional criminal law context. The court went on to hold that even if it was a search, such investigation was reasonable and therefore not within the Fourth Amendment's proscription.

That case and its holdings are applicable here. Such an investigation of the Board is not a search since criminal sanctions are not involved. In addition, such an investigation is reasonable, and does not constitute an unwarranted invasion of privacy. For other cases on this subject, see *Harkey* v. *deWetter*, 443 F.2d 828 (5th Cir. 1971); *United States* v. *Hofbrauhaus of Hartford, Inc.*, 313 F.Supp. 544 (D. Conn. 1970); *State* v. *Rees*, 1966, 258 Iowa 813, 139 N.W.2d 406; *State* v. *Russo*, 470 S.W.2d 164 (Mo. App. 1971).

In summary then, we are of the opinion that the Board may conduct investigations of nursing homes to determine whether the nursing home administrators are acting in accordance with the prescribed standards, and that these investigations may be made without search warrants.

February 16, 1972

HIGHWAYS — Primary Road Funds — Billboards — Signs — Junk Yards — Art. VII, §8; §§312.1, 312.2, 313.1, 313.3, 313.4, 313.5, 307.7, Code of Iowa, 1971. Billboards, signs and junk yards outside the right-of-way on lands adjacent to public highways are not part of the highways and the 1942 anti-diversion amendment to the Constitution prevents use of primary road funds for purchasing same. (Turner to Holden, State Representative, 2/16/72) #72-2-18

Honorable Edgar H. Holden, State Representative: You have requested an opinion of the attorney general as to whether primary road funds can be expended in furtherance of billboard and junk yard control, apparently to implement House File 737, 64th G.A., Second Session, a bill for an act to control and regulate outdoor advertising along interstate and federal aid primary highways, and which requires the highway commission to acquire by purchase, gift or condemnation, and to pay just compensation for signs lawfully in existence on land adjoining any interstate, freeway or primary highway, and for the taking of any other property as provided in the act. Apparently, approximately six million dollars per year would be used for this purpose and would be provided by federal aid highway funds apportioned to the state, and for which the state would pay some percentage of matching funds. Title 23, U.S.C., §104 and §131, as amended.

Specifically you ask as follows:

"Inasmuch as the 18th amendment to the Iowa constitution regarding

the use of motor vehicle fees and taxes is quite specific in that these fees and taxes 'shall be used exclusively for the consideration, maintenance and supervision of the public highways exclusively within the state or for the payment of bonds issued or to be issued for the construction of such public highways and the payment of interest on such bonds', my request for your opinion would be:

"Can the State of Iowa purchase billboards and junk yard sites or pay for the screening of the latter where they are located outside of the right-of-way and would not be a part of a construction or maintenance project?"

In my opinion, primary road funds cannot be used for purchasing billboards and junk yard sites, or for the screening of the latter, where they are located outside the right-of-way because they could not be properly considered a part of the construction, maintenance or supervision of the highway and the 1942 anti-diversion amendment to the Constitution of Iowa, Art. VII, §8, provides as follows:

"All motor vehicle registration fees and all licenses and excise taxes on motor vehicle fuel, except cost of administration, shall be used exclusively for the construction, maintenance and supervision of the public highways exclusively within the state or for the payment of bonds issued or to be issued for the construction of such public highways and the payment of interest on such bonds."

A related problem, concerning the use of a portion of the primary road fund for construction, or for matching federal funds, for safety rest areas, was considered at length in 1968 OAG 494, an opinion to Governor Hughes. In that instance, I found that safety rest areas are part of the public highways. But signs, billboards and junk yards on land adjoining our highways, and not located on the right-of-way, are clearly not a part of the highway. Thus, the State must find another source of funds for this purpose if it is to implement House File 737.

In reaching this conclusion, I am not unaware of *Newman v. Hjelle*, 1965 N.D., 133 N.W.2d 549, in which it was held that an anti-diversion provision of the North Dakota Constitution, earmarking highway revenues in almost exactly the same way as Iowa's provision did not prevent the North Dakota State Highway Department from expending such funds to acquire advertising signs and billboards erected on the right-of-way, as well as on lands abutting thereon, if such control was provided for by law. But the Iowa Supreme Court has construed our anti-diversion amendment more narrowly. In *Edge v. Brice*, 1962, 253 Iowa 710, 113 N.W.2d 755, the court held that although costs of relocating the facilities of a public utility were properly a part of the cost of construction, the term "construction" as used in the anti-diversion amendment "includes all things necessary to the completed accomplishment of a highway for all uses properly a part thereof." Nothing therein indicates that our court would take such a liberal view as the North Dakota court took. Subsequently in *Slaonica v. City of Cedar Rapids*, 1965, 258 Iowa 382, 139 N.W.2d 179, our court followed the *Edge* case and held that preliminary engineering services in contemplation of building an expressway through Cedar Rapids were authorized by a statute providing for construction of roads and streets and were not within the prohibition of the anti-diversion amendment. But nothing therein indicated that services not directly or indirectly related to the construction of the highway, itself, would be proper. Still more recently in *Frost v. State*, 1969 Iowa, 172 N.W.2d 575,

the court held unconstitutional under the anti-diversion amendment, provisions of the Interstate Bridge Act permitting the highway commission to advance funds from primary road funds to pay part of the construction costs and to spend monies from annual primary road fund receipts on an interstate bridge, part of which and certain approaches for which would lie in another state, although the bond issues specifically provided that the primary road fund, if used at all, should be used only on that portion of the bridge lying within the State of Iowa. Thus, it appears that the Iowa Supreme Court will at least construe the anti-diversion amendment to mean what it says. And when our people say in their constitution that such funds can be expended only for construction, maintenance and supervision of highways, I do not believe they intended to authorize their expenditure for purchase of signs, billboards and junk yards outside of the right-of-way and which have nothing to do with the construction, maintenance or supervision of the highways.

February 16, 1972

ELECTIONS: Ballot designations — §49.42, Code of Iowa, 1971. Where two supervisors are to be elected for four year terms and both terms are to commence in January, 1973, the proper ballot designation is "Vote for Two" rather than "Vote for One" twice. (Haesemeyer to Synhorst, Secretary of State, 2/16/72) #72-2-19

The Honorable Melvin D. Synhorst, Secretary of State: We have recently two requests for opininos of the attorney general from yuor office both of which relate to the question of how the names of candidates for the office of county supervisor should appear on the ballot in the election to be held in November, 1972. One of these requests originated with the auditor of Henry County and the other with the auditor of Washington County.

In both counties it appears that the terms of two supervisors will expire December 31, 1972, and that the transitional provisions of Chapter 218, 63rd G.A. (1969) as now codified in Chapter 331, Code of Iowa, 1971, have been complied with so that the terms of both supervisors to be elected this year will be for four years.

The question which both the Henry and Washington county auditors ask is, will all candidates' names appear under a single heading "For Board of Supervisors, Vote for Two" or can there be two headings with "Vote for One" under each? In an earlier opinion of the attorney general, 1970 OAG 786, we were confronted with a somewhat similar situation, and concluded that where both the office and the term are the same that write-in votes cast in two separate columns can be combined although this would not be the case if two vacancies in the same office were to be filled but for different terms. Following the rationale of this earlier opinion it is our conclusion that where as in the case of Henry and Washington Counties two supervisors are to be elected in each county for four year terms beginning in January, 1973, that the designation "Vote for Two" should be used.

February 16, 1972

COUNTIES AND COUNTY OFFICERS: Redistricting, supervisor districts — §§331.8, 331.9, 331.26, Code of Iowa, 1971. While the type of

supervisor district plan can not be changed by resolution the supervisors have not only a right but a duty under §331.26 to make a good faith effort to achieve precise mathematical equality in the population of supervisor districts based on the figures provided by the 1970 federal census following the procedure set forth in such §331.26. (Haesemeyer to Synhorst, Secretary of State, 2/16/72) #72-2-20

The Honorable Melvin D. Synhorst, Secretary of State: You have requested an opinion of the attorney general with respect to a question submitted to you by the Dickinson County Auditor. In his letter to you said Dickinson County Auditor states:

"At the school of instruction in October I asked the question, Where the Board of Supervisors members are elected by districts and the 1970 census throws the districts out of balance population wise, can the Board of Supervisors, by resolution, change to an at large basis? The districts by the 1960 census showed percentages of 32.607-32.567 and 34.826; by the 1970 census — 30.187-32.145 and 37.668.

"In looking back at the Code after starting this letter, I note that when an election plan is adopted you have to stay with it for six (6) years and if districts are to be changed, they must be changed by November 1st of the year preceding the election.

"Do we just continue with our present districts and disregard the 1970 census?"

Section 331.8, Code of Iowa, provides:

"331.8 Supervisor districts.

"1. Each county board of supervisors shall, by November 1, 1969, select one of the following alternative supervisor representation plans:

a. Plan one. Election at large and without district residence requirements for members.

b. Plan two. Election at large but with equal population district residence requirements for members.

c. Plan three. Election from single-member equal-population districts in which the electors of each district shall elect one member who shall be required to reside in that district.

"2. The plan so selected and any plan thereafter selected by the board shall, subject to the provisions of section 331.9, remain in effect for at least six years."

It is evident that Dickinson County has adopted either Plan two or Plan three. §331.9, Code of Iowa, 1971, provides:

"331.9 Special election on petition. The board of supervisors, when petitioned by ten percent of the number of qualified electors of the county having voted in the last previous general election for the office of governor, shall cause a special election to be held within the county for the purpose of selecting the supervisor representation plan enumerated in section 331.8 under which such county board shall thereafter be elected.

"Such petition shall be filed with the county auditor by January 1 of any general election year. However, the plan selected by such special election shall remain in effect for at least six years. Said special election shall be held at least one hundred days prior to the primary election. Notice of such special election shall be published once each week for three successive weeks in an official newspaper of the county and shall state the alternative representation plans to be submitted to the electors and that the election will be held not less than five nor more than twenty days from the date of last publication.

"The alternative supervisor representation plans shall be stated in substantially the following manner:

"The individual members of the county board of supervisors in ..... county, Iowa, shall be elected:

"Plan 1. At large and without district residence requirements for members.

"Plan 2. At large but with equal population district residence requirements for members.

"Plan 3. From single-member equal-population districts in which the electors of each district shall elect one member who shall be required to reside in that district.

"If the plan adopted by a plurality of the ballots cast in the special election is not the supervisor representation plan currently in effect in the county, the members of the board serving at the time of the special election shall continue their terms until the second secular day in January fllowing the next general election, at which time the terms of all such members shall expire and members shall be elected pursuant to the requirements of the plan adopted by the people and set out in sections 331.25, 331.26 and 331.27."

It is evident from the foregoing that a plan adopted pursuant to §331.8 remains in effect for at least six years unless changed as a result of an election held under §331.9. Similarly, any plan adopted under §331.9 remains in effect for at least six years. However, §§331.26 and 331.27 provide specifically for redrawing supervisor district lines to take into consideration population changes in those counties where plans 2 and 3 are in effect. Thus, in answer to the Dickinson County Auditor's specific questions there is no basis under which the board of supervisors can by resolution change to an at large basis. The only way they can change from one of the three plan types described in §331.8 is by way of an election held pursuant to §331.9. However, while the type of plan can not be changed by resolution the supervisors have not only a right but a duty under §331.26 to make a good faith effort to achieve precise mathematical equality in the population of supervisor districts based on the figures provided by the 1970 federal census following the procedure set forth in such §331.26.

February 18, 1972

STATE OFICERS AND DEPARTMENTS: Public Safety Peace Officers' Retirement Accident and Disability — correction of benefit overpayments — §97A.13, Code of Iowa, 1971. Where an error has resulted in a member or beneficiary receiving more or less than he would have been entitled to receive the board of trustees shall correct such error, and, as far as practicable, shall adjust the payments in such a manner that the actuarial equivalent of the benefit to which such member or beneficiary was correctly entitled, shall be paid. Haesemeyer to Doyle, State Representative, 2/18/72) #72-2-21

The Honorable Donald V. Doyle, State Representative: Reference is made to your letter of January 17, 1972, in which you state:

"Under Chapter 97A, Code of Iowa, 1971, can amounts be deducted from a widow's pension each month for a mistake made by the Department in previous years by making a mistake in monthly payments?

"Example: A widow of a Highway Patrolman, with two children received an overpayment to her in 1956, 1957, 1958, and 1959, due to an

error in computation by the Department. She did not know there was an error. The Department states that she was overpaid approximately $2,200.00, and that they will now deduct an amount each month from her future checks based on her life expectancy. She now has one child yet a minor. Are they allowed under 97A.13, or any other section to now withhold payments on a mistake made by the Department?"

Section 97A.13, Code of Iowa, 1971, to which you make reference provides in relevant part:

"Should any change or error in records result in any member or beneficiary receiving from the system more or less than he would have been entitled to receive had the records been correct, the board of trustees shall correct such error, and, as far as practicable, shall adjust the payments in such a manner that the actuarial equivalent of the benefit to which such member or beneficiary was correctly entitled, shall be paid."

In our opinion this statutory provision furnishes ample authority for the procedure you describe and the department is justified in adjusting future payments to rectify the past overpayments. It should be noted that in the event the woman in question has received less than she was entitled to in the past this section would also require the department to make up the shortage in the payments made.

February 18, 1972

STATE OFFICERS AND DEPARTMENTS: Department of General Services, purchase of liquor for Beer and Liquor Control Department — Ch. 84, §3(1) and Ch. 131, §22, 64th G.A., First Session (1971). The General Services Department is not authorized to purchase liquor for the Beer and Liquor Control Department. (Haesemeyer to McCausland, Director, Department of General Services, 2/18/72) #72-2-22

Mr. Stanley L. McCausland, Director, Department of General Services: You have raised a question concerning the general services department which may be briefly stated as follows:

Does the Act creating the general services department require that department to purchase all the alcoholic beverages which are used by the Iowa beer and liquor control department?

Chapter 84, §3(1), 64th G.A., First Session (1971), provides in part:

"When the system is developed, all items *of general use* shall be purchased through the department, except items used by the highway commission, institutions under the control of the board of regents, the commission for the blind, and *any other agencies exempted by law.*" (Emphasis added)

It seems to us that the words "of general use" refer to items which are routinely and commonly used by all or most state departments in the normal conduct of their day to day operations. One would certainly hope that spirituous liquors and wines are not so used by any state departments and particularly by the Iowa beer and liquor control department although in the latter case the temptation must be especially great. In our opinion what the statute contemplates is equipment, consumable supplies and related items — not an agency's stock in trade or inventory.

But apart from this we are inclined to the view that the beer and liquor control department falls within the exemption afforded "other agencies exempted by law" insofar as its liquor purchases are concerned.

Chapter 131, §22, 64th G.A., First Session (1971), specifically desig-

nates the Iowa beer and liquor control department as exclusive purchaser and vendor of all alcoholic liquor sold by distilleries within the state. That section provides in part as follows:

"*State Monopoly.* The department shall have the sole and exclusive right of importation, into the state, of all forms of alcoholic liquor, except as otherwise provided in this Act, and no person shall so import any such alcoholic liquor, except that an individual of legal age may import and have in his possession an amount of alcoholic liquor not exceeding one quart or, in the case of alcoholic liquor personally obtained outside the United States, one gallon for personal consumption only in a private home or other private accommodation. No distillery shall sell any alcoholic liquor within the state to any person but only to the department, except as otherwise provided in this Act. It is the intent of this section to vest in the department exclusive control within the state both as purchaser and vendor of all alcoholic liquor sold by distilleries within the state or imported therein, except beer, and except as otherwise provided in this Act."

Even if it were to be determined that the Iowa beer and liquor control department is not an "agency exempted by law," the Iowa beer and liquor control department may request that it be allowed to purchase alcohol directly from the distilleries pursuant to Chapter 84, §6(8), Acts of the 64th G.A., which provides in part:

"The director shall establish regulations providing that any state agency may, upon request, purchase directly from a vendor if the direct purchasing is as economical or more economical than purchasing through the department, or upon a showing that direct purchasing by the state agency would be in the best interests of the state due to an immediate or emergency need.

"Any state agency denied the opportunity to purchase separately by the director may appeal the decision to the executive council. The executive council shall hear and determine the appeal in the same manner as an appeal filed by an aggrieved bidder."

However, as we have indicated "items of general use" does not include liquor and the liquor control department is an agency exempted by law where purchases of liquor are involved.

February 23, 1972

SCHOOLS: Merged area bond litigation — Ch. 280A, Code, 1971. There appears to be no legal prohibition against the expenditure of funds to help defray the costs of litigation incident to the sale of bonds by a merged area community college if other merged area boards determine they receive some particular value thereby. (Nolan to Schwieger, State Representative, 2/23/72) #72-2-23

The Honorable B. L. Schwieger, State Representative: This is in response to your letter requesting an opinion on the question of whether Hawkeye Institute of Technology may legally expend its funds to assist Southwestern Community College in bearing the cost of the community college bonding lawsuit. Apparently, some schools have made contributions ranging in amounts from $400 to $600 and the Hawkeye Institute would be willing to make a contribution also if it can legally be done.

The subject litigation is *Stanley v. Southwestern Community College* (Merged Area XIV), Iowa 1971, 184 N.W. 29. This was a class action brought by residents, voters and taxpayers of the Southwestern Community College Merged Area to challenge the validity of an election for

the issuance of bonds to construct and equip college buildings. The decision upheld the provisions of Ch. 280A, Code of Iowa 1971, under which merged areas are authorized to acquire sites, erect and equip buildings and to incur indebtedness, issue bonds and levy a tax to pay the bonds. Further, it held that all proceedings in connection with the sale of Southwestern Community College bonds were legal and valid.

Insofar as such decision is determined by the several boards of other merged areas to be of value to their particular area community college, there appears to be no law prohibiting a contribution to assist in defraying expenses of such litigation. However, the ordinary rule is that persons other than parties to the litigation cannot be compelled to contribute to the cost of such litigation unless they are made parties to litigation or are of a class qualified by the decision to share in a fund created by such litigation. It appears that the Hawkeye Institute of Technology does not fall in either of the aforementioned categories. Further, there is no guarantee that by making such a contribution the taxpayers of the merged area in which the Hawkeye Institute of Technology is located, can be assured that they would thereby avoid similar litigation in the event that they attempted to issue bonds for the purposes authorized in Chapter 280A of the Code.

February 23, 1972

PUBLIC FUNDS: Savings and Loan Associations authorized as depositories — Ch. 221, 64th G.A., First Session (1971). Where statutes now permit investment of public funds in notes, certificates, bonds, or other evidences of *indebtedness* guaranteed by the United States of America or any agency or instrumentality thereof this includes savings and loan associations which are insured by the Federal Savings and Loan Insurance Corporation. (Haesemeyer to Yenter, Auditor of State's Office, 2/23/72) #72-2-24

Mr. Ray Yenter, Deputy Auditor of State: You have requested an opinion of the attorney general with respect to the following:

"This office has supervision over savings and loan associations organized under the laws of the State of Iowa, as well as the duty of auditing certain public bodies or governmental subdivisions. Because of recent changes in state and federal laws, the question arises as to whether or not certain monies placed with savings and loan associations by public bodies or government subdivisions is now legal.

"Specifically, reference is made to Section 452.10 of the Code of Iowa, as amended by Chapter 221 of the first session of the 64th General Assembly of the State of Iowa, pertaining to 'deposit and investment of public funds'.

"Representatives of the savings and loan industry in this state have stated that deposits or other investments in savings and loan associations in Iowa are now authorized under the above reference statute insofar as it relates to investments or deposits which are 'evidences of indebtedness which are obligations of or guaranteed by the United States of America or any of its agencies' or which are 'issued, assumed, or guaranteed by the United States of America or by any agency or instrumentality thereof'.

"Reference is also made to the fact that the Federal Savings and Loan Insurance Corporation, which is an instrumentality or agency of the United States Government, is commonly used by savings and loan associations throughout this state. Qualified certificates of deposit; savings accounts; or deposits, are insured by said federal agency up to a limit of

$20,000.00 in any one savings and loan association which is insured by said instrumentality or agency.

"Reference is also made to the fact that the Home Owners Loan Act of 1933 was amended by Congress in 1968 under an act entitled 'Housing and Urban Development Act of 1968'. Under Section 1716(a) (section 5b), authority was granted for the chartering and regulation of 'deposit type' savings and loan associations wherein time certificates of deposit or other evidence of savings accounts; payment of 'interest'; and authority for the use of the name 'mutual savings association or institution' was provided. Under this basic law, the Federal Home Loan Bank Board of Washington, D.C., which is the supervisory authority of the federally chartered savings and loan associations, as well as the state savings and loan associations which become members of this Federal Home Loan Bank System, issued regulations authorizing conversion of federally chartered mutual savings and loan associations into federally chartered mutual 'deposit type' savings and loan associations with certain rights and duties which are similar in their *debtor-creditor relationship* to commercial banks; and the regulations recognize this new relationship in many ways, including the terminology permitted. Subsequently, the legislature of the State of Iowa amended Section 534.19(18) of the Code of Iowa, authorizing state chartered associations to likewise convert to such 'mutual deposit associations or institutions', and authorized similar use of certificates of deposit and other terms acknowledging the *debtor-creditor relationship* common to commercial banks. Reference is also made to investment of public funds in savings and loan associations in Section 534.11(1) and (10).

"Based upon the above brief explanation and references, this office wishes an opinion as to whether or not the following types of Iowa savings and loan associations can legally be used by those who invest public funds in Iowa:

"1. Federally chartered 'mutual deposit associations or institutions' which are insured by the Federal Savings and Loan Insurance Corporation, and:

a. Have converted to the 'mutual deposit association or institution';

b. Have not converted to the 'mutual deposit association or institution'.

"2. State chartered savings and loan associations which are insured by the Federal Savings and Loan Insurance Corporation and:

a. Have converted to the 'mutual deposit association or institution';

b. Have not converted to the 'mutual deposit association or institution'."

Chapter 221, 64th G.A., First Session (1971), amended §§452.10, 453.5, 453.9, 453.10, 454.5, 302.20, 35.2, 35.3, 97A.7, and 605A.11, Code of Iowa, 1971, generally to provide that public funds now may be invested among other things in "bonds or other evidences of indebtedness issued, assumed, or guaranteed by the United States of America, or by any agency or instrumentality thereof".

Certainly, as you pointed out, the Federal Savings and Loan Insurance Corporation is an instrumentality or agency of the United States Government.

Accordingly, it is our opinion that where statutes now permit investment of public funds in notes, certificates, bonds, or other evidences of indebtedness guaranteed by the United States of America or any agency or instrumentality thereof this includes savings and loan associations

which are insured by the Federal Savings and Loan Insurance Corporation regardless of whether or not they are federally or state chartered. However, it is only notes, certificates, bonds or other evidences of *indebtedness* which may be taken in connection with the deposit of public funds. Hence, while state and federal "mutual deposit associations or institutions" would certainly seem to qualify as depositories of public funds, some question might arise as to savings and loan associations whose depositors are regarded as holding an equity interest. But any association finding itself denied deposits of public funds for this reason presumably would convert to a "mutual deposit type institution" under the relatively simple procedures for doing so.

February 25, 1972

COURTS: Justice of the Peace — Iowa Constitution, Art. I, §11; §§601.17, 762.31 and 789.12, Code of Iowa, 1971. A justice of the peace may impose cumulative sentences upon a criminal defendant. (Blumberg to McGrath, Assistant Van Buren County Attorney, 2/25/72) #72-2-25

James W. McGrath, Assistant County Attorney: In your letter of January 26, 1972, you asked:

"May the justice of the peace impose the maximum sentence of 30 days on each charge where two or more charges are involved and require the man to serve them consecutively, thereby making the actual time served in excess of 30 days?"

Your letter makes reference to §762.31 of the Code which makes the rules prescribed for the district court applicable to the justice of the peace courts, and to §798.12. Section 789.12 rather than 798.12 is controlling, and states that the district court may impose cumulative sentences. We are of the opinion that under the above sections a justice of the peace may impose cumulative sentences. The legislative intent is clear and the language of the statutes is unambiguous and prceise. See also §601.17 of the Code, and Article I, §11 of the Iowa Constitution. The combining of a number of offenses in an information before a justice of the peace is not violative of Article I, §11, even though the fines may exceed one hundred dollars, and the sentences exceed thirty days. *State* v. *Denhardt,* 1905, 129 Iowa 135, 105 N.W. 385; *Jackson* v. *Boyd,* 1880, 53 Iowa 536, 5 N.W. 734.

Furthermore, there are no prohibitions in the Code as to a justice of the peace imposing sentences cumulatively or prohibiting the serving of sentences over 30 days.

February 22, 1972

SCHOOLS: School bus inspections — §§285.8(4), 321.374, Code of Iowa, 1971. The State Department of Public Instruction is authorized to make annual inspection of school buses operated by an institution governed by the Board of Regents. (Nolan to Smith, Dept. of Public Instruction, 2/22/72) #72-2-26

Mr. Richard N. Smith, Deputy State Superintendent, Department of Public Instruction: This replies to your request for an opinion concerning the responsibilities of the Department of Public Instruction with respect to the inspection of school buses at institutions governed by the Board of Regents or the Department of Social Services. Your letter sets

out the following pertinent sections of the 1971 Iowa Code and states:

"Under Chapter 285.8, *Powers and Duties of State Department,* subsection 4 reads:

" 'Inspect or cause to be inspected all vehicles used as school buses to transport school children to determine if such vehicles meet all legal and established standards of construction and can be operated with safety, comfort, and economy. . . . .'

"Chapter 321.374, *Inspection — seal of approval,* states:

" 'No vehicle shall be put into service as a school bus until it is given an original inspection to determine if it meets all legal and established uniform standards of construction for the protection of health and safety of children to be transported. Vehicles which are approved shall be issued a seal of approval by the superintendent of public instruction. All vehicles used as school buses shall be given a safety inspection at least once a year. . . . .'

"We are wondering if our responsibilities lie with the inspection of school buses owned or used by institutions which are governed by the Board of Regents or the Department of Social Services. Also, do these laws apply to buses owned by said institutions — when the buses are of a different type than the usual school buses. For instance, some institutions have the commercial type bus which is used quite frequently to transport teams or other groups over longer distances.

"We have been asked by the Sight Saving School officials at Vinton to check their buses. While we are glad to do anything along the lines of improving safety factors, we are not sure if we have either the responsibiliity or the authority to comply with their request."

I am of the opinion that ample authority exists for the Department of Public Instruction to make an annual check of the Sight Saving School buses under §321.374 of the Code which is set out in full below:

"No vehicle shall be put into service as a school bus until it is given an original inspection to determine if it meets all legal and established uniform standards of construction for the protection of the health and safety of children to be transported. Vehicles which are approved shall be issued a seal of approval by the superintendent of public instruction. All vehicles used as school buses shall be given a safety inspection at least once a year. Buses passing the inspection shall be issued an inspection seal of approval by the superintendent of public instruction. The seal of original inspection and the annual seal of inspection shall be affixed to the lower right hand corner of the windshield."

February 29, 1972

STATE OFFICERS AND DEPARTMENTS: Agriculture, Licensing and inspection, meat and poultry producers — §§189A.2, 189A.3 and 189A.4, Code of Iowa, 1971. While the Secretary of Agriculture may exempt federally inspected meat and poultry production operations from state inspection he may not exempt such operations from licensing and payment of the license fee. (Haesemeyer to Gross, State Senator, 2/29/72) #72-2-27

The Honorable G. William Gross, State Senator: You havee requested an opinion of the attorney general and state:

"I am writing for your opinion regarding the legality of charging a state license fee for meat and poultry processors who come under the Federal Inspection Act.

"As I understand the Act, anyone who is federally inspected can be

exempt from state inspection under, 189A.4, chapter 145, Acts 63rd G.A., Sec. 3 Paragraph 2, exemption. I feel that the federal inspection which supersedes state inspection should eliminate the need for state inspectors and licenses. It appears to be an unnecessary expense to the processor and the state. If processors are under the federal inspector act, and are not state inspected, they should not be charged and state licensed."

The law with respect to the licensing and inspection of persons and firms engaged in the business of meat and poultry production is found in Chapter 189A, Code of Iowa, 1971. §189A.2(32) defines the term "establishment" as follows:

"32. 'Establishment' means all premises where animals or poultry are slaughtered or otherwise prepared, either for custom, resale, or retail, for food purposes, meat or poultry canneries, sausage factories, smoking or curing operations, restaurants, grocery stores, brokerages, cold storage plants, and similar places."

Sections 189A.3 and 189A.4, Code of Iowa, 1971, provide:

"189A.3 License — fee. No person shall operate an establishment without first obtaining a license from the department. The license fee for each establishment, excluding restaurants and grocery stores, per year or any part of a year shall be:

"1. For all meat and poultry slaughtered or otherwise prepared not exceeding twenty thousand pounds per year for sale, resale, or custom, twenty-five dollars.

"2. For all meat and poultry slaughtered or otherwise prepared in excess of twenty thousand pounds per year for sale or resale, fifty dollars.

"The license fee for each restaurant selling twenty pounds or more of meat or meat products annually and each grocery store per year or any part of a year shall be five dollars.

"The funds shall be deposited with the department of agriculture. The license year shall be from July 1 to June 30. Applications for licenses shall be in writing on forms prescribed by the department.

"It is the objective of this chapter to provide for meat and poultry products inspection programs that will impose and enforce requirements with respect to intrastate operations and commerce that are at least equal to those imposed and enforced under the federal Meat Inspection Act and the federal Poultry Products Inspection Act with respect to operations and transactions in interstate commerce; and the secretary is directed to administer this chapter so as to accomplish this purpose. A director of the meat and poultry inspection service shall be designated as his delegate to be the appropriate state official to cooperate with the secretary of agriculture of the United States in administration of this chapter.

"189A.4 Exemptions. In order to accomplish the objectives of this chapter, the secretary may exempt the following types of operations from inspection:

"1. Slaughtering and preparation by any person of livestock and poultry of his own raising exclusively for use by him and members of his household, and his nonpaying guests and employees.

"2. Any other operations which the secretary may determine would best be exempted to further the purposes of this chapter, to the extent such exemptions conform to the federal Meat Inspection Act and the federal Poultry Products Inspection Act and the regulations thereunder."

It is to be observed that §189A.4 exempts certain types of operations including those which conform to the federal Meat Inspection Act and

the federal Poultry Products Inspection Act and the related regulations thereunder. However, by the express language of §189A.4 the secretary's authority is limited to the granting of exemptions *"from inspection"*. While it may seem somewhat anomalous that the state should continue to collect license fees from establishments which are not being inspected by the state nevertheless that is what the law requires. Under §189A.3 no person is permitted to operate a meat or poultry production establishment without first obtaining a license from the Iowa department of agriculture. If the 63rd General Assembly which enacted both §§189A.3 and 189A.4 as they now appear in the code had intended to authorize the secretary to exempt federally inspected operations from licensing as well as inspection it would have said so in §189A.4.

March 3, 1972

COUNTY & COUNTY OFFICERS: County Attorneys; Welfare, Records; — Federal Regulation HEW CFR 205.50(b); §§68A.1, 68A.2, 239.10, 239.14, 336.2, 1971 Code of Iowa. County Attorneys or their representatives have unimpeded access to records of their County Board of Social Welfare for discovery or prosecution of frauds in welfare programs. (Williams to Fischer, State Representative, 3/3/72) #72-3-1

The Honorable Harold O. Fischer, House of Representatives: This is in response to your request for an opinion of the Attorney General in which you ask the following question:

"Can County Attorneys or their representatives have access to the Aid to Dependent Children records of the County Boards of Social Welfare for the purpose of prosecution for or discovery of frauds?"

The answer to your question is yes.

The Federal Regulations promulgated by the Secretary of Health, Education and Welfare (HEW), published in the Federal Register, Volume 36, Number 40, Saturday, February 27, 1971, (45 CFR 205.50) concerns the safeguarding of information. In subparagraph (b), there is an exception to the detailed requirements which is applicable in view of the Iowa statutes. This exception reads:

"... (b) *Exception.* In respect to a State plan under title I [Old Age Assistance], IV-A [Aid to Dependent Children], X [Aid to the Blind], XIV [Aid to the Disabled], or XVI [General Provisions] of the Social Security Act, exception to the requirements of paragraph (a) of this section may be made by reason of the enactment or enforcement of State legislation, prescribing any conditions under which public access may be had to records of the disbursement of funds or payments under such titles within the State, if such legislation prohibits the use of any list or names obtained through such access to such records for commercial or political purposes."

It is necessary to refer to the Iowa law in connection with this provision of said regulation. There are several chapters of the Iowa Code which must be read together to determine the extent to which the exception applies.

The "State legislation" referred to in this section is found in the following chapters:

CHAPTER 68A. EXAMINATION OF PUBLIC RECORDS

CHAPTER 239. AID TO DEPENDENT CHILDREN

CHAPTER 336. COUNTY ATTORNEY

Pertinent sections from these chapters are hereinafter quoted:

Chapter 68A.1, 1971 Code of Iowa, Public records defined

"Wherever used in this chapter, 'public records' includes all records and documents of or belonging to this state or any county, city, town, township, school corporation, political subdivision, or tax-supported district in this state, or any branch, department, board, bureau, commission, council, or committee of any of the foregoing."

Chapter 68A.2, 1971 Code of Iowa, Citizens right to examine

"Every citizen of Iowa shall have the right to examine all public records and to copy such records, and the news media may publish such records, unless some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential . . ."

Section 239.10, 1971 Code of Iowa [Aid to Dependent Children], reads in part as follows:

"All applications, investigation reports and case records shall be privileged communications and held confidential, subject to use and inspection only by persons authorized by law in connection with their official duties relating to financial audits and the administration of the provisions of this chapter.

Provided, however, that the county board of social welfare shall prepare and file in its office . . . a report showing the names and addresses of all recipients receiving assistance under this chapter, together with the amount paid to each during the preceding quarter. . . . The record book shall be and the same is hereby declared to be a public record, open to public inspection at all times during the regular office hours of the respective county boards of social welfare. . . .

It shall be unlawful for any person . . . to solicit, disclose, receive, make use of or to authorize, knowingly permit, participate in or acquiesce in the use of any lists, names or other information obtained from the reports above provided for, for commercial or political purposes . . ."

Section 239.14, 1971 Code of Iowa [ADC], reads in part:

"239.14 Fraudulent acts

Whoever obtains, or attempts to obtain, or aids or abets any person to obtain, by means of a willfully false statement or representation, or by impersonation, or any fraudulent device, any assistance under this chapter to which the recipient is not entitled, shall be guilty of a misdemeanor, and, upon . . ."

Section 336.2, 1971 Code of Iowa, Duties of County Attorney, reads in part as follows:

"It shall be the duty of the county attorney to:

1. Diligently enforce or cause to be enforced in his county, all of the laws of the state, actions for a violation of which may be commenced or prosecuted in the name of the state of Iowa, or by him as county attorney, except as otherwise specially provided.

2. Appear for the state and county in all cases and proceedings in the courts of his county to which the state or county is a party . . .

6. Commence, prosecute, and defend all actions and proceedings in which any county officer, in his official capacity, or the county, is interested, or a party.

7. Give advice or his opinion in writing, without compensation, to the board of supervisors and other county officers . . . upon all matters in

which the state, county . . . is interested, or relating to the duty of the board or officer . . .

8. Attend the grand jury whenever necessary for the purpose of examining witnesses before it, or of giving it legal advice, or to procure subpoenas or other process for witnesses, to prepare all informations and bills of indictment.

10. Make reports relating to the duties and the administration of his office to the governor or the attorney general whenever called upon by the governor or the attorney general so to do."

CONCLUSION

There is no conflict with the Federal Regulation 45 CFR 205.50 relating to the safeguarding of information in the ADC (and other welfare) Programs. In view of the Iowa statutes, the exception stated in subparagraph (b) is applicable. The Iowa statutes prohibit the "use of any list or names obtained through access to such records for commercial or political purposes", and there is "State legislation" prescribing the "conditions under which public access may be had to records".

In Chapter 239, 1971 Code of Iowa (ADC statute), county attorneys are charged with the responsibility of handling fraud cases in the ADC Program, and in Chapter 336 (Duties of County Attorneys), they are charged with the duty to "diligently enforce or cause to be enforced in his county all of the laws of the state".

Thus, county attorneys or their representatives are the "persons" referred to in Section 239.10, 1971 Code of Iowa, "authorized by law in connection with their official duties relating to . . . the administration of the provisions of this chapter" to have unimpeded access to "applications, investigation reports and case records" of the County Board of Social Welfare of their particular county for discovery or prosecution of frauds.

March 2, 1972

ELECTIONS: Re-precincting, combining two or more townships — §49.4, Code of Iowa, 1971, as amended by Ch. 99, §1, and Ch. 98 §21, 64th G.A., First Session (1971). The last date when supervisors could re-precinct under §49.4 of the code was December 31, 1971. However, because of the Supreme Court's decision invalidating the legislative reapportionment plan enacted by the last general assembly it is expected that the legislature will set a later date for such re-precincting to be accomplished. (Haesemeyer to Beisser, Webster County Attorney, 3/2/72) #72-3-3

Mr. Louie F. Beisser, Webster County Attorney: Reference is made to your letter of February 28, 1972, in which you state:

"Attached hereto and made a part hereof is a copy of our letter written to our Webster County Board of Supervisors pertaining to Code Section 49.4 of the 1971 Code of Iowa. The Board desires to combine two townships into one voting precinct, as the number of residents in the separate townships has decreased thereby making the combining of two townships for voting purposes more appropriate and less expensive.

"It would be appreciated if you would advise us:

"1. Did the General Assembly by joint resolution establish a later date?

"2. Can the Board of Supervisors after March 15, 1971, combine two

townships into one voting precinct?"

Section 49.4, Code of Iowa, 1971, as amended by Chapter 99, §1, and Chapter 98, §21, 64th General Assembly, First Session (1971), provides:

"The board of supervisors may divide a township, or part thereof, into two or more precincts, or change or abolish such division. The board of supervisors may also combine two or more contiguous townships into one election precinct, subject to the provisions of this section. An order establishing precincts shall define their boundaries.

"No election precinct shall have a total population in excess of three thousand five hundred, as shown by the most recent federal decennial census. Where a civil township, or the portion of a civil township outside the corporate limits of any or all cities and towns located wholly or partially within the boundaries of such township, is divided into two or more election precincts, the populations of each such precinct shall be as nearly equal as possible within the limitations of availability of suitable polling places and of reliable data on the populations of various parts of such township, and the boundaries of each precinct so established shall follow the boundaries of areas for which official population figures are available from the most recent federal decennial census. Every precinct shall be contained wholly within an existing legislative district as established by law, and where an unavoidable conflict arises between this requirement and the requirement that the populations of any two precincts shall be as nearly equal as possible, the requirement that each precinct shall be contained wholly within an existing legislative district shall take precedence. The board of supervisors shall make any changes necessary to comply with this section no earlier than July first and not later than December thirty-first of each year immediately following a year in which the federal decennial census is taken, unless the general assembly by joint resolution establishes different dates for such compliance. Any or all of the publications required by section 49.11 may be made after December thirty-first if necessary.

"Nothing in this section shall prohibit a board of supervisors which has complied with the applicable requirements of this section by December thirty-first of any year following a year in which the federal decennial census is taken, from thereafter changing the boundaries of any precinct in the manner and within the limitations provided by this section at any time prior to or during the year in which the next federal decennial census is taken, if the board concludes that the changes in precinct boundaries are necessary to best serve the voters affected.

"The secretary of state shall be notified when precinct boundary lines are changed and a map delineating the new boundary lines supplied."

As you will notice the March 15, 1971, cutoff date has been changed and a December 31, 1971, date established instead. The language authorizing the general assembly to establish a later date by joint resolution remains unchanged.

Because of the Iowa supreme court's recent decision invalidating the legislative reapportionment act enacted by the last general assembly and its decision to formulate a legislative redistricting plan of its own there is going to have to be wholesale restructuring of election precincts throughout the state. In anticipation of this a measure, House File 1265, has been introduced and has passed the house which would set back the date for compliance with §49.4 to forty-seven days after the supreme court comes out with its legislative reapportionment plan. I am informed that there is no question but that House File 1265 will pass and become law. Accordingly, it would be my advice that you instruct you supervisors to wait until the supreme court's plan has been promulgated and the forty-

sevent day period has started to run before undertaking any re-precincting activities or combining of townships. A copy of House File 1265 is enclosed for your convenience.

March 3, 1972

COUNTIES AND COUNTY OFFICERS: County Attorney, disclosure of results of an investigation — §§28A.3, 365.14, 769.19 and 771.23, Code of Iowa, 1971. There is no legal impediment to either the city attorney or the county attorney disclosing to the city council the details of their investigation into the alleged misconduct of the chief of police, or upon the city council receiving such information, or upon the city council receiving it in executive session. (Turner to Johnston, State Representative, 3/3/72) #72-3-4

The Honorable Joseph C. Johnston, State Representative: You requested our opinion as to whether there is any legal impediment to the City Attorney of Iowa City disclosing to the City Council the details of his investigation into alleged misconduct of the Chief of Police. The City Attorney is also attorney for the Iowa City Civil Service Commission and you stated that his investigation may have been made on behalf of the Commission. You also asked if there is any impediment upon the County Attorney, who also conducted an investigation into the same matter utilizing his subpoena power under §769.19, Code of Iowa, 1971, from making similar disclosure to the City Council. Finally, you requested our opinion as to whether there is any legal impediment to the City Council receiving such disclosures, and whether such may be made in an executive session of the City Council.

In our opinion there is no legal impediment to either the City Attorney or the County Attorney disclosing to the City Council the details of their investigation into the alleged misconduct of the Chief of Police, or upon the City Council receiving such information, or upon the City Council receiving it in executive session.

The City Attorney, if anything, owes a duty to the City Council, if requested, to disclose the details concerning alleged misconduct of a city employee. The fact that the Chief of Police may also be within the Iowa City Civil Service system does not preclude the City Council from considering whether he should be retained as Chief of Police, since that position is not protected by the civil service law. §365.14, Code of Iowa, 1971.

Further, the County Attorney may disclose the details of his investigation into the same matter, despite the fact he utilized his subpoena power under §769.19, Code of Iowa, 1971. There is no requirement of secrecy connected with such investigations comparable to the requirement to keep secret grand jury proceedings found in §771.23, Code of Iowa, 1971. We presume the County Attorney's investigation was undertaken in good faith to determine whether a criminal violation had occurred, and the City Council also has a proper interest in determining whether or not its Chief of Police is qualified for retention in that office.

Finally, Chapter 28A, Code of Iowa, 1971, does not prohibit the City Council from reciving the above information in executive session, provided two-thirds of the members of the Council present deem such a meeting necessary to prevent irreparable and needless injury to the reputation of the Chief of Police whose employment or discharge is under considera-

tion, or for some other exceptional reason so compelling as to override the general public policy in favor of public meetings. §28A.3, Code of Iowa, 1971.

March 6, 1972

COUNTIES AND COUNTY OFFICERS: Tax Sales — §§446.15, 446.16, 447.1, Code of Iowa, 1971. There is no prohibition against accepting a tax sale bid made by mail, nor the redemption of a tax certificate by mail. (Nolan to Baringer, Treasurer of State, 3/6/72) #72-3-2

The Honorable Maurice E. Baringer, Treasurer: You requested an opinion of this office on several questions regarding the payment of delinquent property taxes as follows:

"1. Insofar as the law is concerned, is there any reason why bids may not be made by mail to the County Treasurers, to be accepted on the date of the sale?"

"2. If bids are made by mail can they be accepted if an 'on-the-spot' bidder does not make an offer for a particular item? If this point is not specifically covered by statutes is it left to the option of each county treasurer to decide whether or not he will accept bids by mail?"

"3. Is there any reason why redemption of tax certificates cannot be redeemed by mail in Iowa?"

I

The law apears to be silent on the matter of whether bids may be received by mail. Section 446.15 of the 1971 Code of Iowa provides only:

"The treasurer shall on the day of the sale, at ten o'clock in the forenoon, at his office, offer for sale, separately, each tract or parcel of real estate advertised for sale on which the taxes and costs shall not have been paid."

In two Iowa cases sales have been upheld where the bidder was not present at the time and place advertised for the tax sale. In both cases the purchase of land by such person not present at the sale was upheld where the treasurer conducted the sale as advertised checking off each tract for the amount of taxes, interest and costs to the person who had left bids and agreed beforehand to take the lands on those terms. *Slocum v. Slocum*, 1886, 70 Iowa, 259, 30 N.W. 562, *Lamb v. Davis*, 1888, 74 Iowa, 719, 39 N.W. 114. It is our view that it would be within the county treasurer's discretion as to whether or not a written bid should be accepted on the date of the sale along with oral bids. However, there is no prohibition on the law against submitting a bid by mail.

II

The answer to your second question is contained in our answer to the first, however, §446.16 of the Code specifically provides:

"The person who offers to pay the amount of taxes which are a lien on any parcel of land or town lot for the smallest portion thereof shall be the purchaser . . ."

This section would be controlling whenever two or more persons bid on the same tract of land. If the treasurer should receive mailed bids where an on-the-spot bidder is present, the person mailing in the bid could not be heard to complain should a bidder present at the sale become

the purchasers by virtue of his offer on a smaller parcel than shown in the bid which was mailed.

III

There appears to be no prohibition against the redemption of tax certificates by mail. See §447.1 which provides:

"Real estate sold under the provisions of this Chapter and under Chapter 446 may be redeemed at any time before the right of redemption is cut off, by the payment to the auditor, to be held by him subject to the order of the purchaser, of the amount for which the same was sold and four percent of such amount added as a penalty, with six percent interest per annum on the whole amount thus made from the day of the sale; and the amount of all taxes, interest, and costs paid by the purchaser or his assignee for any subsequent year or years, with a similar penalty added as before on the amount of the payment for each subsequent year, and six percent per annum for the whole of such amount or amounts from the day or days of payment."

The property owner may make statutory redemption without obtaining a court order permitting him to do so. *Wren v. Berry*, 1933, 214 Iowa 1191, 243 N.W. 375.

March 6, 1972

COUNTIES AND COUNTY OFFICERS: Zoning Regulations — Ch. 358A, Code of Iowa, 1971. Board of Supervisors can establish county zoning law without vote of the people. (Nolan to Harbor, Speaker of the House, 3/6/72) #72-3-5

The Honorable William H. Harbor, Speaker of the House, House of Representatives: This is in reply to your request for an Attorney General's opinion as to whether a County Board of Supervisors can establish a county zoning law without a vote of the people.

Section 358A.3, Code of Iowa 1971, empowers the County Board of Supervisors to enact zoning regulations. Under the provisions of Ch. 358A, the supervisors may divide the county into zoning districts. The regulations in one district may differ from those in another district provided that all such regulations are made in accordance with a comprehensive plan.

While the statutes provide for public hearings at which parties in interest and citizens have an opportunity to be heard, there is no requirement in the law that makes the vote of the people of the county necessary to the establishment and enforcement of county zoning regulations.

March 6, 1972

HIGHWAYS: COUNTIES: ROAD USE TAX FUNDS: INSURANCE — Art. VII, §8, Constitution of Iowa; §§517A.1, 613A.7, 332.35, 310.34, 310.35, 312.1, 312.2, 310.3, Code of Iowa, 1971. Neither the secondary road research fund nor any other road use tax fund may be used to pay for a research project insurance survey to determine the risks and insurance needs of the several counties. But the counties have implied power to undertake such a study, jointly or severally, provided they appropriate and pay for same with their own funds. (Turner to Fischer, State Representative, 3/6/72) #72-3-6

The Honorable Harold O. Fischer, State Representative: By your letter of February 18, 1972, you have requested an opinion of the attorney general as to whether the Iowa State Highway Commission can lawfully

expend $24,600 from the road use tax fund or the secondary road fund for an insurance survey for the various counties.

On February 16, 1972, the Highway Commission executed a contract with Drake University, agreeing to pay the aforesaid amount for a study, the objectives of which are as follows:

"To develop a means by which the nature and extent of risks involving county roads by Iowa counties can be identified.

"To develop guidelines to aid persons responsible for the management of risks involving county roads. These guidelines will relate to the kinds and amounts of insurance which should be purchased and to effective use of other risk management tools such as loss control and risk shifting.

"To examine the question of whether savings for county taxpayers could be effected by coordinated purchase of insurance or through a cooperative pooling arrangement.

"To recommend an organization for risk management in the county to facilitate continuing risk analysis and effective expenditure of insurance premium dollars."

A copy of said contract together with the exhibits which, among other things, set forth the aforesaid objectives, is hereto attached and made a part of this opinion.

While paragraph X provides for the compensation to be paid by the Commission and the manner and time of payment, I am unable to find anything in said paragraph or elsewhere in the contract stating from which fund payment is to be made to Drake University. However, the chief counsel at the Highway Commission informs me that payments for this research project are to be made from the secondary road research fund created by §310.34, Code of Iowa, 1971, and which provides as follows:

"Notwithstanding any law to the contrary, the state highway commission is hereby authorized to set aside each year not to exceed one and one-half percent of the receipts in the farm-to-market road fund in a fund to be known as the secondary road research fund."

In my opinion, the secondary road research fund cannot be used to pay for this project because of the provisions of §310.35 which provides as follows:

"The secondary road research fund shall be used by the state highway commission *solely* for the purpose of financing engineering studies and research projects which have as their objective the *more efficient use of funds and materials that are available for the construction and maintenance* of secondary roads, including bridges and culverts located thereon." (Emphasis added)

A research project with reference to liability insurance is unrelated to the "more efficient use of funds and materials that are available for the construction and maintenance of secondary roads, including bridges and culverts located thereon". Thus, in my opinion, the secondary road research fund may not properly be used for this insurance research project.

Moreover, the 1942 antidiversion amendment to the Constitution of Iowa (Article VII, §8) restricts the use of motor vehicle registration fees, licenses and excise taxes on motor vehicle fuel to construction, mainten-

ance and supervision of the highways of this state. Such restricted funds make up the road use tax fund (§312.1), from which the secondary road fund of the counties, and the farm-to-market road fund are derived (§312.2). The secondary road research fund (§310.34) is created out of the farm-to-market road fund (§310.3). In any event, road use tax funds are restricted by the antidiversion amendment and must be used at least indirectly for "construction, maintenance or supervision" of the roads and highways of the state. While some types of insurance such as, for example, insurance on construction or maintenance equipment, might properly be considered a direct or an indirect cost of construction, maintenance or supervision, the type of risk of liability to be considered in this study and the kind of insurance and the amount of premium dollars which should be expended for such risk, is not properly a cost of construction, maintenance or supervision.

Chapter 517A, Code of Iowa, 1971, authorizes counties "to purchase and pay the premiums on liability, personal injury and property damage insurance covering all officers, *proprietary functions* and employees *** while in the performance of any or all of their duties *** which insurance shall insure, cover and protect against individual personal, corporate or quasi-corporate liability that such bodies or their officers or employees may incur." In addition, a similar provision, §613A.7, allows the board of supervisors to purchase tort liability insurance for the county. See, also, §332.35 and 1970 OAG 462. The cost of such insurance is to be paid for by the county from funds appropriated for that purpose, not by the state from road use funds.

Thus, while the contemplated insurance study and survey may be worthwhile, and while the counties have the implied power to undertake such a study, jointly or severally, as incidental to the exercise of their power to purchase such insurance, under the present state of the law they must expend their own funds for that purpose.

March 7, 1972

TAXATION: Personal property tax credit: §§427A.2, 427A.4 and 427A.5, Code of Iowa, 1971. Where two individuals each own fifty percent of the stock of two corporations each of which is separately managed by one of them, each corporation may be entitled to a personal property tax credit not in excess of two thousand seven hundred dollars. (Griger to Wornson, Cerro Gordo County Attorney, 3/7/72) #72-3-7

Mr. Clayton L. Wornson, Cerro Gordo County Attorney: You have requested the opinion of the Attorney General concerning the application of the personal property tax credit as authorized by the provisions of Chapter 427A, Code of Iowa, 1971, based upon the following factual situation:

A and B each own fifty percent of the stock of a corporation located and doing business in Mason City, Iowa, and each owns fifty percent of the stock of a corporation located and doing business in Fort Dodge, Iowa. A separately manages the Mason City Corporation and B separately manages the Fort Dodge Corporation. A has applied for the full credit in Mason City, Cerro Gordo County, on behalf of the corporation located therein and B has similarly applied for the full credit in Fort Dodge, Webster County, Iowa.

Your question is whether each of these corporations would be entitled to a separate credit or would only one credit be available to both corporations.

Section 427A.2, Code of Iowa, 1971, provides in part:

". . . There is hereby granted a credit of not to exceed two thousand seven hundred dollars against the assessed value of tangible personal property as defined in section 427A.1, owned by a person or business enterprise.

"For the purposes of this section:

1. 'Person' means an individual, partnership, joint venture, association, corporation, trust, or estate.

2. 'Business enterprise' means a person engaged in business."

Section 427A.4, Code of Iowa, 1971, provides:

"No person or business enterprise in the state shall be allowed a credit on personal property tax in excess of two thousand seven hundred dollars assessed valuation. Any person or business enterprise who owns personal property subject to taxation in more than one county of the state shall designate in reporting such property to the assessor for the purpose of assessment as required in section 427A.1 in which counties of the state the property is located and may claim the entire credit in one county or a proportionate part thereof in each county where the property is situated, and in no case shall he claim more than the two thousand seven hundred dollars assessed value for all personal property assessed in all counties.

Each year, on or before July 1, the taxpayer shall deliver to the assessor an application for personal property tax credit and state by such affidavit or affidavits filed in each county where his personal property is situated, that he has not claimed a total personal property tax credit in all counties in excess of a total of two thousand seven hundred dollars assessed valuation.

It shall be the duty of the assessor to examine claims for such credit filed with him and recommend on each such claim the disallowance thereof where it appears that an owner of tangible personal property has attempted to divide the ownership thereof for purpose of obtaining additional credit beyond the amount of two thousand seven hundred dollars in a year.

If any person fails to make application for the credits provided for under this chapter as herein required, he shall be deemed to have waived the personal property tax credit for the year in which he failed to make claim.

Any person making a false affidavit for the purpose of obtaining the credit provided for in this section, or who knowingly receives such credit without being legally entitled thereto, or who makes claim for credit of more than two thousand seven hundred dollars in the state shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than one hundred dollars or imprisoned in the county jail for not more than thirty days or be both so fined and imprisoned."

Section 427A.5, Code of Iowa, 1971, provides:

"If personal property is owned separately by a husband and wife, they may divide the credit or one may take the entire credit, but in no case may a husband and wife receive a total credit of more than two thousand seven hundred dollars unless husband, wife or minor children own farm units separately. If personal property is owned by separate business enterprises and the business enterprises are controlled or owned by the

same person, the separate business enterprises may divide the credit or one may take the entire credit, but in no case may separate business enterprises which are controlled or owned by the same person receive a total exemption of more than two thousand seven hundred dollars.

Business enterprises are controlled or owned by the same person if over fifty percent of their assets or shares of stock are controlled or owned by the same person, or if they are in fact controlled and managed by the same person, regardless of how actual title to the assets or shares of stock are held. The assessor shall deliver the sworn affidavits to the county auditor by August 1 of each year."

The answer to your question depends upon the interpretation of §§427A.4 and 427A.5. These statutes are in pari materia and must be construed together. *France v. Benter*, 1964, 256 Iowa 534, 128 N.W.2d 268; *Northwestern Bell Tel. Co. v. Hawkeye State Tel. Co.*, 1969, Iowa, 165 N.W.2d 771.

Section 427A.4 limits the tax credit to two thousand seven hundred dollars assessed valuation to any person or business enterprise, regardless where the personal property is located. Further, the assessor has the duty to recommend disallowance of such credit where it appears that the property owner has attempted to divide ownership thereof for the purpose of obtaining the additional credit. A person who makes claim for credit of more than the maximum amount allowed commits a crime.

Section 427A.5 precludes separate business enterprises which are controlled or owned by the same person from receiving a total exemption of more than two thousand seven hundred dollars where personal property is owned by such enterprises. The statute defines what is meant by "business enterprises controlled or owned by the same person."

In the factual situation you posed, there is no ownership by the same person of *over* fifty percent of the assets or stock of either corporation. Furthermore, both corporations are not in fact controlled and managed by the same person, but each corporation is managed by a different person. Therefore, based upon the facts you presented, it does not appear that the personal property is owned by business enterprises which are controlled or owned by the same person as defined in §427A.5. It only appears that each corporation is a separate business enterprise.

Sections 427A.2 and 427A.4 clearly allow one credit not in excess of two thousand seven hundred dollars assessed valuation to a person or business enterprise. Section 427A.5 limits the total exemption where separate business enterprises are controlled or owned by the same person as defined therein. Since neither corporation in question fits the limitation set forth in §427A.5, each corporation would be entitled to a credit not in excess of two thousand seven hundred dollars assessed valuation pursuant to §§427A.2 and 427A.4.

March 7, 1972

CITIES AND TOWNS: Ordinances — §§321.236, 321G.2, Code of Iowa, 1971. A city may promulgate ordinances in addition to, and consistent with Ch. 321G. (Blumberg to Kennedy, State Representative, 3/7/72) #72-3-8

Michael K. Kennedy, State Representative: In your letter of February

29, 1972, you posed the following question:

"Can the city of New Hampton adopt an ordinance which would make it a violation to: (1) Commit any of the acts set forth in Section 321G.13 of the Code. (2) Any other acts which the council felt reasonable, such as limited hours of operation and providing for a flag on the vehicle which could be seen above snow drifts."

Section 321.236, 1971 Code of Iowa provides that local authorities do not have the power to enact ordinances in conflict with, contrary to, or inconsistent with the provisions of Chapter 321. In conjunction with this, the Supreme Court of Iowa held, in *City of Vinton* v. *Engledow*, 1966, 258 Iowa 861, 867, 140 N.W.2d 857:

"Defendant cites Des Moines v. Reiter, 251 Iowa 1206, 102 N.W.2d 363, for the proposition that a municipality, when not expressly prohibited, has the power to enact an ordinance dealing with the same subject matter as that dealt with by state law. . . . We recognized this right of cities to enact ordinances in connection with laws affecting the operation of a motor vehicle where the additional regulations are not in conflict with Chapter 321 in Bergeson v. Pesch, [254 Iowa 223, 117 N.W.2d 431]. We do not change that rule."

Upon reading the *Reiter* and *Bergeson* cases, it is apparent that a municipality may promulgate ordinances which do not conflict with any statute. It must be pointed out that it is not necessary for a municipality to promulgate an ordinance which is merely a copy of the statute.

The above discussion is also applicable to your second question. In addition, section 321G.2, provides in part: "[C]ities and towns may regulate [the use of snowmobiles] on streets under the jurisdiction of cities and towns within their respective corporate limits."

Accordingly, it is our opinion that municipalities may adopt ordinances in addition to, and consistent with Chapter 321G, 1971 Code of Iowa.

March 8, 1972

EDUCATIONAL TV — INSURANCE — Ch. 517A, §19.7, Code of Iowa, 1971. The State Educational Radio and TV Board has authority to purchase liability coverage for the mobile production unit but this authority does not extend to purchasing insurance to cover loss or damage to the property except as part of comprehensive coverage under a liability coverage policy. The mobile unit and its contents may be repaired or replaced by the Executive Council pursuant to Code §19.7 if the need arises. (Nolan to Montgomery, Executive Director, State Educational Radio and Television Facility Board, 3/8/72) #72-3-9

Mr. John A. Montgomery, Executive Director, State Educational Radio and Television Facility Board: This is in reply to your request for an opinion on the question of whether the State Educational Radio and Television Facility Board may obtain insurance against loss or damage to the Mobile Production Unit and its related equipment.

Under the authority contained in §8A.15, Code of Iowa 1971, the State Educational Radio and Television Facility Board has power to "purchase or lease property, equipment, and services and to improve the same for proper educational uses, and to dispose of the property and equipment when not necessary for their purposes".

The Educational Radio and Television Facility Board is a state agency

and property acquired by the board has the same character as property acquired by other state agencies. Section 517A.1, Code 1971, provides authority for state boards to purchase and pay the premiums on "liability, personal injury and property damage insurance covering the officers and employees" of such public bodies. However, this authority does not extend to the purchasing of insurance to cover loss and damage to the property except as part of a comprehensive coverage policy.

Under §19.7, Code 1971, a contingent fund is set apart for use of the Executive Council which may be expended for the purpose of "repairing, rebuilding, or restoring any state property injured, destroyed, or lost by fire, storm, theft, or unavoidable cause".

Accordingly, it is our view that there is no authority for the board to purchase insurance other than liability coverage for the Mobile Unit without legislative action. However, the property is of the nature which may be repaired or replaced by the Executive Council from the contingency fund pursuant to §19.7 of the Code if the need arises.

March 8, 1972

STATE OFFICERS AND DEPARTMENTS: IPERS benefits exempt from state income tax — §97A.12, Code of Iowa, 1971. All benefits paid to beneficiaries under §97A.12 are exempt from all Iowa state income taxes. (Murray to Bidler, Department of Public Safety, 3/8/72) #72-3-17

Mr. Carroll L. Bidler, Deputy Commissioner, Department of Public Safety: We have your request for an opinion concerning the exemption from Iowa Income Tax of all benefits paid to beneficiaries under the provisions of Ch. 97A, Code of Iowa, 1971.

I am enclosing a copy of an opinion of the Attorney General on the same subject matter dated May 18, 1965 to another state agency which construed the language of §97A.12 and the determination would be the same to members of your department. We have checked this section and find that it has not been amended and the language is the same as it was when this opinion was written.

We are also enclosing a copy of an opinion of the Attorney General to Mr. Ray A. Fenton, Polk County Attorney, concerning the interpretation of a similar exemption found in Ch. 411 which is concerned with Civil Service Employees of a city. You will note that this opinion refers to and adopts the conclusions of the opinion of May 18, 1965 to another state agency.

It is our opinion that these prior opinions interpreting the language of §97A.12 correctly state the law and agree that all benefits paid to beneficiaries under §97A.12 are exempt from the Iowa State Income Tax.

March 9, 1972

COUNTIES AND COUNTY OFFICERS: Assessment appeals, County Attorney §§341.7, 441.16, 441.41, Code of Iowa, 1971. The county may employ special counsel to assist the county attorney in litigation involving assessments and pay for such services from the court fund pursuant to §341.7. The conference board also has authority to hire counsel and expert witnesses. However, persons employed by the conference board must be paid under §441.41 rather than from the court fund. (Nolan to Goetz, Johnson County Attorney, 3/9/72) #72-310

Mr. Carl J. Goetz, Johnson County Attorney: Reference is made to your request for an opinion on two questions concerning payment for the probable expenses of defending assessment appeals. Essentially, your questions are:

1. Must a special counsel assisting the county attorney in litigations dealing with assessments be employed and paid under the authority of §§441.16 and 441.41, Code of Iowa 1971, or may such special counsel for this purpose be employed under §341.7 of the Code and then compensated from the Court Fund?

2. May the cost of an expert appraisal witness in assessment litigation be paid out of the Court Fund, and if not, what would be the proper Fund for payment of this expense item?

The sections of the 1971 Code of Iowa, which are pertinent to your inquiry, are set out below:

§441.16:

"All expenditures under this chapter shall be paid as hereinafter provided.

"Not later than July 1 of each year the assessor, the examining board, and the board of review, shall each prepare a proposed budget of all expenses for the ensuing year. The assessor shall include in his proposed budget the probable expenses for defending assessment appeals. Said budget shall be combined by the assessor and copies thereof forthwith filed by him in triplicate with the chairman of the conference board.

"Such combined budgets shall contain an itemized list of the proposed salaries . . . and other expenses necessary to operate the assessor's office, the estimated expenses of the examining board and the salaries and expenses of the local board of review.

* * *

"The assessor shall not issue requisitions so as to increase the total expenditures budgeted for the operation of the assessor's office. However, for purposes of promoting operational efficiency, the assessor shall have authority to transfer funds budgeted for specific items for the operation of the assessor's office from one unexpended balance to another; such transfer shall not be made so as to increase the total amount budgeted for the operation of the office of assessor, and no funds shall be used to increase the salary of the assessor or the salaries of permanent deputy assessors. He shall issue requisitions for the examining board and for the board of review on order of the chairman of each board and for costs and expenses incident to assessment appeals, only on order of the city legal department, in the case of cities and of county attorney in the case of counties.

"Unexpended funds remaining in the assessment expense fund at the end of a year shall be carried forward into the next year."

§441.41:

"In the case of cities having an assessor, the city legal department shall represent the assessor and board of review in all litigation dealing with assessments. In the case of counties, the county attorney shall represent the assessor and board of review in all litigation dealing with assessments. Any taxing body interested in the taxes received from such assessments may be represented by an attorney and shall be required to appear by attorney upon written request of the assessor to the presiding officer of any such taxing body. The conference board may employ special counsel to assist the city legal department or county attorney as the case may be."

§341.7:

"The county attorney may with the approval of a judge of the district court procure such assistants in the trial of a person charged with felony as he shall deem necessary and for such assistants upon presenting to the board of supervisors a certificate of the district judge before whom said cause was tried, certifying to the services rendered, shall be allowed a reasonable compensation therefor, to be fixed by the board of supervisors, but nothing in this chapter shall prevent the board of supervisors from employing an attorney to assist the county attorney in any cause or proceeding in which the state or county is interested. The compensation allowed to any such assistants shall be paid out of the court fund of the county."

I am of the opinion that the county may employ special counsel to assist the county attorney in litigation dealing with assessments under the authority of §341.7 and to pay the compensation for such services from the court fund. *Taylor County v. Standley*, 1890, 79 Iowa 666, 44 N.W. 911. The right of the Board of Supervisors to employ counsel on behalf of the county does not depend upon the consent of the county attorney, nor upon his willingness, nor ability to appear for the county. 1936 OAG 383.

The authority to hire attorneys under §341.7 is limited to the county attorney and the Board of Supervisors and does not apply to special counsel employed by the conference board. However, such officers may act jointly to obtain the services of special counsel to assist in valuation cases.

In answer to your second question, although §341.7 specifically authorizes the payment of assistants to the county attorney from the court fund, there is no such authorization for the use of the court fund to defray the cost of expert appraisal witnesses in assessment litigation. Therefore, I am of the opinion that such expense should be paid from that part of the county general fund appropriated pursuant to §441.16.

March 9, 1972

SCHOOLS: School buses — §285.10, Code of Iowa, 1971. School district is not required to furnish bus or reimbursement to parents for the transportation of students to extra-curricular activities but is not prohibited from doing so. (Nolan to Arbuckle, State Senator, 3/9/72) #72-3-11

The Honorable R. Dean Arbuckle, State Senator: This letter is in answer to your request for an Attorney General's opinion on the question of whether a school district must reimburse a parent for transporting his child to or from athletic or other activity practices or performances.

According to the information forwarded to you by the Jefferson Community Schools, a situation exists where the parent of such child lives on a farm approximately ten miles from his child's attendance center. The athletic activities are held after the regular school day when no transportation is provided by the district. None of the athletics or activities are required, nor are graduation credits given for participation in them.

Under such circumstances, it is my opinion that the obligation of the school board to provide transportation for such child extends only to the providing of ordinary school bus transportation at the end of the regular

school day. Section 285.1, Code of Iowa 1971.

Under §285.10, Code of Iowa 1971, a school district has the power and duty to provide transportation for each pupil who attends public school and is entitled to transportation. Under Code §286.11 the use of school buses is limited to transporting pupils and school employees to and from school and school-sponsored extra-curricular activities as part of a regular school program.

March 9, 1972

COUNTY AND COUNTY OFFICERS: Memorial Hospital — §§347.14, 347.26, 28E.4, 28E.5, Code of Iowa, 1971. Trustees may not lease unused portions of memorial hospital except for nursing home or governmental service purpose. (Nolan to Kliebenstein, Grundy County Attorney, 3/9/72) #72-3-12

Mr. Don Kliebenstein, Grundy County Attorney: This has reference to your letter concerning possible leasing of a wing of the memorial hospital:

"I respectfully requested a ruling from your office on the following question.

"The Grundy County Memorial Hospital, located in Grundy Center, Iowa, is a memorial hospital organized and existing under the provisions of Chapter 37 of the 1971 Code of Iowa.

"The hospital recently completed the construction of a new addition to the existing facilities and the remodeling of a portion of the old facilities. This project has greatly modernized the hospital but has created a situation where a portion of the old building is no longer needed for hospital purposes. The portion of the building no longer needed is in good physical condition, is directly connected to the hospital, and maintenance, heating, cleaning and upkeep of the same would be required even though the same will not be used as a portion of the hospital.

"The Board of Commissioners has received several inquiries concerning the leasing of the unused portion of the hospital. The Board believes it would be in the best interests of the hospital, and of the county, to lease the unused portion, and all of the inquiries received are for uses which the Board believes would be fully compatible with the operation of the hospital, and which would produce fair and reasonable rentals.

"My specific question is whether the Board of Commissioners of a memorial hospital, organized and existing under Chapter 37 of the 1971 Code of Iowa, has the power to lease, on fair and reasonable terms, the unused portion of a hospital to the following groups for the following purposes:

"1. To a local non-profit corporation for use as a nursing home or a custodial home?

"2. To a group of practicing physicians for use as a medical office?

"3. To a local non-profit corporation for use as a Senior Citizens Recreation Center?

"4. To a municipal corporation for use as offices or storage space?

"5. To private businessmen for use as offices?

"Your cooperation in assisting us in this problem will be greatly appreciated."

In reply to your questions, I am compelled to advise you that the Board

of Commissioners of the Grundy County Memorial Hospital has neither expressed nor implied power to lease the unused portions of the hospital under their control to any private party, with the possible exception of the establishment of a nursing home to be operated in conjunction with the county hospital pursuant to §§347.14(12) and 347.26, Code of Iowa 1971. 1930 OAG 231, 1936 OAG 434, 1962 OAG 103, 1964 OAG 87 and also page 115, and 1968 OAG 667.

However, space which is unused at such a hospital might be made available to another governmental agency under the provisions of Ch. 28E, Code. This chapter of the Code permits the state and local governments to make efficient use of their powers by enabling them to provide joint services and facilities with other agencies and to coperate in ways of mutual advantage. Under §28E.4 any public agency may enter into an agreement with other agencies for joint or cooperative action pursuant to the provisions of Ch. 28E. The requirements of such an agreement are specified in §28E.5.

Accordingly, your questions numbered 1, 3 and 4 are answered affirmatively and questions 2 and 5 answered negatively.

March 9, 1972

SCHOOLS: Teachers — §§279.14, 294.1, 257.9(11), Code of Iowa, 1971. Public funds of a school district may not be used to pay teachers on sabbatical leave or for their tuition for course approved work. Teachers on leave remain employees of the district for group health insurance purposes. (Nolan to Palmer, State Senator, 3/9/72) #72-3-13

The Honorable William D. Palmer, State Senator: Reference is made to your letter of January 10, 1972, in which you request an opinion on the following questions raised by the administrators of the Saydel Consolidated School District:

"1. Primarily, may school funds be expended for a period of twelve months when no service is rendered to the school district?

"2. Second, may life and health premiums be paid in whole or in part by a school district for an employee on leave and rendering no service therefor?

"3. Although provision is made for repayment of funds, should the teacher choose not to return to the district, two questions are created:

"a. What collateral is available to protect the interests of the taxpayers in order to assure repayment will be made?

"b. Should a teacher choose to dishonor the contract, what recourse would a school district have to recover after repayment had been made, as requested, for twelve months? Is this an enforceable contract?

"4. Does the Code of Iowa provide Boards of Education may grant sabbatical leave with pay?

"5. Does the Code of Iowa provide school boards may pay for tuition or reimburse teachers for tuition for course approved work?

"6. Should course approved work be approved or required by the Superintendent, may the Board of Education provide in the adopted salary schedule an increment for the successful completion of the course and proof of same?"

The first question may be answered by simply saying that there are no provisions in the Code of Iowa which authorize the Board of Education

to grant sabbatical leave with pay. The remaining questions will be dealt with individually in the order in which they appear in your letter.

It is well established that the contracts which teachers and school districts enter into are ones which may be classified as personal service contracts. As such, the teacher is contracting to perform the personal service of teaching in return for which the school district will compensate the teacher in terms of a salary. A "salary", as defined in Black's Law Dictionary, is "a reward or recompense for services performed". Thus, since a teacher on a sabbatical leave would be performing no services for the school district, he would not be entitled to any "reward or recompense" in the form of a salary. In the case of *Board of Education v. Associated Teachers*, (1970) 310 N.Y.S.2d 929, it was held that:

"Taking of graduate courses is not 'services rendered' to the school district, entitling teachers to compensation, unless required by term or condition of employment, and thus compensation therefore does not fall within statutory definition of 'salary'."

See also 1970 OAG 334 where it was decided that a speech clinician employed by a county Board of Education, who resigned (due to military duty) prior to commencing employment contemplated by his contract, was not entitled to any pay under the contract since he performed no service thereunder.

In 47 Am. Jur. *Schools*, §123, it is stated that, ". . . the granting of leave of absence with pay has been held to constitute a gift of public money, and to be beyond the power of any school board". Since the Iowa Code makes no provisions for school boards to grant gifts of public money to its teachers in the mode of sabbatical leaves with pay, and since the teacher on leave will be giving no services to the school board during this period, it must be concluded that the school district may not expend funds for these teachers on sabbatical leave.

Regarding life and health insurance premiums, the full or partial payment of these life and health premiums is a part of the teacher-school district contractual relationship. A teacher on authorized leave, with or without pay, remains an "employee of the educational institution under its control" and may be covered within any group insurance plan established by the school district.

The answer to your third question regarding collateral and repayment of funds depends on the provisions of the specific contractual arrangement. Since it has been established that school funds may not be expended for teachers on sabbatical leave, there should be no problem arising with regard to repayment or needed collateral. With respect to contributions to group insurance we believe there is latitude for payment of the total premium by the employee, through the school district, while on leave status.

As to your question of whether the school board may pay for tuition or reimburse teachers for tuition for course approved work, it was held in 1952 OAG 142 that a school district could not under any circumstances pay the expense for room, board, tuition and supplies of graduates of the high school of the district attending teachers college. As the opinion goes on to state, "upon graduation from high school a student is no longer

entitled to free education by the school district". Therefore, by analogy, the paying of the tuition for these teachers to continue their studies would, in essence, be a form of "free education" and as such may not be paid for by a school district.

Finally, you ask whether the Board of Education may have salary increments for those who have completed approved or required course work, as established by the Superintendent. Section 279.14 of the Iowa Code provides in pertinent part that:

". . . He (the superintendent) shall be the executive officer of the board and have such powers and duties as may be prescribed by rules adopted by the board or by law."

Section 294.1, Code of Iowa 1971, prohibits the employment of a teacher not holding a certificate of qualification given by the county superintendent . . . or some other officer duly authorized by law. Code §257.9(11) provides that the State Board of Public Instruction shall:

"(c)onstitute the board for the certification of administrative, supervisory and instructional personnel for the public school systems of the state; prescribe types and classes of certificates to be issued, the subjects and fields and positions which such certificate shall cover and determine the requirements for certificates, establish standards for the acceptance of degrees, credits, courses and other evidence of training and preparation . . ."

The Board of Education of a school district, while preempted of authority to prescribe requirements for teacher certification may provide for recognition of experience and specialized training in the salary schedule adopted by it for the district.

March 9, 1972

SCHOOLS: Uniforms. A school board may not use public funds to buy uniforms for the school band unless wearing of such uniform is required as a condition for obtaining credit in music instruction. (Nolan to Balloun, State Senator, 3/9/72 #72-3-14

The Honorable Charles F. Balloun, State Senator: This is in reply to your request for an opinion on the question of whether a school board may use public funds to buy uniforms for the school band. In your letter you have asked if this might be allowed because the departmental rules promulgated by the State Department of Public Instruction set standards for an activity program of approved schools. Listed among the standards in 1971 Iowa Departmental Rules, Page 639, is the following general guideline:

"3.6(1). Each school or school system shall have a pupil activity program sufficiently broad and balanced to offer opportunities for all pupils to participate. The activity program shall be cooperatively planned by pupils and teachers, shall be supervised by qualified school personnel, and shall be designed to: (a) Meet the needs and challenge the interests and abilities of all pupils consistent with their individual stages of development; (b) contribute to the physical, mental, aesthetic, civic, social, moral, emotional, and spiritual growth of all pupils; (c) offer opportunities for both individual and group activities; (d) be integrated with the instructional program; (e) provide balance whereby a limited number of activities will not be perpetuated at the expense of others; (f) be controlled to a degree that interscholastic activities do not unreasonably interfere with the regularly scheduled daily program, and (g) furnish

guidance to pupils to insure that they regulate the amount of time they participate in the activity program so that they will not jeopardize benefits they might receive from other aspects of the school program.

"The school shall make reasonable efforts to provide and maintain adequate facilities and equipment to develop and encourage a broad activities program."

It has long been the opinion of this office that public school funds can be used for instructional equipment but not for personal equipment or clothing. 1936 OAG 375, 377.

As a result of such interpretation, it has been the long-standing general practice of schools, and the students and supporters of such schools, to maintain an activity fund to take care of the expenses of uniforms and travel expenses of students participating in extra-curricular activities.

While it is proper to expend public funds for text books, music, and musical instruments which are necessary for the purpose of providing instruction in band or orchestral music, it is difficult to correlate the use of public funds for band uniforms, choir robes, caps and gowns for graduation, or gym suits. However, if the school board requires the wearing of such a uniform as a condition for obtaining credit in the course taught, then, in my opinion, the furnishing of such uniforms is as appropriate as the furnishing of the text books and instruments.

March 9, 1972

INSURANCE: Hospital medical service — Ch. 514, §§504.2, 504A.4, Code of Iowa, 1971. A non-profit hospital medical service may acquire real estate for a home office building, such property acquisition is subject to approval of the Insurance Commissioner. (Nolan to Huff, Commissioner of Insurance, 3/9/72) #72-3-15

Mr. William Huff, Commissioner of Insurance, Insurance Department: An opinion on several questions concerning the acquisition of a home office building by a non-profit hospital medical service corporation in Iowa has been requested by your office:

"Chapter 514, Code of Iowa, . . . is both the enabling legislation for and the statutory regulation of non-profit hospital-medical service corporations in Iowa. Section I of this Chapter exempts such corporations from other provisions of the insurance laws of this state, except where this Chapter specifically designates therein.

"Recently, Iowa Medical Services, Inc., and Hospital Service, Inc., of Iowa have raised certain questions concerning the acquisition of a home office building. The Department and the corporations have exchanged briefs concerning this issue and it has become obvious there are some material differences of opinion between us on the following questions:

"1. Does Chapter 514, Code of Iowa, 1971, permit non-profit service corporations to acquire and own realty for the purpose of erecting and maintaining a home office building?

"2. If such power to acquire home office realty exists, does Section 12 of Chapter 514 qualify and limit the acquisition by reference to Section 511.8(10)(a) Chapter 511, Code of Iowa, . . . , which regulates the investments of life insurance companies on home office realty to investments?

"3. Could the acquisition of a home office be considered as 'acquisi-

tion costs in connection with the solicitation of subscribers' and thereby be cost controlled as is required by Section 514.11, Code of Iowa . . .?"

In answer to these questions, I advise:

1. I find no express authorization in Ch. 514, Code of Iowa 1971, for such non-profit service corporation to acquire and own real estate for a home office building. However, power to acquire a home office may be implied from the following statutes:

"§514.1. Any corporation hereafter organized under the provisions of Chapter 504 or Chapter 504A for the purpose of establishing, maintaining, and operating a non-profit hospital service plan . . . medical and surgical service . . . non-profit pharmaceutical service plan or optometric service plan . . . shall be governed by the provisions of this chapter and shall be exempt from all other provisions of the insurance laws of this state, unless specifically designated herein, not only in governmental relations with the state but for every other purpose, and no additions hereafter enacted shall apply to such corporations unless they be expressly designated therein . . ."

"§504.2. Upon filing such articles, the persons signing and acknowledging the same, and their associates and successors, shall become a body corporate, with the name therein stated, and may sue and be sued. It may have a corporate seal, alterable at its pleasure, and may take by gift, purchase, devise, or bequest real and personal property for purposes appropriate to its creation . . ."

"§504A.4. Each corporation unless otherwise stated in its articles of incorporation, shall have power:

* * *

"4. To purchase, take, receive, lease, take by gift, devise or bequest, or otherwise acquire, own, hold, improve, use and otherwise deal in and with real or personal property, or any interest therein, wherever situated."

2. The authority to own real estate is not limited by §514.12, which authorizes the investment of company funds in "securities" which life insurance companies may own. The word "securities" does not usually include land. Words and Phrases, Vol. 38A, Perm. Ed. 159. The "securities" which may be purchased are described by §511.8. In addition to "securities" life insurance companies may also invest funds in real estate. However, such investment for the accommodation of the company or association as a home office or in the transaction of its business may not exceed a specified portion of its legal reserve. (§511.8(10)).

Companies authorized under Ch. 514 are exempt from the reserve requirements of the insurance laws. Consequently, the limitation on the amount which may be spent by a life insurance company on a home office building does not apply in this case.

3. In determining whether to equate the "acquisition costs in connection with the solicitation of subscribers" to authority for expenditure of funds for a home office building, I have studied §514.11 which provides:

"All acquisition costs in connection with the solicitation of subscribers to such hospital service plan or medical service plan or pharmaceutical or optometric service plan, and administration costs including salaries paid its officers, if any, shall at all times be subject to the approval of the commissioner of insurance."

There has been no showing of substantial relationship between the cost

of obtaining subscribers and the necessity of owning a home building. Unless the real estate (home office building) signifies salutory characteristics of stability, efficiency, dignity and permanency of the service offered to subscribers, it would seem that the impact of investing funds in such building would be negligible as a cost of obtaining subscribers.

Under the present practices of most companies, the operating cost of obtaining suitable office space is charged as rent whether the company owns its own office space or leases it from another. Potential subscribers may not be aware of the fact that the home office is actually located in one building or several and are likely to be concerned only for reasons of economy as shown by the cost of the premium for the coverage offered to them, as their contacts with such office are more likely to be by phone or mail than by personal visit. Therefore, it does not logically follow that the commissioner is authorized to impose conditions tied to subscriber acquisition costs as a basis for limiting the expenditure of funds for a home office building.

On the other hand, §514.11 does provide that "administration costs . . . if any, shall at all times be subject to the approval of the commissioner of insurance". Allocation of funds for the acquisition of a home office building are clearly administration costs which require such approval.

March 9, 1972

CITIES AND TOWNS: Donations — Art. III, section 31, Iowa Constitution. A city may not make a donation for a private purpose. (Blumberg to Campbell, State Representative, 3/9/72 #72-316

Mr. Herbert Campbell, State Representative: You have requested an Attorney General's Opinion as to whether a town council may make a donation from town funds to a recreation center which is operated and funded by private citizens not responsible to the Town Council. In addition, the Council does not have any authority whatsoever in the operation of the center.

Under general principles of law, and the decisions of the courts of some of our neighboring states, such a donation would not be advised. As stated in 56 Am. Jur. 2d *Municipal Corporations* §591:

"In a number of cases, the view has been taken that it is not within the power of a municipal corporation, even with express legislative authority, to donate funds in aid of a private institution, although it is devoted to charitable or educational work for which public funds might lawfully be expended by the municipality directly, if a private corporation or organization controls the institution, elects its own officers, manages its own affairs, and owes no duty to the state except that which arises from the nature of work undertaken by it."
See also, *Washington Home* v. *Chicago*, 157 Ill. 414, 41 N.E. 893, *Farmer* v. *St. Paul*, 65 Minn. 176, 67 N.W. 990; *Curtis* v. *Whipple*, 24 Wis. 350.

Specifically, The Constitution of the State of Iowa, Article III, section 31, provides in part:

"[*N*]*o public money or property shall be appropriated for local, or private purposes* unless such appropriation, compensation or claim be allowed by two thirds of the members elected to each branch of the General Assembly" [emphasis added.]

Interpreting the above section, as it applies to limit the power of a city council, the Iowa Supreme Court in *Love* v. *City of Des Moines*, 1930, 210 Iowa 90, 94, 230 N.W. 373, said:

"One of the fundamentals of popular government is that the power of taxation and the expenditure of taxes shall not be exercised for private benefit or for the purpose of mere gratuities to private interests."

It is our opinion, therefore, that a donation such as you describe in your letter would not be authorized.

March 10, 1972

STATE OFFICERS AND DEPARTMENTS: Vacation entitlement, transferring employees — §79.1, Code of Iowa, 1971, as amended by Ch. 105, 64th G.A., First Session (1971). So long as a particular individual's state employment is continuous it makes no difference whether or not he transfers from a non-merit position to a merit position or vice versa insofar as his vacation entitlement is concerned. (Haesemeyer to Bidler, Dept. of Public Safety, 3/10/72) #72-3-18

Mr. Carroll L. Bidler, Deputy Commissioner, Iowa Department of Public Safety: You have requested an opinion of the attorney general with respect to the following matter:

"A problem has arisen concerning the earned vacation of one of our employees. The Merit System has indicated to us that an employee who leaves the covered service and goes to work for another state agency, not covered by the Merit System, and who later returns to covered employment under the Merit System, loses any vacation accrued up to the time when he returns to covered service. Section 19A.9, paragraph 18, provides that the Merit Employment Commission shall adopt rules covering annual sick leave and vacation time in accordance with Section 79.1 of the Code. Section 79.1 as it existed prior to its amendment by Chapter 105, Acts of the Sixty-fourth General Assembly, provided for vacation allowances covering all employees of the State, including highway maintenance employees of the State Highway Commission.

"As amended by Chapter 105, Acts of the Sixty-fourth General Assembly, Chapter 79.1 of the Code now reads: 'All employees of the State, including highway maintenance employees of the State Highway Commission, shall earn one week vacation during the first year of employment and two weeks vacation per year during the second and through the fourth year of employment, and three weeks vacation per year during the fifth and through the eleventh year of employment, and four weeks vacation during the twelfth year and all subsequent years of employment, with pay.

"I respectively request your opinion as to the following: Does the vacation allowance for a state employee who transfers from a non-merit position to a merit position accrue from the date of his original employment with the state, or from the date of his transfer to the merit position."

It is to be observed that §79.1, Code of Iowa, 1971, as amended by Chapter 105, 64th General Assembly, First Session (1971) sets forth the vacation entitlement of state employees and in doing so grants progressively greater vacations for successive years of employment. In speaking of "employment" such §79.1 makes no distinction between state service covered by the merit system and exempt or non-covered service. Under Rule 14.2 of the Rules adopted by the merit employment department it is necessary that employment be continuous in order to qualify for successively greater periods of vacation entitlement and Rule 14.2(4) provides,

"A classified employee who is transferred from one state agency or department to another state agency or department shall be credited with the vacation leave he has accumulated."

It is our opinion that so long as a particular individual's state employment is continuous it makes no difference whether or not he transfers from a non-merit position to a merit position or vice versa insofar as his vacation entitlement is concerned. However, we must emphasize that we are talking only about vacation entitlement and this opinion has nothing to do with reinstatement rights, probationary vs. permanent status, or any other matters distinct from the narrow question of vacation accrual.

March 13, 1972

COUNTIES & COUNTY OFFICERS: County Engineer — §345.1, Code of Iowa, 1971, as amended by Ch. 200, Acts, 64th G.A., First Session; §§332.7, 332.8, 309.9, Code of Iowa, 1971. There is no authority for use of secondary road fund to construct an office for the county engineer. (Nolan to Huibregtse, Sioux County Attorney, 3/13/72) #72-3-19

Mr. Robert R. Huibregtse, Sioux County Attorney: Reference is made to your letter dated January 9, 1972, in which you requested the following:

"Sioux County is anticipating construction of a building which will provide for a County Engineer's office, drafting room and a garage for engineering survey vehicles.

"The cost of the building is estimated at $50,000.00. These funds to come from the Secondary Road Fund and not to necessitate a levy of additional taxes.

"Quaere: Does this construction, when authorized by the Board of Supervisors, solely for the use of the County Engineer's Office, with payment solely from the Secondary Road Fund, fall within the scope of Chapter 200 (S.F. 269) of the 64th General Assembly, First Session, rather than under the provisions of Iowa Code Sections 332.7 and 332.8, which require contracts and bids?"

Chapter 200 of the 64th General Assembly, First Session, provides:

"345.1 Expenditures — when vote necessary. The board of supervisors shall not order the erection of, or the building of an addition or extension to, or the remodeling or reconstruction or relocation and replacement of a courthouse, jail, county hospital, county home, or any other county building or facility, except as otherwise provided, when the probable cost will exceed ten thousand dollars, nor the purchase of real estate for county purposes exceeding ten thousand dollars in value, until a proposition therefor shall have been first submitted to the legal voters of the county, and voted for by a majority of all persons voting for and against such proposition at a general or special election, notice of the same being given as in other special elections. However, such proposition need not be submitted to the voters if any such election, construction, remodeling, reconstruction, relocation and replacement, or purchase of real estate may be accomplished without the levy of additional taxes and the probable cost will not exceed fifty thousand dollars, or when a relocation and replacement is made necessary by the acquisition of county property for a federal or state project, and the cost of the relocation does not exceed the amount of the award of damages by the state or federal government."

As may be seen from the above, as long as the construction may be completed for less than $50,000.00 and there will be no need for an

additional tax levy, the proposition does not have to be put to a vote. But, in no manner does this section allow the board to avoid the requirements of §§332.7 and 332.8. These sections require contracts and bids to be made for the erection of any building where the cost will exceed $2,000.00. However, there is still another legal problem with your present plans.

Iowa Code §309.9 sets forth uses for which the Secondary Road Fund may be used. The section states:

"The secondary road fund is hereby pledged to and shall be used for any and all of the following purposes at the option of the board of supervisors:

"1. Construction and reconstruction of secondary roads and costs incident thereto.

"2. Maintenance and repair of secondary roads and costs incident thereto.

"3. Payment of all or part of the cost of construction and maintenance of bridges in cities and towns having a population of eight thousand, or less and all or part of the cost of construction of roads located within an incorporated town, of less than four hundred population, which lead to state parks.

"4. Special drainage assessments levied on account of benefits to secondary roads.

"5. Payment of interest on and principal of any bonds of the county issued on account of secondary roads, bridges or culverts constructed by the county.

"6. Any legal obligation or contract in connection with secondary roads and bridges which is required by law to be taken over and assumed by the county, and

"7. Secondary road equipment, materials, supplies and garages or sheds for the storage, repair and servicing thereof.

"8. For the assignment or designation of names or numbers to roads in the county and to erect, construct or maintain guide posts or signs at the intersections thereof."

As can be seen from the above section, there are no provisions for the use of the Secondary Road Fund to construct offices for the County Engineer, or for a drafting room. Section 309.9(7) would permit construction of a garage for engineering survey vehicles and any offices incidental to that use, i.e., a dispatcher, etc. 1968 OAG 648. But, we do not construe this provision to authorize the construction of an office building for the relocation of the County Engineer.

March 20, 1972

TAXATION: Compromising Taxes — Attorney General — County Board of Supervisors — §§135D.22, 445.16, 445.19, Code of Iowa, 1971. The Attorney General has no statutory authority to waive the tax on mobile homes and the Board of Supervisors has the authority to compromise property taxes but said authority is extremely limited by the statute. (Kuehn to Knoblauch, State Representative, 3/20/72) #72-3-20

The Honorable Charles E. Knoblauch, State Representative: You have requested an Attorney General's Opinion with reference to the authority of the Attorney General or the County Board of Supervisors to waive the tax on a mobile home as set forth in §135D.22, Code of Iowa 1971.

The mobile home you refer to in your letter was purchased in 1966 and at that time was not used supposedly because of its condition. The buyer failed to do anything to get the title changed or transferred, pay registration fees as required by §321.123(3), Code of Iowa 1971, and pay taxes as required in §135D.22. Since 1966, the buyer remodeled and reconstructed the mobile home so that it was serviceable. Now the buyer wants to sell the mobile home but is having difficulties because of the registration fees, taxes and penalties that are due. Since the taxes, etc., now supposedly total more than the value of the mobile home, the buyer wants the taxes that are set forth in §135D.22 waived.

This section of the Iowa Code reads as follows:

"135D.22. Semiannual tax. The owner of each mobile home shall pay to the county treasurer a semiannual tax as herein provided. However, when the owner is any educational institution and the mobile home is used solely for student housing or when the owner is the state of Iowa or a subdivision thereof, the owner shall be exempt from the tax provided herein. The semiannual tax shall be computed as follows:

1. Multiply the number of square feet of floor space each mobile home contains when parked and in use by ten cents, except that if the owner of a mobile home is sixty-five years of age or older and his net income as defined in section 422.7, plus interest and dividends from federal securities and income from social security and other tax-exempt retirement or pension plans, when included with that of his spouse is less than thirty-five hundred dollars per year, the semiannual tax shall be computed by multiplying the number of square feet of floor space the mobile home contains when parked and in use by seven and one-half cents. In computing floor space the exterior measurements of the mobile home shall be used as shown on the certificate of registration and title, but not including any area occupied by any hitching device.

2. The amount thus computed shall be the semiannual tax for all mobile homes for the first five years after the year of manufacture.

3. For the sixth through ninth years after the year of manufacture the semiannual tax shall be ninety percent of the tax computed according to subsection 1 of this section.

4. For all mobile homes ten or more years after the year of manufacture the semiannual tax shall be eighty percent of the tax computed according to subsection 1 of this section.

5. The semiannual tax shall be figured to the nearest whole dollar."

The general rule is that the power to tax does not include the power to remit or compromise taxes. Where taxes are legally assessed, the taxing authority is without power to compromise, release or abate them except as specifically authorized by statute. *State Ex Rel. Donsante v. Pethtel*, 1952, 158 Ohio St.35,106 N.E.2d 626,28 ALR2d 1419. The Courts are virtually in unanimous agreement with the general rule. 28 ALR2d 1428. The Attorney General for the State of Iowa has no statutory authority to waive the tax on mobile homes.

Chapter 135D, Code of Iowa 1971, is silent as to any powers of the County Board of Supervisors to waive the mobile home tax. Authority is given to the Board of Supervisors to compromise property taxes in §§445.16 and 445.19, Code of Iowa 1971. These sections read as follows:

"445.16 Compromising tax. When any property in this state has been offered by the county treasurer for sale for taxes for two consecutive

years and not sold, or sold for only a portion of the delinquent taxes, then and in that event the board of supervisors of the county is hereby authorized to compromise the delinquent taxes against said property antedating any tax sale certificate; or being a part of the taxes due for the year for which such property was sold for taxes, and may enter into a written agreement with the owner of the legal title or with any lienholder for the payment of a stipulated sum in full liquidation of all delinquent taxes included in such agreement."

"445.19 Compromising tax on personal property. When personal property taxes are not a lien upon any real estate and are delinquent for one or more years, the board may, when it is evident that such tax is not collectible in the usual manner, *compromise such tax as provided in sections 445.16* to 445.18 inclusive." (emphasis added)

These statutes have been explained and construed by several Attorney General Opinions. 1925-26 O.A.G. 440, 1928 O.A.G. 308, 1938 O.A.G. 699.

These Attorney General Opinions state that there can not be any deviation from the procedure that requires that before the Board can compromise a tax, (1) the property (including personal) must have been offered for sale for taxes for two consecutive years, and not sold, or sold for only a portion of the delinquent taxes, (2) the taxpayer owing the personal property tax must be unable to pay the tax because if he is, the Board has no authority to make any compromise (3) on personal property the tax can not be a lien on any real estate, (4) on personal property the tax must have been delinquent for one year or more.

The Board of Supervisors has no authority to waive the tax on the mobile home because the factual situation you presented does not fit within the statute (§§445.16 and 445.19) with reference to the powers of the Board to waive the delinquent taxes.

There may be a question as to whether or not §§445.16 and 445.19 giving the Board the power to compromise taxes would apply to Chapter 135D. However, it is unnecessary to answer this question at this point because, as stated above, the Board has no statutory authority to waive the tax on the mobile home.

March 21, 1972

VETO; ADJOURNMENT; SINE DIE; Computing time — Art. III, §16, Constitution of Iowa; §4.1(23), Code, 1971. The Governor has three full days, until midnight of the third day after a bill has been presented to him in which to exercise his veto and return his disapproval to the originating house, the day of presentation and Sunday being excluded in counting the days. "Adjournment" as used in the Constitution means "sine die" or "final adjournment" for the session. (Turner to Schroeder, State Representative, 3/21/72) #72-3-21

The Honorable Laverne W. Schroeder, State Representative: You have requested an opinion of the attorney general as to the effectiveness of the Governor's veto of House File 48, Acts of the 64th General Assembly, Second Session. Specifically, you state that H.F. 48 was delivered to the Governor shortly after noon on March 13, 1972, and that none of this day is counted in the three days in which the Governor must make his determination whether to approve or disapprove the bill. You state, however, that the disapproval message or veto was not returned to the House prior to its adjournment on March 16. The House adjourned at approximately 5:55 P.M. and the veto message was received at 7:15 P.M.

The pertinent part of Art. III, §16, Constitution of Iowa, states:

"If any bill shall not be returned within three days after it shall have been presented to him, Sunday excepted, the same shall be a law in like manner as if he had signed it, unless the General Assembly, by adjournment, prevent such return."

As you point out, the first day, March 13, on which the bill was delivered to the Governor, is not properly counted as part of the three days in which the Governor has to make his determination. §4.1(23), Code of Iowa, 1971, provides that in computing time, "the first day shall be excluded and the last included, unless the last falls on Sunday, in which case the time prescribed shall be extended so as to include the whole of the following Monday" etc. While the statute cannot be construed to amend or control the Constitution, there is nothing in the Constitution to suggest that the first day was not properly excluded. The legislature's long-standing construction that the first day is to be excluded is entitled to weight, as is the long-standing practice of the Governor in this regard. Moreover, I believe substantial authority may be found in the common law for excluding the first day in computing time.

Your principal question is whether the veto must be accomplished and the bill returned to the House in which it originated (1) before the House adjourns on the third day or (2) before midnight of the third day. In my opinion, the Governor has three full days, until midnight of the third day, and need not concern himself as to when the legislature will adjourn for the day. This is indicated, for one thing, by the fact that Sundays are also excluded in computing the time. And, if it were otherwise, a legislature bent upon avoiding the Governor's disapproval of a bill and the consequences of his veto, could adjourn unexpectedly on the morning of the third day. Indeed, such a prospect may have been anticipated when our people said "unless the General Assembly, by adjournment, prevent such return."

But I am convinced that the word "adjournment" in Art. III, §16, means "final" adjournment or "adjournment *sine die*". *In re Opinion of the Justices*, 252 Ala. 541, 42 So.2d 27, 29; *State v. Joseph*, 175 Ala. 579, 57 So. 942; *State ex rel Sullivan v. Dammann*, 221 Wis. 551, 267 N.W. 433, 434; *Johnson City v. Tennessee Eastern Electric Co.*, 133 Tenn. 632, 182 S.W. 587, 589; *Kidd v. Bailey*, 152 W.Va. 196, 160 S.E.2d 142. In other words, the legislature does not truly adjourn in any final sense, during a particular session, until it adjourns *sine die*. It merely recesses from time to time. So, while the Governor cannot rely upon recesses or spring vacations to extend the time in which he can exercise his veto power, he nevertheless has three full days until midnight of the third day in which to perform this important legislative power, unless the legislature has adjourned *sine die* in which case:

"Any bill submitted to the Governor for his approval during the last three days of a session of the General Assembly, shall be deposited by him in the office of the Secretary of State, within thirty days after the adjournment, with his approval, if approved by him, and with his objections, if he disapproves thereof." Art. III, §16.

For all of these reasons, under the facts stated, it is my opinion that the Governor's disapproval was timely executed and proper.

March 21, 1972

COUNTIES AND COUNTY OFFICERS: Supervisors — §39.18, Code of Iowa, 1971. Where term of office was not otherwise specified on the ballot a supervisor elected in 1968 should serve a statutory 4 year term. Ch. 1165, Acts, 63rd G.A., Second Session, clearly provides means for discontinuing practice of staggering terms of office by having such time commence more than one year after the election. (Nolan to Petersen, Montgomery County Attorney, 3/21/72) #72-3-22

Mr. John K. Petersen, Montgomery County Attorney: This has reference to your letter requesting an opinion on §39.18, Code of Iowa 1971. In your letter you state:

"Chapter 39.18 is applicable to 1968 Elections and thereafter, and as I read it the Chapter required the Board of Supervisors to set the term of that Supervisor who would have been elected for the term beginning on January 2, 1970, they to decide whether he should have a three or five year term, and this was to be specified on the ballot.

"Montgomery County did not make a determination and did not specify on the Ballot the length of the term. Your advice will be appreciated as to the situation of the Supervisor who was elected for the Term beginning January 2, 1970. Does he serve a three year term, a four year term or a five year term?

"If he serves a four year term, do we at this election make a determination as to whether the Supervisor will serve a three or five year term and elect a Supervisor for a Term beginning January 2, 1974? Or, may we continue with a Supervisor being elected for a four year term beginning on the off-year?"

In answer to your questions as they appear, it is our view that the Supervisor elected for the term beginning January 2, 1970, was elected to a four-year term since no other determination was made prior to this election. Therefore, he should be permitted to serve a four-year term.

Second, at the forthcoming election to be held in 1972 two Supervisors will be elected. One to fill the four-year term of the Supervisor elected in 1968 whose term expires the last day of December, 1972, and also a Suprvisor to be elected to either a three-year term or a five-year term as determined by the Board to succeed the Supervisor whose term commenced January 2, 1970, and expires December 31, 1973. This Supervisor is to be elected under the provisions of §39.18 as follows:

"The term of office of any supervisor or trustee taking office for a four-year term one year later than the January next succeeding his election, shall, at the general election *which next precedes by more than one year* the expiration of his term, be refilled by a member elected to a three-year term or a five-year term to be specified on the ballot as determined by the board, so that the terms of no more than a bare majority of the board will expire in the same year." [Emphasis added]

Third, it is clear under the provisions of Section 3 of Ch. 1165, Acts of the 63rd G.A., Second Session, which became law on July 1, 1970, that the practice of electing a Supervisor for a four-year term beginning on the off-year is to be discontinued. The above quoted provision has application to all trustees and members of the Board of Supervisors elected in the year 1968 and thereafter. This would mean that the first opportunity to correct the situation of staggered terms beginning more than a year from the date of election, in a case such as the one you present, would be the 1972 elections.

March 21, 1972

CITIES AND TOWNS: Donations of municipalities and accumulation of funds — §8.6(4), Code of Iowa, 1971. Municipalities should not donate funds to other municipalities in the absence of a statutory joint agreement. The unexpended cash balance of a special fund may be accumulated. (Blumberg to Harbor, Speaker of the House of Representatives, 3/21/72) #72-3-23

William H. Harbor, Speaker of the House of Representatives: I am in receipt of your opinion request wherein you ask the following questions:

"*Number One* — Can a town or city whose rural fire tax fund has succeeded in paying off all the indebtedness of that fire fighting department, utilize any accumulated funds to help adjoining towns with whom they have mutual fire fighting agreements in paying off their debt toward the purchase of fire trucks or fire equipment be made?

"*Number Two* — Can funds which are earmarked for the rural fire fighting fund be accumulated over a period of time toward the future purchase of equipment? In other words, can they build up a fund for these purposes?"

The above questions center around the authority of municipalities in making donations from their funds.

It is well known that municipalities may expend money from their funds for public purposes. 56 Am. Jur. 2d, *Municipal Corporations* §588, and citations therein. See also an opinion of February 5, 1971, Gors to Thordsen. However, municipalities may not expend funds for private purposes. 56 Am. Jur. 2d, *Municipal Corporations* §591, and the cases cited thereunder. See also Article III, section 31, of the Iowa Constitution.

It would seem that the funding of the purchase and use of firefighting equipment would be a public purpose as opposed to a private one. However, this is not apparent in your case. It is our opinion that the "public purpose" necessary for the proper expenditure of funds must be for the benefit of the municipality so funding. The fact that there is a verbal agreement between the municipalities for mutual assistance in firefighting has no bearing here. This type of agreement may be ended at any time. If so, the money donated will not be used for any purpose of the municipality so expending.

Making a donation to another municipality is analogous to private donations. As in private donations there does not appear to be a sufficient public purpose here to make such an expenditure legal. Expenditures of this type may be legal pursuant to a joint agreement under Chapter 28E, 1971 Code of Iowa. However, no such agreement is apparent.

In answer to your second question, we are of the opinion that these funds may be accumulated. We assume that this accumulation will be due to expending less than is budgeted. Section 8.6(4)(c), 1971 Code of Iowa, makes reference to unencumbered cash balances in funds from preceding years. This necessarily implies that the unexpended balances from a fund may be accumulated in that fund until they are budgeted and expended.

In summary, our opinion is as follows: (1) That it is not advisable that a municipality donate money from one of its special funds to another municipality; and (2) The unexpended cash balances in a fund at the

end of the budget year may be accumulated in that fund for future purposes.

March 22, 1972

STATE OFFICERS AND DEPARTMENTS: Secretary of Agriculture; cooperative agreement with federal government for meat inspection — §§189A.3 and 189A.7, Code of Iowa, 1971. The Secretary of Agriculture may, upon 30 days written notice, terminate the cooperative meat inspection agreement with the U.S. Dept. of Agriculture. (Haesemeyer to Liddy, Secretary of Agriculture, 3/22/72) #72-3-24

The Honorable L. B. Liddy, Secretary of Agriculture: You have requested an opinion of the attorney general with respect to the following:

"We are enclosing a copy of our Agreement with the United States Department of Agriculture concerning the Wholesome Meat Act of 1967. The 63rd Session of the Iowa Legislature passed an Act providing for funding as well as our participation on a State level of meeting the 'equal to' basis of the Federal Act.

"My specific question is — would I as Secretary of Agriculture have the authority to carry out the 30-day cancellation clause in the Agreement signed by the U.S.D.A., or would the Act of the Legislature preempt the 30-day cancellation clause referred to above."

The Cooperative Agreement between the Iowa department of agriculture and the consumer and marketing service of the United States department of agriculture, a copy of which was attached to your letter, provides in part:

"This agreement shall continue in force until June 30, 1968, and as long thereafter as Congress and the State shall provide the necessary authority and funds therefor, subject to annual confirmation by a duly authorized officer of the United States Department of Agriculture; *Provided, however,* That this agreement may be terminated at any time by mutual consent, or by either party hereto by giving written notice to the other party 30 days in advance of and specifying the date of termination."

It is evident from the foregoing that the agreement contemplates that it is to continue in force so long as both the Congress of the United States and the State of Iowa provide both authority and funds therefor except that the agreement may be terminated at any time by mutual consent or by either party, including the Iowa department of agriculture upon thirty days written notice. The measure enacted by the 63rd General Assembly to which you make reference is Chapter 145, 63rd G.A., First Session (1969), now codified as Chapter 189A of the 1971 Code. Section 189A.3 provides:

"189A.3 License — fee. No person shall operate an establishment without first obtaining a license from the department. The license fee for each establishment, excluding restaurants and grocery stores, per year or any part of a year shall be:

"1. For all meat and poultry slaughtered or otherwise prepared not exceeding twenty thousand pounds per year for sale, resale, or custom, twenty-five dollars.

"2. For all meat and poultry slaughtered or otherwise prepared in excess of twenty thousand pounds per year for sale or resale, fifty dollars.

"The license fee for each restaurant selling twenty pounds or more of meat or meat products annually and each grocery store per year or any

part of a year shall be five dollars.

"The funds shall be deposited with the department of agriculture. The license year shall be from July 1 to June 30. Applications for licenses shall be in writing on forms prescribed by the department.

"It is the objective of this chapter to provide for meat and poultry products inspection programs that will impose and enforce requirements with respect to intrastate operations and commerce that are at least equal to those imposed and enforced under the federal Meat Inspection Act and the federal Poultry Products Inspection Act with respect to operations and transactions in interstate commerce; and the secretary is directed to administer this chapter so as to accomplish this purpose. A director of the meat and poultry inspection service shall be designated as his delegate to be the appropriate state official to co-operate with the secretary of agriculture of the United States in administration of this chapter."

Section 189A.7 confers certain powers upon the secretary of agriculture with respect to the implementation of Chapter 189A among which is the power conferred by subsection 10 of such §189A.7 as follows:

"In order to accomplish the objective stated in section 189A.3, the secretary may:

* * *

"10. Co-operate with the secretary of agriculture of the United States in administration of this chapter to effectuate the purposes stated in section 189A.3; accept federal assistance for that purpose and spend public funds of this state appropriated for administration of this chapter to pay the state's proportionate share of the estimated total cost of the co-operative program.

* * *"

It is evident that the cooperative agreement between the Iowa department of agriculture and the United States department of agriculture antedated the enactment of Chapter 189A in the form we now find it. However, we have been unable to find any provision in Chapter 189A which would preclued the secretary of agriculture from terminating the cooperative agreement upon thirty days notice pursuant to the express terms of that agreement.

March 22, 1972

CITIES AND TOWNS: Sanitary disposal projects, contracts with private operators — §§406.2, 406.3, Code of Iowa, 1971. Cities, towns and counties may enter into contracts with private entities for the collection of solid waste and the establishment and operation of sanitary disposal projects and the general administration of the same without public bids. (Haesemeyer to Harbor, Speaker of the House of Representativs, 3/22/72) #72-3-25

The Honorable William H. Harbor, Speaker of the House of Representatives: Reference is made to your request for an opinion of the attorney general in which you state:

"Can a town enter into a private contract with a sanitary landfill operation without the contract being put up for bids?

"As a way of explanation, an enterprising private businessman has spent thousands of dollars looking into such a potential project in southwest Iowa. He has made contact with county boards of supervisors, town councils, state agencies and other interested people. He has feasibility figures and stands ready to meet this need without the necessity of coun-

ties going into condemnation and land purchases for this service."

Section 406.3, Code of Iowa, 1971, provides:

"406.3 Mandatory establishment of sanitary disposal projects. Every city, town and county of this state shall provide for the establishment and operation of a sanitary disposal project for final disposal of solid waste by its residents not later than the first of July, 1975. Sanitary disposal projects may be established either separately or through co-operative efforts for the joint use of the participating public agencies as provided by law.

"Cities, towns and counties may execute with public and private agencies contracts, leases, or other necessary instruments, purchase land and do all things necessary not prohibited by law for the collection of solid waste, establishment and operation of sanitary disposal projects, and general administration of the same. Any agreement executed with a private agency for the operation of a sanitary disposal project shall provide for the posting of a sufficient surety bond by the private agency conditioned upon the faithful performance of the agreement."

It is clear from the express language of the foregoing statutory provision that cities, towns and counties may contract with private agencies for a sanitary disposal project. Section 406.2 defines private agency to mean a private agency as defined in §28E.2. Section 28E.2 provides in relevant part:

"The term 'private agency' shall mean an individual and any form of busines organization authorized under the laws of this or any other state."

Clearly a private entrepreneur would meet the requirements of this definition. Section 406.2 also defines sanitary disposal project:

"3. 'Sanitary disposal project' means 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 commissioner of public health."

Thus, cities, towns and counties may enter into contracts with private entites for the collection of solid waste and the establishment and operation of sanitary disposal projects and the general administration of the same. §406.3. Moreover, there is no requirement in Chapter 406 that a contract be put up for public bids. The public bidding requirements found in Chapter 23 and §391.31 are inapplicable because they deal only with construction projects. Chapter 394, Code of Iowa, 1971, as amended by Chapter 209, 64th G.A., First Session (1971), authorizes cities, towns, counties and sanitary districts to own, acquire, establish, construct, purchase, equip, improve, extend, operate, maintain, reconstruct and repair sanitary disposal projects as defined in §406.2. It also authorizes the issuance of revenue bonds to pay the costs thereof. However, this alternative procedure would not in our opinion preclude a city or county from entering into a private contract under Chapter 406. Apart from this under certain circumstances involving cities with a population between 13,000 and 17,000 a contract for the construction of a sanitary disposal project under Chapter 394 could be entered into without being subject to the bidding requirements of §23.18. §394.14.

March 22, 1972

STATE OFFICERS AND DEPARTMENTS: Department of Health — Jurisdiction of Department of Health over Mobile Homes and Parks — §§135D.1, 135D.26, Code of Iowa, 1971. Mobile homes that have been converted to real property pursuant to §135D.26 are exempt from regulations under Chapter 135D. (Corcoran to Rodenburg, Pottawattamie County Attorney, 3/22/72) #72-3-26

Mr. Lyle A. Rodenburg, Pottawattamie County Attorney: This letter is in response to your request for an opinion regarding whether or not the Council Bluffs City Board of Health has jurisdiction over a particular trailer park within the City of Council Bluffs pursuant to Chapter 135D, 1971 Code of Iowa. Pursuant to 135D.20 the state department of health has the power to delegate to local boards of health the duties of inspection and regulation of mobile home parks located within the jurisdiction of such local board of health.

According to your letter the trailer park in question, designated as Malmore Acres, Inc., is operating under the following circumstances:

(1) The individual mobile home owners own the lots on which said mobile homes are located and pay property tax on same.

(2) Permanent foundations are constructed and laid for individual mobile homes. The wheels are removed and the dwellings treated as stationary units.

Your question is whether or not the purchase of the individual mobile home lots by the trailer owners exempt the park from the state mobile home rules and regulations.

Section 135D.1 defines "mobile home" and "mobile home parks" as follows:

"1. 'Mobile home' means any vehicle without motive power used or so manufactured or constructed as to permit its being used as a conveyance upon the public streets and highways and so designed, constructed or reconstructed as will permit the vehicle to be used as a place for human habitation by one or more persons; but shall also include any such vehicle with motive power not registered as a motor vehicle in Iowa.

"2. 'Mobile home park' shall mean any site, lot, field or tract of land upon which two or more occupied mobile homes are harbored, either free of charge or for revenue purposes, and shall include any building, structure, tent, vehicle or enclosure used or intended for use as part of the equipment of such mobile home park."

Accordingly, mobile homes and mobile home parks which do not fall within the above definition are not within the jurisdiction of Chapter 135D. Section 135D.26 provides a means by which a mobile home owner may convert his mobile home to real property, thereby exempting said mobile home from the jurisdiction of this chapter. Said procedure is as follows:

"1. The mobile home owner intends to convert his mobile home to real estate and does so by:

a. Attaching his unencumbered mobile home to a permanent foundation on real estate owned by him. Encumbered mobile homes shall not be converted to real property.

b. Destruction or modification of the vehicular frame rendering it impossible to reconvert the real property thus created to a mobile home."

It appears that the situation described by you falls within the above requirements. Since the mobile home owners in your situation are in fact paying property taxes on same, it is evident that they have complied with Section 135D.26 and therefore would be exempt from the operation of Chapter 135D.

Your question seemed to hinge upon the fact that the individual mobile home owners purchased their own lots. That action is just one of several required to convert a mobile home to real property. It is necessary that all of the above requirements be complied with before conversion is possible. If they are not, then Chapter 135D would be applicable.

March 22, 1972

MOTOR VEHICLES: Maximum length, vehicle defined — §321.1 and §321.457, Code of Iowa, 1971. A device utilized to provide a supplemental axle to transfer and carry a portion of the main vehicle load is not a separate vehicle, but an integral part of the main unit, the maximum length of which is 35 feet. (Schroeder to Coupal, Director of Highways, Iowa State Highway Commission, 3/22/72) #72-3-27

Mr. J. R. Coupal, Jr., Director of Highways, Iowa State Highway Commission: Reference is made to your letter of February 17, 1972, in which you state:

"It has been our policy for enforcement procedure to allow a maximum length of 35 feet for a type of vehicle shown in an attached drawing based on Chapter 321.457, paragraph one. We have viewed this unit as a single vehicle. However, in view of two recent Attorney General's Opinions (OAG 71-5-3 and 70-4-33) attached concerning the definition of vehicle as used in Chapter 321 and the length allowed certain tractor semi-trailer combinations, this procedure may not be consistent."

"This, therefore, is to request an official opinion of your office as to the maximum length allowed the unit shown in the drawing and the proper vehicle registration required in Iowa for this unit."

The drawing with weight and dimension data you furnished shows a cement mixer mounted on a straight truck chassis with a hydraulically operated movable single axle attached at several points to the rear by arms and a hydraulic cylinder. The axle may be raised or lowered to contact the ground. The sole purpose of the unit is to provide another axle to transfer a portion of the weight from the chassis front and rear tandem axles thereby increasing the total load carrying capability of the straight truck while at the same time decreasing the weight on any given axle. The unit is designated as a "trailer" on the drawing.

It is our opinion the unit described and pictured is a supplemental movable axle integral with the straight chassis and is neither a separate trailer nor a vehicle *per se* within the contemplation of Chapter 321, Code of Iowa, 1971.

A vehicle is defined in relevant part by §321.1(1), Code of Iowa, 1971, as:

". . . every device in, upon or by which any . . . property is or may be transported or drawn upon a highway . . ."

Here no property is or may be transported in or on the device. The property is all carried physically on the straight chassis and only by

applied physics, part of the weight of that property is transferred to the unit. The stated purpose is to add weight carrying capability to the straight chassis, not to carry or transport property itself. Since this function does not come within the definition of a vehicle, then it cannot be classified as a trailer or semi-trailer. It is merely an extension of the same primary vehicle and §321.457(1) applies as to length.

The unit most closely resembles by definition, an auxiliary axle as defined by §321.1(69). We would have no hesitation in so classifying this unit as such if it is transferable from one chassis to another but the information you furnished is silent as to this feature, therefore, we reserve comment as to this particular unit. We do note, though, that an auxiliary axle is treated separately and distinctly and is not classified as a vehicle in Chapter 321. Since the unit in question and an auxiliary axle both perform the same functions and the legislature saw fit to differentiate between axles and vehicles, this reinforces our position.

The prior opinions you mentioned are clearly distinguishable in that they dealt with devices that had separate property carrying functions and capabilities in their own right which is not the case here. There is no conflict.

March 24, 1972

COUNTIES AND COUNTY OFFICERS: Board of Supervisors — §331.8, Code of Iowa, 1971. Election of supervisors under Plan Two requires equal population districts drawn according to 1970 census. (Nolan to Stokes, State Representative, 3/24/72) #72-3-28

The Honorable Gordon Stokes, State Representative: Your recent letter requested an opinion of the Attorney General on two questions relating to the election of a county board of supervisors. Such elections are required by §331.8, Code of Iowa 1971, to be held in accordance with one of three district plans. The situation you present appears to be one covered by §331.8(1)(b):

"b. Plan two. Election at large but with equal population district residence requirements for members."

The questions you have presented, as we understand them, are:

1. Must election districts for members of the county board of supervisors elected at large from districts be of equal size population wise?

2. If so, may the supervisors reapportion these districts?

The answer to both of these questions is yes. The first question is answered by the language of §331.8(1)(b) which clearly states that the districts are to be of equal population.

In an opinion issued on February 16, 1972, this office advised that while the plan for the districting of supervisors adopted pursuant to §331.8 remains in effect for at least 6 years unless changed as a result of an election held under §331.9, the provisions of §§331.26 and 331.27 provide specifically for redrawing supervisor district lines to take into consideration population changes in those counties where plans 2 and 3 are in effect. Further, this opinion stated:

"However, while the type of plan cannot be changed by resolution the

supervisors have not only a right but a duty under section 331.26 to make a good faith effort to achieve precise mathematical equality in the population of supervisor districts based on the figures provided by the 1970 federal census following procedures set forth in such section 331.26."

March 24, 1972

COUNTIES AND COUNTY OFFICERS: Zoning Commissioners — §§358A.8, 358A.10, 332.3, Code of Iowa, 1971. Zoning Commissioners and members of board of adjustment may be reimbursed for mileage expense upon submission of a claim and approval thereof by Board of Supervisors. (Nolan to Taylor, State Representative, 3/24/72) #72-3-29

The Honorable Raymond J. Taylor, State Representative: You have requested an opinion as to whether members of the county zoning commission or members of the county zoning board of adjustment can receive mileage to and from their official meetings or for activities related to making a judgment, such as viewing property. According to your letter the county attorney of Dubuque County has ruled against mileage being paid to such commission or board members.

Neither §358A.8 nor §358A.10, Code of Iowa 1971, under which such members are appointed and their duties specified, contained any provision for the payment of the mileage or other expenses of such board or commission members. There being no specific statutory authorization for payment of mileage, such members are not automatically entitled thereto. They may, however, submit a claim for their expenses to the board of supervisors to be handled as a claim against the county pursuant to §332.3, Code of 1971. The allowance of such claims for expenses is discretionary with the board of supervisors. It is proper for the county to do whatever acts are necessary in order to facilitate the business of the county. 1934 OAG 421.

Accordingly, it is our opinion that the members of zoning boards and commissions may be reimbursed their mileage expense upon the submission of a claim and the approval thereof by the board of supervisors.

March 24, 1972

COUNTIES AND COUNTY OFFICERS: County Officers — §§332.17, 337.7, Code of Iowa, 1971. Offices of Bailiff and member of Board of Supervisors are incompatible. (Nolan to Gunderson, Pocahontas County Attorney, 3/24/72) #72-3-30

Mr. Charles A. Gunderson, Pocahontas County Attorney: This is in response to your request for an Attorney General's opinion as to the legal compatibility of the office of District Court Bailiff and member of the Board of Supervisors. Your letter states that the Pocahontas Bailiff has been recently appointed to fill a vacancy on the Pocahontas Board of Supervisors.

I am of the opinion that the two positions are incompatible. This opinion is based on the language of §337.7, Code of Iowa 1971, which states as follows:

"The sheriff shall attend upon the district court of his county, and while it remains in session he shall be allowed the assistance of such number of bailiffs as the judge may direct. They shall be appointed by the

sheriff and *shall be regarded as deputy sheriffs, for whose acts the sheriff shall be responsible.*" [Emphasis added]

The case of *State ex rel LuBuhn v. White,* (1965) 257 Iowa 606, 133 N.W.2d 903, sets out the criteria of incompatibility of public offices, the test being whether there is an inconsistency in the functions of the two or where the duties are inherently repugnant from considerations of public policy.

The Supervisors are legislative officers, the Bailiff is an administrative officer. I am of the opinion that it would be contrary to the separation of powers doctrine and accordingly against public policy for one person to hold both offices simultaneously.

March 28, 1972

ELECTIONS: Supervisors, reduction in number. §§331.3 and 331.7, Code of Iowa, 1971. A proposal to reduce the number of supervisors from five to three may be submitted to the voters only at a general election. (Haesemeyer to Schweiker, Deputy Secretary of State, 3/28/72) #72-3-31

Mr. J. Herman Schweiker, Deputy Secretary of State: Reference is made to your letter of March 23, 1972, in which you request an opinion of the attorney general on the following question:

"Should a request by the people to reduce the number of members of the Cherokee County Board of Supervisors from five to three appear on the election ballot for the Primary or General Election?"

§331.3, Code of Iowa, 1971, provides:

"In any county where the number of supervisors has been increased to five, the board of supervisors shall, on petition of one-tenth of the qualified electors of the county having voted in the last previous general election for the office of governor, or may on its own motion by resolution, submit to the qualified electors of the county, at any *regular election,* a proposition as to whether or not the number of supervisors should be decreased to three.

"If a majority of the votes cast shall be in favor of the decrease to three members, then the number of supervisors shall be so reduced as provided in sections 331.6 and 331.7." (Emphasis added)

The answer to your question hinges on whether the expression "regular election" as underlined in the preceding statutory provision contemplates a primary election or is limited only to general elections.

In our opinion the question can be submitted to the voters only at a general election. The precise question you now raise was previously submitted to the attorney general and the same answer given. 1932 OAG 194. Support for the position we have taken that regular elections means only general elections is found in §331.7 which provides:

"At the next general election following the *one* at which the proposition to reduce the number of members of the board to three was carried, such members shall be elected pursuant to the supervisor representation plan currntly in effect in such county. One person shall be elected as member of the board for two years and two for four years." (Emphasis added)

Obviously, the word "one" refers back to the expression general election.

March 28, 1972

ELECTIONS: Precinct caucuses and county conventions, participation by persons under 18 years of age. §§43.90 and 43.91, Code of Iowa, 1971, as amended by Chapter 97, 64th G.A., First Session (1971). To be eligible to vote at a political party precinct caucus or county convention, an individual must be at least eighteen years of age on the day the caucus or convention is held, as the case may be. (Haesemeyer to Kelly, Jefferson County Attorney, 3/29/72) #72-3-32

Mr. Edwin F. Kelly, Jr., Jefferson County Attorney: Reference is made to your letter of March 17, 1972, in which you state:

"I would respectfully request an Attorney General's opinion as to the extent of participation permitted an individual who is not eighteen in Republican caucuses and County conventions. May an individual who has not attained the age of voting participate to the extent of voting in a caucus if he will be of voting age before the next election?"

§43.91, Code of Iowa, 1971, as amended by Chapter 97, §2, 64th General Assembly, First Session (1971), provides:

"Voter at caucus must be precinct resident. Any person voting at a precinct caucus must be an eligible voter and resident of the precinct, provided that persons eighteen years of age or over who are residents of the precinct and meet all other qualifications of an eligible voter in the precinct shall be entitled to vote. A list of the names and addresses of each person to whom a ballot was delivered or who was allowed to vote in each precinct caucus shall be prepared by the caucus chairman and secretary who shall certify such list to the county auditor at the same time as the names of those elected as delegates and party committeemen are so certified."

The requirements of this statutory provision are clear, plain and free from ambiguity. In order to vote in a precinct caucus a person must be an eligible voter and a resident of the precinct. While §43.91 does not say "at the time the precinct caucus is held", that obviously is what the section means. An earlier opinion of the attorney general, Clark Rasmussen, March 8, 1966, is in our opinion not dispositive of the question you raise or even particularly relevant.

Accordingly, it is our opinion that in order to be eligible to vote at a party precinct caucus an individual must be at least eighteen years of age on the day the caucus is held. The same is true of county conventions under §43.90.

March 30, 1972

STATE OFFICERS AND DEPARTMENTS: Department of Health — §138.1(16), Code of Iowa, 1971. Laborers employed in food processing plants full time do not come within the application of Chapter 138, Code of Iowa, 1971. (Corcoran to Tapscott, State Senator, 3/30/72) #72-3-33

Mr. John Tapscott, State Senator: This opinion letter is in response to your letter of March 9, 1972, in which you present the question of whether or not Chapter 138, Code of Iowa, 1971, applies to migrant laborers who are employed by chicken processors by reason of the definition of "migrant" as set forth in Section 138.1(16). Chapter 138 sets forth statutory requirements regarding the operation of migratory labor camps and designates the State Department of Health as the agency regulating said chapter.

Section 138.1(16) defines migrant as follows:

"'Migrant' means any individual who customarily and repeatedly travels from state to state for the purpose of obtaining seasonal *employment in agriculture*, including the spouse and children of such individuals, whether or not authorized by law to engage in such employment." [Emphasis added]

In order for a labor camp to come within the application of Chapter 138, the laborers must fall within the definition of "migrant" as set forth above. Pursuant to your request, this opinion will only deal with the interpretation of the phrase "employment in agriculture" as it relates to laborers who are employed in food processing plants.

The Iowa Supreme Court in the case of *Crouse* v. *Lloyd's Turkey Ranch*, 1959, 251 Iowa 156, 100 N.W.2d 115, dealt with the question of whether or not the person employed in a turkey processing plant was employed in agriculture for purposes of the workman's compensation act. The court held that the word "agriculture" and the words "agricultural pursuits" do not apply to the occupation of the plaintiff in a turkey processing plant. All justices concurred in the above decision. The court further set forth the proposition that an employer can be engaged in two distinct occupations, one agricultural and one commercial, manufacturing, or otherwise industrial. If the laborers as referred to in your letter were also engaged in other activities that could be considered agricultural, and if they should meet the other requirements as set forth in the definition of "migrant" (138.1(16)), then Chapter 138 would be applicable to this situation. However, if the laborers were engaged only in a food processing plant, then, according to the *Crouse* decision, their employment would not be considered agricultural and therefore outside the application of Chapter 138. The Iowa Supreme Court affirmed their interpretation of "agriculture" and "agricultural pursuits" in the recent case of *Snook* v. *Hermann*, 161 N.W.2d 185 (Iowa, 1968).

In conclusion, it appears from the recent case law cited above that laborers who are employed in food processing plants on a full time basis, would not come within the definition of "migrant" as set forth in Section 138.1(16) and therefore would not come under the application of Chapter 138, Code of Iowa, 1971.

April 5, 1972

ELECTIONS: Provision of polling places; party ballot designates of candidates — §§ 49.10, 49.21, 49.24, 49.39, Code of Iowa, 1971. Central location is only one of a number of factors which may be considered in fixing the location of polling places. Where a voting precinct is comprised of two townships only a single polling place should be provided. A person may not run as a candidate of both parties for the same office. (Haesemeyer to Taylor, State Representative, 4/5/72) #72-4-1

The Honorable Raymond J. Taylor, State Representative: Reference is made to your letter of March 1, 1972, in which you state:

"I would request an opinion regarding Dubuque County Supervisors' voting precinct reshaping.

"Did the County Supervisors follow Section 49.21 in regard to making a polling place central in the precinct?

"Can County Supervisors provide two polling places in one voting

precinct that is comprised of two townships under present law?

"Under Section 49.39 can a person file for one office, but with both political parties such as has been done in California?

"Enclosed is a copy of the new precinct map that they created."

Section 49.21, Code of Iowa, 1971, to which you make reference provides:

"49.21 Polling places. In townships the trustees, except as otherwise provided, shall provide, at the expense of the county, suitable places in which to hold all elections provided for in this chapter, and see that the same are warmed and lighted.

"Upon the application of the county auditor or the township trustees, the authority which has control of any building or grounds supported by taxation under the laws of this state shall make available the necessary space therein for the purpose of holding elections, without charge for the use thereof.

"Except as otherwise provided by law, the polling place in each precinct in the state shall be located in a central location if a building is available. However, first consideration shall be given to the use of public buildings supported by taxation."

As appears from the map attached to your letter a number of the polling places established in Dubuque County are not centrally located in their respective precincts. Indeed, in some cases the polling places are in corners or along the edges of such precincts. However, as §49.21 sets out the requirement of a central location is subject to other provisions of law and the availability of a building. Thus, central location is not the only criterion. Section 49.24, for example, provides that in precincts out of cities and towns the election shall if praticable be held in a public school building. Moreover, under §49.10, as amended by §2, Chapter 100, gives the supervisors considerable latitude in the fixing of polling places even to the extent under certain circumstances of locating such polling places outside a precinct. Subsection 4 of such §49.10 provides:

"If two or more contiguous townships have been combined into one election precinct by the board of supervisors, the board shall provide a polling place which is convenient to all of the electors in the precinct."

In considering the convenience of the electors the supervisors presumably may consider many factors including population density, accessibility, etc. Thus, while it is apparent that the polling places in all election precincts in Dubuque County are not centrally located we are not prepared to say that the county supervisors acted in excess of their authority in establishing the polling places where they did.

In answer to your second question it would be our opinion that in view of the language of subsection 4 of §49.10 that where a voting precinct is comprised of two townships only a single polling place should be provided. Section 49.10(4) speaks in terms of a polling place.

In answer to your third question §49.39 of the Code quite clearly appears to preclude a person from running as a candidate for both political parties. Such §49.39 provides:

"49.39 Dual nomination. When two or more political parties, or when two or more political organizations which are not political parties, or when a political party and a political organization which is not a political

party, nominate the same candidate for the same office, such nominee shall forthwith designate, in writing, the political party name, or the political organization name, under which he desires to have his name printed on the official ballot for the ensuing general election; such written designation shall be filed with the officer with whom the nomination paper, or certificate of nomination by a convention or caucus, is filed and the name of such nominee shall appear on the ballot in accordance therewith."

Moreover, under §49.38 a candidate's name may not appear on the ballot in more than one place for the same office.

April 5, 1972

ELECTIONS: Cities, reprecincting — House Files 1147 and 1265, Acts, 64th G.A., Second Session (1972). The reporting requirements as to reprecincting progress of §4 of H.F. 1265 only applies to cities of 3,500 or more population. This does not mean, however, that smaller cities are not obliged to reprecinct where that is necessary to comply with the requirement that every precinct must be contained wholly within a legislative district as set forth in the supreme court's plan. (Haesemeyer to Synhorst, Secretary of State, 4/5/72) #72-4-2

The Honorable Melvin D. Synhorst, Secretary of State: Reference is made to your letter of March 31, 1972, requesting an opinion of the attorney general with respect to the following:

"House File 1265, Acts of the Second Session, Sixty-fourth General Assembly of Iowa provides in section 4, subsection 1, as follows:

" 'Notwithstanding the provisions of section forty-nine point five (49.5), Code 1971, as amended by chapter ninety-nine (99), section two (2), and chapter ninety-eight (98), section twenty-two (22), Acts of the Sixty-fourth General Assembly, First Session, the city council of any city *required to establish new election precincts with a population of three thousand five hundred or less* by December thirty-first of the year imediately following the year in which the last federal decennial census was taken, shall not be required to establish new election precincts until a new apportionment plan has been adopted in the year 1972 and made public by the Iowa supreme court. Upon the adoption of the new apportionment plan by the Iowa supreme court, the council of each city shall cause new election precincts to be drawn pursuant to the provisions of section forty-nine point five (49.5) of the Code, as amended by chapter ninety-nine (99), section two (2), and chapter ninety-eight (98), section twenty-two (22), Acts of the Sixty-fourth General Assembly, First Session. The city council of each city shall issue an order establishing the new election precincts and defining the boundaries of such precincts not more than forty days from the date the Iowa supreme court adopts a new apportionment plan.'

"Your opinion on the following question is respectfully requested: Since the new apportionment plan was adopted by the Iowa Supreme Court on March 31, 1972, will only cities of over 3,500 population be required to cause new election precincts to be drawn *with a report to be filed with the Secretary of State upon the completion of the reprecincting?*

"It is important for us to know this so that we will be able to send notification to cities that have duties to perform under the provisions of section 4, House File 1265, Acts of the Second Session, Sixty-fourth General Assembly."

To insure compliance with the requirements of subsection 1 of section 4 of House File 1265 that new election precincts be established within forty days from the date the Iowa supreme court adopted its new reapportionment plan, subsections 2, 3 and 4 of such section 4 require

periodic progress reports to be filed with the secretary of state by the city clerks of cities affected by the requirement. Section 363.4, Code of Iowa, 1971, provides:

"363.4 Classification. Municipal corporations are divided into cities and towns.

"1. Any municipal corporation which has a population of two thousand or more is a city.

"2. Any municipal corporation which has a population less than two thousand is a town."

It is evident from the foregoing that any municipality with a population of less than two thousand is a town rather than a city and therefore not subject to the reporting requirements of section 4 of House File 1265.

The question remains, however, as to whether or not cities having a population between two thousand and three thousand five hundred are required to report. We think they are not. From the underlined language of subsection 1 of section 4 set forth above it is evident that the section is directed at cities required to establish new election precincts with a population of three thousand five hundred or less under §49.5 of the Code as amended by Ch. 99, §2, Ch. 98, §22, Sixty-fourth General Assembly, First Session (1971), and House File 1147, Acts, Sixty-fourth General Assembly, Second Session (1972). Such §49.5 provides:

"49.5 City Precincts. The council of a city may, from time to time, by ordinance definitely fixing the boundaries, divide the city into such number of election precincts as will best serve the convenience of the voters.

"Election precincts shall be of as nearly equal population as possible within the limitations of reliable data on the populations of various parts of such city, and the boundaries of each precinct shall follow the boundaries of areas for which official population figures are available from the most recent federal decennial census. *A city having a population of more than three thousand five hundred shall cause the federal decennial census to be taken on a block-by-block basis and shall preserve block statistics.* Every precinct shall be contained wholly within an existing legislative district. No election precinct shall have a total population in excess of three thousand five hundred, as shown by the most recent federal decennial census, except that:

"1. If in any area of the city it is not possible to devise a contiguous precinct having a population of less than three thousand five hundred by the most recent federal decennial census, because one or more of the smallest population units for which census data are available are composed of noncontiguous territory, the city council may utilize other reliable and documented indicators of population distribution in establishing precincts within that area.

"2. Where an unavoidable conflict arises between the requirements of this section relating to population of precincts and the requirement that each precinct be contained wholly within an existing legislative district, the latter requirement shall take precedence.

"The council shall make any changes necessary to comply with this section no earlier than July first and not later than December thirty-first of each year immediately following a year in which the federal decennial census is taken, unless the general assembly by joint resolution establishes different dates for such compliance. Any or all of the publications required by section 49.11 may be made after December thirty-first if

necessary.

"If the council fails to fix election precinct boundaries by the deadlines established pursuant to this section, the state commissioner of elections shall fix or cause to be fixed the boundaries as soon as possible. Expenses incurred by the state commissioner of elections shall be assessed to the city and paid by the city.

"The state commissioner of elections may request the services of personnel of the legislative service bureau and material available to the legislative service bureau for the purpose of fixing the boundaries of election precincts as provided in this section.

"Nothing in this section shall prohibit a city council which has complied with the applicable requirements of this section by December thirty-first of any year following a year in which the federal decennial census is taken, from thereafter changing the boundaries of any precinct in the manner and within the limitations provided by this section, at any time prior to or during the year in which the next federal decennial census is taken, if the council concludes that the changes in precinct boundaries are necessary to best serve the voters affected.

"The state *commissioner of elections* shall be notified when precinct boundary lines are changed and a map delineating the new boundary lines supplied."

It seems clear from the foregoing that the only cities which would be "required" to establish new election precincts with populations of three thousand five hundred or less would be cities having a population in excess of three thousand five hundred.

Accordingly, we conclude that the reporting requirements of §4 of House File 1265 only applies to cities of this size. This does not mean, however, that smaller cities are not obliged to reprecinct where that is necessary to comply with the requirement that every precinct must be contained wholly within a legislative district as set forth in the supreme court's plan.

April 5, 1972

ELECTIONS: Residency requirements for voting — H.F. 1147, Acts, 64th G.A., 2nd Session (1972). The 30 day residence requirement for voting contained in H.F. 1147 insofar as it relates to persons seeking to vote for president and vice president is in conflict with the federal law and therefore invalid. A person who has moved into Iowa less than 30 days before the Nov. 1972 general election and, where permanent registration is in effect, has registered not less than 10 days before the general election must be permitted to vote for the offices of president and vice president. Where permanent registration is not in effect, such a person must be permitted to vote for the offices of president and vice president even if he moves into the state on the day of election. A person moving from the State of Iowa less than 30 days before the Nov. 1972 general election and who is not qualified to vote in the state to which he has moved would have a right to vote the entire ticket in the Iowa community from which he had moved. It will be necessary to have separate ballots for the offices of president and vice president to accommodate those voters who under the various circumstances described above are entitled only to vote for those offices. (Haesemeyer to Synhorst, Secretary of State, 4/5/72) #72-4-3

The Honorable Melvin D. Synhorst, Secretary of State: Reference is made to your letter of March 28, 1972, in which you request an opinion of the attorney general on the following questions:

"1. Do the provisions of House File 1147, Acts of the Second Session

of the Sixty-fourth General Assembly of Iowa, place Iowa in compliance with the state residency requirements prescribed in Public Law 91-285?

"2. Will a person who has moved into Iowa less than thirty days before the November, 1972, General Election have a right to vote in Iowa for the offices of president and vice-president?

"3. Will a resident who has moved from Iowa less than thirty days before the November, 1972, General Election and who is not qualified to vote in the state to which that person has moved have a right to vote in Iowa for the offices of president and vice-president only, or will such person have the right to vote the entire ticket in the Iowa community in which that person had established residence?

"4. Will one general election ballot be sufficient in Iowa for the General Election in November, 1972, or will it be necessary to have separate ballots for the offices of president and vice-president under any circumstances?"

Public Law 91-285 is the Voting Rights Act amendments of 1970, enacted June 22, 1970, by the 91st Congress. 84 STAT. 314-319. 42 U.S.C.A., §1973(b) et seq. Under 42 U.S.C.A., §1973aa-1, all durational residency requirements for voting for the offices of president and vice president are abolished, absentee ballots for persons wishing to vote for president and vice president must be furnished when application is received not later than seven days before the election, such ballots must be counted if returned before the closing of the polls on election day, and prsons who move from the state or political subdivision after the thirtieth day next preceding an election and by reason thereof cannot vote in the state to which they have moved must be permitted to vote in the state they have left. 42 U.S.C.A., §1973aa-1(b) through (f) provide:

"(b) Upon the basis of these findings, Congress declares that in order to secure and protect the above-stated rights of citizens under the Constitution, to enable citizens to better obtain the enjoyment of such rights, and to enforce the guarantees of the fourteenth amendment, it is necessary (1) to completely abolish the durational residency requirement as a precondition to voting for President and Vice President, and (2) to establish nationwide, uniform standards relative to absentee registration and absentee balloting in presidential elections.

"(c) No citizen of the United States who is otherwise qualified to vote in any election for President and Vice President shall be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to comply with any durational residency requirement of such State or political subdivision; nor shall any citizen of the United States be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to be physically present in such State or political subdivision at the time of such election, if such citizen shall have complied with the requirements prescribed by the law of such State or political subdivision providing for the casting of absentee ballots in such election.

"(d) For the purposes of this section, each State shall provide by law for the registration or other means of qualification of all duly qualified residents of such State who apply, not later than thirty days immediately prior to any presidential election, for registration or qualification to vote for the choice of electors for President and Vice President or for President and Vice President in such election; and each State shall provide by law for the casting of absentee ballots for the choice of electors for President and Vice President, or for President and Vice President, by all duly qualified residents of such State who may be absent from their

election district or unit in such State on the day such election is held and who have applied therefor not later than seven days immediately prior to such election and have returned such ballots to the appropriate election official of such State not later than the time of closing of the polls in such State on the day of such election.

"(e) If any citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any election for President and Vice President has begun residence in such State or political subdivision after the thirtieth day next preceding such election and, for that reason, does not satisfy the registration requirements of such State or political subdivision he shall be allowed to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election, (1) in person in the State or political subdivision in which he resided immediately prior to his removal if he had satisfied, as of the date of his change of residence, the requirements to vote in that State or political subdivision, or (2) by absentee ballot in the State or political subdivision in which he resided immediately prior to his removal if he satisfied, but for his nonresident status and the reason for his absence, the requirements for absentee voting in that State or political subdivision.

"(f) No citizen of the United States who is otherwise qualified to vote by absentee ballot in any State or political subdivision in any election for President and Vice President shall be denied the right to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election because of any requirement of registration that does not include a provision for absentee registration."

To the extent that House File 1147 is in conflict with the federal Voting Rights Act Amendment of 1970, the latter prevails because of the supremacy clause of the United States Constitution, Article VI, cl. 2. Moreover, the section abolishing state durational residency requirements and providing for absentee balloting in presidential elections was within the power of Congress to enact. *Oregon v. Mitchell,* 1971, 91 S.Ct. 260, 400 U.S. 112, 27 L.Ed.2d 272, reh. den. 91 S.Ct. 862, 401 U.S. 903, 27 L.Ed.2d 272.

In our opinion and in answer to your first question, House File 1147, Acts, 64th General Assembly, Second Session (1972), is not in compliance with the Voting Rights Act Amendments of 1970 insofar as such House File 1147 purports to establish a durational residency requirement for voting for the offices of president and vice president. §4(2) of House File 1147 without making any distinction as to presidential and vice presidential elections provides:

"Every citizen of the United States at the age of eighteen years or older who shall have been a resident of this state for thirty days next preceding the election shall be entitled to vote, subject to the provisions of chapter forty-eight (48), if applicable, and chapter forty-nine (49) of the Code, at all elections which may now or hereafter be authorized by law."

This is a durational residency requirement and it is flatly prohibited by the federal law insofar as it relates to elections for president and vice president.

It is true under subsection (d) that states may by law provide for the closing of registration as much as thirty days immediately prior to any presidential election; however, this is not the same as allowing a thirty day residence requirement. Indeed, the Iowa law, House File 1147, does provide for closing registrations but much less than thirty days before

the election. Thus, §48.11, Code of Iowa, 1971, as amended by Chapter 98, §8, 64th General Assembly, First Session (1971) and House File 1147, §15, Acts, 64th General Assembly, Second Session (1972) provides:

"The county commissioner of registration shall register, on forms prescribed by the state commissioner of elections, electors for elections in a precinct until the close of registration in the precinct. An elector may register during the time registration is closed in the elector's precinct but the registration shall not become effective until registration opens again in his precinct.

"Registration shall close in a precinct ten days before an election."

Accordingly, in answer to your second queston, a person who has moved into Iowa less than thirty days before the November, 1972, general election and, where permanent registration is in effect, has registered not less than ten days before the general election must be permitted to vote for the offices of president and vice president. Where permanent registration is not in effect, such a person must be permitted to vote for the offices of president and vice president even if he moves into the state on the day of election.

We might point out that in view of a very recent United States Supreme Court decision a respectable argument could be advanced that Iowa's thirty day durational residency requirement as applied to persons seeking to vote for offices other than president and vice president violates the federal Constitution and for that reason is void. In that event the only requirement for voting would be compliance with the ten day registration cut off where permanent registration is in effect. *Dunn v. Blumstein*, decided March 21, 1972, ... S.Ct. ....., ... U.S. ....., ... L.Ed.2d, 40 L.W. 4269, struck down as unconstitutional Tennessee's durational residency requirements of one year in the state and three months in the county. But in doing so the court used language susceptible of the interpretation that *all* durational residency requirements, no matter how short, for *all* elections, are unconstitutional. For example, it concludes its opinion by saying:

"Given the exacting standard of precision we require of statutes affecting constitutional rights, we cannot say that durational residence requirements are necessary to further a compelling state interest." 40 L.W. 4269, 4279.

The Court did uphold Tennessee's requirement of closing *registration* thirty days before an election on the basis that such a period is ample to complete whatever administrative tasks are necessary to prevent fraud and insure the purity of the ballot box, and reflects the judgment of the Tennessee legislature as to what period is required for this purpose.

In Iowa our legislature has apparently concluded that only ten days is sufficient to complete whatever administrative tasks are necessary. Logically one could conclude from all of this that even the thirty day durational residency requirement present in House File 1147 is unconstitutional and that a person who has moved into Iowa less than thirty days before the November, 1972, general election, and where permanent registration is in effect, has registered not less than ten days before the election must be permitted to vote the entire ticket, not just for the office of president. Moreover, it would follow that where permanent registration is not in effect such a person must be permitted to vote for all can-

didates and on all issues even if he moves into the state on the day of election. However, we are not constrained to give *Dunn v. Blumstein* so liberal a reading but prefer to limit it to the facts of that case. If Iowa's thirty day residence requirement is to be nullified the courts will have to do it. We will not.

§4(4) provides in part:

"If a person who meets the above requirements moves to a new residence, within or without the state, and does not meet the voter residency requirements at his new residence, he may vote at his former place of residency in Iowa until he meets the voter residency requirements of his new residence."

Under the plain language of this statutory provision a person moving from the State of Iowa less than thirty days before the November, 1972, general election and who is not qualified to vote in the state to which he has moved would have a right to vote the entire ticket in the Iowa community from which he had moved. In this connection, it is worth noting that the only reason such a person would not be qualified to vote in the state to which he has removed himself under the federal law would be because the laws of that state provided for the closing of registration before he had moved there. He could not be said to be disqualified in voting for the offices of president and vice president in such state because of any durational residency requirements thereof because as we have pointed out, *all* durational residency requirements for voting for those offices have been abolished by the federal law.

In answer to your fourth question, it will obviously be necessary to have separate ballots for the offices of president and vice president to accommodate those voters who under the various circumstances described above are entitled only to vote for those offices.

April 6, 1972

CITIES AND TOWNS: Financial Disclosure — §368A.1(7), Code of Iowa, 1971. An ordinance of the Davenport City Council, entitled "An ordinance to provide for financial disclosure procedures to be followed by elected and certain administrative city officials," appears to be constitutional on its face. (Blumberg to Thordsen, State Senator, 4/6/72) #72-4-4

Honorable Harold Thordsen, State Senator: I am in receipt of your opinion request concerning the constitutionality of an ordinance of the Davenport City Council, entitled: "An ordinance to provide for financial disclosure procedures to be followed by elected and certain administrative city officials." The ordinance requires that all elected and certain administrative city officials shall file a financial disclosure statement with the city clerk on January 31, of each year. Said statement shall list the officials' principal sources of income; all businesses and the like doing business with the city that the official may have either a direct or indirect financial interest in, and any source of gifts or gratuities in excess of one hundred dollars.

It is important to note that muncipalities have the authority not only to appoint various officials, but also to set up the conditions of employment by ordinance. Section 368A.1(7), 1971 Code of Iowa.

It appears from reading the ordinance that it is designed to check any conflicts of interest that might arise in the administration of city government. Your question deals not with the wisdom of such a law, but rather with its constitutionality. In conjunction with this, your concern rests with those city employees who are not elected. You are concerned that requiring a disclosure statement as a condition to employment may be an unconstitutional deprivation of personal liberties.

Upon reading the ordinance we find that the non-elected officials included are those who would be involved with contracts and other contacts with individuals, corporations and businesses doing business with the city. Thus, it seems logical that a conflict of interest might arise among these individuals which could hamper business dealings of the city.

The Constitution prohibits certain governmental activities that are discriminatory and in deprivation of an individual's rights, by guaranteeing those rights. However, governments, whether federal, state or local, may either prohibit or require certain actions by individuals, pursuant to the general police powers of that government. Police powers appertain to regulations relating to personal and property rights affecting the public health, safety and welfare, and is a power inherent in a government to enact laws, within constitutional limits, to promote the order, safety, health, morals, and general welfare of society. It is a governmental function, an inherent attribute of sovereignty, and the greatest and most powerful of government. 16 C.J.S. *Constitutional Law*, §§174, 175.

Police powers are very broad and comprehensive. They have been defined as very high powers, and the laws enacted for the purpose of regulation may be impolitic, harsh and oppressive without being unconstitutional. They are essential in all orderly governments for proper maintenance. It is the very foundation upon which our social system is based. The objectives of the use of police powers are the improvement of social and economic conditions, with the view of bringing about the greatest good of the greatest number. Generally, public safety, public health, morality, peace and quiet, and law and order are some of the more conspicuous examples of the traditional application of the police power. Also included within these powers are the promotion of prosperity and the general welfare. *Diamond Auto Sales, Inc.* v. *Erbe*, 1960, 251 Iowa 1330, 105 N.W.2d 650. We are of the opinion that the ordinance in question is an exercise of the city's police powers.

What the ordinance does is to classify certain city officials. A government may classify persons and objects for the purpose of legislation. If the classification is reasonable, it is not violative of equal protection. *St. John* v. *New York*, 1906, 201 U.S. 633, 265 Ct. 554, 50 L.Ed. 896. The principle that a government has broad discretion in classification when consistently exercising its power of regulation has constantly been recognized by the Supreme Court of the United States. *Smith* v. *Cahoon*, 283 U.S. 553, 51 S.Ct. 582, 75 L.Ed. 1264. See also, *State ex rel. Cairy* v. *Iowa Co-op Association*, 1959, 250 Iowa 839, 95 N.W.2d 441. The constitutionality of a classification is based upon its reasonableness, and, if the act is not purely arbitrary, but rests upon some reasonable basis, it will suffice for constitutionality. *Diamond Auto Sales, Inc.* v. *Erbe*,

supra; *Steinberg-Baum & Co.* v. *Countryman*, 1956, 247 Iowa 923, 77 N.W.2d 15. The ordinance appears to apply equally to all within the class, as defined by the ordinance.

We do not find that this ordinance deprives those individuals in question of their personal liberties to be considered unconstitutional. These individuals are in public service for the betterment of the citizens as a whole. This ordinance was promulgated for the greatest good of the greatest number, i.e., the citizens of the municipality. This type of ordinance is sometimes necessary to prevent any conflict of interest that might jeopardize the welfare of the citizenry.

Accordingly, we are of the opinion that this ordinance, on its face, is constitutional.

April 10, 1972

CONSERVATION: Removal of private dam — §§109.15, 455A.33, 564.1, Code of Iowa, 1971. On facts presented, lower riparian landowners have acquired no prescriptive right to continued existence of private dam forming Lake Melrose; written approval of the Iowa Natural Resources Council is required for removal thereof; and approval for such removal may be granted only upon such investigation or showing as the Iowa Natural Resources Council deems necessary or appropriate to establish the safe removal of the water behind the dam. (Peterson to McMurry, Director, Natural Resources Council, 4/10/72) #72-4-5

Othie R. McMurry, Director, Natural Resources Council: This is in reply to your request for an Opinion of the Attorney General as follows:

"Recently, application has been submitted to the Iowa Natural Resources Council by Mr. and Mrs. Robert Thompson requesting permission to drain Melrose Lake by removing the dam which creates the impoundment. Melrose Lake is an impoundment located in Section 16, T79N, R6W, Johnson County, Iowa (within corporate limits of Iowa City) having a surface area of about 2.9 acres, a permanent storage capacity of 15.6 acre feet, a temporary storage capacity of 6.6 acre feet, and a dam height of 16.4 feet. The drainage area upstream from the dam site is approximately 67 acres and the outlet works for the dam consists of a 6 ft. x 4 ft. drop inlet structure with a 24 inch corrugated metal pipe conduit. The dam has purportedly been in place at least 50 years. The Iowa Natural Resources Council has never issued an approval order for said dam and impoundment.

"During the processing of Mr. and Mrs. Thompson's application, the following questions have arisen which we are hereby submitting to you for opinion.

1. Do property owners downstream from the dam have a prescriptive right to any flood control benefits that might have resulted from the operation of the dam over a period of years?

2. Do the provisions of Chapter 455A.33 of the Iowa Code apply to removal of the dam forming Melrose Lake?

3. Is the applicant responsible for proving that no adverse flood control effects will be created due to removal of the dam forming Melrose Lake?"

Relevant to your questions are Sections 109.15, 455A.33, and 564.1, Code of Iowa, 1971, which in pertinent part, are as follows:

"§109.15 Injury to dam. It shall be unlawful for any owner or his agent to remove or destroy any existing dam, or alter it in a way so as

to lower the water level, without having received written approval from the Iowa natural resources council.

"§455A.33 Unlawful acts — powers of council. It shall be unlawful to suffer or permit any structure, dam, obstruction, deposit or excavation to be erected, used, or maintained in or on any floodway or flood plains, which will adversely affect the efficiency of or unduly restrict the capacity of the floodway, adversely affect the control, development, protection, allocation, or utilization of the water resources of the state, or adversely affect or interfere with the state comprehensive plan for water resources, or an approved local water resources plan, and the same are declared to be and to constitute public nuisances, provided, . . .

"§564.1 Adverse possession — 'use' as evidence. In all actions hereafter brought, in which title to any easement in real estate shall be claimed by virtue of adverse possession thereof for the period of ten years, the use of the same shall not be admitted as evidence that the party claimed the easement as his right, but the fact of adverse possession shall be established by evidence distinct from and independent of its use, and that the party against whom the claim is made had express notice thereof; and these provisions shall apply to public as well as private claims."

We will answer your questions in the order stated.

1. The Iowa Supreme Court in *Phillips* v. *Griffin*, 1959, 250 Iowa 1350, 98 N.W.2d 822, an action to establish a driveway easement over six feet of an adjoining owner's land, held that the fact that Plaintiff and her predecessors for 38 years had used the driveway between her property and the adjoining residence as a joint driveway was insufficient to establish an easement where there was no showing that Plaintiff or any predecessor had asserted any rights to the driveway and it appeared that they had merely used a portion which was on the adjoining land.

The court set forth the elements necessary to establish an easement by prescription as follows:

"By 'prescription' means by adverse possession under claim of right and color of title, openly, notoriously, continuously and hostilely asserted against the other party for ten years or more. [Citing: *Webb* v. *Arterburn*, 1954, 246 Iowa 363, 67 N.W.2d 504] Claimant must show more than use. To comply with §564.1, Code of Iowa, 1951, there are two other requirements: (1) that he claim his easement as his right, and this must be established by evidence distinct from and independent of its use, (2) that the party against whom claim is made must have express notice before ten year adverse possession; not alone of use, but of the claim of right to use against objections and protest of owner."

This case has been followed and cited as controlling in a more recent case, *Simonsen* v. *Todd*, 1967, 261 Iowa 485, 154 N.W.2d 732, the court also citing therein *Roberts* v. *Walker*, 1947, 238 Iowa 1330, 30 N.W.2d 314, *Gerdts* v. *Mulford*, 1941, 230 Iowa 647, 298 N.W. 873, and *Young* v. *Ducil*, 1920, 188 Iowa 410, 176 N.W. 272.

Should any of these elements be missing in any set of circumstances wherein rights by prescription are claimed, no such rights will be deemed to have accrued.

Decisions from other jurisdictions support the holding and rationale of the Phillips case, supra. Particularly pertinent to your fact situation is the ruling of the Supreme Court of Nebraska in *Kiwanis Club Foundation* v. *Yost*, 1966, 179 Neb 598, 139 N.W.2d 359. Plaintiffs in that action

alleged that a dam was built by Nebraska Gas about one mile downstream from Plaintiffs' property and that, at great expense, Plaintiffs acquired said property and operated it for more than forty years as a recreation area for the Camp Fire Girls in reliance upon the continued existence of the dam. The court ruled that in an action by upper riparian owners for an injunction restraining Defendant from damaging and destroying a dam, the Defendant could not be so enjoined for the reason that the majority of jurisdictions and the majority rule is that where a dam has been built for private convenience and advantage of the owner, he is not required to maintain and operate it for the benefit of upper riparian owners who obtain advantages from its operation, and construction and maintenance of such dams does not create any reciprocal rights in upstream riparian proprietors based on prescription, dedication, or estoppel.

The court stated:

"Construction and maintenance of a dam over a long period of years may well tend to lead persons owning property above the dam to believe that a permanent and valuable right has been acquired, or is naturally present. The very fact that a manmade dam is obviously present, however, is sufficient to charge them with notice that the water level above the dam is artificial, not natural, and that its level *may be lowered or returned to the natural state at any time.*" [Emphasis added.]

This majority rule is expressed in:

93 C.J.S. *Waters* §147 p. 865.
56 Am. Jr. *Waters* §159 p. 626.
Mitchell Drainage Dist. v. *Farmers Drainage Dist.*, 1934, 127 Neb 484, 256 N.W. 15.
Taft v. *Bridgeton Worsted Company*, 1921, 237 Mass. 385, 130 N.E. 48, 13 ALR 928.
Drainage Board v. *Village of Homer*, 1957, 351 Mich. 73, 87 N.W.2d 72.
Hood v. *Sletkin*, 1958, 88 R.I. 178, 143 A.2d 683.
Goodrich v. *McMillan*, 1922, 217 Mich. 630, 187 N.W. 368, 26 A.L.R. 801.

No greater claim of right to continued existence of the dam could be asserted by lower riparian owners.

We are, therefore, of the opinion that in the absence of a showing that the three elements necessary to obtain a prescriptive right as cited in *Phillips*, supra, are present, owners downstream from the dam in question obtain no prescriptive rights to any flood control benefits that might have resulted from the operation of the dam over a period of years. We understand from your letter that the latter two elements cited in that case do not exist in the Lake Melrose siuation.

2. The provisions of §455A.33 apply to any dam in public or private waters which violate any of the unlawful acts enumerated therein and cited above. Should the dam forming Melrose Lake be found to be in violation of any of the above enumerated acts, all of which deal with the effects of its construction or maintenance, the provisions of §455A.33 would be applicable in all respects. Absent such a showing, however, §455A.33 would not be applicable. We therefore conclude that the provisions of §455A.33 are inapplicable in the present situation inasmuch as the owners simply wish to remove the dam and restore natural conditions.

3. Removal of the private dam in question is regulated by §109.15,

quoted above, requiring written permission of the Iowa Natural Resources Council therefor.

In order to carry out the purposes for which the Iowa Natural Resources Council was created (§455A.1), it is both necessary and appropriate that the Council make such investigation or require such showing or assurance as it may deem necessary or appropriate to provide for the safe removal of the dam and restoration of natural conditions.

In summary, we are of the opinion that, on the facts presented, lower riparian landowners have acquired no prescriptive right to continued existence of the private dam forming Lake Melrose; that written approval of the Iowa Natural Resources Council is required for removal thereof; and that approval for such removal may be granted only upon such investigation or showing as the Iowa Natural Resources Council deems necessary or appropriate to establish the safe removal of the water behind the dam.

April 10, 1972

STATE OFFICERS AND DEPARTMENTS: Department of Health — §§406.5, 135.11(17), 135.38, Code of Iowa, 1971. A person may be charged with a violation of rules and regulations of the Iowa State Department of Health and if found guilty thereof, would be guilty of a misdemeanor. (Corcoran to Yarham, Cass County Attorney, 4/10/72) #72-4-6

Mr. Ray Yarham, Cass County Attorney: I am in receipt of your letter of April 3, 1972, in which you raise the question of whether or not a charge can be filed against a person, for violation of rules and regulations promulgated by the Iowa State Department of Health pursuant to Section 406.5, Code of Iowa, 1971. You further inquire as to what penalty a person would be subjected if found guilty of a violation of said rules and regulations.

Chapter 406 pertains to sanitary disposal projects, and Section 406.5 charges the Commissioner of Public Health with the responsibility of promulgating, adopting and enforcing rules for the proper administration of the chapter. Chapter 135, entitled "State Department of Health", provides for the general responsibilities of said department, and Section 135.11(17) states as follows:

"135.11 Powers and duties. The commissioner of public health shall be the head of the 'State Department of Health', which shall:

***

17. Establish, publish, and *enforce rules* not inconsistent with law for the enforcement of the provisions of this title and for the enforcement of the various laws, the administration and supervision of which are imposed upon the department." [Emphasis added.]

Since Section 406.5 charges the Commissioner with the administration of sanitary disposal projects, it would follow that he would be responsible for the enforcement of the provisions of that chapter, and any rules and regulations promulgated thereby would be a part of the enforcement procedure.

Section 135.38 provides the Commissioner with the teeth to enforce any laws under his jurisdiction and rules promulgated pursuant to said laws.

Section 135.38 provides, in part, as follows:

"Any person who knowingly violates any provision of this chapter, or of *rules of the department*, or any lawful order, of the department or of its officers, or authorized agents, shall be guilty of a misdemeanor." [Emphasis added.]

Therefore, any adjudged violation of rules of the department would be considered a misdemeanor.

It is therefore my opinion that a person may be charged with a violation of rules and regulations of the Iowa State Department of Health and if found guilty thereof, would be guilty of a misdemeanor.

April 19, 1972

SCHOOLS: Lease of school district property — §297.22, Code of Iowa, 1971. Statutory limitations on power to sell or lease school property are based on the number of pupils in attendance in the whole school district, not just in the high school, and the value of the property. (Nolan to McKey, Hancock County Attorney, 4/19/72) #72-4-7

Mr. J. Ramsay McKey, Hancock County Attorney: This will acknowledge receipt of your letter requesting an interpretation of language contained in §297.22, Code of Iowa, 1971. This section of the Code provides authority for the school board "in school districts which maintain a high school and in which the average daily attendance in the preceding year was 200 or less" to sell, lease, or dispose of, in whole or in part, any schoolhouse or site or other property belonging to the corporation of a value not exceeding $2,500.00. The question raised by your letter is whether it is the attendance of high school or of the entire school district which is controlling in establishing this limitation.

It is my opinion that the requirement as to average daily attendance in the preceding year pertains to the attendance of the entire school district. In 1966 OAG 15 this office advised that the Board of Directors of a school corporation has authority to sell or lease property owned by it within specified limitations "based on school attendance and the value of the property". In 1966 OAG 272 at page 273 the following appears:

". . . before a lease or sale can be consumated, there are certain specific conditions precedent, found in Subsections 1 through 4 of Section 297.22 (supra) that must be met. Subsections 1 through 3 require that before a board of directors may sell or lease property belonging to the school corporation the property must be less than the value stated in the respective subsection, the district must maintain a high school and the average daily attendance in the district during the preceding year must meet the requirements of the specific subsections. 62 OAG 348. Subsection 4 allows the board to sell or lease school property without reference to daily attendance in the district for the preceding year or whether the district maintained a high school if the value of the property to be sold or leased is $500 or less."

April 19, 1972

CITIES: PARKS: SCHOOL LANDS — §297.22, as amended by Ch. 163, Acts, 64th G.A.; §§370.11 and 370.7, as amended by Ch. 207, Acts, 64th G.A., 1st Session; and §374.5, Code of Iowa, 1971. A school district may lease land to city for recreational purposes and cooperate in the operation thereof. (Nolan to Norpel, State Representative, 4/19/72) #72-4-8

The Honorable Richard J. Norpel, Sr., State Representative: This is an answer to your request for an opinion on the following question:

"Can the Bellevue Community School Board lease some of their land to the Bellevue Park Board so they can develop it into a recreational area which would contain a baseball and a football field plus other recreational facilities?"

Your letter refers to Senate File 256 which was enacted as Chapter 207, Acts of the 64th General Assembly, First Session and which provides in pertinent part substantially as follows:

Cities and towns are authorized to contract indebtedness and to issue general obligation bonds to provide funds to pay the cost of the acquisition of lands, the acquisition and permanent improvement of lands, or the permanent improvement of lands owned or leased by the cities or towns for park purposes within or without their coroprate limits, including, but not limited to, the paving, macadamizing and otherwise improving the roadways, drives, avenues and walks in and through parks.

The park board may acquire real estate within or without the city for park purposes by donation, lease, purchase, or condemnation, take title to real estate in the name of the board in trust for the public, and hold it exempt from taxation.

The above provisions were enacted as amendments to §§370.7 and 370.11, Code of Iowa, 1971.

The power of the Board of Directors of the school district to sell, lease, exchange, give or grant and accept any interest in a real property to, with or from any county, municipal corporation, school district or township if the real property is within the jurisdiction of both the grantor and grantee is spelled out in §297.22, Code of 1971, as amended by Chapter 163, Acts of the 64th General Assembly. It is the opinion of this office that sufficient authority exists by virtue of the foregoing statutes to authorize the contemplated action of the Bellevue Community School Board.

In connection with the proposed use of the football and baseball fields and other recreational facilities by the school after the area is developed, we direct your attention to the provisions of §374.5, Code of 1971, which provides:

"The name that may be adopted for said community center district, and the location of the improvements, shall be determined by the city council; and in this connection said city council is authorized, if it shall deem it advisable, and with the consent of the school board, to locate such community center improvement in connection with, adjacent to, or as a part of public school buildings and grounds erected or to be erected and maintained within said community center district, and to co-operate with the boards having the custody and management of public school buildings or grounds within said district, and, by making arrangements satisfactory to such boards, to provide for the supervision, instruction, and oversight necessary to carry on public educational and recreational activities, and for a division between the school board and the community center district of the cost of buildings, recreation grounds, and equipment to be used in connection with such school as a community center, and of the expense of operation thereof; provided further that in case such community center shall be established or maintained in connection with a public school operated within said community center district, the city council shall have authority to arrange as it may deem best with the school board for the necessary personal supervision of such community

center, other than that contemplated herein where such center is operated independently."

April 19, 1972

CITIES AND TOWNS: **Subdivisions** — §409.14, Code of Iowa, 1971. A municipality may require a property owner to provide public utilities to areas he desires to plat or subdivide. (Blumberg to Davis, State Senator, 4/19/72) #72-4-9

Senator Wilson L. Davis: I am in receipt of your letter of April 4, 1972, in which you requested an Attorney General's Opinion with regard to the following questions:

1. Under what statutory authority may a municipality, by ordinance, pass the responsibility of financing improvements, such as streets, sewers, and water mains, on to the property owner who wishes to subdivide, or plat his property into lots for sale to private parties?

2. What effect will the Home Rule Amendment have on the above stated question?

In response to your first question. I would direct you to the 1971 Code of Iowa, Section 409.14. This Section sets forth the duties and powers of municipalities exceeding 25,000 in population and cities under 25,000 in population in which plan commissions have been established pursuant to Chapter 373 of the Code. Paragraph three of Section 409.14 provides:

"For the information of the city council and the city plan commission, where such exists, and to facilitate action on said plats, the city council shall have authority by ordinance to prescribe reasonable rules and regulations governing the form of said plats and require such data and information to accompany same on presentation for approval as may be deemed necessary by the said council."

Paragraph four of said Code Section provides in part:

"[P]rovided that the city council may require as a condition of approval of such plats that the owner of the land bring all streets to a grade acceptable to the council, and comply with such other reasonable requirements in regard to installation of public utilities, or other improvements, as the council may deem requisite for the protection of the public interest."

Paragraph five of the same code section contains a provision that the city council may require that the owner of the land post sufficient bond to insure the installation of such improvements as are deemed necessary. Therefore, it is apparent that municipalities which fit within the category described in Section 409.14 have the authority to require, under the existing law, that the property owner provide public utilities to areas which he desires to plat or subdivide.

In response to your second question, Chapter 409 of the Code has not been repealed by the new Home Rule for Cities Act. Therefore, it will still be in effect with this Act. Thus, the result will be the same.

Accordingly, we are of the opinion that municipalities may require a property owner to provide public utilities to areas which he desires to plat or subdivide.

April 24, 1972

CITIES AND TOWNS: Liability of Councilmen — City Council members may not be held personally liable for voting a particular way in the absence of fraud, corruption or maliciousness. (Blumberg to Anderson, State Representative, 4/24/72) #72-4-10

Representative Leonard Anderson: I am in receipt of your letter of April 11, 1972, in which you requested an opinion of the Attorney General. The question for which you sought an opinion was: "Can a city councilman be sued personally for voting to refuse to allow any shopping center on property zoned commercial by ordinance?"

Although there does not seem to be any Iowa case law on the subject, the general principle indicates that municipal council members may not be held personally liable for any acts which are left to the discretion of the council members, unless fraud, corruption or malice of the council member can be shown. It is stated in 62 C.J.S. *Municipal Corporations, Municipal Officers,* §545 at page 1009:

"Municipal officers performing acts as to which they are empowered to exercise judgment and discretion are not personally liable for resulting damages to private individuals, unless they act corruptly, fraudulently, or maliciously, or there is a statute imposing liability."

Discretionary acts are defined, at 62 C.J.S. *Municipal Corporations, Municipal Officers* §545 at page 1006:

"[D]iscretionary duties are such as necessarily require the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued."

It is our opinion that voting by a council member fits the definition of a discretionary duty.

It is further stated in 62 C.J.S. *Municipal Corporations, Municipal Officers,* §545 at page 1009:

"No member of a municipal council can be held liable to any individual for the enactment or repeal of an ordinance within its authority whereby the latter has suffered damage; nor can his motives be inquired into."

Voting on the enactment of an ordinance would seem to be analogous to voting on any matter before a city council, and thus council members would be immune from suit for voting on such matters.

It is therefore our opinion that city council members may not be held personally liable to suit for voting a particular way on any matter, unless it can be shown that the council member acted corruptly, maliciously or fraudulently.

April 24, 1972

COUNTIES AND COUNTY OFFICERS: County Officers — §332.18, Code of Iowa, 1971. Board of Supervisors has no authority to transfer duties of Treasurer with respect to motor vehicle registration to the Recorder except upon petition and vote of the electors at a special election under §332.18, Code of Iowa, 1971. (Nolan to Stipp, Winnebago County Attorney, 4/24/72) #72-4-11

Mr. Harley Stipp, Winnebago County Attorney: Your letter requesting an opinion concerning the authority of the County Board of Supervisors to shift the duties of the Motor Vehicle Department from the County

Treasurer to the County Recorder has been received. In your letter you state that such a change would be desirable because of the work load of the County Treasurer and the congestion in the office due to lack of space. You further point out that §332.17, et. seq., Code of Iowa, 1971, provides authority for combining county offices but that your Board does not desire to combine these two offices, but only to shift the duties of handling motor vehicle matters from County Treasurer to the County Recorder and to have these matters handled in the Office of the County Recorder.

I find no authority for the County Board of Supervisors to transfer duties imposed upon the Office of County Treasurer by Ch. 321, Code of Iowa, 1971, (specifically §§321.20, 321.34 and 321.162 as amended by S.F. 1023, Acts of the 64th G.A., Second Session) to another county officer except where the procedures set out in §332.18, Code of 1971, are followed. Such procedures require the petition of the electors of the county (25% of the votes cast for the county office receiving the greatest number of votes at the last preceding general election) and the affirmative vote of a majority of the voters at a special election on the proposal for combining such duties.

As an alternative consideration, the supervisors' powers with respect to the management of county business and the control of space and county buildings (§332.3(2), (6), (15), (19)) would appear to support the location of the motor vehicle department in any convenient and accessible place and §340.4 permits the Board of Supervisors to fix all compensation for extra help and clerks required to assist the Treasurer and the Deputy in charge of the motor vehicle registration and title department.

April 24, 1972

COUNTY AND COUNTY OFFICERS: Hospitals — Ch. 145A, Ch. 347, Code of Iowa, 1971. A county may acquire an existing privately owned hospital facility and issue bonds to raise funds for such purpose. The officials who plan an area hospital pursuant to code chapter 145A are the members of the Board of Supervisors and the City Councils. (Nolan to Straub, Kossuth County Attorney, 4/24/72) #72-4-12

Mr. Joseph J. Straub, Kossuth County Attorney: This is in reply to your letter requesting an Attorney General's opinion on two questions concerning the acquisition of an existing privately-owned hospital facility by Kossuth County or a merged area. The questions posed in your letter are:

"1. May a county or a merged area issue bonds to purchase an existing privately owned hospital facility under either Chapter 347 or Chapter 145A of the Code of Iowa?

"2. In the event an existing hospital is purchased under Chapter 145A by a merged area, who are the officials or governing bodies who are to adopt the plan for an area hospital under such chapter?

In answer to your first question, I am of the opinion that there is sufficient statutory authority in either Chapter 145A or Chapter 347, Code of Iowa 1971, for the acquisition of an existing privately-owned hospital facility and the issuance of bonds to raise funds for such purpose.

The pertinent statutory provisions are as follows:

§145A.17:

"Boards of hospital trustees may acquire sites and erect and equip buildings for use by area hospitals and may contract indebtedness and issue bonds bearing interest at a rate not exceeding seven percent per annum to raise funds for such purposes in accordance with chapter 75."

§347.1:

"When it is proposed to establish in any county a county public hospital, a petition shall be presented to the board of supervisors, signed by two hundred or more resident freeholders of such county, at least one hundred fifty of whom shall not be residents of the city, town, or village where it is proposed to locate such hospital, requesting said board to submit to the electors the proposition to issue bonds for the purpose of procuring a site, and erecting, equipping, and maintaining such hospital, and specifying the amount of bonds proposed to be issued for such purpose.

* * *

§347.13:

"Said board of hospital trustees shall:

"1. Purchase, condemn, or lease a site for such public hospital, and provide and equip suitable hospital buildings. . . . ."

The word "site" as defined by Webster is a place or a space of ground occupied or to be occupied by a building. Accordingly, a site upon which a privately-owned hospital facility is located might very well be acquired under either Chapter 347 or Chapter 145A as well as under the specific authorizing provisions of Chapter 347A.8.

In 1946 OAG at 185 the question of whether a statute which authorized a school district to build and furnish a home for the school superintendent might be interpreted to permit purchasing an existing building for such purpose was considered. The opinion was that such purchase was authorized under the statute.

With respect to your second question, it is our view that the "officials" who are to adopt the plan for an area hospital under Chapter 145A are the members of the Board of Supervisors and the City Councils interested in joining such a venture. See 1970 OAG 571. Code §145A.2 defines officials as the respective governing bodies of political subdivisions. The section further defines political subdivision as meaning any county, township, school district, city or town. In the opinion dated November 13, 1967, to be found at 1968 OAG 401, this office previously stated the following:

"With reference is this portion of your inquiry, the statute clearly contemplates *the merger* of political subdivisions for the purpose of creating an area hospital. While a school district is a political subdivision, after comprising merged townships, it is not possible for a single school district to create an area hospital under this statute as this was not the purpose for which a school district itself was formed. . . . .

"This is not to say that it would be improper to form a 'merged area' for the purpose of establishing an area hospital that would comprise the same political subdivisions as are now included in an existing school district. But the establishment of the school district itself did not make the political subdivisions which form a part thereof captive for the purpose of creating an area hospital or any other new political subdivision."

It should be noted that the Board of Supervisors of a county may exclude any township from participation in the area hospital pursuant to §145A.3. On the other hand it appears that there is broad enough authority in the statute to permit several townships to plan together for the merged area supporting an area hospital.

April 24, 1972

MOTOR VEHICLES: Maximum length, vehicle and trailer defined — §321.1 and §321.457, Code of Iowa, 1971. A device utilized to transport property and provide supplemental axle to transfer and carry a portion of the main vehicle load is a trailer within the provisions of the Code, the maximum length of both vehicles of which is fifty-five feet. (Schroeder to Coupal, Iowa State Highway Commission, 4/24/72) #72-4-13

Mr. J. R. Coupal, Jr., Director of Highways, Iowa State Highway Commission: You will recall that on March 22, 1972, we rendered an Opinion (#72-3-27) that a device described by you was not a separate trailer or vehicle within the contemplation of Section 321.1(1) Code of Iowa, 1971.

The rationale was that the device, as described, carried no property and therefore, did not come within the code of definition of vehicle. We have subsequently been furnished pictures and further description of the device. They reveal that, in fact, two discharge chutes are physically transported by and on the device.

Therefore, reviewing the situation in light of the additional facts made available, it is now our opinion the device is a vehicle properly classified as a trailer which is defined by Section 321.1(9) Code as:

". . . every vehicle without motive power designed for carrying persons or property and for being drawn by a motor vehicle and so constructed that no part of its weight rests upon the towing vehicle."

Therefore, the maximum length of the truck and the trailer described may be fifty-five feet.

Your original request also asked for licensing information which the prior Opinion did not cover due to the nature of the answer. When the supplemental information was supplied it was also brought to our attention that the Department of Public Safety, by letter to the manufacturer on August 23, 1963, has considered this device to be a trailer weighing over 2,000 pounds and would be licensed accordingly upon securing an Iowa Certificate of Title. This position was further reaffirmed by a subsequent letter dated June 23, 1971.

Opinion #72-3-27 is hereby rescinded.

April 26, 1972

HIGHWAYS: Taxability of Toll Bridge Revenue Bonds — Ch. 313A, §313A.36, Code of Iowa, 1971. Revenue Bonds issued by the Highway Commission to finance interstate toll bridge acquisitions are not subject to taxation by or within the State of Iowa. (Lundgren to Coupal, Director of Highways, Iowa State Highway Commission, 4/26/72) #72-4-14

Mr. Joseph R. Coupal, Jr., Director of Highways, Iowa State Highway Commission: This is in reply to your request for an opinion on the

following question:

"I request an official opinion from your office as to whether any bonds issued under the authority of Chapter 313A, Code of Iowa, together with all income therefrom are exempt from all taxes of the State of Iowa including the State Income Tax."

Chapter 313A, Code of Iowa, 1971, pertains to acquisition, construction, operation and maintenance of Interstate Bridge by the Iowa State Highway Commission. The Chapter further authorizes the issuance, sale, redemption and exchange of revenue bonds by the Highway Commission.

Section 313A.36, Code provides in part:

"[T]he bonds issued under the provisions of this Chapter, their transfer and the income therefrom including any profit made on the sale thereof shall at all times be free from taxation by or within the State of Iowa."

In view of the specific exemption quoted above, revenue bonds issued pursuant to Chapter 313A, Code, their transfer, income or profit on sale are not taxable by or within the State.

April 27, 1972

STATE OFFICERS AND DEPARTMENTS: Iowa Development Commission Foundation, Inc. — §§28.11 - 28.16, Code of Iowa, 1971, as amended by §§1 - 5, Chapter 89, 64th G.A., First Session (1971). The Iowa Development Commission Foundation, Inc., can under §108 of the federal Rivers and Harbors Act of 1960 qualify as an agency of state government to acquire property from the corps of engineers and then, depending on the decision of the corps of engineers either lease or resell the same for development without taking bids and impose such conditions or restrictions as it saw fit. (Haesemeyer to Wymer, Director, Iowa Development Commission, 4/27/72) #72-4-15

Mr. Chad A. Wymer, Director, Iowa Development Commission: In connection with the proposed Guttenberg Terminals project you have requested an opinion of the attorney general on the following two questions:

"1) Can the Iowa Development Commission Foundation, Incorporated, under section 108 of the River and Harbors Act of 1960, qualify as an agency of state government to acquire property from the Corps of Engineers, which would then be either leased or resold, depending upon the decesion of the Corps of Engineers, for development?

"2) If the Foundation can qualify to acquire said property, what procedures would we be required to follow in either leasing or reselling said property? e.g., would we be required to take bids, and if so, could we set up restrictions and specifications on the development and use of the property?"

The Iowa Development Commission Foundation, Inc., is a non-profit corporation organized by the Iowa Development Commission under Chapter 504A, Code of Iowa, 1971, pursuant to the authority contained in §§28.11 - 28.16, as amended by §§1 - 5, Chapter 89, 64th General Assembly, First Session (1971). That the corporation's powers are extremely broad is apparent from §§28.11 and 28.16, as amended, which provide respectively:

"The Iowa development commission is hereby authorized to form a corporation under the provisions of chapter five hundred four (504) of the Code for the purpose of receiving and disbursing funds from public or private sources to be used to further the overall development and

well-being of the state."

"28.16 The corporation formed under sections twenty-eight point eleven (28.11), twenty-eight point fourteen (28.14) and twenty-eight point fifteen (28.15) is hereby authorized to accept grants of money or property from the federal government or any other source and may upon its own order use its money, property or other resources for any of the purposes herein."

Thus, the corporation has sweeping powers to receive funds and property from private and public sources including the federal government and disburse or use the same upon its own order "to further the overall development of the state". It is clear that the term "property" includes real property. §4.1(10), Code of Iowa, 1971.

The Iowa Development Commission Foundation, Inc., was originally organized on May 3, 1963. Because of the substantially broader grant of statutory power given to the corporation by the amendments contained in Chapter 89 the articles of incorporation were recently amended to expand correspondingly the corporate purposes and powers. Thus, Article II, Purposes and Object, now provides:

"The purpose of the corporation is to receive and disburse funds from public or private sources to be used to further the overall development and well-being of the state. No member of the corporation shall receive any pecuniary profit therefrom, but may receive reasonable compensation for services actually performed in carrying out the purposes of the corporation when authorized by the Board of Directors of the corporation. The purposes and objects of the corporation as stated are those identified in Chapter 28, Iowa Code, as amended by the first regular session of the 64th General Assembly."

Article V, relating to the corporate powers, provides:

"For the furtherance of the purposes of this corporation, it shall have the power:

"1. To enter into contracts, to sue and be sued, to have a corporate seal, to take by purchase, gift, devise or bequest real and personal property, whether the same be tangible or intangible, including, but without limitation either as to class or kind, inchoate rights of whatsoever kind and nature, and to hold, dispose of, manage and administer the same in the carrying out of the purposes and objects of the corporation.

"2. To borrow money and give its notes or other obligations therefor, and to secure payment therefor by pledging or mortgaging any property it may own.

"3. To do and perform any act or thing necessary, proper or convenient in accomplishing any or all of the above enumerated matters and to have and exercise all powers conferred by the laws of the State of Iowa or otherwise upon a corporation of this type formed for the aforesaid purposes. The enumeration herein of specific powers shall not be deemed exclusive nor affect the rights of the corporation to exercise all of any other powers necessary or incidental to the accomplishment of its purposes."

The foundation is closely related to the development commission created under chapter 28 of the code. Indeed the members and directors of the foundation are the members of the development commission. §28.15, Code; Article VI, Articles of Incorporation. Withal it would seem that the foundation is in fact an adjunct or arm of the development commission.

Section 108 of the Rivers and Harbors Act of 1960 provides:

"(a) Whenever the Secretary of the Army, upon the recommendation of the Chief of Engineers, determines that notwithstanding the provisions of the Federal Property and Administrative Services Act of 1949, as amended, with respect to disposal of surplus real property, (1) the development of public port or industrial facilities on land which is part of a water resource development project under his jurisdiction will be in the public interest; (2) that such development will not interfere with the operation and maintenance of the project; and (3) that disposition of the property for these purposes under this section will serve the objectives of the project within which the land is located, he may convey the land by quitclaim deed to a State, political subdivision thereof, port district, port authority, or other body created by the State or through a compact between two or more States for the purpose of developing or encouraging the development of such facilities. In any case, where two or more political subdivisions thereof, or bodies created by, a State or group of States, seek to obtain the same land, the Secretary of the Army shall give preference to that political subdivision or body whose intended use of land will, in his opinion, best promote the purposes for which the project involved was authorized.

"(b) Any conveyance authorized by this section shall be made at the fair market value of the land, as determined by the Secretary of the Army, upon condition that the property shall be used for one of the purposes stated in the subsection (a) of this section only, and subject to such other conditions, reservations or restrictions as the Secretary may determine to be necessary for the development, maintenance, or operation of the project or otherwise in the public interest.

"(c) Prior to the conveyance of any land under the provisions of this section, the Secretary of the Army shall, in the manner he deems reasonable, give public notice of the proposed conveyance and afford an opportunity to interested eligible bodies in the general vicinity of the land to apply for its purchase.

"(d) The Secretary of the Army may delegate any authority conferred upon him by this section to any officer or employee of the Department of the Army. Any such officer or employee shall exercise the authority so delegated under rules and regulations approved by the Secretary.

"(e) The proceeds from any conveyance made under the provisions of this section shall be covered into the Treasury as miscellaneous receipts."

Pub.L. 86-645, Title I, §108, July 14, 1960, 74 Stat. 486. 33 U.S.C. §578.

In our opinion the Iowa Development Commission Foundation, Inc., is a "body created by the state" within the meaning of the foregoing provision of federal law. It is created pursuant to express state statutory authority. Its members and directors are public officials, i.e., the members of the state's development commission. The corporation's articles of incorporation incorporate by reference the purposes described in the statute authorizing its creation. Plainly, this is a body created by the state.

Moreover, it was created, among other things, "for the purpose of developing or encouraging the development of [public port or industrial] facilities". Surely this is a purpose falling within the broader scope of furthering "the overall development and well-being of the state". §28.11, Code of Iowa, 1971, as amended. The federal law, 33 U.S.C. 578(a) does not say that the body must have been created for the exclusive purpose of developing or encouraging the development of public port or industrial facilities and it would be gratuitous to read such a meaning into the section.

Accordingly, in answer to your first question it is our opinion that the Iowa Development Commission Foundation, Incorporated, can under §108 of the Rivers and Harbors Act of 1960, qualify as an agency of state government to acquire property from the corps of engineers which would then be either leased or resold, depending upon the decision of the corps of engineers, for development.

As noted previously the foundation has rather broad powers with respect to the management and use of its property including the power to receive and disburse funds to further the overall development and well-being of the state and the authority, upon its own order, to use its money, property or other resources for any of its corporate purposes.

Accordingly, in our opinion the foundation could resell or lease property acquired from the corps of engineers as it saw fit without taking bids much as a private person or corporation could do. It could impose such conditions or restrictions as could be imposed by any other grantor or lessor and presumably would be obliged to comply with restrictions required by the corps of engineers.

April 27, 1972

ELECTIONS: Candidates for nomination at primary elections, residence requirements —Art. III, §§4 & 5, Constitution of Iowa; §§43.5, 43.18, 43.44, Code of Iowa, 1971. A person need not be a resident of the district he seeks to represent in order to be a candidate for nomination at a primary election. (Haesemeyer to Kennedy, State Representative, 4/27/72) #72-4-16

The Honorable Michael K. Kennedy, State Representative: You have requested an opinion of the attorney general with respect to the following:

"Is there any constitutional or statutory impediment for an elected State Representative from one district to file for election in a primary election of another district without resigning from his office and without establishing a residence in the new district more than 60 days prior to the general election as provided in Art. III, Sec. 4 of the Iowa Constitution?"

Art. III, §4, Constitution of Iowa, to which you make reference provides:

"No person shall be a member of the House of Representatives who shall not have attained the age of twenty-one years, be a citizen of the United States, and shall have been an inhabitant of this State one year next preceding his election, and at the time of his election shall have had an actual residence of sixty days in the County, or District he may have been chosen to represent."

Under Article III, §5, senators must possess the same qualifications as to residence and citizenship as representatives.

It is well settled in Iowa that a primary election is not an election within the meaning of the constitution. In an earlier opinion of the attorney general, 1968 OAG 154 at 159 we said:

". . . it is my opinion that the sixty day residence period referred to in Article III, §4 of the Constitution of Iowa refers only to general elections. In framing your question you have expressly excluded special

elections so that the only question remaining is whether the term 'election' as used in Article III, §4 includes primary elections.

"This issue was squarely presented to and decided by the Iowa Supreme Court in State v. Carrington, 194, Iowa 785, 190 N.W. 390 (1922). As stated by the court therein:

" 'A primary election is not an election, within the meaning of the Constitution; nor is it such within any meaning known to the common law. It is purely a legislative creation, that involves neither life, liberty, property, nor franchise. It is enacted solely for the benefit of orderly procedure in the administration of political parties respectively, whereby each may select candidates for office, to be submitted to the consideration of all the electors at the general election. In its creation the legislature was subjected to no constitutional inhibition; nor are its imperfections, if any, subject to attack on constitutional grounds. Prior to its legislative creation, the primary election never was or could be the subject of judicial cognizance; nor in its creation has the legislature conferred or taken away any right which has been heretofore, or can be hereafter, the subject of judicial cognizance, except so far as such right may be later conferred by legislation.'

"Thus the court recognized that a primary election is not an election as that term is used in the constitution. Accordingly, Article III, §4 imposes no requirement on a candidate in a primary election contest that such person shall have had an actual residence of sixty days prior to such primary election in the county or district from which he hopes to become a candidate in a general election."

Concluding as we do that the constitution imposes no residence requirements with respect to persons desiring to run in the primary election we next must determine whether or not there is any statutory requirement. Chapter 43, Code of Iowa, 1971, as amended by House File 1147, Acts, 64th G.A., Second Session (1972), contains statutory provisions relating to nominations by primary election. Nowhere in such chapter do we find any requirement that a person seeking to be nominated at the primary election must be a resident of the legislative district he seeks to represent. The form of nomination papers set forth in §43.44 does contain the words, "hereby nominate ..... of ..... county". However, the fact that the nominee's county must be set forth on the nomination papers is not the same as requiring that he live in the legislative district. Indeed, with counties having been dissected in the formation of legislative districts a prospective nominee could live in one part of the county although another part of the county was in the legislative district he hoped to represent. Sec. 43.18 sets forth the form of the affidavit to be made and filed by the candidate but here again it merely requires him to state what his residence is and contains no requirement that it be within the legislative district.

Sec. 43.5 provides:

"43.5 Applicable statutes. The provisions of chapters 49, 50, and 738 shall apply, so far as applicable, to all said primary elections, except as hereinafter provided."

However, an examination of Chapters 49, 50 and 738 discloses no requirement as to candidate's residency. Accordingly, it is our opinion that a person need not be a resident of the district he seeks to represent in order to be a candidate for nomination at a primary election.

An earlier opinion of the attorney general, 1909 OAG 319, reaches a

different conclusion:

"Ordinarily, if one is eligible for office at the date of election, it is sufficient.

"See State vs. Huegle, 112 N.W. (Iowa), 234, and cases cited.

"But the primary law, chapter 51, acts of the thirty-second general assembly, section 10, provides among other things that each and every candidate shall make and file his affidavit stating that he is eligible to the office in which he is and will be a bona fide candidate for nomination for said office, and shall file such affidavit with his nomination paper thirty days prior to the primary election. This, it seems to me, implies that the candidate must at the time he makes the affidavit in question be eligible to the office which he seeks."

In our view the reasoning of this opinion is somewhat strained and rests entirely upon the form of affidavit set forth in the statute. As §43.18 makes clear a candidate must make and file an affidavit in *substantially* the form set forth in that section. We are not prepared on the basis merely of a recommended statutory form to impose an additional ninety days residence prior to the primary election on prospective nominees. To do so would render essentially meaningless the sixty day residence requirement contained in Article III, §4, and since the primary election is held ordinarily well in advance of the general election significantly enlarge the required period of residence for prospective candidates of political parties. Our conclusions in this respect are consistent with an earlier opinion of the attorney general, Turner to Synhorst, August 4, 1971, in which we concluded that a person who would be eighteen on election day should be permitted to register to vote before such election day notwithstanding the fact that the statutory form of affidavit which he is required to execute in order to register includes the statement that he is then eligible to vote.

April 28, 1972

CITIES AND TOWNS: Authority of police officers outside the confines of their municipalities — Chs. 28D and 28E; §§748.4, 368A.17 and 368A.18, Code of Iowa, 1971. Authority of police officers may extend beyond the limits of the municipalities by which they are employed when they are temporarily assigned to duty in another municipality. (McGrane to Sellers, Dept. of Pub. Safety, 4/28/72) #72-4-17

Michael M. Sellers, Commissioner, Department of Public Safety: You have requested an opinion of the Attorney General on the question of whether or not a peace officer who is working for a specific municipal police department has the arrest powers of a peace officer when operating as a peace officer on a specific assignment in another municipality.

The general rule is that in the absence of statutory authority a peace officer may make arrests only within the confines of the geographic unit of which he is an officer. 6 C.J.S. *Arrests* §12(2). In the absence of special statutes, the powers conferred on a municipal police officer must be exercised within the territorial limits of the city. 62 C.J.S. *Municipal Corporations* §574.

A peace officer's geographic jurisdiction in Iowa is defined generally by Section 748.4, Code of Iowa (1971):

"It shall be the duty of a peace officer and his deputy, if any, *throughout the county, township, or municipality of which he is such an officer,* to preserve the peace, . . ." (emphasis added)

The Code contains further reference to geographic limitations on the authority of a municipal police officer. Section 368A.18, Code of Iowa (1971) states that policemen shall have the same powers as marshals to make arrests. Section 368A.17 provides that marshals

". . . shall suppress all riots, disturbances, and breaches of the peace, arrest all disorderly persons in the city or town and all persons committing any offense against the ordinance thereof . . ."

However, the Iowa Legislature in 1965 provided for the joint and cooperative exercise of governmental functions by agencies of the state, including municipalities. Acts 1965 (61 G.A.) Chapters 82, 83. Chapter 28D, Code of Iowa (1971) provides for and is entitled "Interchange of Federal, State and Local Government Employees". Section 28D.1 provides:

"The state of Iowa recognizes that intergovernmental co-operation is an essential factor inresolving problems affecting this state and that the interchange of personnel between and among governmental agencies at the same or different levels of government is a significant factor in achieving such co-operation."

This section states that the legislature has made a determination that joint efforts between agencies should be encouraged where it will aid in resolving problems affecting the state.

Methods enacted to promote this policy include Section 28D.3(1) which states:

"Any department, agency, or instrumentality of the state, county, city, municipality, land-grant college, or college or university operated by the state or any local government is authorized to participate in a program of interchange of employees with departments, agencies, or instrumentalities of the federal government, another state or locality, or other agencies, municipalities, or instrumentalities of this state as a sending or receiving agency."

This section is sufficiently broad and inclusive to allow the temporary exchange of police officers by municipalities but leaves open the question of what powers a police officer may exercise while on such assigned duty.

Section 28D.4 states in part:

"1. Employees of a sending agency participating in an exchange of personnel as authorized in section 28D.3 may be considered during such participation to be

a. on detail to regular work assignments of the sending agency, or

b. in a status of leave of absence from their positions to the sending agency.

"2. Employees who are on detail shall be entitled to the same salary and benefits to which they would otherwise be entitled and shall remain employees of the sending agency for all other purposes except that the supervision of their duties during the period of detail may be governed by agreement between the sending agency and the receiving agency."

The reference to regular work assignments in the above section implies that the exchanged police officer would be empowered to perform the

same functions in the receiving agency as he or she did in the sending agency. In the case of a police officer this would include the power to make arrests. Further, Section 28D.4(2) allows the agencies involved to determine the status of the exchanged officer in regards to the supervision of his or her duties. This implies the agencies may confer upon the officer such authority as they may jointly be empowered to delegate.

A municipality may grant the power to make arrests to police officers. These police officers are to be under the supervision of the chief of police. If the temporarily assigned police officer is then by agreement put under the supervision of the police chief of the receiving municipality, granting arrest powers to this officer would not be inconsistent with Section 368A.18, Code of Iowa (1971) even though he or she is still employed by the sending municipality.

It also appears that Chapter 28E, Code of Iowa (1971) is inclusive enough to allow municipalities to have a joint program of law enforcement which could include the exchange of police officers. Chapter 28E, specifically Sections 28E.1, 28E.3 and 28E.12 read as follows:

"28E.1. The purpose of this chapter is to permit state and local governments in Iowa to make efficient use of their powers by enabling them to provide joint services and facilities with other agencies and to cooperate in other ways of mutual advantage. This chapter shall be liberally construed to that end.

"28E.3. Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed jointly with any other public agency of this state having such power or powers, privilege or authority, and jointly with any public agency of any other state or of the United States to the extent that laws of such other state or of the United States permit such joint exercise or enjoyment. Any agency of the state government when acting jointly with any public agency may exercise and enjoy all of the powers, privileges and authority conferred by this chapter upon a public agency.

"28E.12. Any one or more public agencies may contract with any one or more other public agencies to perform any governmental service, activity, or undertaking which any of the public agencies entering into the contract is authorized by law to perform, provided that such contract shall be authorized by the governing body of each party to the contract. Such contract shall set forth fully the purposes, powers, rights, objectives, and responsibilities of the contracting parties."

Under these sections it appears that two municipalities or agencies might set up a cooperative program which would be of mutual advantage in enforcing the law. It would not be inconsistent with this chapter to include in such a program the exchange of police officers. And the powers to arrest which could be exercised by the officer in one municipality, could also be exercised by that officer in the other municipality which was party to the program. Section 28E.3, Code of Iowa (1971). This chapter might normally be unavailable for the exchange of employees in the face of the specific authorization in Chapter 28D, however, Section 28E.13 states that the powers granted under this chapter are in addition to any specific grants for intergovernmental agreements and contracts.

It is arguable that Chapters 28D and 28E do not expressly authorize a receiving agency to delegate police powers to an officer who is still in fact a peace officer of the sending agency, and restricted in the exercise of his authority to the boundaries of the sending agency by Sections

748.4 and 368A.18, discussed above. However such an interpretation would nullify Chapters 28D and 28E insofar as it applies to law enforcement agencies. Further it would be inconsistent with the stated purpose in Section 28D.1 and the statement of purpose and mandate for liberal construction of the statute in Section 28E.1.

It is our conclusion therefore that the specific geographical limitations on the arrest powers of police officers in Sections 368A.17, 368A.18 and 748.4, Code of Iowa (1971) do not prevent a police officer, temporarily assigned to a municipality other than the one by which he or she is employed, from exercising those arrest powers in the second municipality when he is under the supervision of the police chief of that municipality.

May 2, 1972

CITIES AND TOWNS: Municipal Hospitals — §§380.6, 452.10, Ch. 453, Code of Iowa, 1971; Ch. 77, §14, Acts of the 64th G.A., First Session; §§197, 199, H.F. 574, Acts of the 64th G.A., Second Session. Muncipal hospital trustees may invest proceeds from gifts in United States Government bonds. But, once so invested, they shall remain in said bonds until used for hospital purposes. (Blumberg to Chalupa, Jasper County Attorney, 5/2/72) #72-5-1

Mr. Dennis F. Chalupa, Jasper County Attorney: I am in receipt of your opinion request of April 19, 1972. You want to know what types of investments are available for municipal hospital funds. In your situation, the Mary Frances Skiff Memorial Hospital received a gift of stock for improved hospital building facilities. Pursuant to section 380.6, Code of Iowa, 1971, the stock was sold and the proceeds thereof were invested in United States Government bonds. It appears that the hospital trustees now wish to sell these government obligations for a profit and reinvest them.

Section 380.6, Code of Iowa, gives the hospital board of trustees authority to provide for the management, control and government of the hospital. The second paragraph states that upon receipt of a gift the trustees may sell or exchange such gift and apply the proceeds to any legitimate purpose. The third paragraph gives the trustees authority to establish a fund for these proceeds. Said funds may then be invested in United States Government bonds, but, "such investment when so made *shall* remain in said United States Government bonds until such time as . . . it is deemed advisable to use such funds for hospital . . . purposes." The word *shall* imposes a duty upon the trustees. Thus, the funds must remain in government securities until they are to be used.

You also want to know whether the new City Code changes this result. Section 199 of House File 574 repeals Chapter 380 of the present Code. However, the contents of section 380.6 are incorporated into section 197 of the Act. Therefore, the result would be the same.

Your opinion request made reference to section 452.10 and Chapter 453, 1971 Code of Iowa. These refer to public funds, which include municipal hospital funds. Section 452.10 authorizes that funds not needed for current operating expenses shall be invested in Government securities. All other funds currently needed are to be deposited in city banks as provided in Chapter 453. See 68 O.A.G. 693.

Home Rule has no effect on these chapters since the sections involved use the word *shall* as to where the investments are to be made. This imposes a duty and is a restriction upon the powers of a city or its agencies. See Chapter 77, §14, Acts of the 64th General Assembly, First Session.

In summary, then, once the gift has been invested in Government bonds, pursuant to sections 380.6 or 197 of the new Act, it must remain in said bonds until it is to be used for a hospital purpose. Section 452.10 and Chapter 453 do not appear to be applicable to your situation.

May 4, 1972

TAXATION: Apportionment of tax monies — §§430A.3 and 533.22, Code of Iowa, 1971; §§32 and 34, Ch. 165, Acts 1st Regular Session 64th G.A. Fifty percent of the monies collected by the county treasurers pursuant to these sections and amendments thereto after January 1, 1972, should be apportioned to the general fund of the state rather than the basic school tax equalization fund. (Kuehn to Baringer, Treasurer of State, 5/4/72) #72-5-2

The Honorable Maurice E. Baringer, Treasurer of State: You have requested an Attorney General's Opinion concerning the monies collected by the county treasurers after January 1, 1972, as a result of the 1971 levies under §§430A.3 and 533.22, Code of Iowa, 1971, as amended by §§32 and 34, Ch. 165, Acts 1st Regular Session 64th G.A. You want to know whether or not the monies should be distributed to the general fund of the State of Iowa or the basic school tax equalization fund.

Sections 430A.3 and 533.22 as amended by §§32 and 34, Ch. 165, Acts First Regular Session 64th G.A. read as follows:

"Sec. 32. Effective January 1, 1972, section four hundred thirty A point three (430A.3), Code 1971, is amended as follows:

430A.3 Levy. There is hereby imposed upon capital employed in the business of making loans or investments within the state of Iowa, as determined under the provisions of this chapter, a tax of five mills on each dollar of such capital; such tax to be considered a tax upon moneys and credits of such corporations which shall be levied by the board of supervisors, and placed upon the tax list and collected by the county treasurer. The amount collected in each taxing district in cities and towns shall be apportioned twenty percent to the county general fund, thirty percent to the city or town general fund, and fifty percent to the [basic school tax equalization fund] *general fund of the state,* and the amount collected in each taxing district outside of cities and towns shall be apportioned fifty percent to the county general fund and fifty percent to the [basic school tax equalization fund] *general fund of the state.* The term "loans" as used herein shall mean the lending of money to members of the general public upon other than real estate security. The term "investments" as used herein shall mean the discounting, purchasing, or otherwise acquiring notes, mortgages, sales contracts, debentures, or any other evidences of indebtedness, based upon other than real estate security when such investments are made in connection with loans made to members of the general public in the state of Iowa or in the courts of any operations having as their effect the financing of business transactions within the state of Iowa resulting in the incurring of any indebtedness based upon security other than real estate security.

Sec. 34. Effective January 1, 1972, chapter five hundred thirty-three point twenty-two (533.22), Code 1971, is amended as follows:

533.22 Taxation. A credit union shall be deemed an institution for

savings and shall be subject to taxation only as to its real estate, tangible personal property, moneys and credits. The shares shall not be taxed. The moneys and credits tax on credit unions is hereby imposed at a rate of five mills on each dollar of legal and special reserves of every credit union, and shall be levied by the board of supervisors, and placed upon the tax list and collected by the county treasurer, except that an exemption shall be given to each credit union in the amount of four thousand dollars and, in addition, any amount of the legal and special reserves which are invested in United States government securities. The amount collected in each taxing district within a city or town shall be apportioned twenty percent to the county general fund, thirty percent to the city or town general fund, and fifty percent to the [basic school tax equalization fund] *general fund of the state*, and the amount collected in each taxing district outside of cities and towns shall be apportioned fifty percent to the county general fund, and fifty percent to the [basic school tax equalization fund] *general fund of the state.* The moneys and credits tax shall be collected at the location of the credit union as shown in its articles of incorporation."

(Italics indicates new material added to existing statutes; brackets indicate deletions from existing statutes.)

The issue is whether funds collected by the county treasurers after January 1, 1972, as a result of 1971 levies under these amended code sections should be distributed to the general fund of the state or to the basic school tax equalization fund.

The legislative mandate contained in the amendments to §§430A.3 and 533.22 says literally that amounts *collected* in each taxing district after January 1, 1972, shall be apportioned "fifty percent to the general fund of the state." The words "general fund of the state" replace the words "basic school tax equalization fund." The key words in the amendment to both code sections are "effective January 1, 1972" and "collected."

What doesn't the statute say? It makes no mention of when the tax was levied. Its only concern is when the tax is *collected* by the county treasurer.

Thus, a reading of §§430A.3 and 533.22 and amendments thereto reveals that the critical factor is the date of collection and not the date of levy. Therefore, 50% of the monies collected by the county treasurers pursuant to the amendments of said sections, after January 1, 1972, should be apportioned to the general fund of the state rather than the basic school tax equalization fund.

May 4, 1972

STATE OFFICERS AND DEPARTMENTS: 42 U.S.C. 2000e-12, 37 Fed. Register 6835, Section 1604.10. State employees, except the personal staff of elected public officials, are covered by the federal guidelines concerning pregnancy and childbirth promulgated by the Equal Employment Opportunity Commission at 37 Federal Register 6835, Section 1604.10. (Conlin to Richey, May 4, 1972) #72-5-3

R. Wayne Richey, Executive Secretary, State Board of Regents: We have your letter of May 1, 1972, wherein you request an opinion of this office concerning the applicability of E.E.O.C. Regulations concerning pregnancy and childbirth to employees of the State of Iowa, including employees of the Board of Regents.

The E.E.O.C., under and pursuant to Section 713(b), Title VII of

the Civil Rights Act of 1964, 42 U.S.C. 2000e-12, promulgated rules and regulations concerning employment policies relating to pregnancy and childbirth, 37 Federal Register 6835, Section 1604.10, which proivde as follows:

"(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of title VII.

"(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

"(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity."

Prior thereto, on March 24,1972, Title VII was amended by HR 1746, the Equal Employment Opportunity Act of 1972 to extend coverage to employees of all state and local governments, governmental agencies and political subdivisions, except persons elected to public office in such state or political subdivisions and such officers' personal staff.

It is therefore the opinion of this office that employees of the State Board of Regents are covered by the above-cited federal regulation governing maternity leave.

May 4, 1972

CITIES AND TOWNS: Incompatibility of Offices — §368A.4, Code of Iowa, 1971. There is no incompatibility between the positions of city treasurer and member of the board of directors of the school district wherein said city is located. (Blumberg to Saur, Fayette County Attorney, 5/4/72) #72-5-4

Mr. Walter Saur, Fayette County Attorney: I am in receipt of your opinion request wherein you asked:

"Are the positions of city treasurer and member of the board of directors of the school district wherein said city is located incompatible, or may one person hold both positions?"

The case of *State ex rel. Crawford* v. *Anderson,* 1912, 155 Iowa 271, 136 N.W. 128, sets forth the criteria for incompatibility of offices. It is stated therein (155 Iowa at 273):

"The principal difficulty that has confronted the courts in cases of this kind has been to determine what constitutes incompatibility of offices, and the consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time. Bryan v. Cattell, supra. But that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where

one 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.' State v. Bus, 135 Mo. 338, 36 S.W. 639, 33 L.R.A. 616; Attorney General v. Common Council of Detroit, supra [112 Mich. 145, 70 N.W. 450, 37 L.R.A. 211]; State v. Goff, 15 R.I. 505, 9 A. 226, 2 Am.St. Rep. 921. A still different definition has been adopted by several courts. It is held that incompatibility in office exists 'where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both'."

See also, *State ex rel. LeBuhn* v. *White*, 1965, 257 Iowa 606, 133 N.W. 2d 903.

In *Goreham* vs. *Des Moines Metropolitan Area Solid Waste Agency*, 179 N.W.2d 449 (Iowa 1970), the Iowa Supreme Court was asked to decide whether there was a conflict of interest when elected officials of municipalities participating in the Solid Waste Agency were to serve on the board regulating the agency. The Court stated (179 N.W.2d at 462):

"In passing on this question the trial court said, 'Inasmuch as each representative is on the board primarily to serve as spokesman for the particular municipality or political subdivision he represents, (it could) * * * see no conflict of interest such as would likely affect his individual judgment by virture of his status as an elected official'."

The court indicated that, although members of such a board would want to keep the costs to their constituents as low as possible, the board members would likewise realize the necessity of maintaining sufficient funds and rates to operate the agency.

Other situations where no incompatibility was found include a mayor and council man on a board of trustees of a charity fund, *State* v. *Central States Electric Co.*, 1947, 238 Iowa 801, 28 N.W.2d 457; clerk of district court and court commissioner, *Kenny* v. *Georgen*, 36 Minn. 190, 31 N.W. 210; town marshal and deputy sheriff, *Gulbrandson* v. *Town of Midland*, 1949, 36 N.W.2d 655; justice of peace and clerk of district court, *State* v. *Lee*, 1951, 50 N.W.2d 124. See also, 62 C.J.S. *Municipal Corporations*, §485.

The fact situation in *Goreham, supra,* is not analogous to the question at hand. However, that decision is of some merit on the question of what constitutes incompatibility. In his capacity as member of the board of directors of the local school district, the treasurer would not merely represent the interests of his municipality. However, there appears to be nothing in the duties prescribed for the city treasurer (§368A.4, Code, 1971) which would likely affect his individual judgment as a school board member, or visa versa. Nor does the contemporaneous holding of the two offices appear to be repugnant to public policy under the precedents cited above.

Two prior opinions of this office are nearly directly in point with the instant question. In 1930 OAG 48, this office held that the office of city treasurer was not incompatible with that of secretary of the board of education of the independent school district comprising the city. This conclusion was based upon the *Crawford* case, supra. The same reasoning and conclusion was applied in 1932 OAG 187 when this office held that there was no incompatibility between the duties of a member of a town council and that of a member of the school board of the independent

district of that town. Compare 1970 OAG 472 which holds that offices of mayor and county school board member are incompatible because under Section 441.2 of the Code the same individual would be representingdifferent interests on the county conference board.

Therefore, it is our opinion that there is no conflict or incompatibility between the positions of city treasurer and a member of the board of directors of the school district in which the city is located.

May 8, 1972

CONSTITUTIONAL LAW: Schools, sex discrimination, industrial arts and home economics courses — 14th Amendment, Constitution of the United States; §280.1, Code of Iowa, 1971. A school district may not limit enrollment in industrial arts courses to boys or enrollment in home economics courses to girls. (Conlin to Johnston, Supt. of Public Instruction, 5/8/72) #72-5-5

Mr. Paul F. Johnston, State Superintendent of Public Instruction: You have requested an opinion as to whether a local school board has lawful authority to adopt and pursue a policy limiting enrollment in Industrial Arts to boys only. You also asked whether Chapter 105A of the 1971 Code of Iowa would have any bearing on this question.

From your letter it appears that a certain school district in the State of Iowa has adopted a program of Industrial Arts for ninth grade boys and a program of Home Economics for ninth grade girls. The policy of that board is that girls are not permitted to enroll in Industrial Arts and boys are not permitted to enroll in Home Economics. A mother of a girl in the school claims the board policy is unlawful discrimination and threatens litigation if the girl is not permitted to enroll in Industrial Arts.

Section 280.1 of the 1971 Code of Iowa grants the local school board the right to prescribe courses of study for the schools in the district. The school board also has the right to regulate the conduct of pupils where it relates directly to and affects the management of the school and its efficiency. *Board of Directors of Independent School District of Waterloo* v. *Green*, 259 Iowa 1260, 147 N.W.2d 854 (1967). But where those regulations are *arbitrary* and *unreasonable*, they will not be upheld by the courts. *Board* v. *Green, supra*, at 1267.

This principle is based upon the Fourteenth Amendment to the Constitution of the United States which requires that:

". . . No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The provisions and protections of the Fourteenth Amendment have been held by the United States Supreme Court to be applicable to students as well as other citizens. They have the same rights and enjoy the same privileges as adults under that amendment.

Most recently, in *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1966), the high court held at page 511:

"School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our consti-

tution. They are possessed of fundamental rights which the state must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the state chooses to communicate."

Although the *Tinker* case dealt with First Amendment rights, we must assume that the Court would find Fourteenth Amendment rights no less significant.

The reasoning behind the *Tinker* opinion and its holding that adult constitutional rights are applicable to juveniles, can be traced back to earlier Supreme Court opinions such as *West Virginia* v. *Barnette*, 319 U.S. 624, 637 (1943), where they stated that because the public schools are educating the young for citizenship,

"is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."

See also, *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960).

One year after *Tinker*, the Supreme Court specifically held the basic due process requirements of the Fourteenth Amendment applicable to juveniles. See *In re Gault*, 387 U.S. 1 (1967).

The *Tinker* ruling has also been applied in Federal Court in Iowa in *Sims* v. *Colfax Community School District*, 307 F.Supp. 485 (S.D. Iowa, 1970). There the court held that a school rule requiring both male and female students to keep their hair "one finger width above the eyebrows" unreasonably circumscribed the students' rights under the Fourteenth Amendment. The court also cited *Tinker*. Other Federal courts have held similarly. *Miller* v. *Gillis*, 315 F.Supp. 94 (N.D. Ill. 1969).

As noted in *Board* v. *Green*, *supra*, the interpretation given to the Fourteenth Amendment as it relates to school board regulations of this sort is that the regulation must be reasonable and not arbitrary. The most recent statement by the Supreme Court on this subject was in the sex discrimination case of *Reed* v. *Reed*, 92 S.Ct. 251 (1971). There the Court said:

"A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shal lbe treated alike." at 254.

Discrimination based upon sex will be tolerated by the courts only if it bears a *rational relation to a permissible purpose* of classification. *Seidenberg* v. *McSorleys' Old Ale House, Inc.*, 317 F.Supp. 593 (1970); *Clarke* v. *Redeker*, 259 F.Supp. 117, *aff'd* 406 F.2d 883, *cert. denied*, 396 U.S. 862, 24 L.Ed.2d 115 (1966); *In re B*, 326 N.Y.S.2d 702 (1971).

Regulations promulgated under the authority of a state (i.e. — by a local school board) have been held to violate the Equal Protection Clause of the Fourteenth Amendment where they fall within one or more of the following categories:

(1) The regulation is not necessary to the health, education, and welfare of the people of the state.

(2) The regulation does not bear a relationship to its object.

(3) The regulation creates an evil greater than the one it was promulgated to prevent; and

(4) The regulation is arbitrary in defining the class of people to which it applies.

It is the opinion of this office that the school board regulation in question could be violative of the Fourteenth Amendment under any one of these four categories. Although these would be questions of fact, it does not appear that prohibiting girls from enrolling in Industrial Arts is necessary to the health, education, and welfare of the people of the state. It is also evident that by keeping a girl out of Industrial Arts and a boy out of Home Economics, it is possible that a viable career choice would be thwarted, and thus a greater evil would be created than whatever was sought to be prevented.

The cases also point out that the object of the regulation is important. There could be several possible reasons for such a rule prohibiting ninth grade girls from enrolling in Industhial Arts, each of which would most likely be held invalid by the courts.

Administrative efficiency has been cited as a rationale for a rule such as this, but the recent Supreme Court ruling in *Reed* v. *Reed, supra,* struck this reasoning down as invalid:

"To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings . . ., is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; . . ."

Financial reasons have also been cited as a justification for such regulations, but these too have been invalidated:

"While the state . . . may legitimately attempt to limit its expenditures for public education, or any other purpose, it may not accomplish such a purpose by invidious discrimination between classes of its citizens." *Hargrave* v. *Kirk,* 313 F.Supp. 944, 948 (M.D. Fla., 1970).

Protection of women has also been defeated as a rationale for such a discriminatory rule. *Strain* v. *Philpott,* 331 F.Supp. 836 (1971); *Mengelkoch* v. *Industrial Welfare Commission,* 284 F.Supp. 956 (C.D. Cal., 1968).

The most broad and vague reasons for promulgating such a regulation have been those of "public policy." Presumably what is meant by this is the public policy of teaching young girls to be better housekeepers and teaching young boys skills to be used outside the home. However, such a regulation in reality results in discouraging young girls from developing possible job-related skills, in favor of the development of homemaking skills. It nowhere appears to be the policy of the State of Iowa to discourage any individual from developing his or her talents, whatever direction they may take.

Because the Iowa Court has recognized public school attendance as a right, not a privilege, *Board* v. *Green, supra,* at 1270, it is a part of this right to take those courses prescribed by the school board. If there were an equitable alternative open to those ninth grade girls who desired to

enroll in Industrial Arts, perhaps the regulation would not be unreasonable. But there does not appear to be such an alternative. The recent case of *Williams* v. *McNair*, 316 F.Supp. 134, *aff'd* 401 U.S. 951, 91 S.Ct. 976, 28 L.Ed. 235 (1970), is illustrative of this point. In that case, several male students desired entrance to an all-female school and were denied admission. The admission policy was upheld because the male students could enter another state school and get a substantially equal education. There was not shown to be great differences in courses offered. In the case you have presented, however, there is no such alternative open to female students. If they enroll in Home Economics, as opposd to Industrial Arts, they are not receiving equal training, under any circumstances.

Where there are special features attached to the desired course or school, such as training for industrial participation or cooking skills, then denial of enrollment constitutes a denial of Equal Protection. *Kirstein* v. *Rector and Visitors of the University of Virginia*, 309 F.Supp. 184 (1970); *Brewton* v. *Board of Education of St. Louis*, 233 S.W.2d 697 (Mo. 1950).

The second part of your question dealt with the relevancy of Chapter 105A of the 1971 Code of Iowa to this problem. In answer to this question, it can most simply be stated that although Chapter 105A of the 1971 Code of Iowa does not contain provisions which directly govern this case, the over-all purpose of that legislation is not inconsistent with the law as set out in this opinion. A reasonable interpretation of the Fourteenth Amendment to the Constitution of the United States indicates that the classification established by the school board in its regulation is arbitrary and unreasonable and consequently should not be maintained.

May 8, 1972

SCHOOLS: Incompatibility. Offices of county assessor and school board of a district which is partially within the same county are incompatible. (Nolan to Gunderson, Pocahontas County Attorney, 5/8/72) #72-5-6

Mr. Charles A. Gunderson, Pocahontas County Attorney: Reference is made to your letter of February 9, 1972, in which you requested an opinion of this office as follows:

"A member of the Board of Directors of Manson School District was appointed yesterday as Pocahontas County Assessor. He lives in Pocahontas County in the Manson Community School District although all of the school facilities are located in Calhoun County.

"I hereby request an Attorney General's opinion as to the legal compatibility of these two positions."

I am of the opinion that because such an individual represents two different taxing bodies whose interests may at times at least appear to be at odds, allowing one man to hold both positions simultaneously is improper. As stated in *State* v. *White*, 1965, 257 Iowa 606, 133 N.W.2d 903:

"The test of incompatibility is whether there is an inconsistency in the functions of the two, as where one 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'."

The present situation is one which, in my opinion, is "inherently inconsistent and repugnant."

In 1968 OAG 674, it is stated:

"Where school districts cross county lines, the representative from the board of directors of such school district must be the person elected from the election area which includes the territory of the county to be represented on the county conference board."

This would seem to indicate that the assessor would be present at the county conference board meeting in a dual-capacity. As such, this situation would be highly inconsistent and repugnant. For, while acting as assessor and clerk of the county conference board, this person at the same time could be on the examining board of the conference board making decisions regarding his office of assessor (I.C.A. 441.3). This same type of situation has been found to be repugnant and incompatible in the case of a person who, while serving as a member of the county board of education, was also a county deputy assessor. (1958 OAG 83)

Therefore, it is the opinion of this writer that a person who is both county assessor and a member of the board of directors of a school district which is partially within the same county is holding incompatible positions.

May 8, 1972

COUNTIES & COUNTY OFFICERS: Clerk of District Court — §§606.7, 639.27, 639.28, Code of Iowa, 1971. Clerk of District Court is required to index in Lien Book attachment levies entered in Encumbrance Book. Nolan to Irvin, Page County Attorney, 5/8/72) #72-5-7

Mr. J. C. Irvin, Page County Attorney: This letter is written in response to your request for an opinion on the following question:

"Section 606.7 of the Code of Iowa provides for the books to be kept by the Clerk of the District Court. Among those included are the Encumbrance Book and the Lien Book. The question presented is whether or not the Clerk is required to index in the Lien Book statements of attachment levies which have been entered in the Encumbrance Book by the Sheriff."

I am of the opinion that your question must be answered affirmatively. Section 606.7 provides:

"The records of said court shall consist of the original papers filed in all proceedings, and the books to be kept by the clerk thereof as follows:

* * *

"5. Encumbrance book. One to be called the 'encumbrance book,' in which the sheriff shall enter a statement of the levy of every attachment on real estate.

* * *

"7. Lien book. One in which an index of all liens in said court shall be kept."

Section 639.27:

"Real estate or equitable interests therein may be attached."

Section 639.28:

"The levy shall be a lien thereon from the time of an entry made and signed by the officer making the same upon the encumbrance book in the office of the clerk of the county in which the land is situated, showing the levy, the date thereof, name of the county from which the attachment issued, title of the action, and a description of the land levied on."

In an opinion issued by this office June 17, 1971, Nolan to McNeal, copy of which is enclosed herewith, reference is made to the form and type of information required to be included in the Index of Liens.

May 9, 1972

STATE OFFICERS AND DEPARTMENTS: Engineering Examiners — §§114.3, 114.14, Code of Iowa, 1971. It is proper to register professional engineers with a certificate of proficiency in a particular branch of engineering and to enforce a policy precluding practice in branches where not registered. (Nolan to Willis, Board of Engineering Examiners, 5/9/72) #72-5-8

Mr. Noel W. Willis, P.E., Chairman, Board of Engineering Examiners: This has reference to your request for the opinion of this office on several questions relating to a current practice of the Board of Engineering Examiners under which the branch designation is used to indicate the field of examination and limit the scope of practice of an individual registered as a professional engineer. The questions, as set forth in your letter, are as follows:

"1. May the Board of Engineering Examiners register Professional Engineers by branch?

"2. May the Board of Engineering Examiners enforce the administrative policy listed in Section III, 'Practice in More Than One Branch,' on pages 12 and 13 of the 1970 Annual Report?

"3. May the Board of Engineering Examiners continue to publish a roster with branch designations noted by the names of registrants?"

Code §114.14, Code of Iowa 1971, is pertinent to this inquiry, and provides as follows:

"Each applicant for registration as a professional engineer or land surveyor shall have all of the following requirements, respectively, to wit:

"1. As a professional engineer:

"a. Graduation from a course in engineering of four years or more in a school or college which, in the opinion of the board, will properly prepare the applicant for the examination in fundamental engineering subjects. In lieu of graduation from a school or college, eight years' practical experience which, in the opinion of the board, is of satisfactory character to properly prepare the applicant for the examination in fundamental engineering subjects.

"b. Successfully passing a written, oral, or written and oral examination in fundamental engineering subjects which is designed to show the knowledge of general engineering principles. A person passing the examination in fundamental engineering subjects will be entitled to a certificate as an engineer-in-training.

"c. In addition to any other requirement, a specific record of four years or more of practical experience in engineering work which is of a character satisfactory to the board.

"d. Successfully passing a written, oral, or written and oral examination designed to determine the proficiency and qualifications to engage in the practice of professional engineering. No applicant shall be entitled to take this examination until the applicant shows the necessary practical experience in engineering work."

The definition of the term "professional engineer" is set out in §114.2 of the Code. This definition contains no specific reference to the practice of any branch of the profession of engineering (cf. §1855, Codes of 1924, 1927, 1931, 1935, and 1939). However, §114.2 does refer to the acquisition of the principles of engineering "by professional education or practical experience."

In an opinion bearing the date June 16, 1960, this office advised that an engineer registered under Ch. 114, Code of Iowa 1958, with an area of proficiency in architectural engineering might hold himself out as an architectural engineer. 1960 OAG 213.

In *Horner v. State Board of Engineering Examiners*, Iowa 1961, 110 N.W.2d 371, 373, the Iowa Supreme Court stated:

"It is plain the legislature intended to give the board discretion in determining the qualification of applicants for registration."

Subsequently, in *Iowa State Board of Engineering Examiners v. Electronic Engineering Company*, 1967, 154 N.W.2d 737, the Iowa Supreme Court observing that the term engineer had lost much of its original professional significance and no longer connotes necessary professional competence or skill stated at 154 N.W.2d 740:

"Apparently the legislature recognized this in limiting the application of chapter 114 to *professional* engineers, which section 114.2 defines to exclude many of those who now use that term to describe their work or occupation. It must be conceded that 'engineer' and 'professional engineer' are not synonymous. The use of one does not necessarily imply the other."

We have noted that Code §114.3 provides that no two members of the board of engineers shall be from the same branch of the profession of engineering. Also in 1964 OAG 377 this office recognized that the members of the board might require specialized assistance in preparing and evaluating examination questions. In view of the above authorities and the long standing administrative practice of registering professional engineers with a certification of proficiency in a particular branch of engineering, it is my opinion that the three questions you presented should be answered affirmatively.

May 9, 1972

SCHOOLS: Shared time program — §257.26, Code of Iowa, 1971. A public school classroom may be used exclusively for shared time classes scheduled by the school board. (Nolan to Norpel, State Representative, 5/9/72) #72-5-9

The Honorable Richard J. Norpel, Sr., State Representative: This letter is written in response to your request for an opinion on the legality of a practice whereby one classroom of the Bellevue Community School is used full time for shared-time classes. You question the legal use of this classroom.

Further discussion of this matter reveals that more than 100 students are involved and that all take math classes at various times of the day so that the room is used continuously all day long.

Under the provisions of §257.26, Code of Iowa, 1971, a school board may approve the enrollment in public school of students who are also enrolled in a private school. These students may then take specified courses in the public school.

Accordingly, I am of the opinion that under the facts given the classroom may properly be occupied only by students enrolled under a shared-time propgram according to the schedule of courses prescribed by the local school board.

May 9, 1972

STATE OFFICERS AND DEPARTMENTS: Records — §147.8, Code of Iowa, 1971. Records kept pursuant to §147.8, Code of Iowa, may be maintained on microfilm. (Blumberg to Illes, Director, Iowa Board of Nursing, 5/9/72) #72-5-10

Mrs. Lynne M. Illes, Director, Iowa Board of Nursing: I am in receipt of your opinion request regarding microfilming of records. You specifically asked whether official records on microfilm meet the requirements of Section 147.8, 1971 Code of Iowa.

Section 147.8, provides:

"The name, age, nativity, location, number of years of practice of the person to whom a license is issued to practice a profession, the number of the certificate, and the date of registration thereof shall be entered in a book kept in the office of the department to be known as the registry book, and the same shall be open to public inspection."

This requirement first appeared in Iowa law in 1880. Acts 1880 (18 G.A.) Ch. 75, §4. It was codified for the first time in the Code of 1897, §2591. Section 2445, 1924 Code of Iowa contains the same language as Section 147.8.

When this statute was first conceived, microfilm had not been invented. Records were maintained in books such as the one referred to in Section 147.8. Recently, though, the use of microfilm has become widespread and is currently in use in other state departments. See, 64 O.A.G. 311. The use of microfilm is beneficial because it takes up les sspace; shortens the time required to search for information; is easier to store; and, lessens the problem of deterioration of records.

The obvious purpose of the statute and intent of the Legislature was to have a record of those in the medical professions which could be available for public inspection. This purpose can still be accomplished with microfilm. Accordingly, we are of the opinion that these records may be maintained on microfilm, and will meet the requirements of Section 147.8 if the necessary information is contained in them and if they are open to public inspection.

May 9, 1972

CITIES AND TOWNS: Low-Rent Housing — §§403A.21 and 403A.25, Code of Iowa, 1971. A municipality may not use land for a low-rent

housing project that is outside of the area approved by voters pursuant to §403A.25. (Blumberg to Davis, State Senator, 5/9/72) #72-5-11

Honorable Wilson L. Davis, State Senator: I am in receipt of your opinion request of May 4, 1972. Pursuant to Chpater 403A, 1971 Code of Iowa, the City of Fort Madison held an election on a low-rent housing proposal. The area in question on the ballot encompassed one hundred acres. The matter passed, and it was later decided that sixteen acres within the one hundred acre area would be used for a low-rent housing project. An option was placed upon the sixteen acre property. However, it has now been discovered that of these sixteen acres, nine lie outside of the original one hundred acre area. Your question is:

"The entire question revolves around the criteria for project location in Section 403A.25 of the Iowa Code, which states that the project on the ballot must be located with 'reasonable certainty'."

In reality, the question encompasses more than the mere definition of "reasonable certainty." The decisive question is whether or not these nine acres that lie outside of the original one hundred acres can be used for low-rent housing. Section 403A.25, 1971 Code of Iowa requires:

"No municipality nor any low-rent housing agency shall proceed with the acquisition of any property for any low-rent housing project unless authorized by a vote of at least fifty percent of the electors of such municipality . . . .

* * *

"The form of the question to be presented for a vote of the electors shall include the name of the proposed project, describe its location with *reasonable certainty* . . . ."
[Emphasis added.]

Section 403A.21 provides:

"For the purpose of aiding and cooperating in the planning, undertaking, construction or operation of housing projects *located within the area in which it is authorized to act,* any state public body may . . . ."
[Emphasis added.]

From reading these two sections, it is apparent that a municipality is not empowered to set up a low-rent housing project unless it holds an election, and that once the authorization is given, it only extends within that area approved by the voters. Conversely, the authorization does not extend outside of the approved area. Therefore, we are of the opinion that the nine acres outside the area approved by the voters cannot be used for your low-rent housing project.

In answer to your question on the definition of "reasonable certainty," it is our opinion that the requirements of Section 403A.25 may be met if a description, other than the exact legal description, is given. In other words, a description based upon locations of streets or city limits would be acceptable if they reasonably coincided with the legal description. This means that the exact legal description need not be given. However, this has no effect on whether land outside of the area approved by the voters may be used.

Accordingly, we are of the opinion that land situated outside of the area approved by the voters pursuant to Section 403A.25, may not be used for low-rent housing purposes.

May 12, 1972

STATE OFFICERS AND DEPARTMENTS: School Financing — Ch. 165, Acts of the 64th G.A., First Session; H.F. 1269, Acts of the 64th G.A., Second Session. "Total expenditures for the current year," in Sec. 6 of the Act, means the actual expenses as determined at the close of that school year, while "anticipated expenses for the budget year" means the proposed expenses. (Blumberg to Selden, State Comptroller, 5/12/72) #72-5-12

Marvin R. Selden, Jr., State Comptroller: We are in receipt of your opinion request of May 8, 1972. Your question concerns the new school finance law, Chapter 165, Acts of the 64th G.A., First Session, as amended by H.F. 1269 of the Second Session. With regard to Section six of the Act, you are requesting a definition of "District cost" as contained in H.F. 1269. Specifically, you asked:

"Within the school aid legislation, Chapter 165, Acts of the 64th G.A. First Session, as amended by H.F. 1269, the school year ending June 30, 1972, became the 'base' year for each school district. It is from this base year that all subsequent budgets and budget ceilings will be computed. Hence, it becomes obviously important to define the 'District Cost' for this particular school year ending June 30, 1972. We therefore ask the following question: Does the 'total expenditure for the current year' (i.e., school year ending June 30, 1972) mean (a) the actual expenditure for that year as determined after the close of that year, or (b) the anticipated expenditures (or budgeted expenditures) for that year as estimated (or anticipated) in their budget certified by July 15, 1971 (and any subsequent amendments)?"

Section six of Chapter 165, Acts of the 64th G.A., First Session states that " 'district cost' means the total expenditures or anticipated expenditures of a district which are payable from the school general fund . . . ." Section three of H.F. 1269 amended section six to read: "As used in this division, 'district cost' means the total expenditures for the current year or anticipated expenditures for the budget year of a district which are payable from the school general fund."

The intent of the legislature is important here. The primary rule in construction of a statute is to ascertain and give effect to the intention of the legislature. *In re Klug's Estate*, 1960, 251 Iowa 1128, 104 N.W.2d 600. The subject matter, effect, consequence, reason, spirit and language of a statute must be considered in arriving at the legislative intent. *Overbeck* v. *Dillaber*, 165 N.W.2d 795 (Iowa 1969). The intent is to be gleaned from the statute read as a whole and not from any one section or portion thereof taken piecemeal. *Durant-Wilton Motors, Inc.* v. *Tiffin Fire Association*, 164 N.W.2d 829 (Iowa 1969). In interpreting statutes and seeking the intention of the legislature, courts are obliged to avoid placing on statutory language a strained, impractical or absurd construction. *Cedar Memorial Park Cemetery Association* v. *Personnel Associates, Inc.* 178 N.W.2d 343 (Iowa 1970).

The Act is constructed in such a manner that there is a district cost in one year that aids in determining the district cost for the next year. An example of this is the district cost per pupil concept in Section 9(1)(a) of Chapter 165, Acts of the 64th G.A. There, the district cost per pupil in the year ending June thirtieth (i.e. the school year 1971-1972), plus the allowable growth equals the district cost per pupil in the school year beginning July first (i.e. 1972-1973). Section 9(1)(b), as amended by Section 4 of H.F. 1269, provides that the district cost per

pupil multiplied by the number of students in fall enrollment for a year determines the *maximum* district cost. The word "maximum" is underscored to distinguish it from actual district costs.

Reading Section 9(1)(b) with Section 6 of H.F. 1269, it is obvious that the Legislature intended there to be two district costs within the same year. The "anticipated expenditures for the budget year" is the maximum district cost. The "total expenses for the current year" is the actual district cost. This can either equal the anticipated, or maximum, district cost, or be less. The anticipated expenditures is the figure that is known before the end of the year, while the total expenditures is the figure known at the end of the year. In other words, at the beginning of the year, the anticipated expenditures, or budget, is only proposed. It is not until the end of the year that the actual district cost, or total expenditures, are known.

We are therefore of the opinion that the Legislature intended that the district cost can be two different figures in a year. At the beginning of the year, the district cost is only proposed, while at the end of the year, it is actually known. Thus, "total expenditures for the current year" means the actual expenses as determined at the close of that year, while "anticipated expenditures for the budget year" means the proposed expenditures.

May 15, 1972

SCHOOLS: Public Records — Ch. 68A, Code, 1971. Composite scores of Iowa Basic Skill Tests and Iowa Tests of Educational Development are not excluded from public record law. (Nolan to Kliebenstein, Grundy County Attorney, 5/15/72) #72-5-13

Mr. Don Kliebenstein, Grundy County Attorney: This is in resopnse to your letter of January 26, 1972, raising the question of whether a school administrator is authorized or required to release information of total school composite scores and individual class composite scores of the Iowa Basic Skills Tests and the Iowa Tests of Educational Development. Your letter states that the results of these tests have traditionally been considered as confidential items but that recently a citizen has requested copies of such information.

I am of the opinion that the total composite scores of a school or a class in such tests are public records which, pursuant to Ch. 68A, Code of Iowa, 1971, any citizen has a right to examine. The description of confidential records is clearly stated in §68A.7 and would exclude, as personal information, the scores of individual students. Composite scores are not so excluded.

May 15, 1972

COUNTY & COUNTY OFFICERS: Townships — Fire Districts — Ch. 359, Code, 1971. Where voters authorize tax levy for fire protection equipment and housing for the equipment pursuant to Ch. 359, Code, 1971, it is not necessary to hold second election to determine whether trustees may issue anticipatory tax revenue bonds authorized by §359.45. (Nolan to TeKippe, Chickasaw County Attorney, 5/15/72) #72-5-14

Mr. Richard P. TeKippe, Chickasaw County Attorney: This letter is

written in answer to your request for an opinion on two legal questions submitted as follows:

"Chickasaw Township and the communities of Basset and Ionia have formed a fire protection district known as the Chickasaw Township Fire District, and, in pursuance of Sections 359.42 and 359.43, have held an election to determine whether or not they could levy the annual tax of one and one half mill called for therein; at that election the affirmative vote was at least sixty per cent for that proposal and the tax is being levied and collected currently.

"The said Fire District now wishes to construct a building in which to store and maintain their fire equipment. They desire to issue bonds payable in not more than ten equal installments as called for in Section 359.45. That section, however, states that Sections 23.12 to 23.16 inclusive shall apply to such bonds. Section 23.12 states that before any such bonds may be issued 'excepting such bonds or other evidence of indebtedness as have been authorized by a vote of the people of such municipality, and except such bonds or obligations as it may by law be compelled to issue' a meeting must be held and published notice given."

"The first question is, 'Is the original election authorizing the levy of the one and one-half mill to allow the fire district to 'purchase, own, rent, or maintain fire apparatus or equipment and *provide housing for the same*' as set out in Section 359.42, sufficient in and of itself to authorize issuance of the bonds contemplated here, or is it necessary to submit the building issue to the voters again?'

"The second question is, 'Although Chapter 359 does not specifically include Section 23.18, whereas it does specifically include Section 23.12-23.16, is said Section 23.18 applicable to the construction herein, which would cost in excess of $5,000.00?' "

I am of the opinion that the original election authorizing the tax levy pursuant to the provisions of Ch. 359, Code of Iowa, 1971, is sufficient in and of itself to authorize the issuance of bonds and it is not necessary to submit the building issue again to the voters. Section 359.45 provides:

"Townships may anticipate the collection of taxes authorized by sections 359.43 and 359.44, and for such purposes may issue bonds payable in not more than ten equal annual installments and at a rate of interest not exceeding seven percent per annum and payable at such place and be in such form as the board of trustees shall designate by resolution. Sections 23.12 to 23.16, inclusive, and chapter 408, so far as applicable, shall apply to such bonds."

In 1968 OAG at page 464 there is an opinion issued by this office that states that a township has the indispensably essential statutory authority to provide adequate housing for township fire equipment. Further, in 1958 OAG at page 315 and in 1968 OAG 641 at page 643, the Attorney General has advised that the township trustees may anticipate tax revenues by the issuance of bonds or by the use of stamped warrants. Accordingly, I am of the opinion that the township trustees may, under the authority provided by §359.45, issue anticipatory bonds without submitting the question of the necessity to provide a building to the voters. If such authority is exercised, it will be necessary to strictly follow the statutory requirements for notice and hearing provided by §§23.12 through 23.16 of the Code.

In answer to your second question, it is my opinion that the provisions of §23.18 requiring public notice and advertisement for bid for the construction of the building are applicable under the facts you present.

May 15, 1972

ELECTIONS: School elections, conduct thereof — Sec. 2, House File 1147, Acts, 64th G.A., Second Session (1972), §277.33, Code of Iowa, 1971. A school election should continue, as in the past, to be conducted by school officials. (Haesemeyer to Synhorst, Secretary of State, 5/15/72) #72-5-15

The Honorable Melvin D. Synhorst, Secretary of State: You have requested an opinion of the attorney general with respect to certain questions submitted to you by an attorney representing the North Fayette County Community School District. The request for the opinion states:

"Your advice and opinion is requested regarding the applicability of House File 1147 to elections held by school districts. In Section 2 of said House File, sentence 2, the County Commissioner of election is directed to ' . . . conduct all elections within the county.' Further in sentence 3 of said Section 2 of House File 1147, 'All election . . . duties prior to the effective date of this Act imposed upon other public officials within the county are transferred to the County Commissioner of elections.' These phrases pose definite problems to the North Fayette County Community School District which is in the midst of a school board election. We are attorneys for this School District.

"By election held September 13, 1971, the electors of the North Fayette County Community School District, pursuant to Section 275.35, Code of Iowa 1971, voted to increase the number of directors from five (5) to seven (7). Subsequently, on March 13, 1972, a special election was called by the board of directors of the school district with the election to be held on May 17, 1972. Notice calling the election was then published on March 16, 1972. Said special election was called pursuant to Section 275.37, Code of Iowa, 1971, wherein it provides that the special election must be held ' . . . on or before the tenth day of June next following . . .'. In the calling of the election the board of directors provided that nomination papers were to be filed with the secretary of the School Board between April 3, 1972, and April 27, 1972.

"It is self evident that certain problems exist in connection with conducting said special election. The election was called prior to the passage of House File 1147. The election, and indeed the nomination filing period, is on the other hand after the effective date of said legislation. Because of the timing involved, it is necessary that an opinion be rendered as soon as possible as to the applicability of House File 1147 to school elections. More explicitly your advice and opinion is requested on the following questions.

"1. Are school elections, either special or regular, to be conducted by the newly created County Commissioner of elections?

"2. If the answer to #1 is yes, then does the County Commissioner of elections conduct a school election which was called prior to the effective date of House File 1147 which is to be held subsequently to the effective date of said legislation?

"3. If the answer to question #2 is no, then does the Secretary of the school board conduct the school election as in the past, prior to the passage of House File 1147?

"4. If the answer to question #2 is yes, then does the County Commissioner of elections have to issue another call of the election with another election date?"

Section 2 of House File 1147, Acts, 64th G.A., Second Session (1972) provides:

"Sec. 2. County Commissioner of Elections. The county auditor of

each county is designated as the county commissioner of elections in each county. The county commissioner of elections shall conduct voter registration pursuant to chapter forty-eight (48) of the Code and conduct all elections within the county. All election and registration duties prior to the effective date of this Act imposed upon other public officials within the county are transferred to the county commissioner of elections. All of the present records of registration, precinct books, and all other documents and papers pertaining to the registration of electors or those electors who are currently registered that are upon the effective date of this Act, in the care, custody, and control of a city subject to the provisions of chapter forty-eight (48) of the Code shall be under the jurisdiction of the county commissioner of registration who shall designate the location of such records. Such records that establish that an elector is currently registered and all precinct pollbooks shall be valid, and may be used by the county commissioner of registration in all subsequent elections as provided in this Act. An elector who is validly registered to vote upon the effective date of this Act, shall remain so registered and shall be entitled to vote in all subsequent elections as provided in this Act.

"If a political subdivision is located in more than one county, the county commissioner of elections of the county having the greatest taxable base within the political subdivision shall conduct the election. The county commissioners of elections of the other counties in which the political subdivision is located shall cooperate with the county commissioner of elections who is conducting the election."

As the request for the opinion points out the election was called pursuant to said chapter 275, Code of Iowa, 1971. The method and procedure for conducting school elections is spelled out in chapter 277. Section 277.33 provides:

"277.33 Application of general election laws. So far as applicable all laws relating to the conduct of general elections and voting thereat and the violation of such laws shall, *except as otherwise in this chapter provided,* apply to and govern all school elections." (Emphasis added)

As far as we can determine such §277.33 has not been amended or repealed. While it is true that House File 1147 was enacted after chapter 277 it is equally true that said chapter 277 is a special statute dealing with school elections, whereas §2 of House File 1147 is a statute dealing with elections in general. In view of this and also considering the practical problems involved in the case you described where the machinery for the election was set in motion before the enactment of House File 1147 it would be our opinion that your election should be conducted by the school officials rather than the county commissioner of elections.

May 16, 1972

ELECTIONS: Permanent Registration — §§47.2, 48.1 and 48.22, Code of Iowa, 1971. The city council of a city having a population of 2,000 or more or the supervisors of a county having a population less than 50,000 in which registration is not required may adopt a plan of permanent registration of voters. Where a city adopts such a plan the county auditor is the commissioner of registration but the city clerk may be designated an assistant or deputy commissioner and his office a branch registration place. (Haesemeyer to Synhorst, Secretary of State, 5/16/72) #72-5-16

The Honorable Melvin D. Synhorst, Secretary of State: You have requested an opinion of the attorney general with respect to the following questions which have been raised by the city attorney of Charles City:

"We are requesting information as how to proceed with the adoption of House File 1147.

"We have had registration for many years in Charles City but do not now have a population of 10,000 and do not meet the requirements of this statute.

"Should we abandon our registration practices or should we preserve it even though we are under the statutory minimum?"

Prior to the enactment of Chapter 98, 64th General Assembly, First Session (1971), Chapter 47 of the Code permitted cities having a population greater than 4,000 but not more than 10,000 to require registration of voters by ordinance. Sec. 11 of such Chapter 98 repealed Chapter 47 of the Code in its entirety but at the same time §10 of Chapter 98 amended §48.22 of the Code to read as follows:

"48.22 Permissive adoption. The city council of any city having a population of two thousand or more or the board of supervisors of any other county having a population under fifty thousand in which registration of voters is not required, may, by ordinance or resolution, adopt the plan for registration provided in this chapter. Also, any county may, by resolution by the board of supervisors, require registration of voters in any township having a population of fifteen hundred or more. When the city council of any such city or the board of supervisors of any such county adopts an ordinance or resolution establishing such plan, all the provisions of this chapter shall apply to such city or county."

The Second Session of the 64th General Assembly in 1972 enacted House File 1147 which, among other things, makes substantial changes in Chapter 48 but it did not repeal or amend §48.22 of the Code. The result is that cities having a population of 2,000 or more may by ordinance or resolution adopt permanent registration of voters. Accordingly, it would be our opinion that Charles City and other cities in a similar situation could continue their permanent registration practices.

A question does arise as to who should administer the permanent registration program. Formerly, of course, this was a function of the city clerk.

Sec. 47.2, as amended, provides in part:

"County Commissioner of Elections. The county auditor of each county is designated as the county commissioner of elections in each county. The county commissioner of elections shall conduct voter registration pursuant to chapter forty-eight (48) of the Code and conduct all elections within the county."

Sec. 48.1, as amended, provides:

"48.1 Commissioner of Registration. The office of commissioner of registration is hereby created in all cities having a population of more than ten thousand and in counties having a population of more than fifty thousand. The county auditor is hereby constituted the commissioner of registration. A branch office of registration may be located in the office of city clerk. The commissioner of registration shall register electors of a city having a population of more than ten thousand and of a county having a population of more than fifty thousand."

Reading §§47.2, 48.1 and 48.22 together and in the context of the remainder of the chapters it is our opinion that the Floyd County Auditor is the commissioner of registration for Charles City and that a branch registration office may be located in the city clerk's office with the city clerk being designated as an assistant or deputy commissioner of registration.

May 18, 1972

MOTOR VEHICLES: Trailer Hitches — Ch. 174, Acts, 64th G.A., 1st Session. Trailers and semi-trailers, as well as trailer coaches and travel trailers for human habitation; all must be equipped with weight equalizing hitch with sway control device if they are of a gross weight of three thousand pounds or more. (Schroeder to Bidler, Deputy Commissioner, Dept. of Public Safety, 5/18/72) #72-5-17

Mr. Carroll L. Bidler, Deputy Commissioner, Department of Public Safety: This letter is in response to your request for an opinion concerning H.F. 386, 64th G.A., 1st Session, which also can be cited as Chapter 174, Acts 64th G.A., 1st Session. This Act concerns itself with travel trailers.

The question that you pose is quoted as follows:

"Should the weight equalizing hitch with a sway control device of a type approved by the Commissioner of Public Safety be required on every trailer or semi-trailer of a gross weight of 3,000 pounds or more and every trailer coach or travel trailer of a gross weight of 3,000 pounds or more intended for human habitation, or should the requirement of the weight equalization hitch with a sway control be applied only to a travel trailer of a gross weight of 3,000 pounds or more?"

Section 6 of H.F. 386, 64th G.A., 1st Session, amends Section 321.430(3), Code of Iowa, 1971. As amended this Section will now read in part as follows:

"3. Every trailer or semi-trailer of a gross weight of three thousand pounds or more, and every trailer coach or travel trailer of a gross weight of three thousand pounds or more intended for use for human habitation, shall be equipped with . . . weight equalizing hitch with a sway control of a type approved by the Commissioner of Public Safety . . . ."

We are of the opinion that the weight equalizing hitch with a sway control should be applied to trailers and semi-trailers with a gross weight of three thousand pounds or more and every travel coach or travel trailer with a gross weight of three thousands pounds or more intended for use for human habitation.

The language of the statute is clear and the equalizing hitch must be applied to all these types of vehicles of a gross weight of three thousand pounds or more. The word *and* after the first comma of §321.430(3) as amended by Section 6 of H.F. 386 64th G.A. 1st Session, links the first phrase dealing with trailers and semi-trailers to the second phrase dealing with trailer coaches and travel trailers.

May 18, 1972

STATE OFFICERS AND DEPARTMENTS: Department of Health, Requirements for licensure of cosmetologists — §157.1, 1971 Code of Iowa. A person who performs manicuring professionally must be a licensed cosmetologist. (Corcoran to West, Executive Secretary, Cosmetology Division, Department of Health, 5/18/72) #72-5-18

Mrs. Grace M. West, Executive Secretary, Cosmetology Division, Department of Health: We are in receipt of your letter of April 28, 1972, in which you request the opinion of this office as to whether a person who performs manicuring must be a licensed cosmetologist.

This question was previously dealt with in an Attorney General's

opinion. See 1940 OAG 439. The opinion deals with Section 2585-B1 of the 1939 Code of Iowa, which is identical to Section 157.1 of the 1971 Code of Iowa. In that opinion it was found that a manicurist was required to have a cosmetology license, by reason of the fact that the legislature had made specific reference to manicurists as being included in the definition of those engaged in the practice of cosmetology. Since the law which was interpreted by the above opinion has not changed, it is our opinion that its holding is correct and, therefore, concur in its conclusion. Attached to this letter is a copy of said opinion for your review.

May 23, 1972

CONSERVATION: Federal Uniform Relocation Assistance and Real Property Acqusition Policies Act of 1970, Public Law 91-646 — §§107.29, 107.30, 107.31 and 107.32, Code of Iowa, 1971; Ch. 173, Acts of the 64th G.A., First Session. State Conservation Commission has authority to receive and distribute federal funds for outdoor recreational programs in accord with Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, P.L. 91-646. (Peterson to Priewert, Director, Iowa Conservation Commission, 5/23/72) #72-5-19

Mr. Fred A. Priewert, Director, Iowa Conservation Commission: Reference is made to your request for an opinion of the Attorney General as follows:

"Chapter 173, Acts of the 64th G.A., First Session (HF 182) appears to give all necessary authority to the State to comply with the Act [Uniform Relocation Assistance and Land Acquisition Policies Act of 1970 (P.L. 91-646)] except that Section 301 of the Act is apparently not specifically covered. We, therefore, request from your office an opinion on the following points:

"1. Is the State of Iowa, and specifically the Conservation Commission, authorized to make relocation payments to owners, tenants, farm operations, or businesses because of displacement resulting from acquisition of land for public outdoor recreation purposes?

"2. Is the State of Iowa, and specifically the Conservation Commission, authorized to accept payments from the Land and Water Conservation Fund for disbursement for relocation costs?

"3. Is the State of Iowa, and specifically the Conservation Commission, authorized to conform to the provisions of Section 301 of the Uniform Relocation Assistance and Land Acquisition Policies Act of 1970 (P.L. 91-646)?

"4. Are there any constraints in any authority granted to the State of Iowa which would not be in accord with the Act and related issues?"

Relevant to your inquiry are pertinent portions of sections of the Code of Iowa, 1971, as follows:

"§107.29 The state conservation commission is hereby authorized and empowered to perform such acts as may be necessary to the conduct and establishment of cooperative outdoor recreational and watershed projects as may be defined by the Congress of the United States and by rules and regulations of the appropriate federal agency and may accept federal

funds and assistance for the purpose of planning, acquisition and development of outdoor recreational and watershed projects.

"§107.30 The legislature finds that the state of Iowa and its subdivisions should enjoy the benefits of federal assistance programs for the planning and development of the outdoor recreation resources of the state, including the acquisition of lands and waters and interests therein. It is the purpose of this section and sections 107.31 through 107.34 to provide authority to enable the state of Iowa and its subdivisions to participate in the benefits of such programs.

"§107.31 The state conservation commission is authorized to prepare, maintain, and keep up-to-date a comprehensive plan for the development of the outdoor recreation resources of the state; and to acquire lands, waters, and interests in lands and waters for such areas and facilities.

"§107.32 The state conservation commission may apply to any appropriate agency or officer of the United States for participation in or the receipt of aid from any federal program respecting outdoor recreation. It may enter into contracts and agreements with the U.S. or any appropriate agency thereof and . . ."

In addition, Chapter 173, Acts of the 64th General Assembly, First Session, which specifically authorizes such relocation payments and programs in connection with highway projects, includes similar authority to other state agencies and political subdivisions in §11 thereof as follows:

"Sec. 11 Whenever real property is acquired by a state agency or a political subdivision of the state incident to a federal project or program, the state agency or political subdivision is hereby authorized and shall make all payments and provide all services required by this Act of the commission in order to secure the federal funds available for such project or program."

We are of the opinion that the State Conservation Commission, under the general and specific authority cited above, is authorized and empowered to accept federal funds and to perform such acts as may be necessary to secure the benefits of federal assistance programs respecting outdoor recreation programs. Specifically, your Questions 1, 2, and 3 are answered in the affirmative. With respect to Question 4, we are aware of no provisions of Iowa law that would prevent compliance with the requirements of P.L. 91-646 in order to be eligible for federal financial assistance.

May 23, 1972

STATE OFFICERS AND DEPARTMENTS: Travel expenses of employees, Commission for the Blind — §79.9, Code of Iowa, 1971. Where a counselor for the Commission for the Blind is stationed in a particular city by the Commission it may pay his expenses in travelling to other locations. (Haesemeyer to Jernigan, Director, Commission for the Blind, 5/23/72) #72-5-20

Mr. Kenneth Jernigan, Director, Iowa Commision for the Blind: We are in receipt of your letter of May 16, 1972, in which you state:

"This letter is written pursuant to our recent telephone conversation concerning travel expenses for employees. The Commission for the Blind currently has a counselor located in Iowa City. We do not have an office in Iowa City and do not wish to establish one there at this time because of the expense involved. The closest Commission office containing secretarial personnel is Cedar Rapids. Accordingly, our Iowa City coun-

selor goes to the Cedar Rapids office from time to time to do dictation and for other purposes.

"We have not been paying his expenses from Iowa City to Cedar Rapids. From our telephone conversation I assume that we may legally do so if we wish since the counselor's location is Iowa City and his home serves as his office.

"The problem is given emphasis by the fact that we are realigning counselor territories and may require this particular counselor to move to Davenport. Again, we do not currently plan to rent space in Davenport and place additional secretarial and field personnel there. Rather, we will probably ask the counselor to use his home as his office, thus saving money for our agency.

"Under the circumstances may we pay travel expenses for the counselor when he goes to the Cedar Rapids office from time to time to do dictation or on other Commission business?"

The counselor is stationed in Iowa City at the request and for the convenience of the Commission for the Blind and may in the future be required to move to Davenport in which event that city would be his new duty station. Under these circumstances it is our opinion that you may properly pay the travel expenses of this counselor to go from Iowa City to Cedar Rapids or any other location for business purposes and the same would be true when he moves to Davenport. §79.9, Code of Iowa, 1971. 1916 OAG 16.

May 23, 1972

ELECTIONS: Reprecincting — §§49.4 and 49.7, Code of Iowa, 1971, as amended by Chs. 98, 99 and 100, 64th G.A., First Session (1971). The Black Hawk County board of supervisors can combine that portion of legislative district 35 in Cedar Falls Township which you describe with a precinct in East Waterloo Township. (Haesemeyer to Braun, Assistant Black Hawk County Attorney, 5/23/72) #72-5-21

Mr. Robert W. Braun, Assistant Black Hawk County Attorney: Reference is made to your letter of May 16, 1972, in which you state:

"In accordance with our telephone conference of May 15, 1972, I submit to you the following factual situation for your consideration on the establishment of election precincts in Black Hawk County.

"Legislative District No. 35 cuts into Cedar Falls Township in a very small geographical area and includes a population of less than ten (10) people. In accordance with the provisions of Section 49.4 as amended, the Board of Supervisors has the power to combine 'contiguous townships into *one* election precinct.'

"The Board by an Order passed May 8, 1972, established that portion of Legislative District 35 in Cedar Falls Township as a separate precinct. This will cause considerable difficulty in the Auditor's office in finding election judges and polling places. The cost will also be quite high in order to serve such a small population.

"The question submitted therefore is whether the Board of Supervisors could combine that portion of Legislative District 35 in Cedar Falls Township with a precinct of East Waterloo Township in the same legislative district which is contiguous without combining the entire townships. This would, of course, be the most practical solution, but Section 49.4 and Section 49.7 as amended clearly allow for combination of *townships* into *one* election precinct. There does not seem to be a provision for combining townships into more than one precinct, and it does not seem to allow taking just one precinct out of a township and combining it with a precinct in another township."

Section 49.4, Code of Iowa, 1971, as amended by §21, Ch. 98, and §1, Ch. 99, 64th G.A., First Session (1971) provides in part:

"The board of supervisors may divide a township, or part thereof, into two or more precincts, or change or abolish such division. The board of supervisors may also combine two or more contiguous townships into one election precinct, subject to the provisions of this section. An order establishing precincts shall define their boundaries."

As you point out this authorizes the supervisors to combine contiguous townships only into *one* election precinct. Section 49.7, as amended by §1, Ch. 100, 64th G.A., First Session (1971) provides:

"49.7 Portions of townships combined. No precinct shall contain different townships or parts thereof, except where the board of supervisors has combined two or more contiguous townships into one election precinct or where, by reason of the existence of a village or incorporated town on or near a township line, the board of supervisors may create a voting precinct in compact form, from said town or village, and may include therein territory adjoining and adjacent to said village or town, which is situated in two or more townships."

While it does not appear that either of these sections furnishes statutory authorization for the precise procedure which you describe it is our opinion that the practical necessities of the situation require that the Black Hawk County board of supervisors be permitted to combine the two precincts. As various counties and cities have undertaken the reprecincting required by House File 1147, Acts, 64th G.A., Second Session (1972) and the Iowa Supreme Court's recent redistricting decision numerous practical problems have arisen which simply are insoluble unless a certain amount of flexibility is given to the statutory requirements.

Accordingly, it is our opinion that the Black Hawk County board of supervisors can combine that portion of legislative district 35 in Cedar Falls Township which you describe with a precinct in East Waterloo Township.

May 26, 1972

HIGHWAYS: Road use tax fund, correction of errors — §§312.2 and 421.6, Code of Iowa, 1971. Where refunds which should have been made from the road use tax fund are, in error, made from the general fund, a transfer may be made from the road use tax fund back to the general fund to correct the error. (Haesemeyer to Baringer, Treasurer of State, 5/26/72 #72-5-22

The Honorable Maurice E. Baringer, Treasurer of State: Reference is made to your letter of May 25, 1972, in which you state:

"We have received a request for transfer from the Road Use Tax fund to the Department of Revenue General Fund Refund Account in the amount of $124,612.31.

"We also received a copy of a certification signed by the Director of Revenue addressed to Mr. Jerry Gamble, Assistant State Accountant, which I am enclosing for your information.

"Chapter 312.2, Code of Iowa, 1971, read in part as follows:

'The treasurer of the state shall, on the first day of each month, credit all road use tax funds which have come into his hands, to the primary road fund, the secondary road fund of the counties, the farm-to-

market road fund, and the street construction fund of cities and incorporated towns, respectively, in the following manner and amounts:'

"Please be referred to Chapter 421.6, Code of Iowa, 1971, which reads in part as follows:

" 'All such moneys collected shall be deposited at such times and in such depositories to permit the state of Iowa to deposit the funds in a manner consistent with the state's investment policies. All such moneys shall be promptly deposited, as directed, even though the individual amount remitted may not be correct. If any individual amount remitted is in excess of the amount required, the department or agency receiving the same shall refund the excess amount thereof.'

"Does the reference in 312.2 which reads 'The treasurer of the state shall, on the first day of each month, credit all road use tax funds which come into his hands' mean that in the event that money erroneously deposited in the road use tax fund and certified as such by the Director of Revenue would not in fact be road use tax funds and should be transferred out of the road use tax fund to the general fund refund account so that the refunds could be made to the counties or agencies that had erroneously remitted these moneys."

In our opinion, the funds in question should be transferred out of the road use tax fund to the general fund refund account. It is clear from your letter and the attachment thereto that the amounts in question, which were erroneously paid out of the general fund refund account, should have been paid from the road use tax fund. The Code sections to which you make reference, §§312.2 and 421.6, Code of Iowa, 1971, furnish ample authority for this to be done. The law is not so inflexible as to preclude the mere correction of errors or require that moneys mistakenly deposited in the road use tax fund are forever lost to the general fund.

May 31, 1972

LIQUOR, BEER & CIGARETTES: Minimum age for State liquor store employees, Chapter 131, §3, subsection 33 of Acts of the 64th G.A., First Session, as amended by House File 1011 of the 64th G.A., Second Session. To conform with the change of "legal age" from 21 to 19 years of age, the Iowa Beer & Liquor Dept. may employ person 19 years of age or more in their State liquor stores as of July 1, 1972. (Jacobson to Gallagher, Director, Iowa Beer & Liquor Control Dept., 5/31/72) #72-5-23

Mr. R. A. Gallagher, Director, Iowa Beer & Liquor Control Department: This will acknowledge receipt of your letter of May 17, 1972, in which you requested an opinion of the Attorney General as follows:

"Section 3, paragraph 33, Chapter 131, defines 'legal age' means 21 years of age or more. It has always been our policy not to hire employees in our state retail liquor stores who were less than 21 years of age.

". . . would your opinion be that the legal age in Iowa is now considered to be 19 years of age and that we may now hire, after July 1, employees 19 years of age or over in our state liquor stores?"

House File 1011, An Act Relating to the Attainment of the Age of Majority, which will become effective July 1, 1972, as per Article 3, §26 of the Iowa Constitution, states in part:

"Sec. 54. Chapter one hundred thirty-one (131), section three (3), subsection thirty-three (33), Acts of the Sixty-fourth General Assembly, First Session, is amended to read as follows:

"33. 'Legal age' means nineteen years of age or more."

In light of this amendment after July 1, 1972, it would be proper for your policy to reflect the change of "legal age" from 21 to 19 years of age in your employment practices.

May 31, 1972

STATE OFFICERS & DEPARTMENTS: Members of the general assembly, contracts with highway commission, §§314.2, 68B.2, 68B.3 and 68B.8, Code of Iowa, 1971. The legislature in enacting Chapter 68B did not impliedly repeal §314.2, insofar as §314.2 might apply to state legislators and contracts entered into between the highway commission and legislators may be invalidated by the commission. (Haesemeyer to Welden, State Representative, 5/31/72) #72-5-24

The Honorable Richard W. Welden, State Representative: You have requested an opinion of the Attorney General with respect to the following:

"A member of the General Assembly of the State of Iowa owns a portion but not a majority of the outstanding stock in a construction company incorporated under the laws of the State of Iowa and doing business within the State of Iowa. He is also one of the officers of the Corporation. Since the election to the General Assembly, the Corporation has, in response to invitations for bid issued by the Iowa State Highway Commission, submitted the low bid for certain Highway Commission work and has been awarded the contract. In all instances the work has been open for public bid, the Corporation has been the low bidder, and none of the contracts have been of a negotiated origin.

"STATUTES THOUGHT APPLICABLE:

Section 314.2, Code of Iowa, 1971

Chapter 68B, Code of Iowa, 1971

"PREVIOUS ATTORNEY GENERAL'S OPINIONS TOUCHING ON THE QUESTION

Opinion of Attorney General (Thomas), March 5, 1970

Opinion of Attorney General, June 16, 1955

"QUESTIONS:

"1. Did the Legislature in adopting Chapter 68B after Section 314.2 had been adopted preempt the area of conflicts of interest and thereby impliedly repeal Section 314.2 of the Code insofar as Section 314.2 may apply to state legislators?

"2. If the answer to Question 1 is no, is the definition of 'official' as contained in Section 68B.2(5) (meaning non-legislators) applicable to the term 'official' as the same is used in Section 314.2, so as to remove Members of the General Assembly from the prescription [sic] of Section 314.2?"

Chapter 68B, Code of Iowa, 1971, known as the Iowa Public Official's Act, was enacted in 1967 by the 62nd General Assembly. Chapter 107, 62nd G.A. (1967). Section 68B.2 provides in relevant part:

"When used in this chapter, unless the context otherwise requires:

* * *

"6. 'Official' means any officer of the state of Iowa receiving a salary or per diem whether elected or appointed or whether serving full time or part time. Official shall include but not be limited to all supervisory

personnel and members of state agencies and shall not include members of the general assembly or legislative employees.

* * *

"Whenever the terms 'legislative employee', 'member of the general assembly', 'employee', or 'official' are used in this chapter, the term shall be interpreted to include any firm or association of which any of the above is a member or partner and any corporation of which any of the above holds ten percent or more of the stock either directly or indirectly. The use of the above terms shall also include wives and unemancipated minor children."

Section 68B.3 and 68B.8 provide respectively:

§68B.3:

"When public bids required. No official, employee, member of the general assembly, or legislative employee shall sell any goods having a value in excess of five hundred dollars to any state agency unless pursuant to an award or contract let after public notice and competitive bidding. This section shall not apply to the publication of resolutions, advertisements, or other legal propositions or notices in newspapers designated pursuant to law for such purpose and for which the rates are fixed pursuant to law."

§68B.8:

"Additional penalty. In addition to any penalty contained in any other provision of law, any person who knowingly and intentionally violates the provisions of section 68B.3 through 68B.6 and this section shall be guilty of a misdemeanor and may be suspended from his position."

Section 314.2 is part of a chapter devoted to general administrative provisions for highways. It was enacted in its present form in 1949. Chapter 125, §3, 53rd G.A. (1949). Section 314.2 provides:

"Interest in contract prohibited. No state or county official or employee, elective or appointive shall be directly or indirectly interested in any contract for the construction, reconstruction, improvement or maintenance of any highway, bridge or culvert, or the furnishing of materials therefor. The letting of a contract in violation of the foregoing provisions shall invalidate the contract and such violation shall be a complete defense to any action to recover any consideration due or earned under the contract at the time of its termination."

By your first question you ask whether the legislature in enacting Chapter 68B impliedly repealed §314.2, insofar as §314.2 might apply to state legislators. In our opinion, it did not. The doctrine is well settled that repeals of statutes by implication are not favored by the courts and will not be upheld unless the intent to repeal clearly and unmistakably appears from the language used and such holding is absolutely necessary to avoid irreconcilable conflict between two statutes. *Radosedich v. City of Ottumwa*, Iowa 1970, 173 N.W.2d 522; *Kruse v. Gaines*, 1966, 258 Iowa 983, 139 N.W.2d 935; *Taschner v. Iowa Electric Power and Light Company*, 1957, 249 Iowa 673, 86 N.W.2d 915.

It is true that Chapter 68B is the later enacted of the two provisions. However, it is also clear that Chapter 68B is a general statute directed primarily at the conduct of public officials in their dealings with all state agencies. Section 314.2, on the other hand, is a special statute devoted to a much narrower subject, namely the interest of the state or county officials or employees in contracts for the construction, reconstruction, improvement or maintenance of highways, etc. Where a general statute,

if standing alone, would include the same matter as a special statute and thus conflict with it, the special act will be considered an exception or qualification of the general statutes and will prevail over it, whether passed before or after the general statute. *Liberty Consolidated School District v. Schindler,* 1955, 246 Iowa 1060, 70 N.W.2d 544. It should be noted, too, that under §68B.8 a violation of the chapter carries with it criminal penalties in addition to any penalty contained in any other provision of law. A violation of §314.2, on the other hand, results in only a relatively mild civil sanction being imposed; i.e. invalidation of the contract.

Accordingly, it is our view that Chapter 68B did not impliedly repeal §314.2 and that the sections may co-exist in harmony.

Turning to your second question, the definition of official contained in §68B.2(5) is by the express terms of §68B.2 made applicable only to Chapter 68B. Since Chapter 314 contains no definition of state official, we must look elsewhere for a meaning of the term. While we have been unable to find any Iowa cases on the subject, it is clear from other jurisdictions that the expression "state official" comprehends members of the legislative body. *Lucas v. McAfee,* 217 Ind. 534, 29 N.E.2d 403, 404. In addition to the foregoing, there are numerous cases holding that a member of a state legislature is a "state officer." 40 Words & Phrases, State Officer, page 91, et. seq.

Accordingly, I must conclude that §314.2 applies to members of the General Assembly as well as other state or county officials or employees elective or appointive.

May 31, 1972

ELECTIONS: Form of ballot, party circle — §49.42, Code of Iowa, 1971, as amended by §20, House File 1147, Acts, 64th G.A., Second Session (1972). The enactment of House File 1147 did not operate to do away with straight ticket voting. The vallot should contain a party circle for this purpose, brackets and a single square for the offices of president and vice president, and squares for voting for the other candidates. (Haesemeyer to Synhorst, Secretary of State, 5/31/72) #72-5-25

The Honorable Melvin D. Synhorst, Secretary of State: You have requested an opinion of the Attorney General with respect to the following:

"Section 20, House File 1147, Acts, Second Session, 64th General Assembly, sets forth the form of the official ballot. It is noted that this form does not provide for the circle at the top to vote a straight ticket. Does this mean that Iowans will not be permitted to vote a straight ticket in the November 7, 1972, general election."

Section 20 of House File 1147, Acts 64th General Assembly, Second Session (1972) amends §49.42, Code of Iowa, 1971. Such section contains the recommended form of the official ballot and begins with the words "said ballot shall be *substantially* in the following form." A copy of Section 20 as passed by the General Assembly and signed by the Governor is attached hereto. It is apparent that the sample ballot form departs from the form shown in the present Code in several respects. First, instead of a circle there is a line provided for voting straight tickets. Second, there is no bracket around the offices of President and Vice President; and third, there are no boxes provided for voting for any of

the offices.

These deficiencies apparently stem from mechanical problems in the legislative process. Prior to the 64th General Assembly, bills were printed, and the printing equipment which was used was capable of making circles, brackets and boxes. However, beginning with the First Session of the 64th General Assembly the Legislative Service Bureau began using an offset process for printing bills which involves typing the bills and then taking a picture of them. Since a typewriter is incapable of making circles, brackets and boxes, such were not included in House File 1147 as passed. However, we do not think this mechanical problem acts to do away with straight ticket voting.

In the first place, as noted previously, §49.42 merely requires that the official ballot be in "substantially" the form set forth in the statute. Certainly this language gives the Commissioner of Elections some latitude in setting up the official ballot form. Apart from this, there are references to the party circle elsewhere in the Code. Thus, §§49.42 and 49.94 provide respectively:

§49.42:

"Voting mark. The voting mark shall be a cross or check which shall be placed in the circle at the head of a ticket, or in the squares opposite the names of candidates."

§49.94:

"How to mark a straight ticket. If the names of all the candidates for whom a voter desires to vote appear upon the same ticket, and he desires to vote for all candidates whose names appear upon such ticket he may do so in any one of the following ways:

"1. He may place a cross or check in the circle at the top of such ticket without making a cross or check in any square beneath said circle.

"2. He may place a cross or check in the square opposite the name of each such candidate without making any cross or check in the circle at the top of such ticket.

"3. He may place a cross or check in the circle at the top of such ticket and also a cross or check in any or all of the squares beneath said circle."

Section 49.33 specifically requires that the offices of President and Vice President be voted together and that there be a single square and brackets for this purpose. Section 49.57 specifically requires a square for voting for other candidates.

In view of the foregoing, it is our opinion that the official ballot should contain a circle for straight ticket voting, a box and brackets for voting for the offices of President and Vice President and boxes or squares for voting for the other offices on the ballot.

June 1, 1972

CITIES AND TOWNS: Incompatibility of offices — Iowa Constitution, Art. III, §22; §365.29, Code of Iowa, 1971. There are no requirements for a city employee, who is not a public officer, to take a leave of absence during his term of office as a legislator while the legislature is not in session. (Blumberg to Bennett, State Representative, 6/1/72) #72-6-1

Mr. Vernon N. Bennett, State Representative: We are in receipt of your opinion request concerning municipal employees who desire to run for election in the Iowa Legislature. Specifically, you ask:

"May a City employee under Civil Service who runs and is elected to the Iowa Legislature limit his leave of absence to that period when the Legislature is actually in session?"

Your question encompasses two areas: Leave of absence during the campaign; and compatibility of offices or conflict of interest once elected.

Section 365.29, Code of Iowa, 1971, provides, in part:

"Any employee who shall become a candidate for any elective office shall, commencing thirty (30) days prior to the date of the primary or general election and continuing until such person is eliminated as a candidate, either voluntary or otherwise, automatically receives leave of absence without pay and during such period shall perform no duties connected with the office or position so held."

This section mandates a leave of absence for a city employee during a campaign. Pursuant to a prior opinion of this office, 1970 O.A.G. 285, this section has been interpreted to mean that once the candidacy has ended, the employee may return to his previous position. The ending of a candidacy was interpreted there to include election to office. Thus, a municipal employee on civil service may return to his position after his election to public office.

The question arises here, then, whether the employee is required to take a leave of absence once his term as a legislator commences. We can find no constitutional, statutory or common law rules requiring a city employee to take a leave of absence during his term of office. Rather, we find provisions dealing with incompatibility of offices.

Article III, §22 of the Constitution of Iowa provides:

"No person holding any lucrative office under the United States, or this State, or any other power, shall be eligible to hold a seat in the General Assembly: but offices in the militia, to which there is attached no annual salary, or the office of justice of the peace, or postmaster whose compensation does not exceed one hundred dollars per annum, or notary public, shall not be deemed lucrative."

"Lucrative office" has been interpreted to mean lucrative public office. 1968 O.A.G. 257. "Public office" has been defined in *State* v. *Taylor*, 1967, 260 Iowa 634, 144 N.W.2d 289, to contain the following five essential elements: (1) It must be created by the constitution or legislature or through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government; (3) the duties and powers must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body; (5) the office must have some permanency and continuity, and not be only temporary and occasional. See also, *Hutton* v. *State*, 1947, 235 Iowa 52, 16 N.W.2d 18. It was determined in 1968 O.A.G. 257, that the position of collector of institutional accounts for a county was not a public office because it had no constitutional or

statutory basis for its existence. Accordingly, the holding of that position by a legislator was not prohibited.

The answer to your question is hinged on whether the city employee is a public officer. If he is pursuant to *State* v. *Taylor*, supra, then there is an incompatibility with the office of legislator. Thus, if a person, while occupying one public office, accepts another incompatible with the first, he *ipso facto* vacates the first office. *State ex rel. LeBuhn* v. *White*, 1965, 257 Iowa 606, 133 N.W.2d 903. However, if the city employee does not hold a public office, he can be a legislator and still hold that position. Although there are no requirements for a city employee taking a leave of absence during his term of office as a legislator, it is obvious that it is necessary to do so while the legislature is in session since it would probably be impossible to be in the legislature and at his city position at the same time.

Accordingly, we are of the opinion that there are no requirements for a city employee, who is not a public officer, to take a leave of absence during his term of office as a legislator, while the Legislature is not in session.

June 1, 1972

ELECTIONS: Nomination papers, signatures required. §43.20, Code of Iowa, 1971. Nomination papers for Congress require signatures totalling both 1% of the vote cast for governor in the district in the last general election and also at least 2% of the vote cast for governor in each of at least half of the counties comprising the district. A person filing papers failing to meet either of these requirements should not be certified as a candidate. (Haesemeyer to Synhorst, Secrtary of State, 6/1/72) #72-6-2

The Honorable Melvin D. Synhorst: Reference is made to your letter of May 31, 1972, in which you request an opinion of the Attorney General with respect to the following:

"Nomination papers were filed at 11:55 p.m., May 30, 1972, by Virginia Lee Johnston of Des Moines, Polk County, Iowa, as a candidate for the Fourth Congressional District of Iowa, for the August 1972 Primary Election.

"Section 43.20 of the 1971 Code of Iowa, provides that nomination papers shall be signed as follows:

" 'If for a representative in Congress, in districts composed of more than one county, by at least two percent of the voters of his party, as shown by the last general election, in each of at least one-half of the counties of the district, and in the aggregate not less than one percent of the total vote of his party in such district, as shown by the last general election.'

"The Fourth Congressional District is comprised of ten counties and the total number of signatures required is 663, which is one percent of the total vote cast for the republican candidate for governor in the last general election. Virginia Lee Johnston's papers contain a total of 784 signatures. In four counties, she has a total number of signatures equal to or in excess of two percent. In Marion County, she has 69 signatures, which is just five less than the two percent figure of 74.

"We respectfully request your opinion on the sufficiency of her nomination papers as filed and will be glad to make the nomination papers available for your inspection upon request."

Clearly, under the plain language of the statute Virginia Lee Johnston's nomination papers contain insufficient signatures and she should not be certified as a candidate for Congress from the Fourth Congressional District of Iowa in the August, 1972, primary election.

June 6, 1972

ELECTIONS: Authority to establish election precincts in cities and towns. §§49.1, 49.4, 49.5, 49.6, 49.16 and 363.4, Code of Iowa, 1971, as amended. Since the Code provides that any municipality with a population of less than 2,000 is a town rather than a city §49.5, as amended, applies only to muncipalities having a population of 2,000 or more. The precincts established by city councils are for use in elections other than municipal elections and boards of supervisors may not create different precincts therefor. (Haesemeyer to Synhorst, Secretary of State, 6/6/72) #72-6-3

The Honorable Melvin D. Synhorst, Secretary of State: Reference is made to your request for an opinion of the Attorney General with respect to the following:

"In recent conversations with county auditors who are attempting to comply with House File 1265, Sixty-fourth General Assembly, Second Session, the question of the applicability of voting precincts as established by city councils has arisen many times. The questions asked are:

"1. Do the provisions of Chapter 49.5, Code of Iowa 1971 amended, apply to only those municipalities having a population of 2,000 or more?

"2. Are the voting precincts as established by city councils applicable for all elections (including the primary election) held within that city, or may the board of supervisors for the affected county establish different voting precincts for elections other than municipal or school elections?"

At the outset it is important to bear in mind that the Code makes a distinction between the terms "city" and "town". Section 363.4, Code of Iowa, 1971, provides:

"Classification. Municipal corporations are divided into cities and towns.

"1. Any municipal corporation which has a population of two thousand or more is a city.

"2. Any municipal corporation which has a population less than two thousand is a town."

It is evident from the foregoing that any municipality with a population of less than 2,000 is a town rather than a city.

We must assume that the legislature was aware of this distinction when it enacted §49.5, Code of Iowa, 1971, as amended by Ch. 98, Section 22 and Ch. 99, Section 2, 64th General Assembly, First Session (1971) and H.F. 1147, §19, Acts, 64th G.A., Second Session (1972) omitting all reference to "towns" and referring only to "cities". The fact that a distinction is recognized in Ch. 49 between cities and towns is evident from other provisions of the chapter. Thus, §49.3 provides:

"Election precincts. Election precincts shall, except as otherwise provided, be as follows:

"1. Each township when there is no part of a city therein.

"2. The portion of a township outside the limits of any city.

"3. Such divisions of cities as may be fixed by the council by ordinance.

"4. Each incorporated *town*, for town elections." (Emphasis added)

Other sections of Ch. 49 in which both the expression "town" and "city" are used are §§49.4, 49.6 and 49.7. Accordingly, in answer to your first question, it is our opinion that §49.5, as amended, applies only to municipalities having a population of 2,000 or more. See OAG Haesemeyer to Synhorst, Secretary of State, April 5, 1972.

Turning to your second question, §49.1, provides:

"Elections included. The provisions of this chapter shall apply to all elections known to the laws of the state, except school elections."

Section 49.4, without limitation as to the elections as to which they are to apply, authorizes the Board of Supervisors under certain circumstances to create election precincts; §49.5 vests similar power in the council of any city and §49.6 authorizes a Board of Supervisors and the council of any town or city of less than 3,500 inhabitants to combine wards or precincts as one election precinct.

We can find nothing in Ch. 49, as amended, which would support the contention that the precincts established by city councils are applicable only for city elections and that the Board of Supervisors can establish different voting precincts for elections other than municipal or school elections. It is true that §49.16 provides:

"Council to act in cities and towns. In city and town elections, the powers given in this chapter and duties herein made incumbent upon the board of supervisors shall be performed by the council."

However, this does not mean that precincts established by city councils under §49.5 are for use *only* in city and town elections. The section is a limitation not on the power of city councils but on the powers of Boards of Supervisors insofar as the latter might otherwise appear to have powers and duties with respect to city and town elections under Chapter 49.

June 8 ,1972

COUNTY OFFICERS: Auditor — §§409.1, 409.33, 409.35 and 409.45, Code of Iowa, 1971. A tract of land subdivided into three tracts or parcels must be platted. The Auditor may require a survey plat to be made by the County Engineer or a licensed surveyor. (Nolan to Chwirka, Woodbury County Attorney, 6/8/72) #72-6-4

Mr. Zigmund Chwirka, Woodbury County Attorney: We have your letter requesting an Attorney General opinion on a number of questions requiring the construction of Ch. 409, Code of Iowa, 1971. Your letter indicates that certain land plats in the office of the Woodbury County Auditor show a number of tracts or parcels which have been split numerous times without re-platting as required by §409.1, Code, 1971.

In response to the questions you presented we advise:

1. The original owner or original proprietor within the meaning of §409.1 is the person who subdivides his own land. 1964 OAG 12.

2. The term "three tracts or parcels" as used in §409.1 is defined as two tracts plus the owner's remaining tract. 1970 OAG 713. The Attorney

General's opinion cited supersedes a previous Attorney General's opinion found at 1970 OAG 653.

3. There appears to be no statutory authority for the Auditor or Recorder to refuse to accept a Deed for filing or recording when the Deed is properly acknowledged. Where it appears that property is being split into three or more parcels without a Survey Plat prepared by a registered land surveyor, the Auditor may require that such survey be made pursuant to §409.33. However, the lack of such survey does not preclude the recording of an instrument conveying an interest in such land.

4. If the Auditor determines that a plat is required, the person presenting an instrument conveying land shall be notified that the land must be platted within 30 days from the date of notice (§409.33). A person aggrieved by such determination may appeal to the Board of Supervisors giving notice in writing and the Board will decide at its next session whether the plat should be executed and filed (§409.35). Under the provisions of §409.36 if the grantor neglects for 30 days thereafter to file a plat for record as directed by the Board of Supervisors, then the Auditor shall proceed and cause such plat to be made and recorded in his office and in the office of the County Recorder.

5. If the County Auditor is required to cause an Auditor's Plat to be made, the Auditor may compel a survey to be made by the County Engineer (§355.1) or by any registered land surveyor holding a certificate issued under the provisions of Ch. 114 of the Code (§409.1).

6. The authority under which the County Auditor can cause the employment of a licensed county surveyor is cited in paragraph 5 above. See 1964 OAG 12.

7. Where an original owner divides his property by deeding to two other individuals who subsequently split their tracts deeding part back to the original owner, the provisions of §409.1 requiring platting apply. To correct and prevent obvious subterfuge to avoid platting, §409.45 provides the fine of $50.00 for each lot or part of a lot sold or disposed of, leased or offered for sale prior to the recording of the required acknwledged plat.

8. Your last question asks whether the statute requires a filing of a plat where a vendor sells the first tract of land shown by a drawing of several contiguous tracts or other indication of an intent to sell. Our answer to this question would depend on the necessity for opening streets, roads, etc., and whether the owner has offered for sale or lease any additional lots or tracts. (§409.45) If these elements are present, the answer would be affirmative.

June 8, 1972

COUNTIES: COUNTY OFFICERS — §569.8, Code of Iowa, 1971. In absence of express statutory prohibition a public officer may be a purchaser of land sold by the county at public auction pursuant to §569.8, Code of Iowa, 1971. It is the duty of the board of supervisors to obtain highest price possible for property sold for less than taxes. (Nolan to Rodenburg, Pottawattamie County Attorney, 6/8/72) #72-6-5

Mr. Lyle A. Rodenburg, Pottawattamie County Attorney: Your letter asking for an opinion on two questions concerning the right to bid and purchase property acquired by tax deed by the county subsequently sold at public auction has been received. The questions presented are:

"1. Whether a public official is eligible to bid and purchase property acquired by tax deed by the county subsequently sold at public auction.

"2. Whether a person who lost his real estate for failure to pay taxes can later come in and bid at a public auction, buying back the property for often times what is less than the taxes were."

In connection with the first question we have carefully read your opinion to the Pottawattamie Board of Supervisors which was enclosed with your letter and which states as follows:

"You presented a question to this office as to whether or not county and city officers are permitted to purchase property at the county public auction of tax deed real estate. The question presented is, does the purchase of land being auctioned by the county pursuant to Section 569.8, 1971 Code of Iowa, by county officers or city officials, constitute a conflict of interest?

" 'It has never been the policy of this or any other state or sovereign to place limitations upon the power and means of maintaining its own existence.' *Teget vs. Lambach,* 226, Ia. 1346, 286 N.W. 522 (1939).'

"The state has, however, seen fit to exclude certain officers (Auditor and Treasurer) from any concern, direct or indirect, in the purchase of any real estate sold for the nonpayment of taxes. Section 446.27, Code of Iowa, 1971. Case law has indicated that where a deputy of a prohibited officer is so concerned in the purchase of such real estate, the sale is voidable rather than void. *Lawrence vs. Hornick,* 81 Ia. 193, 46 NW 987 (1890).

"Earlier cases had indicated that a concerned deputy resulted in a void sale. *Kirk vs. St. Thomas Church,* 70 Ia. 287, 30 N.W. 569 (1886).

"A recent Attorney General's Opinion indicates that the prohibition found in Section 446.27, Code of Iowa, discussed above, does not apply in an auction sale pursuant to Section 569.8 and that an Assessor is not disqualified from bidding on such property. Op. Atty. Gen., June 12, 1970, (Nolan). 1970 OAG 631.

"I am unable to find any statutory prohibitions against county or city officers bidding at an auction, pursuant to Section 569.8. This does not, however, answer the principle question. It is my opinion that some officials would be placed in a position of conflict of interests and some would not.

"The additional problem presented is that majority interest taxing bodies have to approve sales of this real estate if it is for less than the taxes due. Among the tax levying bodies are the school districts, the City of Council Bluffs, and Pottawattamie County. If, for example, a member of the school board or the city council purchased property for less than the tax due, and were later called upon to approve the same, there would be a definite conflict of interest, in my opinion.

"There is also a practical conflict of interest for any member of the board of supervisors, auditors or county attorney's office, who are directly involved in the sale of this property, to purchase it at public auction.

"Accordingly, it is the opinion of this office, that at such public auction, no person who is a member of a school board, city council, or other tax levying body, may purchase property at the public auction for less than the taxes due. Furthermore, those county officials, namely: the county auditor, board of supervisors, county attorney, or any member of their staffs, are precluded from purchasing real estate at such public auction, in the opinion of this office."

This office does not concur in all of your views on this matter. It is our view that the public interest is protected by public auction. In the absence of express statute prohibiting certain officials from purchasing property sold by the county at public auction a member of a school board, city council or other public officers may purchase the property. If the property sells for less than taxes due and such official is a member of a board authorized to approve the sale, the official may refrain from voting on the motion of approval when presented. Such motion if carried by a majority vote of the other members not disqualified by conflict of interest, will be valid (§368A.25).

However, note should be taken of the statutory provisions which preclude any municipal officer from voluntarily acquiring a personal interest in any urban renewal project (§403.16) or low rent housing project (§403A.22), also §343.4 prohibits the sheriff, deputy sheriff or constable from becoming a purchaser, either directly or indirectly, of any property exposed by him to sale under any process of law. On the other hand, §741.11 of the Code, which prohibits county officers from furnishing supplies and materials to the county, does not have application in the situation presented.

In answer to your second question, it is the duty of the board to obtain the highest price possible for property sold at public auction for less than taxes. 1938 OAG 623. The precise question of whether the county could sell the property to a person who had previously lost the land for failure to pay taxes was dealt with in 1942 OAG at page 23. In an opinion dated February 5, 1941, the question was whether after the period of redemption has passed, before the county has taken a tax deed, they may in their discretion sell the property involved in such notice to the true owner for the total amount of taxes, interest, penalties and cost charged against such real estate regardless of the fact that a prior bid in an equal amount had been entered by an independent bidder who was prepared to raise his bid. The Attorney General advised then:

". . . The real purpose of a tax sale is to coerce the payment of the taxes. The public bidders statute was enacted to further this purpose.

* * *

". . . There is no requirement in this statute that the property be sold to the highest bidder. The wording of the statute indicates that the board of supervisors has broad powers in disposing of the property, provided, however, it meets the requirements of Section 10260.4 in connection with property acquired under the public bidder act.

"In the instant case, the county will be made whole by accepting the bid of either of the two bidders. It is our opinion that so long as the board of supervisors acts in conformity to the requirements of Section 10260.4 it may use its discretion in selling property acquired under the public bidders statute."

Section 10260.4 cited above is similar in language to the provisions of §569.8, Code of Iowa, 1971, however, the present statute contains additional provision for the sale of such real property by public auction and not by the use of sealed bids. Public auction is merely a procedure by which such realty is offered for sale. It is within the authority of the Board of Supervisors to reject any bid, particularly if less than the accrued taxes, interest and costs. Where the Board rejects any and all bids made at public auction it would be necessary to offer the realty for sale at another public auction. 1968 OAG 837.

June 8, 1972

REGENTS: Tuition fee — §§261.9 to 261.16, Code of Iowa, 1971, Chapter 60 §4, Laws 64th G.A., First Session. Statutory language freezing basic undergraduate tuition fee for purposes of placing ceiling on tuition grants does not preclude State Board of Regents from raising graduate or part-time tuition fees. (Nolan to Richey, Executive Secretary, State Board of Regents, 6/8/72) #72-6-6

Mr. R. Wayne Richey ,Executive Secretary, State Board of Regents: You have requested an opinion from the Attorney General as to whether tuition and fees for part-time students at universities under the jurisdiction of the State Board of Regents may be increased during the current biennium. Your letter states that the Regents have customarily set a basic graduate resident student tuition fee for full-time students of a specified amount for regular full-time students. The current basic undergraduate resident student tuition fee for regular full-time students at the University of Iowa is $620, and at Iowa State University and the University of Northern Iowa the rate is $600 per year. You further state that the Regents customarily set fees for part-time students and charge differential rates for resident and nonresident students, for graduate and undergraduate students and for students enrolled in certain professional schools such as medicine, dentistry and law.

The question arises from the provision in §4, Chapter 60, Laws of the 64th G.A., First Session, which provides:

"The basic undergraduate student tuition fee shall not be increased during the period of July 1, 1971 to June 30, 1973."

The above quoted section follows a section providing for an appropriation from the general fund of the State of Iowa to the Higher Education Facilities Commission for the biennium July 1, 1971 to June 30, 1973 to finance tuition grants to full-time resident students attending accredited private institutions of higher education in Iowa under §§261.9 to 261.16 inclusive of the 1971 Code of Iowa.

In §261.9, a full-time resident student is defined as a resident of Iowa who is enrolled at an accredited private institution in a course of study including at least 12 semester hours or the trimester equivalent of 12 semester hours. It is our understanding based on information obtained from your office that any student taking 9 hours or more of credit work at any of the institutions under the jurisdiction of the Board of Regents is considered a full-time student for purposes of tuition.

It should be noted that the amount of a tuition grant to a qualified student under the tuition grant program is limited by §261.12 to that amount which is the lesser of:

"1. The total tuition and mandatory fees for that student for two semesters or the trimester equivalent, less the base amount determined annually by the higher education facilities commission, which base amount shall be within ten dollars of the average tuition for two semesters or the trimester equivalent of undergraduate study at the state universities under the board of regents, but in any event the base amount shall not be less than four hundred dollars; or

"2. One thousand dollars."

I am of the opinion that the provision in Chapter 60 of the Laws of the 64th General Assembly, freezing the basic undergraduate resident fee pertains to the fee which is charged to a full-time undergraduate student. Therefore, the answer to your question is yes. The hourly fee for work

taken by part-time students may be increased during the biennium.

June 12, 1972

CITIES AND TOWNS: Municipal Hospitals — §§380.6, 452.10, Code of Iowa, 1971. Municipal hospital trustees need not invest proceeds from a gift in government bonds pursuant to §380.6. However, they must follow §452.10 if they do not proceed under §380.6. (Blumberg to Chalupa, Jasper County Attorney, 6/12/72) #72-6-7

Mr. Dennis F. Chalupa, Jasper County Attorney: I am in receipt of your request of May 25, 1972. This request concerns an opinion of this office of May 2, 1972, on the same matter. You are requesting a clarification of the prior opinion, with reference to the latitude a hospital has in investing funds from United States Treasury obligations under Section 452.10 of the Code.

In the prior opinion we erroneously stated that the hospital trustees had invested proceeds from a gift of stock in United States Government Bonds. Thus, we concluded that these funds must remain in said bonds until they were to be used, pursuant to Section 380.6, 1971 Code of Iowa. In actuality, the proceeds were invested in United States Treasury obligations which were not bonds. Therefore, a new conclusion must be reached.

Section 380.6 provides that the proceeds of a gift *may* be invested in United States Government Bonds. If so, then these must remain in said bonds until they are to be used. The word "may" is used which confers authority but does not make it mandatory. Thus, other types of investments may be made pursuant to the Code. If other investments are made, Section 380.6 is not applicable.

Section 452.10, 1971 Code of Iowa, provides:

"The State Treasurer and the treasurer of each political subdivision shall at all time keep all funds coming into their possession as public money, in a vault or safe . . . or in some bank legally designated as a depository for such funds. However, the treasurer of state and the treasurer of each political subdivision shall invest, unless otherwise provided, any of the public funds not currently needed for operating expenses in bonds or other evidences of indebtedness which are obligations of or guaranteed by the United States of America; or make time deposits of such funds in banks as provided in chapter 453 . . ."

The treasury obligations in your situation fall within the provisions of Section 452.10 as "other evidences of indebtedness which are obligations of or guaranteed by the United States of America." There is no provision in this section or in Chapter 452 that the funds must remain in these obligations until they are to be used. Therefore, these funds can be reinvested in either government bonds, government obligations, or deposited in a bank.

Accordingly, we are of the opinion that proceeds from a gift to a municipal hospital need not be invested in government bonds pursuant to Section 380.6. However, they must be invested or deposited, pursuant to Section 452.10 and Chapter 453. There is no prohibition in Chapter 452 which would prevent the hospital trustees from reinvesting these funds, provided that said reinvestment is made pursuant to the Code.

The opinion of May 2, 1972, is hereby withdrawn.

June 12, 1972

STATE OFFICERS AND DEPARTMENTS: Agriculture — Trust Funds — §§200.9, 198.7, Code, 1971; Ch. 11, Acts, 64th G.A., 1st Session. No moneys may be expended from the commercial feed and fertilizer trust funds during 1971-1973 biennium except such amounts as are appropriated under Ch. 11, Acts, 64th G.A., 1st Session. (Nolan to Geddes, Dept. of Agriculture, 6/12/72) #72-6-8

Mr. Mark G. Geddes, Administrative Assistant, Department of Agriculture: This letter is written in response to your request for an opinion on the limits and authority for expenditure of Department of Agriculture "Trust Funds". The two questions presented by your letter are as follows:

"1. Does the Department of Agriculture have authority to assign to the Iowa State University for research and studies unappropriated monies held in the Fertilizer Trust Fund?

"2. Does the Department of Agriculture have authority to expend unappropriated monies held in the Commercial Feed and Fertilizer Trust accounts for educational projects and exhibits dealing with the Department's functions?"

In answer to your first question, the statutes which we consider to be controlling are §200.9, Code of Iowa, 1971, which provides:

"Fees collected for licenses and inspection fees under sections 200.4 and 200.8 shall be deposited in the treasury to the credit of the fertilizer fund to be used only by the department of agriculture for the purpose of inspection, sampling, analysis, preparation and publishing of reports and other expenses necessary for administration of this chapter. The secretary may assign moneys to the Iowa agricultural experiment station for research, work projects, investigations as may be needed for the specific purpose of improving the regulatory functions for enforcement of this chapter."

and Chapter 11, Section 1, 64th General Assembly, First Session, which provides in pertinent part:

"

	1971-72 Fiscal Year	1972-73 Fiscal Year
* * *		
"5. Department of agriculture — fertilizer fund — chapter two hundred (200) of the Code:		
"For salaries, support, maintenance, equipment and miscellaneous purposes:	$261,360.00	$269,635.00"

I am of the opinion that the Department of Agriculture may assign only appropriated moneys from the Fertilizer Fund. However, such an assignment to Iowa State University for research and study would be authorized as a miscellaneous purpose under Chapter 11, 64th G.A., supra. Our Constitution requires that there be no expenditure of state funds except upon a legislative appropriation. See Article II, §24, Constitution of Iowa. A valid appropriation is authority from the legislature given at a proper time in legal form to the officers to apply sums of money out of that which may be in the treasury in a given year to specified objects or demands against the state. *Prime v. McCarthy,* 1894, 92 Iowa 569, 61 N.W. 220.

Section 200.9 providing for the deposit of fees collected for licenses

and inspection fees under §§200.4 and 200.8 of the Code is not an appropriation act, even though this section does permit the Secretary of Agriculture to assign moneys to the Iowa Agricultural Experiment Station for "research, work projects, investigations," by the department. I do not find anywhere in Chapter 200 an authorization to use funds not otherwise appropriated, therefore, I must conclude that the specific language of the appropriation contained in Chapter 11, Laws of the 64th G.A., First Session, governs the amount of money which may be expended from the Fertilizer Fund.

In answer to your second question, it is our opinion that the Department of Agriculture lacks authority to expend unappropriated moneys in either a commercial feed or fertilizer trust accounts. To the extent that such moneys are appropriated under Ch. 11, Laws of the 64th G.A., supra (commercial feed — Sec. 1, 1971-72, $319, 831, 1972-73, $333,191, fertilizer fund — 1971-72, $261,360, 1972-73, $269,635). They may be expended for miscellaneous purposes including educational projects and exhibits dealing with the department's functions in relation to the administration of Chapter 200 and Chapter 198, Code of Iowa, 1971. Any expenditure of moneys from these funds in excess of the amounts appropriated by Chapter 11, supra, would be an unauthorized expenditure.

June 20, 1972

STATE OFFICERS AND DEPARTMENTS: Reciprocity Board — Sec. 326.9, Code of Iowa, 1971. Failure to comply with the requirements of Section 326.9 constitute grounds for cancellation of proration privileges of the entire fleet involved. (Blumberg to Schoenebaum, Executive Secretary, Iowa Reciprocity Board, 6/20/72) #72-6-9

Mr. Steven C. Schoenebaum, Executive Secretary, Iowa Reciprocity Board: I am in receipt of your opinion request of June 19, 1972, wherein you wish to know whether the cancellation of proration privileges in Section 326.9, 1971 Code of Iowa, pertains to the entire fleet or merely the individual vehicles which are in violation.

Section 326.9 of the Code provides:

"The registrations of individual vehicles shall not be subject to proportional registration with this state. The same fleet, consisting of the same vehicles in each state, shall be proportionally registered in each state with which the fleet is prorated; and every one of the vehicles shall be included in the fleet in each state. Failure to comply with these requirements shall constitute grounds for cancellation of proration privileges."

The purpose of this section is to require that in order to receive proportional registration in Iowa for a fleet, each truck in that fleet must also be registered in the other states with which the fleet is prorated. By way of example, if an owner of a fleet of four vehicles wants proportional registration in Iowa and another state, each of those four vehicles *must* be registered in both Iowa and the other state.

The last sentence of Section 326.9 provides that a failure to comply with the requirements of the Section shall constitute grounds for cancellation of proration privileges. The section speaks of fleets being porportionally registered, not individual vehicles. Since the requirements deal with proportional registration of fleets, it is obvious that the cancel-

lation of proration privileges applies to the entire fleet.

Accordingly, we are of the opinion that the cancellation of proration privileges for violation of the requirements of Section 326.9 applies to the entire fleet.

June 21, 1972

COUNTY AND COUNTY OFFICERS: RECORDER — Sec. 68A.2, 79.3, 335.14, 622.46, 554.9405 and 554.9407, Code of Iowa, 1971. The fee charged for copies of documents filed in the County Recorder's office depends upon the nature of the copy and the statute authorizing the document to be filed. (Nolan to Lee H. Gaudineer, State Senator, 6/21/72) #72-6-10

The Honorable Lee H. Gaudineer, Jr., State Senator: This letter is written in response to your request for an opinion on the question of fees charged by county recorders. In your letter you state:

"It has been brought to my attention that several of the County Recorders across the State are charging exorbitant fees for certifying transcripts of recorded documents in their office. It is my understanding that many of them are charging the same fee for a transcript as they are charging for the original recording. Statutory fee for recording is $2.50 for the first page and $2.00 for each page thereafter. These recorders are also refusing to certify a copy of such documents produced by the attorney, simply stating that they will only certify a xerox copy of their records.

"Many other recorders are simply charging 25¢ per page for the xerox copies and, perhaps, an additional $1.00 for a short statement of certification. Even though a zerox copy costs between 5¢ and 10¢ to produce, the 25¢ fee per page probably is not outrageous.

"It would appear that the recorders who are charging the $2.50 for the first page and $2.00 per page thereafter are confusing the fee for original recording with that for the production of a certified transcript. It appears to me that Section 622.46 provides that such transcripts will be furnished and fee charged as provided by law. Section 79.3 provides for a 35¢ charge for certification and a fee of 10¢ per 100 words for transcription. Thus, there are approximately 250 words, on the average, upon a legal sized sheet of paper. I assume that this is where the 25¢ fee, per page, originated.

"In any event, may I have your opinion as to whether or not a county recorder is authorized to charge, for transcripts, the original recording fee of $2.50 for the first page and $2.00 for each page thereafter or if the recorders are governed by the fees as set forth in section 79.3; and further, that a recorder, under this section, cannot refuse to certify a copy produced by the attorney."

Taking your second question first, it is my opinion that a county recorder is not required by §622.46, Code of Iowa, 1971, to certify as a record of his office any copy of a record on file therein other than such copies as may be furnished by his office. Section 622.46 provides:

"Every officer having the custody of a public record or writing shall furnish any person, upon demand and payment of the legal fees therefor, a certified copy thereof."

This does not mean that a county recorder could not certify that a document which may be furnished by an attorney is a true copy of the record on file in his office, if he could make such a determination. Also, §554.9407, Code of Iowa, 1971, contemplates and authorizes the delivery

of a copy of a financial statement, assignment or release to the person who files such document and furnishes the copy but a statutory fee for certification of the state of the record at a given date and hour is $2.50 - $3.00.

Proceeding to the first question, documents on file in the county recorder's office are public records subject to examination and copying under the provisions of Ch. 68A, Code, 1971. Section 68A.2 provides that the right to copy records shall include "the right to make photographs or photographic copies while the records are in the possession of the lawful custodian of the records. All rights under this section are in addition to the right to obtain certified copies of records under §622.46". The custodian of the record is authorized to charge a reasonable fee to be paid by the person desiring to examine or copy a record. (1968 OAG 656) Code §554.9407 prescribes a statutory fee of $1.00 per page for copies of financing statements and assignments filed under the Uniform Commercial Code.

The fee which the recorder is authorized to charge and collect for recording an instrument pursuant to §335.14, Code, 1971, as amended by Ch. 197, Acts of the 64th General Assembly, First Session, or under the U.C.C. §554.9405, should not be confused with the reasonable fee for the services of the lawful custodian and supervising the records authorized by §68A.3. The fee provided under §79.3 for certification of a copy of an official document does not apply to the certified copies of documents covered by §554.9407(2).

June 21, 1972

COUNTY AND COUNTY OFFICERS: County hospital construction — Sec. 347A.1, Code of Iowa, 1971. Construction contracts are to be awarded by the board of supervisors pursuant to sec. 347A.1 and the requirements of the statute are not met by permitting a representative to seek bids and let contracts for the board. (Nolan to Groves, Hamilton County Attorney, 6/21/72) #72-6-11

Mr. Gary J. Groves, Hamilton County Attorney: This letter is written in response to your request for an opinion interpreting §347A.1, Code of Iowa, 1971, as it applies to a situation in Hamilton County. According to your letter the Hamilton County Hospital is considering a new method of letting construction contracts called the Construction Consolidation Management Process. Under this plan the hospital administrator expects to save approximately one percent on all construction contracts. The hospital would let a contract to a representative who then would seek out bids and then the contractor will subcontract for the actual construction.

The procedure outlined in your letter is, in my opinion, not authorized by Code §347A.1 for the reason that it appears to authorize someone other than the County Board of Supervisors to have the responsibility of asking for bids and letting the contract for the construction of the hospital. Section 347A.1 provides as follows:

"Any county in the state of Iowa having a population less than one hundred fifty thousand is hereby authorized and empowered to acquire, construct, equip, operate and maintain a county hospital and, for the purpose of acquiring, constructing, equipping, enlarging or improving any such county hospital and acquiring the necessary lands, rights of way and other property necessary therefor, may issue revenue bonds all

as in this chapter provided. All contracts for construction work of such county hospital shall be awarded by the board of supervisors on competitive bidding following such advertisement as may be prescribed by such board."

* * *

In this connection the provisions of §§332.7 and 332.8, of the Code merit consideration.

§332.7 provides:

"No building shall be erected or repaired when the probable cost thereof will exceed two thousand dollars except under an express written contract and upon proposals therefor, invited by advertisement for three weeks in all the official newspapers of the county in which the work is to be done."

§332.8 provides:

"Contracts for buildings and repairs specified by section 332.7 shall be let to the lowest responsible bidder at a time and place which shall be distinctly stated in the advertisement. The board may on the day fixed for letting such contract adjourn the hearing to some later date and place, of which all parties shall take notice. The board may reject any and all bids and advertise for new ones. The detailed plans and specifications for such improvements shall be on file and open to public inspection in the office of the auditor of the county in which the work is to be done before advertisement for bids."

We see no reason why the Board of Supervisors should not have the assistance of an expert consultant to assist them in drawing the specifications for the proposed building or in reviewing the bids submitted for such construction. However, we do not feel that the mandatory language of §347A.1 stating that the contracts for construction work *shall be awarded* by the Board of Supervisors permits the delegation of such statutory power to another body. Accordingly, it is our view that the procedure outlined in your letter does not meet the requirement of §347A.1 of the Code of Iowa.

June 21, 1972

SCHOOLS: Bond election — §277.2, Code of Iowa, 1971. A school bond election may be held in conjunction with a primary or general election. (Nolan to Synhorst, Secretary of State, 6/21/72) #72-6-12

The Honorable Melvin D. Synhorst, Secretary of State: This will acknowledge and answer your request for an opinion on the following question:

"May a school bond question election be held in conjunction with a primary or general election?"

Under the provisions of 277.2, Code of Iowa, 1971, the Board of Directors of any school corporation may call a special election at which the voters may authorize the creation of an indebtedness as provided by law. There appear to be no statutory limitations as to the time when such special election may be held except that the date of the election shall be fixed on a day not less than five nor more than 20 days after the last publication of notice. (§296.5)

Accordingly, it is our opinion that a school bond election may be held in conjunction with a primary or general election. However, where

practical difficulties seem likely to occur it might be advisable to schedule such an election at a different time. See Opinion Haesemeyer to Synhorst, May 15, 1972.

June 21, 1972

STATE OFFICERS AND DEPARTMENTS: Iowa Civil Defense Division. Private radio and television broadcasting stations could be subject to liability for the negligent dissemination of misinformation regarding storm warnings. (Corcoran to Maricle, Director, Iowa Civil Defense Division, 6/21/72) #72-6-13

Mr. Albert R. Maricle, Director, Iowa Civil Defense Division: This is in response to your letter of December 27, 1971, in which you request the opinion of this office regarding the following questions:

1. Is a radio or television station free from liability in broadcasting "ALL CLEAR" information, which it had received from a national weather service office or other government source after a disaster or threatened disaster had apparently ceased?

2. May a station with its own weather forecasting facilities be held liable for broadcasting an "ALL CLEAR" in a similar situation?

In answer to your first question, as well as we can determine there is no statutory law (Federal or state) or case law which specifically exempts radio or television stations from liability regarding the dissemination of weather information. However, to our knowledge this particular issue has not been litigated either in Federal or state courts.

The United States Court of Appeals in the case of *National Mfg. Co.* v. *United States,* 1954, 210 F2d 263, did deal with the question of the U.S. Weather Bureau's liability to private persons for the alleged negligent dissemination of information respecting the course and action of flood waters. The complaint was brought against the Weather Bureau pursuant to the Federal Tort Claims Act. The government contended that the acts complained of amounted to a misrepresentation by the Bureau employees and that such acts are immune from litigation under the Federal Tort Claims Act. The court agreed with this contention and dismissed the suit.

The above decision is important to your question in that the court acknowledged that the negligent dissemination of misinformation amounts to a misrepresentation. Since said acts of misrepresentation are not actionable under the Federal Tort Claims Act the claim was dismissed. However, private radio and television stations are not operating under the protection of said act, or similar protective acts and therefore would be subject to liability for such misrepresentations.

A situation similar to that of the *National Mfg. Co.* case was dealt with in *Bartie* v. *United States,* 1963, 216, §F, Supp. 10, in which the U.S. Weather Bureau was sued for negligently reporting information regarding hurricane conditions. The court found for the United States on the same reasoning set forth in the *National Mfg.* case. However, the *Bartie* court went further in its discussion of the activities of the private broadcasters. According to the facts set out in the opinion the reports by the various radio and television stations were not clear as to what specific geographical areas were in danger. The broadcasting stations

attempt to play down the danger caused many to be lulled into a false sense of security thereby causing many not to evacuate. The *Bartie* court further alluded to the negligence of broadcasting media, emphasizing the need for more effective communication between the local weather service and the television and radio stations serving the area.

Considering the above, it is our opinion that if it can be determined that the broadcasting personnel were negligent in disseminating weather information they could be subject to liability for persons injured as a result of acting in reliance on said information. It is important to note that the negligence of the broadcasting personnel must be established before persons could recover against them. If said broadcasters were only involved in reporting precisely what the weather bureau reported, and did not deviate from that report, then unless the aggrieved parties could show other negligent acts, a claim possibly would not lie against them.

In response to your second question, all the above would apply. If they were negligent in forecasting, an action could possibly lie against them. Private forecasters would not have the protection of immunity afforded by the Federal Tort Claims Act as shown in the above cited cases.

June 21, 1972

STATE OFFICERS AND DEPARTMENTS: Auditor of State, issuance of industrial loan licenses — Chapters 534 and 536A, Code of Iowa, 1971. A service corporation jointly owned by two savings and loan associations may not be licensed to engage in the industrial loan business. (Haesemeyer to Yenter, Auditor of State's Office, 6/21/72) #72-6-16

Mr. Ray Yenter, Deputy Auditor, Office of Auditor of State: Reference is made to your request for an opinion of the attorney general with respect to the following:

"Section 534.19 - 15 of the 1971 Code of Iowa provides as follows:

"'15. *Service corporations.* Any association shall have the power to organize and own, alone or with any other similar corporation, a service corporation for the mutual good of said corporations. An association may invest in capital stock, obligations, or other securities of service corporations in an amount not to exceed five percent of the association's assets.'

"Two Iowa chartered savings and loan associations have incorporated a service corporation pursuant to the provisions of section 534.19 - 15 above quoted, and are the sole owners thereof.

"This service corporation has filed an application at the office of the State Auditor for an Industrial Loan License to be issued pursuant to the provisions of Chapter 536A of the Code of Iowa.

"Your opinion is respectfully requested as to whether or not the provisions of paragraph 15, of section 534.19 of the Code, authorizes service corporations, organized pursuant thereto, to conduct business of types other than that authorized for savings and loan associations, such as an industrial loan company, or other types of business, at the option of the service corporation."

Iowa law authorizes the creation of and regulates many types of financial institutions within the state including state banks, industrial loan companies and savings and loan associations. The extent of the

state's power to regulate such institutions was clearly set forth by the Iowa Supreme Court in *Henderson v. Farmers Savings Bank of Harper*, 1925, 199 Iowa 496, 202 N.W. 259, a case involving a bank's power to contract indebtedness to purchase notes. The court in denying the banks this power stated:

"A savings bank is a creature of state law the same as any other corporation and can exercise no power not conferred by law. It derives its authority from the statutes creating it; and any act done in an attempt to exercise power not given it by statute is a void act." (p. 504)

Savings and loan associations are not permitted to make industrial loans under Chapter 534, Code of Iowa, 1971. Sections 534.17 and .19, which set out the types of investments and loans permitted, do not list industrial loans. Plainly investments and loans which are not provided for by statute cannot be made. *Home Savings and Trust Company v. Fidelity and Deposit Co.*, 1902, 115 Iowa 394. In 1937 this office issued an opinion concerning the ability of a building and loan association to make investments not authorized by law and stated:

"The statute having designated the security upon which building and loan associations may make loans, or in which they may invest their funds, it will be presumed that the Legislature intended thereby to exclude all other forms of loans or investments. The statute is plain and explicit, and to add to the classes of loans mentioned or the securities enumerated would be to broaden and extend the statute by interpretation beyond the terms thereof." 1938 OAG 325.

To allow savings and loan associations to form service corporations empowered to make industrial loans, would permit these savings and loan associations to circumvent Iowa law by the interposition of a corporate shell. The service corporation stands in the same position in relation to a savings and loan association as does a subsidiary or affiliated corporation does to its parent. It is in truth and fact and for all practical purposes the alter ego of its parent.

While in a strict sense the service corporation undoubtedly enjoys a separate corporate existence this notion of a completely separate legal corporate identity may be disregarded, and the actions of the subsidiary attributed to the parent where the subsidiary is so organized and controlled, and its business conducted in such a manner as to make the subsidiary merely an instrumentality, agent, adjunct or alter ego of its parent. Moreover, corporate identity has also been disregarded where it was used to cover illegality, fraud, injustice or where the courts felt it was necessary to achieve equity. *Ehlers v. Bankers Fire Insurance Co.*, 1922, 108 Neb. 756, 189 N.W. 159; *Chicago, Milwaukee and St. Paul Railroad Co. v. Minneapolis Civic and Commerce Association*, 1918, 247 U.S. 49, 62 L.Ed. 1229, 38 S.Ct. 553, 18 Am.Jur.2d 566.

In *Schlamowitz v. Pinehurst*, 1964, 229 F.Supp. 278 at 280, the court stated that when a corporate shell "merely functions as an agent or servant of another corporation the court will hold the latter responsible for the acts of its agents". Zolman Cavitch in *Business Organization with Tax Planning*, Vol. 3, §61.02(2), indicates that the relationship between a corporation and its parent will be defined as an agency when the corporation exists for the exclusive good or benefit of its parent. Here

the Iowa statute itself, §534.19(15), creates this close relationship, it provides that the service corporation exists "for the mutual good of said corporations" (the parent savings and loan associations). In addition to this the service corporation is wholly owned by the two parent savings and loan associations and the same people sit on the boards of directors of the corporations. In light of the above factors it is evident that the service corporation should be considered as a mere agent of its parents, and thus forbidden by Iowa law to make industrial loans; that is to say the agent corporation may not do what its parent associations are forbidden to do for the acts of the agent are attributable to the prinicpal, *Schlamowitz, supra.*

But apart from this the provisions of Chapter 536A which specifically deals with industrial loans indicate that the legislature did not want savings and loan associations or any entity related to them involved with industrial loans. §536A.2(5) defines an industrial loan company as follows:

"5. 'Industrial Loan Company' shall mean a corporation operating under the provisions of this chapter and engaged in the business of loaning money to be repaid in one payment or in weekly, monthly or other periodic installments and the charging, receiving or requiring of interest, discount, fees, compensation or charges of whatever nature or kind for the use of such money and for the services to be rendered to the borrower in connection with the loan. The term 'Industrial Loan Company' shall not include those businesses specifically exempted in section 536A.5."

Section 536A.5 provides:

"536A.5 Exemptions. The provisions of this chapter shall not apply to businesses organized or operating as permitted under the authority of any law of this state, or of the United States, relating to banks, trust companies, building and loan associations, savings and loan associations, insurance companies, small loan companies organized under the provisions of chapter 536, or credit unions; nor shall the provisions of this chapter apply to persons, firms or corporations that make no loans excepting on notes secured by first mortgages on real estate, nor shall the provisions of this chapter apply to licensed real estate brokers or salesmen, persons or corporations engaged exclusively in the business of purchasing commodity financing or commercial paper, pawnbrokers or persons engaged in the mercantile business. The provisions of this chapter shall not apply to loans made to any domestic or foreign corporation."

It seems clear that the provisions of the industrial loan chapter would not be applicable to the service corporation. It is a business organization operating under the authority of a law of this state relating to savings and loan associations. While it is doubtless incorporated under the general corporation laws it could not have been formed by these parents without the authorization contained in §534.19(15).

In *State v. Gaddy*, 1962,| 184 N.E.2d 698 at 693, the court stated:

". . . it is commonly understood that 'relating to' embraces much more than words as 'directly connected to' or 'a part of'."

In *City of Mitchell v. Western Pacific Service Co.*, 1933, 124 Neb. 248, 246 N.W. 484 at 486, the court said:

"The intransitive verb 'relate' is defined 'to stand in some relation; to have bearing on; concern; to pertain; refer, with to'."

The service corporation is a business organized or operating as permitted under the authority of a law of this state relating to savings and loan associations and under §536A.5 the provisions of Chapter 536A do not apply to this corporation. If the provisions do not apply the service corporation cannot be granted a permit by the Auditor of State. Since a permit is required in order to make industrial loans the service corporation is precluded from making such loans.

It should be noted here that even if the provisions of Chapter 536A were applicable, this service corporation has not met the requirements of §536A.21 which provides:

"536A.21 Other business in same office. A licensee engaged in the business of operating an industrial loan company under the provisions of this chapter may not conduct its business within any office, room, suite or place of business in which any other business is engaged in or conducted, unless specifically authorized to do so in writing by the auditor upon his finding that the character of the other business is such that its operation by the licensee would not facilitate evasions of this chapter or any other statute of the state of Iowa relating to the making of loans."

The service corporation here rents space from one of its parent savings and loan associations. There is a general lobby that gives access to both the service corporation and steps which lead to the lobby of the parent association. Of course this state of affairs could be easily corrected by moving one or the other of the two offices and it is not this defect in the application upon which we rely in reaching the conclusion we do. The impediment lies in the inherent agency relationship created by §534.19(15) and §536A.5 which excludes organizations related to savings and loan associations from its coverage. Accordingly, it is our opinion that a service corporation organized pursuant to §534.19(15), as amended by Chapter 250, §4, 64th G.A., First Session, may not be granted a license to conduct an industrial loan business.

June 22, 1972

STATE OFFICERS AND DEPARTMENTS: Duplicate Licenses — §§147.10, 147.80, Code of Iowa, 1971. A fee may be charged for issuing a duplicate of a renewal license. (Blumberg.to Illes, Executive Director, Iowa Board of Nursing, 6/22/72) #72-6-15

Lynne M. Illes, R.N., Executive Director, Iowa Board of Nursing: I am in receipt of your opinion request of June 9, 1972, wherein you ask whether a fee may be charged for issuing duplicate renewal licenses.

Section 147.80, 1971 Code of Iowa, sets forth the fees for issuances of licenses, renewal licenses and examinations for licenses. Subsection 18 of 147.80 provides:

"The department may issue a duplicate license, which shall be so designated on its face, upon satisfactory proof the original license issued by the department has been destroyed or lost, upon payment of a fee of five dollars."

There is no difference between a license and a renewal license. A license in Chapter 147 expires on the thirtieth day of June each year, where upon it is renewed. Section 147.10, Code of Iowa. The statute never speaks of a renewal license in those words. It only makes reference to a license.

In addition, the work involved in issuing a duplicate of a license is the same whether it is the license initially issued or a renewal of that license. The "original license" mentioned in Section 147.80(18) means the license issued after the thirtieth of June of that year, and not the initial license.

Accordingly, we are of the opinion that a fee may be charged for issuing a duplicate of a renewal license.

June 22, 1972

COUNTIES AND COUNTY OFFICERS: Secondary Road Employees — §509.16(3), Code of Iowa, 1971. Counties are not prohibited by law from paying overtime pay to secondary road employees. All county employees may be covered by a group health insurance plan and road employees are covered in such county plan if they choose to participate. (Nolan to Miller, State Senator, 6/22/72) #72-6-14

The Honorable Charles P. Miller, State Senator: In response to your request for an opinion we have considered the two questions you presented, which as we understand them, are as follows:

"1. Is there a law that expressly prohibits counties from paying the secondary road employees 1½ times their single day wage for working more than 40 hours a week and double the wage time for work done on Sunday?

"2. Can county road employees have a group health insurance plan? Would participation be optional, would all county employees have to be included?"

In answer to the first question, we have previously stated that the County Board of Supervisors sets the pay scale for workers on the secondary road system, and that they have power to raise the wages of such employees. 1968 OAG 1017, 1018. The Highway Commission has authority to pay over-time to employees working in excess of 40 hours per week by the device of paying them on an hourly basis or fixing a compensation as set salary with an additional amount for each hour worked in excess of 40 hours per week. 1968 OAG 909.

With respect to the second question, all county employees may be covered by group health insurance pursuant to §509.16(3), Code of Iowa, 1971, under a plan established by the County Board of Supervisors and to which the county contributes to the premium for the coverage of the employee. 1970 OAG 570. We do not believe there is presently authority for the coverage of road employees only under such a group plan. The county plan should cover all county employees. Participation by the employee is optional and it is possible for a plan to provide that the employee could purchase further coverage for his dependants for whom premiums are not paid by the county. 1966 OAG 2.7.

June 23, 1972

HEALTH CARE FACILITIES: Department of Social Services, Department of Health, Chapter 135C, 1971 Code of Iowa. Facilities which accommodate individuals who are capable of caring for themselves and do not require "supervision" are not required to be licensed pursuant to Chapter 135C, Code of Iowa, 1971. (Williams to Gillman, Commissioner of Dept. of Social Services, 6/23/72) #72-6-17

Mr. James N. Gillman, Commissioner, Department of Social Services: Reference is made to your memorandum in which you state:

"We have had considerable discussion within the Department concerning the appropriateness of placing individuals who are capable of caring for themselves in a foster care arrangement which does not entail health care, but rather a strengthened quality of life through the combining of resources.

Chapter 135C relates to Health Care Facilities and it appears to be an extremely restrictive effort, particularly as it pertains to adult foster care facilities and boarding homes. Since this chapter is obviously health oriented and pertains to sick people, it becomes necessary to know whether or not all adult foster care and boarding homes are required to be licensed under Chapter 135C. There are many people in Iowa who have been able to adjust to their particular disability and live very well with a minimum of help. This help constitutes personal care and certainly does not imply nursing care nor does it imply medical care except on intermittent basis, and then only minimally."

Section 135C.1(8), 1971 Code of Iowa, provides:

"8. 'Health care facility' or 'facility' means any adult foster home, boarding home, custodial home, basic nursing home, intermediate nursing home ,skilled nursing home, or extended care facility."

Section 135C.1(1), 1971 Code of Iowa, provides:

"1. 'Adult foster home' means any private dwelling or other suitable place providing for a period exceeding twenty-four consecutive hours accommodation, board, and supervision, for which a charge is made, to not more than two individuals, not related to the owner or occupant of the dwelling or place within the third degree of consanguinity, who by reason of age, illness, disease, or physical or mental infirmity are unable to sufficiently or properly care for themselves, but who are essentially capable of managing their own affairs."

Section 135C.1(2), 1971 Code of Iowa, defining "boarding home", provides essentially the same definition as the above-quoted §135C.1(1), 1971 Code of Iowa, relating to an "adult foster home" except that the "boarding home" definition extends to "three or more individuals".

Your question refers specifically to "individuals who are capable of caring for themselves in a foster care arrangement which does not entail health care, but rather a strengthened quality of life through the combining of resources". The facilities which require licensing under Chapter 135C, 1971 Code of Iowa, extend only those facilities which admit individuals who are "unable to sufficiently or properly care for themselves". Although this would seem to imply more than care for physical or mental illness only, it does not appear to extend to an individual who requires only minimal personal or medical care on an intermittent basis.

Section 135C.14, 1971 Code of Iowa, provides for the adoption of rules and regulations by the Department of Health and states:

". . . Such rules, regulations and standards shall be formulated in consultation with the commissioner of social services or his designee, and shall be designed to further the accomplishment of the purposes of this chapter . . ."

Section 135C.2, 1971 Code of Iowa, embodies the purpose of Chapter 135C, and states:

"2. Rules, regulations and standards prescribed, promulgated and

enforced under this chapter shall not be arbitrary, unreasonable or confiscatory and the department or agency prescribing, promulgating or enforcing such rules shall have the burden of proof to establish that such rules, regulations or standards meet such requirements and are consistent with the economic problems and conditions involved in the care and housing of persons in nursing homes and custodial homes."

Sections 135C.1(1) and 135C.1(2), 1971 Code of Iowa, defining "adult foster home" and "boarding home", respectively, provide that each home must provide "accommodation, board, and supervision". The Iowa Departmental Rules adopted pursuant to §135C.14 and filed in the Secretary of State's Office on May 23, 1972, pursuant to Chapter 17A, 1971 Code of Iowa, state:

"1.1(23) 'Supervision' means the direct overseeing and management of programs and services."

It would appear that whenever a facility has admitted only individuals who are capable of caring for themselves and do not require "supervision" as provided in §§135C.1(1) and (2), 1971 Code of Iowa, and defined in the above-quoted Iowa Departmental Rules, that such a facility would not be subject to the licensing provisions of Chapter 135C, 1971 Code of Iowa.

June 23, 1972

STATE OFFICERS AND DEPARTMENTS: Iowa American Revolution Bicentennial Commission — Ch. 1286, Laws of the 63rd G.A., Second Session. Where the Code of Iowa and the session law pertaining to the commission are silent as to the procedure to be followed in governing meetings and honorary members' voting privileges, *Robert's Rules of Order Revised* and other by-laws adopted by the commission may be used to decide the question. Only 21 regular members are provided for under Ch. 1286; since the legislature did not make any provision for additional regular members, none may be added. (Haesemeyer to Hibbs, Iowa American Revolution Bicentennial Commission, 6/23/72) #72-6-18

Mr. Phaene G. Hibbs, Field Representative, Iowa American Revolution Bicentennial Commission: Reference is made to your request for an opinion of the attorney general with respect to the following:

"On behalf of the Iowa American Revolution Bicentennial Commission I am writing your office regarding several matters that have come before our commission in recent meetings.

"1. Does a representative of a commissioner have the legal right to vote for the commissioner whom he is representing at our regular monthly Iowa American Revolution Bicentennial Commission meetings?

"2. According to House File 1339, an act creating the Iowa American Revolution Bicentennial Commission, it is our understanding that the Governor of the State of Iowa may appoint whatever honorary members he deems advisable. Do these honorary members have regular voting privileges?

"3. Do any and all additional members appointed by the Governor to the Iowa American Revolution Bicentennial Commission have to serve as honorary members or can a place be made to add members to the original twenty-one members as set forth in House File 1339?"

Both the Code of Iowa and Chapter 1286, Iaws of the Sixty-third General Assembly, Second Session (formerly H.F. 1339), are silent as to the procedure to be followed in the matters posed by questions one and two. Matters such as these, involving the voting of proxies or substitutes,

and honorary members are usually handled as internal matters within the framework of parliamentary rules of procedure.

Parliamentary law is generally thought to encompass all rules and usages of parliaments or other deliberative bodies by which their procedure is regulated. Such rules are merely procedural and not substantive. "The rules of procedure adopted by deliberative bodies have not the force of public law but they are merely in the nature of by-laws." *67 Corpus Juris Secundum,* Parliamentary Law, pp. 869-870.

Since no procedure has been prescribed by the Code of Iowa for your commission and since presumably you have not adopted by-laws covering these matters you may be guided by general parliamentary law as set forth in *Robert's Rules of Order Revised.* It is our understanding that other state commissions have adopted these rules for their own use for the convenient and orderly conduct of their business. Besides *Robert's Rules of Order Revised* the commission may adopt additional by-laws to modify, reserve, waive, revoke, or add to those rules set forth in *Robert's. 67 Corpus Juris Secundum,* Parliamentary Law, p. 870.

Question one states:

"1. Does a representative of a commissioner have the legal right to vote for the commissioner whom he is representing at our regular monthly Iowa American Revolution Bicentennial Commission meetings?"

Employing *Robert's Rules of Order Revised* as a guide, the answer to question one is "no". Voting by proxy is generally not permitted in deliberative bodies because it defeats the whole purpose of the group. An assembly such as the Iowa American Revolution Bicentennial Commission is supposed to come together to discuss ideas and decide issues. This commission was specifically formed by the legislature and it is their ideas and knowledge which is to be brought to bear on the subject of the 200th Anniversary of the birth of this nation. It should be noted, however, that *Robert's* provides that this can be changed in the by-laws, but this change is not recommended.

Question two states:

"2. According to House File 1339, an act creating the Iowa American Revolution Bicentennial Commission, it is our understanding that the Governor of the State of Iowa may appoint whatever honorary members he deems advisable. Do these honorary members have regular voting privileges?"

Robert's Rules of Order Revised also indicates that as a general rule honorary members may not vote, but this too may be changed by a by-law. In the situation at hand, a change to permit honorary members to vote might be appropriate in view of the wording of Chapter 1286, §1.3:

"3. The commission may recommend additional persons to assist it in its work, and the governor shall appoint such persons, and any others he deems necessary, to serve as honorary members."

This suggests that the duties of honorary members will entail more work than is usually contemplated as within the scope of an honorary member's duties. The Governor's office has also indicated that the adoption of a provision allowing honorary members to vote might be advisable in view of their regular attendance of meetings and interest and partici-

pation in the commission's activities. The proposed by-law could read as follows:

"All members, both regular and honorary, shall be entitled to one vote each."

or

"In view of their participation, assistance, and interest all honorary members of this commission shall be entitled to one vote each."

Question three does not involve parliamentary law or proceedings; but the statute itself.

"3. Do any and all additional members appointed by the Governor to the Iowa American Revolution Bicentennial Commission have to serve as honorary members or can a place be made to add members to the original twenty-one members as set forth in House File 1339?"

The statute makes provision for only 21 members, it enumerates how they are to be chosen and if vacancies appear how they are to be filled. No provision has been made to add to the original members. Since there is no provision for such addition, none can be made unless the legislature so provides. *Expressio unius est exclusio alterius.*

In view of our suggestion that honorary members be given voting privileges it would seem that additional regular members might not be needed. Of course under §1.3 hereinbefore set forth the commission may appoint additional persons to assist it in its work but such persons would not be members.

It is our recommendation that the commission adopt *Robert's Rules of Order Revised* and any other by-laws to settle questions involving procedural matters.

June 30, 1972

CITIES AND TOWNS: Municipal Airports — sec. 330.2, 330.12 and 330.14, Code of Iowa, 1971. Improvement to runways and other aeronautical facilities may be made pursuant to section 330.14, and may be financed by the issuance of revenue bonds. Such bonds shall be paid solely out of the revenue of such facilities. Land may not be acquired under section 330.14. A reasonable user's fee may be charged on persons using the airport facilities. (Blumberg to Riley, State Senator, 6/30/72) #72-6-19

Mr. Tom Riley, State Senator: We are in receipt of your opinion request of June 15, 1972, concerning improvements to the Cedar Rapids Airport. You specifically asked whether Sections 330.12 and 330.14, 1971 Code of Iowa, authorize the Cedar Rapids Airport Commission to sell revenue bonds for the building or repairing of runways and the acquisition of land to provide for safety factors, and to be financed by the imposition of a reasonable user's fee.

Section 330.2 of the Code gives cities and towns the power to acquire, establish, improve, maintain, and operate airports. Section 330.14 provides that all political subdivisions authorized to acquire, establish, improve, maintain and operate airports may purchase, construct, maintain and operate "hangars, administration and office buildings and other aeronautical and commercial facilities for which fees are charged, and pay for the same solely and only out of the earnings thereof." The Section also provides that the political subdivisions "are authorized to borrow

money for the purpose of purchasing or constructing the improvements herein authorized, and as evidence of such money borrowed to issue their bonds payable solely and only from the revenues derived from such improvements."

The first question is what may be done under Section 330.14. Aeronautical and commercial facilities for which fees are charged may be purchased, constructed, maintained, and operated. Payment for these facilities shall be made solely out of the earnings thereof. In addition, bonds may be issued to finance the facilities, which are payable solely from the revenues derived from the improvements. It therefore appears that revenue bonds, rather than general obligation bonds, may be issued to finance such improvements. It should also be noted that bonds need not be issued to finance such improvements. Payment for the improvements may be made out of earnings from fees charged for use of the facilities.

Your question was with reference to "building and/or repairing of airport runways, and/or acquisition of land . . ." Is a runway an aeronautical facility? The word "facility" has been defined as something by which anything is made easy or less difficult; an aid, advantage or convenience, such as facilities for travel. *Knoll Golf Club* v. *United States*, 179 F. Supp. 377 (D. N.J. 1959). "Facility" also means something that is built or installed to perform some particular function. *Raynor* v. *American Heritage Life Ins. Co.*, 123 Ga. App. 247, 180 S.E. 2d 248. As applied to carriers, "facilities" means everything necessary for the convenience of passengers and the safety and prompt transportation of freight; everything incident to the general, prompt, safe and impartial performance of the duties to the public at large imposed by the state. *Fraters* v. *Keeling*, 20 Cal. App. 2d. 490, 67 P.2d 118. Thus, courts have determined the following to be facilities: A lake, *Application* of *Oklahoma Planning and Resources Board*, 201 Okl. 178, 203 P.2d 415; power lines, *Jersey Central Power and Light Co.* v. *Federal Power Commission*, 319 U.S. 61, 63 S.Ct. 953, 87 L.Ed. 1258; sewer mains, *City of North Muskegon* v. *Bolema Construction Co.*, 335 Mich. 520, 56 N.W.2d 371; Ski slopes, *Telemark Co.* v. *Wisconsin Department of Taxation*, 28 Wis. 2d 637, 137 N.W.2d 407; switch tracks for railroads, *Tucker* v. *St. Louis-San Francisco R. Co.*, 298 Mo. 51, 250 S.W. 390; and tracks and land for street railroads, *Munoz* v. *Porto Rico Ry., Light and Power Co.*, 74 F.2d 816 (C.C.A. Puerto Rico).

From the above, it is apparent that runways would also be facilities. Therefore, the improvement of runways is within the purview of Section 330.14. However, a question arises as to whether land may be acquired pursuant to Section 330.14. Although land, at times, has been termed a facility, *Munoz* v. *Porto Rico Ry., Light and Power Co.*, supra, we do not feel that the acquisition of land was contemplated by the Legislature to be included within Section 330.14. The facilities in that section are of the nature of hangars, administrative and office buildings, and the like for which fees are charged. Fees are not normally charged for the land, but rather for use of the facilities upon the land. Therefore, we are of the opinion that the acquisition of land is not within the purview of Section 330.14.

Your next question concerns an imposition of a head tax or user fees to finance these improvements. In *Evansville-Vanderburgh Airport Authority* v. *Delta Airlines, Inc.*, 98 S.Ct. 1349, decided in April of this year, the Supreme Court of the United States specifically dealt with the Constitutionality of charges levied on persons using an airport. The Evansville, Indiana, airport authority established a use and service charge of one dollar for each passenger enplaning any aircraft at the airport. In a companion case, decided in the same opinion, the New Hampshire Legislature required that every interstate and intrastate common carrier by aircraft who uses any of the state's public airports pay a service charge of one dollar for each passenger enplaning upon an aircraft with a gross weight of 12,500 pounds or more, or fifty cents for each passenger enplaning an aircraft with a gross weight of less than 12,500 pounds. The Court held that neither schedule of fees was unconstitutional. Thus, a user's fee upon passengers is not unconstitutional, as long as the schedule of fees is not discriminatory, arbitrary or capricious. Section 330.12 provides, in part:

"Any city or town may from time to time fix, establish, and collect a schedule of charges for the use of such property or any part thereof, which charges shall be used in connection with the maintenance and operation of such airport."

In addition, Section 330.14 requires that fees be charged to pay for the improvements. Thus, the Legislature has already given governmental subdivisions the authority to charge fees for use of airports.

In conclusion, we are of the opinion that governmental subdivisions may make improvements to existing airports, and finance them either by issuance of revenue bonds, payable solely out of revenue derived from the improvements, or by earnings from fees charged for use of the facilities. In addition, we feel that runways are aeronautical facilities within Section 330.14. However, we do not feel that land may be acquired pursuant to Section 330.14. Finally, we are of the opinion that a reasonable user's fee may be charged on those persons who use the airport facilities.

June 30, 1972

STATE OFFICERS AND DEPARTMENTS: Commission for the Blind — Attendance at conventions and meetings — Chapter 93, Code of Iowa, 1971, as amended by Chapter 84, 64th G.A., First Session (1971). The Iowa Commission for the Blind may permit its staff members to attend conventions of the National Federation of the Blind, the American Association of Workers for the Blind or other comparable groups without loss of pay or use of vacation time. (Haesemeyer to Jernigan, Director, Iowa Commission for the Blind, 6/30/72) #72-6-20

Mr. Kenneth Jernigan, Director, Iowa Commission for the Blind: You have requested an opinion of the attorney general with respect to the following:

"It has been the long-standing policy of the Commission for the Blind that any staff member may attend conventions of the National Federation of the Blind or of the American Association of Workers for the Blind or of other comparable groups without loss of time or use of vacation. The purpose behind such long-standing policy has been to make available to members of our staff information, concepts dealing with the blind, technical devices, and similar reports that are presented at such meet-

ings. As you know our goal, which is also of long-standing, is to bring the blind person to a realization of his capabilities and this cannot be done without an ongoing educational process within our staff. Over the years staff members have attended institutes, panels, conventions, and other meetings dealing with educational opportunities for the blind, techniques used in training the newly blinded, library services for not only the blind but for the physically handicapped, mobility techniques, and many other aids and appliances, as well as being exposed to the constantly increasing medical knowledge concerning blindness.

"Attendance at these meetings has been generally voluntary on the part of the staff member although on occasion staff members have been directed to attend certain meetings. The National Federation of the Blind at its annual conventions has always been well attended by staff members of the Commission so much so, in fact, that we have totally discontinued paying any travel or other expenses for staff members attending. I would hasten to add at this point that attendance at the national conventions of the National Federation of the Blind by staff members is voluntary.

"The national convention of the Federation will be held this year in the City of Chicago. To give you a relatively short summary of the material and presentations that will be made at that convention, I submit the following:

"a) The Acting Director of the Sensory Aids Evaluation and Development Center at the Massachusetts Institute of Technology will present a paper on 'The M.I.T. Braillemboss;'

"b) The former Director of the Sensory Aids Evaluation and Development Center at M.I.T., Mr. Vito Proscia, who is Vice-President of Telesensory Systems, will present a paper on 'Sensory Aids for the Blind,' both today's status of the art and prospects for the future;

"c) Mr. Edward Rose, Director of the Public Policy Employment Programs of the Federal Civil Service Commission, will present a paper on the 'New Policies and Trends in Federal Civil Service Employment for the Blind;'

"d) Mr. Robert Bray, currently Chief of the Division for the Blind and Physically Handicapped of the Library of Congress in Washington, D.C., will speak on library services for the blind, the prospects that he anticipates and the problems presently encountered in providing adequate services;

"e) Employment for the blind is of vital concern to me, and I am looking forward personally to a panel entitled 'Employment for the Blind —New Careers and New Initiatives.' And on that panel will appear a highly successful blind insurance agent from the state of Mississippi; a blind mechanic who is the chief mechanic of the United States Auto Club (his residence being Massachusetts); a closed microphone reporter who resides in Washington, D.C., and is employed by the United States Department of Justice; a woman who is blind and who has had phenomenal success in developing an answering and radio paging service (her residence being in Massachusetts); and a field representative of the National Education Association — a blind man from Ellsworth, Maine;

"f) The Director of State Services for the Blind at Nashville, Tennessee, will give a professional paper on the present status of state agencies for the blind, her concept of future directions and future and expanded funding;

"g) Mr. John Twiname who is Administrator of the Social and Rehabilitation Service of the Department of Health, Education, and Welfare in Washington, D.C., will address this particular group on 'Federal Initiatives in Services to the Blind.' (Parenthetically, I am most interested in what this paper will reflect.);

"h) Dr. Richard Kinney of the Hadley School for the Blind at Winnetka, Illinois, will give a professorial paper concerning the deaf-blind and his topic is 'Challenges We Live By: Independence Without Sight and Hearing;'

"i) Dr. Jacob Freid, Executive Director of the Jewish Braille Institute of America in New York City, will address the group in his matter of concern which is public education and the challenge for equality of employment opportunity in that area;

"j) Mrs. B. G. Almaguer, who is Executive Director of the Johanna Bureau for the Blind and Visually Handicapped in Chicago, is scheduled to give a paper on 'Reading Materials for the Blind and Physically Handicapped.' (Parenthetically, I would add that our Commission is charged with this responsibility, and by that I mean reading materials not only for the blind but for the physically handicapped.);

"k) Seminars concerning the problems of blind lawyers, blind teachers, blind secretaries, blind merchants, blind students, blind sheltered shop employees, and blind computer science experts will be held. (This goes to the heart of our drive for employment opportunity.)

"There are seminars, panels, meetings, and discussions of both formal and informal nature but the outline set forth above should give you a sufficient grasp of the type of material and the competency of the people to whom our staff members will be exposed.

"No program worth its salt can establish itself and then dissociate itself from all of the things that are going on around the nation — whether we speak of blind persons, lawyers in their continuing education, or county officers meeting in Des Moines to analyze and study new legislative changes affecting their offices.

"The request of the Commission for the Blind to you is whether or not our long-standing policy of permitting our staff members to attend meetings of the National Federation of the Blind and similar groups without loss of time or use of vacation is proper taking into account that the fundamental and underlying purpose of such attendance is to increase the knowledge of the staff members and, therefore, their effectiveness in handling our programs."

It is manifest from your letter that attendance at and participation in meetings, panels, workshops, institutes and conventions sponsored by the National Federation and similar groups by commission staff members is both desirable and beneficial. Indeed, it could well be said that such attendance is vital to the effective functioning of the Iowa commission for the blind. Plainly, your commission cannot exist in a vacuum oblivious to developments in the field of services to the blind in other states and countries. Not only does the Iowa commission stand to gain much from meetings such as the one you describe but because of its acknowledged preeminence and position of leadership among state agencies for the blind, it also has a great deal to contribute. Getting together to discuss developments, exchange ideas and listen to authorities on blindness is what meetings of the type you describe are all about. Plainly they are worthwhile and job related.

Currently salaries and traveling expenses of employees of the Iowa commission for the blind are paid from funds appropriated by Chapter 29, 64th General Assembly, First Session (1971), §1 of which provides:

	1971-72 Fiscal Year	1972-73 Fiscal Year
IOWA COMMISSION FOR THE BLIND		

For salaries, support, maintenance and miscellaneous purposes:	$404,100.00	$446,720.00
For the training and education of multiple handicapped blind children:	10,000.00	10,000.00
Total Iowa commission for the blind:	$414,100.00	$456,720.00"

This very broad language is the same as that which has been used for prior appropriations. Certainly it imposes no limitations on the staff of the Iowa commission for the blind in terms of how they must spend their working hours or what kind of travel expenses may be reimbursed to them. Other departments having appropriations containing the same language routinely and regularly send staff members at state expense to meetings and workshops thought by the department head to be beneficial to the state. In your case the staff members of the commission for the blind are willing to pay their own expenses, a circumstance which does them great credit.

Under Chapter 93, Code of Iowa, 1971, as amended by Chapter 84, 64th General Assembly, First Session (1971) the Iowa commission for the blind is entrusted with broad duties relative to serving and aiding the blind citizens of this state. Withal we do not see how it could effectively and intelligently perform these duties without the access to the experience, expertise and ideas of authorities in the blind field which is afforded them by attendance at national meetings such as you describe.

Accordingly, it is our opinion that the Iowa commission for the blind may permit its staff members to attend conventions of the National Federation of the Blind, the American Association of Workers for the Blind or other comparable groups **without** loss of pay or use of vacation time.

June 30, 1972

STATE OFFICERS AND DEPARTMENTS: Dept. of Social Services — Juveniles — Ch. 232.2, Code, 1971; H.F. 1011, 64th G.A., Second Session. House File 1011 lowering age of majority from twenty-one to nineteen is prospective only and does not affect court orders entered prior to July 1, 1972, pursuant to juvenile court proceedings under Ch. 232, Code 1971, placing custody of the juvenile in the Dept. of Social Services. (Williams to Gillman, Commissioner, Iowa Dept. of Social Services, 6/30/72) #72-6-21

Mr. James N. Gillman, Commissioner, Iowa Department of Social Services: You have requested an Opinion of the Attorney General as to the following questions:

1. Can the Department of Social Services, under §232.2, 1971 Code of Iowa, continue to provide care and treatment to youth who have reached their 19th birthday and are under the age of 21 years who are enrolled in high school, a vocational program or are receiving special help for a medical, emotional, or social problem so that it would not be in their best interest to be discharged from guardianship solely because of age?

2. The Department of Social Services is responsible for a number of youth who are regularly on placement from the Training School for Boys, the Training School for Girls, the Iowa Annie Wittenmyer Home and the State Juvenile Home whose care is paid out of funds appropriated to those institutions. May these funds be used to pay cost of foster care, medical expenses and personal needs for such youth if they are

discharged from guardianship upon reaching their 19th birthday? [This is pursuant to Chapter 232, Code 1971]

3. Prior to the effective date of House File 1011, juvenile court orders pursuant to §232.36, 1971 Code of Iowa, committing youth to the Iowa Department of Social Services specifically state that the commitment is in force until the youth reaches his 21st birthday or until discharge at the discretion of the guardian. Does the passage of House File 1011 in any way affect orders of this nature issued prior to passage?

Initially, H. F. 1011, 64th G.A., Second Session, approved April 19, 1972, is an Act relating to the attainment of the age of majority, in which the Iowa General Assembly lowered the age of majority in Iowa from 21 to 19 years. The effective date of H. F. 1011 is July 1, 1972.

An essential element running through each of the questions posed by you is whether H. F. 1011 was intended by the General Assembly to be retrospective as well as prospective in operation. That is, did the General Assembly intend that H. F. 1011 would affect certain privileges, obligations, rights, duties and transactions predicated upon the previous age of majority? Therefore, before addressing ourselves specifically in answer to the questions you pose, it is necessary to determine whether H. F. 1011 was intended to operate retrospectively.

Where the Legislature has not specifically provided that a statute shall be prospective or retrospective in operation, the Iowa Supreme Court, through the years, has developed certain rules and presumptions of statutory construction in determining legislative intent. In a recent decision, *Schnebly v. St. Joseph Mercy Hosp. of Dubuque, Iowa,* 166 N.W.2d 780 (1969), the Iowa Supreme Court discussed these rules and presumptions as follows:

"The question whether a statute operates retrospectively or prospectively is one of legislative intent. (citations omitted). In determining such intent it is a general rule all statutes are to be construed as having prospective operation only unless the purpose and intent of the legislature to give it retroactive effect is clearly expressed in the act or necessarily implied therefrom. The rule is subject to an exception where the statute relates solely to remedies or procedure. If a statute relates to a substantive right, it ordinarily applies prospectively only. If it relates to remedy or procedure, it ordinarily applies both prospectively and retroactively. (citations omitted)."

A recent Amendment to Chapter 4, 1971 Code of Iowa, relating to statutory construction, [§§3 and 11, Chapter 77, 64th G.A., First Session] which became effective law on July 1, 1971, is also pertinent.

These sections read:

"3. Prospective Statutes. A statute is presumed to be prospective in its operation unless expressly made retrospective."

"11. The reenactment, revision, amendment, or repeal of a statute does not affect:

1. The prior operation of the statute or any prior action taken thereunder.
2. . . .
3. . . .
4. Any investigation, proceeding, or remedy in respect of any privilege, obligation, liability, penalty, forefeiture or punishment; and the investigation, proceeding, or remedy may be instituted, continued, or

enforced, and the penalty, forefeiture, or punishment imposed, as if the statute had not been repealed or amended. . . ."

Juvenile Court commitment orders are not entered to punish the minor. They are entered to provide rehabilitative services and situations for him. In so doing, some of his liberties are necessarily forfeited within the contemplation of the aforesaid amendment concerning statutory construction. And, within the meaning of the aforecited judicial decisions, substantive matters are involved.

Thus, the answer to your first two questions is in the affirmative, but to your last question, it is in the negative since the amendment operates prospectively only and does not affect existing court orders.

It should be noted that the definitions of "minor" and "adult" within the meaning of Chapter 232, 1971 Code of Iowa (Neglected, Dependent and Delinquent Children), are changed by Section 18 of H.F. 1011, effective July 1, 1972.

That section reads:

"Sec. 18. Section two hundred thirty-two point two (232.2) subsections four (4) and five (5), Code 1971, are amended to read as follows:

4. 'Minor' means a person less than nineteen years of age or a person who is at least nineteen years of age but less than twenty-one years of age who is regularly attending an approved school in pursuance of a course of study leading to a high school diploma or its equivalent, or regularly attending a course of vocational or technical training either as a part of a regular school program or under special arrangements adapted to the individual person's needs.

5. 'Adult' means a person ninteen years of age or older."

June 30, 1972

STATE OFFICERS AND DEPARTMENTS: Dept. of Social Services — Prisoners; Paroles — §247.2, 1971 Code of Iowa as amended by H.F. 1042, Acts of 64th G.A., 2nd Session (1972). Amendment permitting the counting of parole time against sentence is not effective until July 1, 1972; and it is at the time of the act which results in revocation when credit against a sentence ceases. (Williams to Gillman, Commissioner, Dept. of Social Services, 6/30/72) #72-6-22

Mr. James N. Gillman, Commissioner, Department of Social Services: You have requested an opinion of the Attorney General concerning an interpretation of §247.12, 1971 Code of Iowa, as amended by H. F. 1042, Acts of the 64th G.A., Second Session (1972). You ask the following questions:

1. Will inmates who are serving a sentence on July 1, 1972, and have been on parole on this sentence receive credit for the time on parole although all of that time occurred before July 1, 1972?

2. The other question is, when does the counting of the parole time cease, i.e., is it at the time the notice of revocation is executed, or is it at the time when the act was committed which resulted in the revocation?

I

Prior to enactment of H. F. 1042, there was no provision in §247.12, 1971 Code of Iowa, which allowed the counting of parole time against an inmate's sentence. Initially, §247.12, 1971 Code of Iowa, reads as follows:

"247.12 Parole time not counted. The time when a prisoner is on parole or absent from the institution shall *not* be held to apply upon the sentence against the parolee if the parole be revoked . . ." [Underscoring Supplied]

The passage of H. F. 1042, however, amended §247.12 so that the counting of parole time against sentence will be allowed, with certain exceptions, on the effective date of the Act. That amendment reads as follows:

"The time when a prisoner is on parole from the institution shall be held to apply upon the sentence against the parolee even if the parole is subsequently revoked, except that the time when the parolee is in violation of the terms of his parole agreement shall not apply upon the sentence."

In construing statutes, it is necessary to consider legislative presumptions. Section 3, Chapter 77, 64th G.A., First Session, Statutory Construction, reads as follows:

"Sec. 3. Prospective statutes. A statute is presumed to be prospective in its operation unless expressly made retrospective."

The time at which an Act duly passed by the General Assembly takes effect is governed by Art. 3, §26, Constitution of the State of Iowa, which reads:

"No Law of the General Assembly, passed at a regular session, shall take effect until the first day of July next after the passage thereof. . . . If the General Assembly shall deem any law of immediate importance, they may provide that the same shall take effect by publication in newspapers in the state."

Under the above-quoted provisions of the law and the Iowa Constitution, the amendment to §247.12, Code of Iowa, is prospective in its operation. It does not become effective until July 1, 1972, since there was no provision for a sooner effective date provided for by the General Assembly.

Thus, anyone on parole before July 1, 1972, does not receive credit against his sentence for that period of time.

II

In answer to your other question, we believe that the counting of parole time against a sentence of an inmate on parole ceases at the time he commits an act which results in revocation and not at the time the notice of revocation is executed.

June 30, 1972

STATE OFFICERS AND DEPARTMENTS: Department of Public Safety, Standardization of Forms — §§321.8, 343.14, Code of Iowa, 1971. Statutory command requiring state officers and agencies to standardize forms required to be submitted by counties to state officers and agencies does not imply the power to compel counties to procure equipment necessary to effectuate such standardization. (Schroeder to Lunn, Assistant Webster County Attorney, 6/30/72) #72-7-1

Mr. Richard C. Lunn, Assistant Webster County Attorney: This will constitute a reply to your formal request for an opinion from the Attorney General concerning implementation of the "tracis" system with

respect to motor vehicle registration on July 1, 1972, and its effect on County Treasurers throughout the state.

You ask, first of all, whether the Department of Public Safety can compel County Treasurers to purchase the special typewriters necessary to implement standardization of forms.

Section 321.8, Code of Iowa, 1971, invests the Commissioner of Public Safety with the following duty:

"The commissioner shall prescribe and provide suitable forms of applications, registration cards, certificates of title and all other forms requisite or deemed necessary to carry out the provisions of this chapter and any other laws, the enforcement and administration of which are vested in the department except manufacturer's or importer's certificates."

This section merely imposes upon the Commissioner the duty to standardize and provide the forms incident to Chapter 321. There is no mention of any reciprocal duty on the part of the County Treasurer's Office.

As authority for requiring the purchase of the special typewriters the Department of Public Safety, in its directive of February 17, 1972, has cited Section 343.14, Code of Iowa, 1971, which reads:

"All reports and forms required to be submitted by county officers to state officers and agencies shall be submitted on standardized forms furnished by the state officer or agency. All state officers and agencies which receive reports and forms from county officers shall consult with the state comptroller, and the office for planning and programming, and shall devise standardized reports and forms which will permit computer processing of the information submitted by county officers, and shall distribute the standardized reports and forms to the county officers."

Again, the dictate "shall" is inserted in that statute in reference to standardization and furnishing of forms.

In the case of *Schmidt* v. *Abbott*, 1968, 156 N.W.2d 649, our Supreme Court held:

"When addressed to a public official the word 'shall' is ordinarily mandatory, excluding the idea of permissiveness or discretion."

The Department of Public Safety feels therefore, that the statutory command to standardize forms implies the power to compel the respective counties to procure conforming equipment. This alleged power is not to be found in a strict reading of the statute and it is my opinion that to assert that it is implicit from the statute's language is to diametrically deviate from the existing rules of sound statutory construction.

In the case of *State* v. *Downing*, 1968, 155 N.W.2d 517, the Iowa Supreme Court held:

"In the field of legislative interpretation it is not for us to rule according to what the legislature might have said. We must rule according to the meaning of what the legislature has said and done."

All duties imposed by the statute are duties imposed upon state officers and agencies, not the counties nor county officers. If the only way the Department of Public Safety can standardize its forms for computer processing is by obtaining typewriters with special "Optical Character Recognition" font, then those machines must be furnished by the Department of Public Safety. As the statute requires that standardized forms

must be furnished by the state officer or agency, it certainly implies that the equipment necessary for the effectuation of that standardization also be furnished by said agency.

In view of this conclusion, it is unnecessary to discuss the second aspect of your question relating to the appropriation of funds for the purchase of said typewriters.

July 7, 1972

STATE OFFICERS AND DEPARTMENTS: Conservation — Title searches and recording fees—§467B.9, Code of Iowa, 1971. Charges for title searches and recording fees may be paid from funds collected for the acquisition of lands or rights or interests therein under the doctrine of implied power. (Peterson to Greiner, Director, Dept. of Soil Conservation, 7/7/72) #72-7-2

Mr. William H. Greiner, Director, Department of Soil Conservation: Reference is made to your request for an opinion of the Attorney General as to whether charges for title searches and recording fees relating to lands or interests in land acquired pursuant to authority contained in Code §467B.9 may be paid from funds collected pursuant to said section.

Section 467B.9, Code of Iowa, 1971, provides:

"Tax. The county board of supervisors may annually levy a tax not to exceed one-quarter mill on all agricultural lands in the county, the same to be used to acquire land or rights or interests therein by purchase or condemnation, and for repair, alteration, maintenance, and operation of the present and future works of improvement built on lands under the control or jurisdiction of the county, as provided for in this chapter."

Although the statute does not specifically provide for payment of such charges from funds collected thereunder, we are of the opinion such expenditures are authorized under the doctrine of implied power. As stated in *Willis* v. *Consolidated Independent School District*, 1930, 210 Iowa 391, 396, 227 N.W. 532, 535:

"It is the universal rule of statutory construction that, wherever a power is conferred by statute, everything necessary to carry out the power and make it effectual and complete will be implied." [Citing authorities] (Cited with approval in *Koelling* v. *Board of Trustees of Mary F. Skiff M. H.*, 1966 259 Iowa 1185, 146 N.W. 2d 284, 290.)

Section 467B.9, supra, makes available certain tax monies to be used to "acquire land or rights or interest therein by purchase or condemnation." Such expenditures represent such an integral part of the process of acquiring lands as to make the services represented by such charges and thus payment therefor necessary for the "effectual and complete" operation of §467B.9.

July 11, 1972

STATE OFFICERS AND DEPARTMENTS: Board of Nursing—§§147.2, 152.1, 152.2 and 152.3, Code of Iowa 1971; and Chapter 148, Acts of the 64th G.A., 1st Session. The term "nurse" as used in Ch. 148 of the 64th G.A. refers only to registered or licensed practical nurses as defined in Ch. 152, 1971 Code of Iowa. (Blumberg to Illes, Executive Director, Iowa Board of Nursing, 7/11/72) #72-7-3

Mrs. Lynne M. Illes, R.N., Executive Director, Iowa Board of Nursing: We are in receipt of your opinion request of June 20, 1972. In it, you

made reference to a prior opinion of this office of December 8, 1971, which discussed the dispensing and administration of controlled substances by nurses and agents of a practitioner, pursuant to Chapter 148 of the Acts of the 64th General Assembly, First Session. Your question now is whether the term "nurse" as used in that opinion and Chapter 148 means only registered nurse and/or licensed practical nurse, or does it include nurses aides, orderlies and the like.

Chapter 148 of the 64th General Assembly does not define "nurse." Therefore, we must look to other chapters and acts of the Legislature. Section 152.1, 1971 Code of Iowa defines nursing as follows:

"*Practice of nursing defined.* For the purpose of this title any person shall be deemed to be engaged in the practice of nursing as a registered nurse who performs any professional services . . . in the prevention of disease or in the conservation of health.

"For the purpose of this title the practice of nursing as a licensed practical nurse shall mean the performance of such duties as are required in the physical care of a convalescent, a chronically ill or an aged or infirm patient . . . requiring the knowledge of simple nursing procedures but not requiring the professional knowledge and skills of a registered nurse."

Section 152.2 provides that nursing shall not include the following: the care of sick by domestic servants or the like; the domestic administration of family remedies; assistance in an emergency; services by nursing students incidental to courses; services by employed workers in offices, hospitals and health care facilities under the supervision of a physician or licensed nurse; practice of a nursing student employed to assist a registered professional nurse.

Section 152.3 sets forth the requirements for licenses. Pursuant to that section, licenses *shall* be issued for registered nurses and licensed practical nurses. The requirements of both for licensure are similar. They must be eighteen years of age; have good moral character; be a graduate of a high school and hold a diploma from an accredited nursing school; and, pass examinations for their respective licenses.

Section 147.2 states that no person "shall engage in the practice of . . . nursing . . . unless he shall have obtained from the state department of health a license for that purpose." From the above it appears that a nurse is either a registered nurse or a licensed practical nurse, both of which have to be licensed.

Section 101(1), of Chapter 148, 64th G.A. provides:

"Nothing in this Act shall be construed to prevent a physician, dentist, or veterinarian from delegating the administration of controlled substances under this Act to a nurse or intern . . ."

Here the term "nurse" is used in conjunction with the term "intern." It is obvious that the Legislature intended both to have the same responsibilities as to administration of controlled substances. Since an intern is a person with a medical degree, serving as an assistant resident in a hospital, it is apparent that a nurse, in Chapter 148, should have similar qualifications. We do not believe that the Legislature went to the trouble of limiting and controlling the use and administration of certain

drugs, while at the same time allowing a wide variety of persons to be termed "nurses" for administration of some of these drugs. For instance, nurses or interns may administer schedule II drugs upon an oral prescription, not in the practitioner's presence. However, others, i.e. agents of the practitioner, may only administer schedule II drugs upon written prescription and only in the practitioner's presence. If "nurse" includes others than registered or licensed practical nurses, the above distinction becomes meaningless.

Accordingly, we are of the opinion that the term "nurse" as used in Chapter 148 of the 64th General Assembly refers only to registered nurses or licensed practical nurses, licensed by the State.

July 11, 1972

MOTOR VEHICLES: Mobile Homes — §§321E.1, 321E.3, 321E.8 and 321E.9, Code of Iowa, 1971. Movement of mobile homes under 12 feet 5 inches is unlimited under either single trip or annual permit. Movements of mobile homes exceeding 12 feet 5 inches must be under the provisions of §321.3, with each permit granted limiting the distance of the move, as prescribed therein. (Schroeder to Kennedy, State Senator, 7/11/72) #72-7-4

The Honorable Gene V. Kennedy, State Senator: This will acknowledge your recent letter of inquiry concerning the movement of mobile homes on Iowa highways. I have paraphrased your questions as follows:

Section 321E.3, Code of Iowa, 1971, restricts movement of mobile homes to a "maximum distance" of 50 miles, §321E.8 restricts movement to a "total aggregate" of 50 miles, and §321E.9, paragraph 1, states that no mobile home over 68 feet long may be moved. However, it has been stated that a manufacturer obtains a permit for the first 50 miles, a dealer for the second 50 miles and the owner for a third 50 miles, thus enabling a 14′5″ x 85′ mobile home to be moved a maximum of 150 miles. Is this a circumvention of the law?

In answering your question, I refer you to Chapter 321E, Movement of Vehicles of Excess Size and Weight, which was enacted as Chapter 285, Acts 62nd G.A., effective July 1, 1967, as an amendment to Chapter 321.

Section 321E.1 gives to the Highway Commission and local authorities, within their discretion, the authority to issue permits (either single trip or annual) for the movement of indivisible loads which exceed the maximum weights and loads specified in §§321.452 to 321.466, but not to exceed the limitations imposed in §§321E.1 to 321E.15.

Section 321E.3, Escorts for movement—distance schedules, states as follows:

"All movements of mobile homes and other vehicles the width of which, including any load, exceeds the roadway lane width of the highway or street being traversed, shall be under escort. Permits for the movement of indivisible loads exceeding twelve (12) feet five (5) inches in width or mobile homes of widths including appurtenances exceeding twelve (12) feet five (5) inches shall be restricted to maximum trip distances in accordance with the following schedule . . ."

All loads exceeding twelve (12) feet five (5) inches in width and less than fifteen (15) feet wide are restricted to fifty (50) miles maximum

trip distance by the schedule of this section.

The actual trip distance of over-width loads is subject to adjustments on account of road widths and traffic volumes, all in accordance with the formulas provided in §321E.4 and §321E.5 of Chapter 321E. (See O.A.G. 68-4-16, April 2, 1968.)

Section 321E.8 (which provides for issuance of annual permits) paragraphs 1 and 2, provides:

"*Except as provided under section 321E.3* and subject to the discretion and judgment provided for in section 321E.1, annual permits shall be issued in accordance with the following provisions:

1. Vehicles with indivisible loads having an overall width not to exceed twelve feet five inches or *mobile homes* including appurtenances not to exceed twelve feet five inches and an overall length not to exceed seventy feet zero inches may be moved for unlimited distances. The vehicle and load shall not exceed the height of thirteen feet, ten inches and the total gross weight as prescribed in section 321.463.

2. Vehicles with indivisible loads having an overall width not to exceed fourteen feet, zero inches and an overall length not to exceed eighty feet zero inches shall be restricted to trip distances not to exceed fifty highway and street miles *in total aggregate.* The vehicle and load shall not exceed the height as prescribed in section 321.456 and the total gross weight as prescribed in section 321.463." (Emphasis added)

Black's Law Dictionary defines "aggregate" as the entire number, sum, mass or quantity of something.

An aggregate is essentially a sum, and the words "in the aggregate" are defined to mean "taken together", considered as a whole; collectively. (In re: Miller's Estate 168 A. 807)

Construing the words "total aggregate" of the statute [321E.8(2)] it is apparent that the legislature intended to restrict the 50 miles "total aggregate" to the combinations of miles on highways and streets together. For example, if such a load was moved 10 miles on a city street, it could be moved only an additional 40 miles on the highway system.

Because the legislature saw fit to specifically include "mobile homes" in paragraph 1, it is our opinion that paragraph 2 of §321E.8, as written, was not meant to apply to mobile homes. For it is a primary rule of statutory construction, that inclusion of items in a specific statute excludes the items not specifically included. *Dotson v. City of Ames*, 1960, 251 Iowa 467, 101 N.W.2d 711; *Archer v. Board of Education*, 1960, 251 Iowa 1077, 104 N.W.2d 621.

Section 321E.9 which provides for the issuance of single trip permits states in paragraph 1:

"*Except as provided in section 321E.3* and subject to the discretion and judgment provided for in section 321E.1, single trip permits shall be issued in accordance with the following provisions:

1. Vehicles with indivisible loads having an overall width not to exceed twelve (12) feet five (5) inches or *mobile homes* including appurtenances not to exceed twelve (12) feet five (5) inches and an overall length not to exceed eighty (80) feet zero (0) inches may be moved for unlimited distances. No mobile home may be moved under the provisions of this subsection if the actual mobile home unit exceeds sixty-

eight (68) feet in length. No unit moved under the provisions of this subsection shall exceed the height as prescribed in section three hundred twenty-one point four hundred fifty-six (321.456) of the Code and the total gross weight as prescribed in section three hundred twenty-one point four hundred sixty-three (321.463) of the Code." (Emphasis added)

It should be noted that both of the above §§321E.8 and 321E.9 contain the phrase, "Except as provided under Section 321E.3 . . .".

Thus, it seems that §321E.3 should be considered paramount in determining the movements of such homes.

To summarize, under the above quoted sections, the permissible distance movements of mobile homes would be as follows:

1. Mobile homes or vehicles under 12 feet 5 inches wide may be moved unlimited distances as long as they do not exceed the height of 13 feet 6 inches (§321.456), weight of 18,000 lbs. per axle (§321.463), or the maximum length requirements of 70 feet for annual permit and 80 feet for single trip permit.

2. All mobile homes over 12 feet 5 inches wide must be moved as provided in §321E.3, the maximum trip distances given in the schedule and under escort.

3. Mobile homes of any width are restricted to 68 feet in length by §321E.9. Thus, while it is true that mobile homes 14 feet 5 inches wide may be moved, it is not true as stated in your letter that trailers over 68 feet in length may be moved. The 80-foot (not 85 feet as in your letter) limitation in §321E.9 applies to the trailer and tow, the combination of which may not exceed 80 feet in length.

Thus, under the current system, it would be permissible to issue a permit to the manufacturer for a 50-mile trip, a permit to a dealer for another 50-mile trip and yet another single trip permit to the new owner for the maximum 50-mile trip under §321E.3.

July 11, 1972

TAXATION: Valuation of property tax exemption property — §427.1, Code of Iowa, 1971; §3 of S.F. 1096, Acts of 64th G.A., 2nd Session. All classes of property exempt from taxation are to be listed and valued by the assessor in accordance with the provision of §3 of S.F. 1096. The assessor should do all that is possible to comply with this statute. Griger to Griffin, State Senator, 7/11/72 #72-7-5

Honorable James W. Griffin, Sr., State Senator: In your recent letter, you have requested the opinion of the Attorney General as follows:

"On behalf of Mr. Dennis L. Nelson, CAE-CIA of the Iowa Assessors Assoc. they would like to have a clarification and interpretation of Section 3, Senate File 1096. Legislative intent as to the assessment of property that no doubt never will be taxed such as Federal, State, City and School properties should be clarified.

A special concern is arriving at market value of governmental buildings and contents. A question arises as to the legal description of presently exempt personal property.

The main point of misunderstanding is that no assessor has the budget, personnel nor time to complete this project by April 16, 1973, as re-

quested by the bill."

Section 3 of S.F. 1096, Acts of 64th General Assembly, Second Session, provides:

"Section four hundred twenty-seven point one (427.1), Code 1971, as amended by chapter two hundred fifteen (215), section one (1), Acts of the Sixty-fourth General Assembly, First Session, is amended by adding the following new subsection:

Each county and city assessor shall determine the assessment value that would be assigned to the property if it were taxable and value all tax exempt property within his jurisdiction. The list of tax exempt property shall contain a legal description of the tax exempt property and the name of the owner of the tax exempt property, the market value of the tax exempt property, and the assessed value of the tax exempt property. The list of tax exempt property shall be filed with the director of revenue and the local board of review on or before April sixteen of each year."

Chapter 215, Acts of 64th General Assembly, First Session, merely struck the property tax exemption for private or professional libraries as contained in §427.1(15), Code of Iowa, 1971.

Section 3 of S.F. 1096, as quoted above adds a new subsection to §427.1, Code of Iowa, 1971, which Code section deals exclusively with various classes of property exempted by the legislature from property taxation. Section 427.1 exempts from property taxation federal and state property in subsection 1 thereunder and subsection 2 concerns tax exemptions for various political subdivisions, including cities and school districts.

Section 3 of S.F. 1096 does not place any classes of property exempted under §427.1 on the tax rolls, but does require each county and city assessor to determine the valuation of such property. Clearly, §3 of S.F. 1096 requires assessors to determine the valuation of all classes of property listed under the various subsections of §427.1, including Federal, State, and local governmental properties exempted thereunder.

There is no legal description of personal property analogous to a legal description of real property. Section 3 of S.F. 1096 requires a "legal description" of tax exempt property to be contained in the list thereof. A description of the personal property in a manner similar to that made by an assessor for taxable property would seem to satisfy this requirement.

Whether or not any assessor has the budget, personnel or the time to complete the work set forth in §3 of S.F. 1096 is a question we would have no knowledge about now. We can only state that the assessor should value all of the tax exempt property in his jurisdiction in accordance with this new law. The word "shall" as used in a statute, unless otherwise specifically provided by the legislature, imposes a duty. See §14(10) (1) of Ch. 77, Acts of 64th General Assembly, First Session. At the very least, the assessor should do all that is possible to comply with §3 of S.F. 1096. Whether the assessor should value all privately owned tax exempt property before valuing all government-owned property is a matter for the assessor's discretion.

July 11, 1972

TAXATION: Authority of county treasurer to accept payment of delinquent mobile home tax in installments; — §135D.22, Code of Iowa, 1971; §135D.24, Code of Iowa, 1971, as amended by Ch. 133, §§1 and 2, Acts of the 64th G.A., First Session. The statutes do not forbid the county treasurer from accepting at his discretion less than the full amount of tax due, but such acceptance does not release any lien that may exist, nor does it jeopardize the treasurer's right to enforce collection of the remaining unpaid balance. (Griger to Atwell, Supervisor of County Audits, Auditor of State's Office, 7/11/72) #72-7-6

Mr. H. E. Atwell, Supervisor of County Audits, Office of Auditor of State: You have requested an Attorney General's Opinion with reference to the authority of county treasurers to accept partial payments of delinquent semiannual taxes on mobile homes. The substance of your inquiry is as follows:

"Mobile home owners are assessed for taxes, as provided in Section 135D.22.

Some owners do not pay their taxes to the County Treasurer semiannually, or annually, and become delinquent for one or more years.

Does the County Treasurer have the authority to accept weekly, or monthly, payments of this delinquent tax, or does the total delinquent tax have to be paid at one time?"

This question has never been specifically dealt with by the Iowa Supreme Court. However, the courts of other jurisdictions have developed a body of fairly well-defined rules with respect to partial payments of taxes.

Since taxation is strictly a creature of the legislature initial consideration must be given to the statutory provisions which impose the semiannual tax and provide for its collection.

Section 135D.22, Code of Iowa, 1971 provides:

"The owner of each mobile home shall pay to the county treasurer a semiannual tax as herein provided. However, when the owner is any educational institution and the mobile home is used solely for student housing or when the owner is the state of Iowa or a subdivision thereof, the owner shall be exempt from the tax provided herein . . ."

Section 135D.24, Code of Iowa, 1971, as amended by Ch. 133 §§1, 2, Acts of the 64th G.A., First Session states:

"The semiannual tax provided herein shall be due and payable to the county treasurer semiannually on or before January 1 and July 1 in each year; and shall be delinquent February 1 and August 1 in each year, after which a penalty of five percent shall be added each month until paid. The semiannual payment of taxes and license may be paid at one time if so desired. A mobile home parked and put to use at any time after January 1 or July 1 shall be immediately subject to the said taxes prorated for the remaining months or days of the tax period. Said tax shall be due and payable immediately, and delinquent thirty days after said parking and subject to the same penalties herein set out. Not more than thirty days nor less than ten days prior to the date that the tax becomes delinquent, the county treasurer shall cause to be published in a newspaper of general circulation in the county, a notice to mobile homeowners. The notification shall include the date the tax becomes delinquent, and the penalty which will apply when delinquent . . .

The tax and registration fee shall be a lien on the vehicle senior to any other lien there may be upon it."

As far as payment of the tax is concerned, the statutes provide only that one tax is payable to the county treasurer on or before January 1 and July 1 of each year; it is payable to the county treasurer; it is delinquent on February 1 and August 1; liability for the tax constitutes a lien on the mobile home. No provision is made for payment of the tax in installments. Moreover, the county treasurer is given no express authority to enter into agreements for payment in installments. The statute is silent on that issue.

General treatment of the subject of partial payment of taxes is found at 84 C.J.S. *Taxation*, 1954, §624(b). There, the problem is discussed in terms of the taxing official's duty to accept partial payment of taxes and to issue a receipt therefore. The conclusion is that except where part payment is authorized by statute, acceptance of such part payment cannot be compelled, although an officer may accept it in his discretion:

"The law ordinarily intends that taxes shall be paid in full at one time and, unless part payment is authorized by statute, a taxpayer cannot tender a portion of the tax due and demand a receipt therefor; but this is not equivalent to saying that the officer may not legally accept a partial payment, and he may do so in his discretion, crediting it on the tax assessed."

This proposition is supported at 3 Cooley, *Taxation*, 1924, §1253 and in the decisions of numerous state courts. See *White v. Kelley*, 1965, 215 Tenn. 576, 387 S.E.2d 821; *McQuade v. State*, 1948, 321 Mich. 235, 32 N.W.2d 510; *Salts v. Salts*, 1945, 28 Tenn. App. 318, 190 S.W.2d 188; *State v. Evans*, 1931, 79 Utah 370, 6 P.2d 161. See also, Annotation at 84 A.L.R. 774.

The power of the taxing authority to enforce lawfully imposed taxes through a tax sale is not jeopardized by acceptance of an amount less than the full amount due and owing. 84 C.J.S. *Taxation*, 1954, §628 states:

". . . [I]f the payment is less than the full amount due, its receipt does not estop the taxing authority from collecting the balance. So, partial payment of a tax does not release the lien or relieve the property from the balance of the tax due;"

The Tennessee Court of Appeals upheld this view in *Salts v. Salts*, 1945, 28 Tenn. App. 318, 190 S.W.2d 188 wherein it was held:

"Partial payment of the tax does not release the lien or relieve the property for the balance of the tax due. After a partial payment and the failure to pay the balance it is the duty of the proper officers to enforce collection of the balance in the same manner as if no partial payment had been made. The original tax should be credited with the partial payment."

Other decisions reaching the same conclusion are *Tharel v. Board of Commissions of Creek County*, 1940, 86 Utah 375, 44 P.2d 1085; *State v. Evans*, 1931, 79 Utah 370, 6 P.2d 161; and *McQuade v. State*, 1948, 321 Mich. 235, 32 N.W.2d 510.

In conclusion, there is nothing in Chapter 135D of the Iowa Code which would prevent a county treasurer in his discretion from accepting delinquent taxes in a sum less than the full amount of semiannual tax due. However, the right of the taxing authorities to collect the remainder of the tax through the prescribed enforcement procedure is in no way

prejudiced by acceptance of such partial payment. The unpaid balance continues to be presently due, owing, and enforceable. In this respect, no agreement between taxpayer and treasurer providing for installment payment of the tax is binding to preclude collection of all unpaid taxes.

July 11, 1972

STATE OFFICERS AND DEPARTMENTS: Director of Iowa Law Enforcement Academy—§§80B, 80B.5, 19A.22, Code of Iowa, 1971; Ch. 2, Laws of the 64th G.A., First Session (H.F. 739). Where the Code of Iowa establishes a State Merit System, Ch. 19A, the provisions of which shall prevail over subsequent Acts unless such Acts provide a specific exemption from the Merit System, an Act which establishes the maximum salary of a state officer employed pursuant to the Merit System constitutes such an exemption. (Haesemeyer to Keating, Director, Iowa Merit Employment Dept., 7/11/72) #72-7-7

Mr. W. L. Keating, Director, Iowa Merit Employment Dept.: Reference is made to your request for an opinion of the attorney general with respect to the following:

"By Acts of the 62nd General Assembly there was enacted legislation, signed in July 1967, establishing a mandated law enforcement training program and creating the Iowa Law Enforcement Academy. This legislation is set forth in Section 80B of the Code. Section 80B.5 of the legislation states: 'A director of the academy and such staff as may be necessary for it to function shall be employed pursuant to the Iowa merit system.'

"Chapter 2 of the Laws of the 64th General Assembly, 1st Session (H.F. 739) reflects legislative action of the General Assembly establishing state official's salaries. Line 91, of this Chapter, set the salary of the Director of the Iowa Law Enforcement Academy. This legislative action would appear to be inconsistent with the provisions of 80B.5 of the Code, as set forth above.

"Section 19A.22 of the Code, dealing with the Merit System, states: 'The provisions of this chapter, including but not limited to its provisions on employees and positions to which the merit system apply, shall prevail over any inconsistent provisions of the Code and all subsequent Acts unless such subsequent Acts provide a specific exemption from the merit system.'

"This matter was informally discussed with Michael Laughlin, Assistant Attorney General. After reviewing the citations set forth above, he suggested the Merit System request, in writing, an opinion of the Attorney General's office concerning this apparent conflict. In view of this suggestion, I respectively request that the Merit System request an Attorney General's opinion as to whether the salary consideration for the Director of the Iowa Law Enforcement Academy is within the purview of the Iowa Merit System." (John F. Callaghan, Director of Iowa Law Enforcement Academy, to Wallace L. Keating, Director of Iowa Merit Employment Department).

Unless specifically established by the legislature, the salary for the director of the Iowa law enforcement academy (ILEA) is definitely within the purview of the Iowa merit system, pursuant to 80B.5 and 19A.22, Code of Iowa, supra. The answer to your question depends solely on an interpretation of the term "specific exemption", 19A.22, Code of Iowa. House File 739, section 1.32, which establishes a salary "not exceeding" $18,000 for the director of ILEA, provides a "specific exemption" as contemplated by §19A.22. This Act only undertakes to establish the director's maximum salary, while the Iowa merit system continues to control the director's conduct, duties, vacation time, working hours and

even his pay scale up to $18,000. This "specific exemption" has a two year duration, as stated in section 2 of H.F. 739:

"When any of the laws of this state are in conflict with this Act, the provisions of this Act shall govern for the biennium."

By "specific exemption from the merit system" it is not meant that subsequent Acts must specifically state which provisions of the merit system are being exempted. If such were the case, the legislature would be forever combing the statutes to make sure that each new piece of legislation would not be nullified by a former Act requiring "specific exemptions." Generally, the latest expression of legislative intent should govern.

Our interpretation of the above statutes causes no actual interference with the operation of the merit system since, in effect, H.F. 739, merely raises the upper limit of the ILEA director's salary from $17,628 to $18,000. The new ceiling of $18,000 still allows discretion by the merit system to set the ILEA director's salary, except that now there is more leeway for making the determination. It must be emphasized that the Act does not set the salary of the director of ILEA; it merely sets the upper limit of his salary.

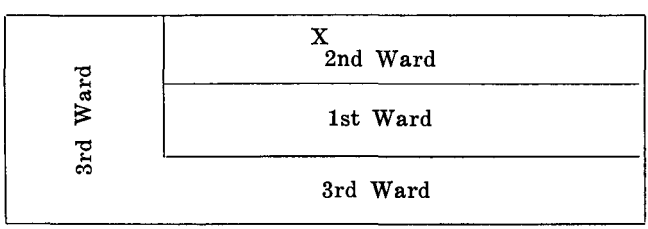
July 11, 1972

ELECTIONS: County Board of Supervisors — §331.26, 1971 Code of Iowa. Where county board of supervisors have already chosen a plan and redistricted the supervisor districts pursuant to §331.26(1), the board may not redistrict again until 2 years have passed, §331.26(3). Since supervisor district lines do not have to follow city ward lines, a person living in a supervisor district may be a candidate for supervisor, despite the fact that the city ward lines which used to follow those of the supervisor district have been changed and he now lives in a different city ward. (Haesemeyer to Smith, O'Brien County Attorney, 7/11/72) #72-7-8

Mr. Richard T. Smith, O'Brien County Attorney: Reference is made to your request for an opinion of the attorney general in regard to a question posed by the O'Brien County Auditor. The Auditor states:

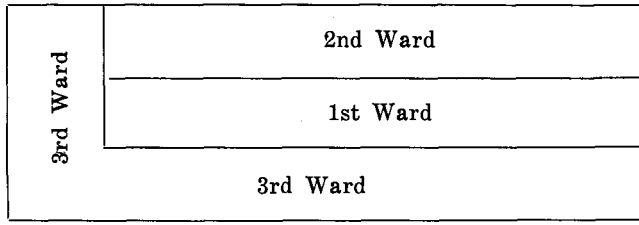
"After the 1970 census figures were received the O'Brien County Board of Supervisors chose [supervisor] Plan 2, election at large but residence requirements. We have 5 supervisors and the county was divided into 5 districts. District No. 3 consisted of Sheldon 1st Ward and Sheldon 2nd Ward. At that time these two wards were as follows:

Map 1



"The city of Sheldon has a population of over 4,000. The city has now taken a block by block census and have adopted new voting wards and precincts of equal population. The new wards are as follows:

Map 2



"Question 1 — Do the Board of Supervisors have the authority to redistrict at this time so their districts follow the new wards in Sheldon?

"Question 2 — Is it required for them to redistrict Supervisor districts at this time?

"Question 3 — If the answer to Questions 1 and 2 are both 'no' and someone lives on the place marked X on map 1, can they be a candidate for Supervisor, District 3? At the time the districts were set by O'Brien County Board of Supervisors, this person lived in 2nd Ward and could meet the resident requirement. This person lives in same house but under the new city reapportionment now lives in 3rd Ward."

The answer to both questions 1 and 2 is "no". From the facts presented in your letter, the Board of Supervisors have already selected Plan 2 and have drawn up the supervisor districts. §331.26 of the 1971 Code of Iowa, provides the guidelines for Plan 2. The section states:

"331.26 Plan 'two' terms of office. If plan 'two' is selected pursuant to section 331.8 or 331.9, the county board shall be elected as provided in this section.

"1. The board of supervisors shall, before November 1, 1969, and before November 1 of the nonelection year following each federal decennial census thereafter, if necessary, divide the county into a number of supervisor districts corresponding to the number of supervisors in such county. However, if such plan is selected pursuant to section 331.9, the board shall so divide the county before March 15 of the election year. The board shall make a good-faith effort to achieve precise mathematical equality in the population of such districts as indicated by the most recent federal decennial census.

"Such supervisor districts may be drawn on the basis of existing natural or artificial divisions and boundaries of the county; township and voting precinct lines may be crossed; but in no event shall the existence of convenient district boundaries justify the designation of supervisor districts which are not of as nearly precise mathematical equality in population as is practicable.

"2. Members of the county board shall be required to reside one to each supervisor district but shall be elected by the electors of the county at large. Election ballots shall be prepared to specify the district which each candidate seeks to represent and each elector may cast a vote for one candidate from each district for which a supervisor is to be chosen in the general election.

"3. The county board may redesignate supervisor districts once in every two years, and no sooner. In the event that the board redistricts, it must be completed and available to the public by November 1 of the year prior to the election to be applicable in that election year. The provisions of this subsection shall not be construed as having the effect of lengthening or diminishing the term of office of any member of such board as a result of such redesignation, nor shall districts be redesignated except in compliance with this section. No supervisor district shall be designated by the county board pursuant to subsection 1 of this section which, while complying with the requirement that it be of as nearly

precise mathematical equality in population as practicable to the other supervisor districts of the county, discriminates by design for or against any political party, board member, candidate for board membership, racial or ethnic minority or any other group of persons.

"4. At the primary and general elections the number of supervisors, or candidates for such offices, which constitute the county board in such county shall be elected as provided in this section. Terms of members shall be as provided in section 331.25, subsection 2."

The statute clearly provides that the county board of supervisors may redesignate supervisor districts once every two years and no sooner. These words are clear and unambiguous. This section of the 1971 Code of Iowa has not been amended or repealed by the new redistricting laws passed by the Sixty-Fourth General Assembly. Since the O'Brien County board of supervisors has already designated the districts, by the terms of §331.26, it must wait two years before redistricting.

The answer to Question 3 is "yes". The person referred to in your request still lives in supervisor district 3. The supervisor district lines do not have to coincide with the ward lines of the city of Sheldon, see §331.26(1), paragraph 2, cited above. The change of ward lines by the city of Sheldon does not affect the supervisor district, except that supervisor district 3 can no longer be said to consist of the 1st and 2nd wards of the City of Sheldon. Accordingly, it is our opinion that the person who lives on the place marked X on map 1 may be a candidate for supervisor district 3.

July 13, 1972

ELECTIONS: School Election. The provisions of H.F. 1147, Acts of the 64th G.A., 1st Session, 1971, do not govern the method of conducting school elections. (Nolan to Schweiker, Sec. of State's Office, 7/13/72) #72-7-9

Mr. J. Herman Schweiker, Deputy Secretary of State: This letter is written in response to your request for a legal interpretation of H. F. 1147, Acts of the 64th General Assembly, Second Session. Your question is whether or not the recently enacted legislation affects school elections. This matter was partially covered by the opinion issued by this office on May 15, 1972, in which you were advised that where the machinery for a school bond election was set in motion before the enactment of H. F. 1147 the election should be conducted by the school officials rather than by the County Commissioner of Elections.

House File 1147, supra, is a general act amending the election laws of this state. By virtue of the language contained in §49.1, Code of Iowa, 1971, which provides that the provisions of Ch. 49 "shall apply to all elections known to the laws of the state, except school elections", it appears that all school elections are exempt from the general law pertaining to the method of conducting elections although the school laws follow similar procedures. Also and as pointed out in our May 15, 1972, opinion, §277.33 acts to exclude school elections from the general election laws.

Under the provisions for statutory construction enacted by the General Assembly (Ch. 77, Acts 64th G.A., 1st Sess.) the following is found:

"If a general provision conflicts with a special or local provision, they

shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision."

Since the legislature did not repeal any of the sections of the Code pertaining to the method of conducting school elections, we must conclude that they remain exempt from the revised election laws. Consequently, school elections continue to be governed by the provisions of Chs. 273, 275, 277, 280A and 296 of the Code of Iowa, 1971, until the General Assembly of Iowa provides otherwise.

July 13, 1972

STATE OFFICERS AND DEPARTMENTS: Commissioner of State Department of Public Safety, Pay Plan for Peace Officers — secs. 19A.3(15), 19A.9(2), 80.8(3), 97A.1 as amended by Ch. 131 sec. 148, Acts of the 64th G.A. First Session, Code of Iowa, 1971; 1970 OAG p. 78. The Commissioner of the State Department of Public Safety has the authority to establish with the approval of the governor, a pay plan for the peace officers within that department. (Haesemeyer to Sellers, Commissioner of Department of Public Safety, 7/13/72) #72-7-10

Mr. Michael M. Sellers, Commissioner, Dept. of Public Safety: Reference is made to your request for an opinion of the attorney general with respect to the following:

"Section 19A.3, subparagraph 15, exempts from the State Merit System the members of the Iowa Highway Safety Patrol and other peace officers employed by the Department of Public Safety.

"Section 19A.9, subparagraph 2, provides in part: 'Unless otherwise established by law, the governor, with the approval of the executive council, shall establish a pay plan for all exempt positions in the executive branch of government except . . . , members of the Iowa Highway Safety Patrol and other peace officers, as defined in section 97A.1, employed by the Department of Public Safety.'

"Section 97A.1 of the Code, as amended by section 148 of chapter 131, Acts of the Sixty-fourth General Assembly, First Session, defines peace officer as 'all members of the divisions of highway safety and uniformed force and criminal investigation and bureau of identification in the department of public safety, except clerical workers, the division of drug law enforcement in the department of public safety, except clerical workers, and the division of beer and liquor law enforcement in the department of public safety, except clerical workers'.

"Section 80.8 of the Iowa Code, paragraph 3, says in part, 'The salaries of all members and employees of the department and the expenses of the department shall be provided for by the legislative appropriation therefor. The compensation of the members of the highway patrol shall be fixed according to grades as to rank and length of service by the commissioner with the approval of the governor.'

"We conclude from the foregoing that the Commissioner of the State Department of Public Safety, with the approval of the Governor, has the authority to establish a pay plan for the peace officers of the Department of Public Safety as defined by chapter 97A.1 of the Code, as amended. Do you agree?"

The language of the statutes is clear, plain and unambiguous and we are in agreement with your interpretation of them. See also 1970 OAG 78.

July 14, 1972

SCHOOLS — Authority to wreck — §297.22, Code of Iowa, 1971. Attor-

ney General opinion of April 15, 1939, has been superseded by subsequent legislation now found at §297.22. (Nolan to Kelly, Jefferson County Attorney, 7/14/72) #72-7-11

Mr. Edwin F. Kelly, Jr., Jefferson County Attorney: This letter is written in response to an inquiry from Mr. Richard McCurdy of your office who requested clarification as to an apparent conflict between the provisions of §297.22, Code of Iowa, 1971, and an Attorney General's opinion dated April 5, 1939, which states that a school board has no authority to wreck and abandon a school building without a vote of the electors of that school district.

At the time the 1939 opinion was written school directors had no authority to sell or lease school property independent of the power vested in the electors except in special chartered cities having a population of 50,000 or more. See §4385-A-1 - 4385-A-4, Code of Iowa, 1935. In subsequent amendments this power has been extended to other school corporation directors with the limitations presently provided under §297.22 of the Code. Consequently, it would appear that the opinion of the Attorney General dated April 5, 1939, has been superseded by subsequent legislation which now appears as §297.22, supra.

July 14, 1972

STATE OFFICERS AND DEPARTMENTS: Office for Planning & Programming — §358A.5, Code of Iowa, 1971. Counties establishing county zoning must have a "comprehensive plan" which is a general statement of policy of the result to be achieved in the community as a whole. (Nolan to Henke, Director, Division of Municipal Affairs, Planning & Programming, 7/14/72) #72-7-12

Mr. Kenneth C. Henke, Jr., Director, Division of Municipal Affairs, Office for Planning & Programming: This letter responds to your request for an opinion defining the phrase "comprehensive plan" as it appears in sec. 358A.5, Code of Iowa 1971:

"Such regulation shall be made in accordance with a comprehensive plan and designed to lessen congestion in the street or highway; to secure safety from fire, flood, panic, and other dangers; to protect health and the general welfare; to provide adequate light and air; to prevent the over-crowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements."

Our research on the subject indicates that the term "comprehensive plan" when used in connection with land use control means a general regulation or ordinance stating the policy to obtain a uniform result according to the present and potential uses of property within a district considering the individual parcels relationship to the community as a whole. 8 Words and Phrases, 1971, Supp. 53. *Furtney v. Simsbury Zoning Commission.* 159 Conn. 585, 271 Atla. 2d 319; *Walus v. Millington,* 266 N.Y.St.2d 833, 49 Misc. 104. The term also connotes an integrated product of rational process designed to promote health, morals, or general welfare. *Palasades Properties, Inc. v. Brady,* 79 N.Jer. Supr. 327, 191 Atla.2d 501. Such plan comprehends that its provisions shall include numerous ordinances formerly enacted independently and covering sanitation, fire, zoning, etc. *Connor v. Chanhassen Township,* 249 Minn. 205, 81 N.W.2d 789.

Secondly, you ask whether a county that desires to establish a county zoning ordinance is required in addition to undertake a comprehensive plan. My answer to this question is affirmative.

Section 358A.4, Code f Iowa 1971, provides that the Board of Supervisors may divide the county or any area or areas within the county into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of the chapter and to regulate the use of land within such districts by zoning.

It should be noted that while the statute provides for uniform regulations and restrictions for each class or kind of building within a given zoning district the regulations in one district may differ from those in another district. In view of the statutory provision permitting the board of supervisors to establish more than one zoning district within the county, and also the provisions excluding farms (sec. 358A.2) and land and structures within the limits of a city or town (sec. 358A.3) it is reasonable to conclude that the legislature by requiring a comprehensive plan provided a method of assuring that the general good of all the county would be reflected in the various zoning districts thus created.

July 14, 1972

STATE CLAIMS — Extradition. State is not liable to reimburse county in extradition claim where person extradited was not confined in state institution. (Nolan to Wellman, Sec., Executive Council, 7/14/72) #72-7-13

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: Re: Reimbursement of an Extradition Claim — Winnebago County. You have requested an opinion concerning the possible reimbursement to Winnebago County of an Extradition Claim in re: State of Washington v. Raymond F. Pepper. The claim amounting to $210.00 was paid by Winnebago County out of the Court Fund in December of 1971.

I find no statutory authority for the approval of such a claim by the Executive Council. Under §759.24, Code of Iowa, 1971, the expenses of extradition may be paid by the state demanding the person to be returned to it. We note that the State of Washington has a provision similar to §759.24 in §10.88-5, Revised Code of Washington. In any event, according to the facts as represented by the letter of the Winnebago County Auditor in this case, it is apparent that the State of Iowa is not liable for reimbursement to the county under either Code §19.10 or §663.44 due to the fact that the person extradited was not confined to a state institution, and, further, that habeas corpus proceedings were waived by the person arrested in this state, who was charged with having committed a crime in the State of Washington. 1968 OAG 657.

Accordingly, it is the opinion of this office that the claim of Winnebago County for reimbursement of an Extradition Claim should not be approved.

July 20, 1972

STATE OFFICERS AND DEPARTMENTS: Sanitary Disposal Projects — §406.6, Iowa Code 1971, Regulation 2.1 (406) of Iowa State Department of Health's Title XXV, Sanitary Disposal Projects. Sanitary land

facility which is considered an existing disposal site is not required to meet the rules and regulations regarding new sanitary disposal sites until July 1, 1975, but a comprehensive plan must be approved by the Commissioner of Public Health and a permit issued for its legal operation. (Corcoran to Faches, Linn County Attorney, 7/20/72) #72-7-14

Mr. William G. Faches, Linn County Attorney: We are in receipt of your letter of June 8, 1972, in which you request our opinion regarding the interpretation and application of rule 2.1 (406) of the Iowa State Department of Health's Title XXV, Sanitary Disposal Projects. Said rule reads as follows:

"Permit required. A new sanitary disposal project shall not be established after the effective date of these rules until a permit is issued by the commissioner."

You presented the following facts:

"Central City has a landfill or city dump presently operated by the owner of the premises and Linn County pursuant to a contract. The contract provides that the owner of the land may have free access to it for dumping and in consideration Linn County will cover the garbage disposed of and maintain the premises. Central City is not charged for its municipal waste deposited in this area. Linn County will terminate the contract with the land owner and exclusively maintain the new sanitary landfill. It is the intention that the land owner, Central City and Coggon will maintain the landfill in exactly the same manner which has been done in the past but without the assistance of Linn County. The same existing site will be utilized. The same procedures will be employed except they will be under the auspices of Central City, Coggon and the land owner. Prior to entering into the contract for several years with Linn County, the land owner had operated the facility himself. He does haul and pick up garbage from Central City and Coggon at the present time."

Your question is whether the continued operation of this site is a "new sanitary disposal project" requiring a permit from the Department of Health. Section 406.6 Code of Iowa, 1971, states in part as follows:

"Permits shall be issued for existing disposal sites which have not met all the provisions of this chapter and rules and regulations issued pursuant thereto, if a comprehensive plan for compliance within the time limitations required by this chapter is developed by a city, town, county or private agency and is approved by the commissioner of public health."

It is our opinion that the situation which you described is that of an existing disposal site and therefore not within the purview of rule 2.1 (406) (*Supra*) as a new disposal project. However, §406.6 provides that existing disposal sites shall be issued permits if a plan for compliance with the chapter is approved by the Commissioner of Public Health.

It is therefore our opinion that said site may be considered an existing site and not required to meet the rules and regulations regarding new sanitary disposal sites, but a comprehensive plan must be approved by the Commissioner of Public Health and a permit issued for its legal operation.

July 20, 1972

CITIES AND TOWNS: Special Election on Public Opinion Poll — §49.2, Code of Iowa, 1971. A special election for a public opinion poll is not authorized by the Constitution or the Code. (Blumberg to Irvin, Page County Attorney, 7/20/72) #72-7-15

Mr. J. C. Irvin, Page County Attorney: We are in receipt of your opinion request of June 20, 1972, regarding a special election for a matter of public interest. You specifically asked:

"1. Can the City Council authorize a Special Election for a matter of public interest rather than a Constitutional Amendment or a public measure?

"2. Can the City Council authorize an expenditure of tax funds for such an election?

"3. In the event such a Special Election is permissible, what chapters of the Code would govern the procedure for such an election?

"4. Would the results of the election be binding on the City Council?

"5. If several alternatives were presented to the voters, it would be impossible to have a majority of the vote favoring any one proposal. Would a plurality be sufficient?

"6. If such an election is permissible could it be held in connection with the State primary election?"

Section 49.2, 1971 Code of Iowa defines "election" as follows:

"1. The term 'general election' means any election held for the choice of national, state, judicial, district, county, or township officers.

"2. The term 'city election' means any other election held in a city or town.

"3. The term 'special election' means any other election held for any purpose *authorized or required by law.*" [Emphasis added]

Elections have no basis in the common-law, but are found only in the Constitution or statutes. It is stated in 26 Am.Jur. 2d *Elections* §183:

"It is fundamental that a valid election cannot be called and held except by authority of the law. There is no inherent right in the people, whether of the state or of some particular subdivision thereof, to hold an election for any purpose. Accordingly, an election held without affirmative constitutional or statutory authority, or contrary to a material provision of the law, is a nullity, notwithstanding the fact that such election was fairly and honestly conducted."

Similarly, it is stated in 29 C.J.S. *Elections* §66:

"In all popular forms of government the power of a majority to bind the minority by a popular vote depends on the fact that the elections are held by virtue of some legal authority. There is no inherent right or power in the people to hold an election, and the system of elections in this country is not of common-law origin, since it was unknown to the common law.

"The right or power to hold an election must be based on authority conferred by law, and an election held without affirmative constitutional or statutory, or contrary to a material provision of the law, is universally recognized as being a nullity, even though it is fairly and honestly conducted. An election purporting to have been held under a statute which by its terms had not then gone into effect is void, as is also an election called under a void statute."

The Code specifically sets forth the types of elections, general and special, that can be held, throughout the various chapters. We can find

no authority in any chapter for an election on a public opinion poll, which is what you are requesting. The Home Rule powers of a city do not change this result. An election may only be held pursuant to statutory or constitutional authorization. Any other election would be in contravention of the Code. This result is consistent with a prior opinion of this office on October 15, 1971, Turner to Riley.

Accordingly ,we are of the opinion that a special election for a matter of public interest (public opinion poll), other than a Constitutional Amendment or a public measure is not authorized.

July 21, 1972

ELECTIONS: County Commissioner of Elections, school elections, city elections, House File 1147, Acts, 64th G.A., Second Session (1972); §§277.33, 49.1, 39.5, 39.6, Code of Iowa, 1971; Senate File 428, §45, Acts, 64th G.A., Second Session, 1972; §49.57, Code of Iowa, 1971; House File 574, Acts, 64th G.A., Second Session; §§49.15, 49.16, 49.20, 50.11, 50.12, 50.1, Code of Iowa, 1971; §53.2, Code of Iowa, 1971, as amended by House File 1147, §24, Acts, 64th G.A., Second Session; §§53.11, 277.5, Code of Iowa, 1971. (1) School elections should continue, as in the past, to be conducted by school officials. (2) §§39.5 and 39.6 have not been repealed but the responsibility for giving notice of elections has been transferred to the county commissioner of elections. (3) There will not be any constables on the ballot in the primary, S.F. 428, §45. (4) The reverse side of the Presidential ballot must bear the name of the precinct, but this printing may be done with a hand stamp. (5) Nomination papers for city elections will be filed with the county commissioner unless the city has adopted the "city code of Iowa" (H.F. 574); if this has been adopted, papers will be filed with city clerk. (6) The county commissioner orders election supplies and has the ballots printed for city elections. (7) The town council appoints the city election judges and they receive compensation. (8) The county commissioner of elections publishes the notice for all city and special proposition elections. (9) The election returns and election supplies are brought to the county commissioner of elections after the canvassing is finished the night of the election. (10) The election board conducts the canvass with one of its clerks acting as clerk of the canvassing board. (11) Applications for absentee ballots are made to, mailed out, and received back by the county commissioner of elections. (12) The state commissioner of elections may provide for the appointment of a deputy commissioner of elections and all rules pertaining thereto. (13) If the school election is held before the November general election th precinct may be over 3500 people; if after November the precinct must follow the new lines, and may not be over 3500 people unless the school board combines them. (Haesemeyer to Synhorst, Secretary of State, 7/21/72) #72-7-16

The Honorable Melvin D. Synhorst, Secretary of State: Reference is made to the questions posed by the county auditors which you have submitted as a request for an attorney general's opinion.

"1. H.F. 1147, Sec. 2 (final paragraph). Clarify tax base and control county. One county has a school budget they control and the taxable base is larger in another county. Who handles the election?

"2. Page 5 of House File 1147, Sec. 8, says County Commissioner of Elections shall publish sample ballots. Was the section 39.5 and 39.6 repealed for publishing election notices?

"3. Will there be any Constables on the ballot in the Primary? The court reform bill eliminated the J.P.'s from the ballot.

"4. In counties using paper ballots, does the name of the precinct need to be printed on the reverse side of the 'President and Vice-President

Ballot'? This is the ballot to be used by persons not meeting the 30 day residence requirements.

"5. Where are nomination papers for city and school elections taken out and where filed?

"6. Does County Auditor order election supplies and have ballots printed for school and town elections?

"7. Who apoints and instructs election judges and clerks for school and town elections and do they receive compensation?

"8. Who published the Notice of Election and the ballot for school, town and all special proposition elections?

"9. Are election returns and supplies brought to the office of the County Auditor, or to the School Secretary and City or Town Clerk on election night or are they certified to the Auditor later?

"10. Who conducts the official canvass and who acts as Clerk of the canvassing board for city or school elections?

"11. Are applications for absentee ballots for all elections made to the County Auditor? If so, does the Auditor mail out and receive back these absentee ballots? Can electors vote in person in the Auditor's office in all elections, as they do in Primary and General Elections?

"12. If a school secretary or city or town clerk is appointed 'Deputy Commissioner of Elections', will he be required to file a bond? Will he receive compensation from the County? (If he received compensation, this same cost is to be charged back to the city, town or school holding the election and it would make no sense).

"13. Can a school election precinct be over 3500?"

Question 1. House File 1147, §2, final paragraph states:

"If a political subdivision is located in more than one county, the county commissioner of elections of the county having the greatest taxable base within the political subdivision shall conduct the election. The county commissioners of elections of the other counties in which the political subdivision is located shall cooperate with the county commissioner of elections who is conducting the election."

This paragraph and others within House File 1147 are not applicable to school elections. Chapter 277 of the 1971 Code of Iowa sets forth the procedure to be followed in the conduct of school elections. This chapter was not amended or repealed by the 64th General Assembly.

Sec. 277.33 provides:

"277.33 Application of general election laws. So far as applicable all laws relating to the conduct of general elections and voting thereat and the violation of such laws shall, *except as otherwise in this chapter provided,* apply to and govern all school elections. (Emphasis ours)

It should be noted that this section is a specific exemption. The conduct of school elections is to be governed by the procedure found in Chapter 277. The Supreme Court of Iowa has stated that when a general statute such as House File 1147, §2, which transfers all election duties to the county commissioner of elections, is in conflict with a specific statute, here §277.33, the specific statute prevails whether enacted before or after the general statute. *Shriver v. City of Jefferson,* 1971, Iowa, 190 N.W.2d 838, *Goergen v. State Tax Commission,* 1969, Iowa, 165 N.W.2d 782, and *Kruse v. Gaines,* 1966, 258 Iowa 983, 139 N.W.2d 535.

In addition to the specific exemption contained in §277.33, §49.1 of Chapter 49 which sets forth the mechanics for general elections provides:

"49.1 Elections included. The provisions of this chapter shall apply to all elections known to the laws of the state, except school elections."

In view of these two specific statutes, it is evident that until the Iowa legislature provides for a different procedure for school elections, they will continue to be conducted in the manner set forth in Chapter 277. See also OAG Haesemeyer to Synhorst, May 15, 1972, and Nolan to Schweiker, July 13, 1972.

Question 2. §§39.5 and 39.6, Code of Iowa, 1971, have neither been specifically repealed or amended. They provide:

"39.5 Notice of election. The sheriff shall give at least ten days notice thereof, by causing a copy of each proclamation to be published in some newspaper printed in the county; or, if there be no such paper, by posting such a copy in at least five of the most public places in the county.

"39.6 Notice of special election. A similar proclamation shall be issued before any special election ordered by the governor, designating the time at which such special election shall be held; and the sheriff of each county in which such election is to be held shall give notice thereof, as provided in section 39.5."

House File 1147, §2, states in part:

"Sec. 2. County commissioner of elections. The county auditor of each county is designated as the county commissioner of elections in each county. The county commissioner of elections shall conduct voter registration pursuant to chapter forty-eight (48) of the Code and conduct all elections within the county. All election and registration duties prior to the effective date of this Act imposed upon other public officials within the county are transferred to the county commissioner of elections. . . ."

In view of this language it would seem that the responsibility for publishing notice for both general and special elections has been transferred from the sheriff to the county commissioner of elections. This situation may be distinguished from your first question involving school elections because there is no specific statutory exception such as those found in §§49.1 and 277.33 which would operate to save the sheriff's duties under Chapter 39.

Question 3. There will not be any constables on the ballot in the primary. Senate File 428, §45, Acts of the 64th General Assembly, Second Session, provides:

"Sec. 45. Courts abolished, transition. All mayors' courts, justice of the peace courts, police courts, superior courts, and municipal courts and offices connected therewith, are abolished as of July 1, 1973. Promptly after July 1, 1973, the officials of these courts shall file all documents and books pertaining to their offices with the clerk of the district court of their counties. District judges shall assign to judicial magistrates the pending cases within judicial magistrates' jurisdiction, and such cases shall then be pending before those judicial magistrates. All other pending cases shall be pending in the district court of the county, and the clerk of that court shall within thirty days give written notice of that fact by ordinary mail to the parties or their attorneys of record at their last known addresses. *All municipal court judges, clerks of the municipal court and their deputies, bailiffs of municipal court and their deputies, police court judges, justices of the peace and constables holding office on July 1, 1972, shall continue in office through June 30, 1973.*" (Emphasis

ours)

Question 4. The name of the precinct does have to appear on the outside of the ballot used only for persons voting for president and vice president. §49.57, 1971 Code of Iowa, provides:

"49.57 Method and style of printing ballots. Ballots shall be prepared as follows:

"1. They shall be on plain white paper, through which the printing or writing cannot be read.

"2. The party name shall be printed in capital letters, not less than one-fourth of an inch in height.

"3. The names of candidates shall be printed in capital letters, not less than one-eighth, nor more than one-fourth of an inch in height.

"4. A square, the sides of which shall not be less than one-fourth of an inch in length, shall be printed at the beginning of each line in which the name of a candidate is printed, except as otherwise provided.

"5. On the outside of the ballot, so as to appear when folded, shall be printed the words 'Official ballot', *followed by the designation of the polling place for which the ballot is prepared,* the date of the election, and a facsimile of the signature of the auditor or other officer who has caused the ballot to be printed." (Emphasis ours)

In view of the limited number of these types of ballots, the designation of the polling place may be done with a hand stamp.

Question 5. As stated in Question 1 school elections do not come within the scope of the new election law and therefore nomination papers for school elections are taken out and filed as provided for in Chapter 277.

House File 574, Acts, 64th G.A., Second Session (1972), city code of Iowa, which takes effect whenever a city adopts its provisions or on July 1, 1974, provides in §64 that petitions for city elective office, requesting that the voter's name be placed on the ballot are filed with the city clerk's office. This measure was enacted by the same session of the general assmbly as House File 1147. It is a specific as opposed to a general statute and therefore takes precedence. §64 states:

"Sec. 64. A voter of a city may become a candidate for an elective city office by filing with the city clerk a valid petition requesting that his name be placed on the ballot for that office. The petition must be filed at least four weeks before the date of the election, and must be signed by voters equal in number to at least two percent of those who voted to fill the same office at the last regular city election, but not less than ten persons.

"The petitioners for an individual seeking election from a ward must be residents of the ward at the time of signing the petition. An individual is not eligible for election from a ward unless he is a resident of the ward at the time he files the petition and at the time of election.

"The petition must include the signature of the petitioners, a statement of their place of residence, and the date on which they signed the petition.

"The petition must include the affidavit of at least one voter other than the petitioners and the individual for whom the petition is being filed, stating the affiant's knowledge, information, and belief as to the residence of the petitioners.

"The petition must include the affidavit of the individual for whom it is filed, stating his name, his residence, that he is a candidate and eligible

for the office, and that if elected he will qualify for the office.

"The city clerk shall accept the petition for filing if on its face it appears to have the requisite number of signatures and if it is timely filed."

Candidates for city office living in cities which have not adopted this provision should file their nomination papers with the county commissioner of elections. Under §43.9, 1971 Code of Iowa, blank nomination papers will be provided by the county auditor for offices which require their papers to be filed with the county auditor. Cities having adopted §64 should provide blank nomination papers in the city clerk's office.

Question 6. House File 574 — "The City Code of Iowa" makes no provision for the ordering of election supplies and the printing of ballots. Since this duty was not specifically imposed on the city clerk the county commissioner of elections under the authority given him in House File 1147, §2, should order election supplies and have ballots printed.

As stated before school elections shall be handled under §277, 1971 Code of Iowa, and for the remainder of this opinion unless stated otherwise all questions involving schools will be deleted.

Question 7. Election judges and clerks are appointed and instructed for cities by the city council. §§49.15 and 49.16 have not been amended or repealed. They provide:

"49.15 Supervisors to choose members — chairman. The membership of such election board shall be made up or completed by the board of supervisors from the parties which cast the largest and next largest number of votes in said precinct at the last general election, or that one which is unrepresented. The board of supervisors shall select said members from a list of persons submitted by the official county chairman of each of aforesaid parties, filed with the said board not more than forty-five days nor less than thirty days prior to each primary and general election. In the event such lists are not timely filed, the said board shall make the selection thereof in the manner prescribed herein without such lists, or, if said lists are incomplete, the said board shall complete the selection thereof in the same prescribed manner. The board of supervisors shall also designate one member of said election board to be the chairman of that board, and of the counting board, if any, with authority over the mechanics of the work of said boards.

"49.16 Council to act in cities and towns. In city and town elections, the powers given in this chapter and duties herein made incumbent upon the board of supervisors shall be performed by the council."

The duty of the county board of supervisors to choose the election board members has not been transferred to the county commissioner of elections. This is shown by House File 1147, §29, Acts of the 64th G.A., Second Session, which states in part:

"The election board of the special precinct shall be known as the absentee ballot counting board. The county board of supervisors shall appoint the absentee ballot counting board in the manner prescribed in sections forty-nine point twelve (49.12) and forty-nine point fifteen (49.15) of the Code."

This indicates that the county board of supervisors still retains that duty to appoint election boards. Since §49.16 merely imposes this duty on the city council, the city council therefore appoints the election board of judges and clerks. It should be noted here that §49.13 which provided

that the councilmen of cities and towns were to be election judges has been repealed under House File 1147, §35.

The statute providing for the compensation of election boards was not repealed or amended and states:

"49.20 Compensation of members. The members of election boards shall receive two dollars per hour while engaged in the discharge of their duties and ten cents per mile for actual and necessary travel. Compensation shall be paid to members of election boards only after the vote has been canvassed and it has been determined in the course of such canvass that the pollbook jurat has been properly executed by the election board."

Question 8. As explained in Question 2 above the duty to publish notice for general and special elections set forth in §§39.5 and 39.6, 1971 Code of Iowa, has been transferred to the county commissioner of elections. The county commissioner of elections also publishes the notice for city elections.

House File 574, §§3 and 65, "City Code of Iowa", Acts of the 64th G.A., Second Session, provide for notice in city elections:

"Sec. 3. Unless otherwise provided by state law:

"1. If notice of an election, hearing, or other official action is required by this Act, the notice must be published at least once, not less than ten nor more than twenty-five days before the date of the election, hearing, or other action.

"2. A publication required by this Act must be in a newspaper published at least once weekly and having general circulation in the city. However, if the city has a population of two hundred or less, or in the case of ordinances and amendments to be published in a city in which no newspaper is published, a publication may be made by posting in three public places in the city which have been permanently designated by ordinance."

"Sec. 65. Notice and a copy of the ballot for each regular, special, primary, or run-off city election must be published as provided in section three (3) of this Act, except that notice of a regular, primary, or run-off election may be published not less than five days before the date of the election. The published ballot must contain the names of all candidates, and may not contain any party designations. The published ballot must contain any question to be submitted to the voters."

Neither of these sections imposes this duty on the city clerk, therefore it must be carried out by the county commissioner of elections.

Question 9. The election returns and supplies are brought to the office of the county auditor, now designated the county commissioner of elections on election night. According to §50.1 the canvass by the election judges shall begin as soon as the polls are closed. §50.11 provides that after the canvass is completed the judges shall proclaim the results of the election. Then §50.12 provides:

"Return and preservation of ballots. Immediately after making such proclamation, and before separating, the judges shall fold in two folds, and string closely upon a single piece of flexible wire, all ballots which have been counted by them, except those endorsed 'Rejected as double', 'Defective', or 'Objected to', unite the ends of such wire in a firm knot, seal the knot in such a manner that it cannot be untied without breaking the seal, enclose the ballots so strung in an envelope, and securely seal

such envelope. *The judges shall at once return all the ballots to the officer from whom they were received, who shall carefully preserve them for six months.*" (Emphasis ours)

Since the county commissioner of elections now has charge of all the ballots, the judges must return the supplies and the election returns to his office the night of the election. The words "at once" used in the statute are clear and unambiguous.

Question 10. The official canvass of city elections is conducted by the election board. Under §49.12 this board consists of three judges and two clerks. As we have shown in Question 7, the city council chooses the election board. §50.1, 1971 Code of Iowa, provides for canvassing:

"50.1 Canvass by judges. When the poll is closed, the judges shall forthwith, and without adjournment:

"1. Publicly canvass the vote, and credit each candidate with the number of votes counted for him.

"2. Ascertain the result of the vote.

"3. Compare the poll lists and correct errors therein.

"4. Cause each clerk to keep a tally list of the count."

Since the election board as provided for in §49.12 consists of 3 judges and 2 clerks, one of those clerks shall keep the tally list provided for in §50.1 cited above.

Question 11. Applications for absentee ballots for all elections, except school elections, shall be made at the county commission of elections, the county auditor's office. §53.2, 1971 Code of Iowa, as amended by House File 1147, §24, states:

"53.2 Application for ballot. Any voter, under the circumstances specified in section 53.1, may, on any day not Sunday, election day, or a holiday and not more than forty days prior to the date of election, make written application *in person or by mail* to the county commissioner of elections on forms prescribed by the state commissioner of elections. Each application form shall have a serial number and shall have postage prepaid.

"The county commissioner of elections shall keep a list of all application forms distributed, to whom each application was distributed, and the date on which the application was distributed." (Emphasis ours)

The county commissioner must receive them back because he then must present them to the Special Absentee Ballot Counting Board set up by §29 of House File 1147. This section provides in part:

"Absentee Ballot Counting Boards. There is created a special precinct in each county in which all absentee ballots cast at any general election in this state shall be counted. The county commissioner of elections may create a special precinct for counting absentee ballots in any other election.

"The board's powers and duties shall be the same as provided in this chapter for judges and clerks in polling places, except that the board shall receive and count all absentee ballots for all precincts in the county upon receipt from the county auditor."

Electors may vote in person in the auditor's office in all elections except school elections. The statute §53.11 which governs this also con-

tains the word "clerk" which should be ignored for reasons discussed above. §53.11 provides:

"53.11 Personal delivery of ballot. Such officer shall deliver said ballot or ballots to any qualified elector applying in person at the office of such auditor or clerk, as the case may be, and subscribing to the foregoing application, not more than fifteen days before the date of said election, but said ballot shall be immediately marked, enclosed in the ballot envelope with proper affidavit thereon, and returned to said officer. Such officer shall record the numbers appearing on the application and ballot envelope along with the name of the qualified voter."

§53.11 is designed to facilitate absentee voting, and a contrary interpretation would simply hinder an elector in his attempt to exercise his right to vote.

Question 12. While House File 1147, §11, Acts of the 64th G.A., Second Session, provides for the appointment of deputy commissioners of *registration*, there is no such corresponding provision in §2 of House File 1147 which deals with the commissioner of *elections* and his powers and duties.

§1 of House File 1147 sets forth the duties of the state commissioner of elections:

"Section 1. State Commissioner of Elections. The secretary of state is designated as the state commissioner of elections and shall supervise the activities of the county commissioners of elections. There is established within the office of the secretary of state a division of elections which shall be under the direction of the state commissioner of elections. The state commissioner of elections may appoint a person to be in charge of the division of elections who shall perform such duties as may be assigned to him by the state commissioner of elections. The state commissioner of elections shall prescribe uniform election practices and procedures and shall prescribe the necessary forms required for voter registration and the conduct of elections. The state commissioner of elections may adopt rules and regulations, pursuant to chapter seventeen A (17A) of the Code to carry out the provisions of this section."

It is evident that the county auditor's duties will be greatly increased now that he has been designated county commissioner of elections and no provision has been made for deputies. It is our recommendation, in light of the authority given to the state commissioner of elections, that the state commissioner promulgate rules, regulations and procedures allowing for the appointment of deputies. If these deputy commissioners of elections were also city clerks, it would seem that both bond and salary could be eliminated. These rules would define the deputies' duties and could be changed if at some point in time deputies were no longer needed.

Question 13. The size of precincts is dealt with in §49.4, 1971 Code of Iowa, as amended by House File 1256, §§1 and 4, Acts of 64th G.A., Second Session, and sets forth the rule that no precinct shall have population greater than 3500 people. As we have stated before Chapter 49 and amendments to it do not apply to school elections.

"49.1 Elections included. The provisions of this chapter shall apply to all elections known to the law of the state, except school elections."

If §49.1 were the only applicable statute, school precincts could contain

more than 3500 people. However, §49.1 is not the only statute applicable to this situation.

§277.33 provides:

"277.33 Application of general election laws. So far as applicable all laws relating to the conduct of general elections and voting thereat and the violation of such laws shall, except as otherwise in this chapter provided, apply to and govern all school elections."

Chapter 277 does have other provisions which govern election precincts. §277.5 states:

"277.5 Precincts for voting. Voting precincts shall be the same as for the last general state election except that the board may consolidate two or more such precincts into one unless there shall be filed with the secretary of the board at least twenty days before the election, a petition signed by twenty-five or more electors of any precinct requesting that such precinct shall not be consolidated with any other precinct. To such petition shall be attached the affidavit of a qualified elector of the precinct that all the signers thereof are electors of such precinct, and that the signatures thereon are genuine."

If a school election is held before the 1972 general state election, the precincts will follow the old precinct lines and school precincts may be larger than 3500. Accordingly, any school election held after the November 1972 general election will use the new voting precincts of 3500, unless the school board combines two precincts as provided for in §277.5 quoted above.

July 21, 1972

HIGHWAYS: Outdoor Advertising — Political Campaign signs and devices — House File 734, enacted by 64th G.A. of Iowa, 2d Session. Political campaign signs and devices are not exempted from controls enacted by Iowa Junkyard Beautification and Billboard Control Act. (Sauer to Varley, Majority Leader, House of Representatives, 7/21/72) #72-7-17

Mr. Andrew Varley, State Representative: Reference is made to your letter of July 12, 1972, wherein you request an opinion concerning the control of campaign material including signs, posters, bumper stickers and related advertising normally used by candidates, with regard to House File 734, enacted by the Second Session of the 64th General Assembly.

"Advertising devices" as defined by Section 10, paragraph 7, "includes any outdoor signs, display, device, figure, painting, drawing, message, placecard, poster, billboard, or other device designed, intended, or used to advertise or give information in the nature of advertising, and having the capacity of being visible from the traveled portion of any interstate or primary highway."

As such no exception or distinction can be made to the application of the Act to political signs and campaign posters and related advertising which is "visible" from interstate or primary highways. The Act does not, however, prohibit all such advertising but controls the permissible areas where it may be displayed and prohibits it in other areas. Certain size, spacing, and lighting criteria are also established in those areas where it is allowed together with requirements in regard to applications

for permits to be made, fees to be paid, permits to be issued and certain devices which must be purchased.

Generally different criteria are applied in respect to advertising devices in existence before July 1, 1972, and devices erected after that date. Without regard to the message or content of advertising devices erected prior to July 1, 1972, such devices beyond 660 feet of the right of way of any interstate or primary highway may remain after that date provided that prior to July 31, 1972, application for a permit has been made to the Highway Commission and the required fees paid. If the device is erected within the 660 feet the device will be allowed to remain during its life so long as the application for permit has been made prior to July 31, 1972, and fees paid, or until it has been acquired where necessary under the Act. The Act requires only those devices existing before July 1, 1972, to be acquired which are not located in "zoned or unzoned industrial and commercial" areas.

The only exception to the above provisions which would be applicable to political advertising would be advertising devices concerning political activities conducted upon the property upon which they are located, such as would be found at a campaign headquarters.

"Official directional" notices erected by governmental, non-political officials such as voting authorities, are only subject to rules and regulations promulgated by the Highway Commission which must be consistent with National Standards promulgated pursuant to Title 23, Section 131 (c) of the United States Code.

Advertising devices erected after July 1, 1972, without first obtaining a permit from the Highway Commission and which are visible from any interstate or primary highway if located outside of incorporated areas or within the 660 feet if inside of incorporated areas, are prohibited and subject to removal pursuant to Section 19 of the act, except as noted in regard to "on premise" and "official" devices, and in areas adjacent to new highways before the highway is designated an interstate, freeway primary, or primary highway.

Because of the fact that the Act applies only to advertising devices "erected or maintained" at specific locations in relation to interstate and primary highways, it would appear that "bumper stickers" are not subject to control under the Act because such vehicles as they are attached to are readily mobile and not designed primarily to advertise or give information in the nature of advertising to any particular portion of any interstate or primary. A different result of course would be obtained if the sticker were of such size and the vehicle to which it was attached was not being used for other than advertising purposes. (i.e. such as a semi-trailer truck displaying a giant poster not being used for other than advertising purposes).

Section 13, paragraph 8 (d) of the Act provides that advertising devices shall not be erected or maintained (or illuminated) which "... are located or maintained upon trees, or painted or drawn upon rocks or natural features."

The Act did not affect or repeal the provisions of §319.12 of the Code of Iowa, 1971, relating to billboards, advertising signs and devices mak-

ing the same illegal when placed or erected upon the right of way of *any* pubilc highway (which includes the right of way of county roads and city streets). Often utility poles, fence posts, temporary stakes, etc. are located within such right of way.

Applications for permits for advertising devices existing on July 1, 1972, are required to be filed with the Iowa State Highway Commission on or before July 31, 1972. No funds were appropriated by the legislature for the purpose of enforcing House File 734, except those authorized in the Act itself (permit fees, and informational sign panel fees) and other funds received pursuant to Title 23 Section 131, of the United States Code. No additional personnel was authorized for the purpose of administering the Act, other than those presently employed by the Highway Commission. No inventory was specified other than the information generated from the applications for permits.

Departmental rules currently being developed by the Iowa State Highway Commission will not be completed and approved by the Legislative Rules Committee for possibly several months.

Because of these and other problems in effectively administering the Act, permits are not currently being issued and will not be until as soon as reasonably possible.

All advertisers including those of political parties and candidates are admonished to endeavor to comply with the provisions of House File 734 as enacted by the 2d Session of the 64th General Assembly, in respect to devices visible to interstate and primary highways in unincorporated areas and within 660 feet within incorporated areas.

Until such time as permits are issued for devices to be erected after July 1, 1972, no new advertising devices, political or otherwise should be erected, except "on premise" or "official" signs noted above.

Advertising messages on devices erected before July 1, 1972, and for which application for a permit has been made and permit fees have been paid on or before July 31, 1972, may be changed without a permit being issued.

Particular attention also should be paid to insure that no devices are erected which do not comply with all other state or local laws, regulations, and ordinances and sign codes or which violate Chapter 319 of the Code of Iowa.

The stated purpose of House File 734, was to promote "the public safety . . . and enjoyment of public travel, to protect the public investment in public highways and to preserve and enhance the scenic beauty of lands bordering public highways." This purpose can best be promoted with the full cooperation of all political parties and candidates in respect of the newly enacted law.

July 24, 1972

CITIES AND TOWNS: Mayor's veto — §§363E.1 and 366.5, Code of Iowa, 1971. A mayor, as a member of the council in a council-manager-ward form of government, with his power to vote on all matters of city business, may participate in the vote to override his veto. (Blum-

berg to Bennett, State Representative, 7/24/72) #72-7-18

Mr. Vernon Bennett, State Representative: We are in receipt of your opinion request of July 7, 1972, concerning overriding a mayor's veto, in a council-manager-ward form of government. You specifically asked:

"1. Does the mayor have a right to vote against the motion to override his veto?

"2. If he does not have the right, does the [two-thirds] vote mean *all 7* members of the City Council, *including the mayor*, (5 of 7 votes)? or

"3. If he does not have the right, does the [two-thirds] vote mean only the other *6 members* of the City Council *excluding the mayor*, or [two-thirds] of 6 = 4 votes to over-ride the veto of the mayor?"

Section 363E.1, Code of Iowa, provides:

"Cities operating under the council-manager-ward form of municipal government shall be governed by a council consisting of a mayor and two councilmen elected at large, and one councilman by and from each of four wards . . . .

. . .

In all cities operating under the council-manager-ward form by popular election the *mayor shall have the right and power to vote on any and all matters* of city business including ordinances, resolutions, appropriations and expenditures." [Emphasis added]

Section 366.5, Code of Iowa provides in part:

"Upon the return of any such ordinance or resolution by the mayor to the council [veto], it may pass the same over his objections, upon a call of yeas and nays, by not less than a two-thirds vote of the council . . . ."

From the above, it is apparent that the mayor is a member of the city council, and that a two-thirds vote of the council is mandatory to override a veto. Also, a mayor has the power to vote on all matters of city government. "All" means all, and we do not feel that the Legislature meant "all" to mean anything else. In conjunction with this, the Legislature obviously intended the vote on the veto to be two-thirds of the entire council and not just part of it. If the latter was the case, a council could override a veto with some of its members absent and not voting. The Code expressly sets forth the requirements for overriding a veto, and if the Legislature intended less than the entire council to override a veto, it would have expressed it in the Code.

The purpose of the two-thirds vote is to require a great majority of those voting, to be in favor of the resolution, possibly greater than the original vote. By way of example, if the original vote was 4-3 in favor of the resolution, there would be no doubt that a two-thirds majority had not been reached, since five favorable votes would be required. If the mayor is not entitled to vote on his veto, the number voting would be six, two-thirds of which is four. Thus, the same four votes would not constitute a two-thirds majority on the original vote, yet would be sufficient on the overriding vote. We do not feel that the Legislature intended such an outcome to exist.

Accordingly, we are of the opinion that a mayor, as a member of the council in a council-manager-ward form of municipal government, with his power to vote on *all* matters of city business, may participate in the vote to override his veto. Thus, a two-thirds majority of the council

means the entire council, including the mayor.

July 25, 1972

STATE OFFICERS AND DEPARTMENTS: Workmen's Compensation— amendment of a previously repealed law — Ch. 108, §5, Acts of 64th G.A., 1st Session; H.F. 680, §3, Acts of 64th G.A., 2nd Session; §85.62, Code 1971. Ch. 108, §5, Acts of 64th G.A., 1st Session, repealed §85.62, Code of Iowa, 1971. H.F. 680, §3, Acts of the 64th G.A., 2nd Session, amended unnumbered paragraph one of §85.62. Being an attempt to amend previously repealed legislation, H.F. 680, §3, Acts, 64th G.A., 2nd Session, is invalid. (Lukehart to Landess, Industrial Commissioner, 7/25/72) #72-7-19

Mr. Robert C. Landess, Industrial Commissioner: This is in reply to your letter of June 26, 1972, requesting an opinion as to whether or not it is possible to amend a previously repealed section, thereby reviving it.

The question is based on the following specific provisions:

Chapter 108, §5, Acts of the 64th G.A., 1st Session, repealed §85.62, Code of Iowa 1971.

House File 680, §3, Acts of the 64th G.A., 2nd Session, amended unnumbered paragraph one of §85.62, Code of Iowa 1971. This amendment, the validity of which you question, attempted to place the same language, with minor variations, back into the Code.

It is generally held that when a law is repealed without simultaneous reenactment in substantially the same terms, absent a saving clause, the rescinded act is operationally deemed to have never existed. *Garrison* v. *Garrison*, 179 N.W.2d 466, 468 (Iowa 1970); *McGlohon* v. *Harlan*, 174 S.E.2d 753 (S.C. 1970); *Certain Taxpayers* v. *Sheahen*, 256 N.E.2d 758 (Ill. 1970); *Woolsey* v. *Lassen*, 371 P.2d 587 (Ariz. 1962). Thus, if in construing statutes, it is presumed that an amendment is intended to effect some change in an existing law, (See *Mallory* v. *Paradise*, 173 N.W.2d 264 (Iowa 1969)), one must conclude that a repealed act cannot be amended. Any purportedly amendatory legislation related to the repealed act must be declared invalid. *State* v. *Blackwell*, 246 N.C. 642, 99 S.E.2d 867 (1957); *Griffin Tel. Corp.* v. *Public Serv. Comm.*, 236 Ind. 29, 138 N.E.2d 150 (1956); *State* v. *Holt*, 121 Mont. 459, 194 P.2d 651 (1948); *Tiger Creek Bus Line* v. *Tiger Creek Transp. Assn.*, 187 Tenn. 654, 216 S.E.2d 348 (1948).

Given the policy in the Iowa courts that requires a judicial interpretation of the language of a statute fairly and sensibly in accordance with the plain meaning of the words used by the legislature, (see *In re Millers' Estate*, 159 N.W.2d 441 (Iowa 1968); *Cedar Rapids Steel Transp. Inc.* v. *Iowa State Commerce Comm.*, 160 N.W.2d 824 (Iowa 1968), the express repeal stated in Chapter 108, §5, Acts of the 64th G.A., 1st Session, must be given a completely literal interpretation. Further, in determining the meaning of a statute, all provisions of the act of which it is a part and other pertinent statutes must be considered. *Maguire* v. *Fulton*, 179 N.W. 2d 508 (Iowa 1970); *Goergen* v. *State Tax Comm.*, 165 N.W.2d 782 (Iowa 1969). House File 680, §3, Acts of the 64th G.A., 2nd Session, is expressly intended to clarify the workmen's compensation coverage of law enforcement officers appointed by the state conservation commission. Yet such officers would be employees of the State of Iowa and would fall under the

normal workmen's compensation coverage for state employees as found in §85.2, Code of Iowa 1971. Therefore the section in question is seemingly not required.

In conclusion, it is the opinion of this office that House File 680, §3, Acts of the 64th G.A., 2nd Session, should be ruled invalid as an attempt to amend previously repealed legislation.

July 26, 1972

STATE OFFICERS AND DEPARTMENTS: Tort Claims Act — Private use of state property, State's liability to Licensee — Ch. 25A, Code of Iowa, 1971. The State could be liable to a licensee for injuries caused by the negligence of the State or its employees claimed under the State Tort Claims Act. It is an administrative decision of the State agency involved, to allow or deny access by the public, across the property occupied by that agency. (Schroeder to Harbor, Speaker of the House of Representatives, 7/26/72) #72-7-20

The Honorable William H. Harbor, Speaker of the House, House of Representatives: You have requested an opinion of the Attorney General with respect to the following question:

"Can the Little League use the private drive of the Highway Commission offices in Red Oak in order to gain access to land behind those offices which a private company has offered to the Little League for use as a baseball diamond?"

The legal issue this question raises is: What liability would the State subject itself to by allowing the Little League to use State property?

To answer this question, it is first necessary to consider the legal classification and relationship of the parties. The case of *Lattner v. Immaculate Conception Church*, 1963, 255 Iowa 120, 121 N.W.2d 639, 642, states:

"We have frequently recognized four classes of persons who are injured on property of another: trespasser, bare (or mere) licensee, licensee by express or implied invitation, and invitee."

The last three of these four will be considered.

A bare (or mere) licensee has been defined in *Mann v. Des Moines Ry. Co.*, 1942, 232 Iowa 1049, 7 N.W.2d 45, as, ". . . one who enters upon the land or property of another without objection, or by the mere permission, sufferance, or acquiescence of the owner or occupier." The case goes on to say that, "A bare licensee enters the land or property of another at his own risk, and assumes the dangers existing or inherent in the property entered."

A licensee by implied invitation is defined in *Connell v. Keokuk Electric Ry. and Power Co.*, 1906, 131 Iowa 622, 109 N.W. 177, and *Reasoner v. Chicago, R.I. & P. R. Co.*, 1960, 251 Iowa 506, 101 N.W.2d 739, and in *Mann*, supra, as follows:

"A licensee by implied invitation is one who has been invited to enter upon the land either by the owner or occupier of the same by some affirmative act done by such owner or occupant, or by appearances which justify persons generally in believing that such owner or occupant had given his consent to the public generally to enter upon or to cross over

his premises, and while such licensee is acting within the scope and limit of such implied invitation he has the lawful right to be where he is so invited."

A slightly different definition of a licensee is found in *Wilson v. Goodrich*, 1934, 218 Iowa 462, 252 N.W. 142, and in *Reasoner*, supra, as follows:

". . . [A] licensee is one who goes on the property of another, either by express invitation, or with implied acquiescence, solely in pursuit or furtherance of business, pleasure, or convenience of the licensee."

As to the duty owed to a licensee by invitation, the cases of *Hodges v. United States*, 1948, 98 F.Supp. 281 (S.D. Iowa) and *Mann*, supra, stated that it was the necessity to exercise due care to see that he is not injured on or about the premises.

An invitee is defined in *Moenck v. United States*, 1966, 264 F.Supp. 615 (N.D. Iowa) and in *Hanson v. Town and Country Shopping Center*, 1966, 259 Iowa 542, 144 N.W.2d 870, as follows:

"Invitees are limited to those persons who enter or remain on land upon an invitation which carried with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make them safe for their reception. . . . They are entitled to expect such care not only in the original construction of the premises, and in any activities of the possessor or his employees which may affect their condition, but also in inspection to discover their actual condition or any latent defects followed by such repairs, safeguards or warnings as may reasonably be necessary for their protection under the circumstances."

In *Atherton v. Hoenig's Grocery*, 249 Iowa 50, 86 N.W.2d 252, and *Hanson*, supra, the Court said a possessor of real estate may avoid the liability owed to an invitee in two ways: ". . . by making and keeping his lands safe, or by warning of the dangers."

The case of *Christianson v. Kramer*, 1963, 255 Iowa 239, 122 N.W.2d 283, points out that the owner and possessor of property are not insurers of the invitee, and the mere fact that an accident happens, of itself, does not create liability.

While it is sometimes difficult to draw a distinction between a licensee and an invitee, one of the more common distinctions is that a licensee is on the property for his own benefit while an invitee is on the property for the owner's benefit or the mutual benefit of both. *Wilson v. Goodrich*, supra. Because of the distinction on the basis of benefit, the landowner has greater liability for an invitee than a licensee.

Applying the case law above to the Little League situation, it would appear that if the State were to impliedly or expressly allow Little League personnel to use the drive for their own benefit, they would be considered licensees on the property. The State's liability to those licensees would be to exercise due care for their safety.

It would not be possible for the State to relieve itself of liability to the Little League. The State Tort Claims Act, Chapter 25A, Code of Iowa, 1971, waives the State's immunity from suit for:

". . . [C]laims against the state of Iowa for money only, on account of damage to or loss of property or on account of personal injury or death, caused by the negligence or wrongful act or omission of any employee of the state while acting within the scope of his office or employment, under circumstances where the state, if a private person, would be liable to the claimant for such damage, loss, injury, or death."

In *Graham v. Worthington*, 1966, 259 Iowa 845, 146 N.W.2d 626, and *Hubbard v. State*, 1969, 163 N.W.2d 904 (Iowa), the Court stated:

"The general purpose of chapter 25A is to impose upon all the people of this state the burden, expense and costs which arise from tortious damage to property or injuries to persons by the officers, agents and employees of our state government. This is a valid means of promoting the general welfare of the state. This is a public purpose."

In your letter you described the access to the Red Oak Construction Residency Building as a "public road." In fact, the access road is no more than a narrow one-lane drive to the residency building. It is not constructed as a road for public use and was not so intended according to Highway Commission personnel.

The precise question of whether the Little League can or rather will be allowed to use this drive is an administrative question depending on the suitability of this drive for such use and on the desire of the State to accept the liability involved.

July 26, 1972

HIGHWAYS: Outdoor Advertising — Erection of advertising devices within zoned areas. H.F. 734, as enacted by the Second Session, 64th General Assembly of Iowa. New advertising devices, including political signs, may not be erected within zoned (or unzoned) industrial or commercial areas, without first obtaining a permit pursuant to Section 18 of the Iowa Junkyard Beautification and Billboard Control Act, unless located within incorporated areas and beyond 660 feet from the right of way of any interstate or primary highway. (Sauer to Keith, State Senator, 7/26/72) #72-7-21

Mr. Wayne D. Keith, State Senator: Reference is made to your letter of July 14, 1972, in which you state:

"I would like an opinion on the placement of political signs along primary highways now that the billboard law is in effect."

* * *

"Would we be allowed to erect new signs within the zoned areas of each community if we were prohibited under the present law of establishing these signs in rural areas?"

House File 734, as passed by the Second Session of the 64th General Assembly is quite specific in Section 18 of the Act, that:

"After the effective date of this Act, no new advertising device for which an application for a permit is required may be erected *without first obtaining a permit from the (Highway) Commission,* except . . ." (Emphasis supplied)

The Act regulates and requires permits for all advertising devices erected or maintained within 660 feet of the nearest edge of the right of way of any interstate or primary highway (adjacent area), and all advertising devices erected and maintained beyond the adjacent area in

unincorporated areas if visible from the main traveled way of the same highways.

Certain exceptions to the Act are also made in regard to "on premise", "official", and other signs not pertinent to political signs.

Thus, it appears that the only exception relevant to political signs and to the requirement that new signs must receive permits prior to their erection would be if they were located outside of the 660 feet adjacent area, within incorporated areas, or were not visible from the traveled way.

Permits currently are not being issued by the Iowa State Highway Commission pending processing of applications for permits for signs in existence on the effective date of the Act, which must be on file prior to July 31, 1972, and the development and approval of Departmental Rules.

At such time as permits are issued for advertising devices located within "zoned and unzoned industrial or commercial" areas, only those proposed which will comply with size, lighting, and spacing criteria of Section 13 of the Act, will be eligible for the issuance of a permit prior to their erection.

Permits will be issued for those devices which were erected prior to the effective date of the Act, beyond the adjacent area in unincorporated areas regardless of zoning; provided they have made application for a permit prior to July 31, 1972.

Conditional permits will be issued for those advertising devices in existence on the effective date of the Act located within the adjacent area, outside of "zoned and unzoned industrial or commercial" areas, for which "just compensation" must be paid prior to their acquisition; provided they also have made timely application for a permit, until such time as they are acquired.

Within the adjacent area, within "zoned and unzoned industrial or commercial" areas, advertising devices in existence on the effective date of the Act, are "grandfathered" in without regard to the size, lighting, or spacing requirements, however, provided they also have made timely application for a permit.

The criteria established by Section 13 of the Act applies to all advertising devices to be erected after the effective date of the Act in "zoned and unzoned industrial or commercial" areas, except in the case of those adjacent to interstate highways, the controls required under Chapter 306B of the Code, or the Act, whichever is stricter, shall be applied.

In your letter you make reference to "zoned" areas. It is important to distinguish that under the Act, permits will not be issued for advertising devices to be erected in areas which, if they are zoned at all, are zoned for anything for other than *industrial* or *commercial.* Zoning for "Residential", "Agricultural", or other similar designation which is not generally recognized as commercial or industrial, will automatically disqualify the area for erection of signs, after the effective date of the Act, and no permits may be issued in those areas, (except for those existing devices eligible for "conditional" permits will be issued them until such

time as they are acquired.)

In conclusion it should be noted that even though the enforcement provisions of Section 19 of the Act provides for a thirty (30) day notice to the owner of the land, and the owner of the sign which is erected or maintained after the effective date of the Act, in violation of the Act, the advertising device is nevertheless illegal. The provision for such notice does not authorize the erection of 30 day political signs under any circumstance where they were otherwise illegal, even though it does appear that it makes enforcement under these circumstances impossible until after thirty days.

July 27, 1972

STATE OFFICERS AND DEPARTMENTS: Iowa Beer and Liquor Control Dept. and Dept. of Agriculture — §§3(10) and 95 of Ch. 131, Acts of the 64th G.A., First Session; and §§170.1(1), 170.1(4) and 170.2, Code of Iowa, 1971. (1) A lodge owned by a corporation which charges a fee for food services at the lodge in addition to a membership fee is a "restaurant" as defined in §170.1(4) of the 1971 Code of Iowa and therefore must obtain a restaurant license from the Dept. of Agriculture pursuant to §170.2 of the 1971 Code of Iowa. (2) A lodge which charges a membership fee does not have to obtain a motel license since the lodge does not come within the purview of "hotel" as defined in §170.1(1) of the 1971 Code of Iowa. (3) A lodge owned by a corporation which charges a fee for membership and food service may not allow the dispensing or consumption of beer or alcoholic beverages upon the premises without first obtaining a Class "C" liquor control license pursuant to the Iowa Beer and Liquor Control Act (Ch. 131, Acts of the 64th G.A., First Session). (Jacobson to Anderson, Deputy Lee County Attorney, 7/27/72 #72-7-22

Mr. Barry M. Anderson, Deputy Lee County Attorney: This is to acknowledge receipt of your letter dated June 1, 1972, in which you requested an opinion from this office regarding the following:

"In Lee County, there is a corporation, authorized to do business in the State of Iowa, as a business corporation, which owns an acreage, which in the past they have used as a hunting and game preserve. In the past, it was used solely for employees or guests of employees of the corporation, for their own hunting privileges. Contained on this preserve, is a lodge, which has sleeping quarters for a maximum of eight people.

"At the present time, the corporation is considering charging individuals, or individual corporations, a membership fee to belong to, and be able to use the game preserve. A fee will also be charged for the amount of wild game killed by the individual members.

"As they see it, the lodge will be used as follows:

"Food will be served, and a fee will be charged for the guests staying, during the individual periods of time. Also, the sleeping facilities will be used for the individual members, when there, and a fee would probably be charged for that. In the past, the individual persons brought their own liquor to the lodge for their own purpose. The corporation plans on continuing to allow the individual members to bring their own liquor.

"The problem for which I am requesting an Attorney General Opinion, is as to whether or not, first of all, this corporation would need a restaurant license. Secondly, whether they would need a motel license, and finally, whether or not they would need a liquor license, and the type of liquor license necessary, if they would need one."

In regard as to whether the corporation will need a restaurant license, your attention is directed to §170.1(4) of the 1971 Code of Iowa, which

states:

" 'Restaurant' shall mean any building or structure equipped, used, advertised, as, or held out to the public to be a restaurant, cafe, cafeteria, dining hall, lunch counter, tavern, cocktail lounge, lunch wagon, or other like place where food is prepared or served for pay or profit for on the premise consumption, except such places as are used by churches, fraternal societies, and civic organizations which engage in the serving of food less frequently than once a week."

As your letter indicated, the members using the lodge will pay a fee for the prepared food in addition to their membership fee. Thus, the lodge would be a "place where food is prepared or served for pay or profit for on the premise consumption." This being the case, the corporation would have to obtain a restaurant license for this food service pursuant to §170.2 of the 1971 Code of Iowa. That section states in pertinent part:

"No person shall maintain a food establishment, tavern, motor inn, hotel, or restaurant until he has obtained a license from the department of agriculture."

As to the necessity of acquiring a hotel license, §170.1(1) of the 1971 Code of Iowa states:

" 'Hotel' shall mean any building or structure, equipped, used, advertised, or held out to the public to be an inn, hotel, motel, motor inn, a public lodging house or place where sleeping accommodations are furnished transient guests for hire, whether with or without meals."

It is apparent that the lodge will not be "held out to the public" as a motel and is not an accommodation for "transient guests." It is the opinion of this office that this lodge is not within the statutory definition of a "hotel" and therefore will not need a motel license.

Finally, regarding the need for a liquor license, Chapter 131, §95, Acts of the 64th G.A., 1st Session, states:

"It is unlawful for any person to allow the dispensing or consumption of intoxicating liquor, except sacramental wines and beer, in any establishment unless such establishment is licensed under this Act.

"However, bona fide conventions or meetings may bring their own legal liquor onto the licensed premises if the liquor is served to delegates or guests without cost. All other provisions of this Act shall be applicable to such premises. The provisions of this section shall have no application to private social gatherings of friends or relatives in a private home or a private place which is not of a commercial nature nor where goods or services may be purchased or sold nor any charge or rent or other thing of value is exchanged for the use of such premises for any purpose other than for sleeping quarters."

The corporation, through which the lodge was established, qualifies as a "person" under Chapter 131, §3(10), Acts of 64th G.A., 1st Session, which provides that "person" means: "any individual, association, partnership, *corporation*, club, hotel or motel, or municipal corporation . . ." (Emphasis added). This lodge would not be considered a private place under Chapter 131, §95, Acts of 64th G.A., 1st Session, because food may be purchased there and also because a membership fee is charged for the use of the lodge.

Accordingly, it is our opinion that it would be unlawful for this corporation to allow the dispensing or consumption of intoxicating liquor on

the lodge premises without first obtaining a Class "C" liquor control license pursuant to the Iowa Beer and Liquor Control Act.

July 27, 1972

COUNTIES AND COUNTY OFFICERS: County treasurer, fees for searching motor vehicle records — §§68A.3 and 321.24, Code of Iowa, 1971. A county treasurer may charge a fee for searching his motor vehicle records to ascertain the owner of a certain car but any such fees collected belong to the county. (Haesemeyer to Atwell, Supervisor of County Audits, Auditor of State's Office, 7/27/72) #72-7-23

Mr. H. E. Atwell, Supervisor of County Audits, Auditor of State's Office: Reference is made to your request for an attorney general's opinion in which you state:

"If the county treasurer should charge a fee when requested to make a search of his motor vehicle records as to who owns a certain car, is this to be considered an office fee and deposited to the credit of the county?"

A county treasurer may charge a fee for searching the motor vehicle records to ascertain the owner of a certain car although the law pertaining to motor vehicles makes no provision for charging fees for searching such records. §321.24, Code of Iowa, 1971, as amended by Chapter 213, §14, Acts of the 64th G.A., First Session merely provides in part:

"One copy of the registration receipt shall be retained by the county treasurer in a registration number file and said file shall be open for public inspection during reasonable business hours."

However, the chapter dealing with public records, such as these, does provide for a fee. §68A.3, Code of Iowa, provides:

"68A.3 Supervision. Such examination and copying shall be done under the supervision of the lawful custodian of the records or his authorized deputy. The lawful custodian may adopt and enforce reasonable rules and regulations regarding such work and the protection of the records against damage or disorganization. The lawful custodian shall provide a suitable place for such work, but if it is impracticable to do such work in the office of the lawful custodian, the person desiring to examine or copy shall pay any necessary expenses of providing a place for such work. All expenses of such work shall be paid by the person desiring to examine or copy. *The lawful custodian may charge a reasonable fee for the services of the lawful custodian or his authorized deputy in supervising the records during such work.*" (Emphasis ours)

While the county treasurer may lawfully charge a fee for such a search, he may not retain this fee if it was collected for official service. §§342.1 and 342.2, Code of Iowa, 1971, provide:

"342.1 Fees belong to county. Except as otherwise provided, all fees and charges of *whatever kind collected for official service* by any county auditor, treasurer, recorder, sheriff, clerk of the district court, and their respective deputies or clerks, shall belong to the county. (Emphasis ours)

"342.2 Record of fees. Each such officer shall keep a record to be known as the 'fee book' of the office to which it relates and shall be kept in such office as a part of the permanent county records. It shall be ruled in appropriate columns for the date, kind of service, for whom rendered, and the amount of fee collected, and when the charge is for recording an instrument, the names of the parties thereto. All said items shall be entered upon said record at the time the service is rendered."

"Official service" has been defined by the Iowa supreme court and

certain guidelines have been established for determining which fees may b kept and which ones must be turned over to the county. In *Burlingame v. Hardin County*, 1917, 180 Iowa 919 at 931, 164 N.W. 115, the court stated:

"We find no apparent confusion in the precedents upon the proposition that, while the duty of a clerk to account for the fees and emoluments of his office *extends to and includes every item of compensation received by him for services rendered in his official capacity*, he is under no requirement to account for or pay over any compensation received by him for services performed otherwise than in his official character. *The statute prescribes the nature and extent of his official service and the fees which may be demanded therefor;* and, if the law imposes upon him any particular duty for which no fee or compensation is provided, he is bound to perform the same without fee or charge." (Emphasis ours)

Earlier in *Polk County v. Parker*, 1916, 178 Iowa 936 at 939, 160 N.W. 320, the court had expressed the same principle in deciding whether a clerk could keep a fee:

"*His duties are fixed by statute*, and, when these are performed, he is not required to do more. If he does do more, he is entitled to the profit thereof on his own account." (Emphasis ours)

Here, the county treasurer may not profit on his own account. It is evident from *Burlingame, supra,* and *Polk County v. Parker, supra,* that the fee collected in the situation at hand is one for official service. The duty to make the search and charge the fee is set forth in §68A.3. §321.24 requires the county treasurer to keep the file, thus making him the "lawful custodian" upon whom the responsibility of supervising and searching the records falls under §68A.3. Since the statute has prescribed the nature of the service and the authority to charge a fee, the fee is one for official service and must be turned over to the county. Failure to turn over fees received for official service is a criminal offense, §§740.7 and 687.7. Therefore, it is our opinion that while the county treasurer may charge a fee for searching motor vehicle records, he may not keep such a fee but must turn it over to the county.

July 27, 1972

SCHOOLS: Auxiliary services — H.F. 654, Acts, 64th G.A., First Session; §257.26 Code of Iowa, 1971. The term "special education services and materials enumerated in this chapter" refers to those referred to in Ch. 257 (§257.25 a-d). Claims for reimbursement to school districts for such expenses filed under §27, Ch. 165, Acts 64th G.A., 1st Session, are not limited to special education programs as defined in Code Ch. 281, but cover those referred to in Ch. 257. (Turner to Benton, State Superintendent of Public Instruction; Walsh, State Senator; Kennedy, State Senator; Holden, State Representative; Millen, State Representative; and Fenton, Polk County Attorney, 7/27/72) #72-7-24

Mr. Robert Benton, State Superintendent of Public Instruction; The Honorable John Walsh, State Senator; The Honorable Gene V. Kennedy, State Senator; The Honorable Edgar Holden, State Representative; The Honorable Floyd Millen, State Representative; Mr. Ray Fenton, Polk County Attorney: This is in response to your letters requesting an opinion of the Attorney General clarifying what is meant by §27, H.F. 654, Acts of the 64th G.A., First Session, under which $1,600,000 was appropriated to reimburse, on a matching basis, public school districts for providing services under §257.26, Code of Iowa, 1971.

Chapter 165, §27 (H.F. 654) provides as follows:

"There is hereby appropriated from the general fund of the state to the department of public instruction for the year beginning July 1, 1972, and ending June 30, 1973, one million six hundred thousand (1,600,000) dollars, or so much thereof as may be necessary for reimbursing public school expenditures incurred in accordance with the provisions of section two hundred fifty-seven point twenty-six (257.26) of the Code."

Section 257.26 is generally referred to as the "shared-time" law. It permits students attending non-public schools to be enrolled in the public schools for specified courses not otherwise available to them in their private schools. The section also permits private schools to comply with school laws and standards by participating in shared-time programs. The last sentence of §257.26, as amended by the 63rd General Assembly, provides:

"School districts and county school systems may when available make special education services and materials enumerated in this chapter available to pupils attending non-public schools in the same manner and to the same extent that they are provided to public school students in the school district or county."

This "auxiliary services" amendment was added to §257.26 by Chapter 1110, 63rd G.A., Second Session (1970). It is to be observed that it was originally proposed as an amendment to Chapter 281 of the Code but as we have seen, it was actually enacted as an addition to §257.26.

Chapter 281 of the Code is entitled "Education of Children Requiring Special Education." As the title implies, Chapter 281 deals with the education, generally speaking, of children suffering from some disability or handicap who require certain special services. Because of this the term "special education" has come to have a particular meaning among educators, that is to say, it refers to services described in Chapter 281.

With these statutes in mind the specific questions considered here are as follows:

1. When §257.26 speaks in terms of "special education services and materials enumerated in this chapter" does it mean Chapter 257 of the Code, 281 of the Code or Chapter 1110 of the session laws of the 63rd G.A.?

2. Can the foregoing language be interpreted to cover all instructional materials generally used in the instructional programs of the several school systems of the state?

3. If the language "special education service and materials enumerated in this chapter" is limited to services and materials covered by Chapter 281 of the Code, can the Department of Public Instruction consider for reimbursement programs that might be established in general conformity with departmental guidelines and rules and regulations for special education even though the programs under consideration are programs not approved by this department?

Before turning to a consideration of these questions it is appropriate to remember that it is a rule of this office not to comment on matters in litigation, and a suit testing the constitutionality of the statute is pending in Polk County District Court, Law No. 97401. However, it is believed that this opinion does not touch upon the ultimate issues pleaded in that case and is limited to the scope of services and materials referred

to in the law, rather than to the validity or constitutionality thereof.

In our opinion there is little doubt but that the reference to the "services and materials enumerated in this chapter" has reference to Ch. 257 of the Code rather than to Ch. 1110, Acts of the 63rd G.A., Second Session or Chapter 281 of the Code. The language was added to §257.26 by S.F. 1293, Acts, 63rd G.A., Second Session (1970). This measure did not become Ch. 1110 until later when the session laws were compiled by the Code Editor. And, of course, no mention at all is made of Ch. 281. In addition, special education services covered by Ch. 281 are provided only for students who are not able to be enrolled for regular classwork in the public schools. Since the act cited above amends the "dual enrollment" legislation, it follows that there would be no purpose in tying this amendment to the provisions of Ch. 281 of the Code.

Accordingly, it is our view that the language of §27 (H.F. 654) Ch. 165, 64th G.A., 1st Sess., is applicable only as an aid to those school districts which incurred expenses by accepting children from private schools on shared-time programs as provided in §257.26 and to those county and joint county school systems providing or distributing materials or pupil personnel services to such students.

Moreover, appropriation for reimbursement to school districts and county boards for expenses of expanded special education programs covered by Code Ch. 281 is found in §§28 and 29 of Ch. 165, supra. Therefore, the appropriation made under §27 must refer to materials and services enumerated in Code Ch. 257 regardless of the fact that to educators the term "special education services" means only those services covered by Ch. 281, supra. Words and phrases shall be construed according to the context and the approved usage of the language. §4.1(2), Code of Iowa, 1971.

It should be noted also that the title to Ch. 1110 does not limit the scope of services and materials to special education as defined in Ch. 281 of the Code but refers instead to:

"*An Act* to provide auxiliary education services to students attending non-public schools."

The services and materials which appear in Ch. 257, supra, include, in addition to minimum curriculum requirements and library, provision for guidance counseling, noninstructional professional staff (physicians, dentists, nurses, school psychologists, speech therapists and other specialists), special education services and instructional materials, including audio visual. §257.25(9)(a-d). It is our view that these services and materials are sufficiently set out so as to be identifiable for the purposes of Ch. 165.

Accordingly, the answer to question number one is that the services and materials are those referred to in Ch. 257. Question three is moot. In answer to question two the Superintendent of Public Instruction may, in the sound exercise of his discretion, approve for payment any claim for reimbursement to a school district for services and materials furnished to students enrolled in a shared-time program pursuant to §257.26, within the limits of the appropriation.

July 28, 1972

ELECTIONS: School elections, precincts — §277.5, Code of Iowa, 1971. Because of the unique situation with which we are now confronted and the seemingly unsurmountable difficulties presented it would be our opinion that the new precincts lines drawn in response to the Iowa supreme court's recent reapportionment plan and legislative enactments in response thereto may be used in forthcoming school elections. (Haesemeyer to Synhorst, Secretary of State, 7/28/72) #72-7-25

The Honorable Melvin D. Synhorst, Secretary of State: You have raised a further question in regard to our opinion to you of July 21, 1972, dealing with certain aspects of House File 1147, Acts, 64th General Assembly, Second Session (1972), a measure which made sweeping changes in the election laws.

In that opinion in answer to Question 13, "Can a school election precinct be over 3500?", we said in part:

"If a school election is held before the 1972 general state election, the precincts will follow the old precinct lines and school precincts may be larger than 3500."

As you point out in your July 25, 1972, letter this presents insuperable obstacles in connection with the conduct of school elections. You note that cities and counties in Iowa have just completed the gigantic task of reprecincting and have subsequently revised their voter registration and other records and notified voters of the change. In many cases, the old lists have been destroyed; and it would not be possible for the September general school elections for election boards to be furnished with lists based upon precincts in effect at the time of the 1970 general election. The costs and practicality of transporting machines is another factor. Machines will be located in new precincts for the August 1 primary election. You point out that it does not appear to be reasonable or practical to move the machines to former precincts for the September school elections, even if the polling places are still available, and then to almost immediately move them back to the new precincts for the November general election.

In light of the foregoing you then ask:

"Is it possible that . . . school precincts may follow the new precinct lines as established by cities and counties for the September school elections?"

Our earlier opinion of July 21, 1972, was based upon §277.5, Code of Iowa, 1971, which provides:

"277.5 Precincts for voting. Voting precincts shall be the same as for the last general state election except that the board may consolidate two or more such precincts into one unless there shall be filed with the secretary of the board at least twenty days before the election, a petition signed by twenty-five or more electors of any precinct requesting that such precinct shall not be consolidated with any other precinct. To such petition shall be attached the affidavit of a qualified elector of the precinct that all the signers thereof are electors of such precinct, and that the signatures thereon are genuine."

Such section 277.5 has not been repealed and remains a part of the statute law of this state. On its face it requires the use of the old precinct lines. However, as you point out, compliance with this section law is in some instances now literally impossible and in others extremely im-

practical.

There seems to be at least some authority for the proposition that in situations such as this reason and common sense must be brought into play notwithstanding the literal import of statutory provisions. In *In Re Marshall*, 1949, 363 Pa. 326, 69 A.2d 619, the Pennsylvania Supreme Court stated:

"An act will not be declared inoperative and ineffectual on the ground that it furnishes no adequate means to secure the purpose for which it is passed, if *** common sense and reason can devise and provide the means, and all the instrumentalities necessary for its execution are within the reach of those intrusted therewith." *Miller v. Belmont Packing & Rubber Co.*, 268 Pa. at page 63, 110 A. at page 806, supra.

Because of the unique situation with which we are now confronted and the seemingly insurmountable difficulties presented it would be our opinion that the new precincts lines drawn in response to the Iowa supreme court's recent reapportionment plan and legislative enactments in response thereto may be used in forthcoming school elections. The one-man, one-vote principle has been applied to school elections, *Meyer v. Campbell*, 1967, 260 Iowa 1346, 152 N.W.2d 617, and this solution would appear to be the one most in harmony with that decision and the practical situation at hand.

July 28, 1972

STATE OFFICERS AND DEPARTMENTS: Iowa Board of Physical Therapy Examiners; — Article VI, United States Constitution; Sections 210, 4105, Title 38, United States Code; §§148A, 148A.3(3), Code of Iowa, 1971; Veterans' Administration Manual MP-5, Part I, Chapter 338. Physical therapists employed by the Veterans' Administration Hospital are exempt from the requirements of licensure as physical therapists in Iowa. (Haesemeyer to Thompson, Secretary, Iowa Board of Physical Therapy Examiners, 7/28/72) #72-7-26

Mrs. Nancy G. Thompson, L.P.T., Secretary, Iowa Board of Physical Therapy Examiners, State Department of Health: Reference is made to your request for an opinion of the attorney general with respect to the following:

"Would you please advise whether or not physical therapists who are employed by the Veterans Administration hospitals are exempt from the requirement of licensure as a physical therapist in Iowa under the provisions of Section 148A.3 of the Code of Iowa."

Licensure requirements for physical therapists practicing in Iowa are set out in §148A of the Code of Iowa, 1971. However, §148A.3 of our Code delineates certain exemptions, one of which states:

"148A.3 Persons not included. Section 148A.1 shall not be construed to include the following classes of persons:

"3. Physical therapists of the United States army, navy, or public health service, or physical therapists licensed in another state, when incidentally called into this state in consultation with a physician and surgeon or physical therapists licensed in this state."

Physical therapists under the employ of Veterans Administration (VA) Hospitals are part of the United States "public health service". As such they are governed by federal law, and they are exempt from the Iowa licensure requirements for physical therapists unless otherwise

required by federal law.

The United States Congress has specifically dealt with the requirements of physical therapists in VA Hospitals in §4105(5)(D) of Title 38, United States Code. That section states in full:

"4105 Qualifications of appointees. Any person to be eligible for appointment in the Department of Medicine and Surgery must —

"(1) be a cititzen of the United States;

"(2) in the Medical Service — hold the degree of medicine or of doctor of osteopathy from a college or university approved by the Administrator, have completed an internship satisfactory to the Administrator, and be licensed to practice medicine, surgery, or osteopathy in a State;

"(3) in the Dental Service — hold the degree of doctor of dental surgery or dental medicine from a college or university approved by the Administrator, and be licensed to practice dentistry in a State;

"(4) in the Nursing Service — have successfully completed a full course of nursing in a recognized school of nursing, approved by the Administrator, and be registered as a graduate nurse in a State;

"(5) in the Auxiliary Service — (A) manager of hospital, home, or center — have such business and administrative experience and qualifications as the Administrator shall prescribe; (B) optometrist — be licensed to practice optometry in a State; (C) pharmacist — hold the degree of bachelor of science in pharmacy, or its equivalent, from a school of pharmacy approved by the Administrator, and be registered as a pharmacist in a State; (D) physical therapists, occupational therapists, dietitians, and other auxiliary employees shall have such scientific or technical qualifications as the Administrator shall prescribe."

Note that all the above categories require some sort of licensing except categories (5)(A) and (5)(D). Congress has provided that requirements for those occupations should be prescribed by the Administrator of Veterans' Affairs, whose office was established by §210, Title 38, United States Code. The Administrator has put forth certain qualifications to be met by physical therapists wishing to work in VA hospitals. These requirements are set out in VA Manual MP-5, Part I, Chapter 338. The Administrator does not require physical therapists to unrego any state licensure procedure.

Even if the Iowa legislature had not made a specific exception for employees in the "public health service," which we hold to include physical therapists in VA Hospitals, Iowa's law would be inapplicable as a consequence of Article VI of the United States Constitution. That article reads in part as follows:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The above quoted section is commonly referred to as the "Supremacy Clause". It provides for the supremacy of Federal laws over State laws. Since the federal government has definitely made law with respect to physical therapists working in VA Hospitals, any state law to the contrary is inapplicable.

It is, therefore, our opinion that physical therapists in VA Hospitals are exempt from Iowa licensure requirements by §148A.3(3), Code of Iowa, 1971. Even if that were not the case, Iowa law is superseded in this situation by federal law. Turning to the federal law we find no stipulation that physical therapists in VA Hospitals should meet state licensure requirements.

A final note of caution must be added. If unlicensed physical therapists undertake practice apart from their duties as federal employees in VA Hospitals, they can be held criminally liable for practicing in Iowa without a license.

August 11, 1972

SCHOOLS: Auxiliary services — §257.26, Code of Iowa, 1971. Auxiliary services legislation was intended to be supplemental to shared time programs and dual enrollment is not prerequisite for reimbursement of claims submitted pursuant to §27, Chapter 165, Acts of the 64th G.A., First Session, as amended by §6 of Chapter 1107, Acts of the 64th G.A., Second Session. Words "enrolled in shared time program" withdrawn from Opinion Attorney General dated July 27, 1972. (Turner to Benton, State Superintendent of Public Instruction; Walsh, State Senator; Kennedy, State Senator; Holden, State Representative; Millen, State Representative; and Fenton, Polk County Attorney, 8/11/72) #72-8-1

Dr. Robert Benton, State Superintendent of Public Instruction; The Honorable Edgar Holden, State Representative; The Honorable John Walsh, State Senator; The Honorable Floyd Millen, State Representative; The Honorable Gene V. Kennedy, State Senator; Mr. Ray Fenton, Polk County Attorney: In an opinion to you dated July 27, 1972, rendered in connection with your request for an interpretation of §27, Chapter 165, Acts of the 64th G.A., First Session, you were advised that according to our view the language of §27, supra, applied only to those school districts which incurred expenses for providing materials and pupil personnel services to students from private schools enrolled in shared-time programs. Initially, we assumed that the addition of the last sentence of §257.26, by Chapter 1110, Acts of the 63rd G.A., Second Session (1970), was simply a broadening of the shared-time or dual enrollment program. But a re-examination of the title of the act has led us to conclude that that was not the intention of the legislature and that the auxiliary services program was in fact intended to be supplemental thereto. Accordingly, it appears that our view was an overly restrictive interpretation and that the words of the last sentence "enrolled in a shared-time program" should be withdrawn.

Any claim submitted by a school district or county school system furnishing materials and services to non-public school students pursuant to §257.26 may be considered for reimbursement pursuant to §27, Chapter 165, Acts of the 64th G.A., First Session, as amended by §6 of Chapter 1107, Acts of the 64th G.A., Second Session.

August 16, 1972

STATE OFFICERS AND DEPARTMENTS: Guest Statute sec. 321.494 Code of Iowa, 1971. The State of Iowa is not liable for injuries sustained by a passenger in a law enforcement vehicle provided the passenger is considered a guest within the meaning of Sec. 321.494, Code of Iowa, 1971. An executed waiver form is evidence the passenger is

aware of risks involved while riding in said vehicles. (Beamer to Sellers, Commissioner of Public Safety Dept. 8/16/72) #72-8-2

Mr. Michael M. Sellers, Commissioner, Department of Public Safety: We are in receipt of your recent letter in which you request this office to give an opinion as to the extent of liability which may be incurred by members of the Highway Patrol or other law enforcement divisions who, while on duty assignments, are accompanied by press people or others outside the field of law enforcement.

Specifically, your questions are as follows:

"1. What liability, if any, does the state have under the above-described circumstances if the passenger is injured as the result of a traffic accident involvement or by assault precipitated by a felon?

2. If the State does have liability under these circumstances, when the passenger is a guest at his own request can the liability be eliminated by having the guest sign a waiver absolving the state of any liability in the event he is injured or killed as the result of accident or criminal action?"

§321.494 of the 1971 Code of Iowa provides:

"The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in said motor vehicle as a guest or by invitation and not for hire unless damage is caused as the result of said motor vehicle being under the influence of an alcoholic beverage, a narcotic, hypnotic or other drug, or any combination of such substances, or because of the reckless operation by him of such motor vehicle."

The Courts have stated that the purpose of Section 321.494, 1971 Code of Iowa is to cut down litigation, to protect "Good Samaritan" host drivers, to prevent guest from displaying his "ingratitude" and to prevent collusive suits. *Pfau* v. *Trent Aluminum Co.*, 1970, 263 A.2d 129, 55 N.J. 511, *Marean* v. *Petersen*, 1966 259 Iowa 557, 144 N.W.2d 906.

Section 321.494 would appear to absolve the State from liability in the type of situations you have described, given of course that the passenger could be considered a guest within the meaning of the statute. In this regard the Supreme Court of Iowa in the case of *Horst* v. *Holtzen*, 1958, 249 Iowa 958, 966, 90 N.W.2d 41, 46 stated:

"[s]ection 321.494, supra, makes the legislative intent clear that a 'guest' may be a person other than one riding by invitation; as by permission."

The guest category would then include not only those who are specifically invited to accompany the patrolman, but also those who request and are granted permission to ride with the patrolman.

The harm which might result to the passengers from an assault precipitated by a felon is not within the scope of immunity from suit afforded by the guest statute. However, any voluntary passenger could be considered to have assumed the risk of such harm which as a matter of common knowledge is attendant to the duties of a police officer.

In W. Prosser, *Handbook of the Law of Torts*, 450-451, (3rd ed. 1964), the eminent legal scholar William Prosser provides the following example of the application and effects of the doctrine of assumption of the risk:

"A second and closely related situation is where the plaintiff, *with knowledge of the risk, voluntarily enters into* some relation with the

defendant which will necessarily involve that risk, and so is regarded as *tacitly* or *impliedly* agreeing to take his own chances. Thus he may accept employment knowing that he is expected to work with a dangerous machine or animal, or a ride in a car with knowledge that the brakes are defective and the driver incompetent; or he may enter a baseball park, and so consent that the players may proceed with the game without taking any precautions to protect him from being hit by the ball. Again, the legal result is that the defendant is simply under no duty and therefore cannot be charged with negligence." (Emphasis added)

The two essential elements as underlined above are knowledge of the risk and voluntary entry. Although both elements would almost certainly be present in the situation you describe, a waiver although not strictly necessary or effective on its own merit, might be extremely useful in substantiating knowledge of the risk and the voluntary nature of the carriage.

The most recent pronouncement by the Supreme Court of Iowa, on the doctrine of assumption of the risk as related to automobiles, is found in *Bessman* v. *Harding*, 1970, 176 N.W.2d 129, where the court reiterated the validity of the doctrine and said:

"In order to invoke the doctrine of assumption of the risk in an action brought under the automobile guest statute it is essential that the risk or danger shall have been known to and appreciated by the passenger or it shall have been so obvious it must be taken to have been known or comprehended."

In summary then, it would appear that the state would not be held liable in the situation you pose. A statement or waiver to the effect that a passenger is aware of the risks of harm which riding in a highway patrol car might entail and that such carriage is voluntary would then effectively preclude any potential liability.

August 16, 1972

COURTS: Judicial Magistrates, Section 22, S.F. 428, Acts of the 64th G.A., Second Session. In the absence of a contractual provision requiring full time services, a teacher may be appointed and serve as a part-time judicial magistrate and receive remuneration from both positions. (Nolan to Weldon, State Representative, 8/16/72) #72-8-3

The Honorable Richard W. Weldon, State Representative: This is written in answer to your letter requesting an Attorney General's opinion on the question:

"Can a teacher in a merged area school with a standard teaching contract accept an appointment as a part-time judicial magistrate under the new unified trial court system and receive remuneration for both positions?"

There appears to be no statutory prohibition precluding a teacher from being appointed as a part-time judicial magistrate under the new unified court act (S.F. 428, Acts of the 64th G.A., 2nd Sess.). Section 22 of the act cited above provides:

"A judicial magistrate shall be an elector of the county of appointment, shall be less than seventy-two years of age, and shall cease to hold office upon obtaining that age."

A teacher may not serve as a member of a school board as such offices are incompatible. 1964 OAG 141.

The tests of incompatibility of offices are set forth in an opinion of the Iowa Supreme Court in the case of *State ex rel LeBuhn v. White*, 1965, 257 Iowa 606, 133 N.W.2d 903. The test of incompatibility is whether there is an inconsistency in the functions of the two as where one 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 so as to render it improper from considerations of public policy for an incumbent to retain both.

The office of judicial magistrate will take the place of the existing offices of justice of the peace, municipal judges and the mayor's court. We have found no precedent establishing a rule against a teacher also serving as justice of the peace or as mayor. Accordingly, it is our view that a teacher in a merged area school may, absent any contractual provision to the contrary, accept and serve as a part-time judicial magistrate under the new unified court system and receive remuneration for both positions.

August 16, 1972

COUNTY AND COUNTY OFFICERS: Supervisors, Section 345.1, Code of Iowa, 1971. Expenditures in excess of $50,000 for court house renovation must be submitted to the voters regardless of the fact that excess funds are obtained from state or federal matching funds. (Nolan to Goen, Dubuque County Attorney, 8/16/72) #72-8-4

Mr. John J. Goen, Dubuque County Attorney: This letter is written in response to your request for an opinion on the following matter:

"Our Board of Supervisors has asked this office for an opinion as to whether or not the board would need permission from the voters to proceed with an expenditure of perhaps $100,000 for Court House renovation if they had $50,000.00 of unappropriated funds in the County General Fund which could be expended for the renovation and could obtain $50,000.00 matching State or Federal funds.

"Would your opinion be the same if the funds to cover the excess expenditure were Federal or State matching funds?"

The answer to your question is outlined in §345.1, Code of Iowa, 1971, as amended by Ch. 200, Acts of the 64th General Assembly, First Session. The section as amended provides as follows:

"The board of supervisors shall not order the erection of, or the building of an addition or an extension to, or the remodeling or reconstruction or relocation and replacement of a court house, jail, county hospital, county home, or any other county building or facility, except as otherwise provided, when the probable cost will exceed ten thousand dollars, nor the purchase of real estate for county purposes exceeding ten thousand dollars in value, until a proposition therefor shall have been first submitted to the legal voters of the county, and voted for by a majority of all persons voting for and against such proposition at a general or special election, notice of the same being given as in other special elections. However, such proposition need not be submitted to the voters if any such erection, construction, remodeling, reconstruction, relocation and replacement or purchase of real estate may be accomplished without the levy of additional taxes and the probable cost will not exceed fifty thousand dollars, or when a relocation and replacement is made necessary by the acquisition of county property for a federal or state project, and the cost of the relocation does not exceed the amount of the award of damages by the state or federal government."

According to the facts as outlined in your letter, it appears that the

probable cost of renovating the Dubuque County Court House would exceed $50,000.00. This factor would, in our opinion, necessitate submitting such proposed expenditure to the voters regardless of whether or not state or federal matching funds might be available. 1968 OAG 877.

August 11, 1972

STATE OFFICERS AND DEPARTMENTS: Merit System, maternity leave — §79.1, Code of Iowa, 1971. Disability resulting from the condition of pregnancy and childbirth is covered by the sick leave provisions of the merit system. §79.1, Code of Iowa, 1971. (Conlin to Keating, Director, Iowa Merit Employment Department, 8/11/72) #72-8-5

W. L. Keating, Director, Iowa Merit Employment Department: We have your letter of June 23, 1972, wherein you request an opinion concerning whether or not the granting of maternity leave under Section 79.1 is required by Equal Employment Opportunity Commission Guidelines, 37 Fed. Reg. 6835 §1604.10.

Section 79.1, Code of Iowa, 1971, provides in pertinent part as follows:

"Leave of absence of thirty days per year with pay may be granted in the discretion of the head of any department to employees of such department when necessary by reason of sickness or injury."

On March 24, 1972, Title VII, 42 U.S.C. 2000(e) was amended to extend coverage to employees of all state and local governments, agencies and political subdivisions, except elected officials and their personal staff.

The Equal Employment Opportunity Commission, the Agency charged with enforcing Title VII has issued guidelines concerning pregnancy and childbirth at 37 Fed. Reg. 6835 §1604.10 which provide in pertinent part as follows:

"(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment."

Clearly sickness or injury is the cause of temporary "disability" and the Equal Employment Opportunity Commission Guidelines, *supra* cover all policies, written or unwritten which affect the employment privileges or rights of pregnant employees.

In the case of *Danielson* v. *Board of Higher Education*, 4 EPD 7773 (S.D., N.Y. Apr. 12, 1972), plaintiff requested that her absence due to pregnancy and childbirth be compensated under her employees sick leave plan. The Court in overruling defendant board's motion to dismiss and for summary judgment said at page 5969:

"Mrs. Danielson's claim that the leave which she took should be treated as any other illness is disputed by defendants on the ground that pregnancy is not an illness. With respect to Mrs. Danielson's claim we thus have another central disputed issue of fact, i.e., whether the period immediately following childbirth unattended by other complications is a medical disability or illness for which a woman is entitled to sick leave. Mrs. Danielson's claim for sick leave pay is a claim which has been previously recognized by a federal court, *Cohen* v. *Chesterfield County*

School Board, (3 EPD ¶8231), 326 F.Supp. 1159 (E.D. Va. 1971), and has been bolstered by recently adopted Rules and Regulations of the Equal Employment Opportunity Commission. 37 Fed. Reg. 6837 (April 15, 1972.)"

In the *Cohen* case, cited *supra,* the Court struck down a mandatory leave of absence rule on the grounds that it violated the 14th Amendment to the Constitution. The Court stated at page 1161:

"The maternity policy of the School Board denies pregnant women such as Mrs. Cohen equal protection of the laws because it treats pregnancy differently than other medical disabilities. Because pregnancy, though unique to women, is like other medical conditions, the failure to treat it as such amounts to discrimination which is without rational basis, and therefore is violative of the equal protection clause of the Fourteenth Amendment. See *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959); *Morey* v. *Doud,* 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1957)."

See *contra Schattman* v. *Texas Employment Commission,* 4 EPD ¶7679 (C.A. 5, 1972).

Section 79.1 states a method for the compensation of employees who are absent from work due to physical conditions. As such, it is a "sick leave plan" within the meaning and intent of the EEOC Guidelines, *supra,* and benefits must be extended for conditions related to pregnancy and childbirth in the manner and to the same extent as benefits are available for other physical conditions.

August 22, 1972

CONSTITUTIONAL LAW: Division of Powers, Delegation of legislative authority, Article III sec. 1 Constitution of Iowa, sec. 135.43 Code of Iowa, 1971. The legislature may not give the state department of health the authority to administer and adopt plans to comply with future amendment to federal law as called for in sec. 135.43. This is an unconstitutional delegation of legislative sovereign power to the federal government and violates Article III sec. 1 Constitution of Iowa. (Turner to Fair, Office of Planning & Programming, 8/22/72) #72-8-5A

Mr. Frank E. Fair, Comprehensive Health Planning, Office of Planning and Programming: Reference is made to your request for an attorney general's opinion, in which you state:

"Section 135.43, Code of Iowa, 1971, provides in part as follows:

"The State Department of Health is hereby authorized and empowered to act as the sole agency of the state to establish and administer a statewide plan for the construction, equipment, maintenance, or operation of any facilities for the provision of care, treatment, diagnosis, rehabilitation, training or related services, which plan is now or may hereafter be required as a condition to the eligibility for benefits under the provisions of Public Law 88-164 (42 U.S.C. 291k, 291k note, 295 et. seq., 2661, et. seq.) or any amendments thereto.

"The above paragraph was instituted under the State Code of Iowa in the early 1960's. During 1970 Public Law 91-517 called the Developmental Disabilities Services and Facilities Construction Amendments of 1970 (amendments to Public Law 88-164) was passed.

"A portion of this Developmental Disabilities Act relates directly to the State-wide Plan for construction of facilities of various types which is a direct responsibility of the State Department of Health. There are, however, other very significant sections to the Developmental Disabilities

Services and Facilities Construction Amendments of 1970. Among the varying responsibilities set forth in the DD Act are the following:

"1. Being responsible for the planning activities on behalf of all developmentally disabled persons in the State of Iowa.

"2. Being responsible for obtaining evaluation, information, and data from within the state, (on individuals, not facilities).

"3. Coordinating and where possible stimulating the development of planning efforts on behalf of all the developmentally disabled throughout the state.

"4. Assure the effective coordination of other major activities and programs in the state for developmental disabilities.

"5. Provide for a service delivery system to be developed and maintained by the State agencies and other public and voluntary state agencies that provide services.

"6. Describe the extent, quality, and scope of services being provided to the developmentally disabled under the following Federal assistance programs: Education for the Handicapped, Vocational Rehabilitation, Public Assistance, Medical Assistance, Social Services, Maternal and Child Health, Crippled Children's Services, Comprehensive Health, Mental Health and Mental Retardation Plans (of the aforementioned nine Federal programs, only one is presently located within the State Department of Health).

"7. Shall assure the Federal government that parts of the funds paid to the State for Developmental Disabilities Program will be made available to other agencies in state government and other non-profit, private institutions, agencies and organizations for the purposes of the carrying out of this Act.

"In summary, this will all require comprehensive application of services provided by many state agencies. More specifically, the Developmental Disabilities Program will encompass services and programs designed to serve the mentally retarded, the cerebral palsied, the epileptic and those with learning disabilities within the State of Iowa. There are five major agencies in state government and over 50 sub-divisions of these agencies in state government providing these services.

"The Developmental Disabilities Act emphasizes services. The Iowa Code section referred to above primarily alludes to construction and facilities. The 1972 FY Plan of Work of Developmental Disabilities in Iowa provides for no dollar expenditure for construction during the next two years of the program.

"Section 416.24 of the Developmental Disabilities Regulations provides as follows:

"The State Plan shall designate the state agency or agencies which will administer or supervise the administration of all designated portions of the State Plan provided that a sole state agency is designated for administering or supervising the administration of grants for construction.

"As I am sure you are aware, the above readily provides for administration and supervision of administration by multiple state agencies. This is the practice (because of the unique nature of this Developmental Disabilities Program) that has been followed in states across the country.

"The section in the State Code refers to the facilities or the construction plan which may be required as *a condition* to the eligibility for benefits under any subsequent amendment to Public Law 88-164. My direct

question is would the designation of the State Health Department as the agency to administer or supervise the administration of grants for construction and all construction related responsibilities for the Public Law 91-517 be sufficient to meet the requirements of that section of the State Code and allow the Governor flexibility of designating a more appropriate agency to administer the other portions of this program.

"If I, or the Office for Planning and Programming can be of any assistance in providing copies of the Public Law or answering any questions that you might have in making the above determination, please feel free to call upon us. The decision directly effects the quality and effectiveness of this very important program in our state."

The statute, §135.43, Code of Iowa, 1971, cited in the above letter under which the state department of health is authorized to be the sole agency to administer construction benefits and seemingly all other benefits found under the provisions of Public Law 84-164 [42 U.S.C., §291K, 291K note, 295 et. seq., 2661 et. seq.] or any amendments thereto, presents some serious difficulties. The phrase "any amendments thereto" is a violation of Article III, Section 1, Constitution of the State of Iowa relating to the legislative department.

Article III, §1, Constitution of the State of Iowa, provides:

"Departments of government. The powers of the government of Iowa shall be divided into three separate departments — the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted."

As we stated in 1968 OAG 132 (Turner to Miller) at p. 141: (See also 1968 OAG 166 and *State v. Johnson,* 1970, 84 S.D. 556, 173 NW2d 894)

"Aside from the separation of powers and the express prohibition against the exercise by one department of powers belonging to another, provided in the constitution, the maxim 'Delegata potestas non est delegari' is frequently applied as preventing the delegation of delegated power. The people, who hold in their hands all power of government, speaking through our constitution, have delegated the law and policy making power to the legislature, which in turn cannot again delegate it to others. Article III, §1, Legislative Department."

The legislature in adding the words "or any amendments thereto" has attempted to delegate its power to the federal government. The legislature cannot adopt subsequent amendments to the Federal law. 16 Am.Jr.2d 495, Constitutional Law §245, says:

"The principle is firmly established that a state legislature has no power to delegate any of its legislative powers to any outside agency such as the Congress of the United States. Thus, it is generally held that the adoption by or under authority of a state statute, of *prospective Federal legislation,* or Federal administrative rules thereafter to be passed, constitutes an unconstitutional delegation of legislative power." See also 133 A.L.R. 401 and the cases cited thereunder. (Emphasis ours)

The legislature may authorize and empower the state department of health to act as the sole agency to establish and administer the construction plan which is now in existence or required under Public Law 88-164 [42 U.S.C., Sections 291K, 291K note, 295 et. seq., 2661 et. seq.] *but not for any subsequent amendments.*

The law in question here, Public Law 91-517, the Developmental Disabilities Services and Facilities Construction Amendment [42 U.S.C.A. 2671 et. seq.] is an amendment to Public Law 88-164 referred to in §135.43. Since the legislature cannot make a delegation of their power to the state department of health to establish and administer plans called for in subsequent amendments such as this, it is our opinion that the governor could designate a more appropriate agency to administer portions of this program under the new amendment.

The office of planning and programming was created and is regulated by Chapter 7A, Code of Iowa, 1971. According to §7A.3 the primary responsibility of this office:

"Shall be to co-ordinate the development of physical, economic and human resource programs and to promote efficient and economic utilization of federal, state, local and private resources."

The means to implement these objectives have been provided for in the rest of the chapter. §7A.3(8 & 12) are illustrative of the breadth and scope of these powers and their emphasis on services and intergovernmental unit co-ordination.

§7A.3(8):

"Analyze the quality and quantity of services required for the orderly growth of the state, taking into consideration the relationship of activities, capabilities, and future plans of local governments, private enterprise, the state and federal government, and regional units established under any state or federal legislation, and make recommendations to the governor and the general assembly for the establishment and improvement of such services."

§7A.3(12):

"Apply for, receive, administer, and utilize federal or other funds available for achieving the purposes of this chapter."

1970 Public Law 91-517, 42 U.S.C.A., §§2671, et. seq., the Developmental Disabilities Services Act, also emphasized services and the use of many agencies, state and private, to provide these services.

Under §7A.4, Code, 1971, all state agencies must submit copies of their grant-in-aid application and assist the office of planning and programming.

§7A.4:

"State agencies and officers to co-operate. All state agencies and officers shall provide the office of planning and programming with any information it requests pertaining to its duties under this chapter, shall assist the office in carrying out its duties, and shall provide the office with a copy of all official grant-in-aid applications, together with a copy of any program plan developed to meet federal requirements, prior to submission of such application to the federal government."

The governor then, under §7A.5, Code, 1971, has the power to review these plans. §7A.5 provides in part:

"Review by governor. The governor shall review, examine, and evaluate all plans and programs filed with the office for planning and programming. If it is determined that any two or more plans or programs are contradictory or duplicate one another, the governor shall determine

which plan or program shall prevail and which contradictory items or duplications shall be deleted from the other plans or programs. The governor's decision on such matters shall be final and binding."

It is our understanding that due to the scope of the program contemplated under Public Law 91-517 and the emphasis on services and agency co-ordination, the governor has indicated that the office of planning and programming is the agency most fitted to undertake the duties set forth in the new law, with the exception of the construction grants which were reserved formerly for the state department of health under §135.43 and now could be delegated to it by the state plan called for in the new law. In view of all of the above, it is our opinion that the office of planning and programming be assigned this task. Its powers under Ch. 7A are sufficiently broad to encompass these responsibilities.

August 23, 1972

OPEN MEETINGS: Non profit corporations, Section 28A.1, Code of Iowa, 1971. River Valley CAP, a local OEO agency is not a public agency within the context of sec. 28A.1, Code of Iowa, but a contract between such non profit corporation and the counties supporting it may provide that it hold "open meetings." (Nolan to Goen, Dubuque County Attorney, 8/23/72) #72-8-6

Mr. John J. Goen, Dubuque County Attorney: You have requested an Attorney General's opinion as an aid in determining whether or not Ch. 28A, Code of Iowa, 1971, applies to the meetings of the River Valley Community Action Program (CAP), a local OEO agency.

Chapter 28A of the Iowa Code is entitled Official Meetings Open to the Public. Section 28A.1, provides as follows:

"All meetings of the following public agencies shall be public meetings open to the public at all times, and meetings of any public agency which are not open to the public are prohibited, unless closed meetings are expressly permitted by law:

"1. Any board, council, or commission created or authorized by the laws of this state.

"2. Any board, council, commission, trustees, or governing body of any county, city, town, township, school corporation, political subdivision, or tax-supported district in this state.

"3. Any committee of any such board, council, commission, trustees, or governing body.

"Wherever used in this chapter, 'public agency' or 'public agencies' includes all of the foregoing, and 'meeting' or 'meetings' includes all meetings of every kind, regardless of where the meeting is held, and whether formal or informal."

According to information submitted with your request, the River Valley CAP is supported by appropriations from three counties and the Dubuque City Council. One-third of the members of the River Valley CAP Board are government-appointed members. On the other hand, the Articles of Incorporation indicate that the River Valley CAP was incorporated under the Iowa Non-Profit Corporation Act (Ch. 504A, Code of Iowa).

Section 28A.1 lists particular public agencies whose meetings shall be open to the public at all times. Such list does not include a non-profit corporation. Therefore, the statutory rule of construction expressio unius

est exclusio alterius applies. Accordingly, it is our opinion that the meetings of the organization are not public meetings within the contemplation of the statute cited.

It may be, however, that under a contract between the counties and the River Valley CAP for the joint performance of governmental services there might be a provision that the meetings of this non-profit corporation be made open to the public. If such is the case, the provision of such contract if made pursuant to Ch. 28E of the Code of Iowa, 1971, would control requiring disclosure.

August 23, 1972

ELECTIONS: Authority to fill vacancy in nomination for state senate or house of representatives — §§43.84 and 43.106, Code of Iowa, 1971. Where a party has no candidate for the state senate or house of representatives on the primary ballot and there is not even one write-in vote for such office for the party a nomination may be made by a district convention under §43.106. (Haesemeyer to Synhorst, Secretary of State, 8/23/72) #72-8-7

The Honorable Melvin D. Synhorst, Secretary of State: Reference is made to your letter of August 31, 1972, in which you request an opinion clarifying an apparent conflict between our opinion of September 17, 1968, and July 23, 1970. In your letter you state:

"In an opinion of the attorney general dated July 23, 1970, addressed to Robert C. Landess, Mr. Haesemeyer states in the paragraph beginning at the bottom of page 3 as follows:

" 'Like Sec. 43.98, Sec. 43.84 as amended by H.F. 1020, makes no provision for the situation where there has been a failure of a candidate to file nomination papers. Thus, where a party has no candidate for the state senate or state house of representatives on the primary ballot and there is not even one write-in vote for such office for the party no nomination may be made.'

"Does this mean that no nomination may be made for the state senate or state house of representatives by district convention in accordance with Sec. 43.106 as referred to in 3(d) and 3(f) of the opinion of the attorney general dated September 17, 1968, addressed to Mr. Landess?"

Paragraphs 3(d) and 3(f) of the September 17, 1968, opinion state:

"3(d). Where the situation is similar to that described in paragraph 3(a) [a party has no primary candidate on the ballot and receives no write-in votes] above but the office in question is that of a member of the general assembly from a district larger than a county a nomination may nevertheless be made under §43.106. . . .

"3(f). Where the situation is similar to that described in 3(a) [a party has no primary candidates on the ballot and receives no write-in votes] . . . but the office in question is that of a member of the general assembly from a legislative subdistrict the rationale of the September 11, 1968, opinion referred to above, attached hereto, would apply and the nomination could be made under §43.106. . . ."

Section 43.106, Code of Iowa, 1971, provides:

"43.106 Nominations permitted. A district convention of a party may be held to nominate candidates for any office for which no nomination exists due to the failure of a candidate to file nomination papers for such office, due to the failure of any candidate to receive the number of votes required for nomination by section 43.66 or to place a name on the ballot as authorized under subsection 1 of section 43.59."

Unlike §43.84, §43.106 permits a district convention to nominate a

candidate for office regardless of whether or not the party in question had any persons' names printed on the primary ballot or had any write-in votes cast for the office.

Accordingly, we would have to advise that a nomination for state senate or house of representatives could be made under §43.106 in the circumstances you describe. The portion of the July 23, 1970, opinion which you quote should be given a narrow reading, that is to say it should be construed as saying merely, "Thus, where a party has no candidate for the state senate or state house of representatives on the primary ballot and there is not even one write-in vote for such office for the party no nomination may be made." *under §43.84.*

August 23, 1972

ELECTIONS: Cities and Towns; municipal civil service employees; leave of absence to run for office — §365.29, Code of Iowa, 1971. A municipal civil service employee is only required by law, when running for the Iowa general assembly, to take a leave of absence thirty days prior to a contested primary election. Thereafter he may be allowed to return to his employment until thirty days prior to the general election. (Turner to Gaudineer, State Senator, 8/23/72) #72-8-8

The Honorable Lee H. Gaudineer, Jr., State Senator: You have requested an opinion of the attorney general with respect to the following question:

"Section 365.29, Code of Iowa, 1971, makes it mandatory for a municipal employee under civil service who desires to run for the Iowa general assembly to take a leave of absence commencing 30 days prior to the primary election and continuing until such person is either eliminated as a candidate in the primary or general election or is elected to such office in the general election?"

Section 365.29, provides in relevant part as follows:

"Any employee who shall become a candidate for any elective office shall, commencing thirty days prior to the date of the primary or general election and continuing until such person is eliminated as a candidate, either voluntarily or otherwise, automatically receive leave of absence without pay and during such period shall perform no duties connected with the office or position so held."

This statute is far from being a model of clarity and by reason of its loose draftsmanship is subject to more than one construction. For example, the use of the disjunctive "or" can be construed to mean that the candidate would have to take a leave of absence thirty days prior to the primary election which would continue until he was either eliminated as a candidate in that election by reason of his nomination or defeat and that the employee could then return to work until thirty days before the general election when he would again have to go on leave. On the other hand it could also be contended that where an individual is successful in the primary he would have to take leave of absence commencing thirty days before the primary and continuing until his final election or defeat in the general election.

It is our opinion that the first construction is the one which should be adopted. A candidate who seeks elective office and follows the primary route is involved in two campaigns and is in effect a candidate twice. First he is a candidate for his party's nomination to run and then he is a candidate for the office in the general election. Since as we have noted

previously an employee is eliminated as a candidate by withdrawal, election or defeat, 1970 OAG 285, it is evident that a candidate who follows the primary route is first eliminated as a candidate in the primary election through his nomination or defeat and then is again eliminated as a candidate in the general election through his election or defeat.

Accordingly, it is our opinion that a municipal civil service employee is only required by law, when running for the Iowa general assembly, to take a leave of absence thirty days prior to a contested primary election. Thereafter he may be allowed to return to his employment until thirty days prior to the general election. Of course the municipality retains discretionary power to place a municipal civil service employee on a leave of absence any time after his candidacy becomes a matter of public knowledge, if such candidacy or the campaigning for such office interferes with or is in conflict with his employment.

August 23, 1972

ELECTIONS: General Assembly: Senate: Qualifications of candidates: Age requirements: Vacancies in Offices and Nominations: Constitutional Law — Article III, §§2, 3, 5, 34, 35 and 36, Constitution of Iowa, as amended; §§43.59, 43.84, 43.101, 43.106, *63.1*, *63.3*, 63.7, 63.8, *69.1* *69.2*, Code of Iowa, 1971. When the Iowa Constitution requires a senator to be 25 years old, the requirement applies to the date of his induction to office rather than the date of election. A candidate who will not be 25 until after the date he is to take office cannot qualify to serve in the Senate. At least this is true when there is no incumbent to hold over until the candidate reaches 25 and a vacancy will occur in the meanwhile. Such a man should not be placed on the general election ballot and his party should be permitted to make another nomination. Because of the Supreme Court's reapportionment decisions, no incumbent legislator elected prior to the 1972 elections can re-qualify to hold over after December 31, 1972, and until his successor is elected and qualified. (Turner to Synhorst, Secretary of State, 8/23/72) #72-8-9

The Honorable Melvin D. Synhorst, Secretary of State: By your letter of August 3, 1972, you have requested an opinion of the attorney general as follows:

"A newspaper story indicates that a candidate for the office of State Senator, who appears to have received the high vote in the August 1, 1972, primary election, will not be twenty-five years of age until March of 1973.

"Sec. 5, Article III of the Constitution of the State of Iowa provides:

'Senators shall be chosen for the term of four years, at the same time and place as Representatives; they shall be twenty-five years of age, and possess the qualification of Representatives as to residence and citizenship.'

"When must a candidate for the office of State Senator attain the age of twenty-five in order to qualify that candidate to have his name placed on the general election ballot?

"If a candidate who has received the high primary vote should withdraw because he is not old enough to have his name placed on the general election ballot, would there then be a vacancy in nomination for the office in question, or would the nomination go to the candidate of that party for that office who received the next highest vote?

"If, as a result of this opinion, any primary candidate with the high vote is because of age ineligible to have his name placed on the general election ballot and if that candidate has not withdrawn, should the State

Canvassing Board knowing of the ineligibility refuse to declare that candidate nominated or is the function of the State Canvassing Board purely ministerial in this respect?

"If the duty of the State Canvassing Board is purely ministerial, whose responsibility would it be to follow through on this situation?"

In answering these questions, it should first be recalled that eligibility requirements ordinarily refer to the date of induction to office rather than to the date of election. 1970 OAG 738; *State v. Huegle*, 1907, 135 Iowa 100, 112 N.W. 234; *State ex rel Perine v. Van Beek*, 1893, 87 Iowa 569, 54 N.W. 525; 1928 OAG 294. Certainly, this is true of Art. III, §5, Constitution of Iowa, and a candidate for the senate can qualify if he will be twenty-five years old on the day he takes office.

Although the first session of the next (65th) General Assembly of Iowa, in which the candidate for election in November, 1972, seeks office, convenes and commences on the second Monday in January, 1973 (Art. III, Legislative Department, §2, as amended in 1968 and §2.1, Code of Iowa, 1971), which in this case would be January 8, 1973, the term of office of a candidate seeking election to the 65th General Assembly in November, 1972, commences on the *first* day of January next after his election (Art. III, §§3 and 5, Constitution of Iowa).

§63.1, Code of Iowa, 1971, provides:

"Each officer, elective or appointive, before entering upon his duties as such, shall qualify by taking the prescribed oath and by giving, when required, a bond, which qualification shall be perfected, unless otherwise specified, before noon of the second secular day in January of the first year of the term for which such officer was elected."

§63.3 of said Code then provides as follows:

"When on account of sickness, the inclement state of the weather, unavoidable absence, or casualty, an officer has been prevented from qualifying within the prescribed time, he may do so within ten days after the time herein fixed."

It is obvious such a candidate for the office of senator who would not attain the age of twenty-five years until March of 1973, could not qualify by the time prescribed by either of the above two sections, nor until his birthday in March, 1973, which would be too late. *State v. Van Beek*, supra. Failing to qualify when he is to take office, he cannot later do so. At least, this is true if, in the meanwhile, his office becomes vacant as I believe it would in this instance.

If he were elected in the November election and failed to qualify as provided in the foregoing sections, his predecessor incumbent would *ordinarily* hold over under Art. III, §3, Constitution of Iowa. Senators and representatives hold over until their successors are elected and qualified. 1914 OAG 80. The incumbent ordinarily requalifies as provided in §§63.7 and 63.8. I shall even go so far as assuming, without deciding, that ordinarily the predecessor incumbent would hold over until this candidate reached age twenty-five in March, 1973 — until this candidate was qualified.

§69.1 provides:

"Except when otherwise provided, every officer elected or appointed for a fixed term shall hold office until his successor is elected and qualified,

unless he resigns, or *is removed* or suspended, *as provided by law.*" (Emphasis added.)

Because of the current situation with reference to legislative apportionment, on January 2, 1973, there will be no predecessor incumbent in the senate who could hold over. In *In re Legislative Districting of General Assembly, Rasmussen v. Ray*, 1970 Iowa, 175 N.W.2d 20, the Iowa Supreme Court held unconstitutional Chapter 89, Acts of the 63rd G.A., First Session (House File 781) as it apportioned both the house and the senate of the 64th General Assembly, commencing in 1971, for the 1970 elections. But the Court allowed the unconstitutional redistricting plan for the 1970 elections as an interim measure stating at page 29 of 175 N.W.2d: "Because of the constitutional defects in H.F. 781, the apportionment it prescribes may not be used after the 1970 elections." The 1971 legislature was therein directed to adopt a plan of redistricting "legally acceptable under the guidelines set forth in this decision", which the 1971 legislature attempted to do in Chapter 95, Acts of the 64th G.A., First Session, 1971 (H.F. 732). But this plan, too, was held unconstitutional in its apportionment of both the house and the senate for the 1972 elections of the 65th G.A. *In the Matter of the Legislative Districting of the General Assembly, Noun v. Turner*, 1972 Iowa, 193 N.W.2d 784. In this second case, at page 791 of 193 N.W.2d, the Supreme Court cut short the terms of the senators elected to a four year term at the general election in 1970 in accordance with the provisions of Art. III, §35, of the Iowa Constitution, as amended November 5, 1968, and provided it would establish fifty new senatorial districts "from each of which a senator must be elected at the 1972 election". In a supplemental opinion in 196 N.W.2d 209, Chapter 1145, Acts of the 64th G.A., Second Session, the Court created all new legislative districts. In so doing, the Court cut short not only the four year terms of those members of the General Assembly elected in 1970, but also any hold over term which might otherwise have accrued to the term of any incumbent senator or representative elected prior to November, 1972. All present legislators are removed from office at midnight on December 31, 1972, and the legislature elected in November, 1972, will take office with the new year. The Court acted in accordance with the constitutional mandate of Art. III, §§34, 35 and 36, Constitution of Iowa, as amended in 1968, to create an entirely new General Assembly, commencing with the 65th G.A. in 1973, after it had found that two successive legislative plans failed to meet constitutional muster.

In my opinion, the decisions of the Supreme Court effectively remove the incumbent from office so that he cannot hold over under §69.1 or requalify under §§63.7 or 63.8, if, indeed, it could be argued that there is an incumbent for the new senate district to which a twenty-four year old candidate is seeking election.

In other words, I believe that where the Supreme Court holds a legislative apportionment unconstitutional, but tolerates election of an interim legislature to serve under that unconstitutional plan, which the Court says may not be used thereafter, and the interim legislature creates another unconstitutional apportionment, which the Court again strikes down, and for which the Court substitutes its own plan, cutting short the terms of holdover senators and creating entirely new legislative districts, no interim incumbent can hold over. In such a situation, a candidate

must be elected to serve the new district under the creation of the entirely new legislature. Such a candidate has no predecessor and is not a successor.

Thus, a twenty-four year old candidate who will not become twenty-five until March, 1973, not only cannot qualify under the provisions of §§63.1 and 63.3, but the office will become vacant as of January 1, 1973, the first day of the term as provided in Art. III, §§3 and 5, because there is no incumbent to hold over.

§69.2 of the 1971 Code provides as follows:

"Every civil office shall be vacant upon the happening of either of the following events:

"1. A failure to elect at the proper election, or to appoint within the time fixed by law, unless the incumbent holds over.

"2. *A failure of the incumbent or holdover officer to qualify within the time prescribed by law.*

"3. The incumbent ceasing to be a resident of the state, district, county, township, city, town, or ward by or for which he was elected or appointed, or in which the duties of his office are to be exercised. This subsection shall not apply to appointments authorized by section 368A.1, subsection 7.

"4. *The resignation or death of the incumbent, or of the officer-elect before qualifying.*

"5. *The removal of the incumbent from, or forfeiture of, his office, or the decision of a competent tribunal declaring his office vacant.*

"6. The conviction of incumbent of an infamous crime, or of any public offense involving the violation of his oath of office." (Emphasis added.)

In view of all of this, if you have reason to believe a candidate was nominated in the primary election of August 1, 1972, who will not be twenty-five years of age until March, 1973, you should immediately notify him and the State and County Central Committees of his party that his name will not be placed on the general election ballot in absence of proof of his age and proof that he will be twenty-five years old on or before January 1, 1973, the day he would take office if elected. If such proof is not forthcoming at once, his party should have the opportunity to make a new nomination under the provisions of §§43.59, 43.84 and 43.106 of the 1971 Code, the same as if he died, resigned or withdrew his name from office, and the people should not be put to the trouble and expense of a special election after the vacancy occurs, where such is obviously unnecessary. In this instance, I checked the Iowa Bureau of Vital Statistics, which reported to me that they could find no birth certificate for the individual in question. However, the Department of Public Safety informs me a driver's license issued to an individual with the same name, from the same town as the candidate in question, shows his birth date as March 31, 1948. Accordingly, it is my opinion that you have reasonable cause to believe that it will be impossible for the candidate in question to qualify and that you should send out the notices immediately.

Either the candidate's voluntary withdrawal or the State Canvassing Board's refusal to certify his name to be printed on the ballot will consti-

tute a vacancy in the nomination which, if in time, may be filled as provided by law. See §§43.59, 43.84, 43.101 and 43.106. I find no provision which would merely allow the nomination to go to the candidate of that party, for that office, who received the next highest vote in the August 1 primary.

In answer to your last question, if it is determined that the candidate will not attain the age of twenty-five years on or before January 1, 1973, the State Canvassing Board, knowing of his ineligibility, should refuse to declare the candidate nominated. Whether the Board's duties are ordinarily considered ministerial, the Board is bound to uphold Art. III, §5 of the Constitution of Iowa. If this matter has not come to the attention of the Board and it has already acted to certify the name, it is my opinion that the Secretary of State and the Attorney General are among those charged with the responsibility of upholding the Constitution and insuring that the voters of the party in question have an opportunity to vote for a qualified candidate of their choice in the general election and to avoid the trouble and expense of a special election which could certainly result from a vacancy in January.

In support of this opinion, see also 1909 OAG 350 and *State ex rel Perine v. Van Beek*, 1893, 87 Iowa 569, 54 N.W. 525.

August 25, 1972

STATE OFFICERS AND DEPARTMENTS: Iowa Beer & Liquor Control Department, former Iowa Liquor Control Commissioner, conflict of interest. Section 68B.2 and 68B.7, Code of Iowa, 1971; sec. 153(2), Chapter 131, 64th G.A. First Session (1971). The Iowa Beer and Liquor Control Department created by Chapter 131, 64th G.A., is not the same agency as the now defunct Iowa Liquor Control Commission and a former member of the latter commission is not barred by the Iowa Public Officials Act, Chapter 68B, Code of Iowa, 1971, from representing a distiller and attempting to sell such distiller products to the new department on a commission basis. (Turner to Gallagher, Iowa Beer & Liquor Control Department, 8/25/72) #72-8-10

Mr. R. A. Gallagher, Director, Iowa Beer & Liquor Control Department: You have requested an opinion as to whether two former commissioners "of the old Iowa Liquor Control Commission" who have been employed, one as a "representative", and the other as a "consultant" by one or more corporate liquor distilleries or wineries which sell products to the Iowa Beer and Liquor Control Department are in violation of §68B.7, Code of Iowa, 1971. You state that you have received "compliance agreements" which list them as such from the respective corporations; that both individuals were commissioners until December 31, 1971, and that your question arises because the old Iowa Liquor Control Commission "was completely reorganized by statute on January 1, 1972, and is now the Iowa Beer and Liquor Control Department." You also inquire as to whether there is any difference in employment as a "consultant" and employment as a "representative" and state that the commissioner who is listed as a consultant has not contacted your department since January 1, 1972, but that the commissioner listed as a representative has contacted you and attempted to sell the department more liquor than the department has been buying from the company he now represents.

It is not within the province of the attorney general to issue opinions

finding individuals guilty of violations of criminal statutes and it would be improper for him to do so. Guilt is a matter for courts and juries to decide. Although Chapter 68B provides no penalty for a violation of §68B.7, in its own terms, when an act is prohibited by statute and no penalty is imposed either in the title or in the statute itself, the act is a misdemeanor. §687.7, Code, 1971; *State v. Cowen*, 231 Iowa 117, 3 N.W.2d 176; and 1971 OAG, Beamer to Sellers, 9/7/71, No. 71-9-3. Thus, §68B.7 is a criminal or penal statute.

However, in this case, you are also inquiring as to whether, because of the statute, the Iowa Beer and Liquor Control Department should revoke the compliance agreements, insofar as these corporations are concerned, and refuse to do business with these former commissioners.

§68B.7 provides as follows:

"No person who has served as an *official or employee* of a state agency shall within a period of two years after the termination of such service or employment appear before such state agency or receive compensation for any services rendered on behalf of any person, firm, corporation, or association *in relation to any case, proceeding, or application* with respect to which such person was directly concerned and in which he personally participated during the period of his service or employment.

"No person who has served as the *head of or on a commission* or board of a *regulatory agency* or as a deputy thereof, *shall* within a period of two years after the termination of such service *receive compensation* for any services rendered on behalf of any person, firm, corporation, or association in any case, proceedings, or application *before the department with which he so served* wherein his compensation is to be *dependent or contingent* upon any action by such agency with respect to any license, *contract*, certificate, ruling, decision, opinion, rate schedule, franchise, *or other benefit*, or in promoting or opposing, directly or indirectly, the passage of bills or resolutions before either house of the general assembly." (Emphasis added.)

The statute is in two parts. The first paragraph prohibits employees and officials from dealing with the state agency for two years after termination of their service or employment therewith, "in relation to any case, proceeding, or application with respect to which such person was directly concerned" during his service or employment, and has been the subject of an opinion of this office applicable to a former employee of the Reciprocity Board. 1971 OAG, Beamer to Sellers, 8/7/71, No. 71-9-3. You have set forth no facts indicating that either former commissioner is involved with any matter covered by the quoted clause of the first paragraph or which would indicate any violation under it. Here, we are concerned with the second paragraph relating to the "head of or on a commission or board of a regulatory agency" who is prohibited for two years from receiving compensation for services rendered on behalf of a person or corporation "before the department with which he so served" and "wherein his compensation is to be dependent or contingent upon any action by such agency".

We do not know, and you do not state, whether or how either of these commissioners are being compensated. Of course, if neither is being paid for his services, there is no violation. And there is no violation if they are being paid on a straight salary basis not "dependent or contingent upon" action by the agency.

Presumably, if any portion of the compensation is a commission based upon sales to the agency, such compensation would be "dependent or contingent upon" the action of the agency. A commission, as it is ordinarily understood with reference to agents or brokers, is compensation usually calculated upon a percentage of the purchase price or profit from the sale or transaction.

Moreover, a "sale" would appear to fall within the words "contract or other benefit" also requisite to a violation of the statute.

But the difficult question is whether either of these commissioners are acting on behalf of the corporation "before the department with which he so served". In the one instance, the commissioner who is a consultant, and who has never contacted the department, is certainly not in prima facie in violation of the statute. His employment with the corporation may be entirely unrelated to influencing the department.

The other commissioner, who you say is actually a representative of his corporation and has actually attempted to sell liquor to the department (but I understand failed to succeed) poses the most difficult question. Assuming he *actually received* a commission based on the sale to the department, (and actual receipt of compensation is another requisite to violation which is not here indicated) were his services "before the department with which he so served" as is required to make the statute applicable? Or is the "Iowa Beer and Liquor Control Department" established by Chapter 131, 64th G.A., First Session, effective January 1, 1972, (§153) a different state agency than the "Iowa Liquor Control Commission" on which these commissioners served under §123.6, Code of Iowa, 1971? §153(2), Chapter 131, 64th G.A., First Session, provides:

"The Iowa liquor control commission, created pursuant to section one hundred twenty-three point six (123.6) of the Code, shall continue to discharge its duties under Title VI of the Code, and its members are entitled to full salary and other benefits, through December 31, 1971, *at which time the commission shall be abolished and all rights, functions, and duties pertaining to the commission and its members shall cease.* Any member whose term expires on June 30, 1971, shall not be replaced as provided by law and such members shall continue in office through December 31, 1971." (Emphasis added.)

While of course the duties and functions of the commission under the Iowa Liquor Control Act, Chapter 123, Code, 1971, and many more, have devolved upon the Iowa Beer and Liquor Control Department under the new comprehensive act (Chapter 131, supra) and the duties of the former commissioners, and more, have devolved upon the director of the Iowa Beer and Liquor Control Department, my study persuades me that they are not the same state agencies.

In the first place, "regulatory agency" is a defined term under §68B.2, which specifically enumerates all of the agencies to which it applies, including the "liquor control *commission*". No mention is made therein, nor in any amendment thereto, of the Beer and Liquor Control Department. *Expressio unius est exclusio alterius.* Doubtless, the legislature simply overlooked amending §68B.2 when it enacted Chapter 131. But I am bound by what the legislature actually has said, rather than what it should or might have said. Rule 344(f)(13), Iowa Rules of Civil Pro-

cedure. *McKillip v. Zimmerman*, 1971 Iowa, 191 N.W.2d 706.

Moreover, criminal and penal statutes are strictly construed and are not to be interpreted to include charges plainly without fair scope and intendment of the statute, though within its policy and reason. Any doubt should be resolved in favor of the accused. *State v. Nelson*, 1970 Iowa, 178 N.W.2d 434; *State v. Ricke*, 1968 Iowa, 160 N.W.2d 499. The latter case quotes Justice Oliver Wendell Holmes as putting it this way: "We do not inquire what the legislature meant. We ask only what the statute means." That case held that dump trucks were not road machinery just because they were used to haul material for road work.

Under the old liquor control law, the three liquor commissioners were appointed to six-year terms, and the terms were staggered to maintain experience and continuity, with only one commissioner's term ending every two years. Under such circumstances, it is understandable that the legislature would be concerned that a former commissioner, particularly during the first two years after leaving office, might unduly influence his brother commissioners, with whom he had served and who were still serving. But it is more difficult to imagine that commissioners removed from their offices by this major legislative reorganization of a state agency would have any greater influence with the newly created and appointed director of the new department, by virtue of the offices they had held, than any other person representing a distillery. Indeed, it seems at least as likely that the new director might be inclined to lean over backward to avoid the appearance of such influence. Of course, the former commissioners might have greater influence than others with employees of the department formerly employed by the commission, possibly including the director if such happened to be the case, so speculation along these lines does not seem fruitful or decisive. In any event, the wisdom and rationale of the statute is not for me to decide.

We have, however, heretofore concluded that the rules and regulations of the old commission also died with the repeal of Chapter 123 when the commission was abolished. See §§152 and 153 of Chapter 131, the new act. Such automatic extinction of the commission's regulations *is* significant. So is the abolition of its rights, functions and duties, and the cessation of its members as of December 31, 1971.

But most significant, the title of the new act says that it is, among other things, "creating an Iowa Beer and Liquor Control Department". I simply cannot see how it can be maintained that either of these former commissioners can appear "before the department with which he so served" when that department was not even created until January 1, 1972, and both were statutorily removed from office on December 31, 1971. See also §§4 and 153.

The question here is not one of ethics but of law. These former high state officers are entitled to the same presumption of innocence, and the same rules of statutory construction, as any other person. For all of these reasons, it is my opinion that these former commissioners are not violating Chapter 68B and the department has no reason to revoke the compliance agreements received from the corporations they represent. In this regard, except as otherwise provided by law and particularly in

the area of invidious discrimination, it is your exclusive prerogative as director of the department to determine with whom you and the department will or will not negotiate about the department's business. In exercising that prerogative, it is for you to decide what is ethical, moral and proper, and whether you are subject to undue influence.

Chapter 68B, our law with reference to conflicts of interest of public officers and employees, was apparently modeled after §73 of the New York Public Officers Law, although it is not so comprehensive. Nor does our law include a code of ethics similar to §74 of New York's Public Officers Law. In adopting the latter, the New York Legislature declared its intent in terms worthy of the consideration of every public official:

"A continuing problem of a free government is the maintenance among its public servants of moral and ethical standards which are worthy and warrant the confidence of the people. The people are entitled to expect from their public servants a set of standards above the morals of the market place. A public official of a free government is entrusted with the welfare, prosperity, security and safety of the people he serves. In return for this trust, the people are entitled to know that no substantial conflict between private interests and official duties exists in those who serve them."

A public official who lives by such principles has nothing to fear except the criticism, both healthy and unwarranted, which, thank heavens, is the burden of every conscientious official in a free society and the duty of every citizen who wants to keep it so.

August 28, 1972

CITIES AND TOWNS: Pension funds — Incompatibility — §§410.2, 410.3, 410.16, 411.5 and 411.7, Code of Iowa, 1971. A city treasurer may not be the bookkeeper for a firemen or policemen pension fund. A treasurer may not draw up warrants. (Blumberg to Drake, State Representative, 8/28/72) #72-8-11

Mr. Richard F. Drake, State Representative: We are in receipt of your opinion request of August 11, 1972, concerning a possible conflict of interest on Boards of Trustees for firemen and policemen pension funds. The question of incompatibility concerns a city treasurer also being the bookkeeper for the funds. A second question arises as to whether the city treasurer or the bookkeeper shall issue warrants on the funds.

Section 410.2, 1971 Code of Iowa, dealing with firemen and policemen pension funds, provides that the chief officer of each department, with the city treasurer and the city attorney, shall be ex officio members of the boards of trustees for each pension fund. The city treasurer is the treasurer of each board. Section 410.3 provides that the treasurer of the boards shall safekeep any investments made by the boards. Section 410.16 provides that all pensions paid and money drawn from the funds shall be upon warrants signed by the appropriate board of trustees. The treasurer shall make an annual report showing money paid, received and on hand.

Chapter 411 of the Code provides for firemen and policemen pension funds for those under civil service. Section 411.5 provides that the chief officers of the fire and police departments, the city treasurer, city attorney, two members of the fire and police departments and two citizens shall constitute the boards of trustees of the pension funds. Section

411.5(5) provides that the boards shall appoint a secretary, who may be one of its members, and engage other services required to transact business. Section 411.7 provides for investment of the funds to be made by the city treasurer, and that the treasurer shall be the custodian of the funds. Sub-section six of 411.7 provides that no trustee shall receive any pay or emolument for his services, except as secretary.

The point to be made with reference to Chapter 411 is that of the employees hired by the boards, only the secretary may be a member of the board. In other words, a member of the board may not be an employee of the board except for the secretary's position. This provision would obviously prevent any member of the board from being a bookkeeper for the board.

The case of *State ex rel. Crawford* v. *Anderson*, 1912, 155 Iowa 271, 136 N.W. 128, sets forth the criteria for incompatibility of offices. It is stated therein (155 Iowa at 273):

"The principal difficulty that has confronted the courts in cases of this kind has been to determine what constitutes incompatibility of offices, and the consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time. Bryan v. Cattell, supra. But that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one 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.' State v. Bus, 135 Mo. 338, 36 S.W. 639, 33 L.R.A. 616; Attorney General v. Common Council of Detroit, supra [112 Mich. 145, 70 N.W. 450, 37 L.R.A. 211]; State v. Goff, 15 R.I. 505, 9 A. 226, 2 Am.St. Rep. 921. A still different definition has been adopted by several courts. It is held that incompatibility in office exists 'where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both'."

See also, *State ex rel. LeBuhn* v. *White*, 1965, 257 Iowa 606, 133 N.W. 2d 903.

It would appear that the duties of a bookkeeper would be subordinate to those of a treasurer. Accordingly, we are of the opinion that the position of city treasurer as treasurer of a board of trustees would be incompatible with the position of bookkeeper for that same board.

With respect to your second question, a "warrant" has been defined as a "written order, drawn by someone with authority, issued to some officer having the possession and control of funds, authorizing and directing the said officer, as, for instance, a treasurer, to pay out to the party named, the amount specified in said order, check or warrant." *Missouri Gravel Company* v. *Federal Surety Company*, 1931, 212 Iowa 1322, 1329, 237 N.W. 635, 639. In *Harrison County* v. *Ogden*, 1914, 165 Iowa 325, 341, 145 N.W. 681, 686, it was stated that a warrant is but the evidence of indebtedness. It is prima facie evidence that the political subdivision, and the like, is legally indebted to the holder of the warrant, but is not negotiable. A warrant is the treasurer's authority for disbursing funds.

Warrants may be used two ways. They may be merely orders to the

treasurer to pay, whereupon he issues a check to the person named on the warrant. In this manner they are somewhat like a voucher. Warrants may also be like a check. In other words, they are given to the people named on the warrant, who then cash them. They are then received by a central bank and presented to the treasurer for payment. Vouchers are itemizations of expenses to be paid. They can be presented to the treasurer who then issues a check, or they can be presented to the person authorized to draw up warrants.

We have no information as to how the warrants and/or vouchers are used with respect to your pension funds. However, it is evident from the above discussions that a treasurer does not draw up warrants, since they are orders to him for payment. We cannot say at this time whether a bookkeeper may draw up warrants. Section 410.16 provides that warrants are to be signed by the boards, and section 411.7(4) provides that the treasurer shall make payments only upon vouchers signed by two persons designated by the boards. Thus, whether the bookkeeper can draw up warrants cannot be determined.

Accordingly, we are of the opinion that the treasurer cannot also be the bookkeeper. We are also of the opinion that the treasurer should not draw up the warrants.

August 28, 1972

STATE OFFICERS AND DEPARTMENTS: Commission on the Aging, Project Concern — §25A, Code of Iowa, 1971. There is no liability incurred to the State of Iowa if a minibus operated by Project Concern is involved in an accident. (Bowles to Nelson, Executive Secretary, Commission on the Aging, 8/28/72) #72-8-12

Mr. Earl V. Nelson, Executive Secretary, Commission on the Aging: This letter is in response to your request for an Attorney General's opinion concerning Project Concern. You ask the following question:

"What is the liability of the state agency in case of an accident with the minibus in which an older person might be injured. Would the state have any liability beyond the idea that we are funding a non-profit corporation? Or, would the liability rest entirely with Project Concern, Inc.?"

It is our understanding that Project Concern is a non-profit volunteer corporation that helps aged individuals. The Project is financed with matching federal and state funds, but it is not a state agency nor is it staffed with state employees. The supporting funds are disbursed by the Commission on the Aging to Project Concern through a sponsoring board of local individuals. This board has the responsibility of operating the project. The Commission's relationship to the sponsoring board is contractual, in that the Commission funds the operation, and in return, the board files quarterly reports and submits to periodic audits. The state does not manage or control the Project, nor is it involved in any way with its operation on the ground level.

The state, through the Commission on the Aging, is not subject to liability except as provided in the Iowa Tort Claims Act. This act provides, in part, that liability can only be found if there is negligence on the part of a state employee or agency. See §25A, Code of Iowa, 1971. Since Project Concern is totally staffed and operated by volunteers who

are not state employees and since the project is not a state agency, it is my opinion that it would not be possible to impute any liability to the state under the Iowa Tort Claims Act. It logically follows that if there is no basis for imputing liability under the Tort Claims Act, there is no basis for imputing liability to the State or the Commission on the Aging at all.

August 28, 1972

SCHOOLS: Transportation — §285.1, Code of Iowa, 1971. High school students living less than 2 miles from school in a town of less than 20,000 population are not entitled to be transported to and from school on the school bus. Elementary pupils living in such town may, in the discretion of the school board, be furnished bus transportation when they live less than the distance from school for which transportation is required. (Nolan to Freeman, State Representative, 8/28/72) #72-8-13

The Honorable Dennis Freeman, State Representative: This letter is written in response to your oral request for an Attorney General's opinion interpreting §285.1, Code of Iowa, 1971, with respect to the providing of transportation within a school district.

The specific questions you raise are:

"1. Is it permissible for a high school student living less than two miles from school in a town of less than twenty thousand population to be transported to and from school on a school bus?

"2. Is it permissible for an elementary school student living less than two miles from school in a town of less than twenty thousand population to be transported to and from school on a school bus?"

Sectin 285.1, Code, 1971, provides in pertinent part as follows:

"1. The board of directors in every school district shall provide transportation . . . . for all resident pupils attending public school, kindergarten through twelfth grade, who reside more than one mile from the school designated by the board for attendance, except as hereinafter provided:

"a. Elementary pupils residing within the limits of a village, town, or city of less than twenty thousand population wherein the designated school is located, must live more than two miles from the school in their district designated for attendance to be entitled to transportation.

* * *

"c. Boards within their discretion may provide transportation for resident elementary children attending public school who live less than the distance at which transportation is required.

"d. High school pupils residing within the limits of a village, town or city of less than twenty thousand population wherein the designated school is located are not entitled to transportation."

In addition, §285.11 provides:

"The establishment and operation of bus routes and the contracting for transportation shall be based upon the following considerations:

* * *

"(2) Each bus route shall serve regularly only to pupils whose homes are beyond the statutory walking distance to the nearest appropriate school. It is provided, however, that in areas of any county having a population of over one hundred fifty thousand, where, in the opinion of the board, the volume of traffic is such that the pupils safety depends

upon transportation, regular transportation may be provided for pupils living less than the statutory walking distance from the designated school."

Only two counties (Polk and Linn) in the State of Iowa had a 1970 population exceeding 150,000. Consequently, it would appear that in all the counties except those two it would be impermissible for a high school student to be transported on the school bus if such student resided within the city limits of a town of less than 20,000 population.

An elementary school pupil living more than two miles from school is entitled to ride the school bus. Elementary pupils living less than two miles from school may, in the discretion of the school board, be furnished bus transportation. Thus, it is permissible for such students to ride the school bus.

August 28, 1972

ELECTIONS: Deputy Mobile Registrars, appointment — §48.27, Code of Iowa, 1971, as amended by Chapter 1025, §17, 64th G.A., Second Session (1972). After August 1, 1972, the county commissioner of elections may not receive additional lists of persons for appointment as deputy mobile registrars from the two major political parties, nor make appointments from such lists. (Haesemeyer to Erhardt, Wapello County Attorney, 8/28/72) #72-8-14

Mr. Samuel O. Erhardt, Wapello County Attorney: You have requested an opinion of the attorney general with respect to the following:

"Section 17 of House File 1147 of the Second Session of 64th G.A. amends Chapter 48.27 of the Code, which provides for the appointment of Mobile Deputy Registrars. The situation in this County now is that the Auditor has appointed 14 Deputy Mobile Registrars from each party, from a list submitted by the chairman of each of the two major political parties. House File 1147 provides for the appointment of three from each political party for each 10,000 inhabitants, or major fraction thereof.

"Now, one party requests that additional registrars be appointed and have submitted a list of proposed appointees. The Auditor has asked the other party to submit such a list and they have told him verbally that they do not wish to have additional registrars.

"The Auditor feels that since he has made the required appointments, he may not make additional appointments unless both parties agree. Do you concur in this conclusion?"

Section 48.27, Code of Iowa, 1971, as amended by Chapter 1025, §17, 64th G.A., Second Session (1972), provides in relevant part as follows:

"48.27 Mobile deputy registrars. The commissioner of registration shall appoint *at least six* persons for each ten thousand inhabitants, or major fraction thereof, within his jurisdiction as mobile deputy registrars. An equal number of these appointees shall be appointed from lists supplied for that purpose from the county chairmen of the two political parties polling the highest vote in the jurisdiction in the last preceding general election. *The list shall be filed with the commissioner of registration not later than August first of each year and the commissioner of registration shall make the appointments from these lists no later than thirty days from the date of filing.* Said lists of appointees as submitted to the commissioner of registration shall be made available to the party chairmen of the two parties receiving the highest votes at the preceding election for secretary of state. *If a county chairman of a political party does not submit a list of appointees ,the county commissioner of registration shall appoint, before September first, persons known to be members*

of that political party." (Emphasis supplied)

It is evident from the foregoing that the deadline for the political parties to file lists with the commissioner of registration was August 1, 1972. Accordingly, the commissioner of registration could not properly receive additional lists after that date. You indicate that 14 deputy mobile registrars have been appointed from each party and I assume that this is sufficient to meet the minimum requirement of at least six mobile deputy registrars for each 10,000 inhabitants or major fraction thereof.

Accordingly, it is our opinion that the county commissioner of registration does not have authority to make additional appointments of deputy mobile registrars or require the submission of additional lists from the two major political parties. Moreover, he may not make additional appointments even if both political parties do agree and submit additional lists to him.

August 28, 1972

ELECTIONS: Cancellation of voter registration for mental incompetence — §633.552, Code of Iowa, 1971, as amended by Chapter 1128, §6, 64th G.A., Second Session (1972) and §18(2)(3), Chapter 1025, 64th G.A., Second Session (1972). The clerk of the district court is required to notify the commissioner of elections only when a person is placed under guardianship or conservatorship by reason of mental problems. The clerk of the district court need not make notification where a person has been placed under guardianship, pursuant to S.F. 1194, for reasons of incompetency, where such reasons do not include mental problems. (Haesemeyer to Erhardt, Wapello County Attorney, 8/28/72) #72-8-15

Mr. Samuel O. Erhardt, Wapello County Attorney: Reference is made to your request for an opinion of the attorney general with respect to the following:

"The Clerk of District Court of our county has asked that I request a ruling from you concerning the new election laws, House File 1147, and probate laws, being Senate File 1194.

"House File 1147 requires that the Clerk of District Court notify the commissioner of elections if a person is placed under conservatorship or guardianship by reason of incompetency.

"Senate File 1194 under section 6 amends section 633.552, subsection 2 and strikes the words "mental retardate, mental illness", etc., out.

"Since the petition for guardianship or conservatorship will not be alleged mental retardation or mental illness or incompetency as referred to in House File 1147, will the Clerk of District Court be required to notify the commissioner of elections if a person is placed under guardianship or conservatorship as provided in section 18, subsection 3 of House File 1147?"

The relevant statutes are set out, in part, below:

"633.552 Petition for appointment of guardian. Any person may file with the clerk a verified petition for the appointment of a guardian. The petition shall state the following information so far as known to the petitioner. * * * 2. That the proposed ward is a minor or is incapable of caring for his own person." §633.552, Code of Iowa 1971, as amended by S.F. 1194, Chapter 1128, §6, 64th G.A., Second Session, (1972).

"2. 'Notification of changes in registration. The clerk of the district

court shall promptly notify the county commissioner of registration of changes of name and of convictions of infamous crimes or felonies, of legal declarations of mental incompetence and of diagnosis of severe or profound mental retardation, or of severe psychiatric illness of persons of voting age. The clerk of the district court shall also notify the county commissioner of registration of the restoration of citizenship of a person who has been convicted of an infamous crime or felony and of the finding that a person is of good mental health. The notice will not restore voter registration. The county commissioner of registration shall notify the person whose citizenship has been restored or who has been declared to be in good mental health that his registration to vote was canceled and he must register again to become a qualified elector.'

"3. 'Cancellation of registration. The registration of a qualified elector shall be canceled in any of the following instances: * * * 6. The Clerk of district court sends notification of a legal determination that the elector is severely or profoundly mentally retarded, or has been diagnosed as ill for severe psychiatric reasons, or under conservatorship or guardianship by reason of incompetency. Certification by the superintendent of a mental hospital or other institution upon the discharge of any such person that he is at that time, restored to good mental health shall qualify such person to again be an elector, subject to the other provisions of this chapter. Termination by the court of any such conservatorship or guardianship shall qualify any such ward to again be an elector, subject to the other provisions of this chapter'." Chapter 1025, (House File 1147), §18(2)(3), 64th G.A., Second Session, (1972).

Note that H.F. 1147 stresses the element of severe *mental* problems rather than the mere inability of "caring for his own person", as stated in S.F. 1194. From the language of the above statutes, it is our opinion that H.F. 1147 deals only with persons having severe mental problems — the new statutes are not worded so as to include any more than that. Thus, the clerk of the district court is required to notify the commissioner of elections only when a person is placed under guardianship or conservatorship by reason of mental problems. The clerk of the district court need not make notification where a person has been placed under guardianship, pursuant to S.F. 1194, for reasons of incompetency, where such reasons do not include mental problems.

Obviously, a person could be incapable of caring for himself within the meaning of §633.552 merely by reason of a physical impairment and still be of an extremely healthy and sound mind. It would be manifestly unjust to withhold the franchise from such a person simply because his physical misfortune placed him under §633.552. District court clerks are simply going to have to exercise some judgment in giving notices under Chapter 1025 and limiting such notices to situations where the presence of serious mental problems has been established.

August 29, 1972

COUNTIES AND COUNTY OFFICERS: Supervisors; Secondary Road Construction Contracts — sec. 309.40 and 314.1, Code of Iowa, 1971. Construction and material contracts for secondary roads and bridges within the purview of sec. 309.40 must be advertised and let at a public letting but Supervisors may reject bids and proceed to construction in accordance with sec. 314.1. (Schroeder to Lamborn, State Senator, 8/29/72) #72-8-16

The Honorable Clifton C. Lamborn, State Senator: You have requested an official Opinion of the Attorney General as follows:

"1. Is Section 309.40 more specific or special statute than Section

314.1 of the Code of Iowa?

"2. If the answer to question one (1) is yes, then my next question is whether a County must advertise and let at a public letting all contracts for road or bridge construction work and materials therefor on secondary roads except surfacing materials obtained from local quarries when the engineer's estimate exceeds $10,000.00, and this is precluded from letting by private contract or constructing by day labor."

In our opinion, the answer to question one (1) is no, and counties are not precluded from letting by private contract or constructing by day labor within the framework of the two statutes.

Sections 309.40 and 314.1, Code of Iowa, 1971, to which you make reference provide respectively:

"309.40. Advertisement and letting. All contracts for road or bridge construction work and materials therefor of which the engineer's estimate exceeds ten thousand dollars except surfacing materials obtained from local pits or quarries, shall be advertised and let at a public letting.

314.1. Bidders' statements of qualifications — basis for awarding contracts. . . . In the award of contracts for the construction, reconstruction, improvement, repair or maintenance of any highway, the board or commission having charge of awarding such contracts shall give due consideration not only to the prices bid but also to the mechanical or other equipment and the financial responsibility and experience in the performance of like or similar contracts. The board or commission may reject any or all bids, or may let by private contract or build by day labor, at a cost not in excess of the lowest bid received . . ."

Chapter 314, as it now appears in the Code, is a consolidation and codification chapter enacted as Chapter 125, 53rd G.A. Prior to this enactment, bid provisions pertaining to each road authority were contained in separate statutes all containing essentially the identical language now in Section 314.1: "The board or commission may reject any or all bids, or may let by private contract or build by day labor at a cost not in excess of the lowest bid received." Chapter 125, Section 2, struck these provisions from Sections 313.11 (primary), 309.40 (secondary) and 310.15 (farm to market) and enacted a new code section which is now 314.1 containing the quoted language.

The statement contained in the title of Chapter 125 reads:

"AN ACT to amend, revise, consolidate, and codify certain sections of chapters three hundred nine (309), three hundred ten (310) and three hundred thirteen (313), Code 1946, relating to secondary roads, farm to market roads, and primary roads."

It is clear the legislative intent of Chapter 125 was to provide one general administrative chapter governing procedures applicable to all classes of roads and to consolidate the repetitive language of the several statutes dealing with the same subject matter. There is no conflict between sections 309.40 and 314.1. The counties must advertise the work covered by section 309.40, they must consider the bids and may reject and build all in accordance with section 314.1, and if no rejection is made there must be a public letting in accordance with 309.40.

August 30, 1972

STATE OFFICERS & DEPARTMENTS: Beer and Liquor Control De-

partment; State Board of Regents; application for beer permit — Chapter 131, §§32, 128, 64th G.A., First Session (1971). Approval of the city of Cedar Falls is not a prerequisite to the issuance of a beer permit to the University of Northern Iowa. (Haesemeyer to Gallagher, Director, Beer & Liquor Control Dept., 8/30/72) #72-8-17

Mr. Rolland A. Gallagher, Director, Iowa Beer & Liquor Control Department: You have requested an opinion of the attorney general with respect to the question of whether or not a municipality has the power to approve or disapprove an application for a Class "B" Beer Permit submitted by a state agency and are the ordinances of that municipality enforceable against that agency?

Your question is prompted by an application for such a permit you have received from the university of northern Iowa. In your letter you set forth the following reasons why you believe the application of UNI cannot be approved:

"1. Part C of the application, question 7 states 'is the place of business for which the permit is sought located within a business district or area now or hereafter zoned as a business district?'

"The answer was 'Not Applicable, State of Iowa is applicant through the State Board of Regents and is not subject to zoning regulations.'

2. See Chapter 131, Section 128, 1b — on May 5 a new law became effective — see Chapter 1029, Acts 2nd Session 64th G.A. — Sec. 9b states 'that the premises for which the permit is sought is in areas where such business is permitted by any valid zoning ordinance or will be so permitted on the effective date of the permit.'

"3. We cannot issue a permit initially without the approval of the local authorities. Chapter 131, Section 32, states 'an application *shall* be filed with the appropriate city or town council —', also the next paragraph 'the local authority *shall* approve or disapprove the issuance of — beer permit'.

"4. Section 128 — 3 'furnishes a bond in the form prescribed, and to be furnished by the department.'

"5. We require all permittees to obtain the signatures of the Chief of Police of the city, the County Sheriff, and the County Attorney as listed on the application.

"6. The above Board should apply for a Federal Retail Beer Dealer's Stamp (we do not require this but the Federal people do — it is a felony if caught selling beer without this stamp.)

"7. Section 32 also requires a fee and a bond. There was no check attached. Perhaps there is something in the Code, of which I am not aware, that a tax supported institution such as the University of Northern Iowa need not pay for a license. However, if they are to pay, we could not accept the fee because 100% of a Class B Beer Permit fee goes to the city. In this case, the city is not participating in okaying the license."

For the reasons which follow herein it is our opinion that approval of the city of Cedar Falls is not a prerequisite to the issuance of a beer permit to the University of Northern Iowa.

It is said that broad principles of sovereignty require that a state or its agencies performing a governmental function remain free of municipal control, 5 McQuillin, Municipal Corporations (3rd Ed., 1969 Rev. Vol.), Section 15.31a, page 112. In *City of Milwaukee v. McGregor*, 1909,

140 Wisc. 35, 121 N.W. 642, the following language is found:

"So it is said, 'The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not' the sovereign 'in the least, if they may tend to restrain or diminish any of his rights and interests.' So general prohibitions either express or implied, apply to all private parties but 'are not rules for the conduct of the state'."

This common law concept of sovereignty is further found in the case of *Newton v. City of Atlanta*, 1939, 189 Ga. 441, 6 S.E.2d 61, in the following language:

"The general rule is that public property and the various instrumentalities of government are not subject to taxation. This immunity rests upon the most fundamental principles of government; being necessary in order that the functions of government be not unduly impeded, as well as for other reasons. The state's properties and instrumentalities are thus exempt from municipal taxation or regulation, in the absence of express legislative authority."

Section 1.2, Code of Iowa, 1971, provides in pertinent part as follows:

"The state possesses sovereignty co-extensive with the boundaries referred to in section 1.1 . . ."

The concept of sovereignty has thus been continued in statutory form and the legislature, by establishing a municipal corporation, does not divest the state of its sovereignty. 56 Am.Jur.2d, Muncipal Corporations, Section 23. The state is, of course, engaging in the performance of one of its governmental functions when operating its state university system. Furthermore, there are specific instances where our court has refused to permit the application of local ordinances to the state or its agencies. In *City of Bloomfield, Iowa v. Davis County Community School District*, 1963, 254 Iowa 900, 119 N.W.2d 909, the court concluded that a municipal zoning ordinance is not applicable to the state or any of its agencies in the use of its property for a governmental purpose unless the legislature has clearly manifested the contrary intent. Likewise, in 1970 OAG 353, it was held that a municipality may not enforce its building codes, against the state, except as expressly stated by statute.

Finally, in 62 C.J.S. Municipal Corporations, Section 157, the following language appears:

"Property of the state is exempt from municipal regulation in the absence of waiver on the part of the state of its right to regulate its own property, and such waiver will not be presumed. The municipality cannot regulate or control any property which the state has authorized another body or power to control." (*Board of Regents of Universities and State College v. Tempe*, 1960, 88 Ariz. 299, 356 P.2d 399).

In the instant situation, the university system is clearly property of the state which the state regulates through the Board of Regents. There having been no waiver to so regulate, the state has the right to regulate this property on its own without any municipal interference. Also, it must be remembered that the state has superior power, as against its municipalities, over matters which are state, rather than purely local affairs, and where the subject is of statewide concern. (62 C.J.S., Municipal Corporations, Section 143). Furthermore, as stated in 62 C.J.S., Municipal Corporations, Section 157:

"Generally speaking, the state is not subject to legislative enactments of a municipal corporation, and the property of the state and its agencies is free from municipal power to regulate."

Thus, since the university system is property of the state and/or an agency of the state it is free of municipal regulation.

Since the subject matter at hand, the sale of beer, is of a statewide concern, the state has the power to regulate its own property regarding this subject. Therefore, although the university would not be subject to any municipal enforcement regarding this subject, it would still have to regulate itself in the matter. This being the case, and in keeping with the axiom of law that all laws should be applied uniformly, the university still would need a license to dispense beer on its premises. Since the state or its agencies — the university here — cannot be subject to municipal regulation as previously shown, the university could file its application directly with the department such as is provided for in the case of a class "D" liquor control license and class "A" beer permits (Section 32, subsection 1, Chapter 131, Acts, 64th G.A.). This means that the University of Northern Iowa of Cedar Falls, Iowa, would not have to file a beer permit application with the Cedar Falls, Iowa, city council because that city council would have no authority to approve or disapprove the application. Also the Cedar Falls city zoning ordinances would not be enforceable against the university.

The University of Northern Iowa, to obtain a beer permit, should file its application directly with the Iowa Beer and Liquor Control Department. The university would have to post the bonds and pay the fee required by Chapter 131 of the Acts of the 64th General Assembly, First Session. A building or fire inspection could be performed by the State Fire Marshal or his designee.

The State of Iowa does not require that an applicant possess a Federal Retail Beer Dealers Stamp. Any exemption from this Federal law should be taken up by the University with the United States Internal Revenue Service.

August 30, 1972

ELECTIONS: Signatures on nomination papers — §43.17, Code of Iowa, 1971. Nomination papers filed by a candidate which appear on their face to have duplicate sets of handwriting for various persons but which contain the proper number of signatures, the necessary affidavit and are regular in other respects are *prima facie* valid and no action would normally be taken with respect thereto by the attorney general or secretary of state on the seemingly duplicate sets of handwriting. This would not, however, preclude an aggrieved citizen or group of citizens from challenging the nominee's right to a place on the ballot by appropriate action in the courts. (Haesemeyer to Allbee, Franklin County Attorney, 8/30/72) #72-8-18

Mr. Richard A. Allbee, Franklin County Attorney: You have requested an attorney general's opinion with respect to nomination papers filed by a candidate which appear on their face to have duplicate sets of handwriting for various persons. You stated in part:

"Under the Affidavit to nomination papers, Section 43.17 of the 1971 Code of Iowa, it is required that verification be affixed as to each signature and that under Section 43.15 a person is to sign his name to the nomination papers. Obviously, many of the signatures on here appear

to be signatures of a person by someone else, presumably, the spouse, affixing not only his or her signature, but also that of his or her spouse.

"I would respectfully appreciate your opinion as to what action, if any, should be taken on these nomination papers in regard to signatures such as this and as to whether or not nomination papers are still valid, in total, or whether it should be disqualified to the extent of either of the whole nomination paper or as to those duplicate signatures only."

In checking with the secretary of state's office we have learned that their practice in accepting nomination papers for state offices is merely to check the number of signatures and the affidavit on the back. If the affidavit is properly executed and the correct number of signatures appears on the papers they are accepted. The authenticity of the signature is not questioned for the following reasons.

The handwriting of some spouses, some brothers and sisters and some parents and children is quite similar. It would take a qualified document examiner trained in handwriting analysis to make a positive determination that the two signatures were made by the same person. This process would be expensive and time consuming.

Once two signatures were determined to have been signed by the same person, it would then be necessary to call one of the people and ascertain who had signed the papers, and whether the other person was authorized to make the signature in question. The affidavit required under §43.17, Code of Iowa, 1971, which must be placed on the nomination papers is designed to eliminate the long process of signature verification. The document you have submitted to us in the case at hand does contain such an affidavit.

While the attorney general's office has never issued an opinion on exactly this point in 1968 OAG 771 a set of nomination papers was questioned. It contained the requisite number of signatures but a required address and date had been omitted. We stated at that time:

"In view of the fact that this candidate's papers do contain forty-three (43) signatures, based upon uncertified figures given you by the county auditor, it is my opinion that in this instance, under these circumstances, the papers which on their face completely comply except for the address and date on one of the signatures, should be accepted. Less injustice will be done by certification for inclusion of the name on the primary ballot than by leaving it off. It could be that an elector could successfully attack the papers on these grounds, or other possible latent defects, and enjoin the printing of the name on the ballot. But, if not, the people of his political party will decide, in the primary election, whether he is to be his party's candidate for this office." P. 774.

It is our opinion that the foregoing reasoning is sound and should be applied to the situation here. If the correct number of signatures appears on the nomination papers, plus the affidavit on the back, the papers are prima facie valid, no action would be taken by this office or the secretary of state's office on the seemingly duplicate sets of handwriting. This would not, of course, preclude you or any aggrieved citizen or group of citizens from challenging the nominee's right to a place on the ballot by appropriate action in the courts.

August 30, 1972

STATE OFFICERS & DEPARTMENTS: State Historical Society, con-

tracts for printing — §§15.6, 304.1, 304.13, Code of Iowa, 1971. All printing contracts must be let by the director of the department of general services under Chapter 15 of the Code except for gifts where the donor has imposed a condition requiring a different procedure. (Haesemeyer to Gelfand, State Historical Society of Iowa, 8/30/72) #72-8-19

Mr. Lawrence E. Gelfand, Member, Board of Curators, State Historical Society of Iowa: Reference is made to your request for an attorney general's opinion with respect to the following:

"I am writing to you in my capacity as a member of the Board of Curators, State Historical Society of Iowa. In that capacity, I am requesting an opinion by the Attorney General on a question that has caused some members of the Board serious concern. As you know, the State Historical Society finances its operations with funds provided by State appropriations and also with the Society's own funds, that is non-appropriated revenues derived from membership fees, donations, bequests, trust funds and the like.

"In the State Auditor's Report on the State Historical Society for fiscal 1970-71, dated 4 December 1971, Mr. Lloyd Smith recommended (page 30), 'that all printing purchased from State appropriated funds by the State Historical Society be in compliance with Section 15.6 of the Code.' The State Auditor is here recommending that when funds appropriated by the State are to be used, printing contracts must be let in accordance with the regular procedures of competitive bidding, which very clearly has not been the practice of the State Historical Society. My question extends beyond the State Auditor's recommendation: I am seeking your opinion as to whether printing contracts which are to be financed out of the Society's non-appropriated income must also be subject to the procedures governing competitive bidding as set forth by the Code. In other words, must the State Historical Society of Iowa submit all of its printing contracts, irrespective of the sources of funds to be used, to the process of competitive bidding pursuant to Section 15.6(1). Much of the publication program of the Society has been supported out of membership fees collected for the general use of the State Historical Society. I realize that in expressing your opinion on this question, it may also be necessary to express an opinion concerning the legal status of the State Historical Society.

"Needless to say, I and, hopefully, my fellow curators as well, will appreciate whatever your opinion may be on the question posed above and the related issues on which you may also wish to express yourself."

The state historical society is a state agency. This is quite evident from several sections of the Code of Iowa, 1971. §17.1 provides in part:

"17.1 Official reports — preparation. State officials, boards, commissions, and heads of departments shall prepare and file written official reports, in simple language and in the most concise form consistent with clearness and comprehensiveness of matter, required by law or by the governor."

§17.3 then lists the officials, boards and commissions which must file biennial reports. The "Board of Curators of the State Historical Society" appears in §17.3(11).

While §17.1 requires a report to be made the actual operation, structure and purpose of the society is set forth in Chapter 304, Code of Iowa, 1971. §304.1 provides:

"304.1 Objects and purposes. The state historical society shall be maintained in connection with and under the auspices of the state University of Iowa, for carrying out the work of collecting and preserving

materials relating to the history of Iowa and illustrative of the progress and development of the state; for maintaining a library and collections, and conducting historical studies and researches; for issuing publications, and for providing public lectures of historical character, and otherwise disseminating a knowledge of the history of Iowa among the people of the state."

It should be noted here that besides being a "state" society the historical society is to "be maintained with and under the auspices of the State University of Iowa" under §304.1, supra. This further emphasizes the state tie and the tie with the University of Iowa. "Auspices" has been defined in Webster's Third New International Dictionary Unabridged as, "patronage and kindly guidance". Thus, the state historical society is under state control and the "kindly guidance of the University of Iowa".

The funding for the society is both public and private. Chapter 35, Acts of the 64th G.A., First Session (1971), appropriated $143,844.00 for the fiscal year 1971-72 and $145,219.00 for the fiscal year 1972-73. Other monies come from private sources — mostly membership fees. However, all these monies both public and private are expended for the purposes set forth in Chapter 304, especially §304.1.

The provisions governing competitive bidding for printing are set forth in the Iowa Code in §15.6(1), et seq., as amended by Chapter 84, §23, et seq., Acts of the 64th G.A., First Session (1971) which provides in §15.6(1):

"15.6 Duties. The [printing board] *director of the department of general services* shall:

"1. Let contracts, except as provided in section 15.28, for all printing for all state offices, departments, boards, and commissions when the cost of [such] *the* printing is payable out of any taxes, fees, licenses, or *funds collected for state purposes.*" (Emphasis ours)

Since all the funds both publically and privately obtained are spent for state purposes as outlined in §304.1, §15.6(1), et seq. are applicable. Competitive bidding must be used for all printing contracts irregardless of the source of funds.

There could be one exception. Provision has been made under §304.13 for gifts or bequests. The wishes of the donor are to be followed and under certain stipulations a different or special printing procedure might be necessary to fulfill the wish of the donor. §304.13 provides in part:

"304.13 Gifts. The board of curators may accept gifts, appropriations, and bequests and shall use such gifts, appropriations, and bequests in accordance with the wishes of the donor if expressed. Funds received shall be paid into the state treasury and shall be paid out on order of the board."

It should be noted here that the gifts mentioned in the above section are of a special nature and regular membership fees would not fall within this category.

In view of the foregoing it is our opinion that all printing contracts of the state historical society must be submitted to the procedures outlined in §15.6(1) above with the above exception noted in §304.13.

August 31, 1972

STATE OFFICERS AND DEPARTMENTS: State Traveling Library; disposal of withdrawn materials, sec. 303.18(1), Code of Iowa, 1971. The Board of Trustees of the Iowa State Traveling Library (ISTL) has the authority to dispose of useless materials in any manner which the Board deems appropriate. (Haesemeyer to Rausch, Iowa State Traveling Library, 8/31/72) #72-8-20

Mrs. Margaret Rausch, Director, Headquarters Services, Iowa State Traveling Library: Reference is made to your request for an opinion of the Attorney General with respect to the following:

"The Board of Trustees of the Iowa State Traveling Library has directed me to request an opinion of the Office of the Attorney General as to the disposal of materials withdrawn from the Library's collection. Categories withdrawn include books, phono-discs, cassettes and films. There appears to be no clear-cut regulations as to the disposition of such materials once they are withdrawn.

"Books may be withdrawn for a number of reasons as part of the normal weeding process of any library: superseded volumes, duplicate copies no longer needed, missing books for which the records are withdrawn, etc. Phono-discs, cassettes and films are withdrawn when their physical condition is such that they can no longer be used.

"We will appreciate your opinion as to the correct disposition of these materials."

It is our opinion that the Board of Trustees of the Iowa State Traveling Library (ISTL) has the authority to dispose of your useless materials in any manner which the Board deems appropriate. Said authority is derived from §303.18(1), Code of Iowa, 1971, which states:

"The powers and duties of the board shall be: (1) To make and enforce rules for the keeping of the records and for the management and care of the property of the Iowa state traveling library."

This section of our Code contemplates that the Board will provide guidelines not only for "the keeping of the records" and the "care of the property" of ISTL, but, impliedly, for the disposition of said property as well.

The following information was contained in a letter from the Secretary of the Executive Council to the Law Librarian, October 15, 1959:

"Replying to your letter of September 14, 1959, relative to the disposition of books now in the Law Library attic, it is the opinion of the Attorney General's Office that the Trustees of the Law Library have the authority to dispose of these books."

It is our opinion that the Board of Trustees of ISTL has similar authority to dispose of materials which have been withdrawn from your library.

In 1970 OAG 755 (11-20-70) our office held that the Board of Trustees of ISTL did not need the approval of the Executive Council to purchase books for local libraries. In so holding we pointed out that the Board had "broad powers" to conduct the affairs of ISTL. These broad powers include the authority to dispose of materials withdrawn from ISTL, and such authority is uncontroverted by other provisions of our Code.

The foregoing discussion does not deal with the disposition of federal materials which, as you may know, must be handled pursuant to Public

Law 90-620, October 22, 1968, 82 Stat. 1286, Title 44 U.S.C.A., §1912. That law states in part:

"The libraries designated as regional depositories may permit depository libraries, within the area served by them, to dispose of government publications which they have retained for five years after first offering them to other depository libraries within their area, then to other libraries."

ISTL, as a depository library, is bound by the above law with respect to disposition of government publications. The Board of Trustees of ISTL may dispose of all other materials in any manner they choose. This includes, but is not limited to, sale, recycling, destruction, indefinite loan period, or "give away". In the past sale of such materials needed the approval of the Executive Council under §19.23, Code of Iowa, 1971, which statute, however, has been repealed by Chapter 84, §99, 64th G.A., First Session. Thus, the Board of Trustees may decide to sell said materials either for value or for purposes of recycling.

Destruction is a common mode of disposal for such materials, but under the present circumstances it is not mandatory. Destruction of state materials usually pertains to such items as warrants, vouchers and claims, which may be used fraudulently if passed on to others.

The Board of Trustees of ISTL has the power to set a time period for the loaning of its supplies pursuant to §303.18(7), Code of Iowa, 1971, which states in part:

"The powers and duties of the board shall be: (7) To adopt rules providing for the loaning of books. . . ."

Thus, the Board might arrange an indeterminant loan period for certain of these materials to institutions such as jails, state prisons, retirement homes and for other good cause.

Finally, there is no statutory prohibition against simply giving away useless materials belonging to ISTL. For example, in the past the law librarian has given away certain materials to judges and State Senators and Representatives. It is assumed, of course, that the Board of Trustees will be discerning and conscientious in its decisions as to the disposition of materials withdrawn from ISTL.

August 31, 1972

STATE OFFICERS AND DEPARTMENTS: State Traveling Library, relocation assistance, Chapter 303, Code of Iowa, 1971, Chapter 173, sec. 11 64th G.A., First Session (1971). The Iowa State Traveling Library may do all things to comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, P.L. 91-646. (Haesemeyer to Muller, Iowa State Traveling Library, 8/31/72) #72-8-21

Mr. Tom Muller, Chairman, Board of Trustees, Iowa State Traveling Library: The Board of Trustees of the Iowa State Traveling Library has requested an Attorney General's opinion with respect to the following question:

"Does the State of Iowa and/or local Library Boards of Trustees, as applicants for federal funds under Title II of the Library Services and Construction Act, as amended P.L. 91-600, have the authority under state law to comply with the Uniform Relocation Assistance and Real Property

Acquisition Policies Act of 1970, P.L. 91-646."

The Sixty-fourth General Assembly, First Session, passed a bill entitled "Highway Relocation Assistance Law", Chapter 173, Acts of the 64th G.A., First Session (1971). This Act was passed so that the Highway Commission and other state agencies or political subdivisions could comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, P.L. 91-646.

It provides for relocation assistance and payments for those who are displaced, and stated that the Highway Commission (known as "the commission throughout the law) should under this statute make certain rules.

Chapter 173, §9, Acts of the 64th G.A., First Session, states:

"Rules adopted. The commission shall make departmental rules and regulations necessary to effect the provisions of this Act and to assure:

"1. Compliance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646.

"2. The payments authorized by this Act are fair and reasonable and as uniform as practicable.

"3. A displaced person who makes proper application for a payment authorized by this Act is paid promptly after a move or, in hardship cases, is paid in advance.

"4. Any person aggrieved by a determination as to eligibility for a payment authorized by this Act, or the amount of a payment, may have his application reviewed by the commission.

"All rules shall be subject to the provisions of chapter seventeen A (17A) of the Code."

Section 11 of the same Act authorizes other state agencies to make the same payments and comply with the federal law.

"Sec. 11. Acquisitions by other state agencies and political subdivisions. Whenever real property is acquired by a state agency or a political subdivision of the state incident to a federal project or program, the state agency or political subdivision is hereby authorized and shall make all payments and provide all services required by this Act of the commission in order to secure the federal funds available for such project or program."

It is therefore our opinion that since the Iowa State Traveling Library is a state agency under Chapter 303, Code of Iowa, 1971, it may under Chapter 173, Acts of the 64th G.A., First Session, do all things to comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, P.L. 91-646.

September 1, 1972

CIVIL RIGHTS: §§245.2, 105A.7, Code of Iowa, 1971; 42 U.S.C. 2000e, 14th Amendment to the United States Constitution. §245.2, Code of Iowa, 1971, which requires that only a female be hired as superintendent of the Women's Reformatory is in conflict with §105A.7, Code of Iowa, 1971, and was repealed by implication when the Civil Rights Act was passed. That section also violates the Equal Employment Opportunity Act, 42 U.S.C. 2000e and is subject to challenge as a violation of the equal protection clause of the 14th Amendment to the United States Constitution. (Conlin to Gillman, Commissioner, Department of Social Services, 9/1/72) #72-9-1

James N. Gillman, Commissioner, Department of Social Services: We have your letter of August 29, 1972, wherein you request an opinion of

the Attorney General concerning whether or not Section 245.2, Code of Iowa, 1971, which requires that the Superintendent of the Women's Reformatory be female, is in conflict with the Iowa Civil Rights Act, Chapter 105A, Code of Iowa, 1971, or with the Equal Employment Opportunity Act, 42 U.S.C. 2000(e).

Section 245.2, Code of Iowa, 1971, provides as follows:

"The superintendent of the women's reformatory shall be a female and shall receive a salary as determined by the state director."

That section was first enacted in 1900 by the 28th General Assembly.

Section 105A.7 provides in pertinent part as follows:

"1. It shall be an unfair or discriminatory practice for any:

a. Person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the race, creed, color, sex, national origin, or religion of such applicant or employee, unless based upon the nature of the occupation."

The Iowa Civil Rights Act was passed in 1965, but the prohibition against discrimination on the basis of sex was not added until 1970 (Acts, 63 G.A., Ch. 1058 §3).

The Equal Employment Opportunity Act, 42 U.S.C. 2000e(2) provides:

"It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin."

It was passed by Congress in 1964 and amended March 24, 1972, to cover the employment practices of states and other political subdivisions.

From the information provided us concerning the job functions and duties of the Superintendent, there appears to be no grounds for a bona fide occupation qualification exception. That exception is allowed only where the "essence" of the business or position requires that only persons of a particular sex be employed. *Weeks* v. *Southern Bell*, 408 F.2d 228 (1969).

There is no indication that any function of the Superintendent could not be performed by either a male or female.

It therefore appears that Section 245.2, Code of Iowa, 1971, and Section 105A.7, Code of Iowa, 1971, are in direct conflict concerning the employment of a member of the female sex and excluding the employment of any male in a position which does not by its nature, require a female.

It is well settled that the repeal of a statute by implication is not favored. *Glaser* v. *City of Burlington*, 231 Iowa 670, 1 N.W.2d 709 (1942). However, where two statutes are in irreconcilable conflict and are absolutely repugnant, the later act repeals the former. *Waugh* v. *Shirley*, 216 Iowa 468, 249 N.W. 246 (1933). An act is repealed by implication where its conflict with a later act is plain, unavoidable and irreconcilable. *Taschner* v. *Iowa Electric Light & Power Co.*, 249 Iowa 673, 86

N.W.2d 915.

Section 245.2 also appears to be in conflict with 42 U.S.C. 2000e. State laws may not be inconsistent with federal law or authorize any employment practice which would be unlawful under federal law. *Rosenfield* v. *Southern Pacific Co.*, 293 F.Supp. 1219 (1968). See also *Rabouin* v. *N.L.R.B.*, 195 F.2d 906 (1952). The courts in interpreting the Equal Employment Opportunity Act, have not hesitated to strike down state legislation which interfered with the employment opportunities of individuals on the basis of their sex. *Bowes* v. *Colgate-Palmolive*, 416 F.2d 711 (1969). In a recent Supreme Court case *Reed* v. *Reed*, 92 Sup. Ct. 251 (1971) that court struck down an Idaho statute which mandated that men must be preferred over women for the administration of the estates of deceased relatives. The court held that this classification on the basis of sex was unreasonable and arbitrary and violated the equal protection clause of the 14th Amendment to the Constitution of the United States.

It is therefore the opinion of the Attorney General that Section 245.2, Code of Iowa, 1971, is in conflict with the Iowa Civil Rights Act, Chapter 105A and with 42 U.S.C. 2000e and that it was repealed by implication when Section 105A.7, Code of Iowa, 1971, was passed and must also fall under the doctrine of federal supremacy in light of the Congressional intent to guarantee all citizens the right to compete for employment without regard to sex. It also appears that the statute would be subject to challenge as a violation of the 14th Amendment to the Constitution which guarantees all citizens equal protection of the laws.

September 8, 1972

SCHOOLS: Cooperative counseling and rehabilitation programs — Ch. 28E, Code, 1971. School districts may participate with other governmental agencies in a community counseling and rehabilitation project under an appropriate joint services agreement entered into in accordance with Ch. 28E, Code, 1971. The school budget should state the amount of funds made necessary for such participation. (Nolan to Holden, State Representative, 9/8/72) #72-9-2

The Honorable Edgar H. Holden, State Representative: This refers to your request for an opinion as to the legality of local school districts granting funds from their budget to be pooled with funds from other taxing bodies, including federal funds, to operate community counseling and rehabilitative programs. As stated in your letter "the program generating the question is the Youth Services Bureau (a proposed new Scott County program) which I am advised will receive $5,000 from the Davenport School District and $1,000 from the Muscatine-Scott joint county system. The program would be largely funded by federal monies as seed money and perhaps some county or city funds".

You also ask whether "if participation is legal . . . the amount granted by the school district need be itemized in their proposed budget or could it be granted from any funds within their general fund budget".

This office has previously advised that a city may provide partial funding in cooperation with other governmental agencies for a program such as a Youth Services Bureau. (Opinion, Feberuary 5, 1971, Gors to Thordsen)

It is clear that school districts have statutory authority to have qualified guidance counselors and other pupil personnel services, §255(b), Code of Iowa, 1971. Under Code §300.1 they may establish and maintain "public recreation places and playgrounds" and to carry on public educational and recreational activities there. School districts also may provide vocational education, §258.10, part-time schools for children 14 to 16 years of age, Ch. 288, and evening schools for students over 16 years of age, Ch. 288. School districts are required to provide special education for children requiring it, Ch. 281. But the responsibilities for vocational rehabilitation are placed directly with the State Department of Public Instruction, Ch. 259.

Based on the information contained in your request, expenditure of school district funds for a community Youth Service Bureau operating a counseling and rehabilitation program might properly be made in accordance with an appropriate joint governmental services contract pursuant to Ch. 28E, Code. (Opinion of April 27, 1971, Haesemeyer to Harbor)

In answer to your second question, such a contract pursuant to §28E.5 must specify the following:

1. Duration.
2. Precise organization of any separate legal or administrative entity created thereby together with the powers delegated thereto.
3. Its purpose or purposes.
4. The manner of financing and establishing and maintaining a budget therefor.
5. Provisions for termination (partial or complete).
6. Other necessary and proper matters.

Consequently, it would be appropriate to include any funds to be obligated under such contract as a budget item for the school district if the duration of the agreement exceeds the current fiscal year.

September 11, 1972

ELECTIONS: Manner of voting, exception to straight ticket — §§49.94, 49.96, Code of Iowa, 1971. The method of casting votes for offices where an elector is entitled to vote for two and wishes to make an exception to straight ticket voting is discussed. (Haesemeyer to Synhorst, Secretary of State, 9/11/72) #72-9-3

The Honorable Melvin D. Synhorst, Secretary of State: You have requested an opinion of the attorney general with respect to the following questions which have been submitted to you by the Monroe County Auditor:

"If an elector makes a cross or check in the party circle and then further down the ballot there is an office for which the elector may vote for two and said elector votes for a candidate of a party other than the party for which he has marked the party circle, is the elector voting for three candidates rather than two, is he nullifying his vote for both candidates under the party circle, or is he voting for one candidate under the party circle and oen candidate of a party other than the party for which he has marked the party circle?"

The applicable statutory provision is §49.96, Code of Iowa, 1971, which provides:

"49.96 Group candidates for offices of same class. Where two or more offices of the same class are to be filled at the same election, and all of the candidates for such offices, for whom the voter desires to vote, appear upon his party ticket at the top of which he has marked a cross or check in the circle, he need not otherwise indicate his vote for such candidate; but if the name of any candidate for whom he desires to vote for such office appears upon a different ticket, then as to such group of candidates the cross or check in the circle does not apply and to indicate his choice the voter must place a cross or check in the square opposite the name of each such candidate for whom he desires to vote whether the same appears under such marked circle or not."

The application of this provision to various situations where a voter wishes to vote a straight party ticket but cast one or more votes for the candidate of another party for an office for which he is entitled to vote for more than one may be illustrated by the following examples:

No. 1

☒ REPUBLICAN * * *	O DEMOCRATIC * * *
For County Supervisor (Vote for two)	For County Supervisor (Vote for two)
☐ A.....	☒ C.....
☐ B..... * * *	☐ D..... * * *

Votes are cast for all Republican candidates except A and B. A vote is cast for C.

No. 2

Same as No. 1 except:

☐ A.....	☒ C.....
☐ B.....	☒ D.....

Votes are cast for all Republican candidates except A and B. Votes are cast for C and D.

No. 3

Same as No. 1 except:

☒ A.....	☒ C.....
☐ B.....	☐ D.....

Votes are cast for all Republican candidates except B. A vote is cast for C.

No. 4

Same as No. 1 except:

☐ A.....	☒ C.....
☒ B.....	☐ D.....

Votes are cast for all Republican candidates except A. A vote is cast for C.

No. 5

Same as No. 1 except:

☒ A.....	☐ C.....
☐ B.....	☐ D.....

Votes are cast for all Republican candidates including B and no votes are cast for C or D. This is so because of §49.94 which provides in **part:**

"49.94 How to mark a straight ticket. If the names of all the candidates for whom a voter desires to vote appear upon the same ticket, and he desires to vote for all candidates whose names appear upon such ticket he may do so in any one of the following ways:

* * *

"3. He may place a cross or check in the circle at the top of such ticket and also a cross or check in any or all of the squares beneath said circle."

If, as might be the case, the voter wished to vote for all Republican candidates except B he would have to forego putting an "X" in the party circle. Instead he should mark the square in front of each individual Republican candidate on the ballot except B.

September 11, 1972

LIQUOR, BEER & CIGARETTES: Beer brand advertising signs. Chapter 131, sections 3(31), 51(3), 64th G.A., First Session (1971). It is not unconstitutional for the legislature to ban beer brand advertising signs outside licensed premises. No beer brand sign may be hung, attached, painted, carved, printed, inscribed or in any other manner affixed to any area forming a part of the right, title or interest of a separate and distinct piece of property upon which is located or houses a liquor licensed establishment or beer permit "authorized to sell beer at retail". (Haesemeyer to Norpel, State Representative, 9/11/72) #72-9-4

The Honorable Richard J. Norpel, Sr., State Representative: You have requested an opinion from this office regarding House File 172 of the 64th General Assembly, now Chapter 131, Acts of the 64th G.A., First Session. You specifically asked:

"With the passage of House File 172 by the 64th General Assembly, I would like a ruling on Section 51, No. 3.

"I question this section to its validity and constitutionality. It discriminates against the beer and liquor licensee premises as applied against other business premises because other business premises can erect a beer and liquor sign, yet not the beer and liquor licensee.

"Please clarify the word 'premise.' The law reads, according to Section 3, No. 13, that premises means all rooms or enclosures where alcoholic beverages or beer are sold or consumed under the authority of the Liquor Control License or Beer Permit. A liquor license has to designate the area that liquor can be served. To me this would mean that certain areas of a building, especially in a Motel or Hotel or a building several stories high, would have some area not classified as a licensed premises. I would like to know if a sign advertising a beer could be erected on this section of building.

"Also a clarification on the following:

"a. Could a licensee attach a beer sign on a pole or other stationary object not connected to the building in front of his establishment?

"b. Could a licensee attach a beer sign to an adjacent building, not operating under a beer and liquor license?

"c. Could a building that houses other businesses (like a Mall) erect a beer sign on any part of the building?"

Turning first to your question concerning the meaning of the word "premises" as used in §51 of Chapter 131, 64th General Assembly, First Session (1971), it is to be observed that this is a defined term in the Act. Thus, §3, subsection 31 of Chapter 131 provides:

"Sec. 3. As used in this Act, *unless the context otherwise requires*:

* * *

"31. 'Licensed premises' or 'premises' means all rooms or enclosures where alcoholic beverages or beer are sold or consumed under authority of a liquor control license or beer permit.

* * *"

(Emphasis added)

Section 51 of Chapter 131, provides in relevant part:

"3. No signs or other matter advertising any brand of beer shall be erected or placed upon the outside of any premises occupied by a licensee or permittee authorized to sell beer at retail. All such signs shall be removed by the owner of same by July 1, 1974."

Giving the term "premises" the literal and narrow meaning ascribed to it by §3(31) would produce some interesting if not indeed absurd results. For example, we do not think that the legislature had it in mind that beer brand signs should not be hung or affixed merely to the outside of the *physical structure* of the premises as described in the application for the permit or license only; nor do we think that they had in mind that no beer brand signs could be erected or placed anywhere outside of any premises occupied by a licensee or permittee which in effect would create an almost total prohibition of beer signs anywhere in Iowa since the entire state is outside one or another of licensed premises. In our opinion the "context" of §51(3) requires a more rational and reasonable understanding of the term.

We turn then to the normal and accepted meaning of the word "premises" which in our opinion the context of §51(3) requires. According to Black's law dictionary in matters of estate "premises" is defined in connection with "right", "title", and "interest" and is in a great degree synonymous with all of them. Premises means "lands and tenements; an estate; land and buildings thereon; the subject matter of a conveyance." *McSherry v. Heimer*, 1916, 132 Minn. 260, 156 N.W. 130, 132. The term "premises" is used in common parlance to signify land, with its appurtenances; but its usual and appropriate meaning in a conveyance is the interest or estate demised or granted by the deed. *New Jersey Zinc Co. v. New Jersey Franklinite Co.*, 1861, 13 N.J. Eq. 322. In *Ratzell v. State*, 1924, (Okla.), 228 P. 166, 168, premises was found to mean "the area of land surrounding a house, and actually or by legal construction forming an enclosure with it."

Thus, turning to your question as to whether or not a licensee could attach a beer sign on a pole or other stationary object not connected to the building in front of his establishment and assuming that the area in front of the establishment is either owned or controlled by the licensee through leasehold, ownership in fee or some other similar form of control, it would be our opinion that no beer brand sign could be hung, attached,

painted, carved, printed, inscribed or in any other manner affixed to any area forming a part of the right, title or interest of a separate and distinct piece of property upon which is located or houses a liquor licensed establishment or beer permit "authorized to sell beer at retail".

In answer to your question as to whether or not a licensee could attach a beer sign to an adjacent building not operating under a beer and liquor license it would be our opinion that he could do so so long as the adjacent building was not a part of the estate or property in which any right, title or interest is held in common with the property or premises upon which is housed the physical establishment for which a license or permit has been granted to sell beer at retail.

You also ask could a building that houses other businesses (like a mall) erect a beer sign in any part of the building. Assuming that the mall or building housing the licensed establishment is under the same or common ownership and control it would be our opinion that the beer sign could not be erected on the building or the mall even though the named permittee or licensee might not be the owner of the building or mall. Were it otherwise the statutory control manifestly intended by the legislature could be easily subverted and frustrated by the subterfuge of lease or corporate veil arrangements.

You also question the constitutionality of §51(3) because it discriminates against the premises of the beer and liquor licensee. Although the manufacture and sale of intoxicating liquors, where permitted, is a lawful business which is fully entitled to protection, it is nevertheless regarded as dangerous to public health, safety, and morals and is thus subject to strict regulation or control by the states under their police power, which has generally been held to include the prohibition or regulation of advertising. 1964 OAG 248.

Thus, a statute prohibiting signs exceeding a certain size advertising any alcoholic beverage and prohibiting altogether signs using the words "bar", "barroom", "saloon", "cocktail bar", "lounge", or words of similar import upon or adjacent to any premises licensed to sell alcoholic beverages was held to be a valid exercise of the state's police power in *Premier-Pabst Sales Co. v. State Board of Equalization* (1936, DC Cal), 13 F.Supp. 90, notwithstanding the fact that beer manufacturers had already erected such signs prior to the enactment of the statute and that the enforcement of the statute would result in the signs' destruction. The court said that since the state is permitted, under its police power, to wholly prohibit the business of intoxicating liquors from being carried on, it can, within the meaning of the Fourteenth Amendment, prohibit and control advertising as one of its incidents.

And a statute prohibiting the advertisement of liquors on signboards or bilboards, but providing that signs advertising beer or malt liquors could be placed upon a brewery or premises where beer or malt liquor was lawfully stored or kept, was held not to be unconstitutional as an unreasonable interference with a lawful private business in *Fletcher v. Paige*, (1950), Mont., 220 P.2d 484, 19 ALR2d 1108, the court stressing the exceptional nature of the business, which subjected it to a high degree of control by the legislative branch. By the same token a municipal ordinance prohibiting advertising of intoxicating liquors within 200 feet of

schools or churches was held to be reasonable and valid in *Horton v. Old Colony Bill Posting Co.*, 1914, 36 RI 507, 90 A. 822, Ann. Cas. 1916A 911.

In *Advertiser Co. v. State*, 1915, 193 Ala. 418, 69 So. 501, the court, in rejecting the defendant's contention that the state could not enjoin the sale of periodicals and newspapers containing liquor advertisements in violation of the state's anti-advertising liquor law on the ground that it would impair the obligation of outstanding contracts which the defendant had for their publication, stated that a citizen had no vested right to engage in the sale of liquor or otherwise to deal in it and that the business, which necessarily included all contracts made in pursuance thereto, was completely subject to the police power of the state. In any event, the court noted, the defendant would not be bound by its contract with dealers, in view of the rule which avoids a promise where the act or thing contracted to be done is subsequently made unlawful by an act of the legislature.

September 13, 1972

INTERSTATE HIGHWAY SYSTEM: Utilities — Title 23 U.S.C.A. sec. 123; Federal Highway Administration Policy and Procedure Memorandum 30-4; secs. 306A.10, 306A.11, 306A.12, Code of Iowa, 1971. When the State reimburses a utility system for relocating a facility under Section 306A.11, Code of Iowa, 1971, the State must be given a credit for the expired life and for the salvage value of the old facility if it is replaced by a new facility, as well as a credit for any costs of increasing the capacity of the facility. (Schroeder to Coupal, Director of Highways, Iowa State Highway Commission, 9/13/72) #72-9-5

Mr. J. R. Coupal, Jr., Director of Highways, Iowa State Highway Commission: This is in response to your letter of December 2, 1971, requesting an Attorney General's Opinion on the following question:

"Under the Iowa law and particularly Section 306A.11, Code of Iowa, 1971, can the Iowa State Highway Commission reimburse a public utility for relocation of certain underground and overhead utility transmission or distribution facilities in connection with the construction of an interstate federal aid highway project, without requiring a credit against such reimbursement for an increase in value of such utility facility due to the installation of new materials in place of old?"

Section 306A.11, Code of Iowa, 1971, provides as follows:

"Cost of relocation or removal shall include the entire amount paid by such utility properly attributable to such relocation or removal except the cost of land or any rights or interest in land, after deducting therefrom any increase in the value of the new facility and any salvage value derived from the old facility."

Section 306A.10, Code of Iowa, 1971, gives the Iowa State Highway Commission the right to compel a utility system owning or operating a facility located in, over, along or under any highway or street to relocate or remove the facility if necessitated by the construction of a project on an interstate highway. The term "facility" necessarily means that segment of utility line that must be relocated or removed, *Iowa Power & Light Co. v. Iowa State Highway Comm.*, 1964, 254 Iowa 534, 117 NW2d 425.

Section 306A.10 further provides that the costs of relocation or removal shall be ascertained by the Iowa State Highway Commission and paid by the State out of the primary road fund. Section 306A.12, Code

of Iowa, 1971, provides that such reimbursement shall be made only if 90 percent of that amount is reimbursed to the State by the Federal Government.

The Iowa Supreme Court in *Edge v. Brice*, 1962, 253 Iowa 710, 113 NW2d 755 in viewing these statutes, upheld their constitutionality. The Court further stated that the reimbursement contemplated by the statutes was to not make the utility system any better off after the relocation of some of its facilities, than it was before the relocation.

As a practical matter when the facility is relocated, instead of just moving the old existing lines to another location, often times new lines are substituted for the old ones in the new location. Section 306A.11, Code of Iowa, 1971, anticipates this. It allows reimbursement to the utility system for its cost of removal less (1) any increase in value of the new facility, and (2) any salvage value of the old facility. Section 306A.11 explicitly refers to value and salvage value which necessarily encompasses the concept of depreciation in value of the facility being replaced and relocated. Therefore, the State in reimbursing the utility system for relocating some of its facilities must be given a credit against the reimbursement for the expired life or depreciation of the old facility being replaced by a new one during the relocation.

If in relocating some of its facilities a utility system replaces the old facility with a new facility which has a greater functional capacity or capability, such as twice as many lines, the utility system cannot be reimbursed for the costs of increasing the facility's capacity or capability either. *Edge v. Brice*, supra, 1966 O.A.G. 208 (9.5).

In short, Section 306A.11, Code of Iowa, 1971, authorizes the State to reimburse a utility system only in the amount that it would cost to move an existing facility from one location to another. Any costs above and beyond that are not to be reimbursed by the State.

Title 23 U.S.C.A. §123 authorizes federal participation in the costs of reimbursement due to such relocation. Policy and Procedure Memorandum (P.P.M.) 30-4 of the Federal Highway Administration recognizes that the State shall receive a credit for the expired service life of the facility being relocated and replaced by a new one. P.P.M. 30-4 allows an exception to requiring that the State receive a credit for the amount of depreciation of the segment of the utility line being relocated and replaced by a new segment. The exception is when the segment so relocated and replaced (1) crosses the highway or (2) is less than one mile in length.

However, Chapter 306A, Code of Iowa, 1971 makes no provision for any exceptions to the requirement that the State shall receive credit for the depreciation and salvage value of the old facility being relocated and replaced by a new facility. The Iowa law is therefore more restrictive in reimbursing a utility system for relocating a facility than is the Federal Government. But, this is entirely permissible and acceptable. P.P.M. 30-4 states that when the State's standard for reimbursement is more restrictive, the State's standard will govern such reimbursement.

In summary, when the State reimburses a utility system for relocating

a facility under Section 306A.11, Code of Iowa, 1971, the State must be given a credit for the expired life and for the salvage value of the old facility if it is replaced by a new facility, as well as a credit for any costs of increasing the capacity or capability of the facility.

September 13, 1972

CITIES AND TOWNS: Conflict of interest. Section 368.22, Code of Iowa, 1971. A potential conflict of interest exists when a person who is both a councilman and volunteer fireman votes as both on the same issue. (Blumberg to Avery, Clay County Attorney, 9/13/72) #72-9-6

Mr. Stephen F. Avery, Clay County Attorney: In your letter of October 25, 1971, you asked whether there is any conflict of interest in a man voting both as a fireman and as a councilman in the appointment of the Chief of the Fire Department. The question concerns a situation where a councilman is also a volunteer fireman. The ordinance in question provides, in part, that:

"The Chief of the Fire Department shall be recommended by the members of that Department and selected and employed by the Council. . . ."

There is no doubt that a volunteer fireman can also be a member of a city council. See, section 368A.22, 1971 Code of Iowa. However, a conflict may still exist. Generally, incompatibility does not depend upon the incidents of the office. Rather, the test is whether there is an inconsistency in the function of the two, such as where one is subordinate to the other and subject to its revisory power. *State ex rel. LeBuhn* v. *White*, 257 Iowa 606, 133 N.W.2d 903 (1965).

In *LeBuhn*, a problem arose where one of the parties was both a member of a Community School District and the County Board of Education. The question was whether the two offices were incompatible. The Iowa Supreme Court, in a unanimous decision, held that the two positions were incompatible, not because of the incidents of the positions, but rather because of the revisory power of the County Board of Education over the Community School District. In other words, he would be in a position where he would have to judge and render an opinion as a member of the County Board as to his actions on the Community School District. In the absence of statutory authority, the Court held that the common law rules of incompatibility must be applied. In reaching its decision, the Court cited with approval to *Bryan* v. *Cattell*, 15 Iowa 538, 550; *State* v. *Bus*, 135 Mo. 338, 36 S.W. 639, 33 L.R.A. 616; and *State* v. *Goff*, 15 R.I. 505, 9 Atl. 226.

The present situation is similar. Although we are concerned with a possible conflict of interest instead of incompatibility of office, the reasoning of *LeBuhn* is applicable. Because the ordinance makes it mandatory that the members of the fire department recommend a fire chief to the city council which then makes the selection, a councilman who is also a volunteer fireman places himself in a potentially conflicting situation if he votes as both a councilman and a fireman on the issue. In other words, he is put in the position of a revisor as to his vote as a volunteer fireman. In the absence of any statutory language as to a conflict of interest in this situation, the common law rules must apply.

Accordingly, we are of the opinion that a conflict of interest may arise when one votes both as a volunteer fireman and a councilman on the same issue.

September 13, 1972

STATE OFFICERS AND DEPARTMENTS: Department of Public Safety — secs. 127.15, 127.19, Code of Iowa, 1971. Chapter 84, sec. 72, Acts of the 64th G.A., 1st Session. The Department of Public Safety cannot requisition a forfeited vehicle under the provisions of sec. 127.15. The Attorney General may not requisition a forfeited vehicle pursuant to sec. 127.15 for another state department or agency, nor for the Department of General Services pursuant to Chapter 84, sec. 72, Acts of the 64th G.A., 1st Session. (Voorhees to Bidler, Deputy Commissioner, Dept. of Public Safety, 9/13/72) #72-9-7

Mr. Carroll L. Bidler, Deputy Commissioner, Department of Public Safety: This letter is in response to your request for an opinion on the following question:

"Since the repeal of section 127.18 of the Code, can the Department of Public Safety requisition, for use by the Department, confiscated vehicles forfeited by the court through the provisions of section 127.15 of the *Code of Iowa*? If the determination is that the Department of Public Safety cannot requisition confiscated vehicles forfeited by the court under the provisions of Chapter 127.15, would it be possible for the Department of Justice to requisition such conveyances and transfer them to the Department under the provisions of Chapter 84, section 72, Acts of the Sixty-fourth General Assembly, First Session?"

Section 127.15, Code of Iowa, 1971, reads as follows:

"The *state department of justice may*, if the conveyance is such a one as may *be used by said department* in connection with its duties and the enforcement of the law, requisition said conveyance for *said department* and said requisition shall be delivered to the clerk of the district court of the county having jurisdiction of such conveyance, within ten days after the notice of judgment of forfeiture has been received by the bureau of investigation. If said conveyance is not so requisitioned within ten days after the clerk of the district court has notified the department of justice of the judgment of forfeiture, then the conveyance shall be sold by the sheriff as provided in this chapter." (emphasis added).

The Department of Justice may requisition a forfeited conveyance for its own use through this provision, or for the use of a city or county through §127.19. ". . . (T)he power of requisition of a forfeited conveyance under the foregoing sections is lodged solely in the Department of Justice, and in no other agency." Opinions of the Attorney General, 1946, page 208.

It is therefore our opinion that the Department of Public Safety may not requisition a forfeited conveyance through the provisions of §127.15.

Chapter 84, section 72, Acts of the 64th G.A., 1st Session provides that:

". . . (T)he authority to assign all state-owned motor vehicles to state officers and employees, or to state offices, departments, bureaus, and commissions, shall be transferred and vested in the department of general services."

The only authority the Attorney General has to requisition a forfeited conveyance is through Sections 127.15 and 127.19. There is no provision in either Chapter 127, Code of Iowa, 1971, or in Chapter 84, Acts of the

64th G.A., 1st Session, that would allow the Attorney General to requisition a forfeited conveyance for any department or agency. Nor is there any authority to allow the Attorney General to requisition a forfeited conveyance for the Department of General Services, which would in turn allocate the conveyance to some department or agency. We are therefore of the opinion that the Attorney General does not have the authority to requisition a forfeited conveyance for another state department or agency, either directly, or indirectly through the Department of General Services.

September 13, 1972

CITIES AND TOWNS: Conflict of Interest — secs. 368A.22(2) and 368A.25, Code of Iowa, 1971. Even though there is a conflict of interest involved in a vote on a resolution before a city council, said vote is not invalid unless the individual vote containing the conflict is decisive to the passage of such resolution. (Blumberg to TeKippe, Chickasaw County Attorney, 9/13/72) #72-9-8

Mr. Richard P. TeKippe, Chickasaw County Attorney: We are in receipt of your opinion request of July 24, 1972, regarding a conflict of interest or incompatibility of office regarding a city councilman for New Hampton, Iowa. The councilman in question is a resident engineer for the Iowa State Highway Commission. From your letter, the following facts are evident. A question came before the city council whether or not to enter into an agreement with the Highway Commission. The initial vote on the resolution was a 3 to 3 tie. The councilman in question voted in the affirmative, taking a favorable position toward the Highway Commission. After the initial tie vote, the councilman sought the approval of other council members to change their vote. One council member then changed his vote and voted in favor of authorizing the resolution.

In answer to your first question on any incompatibility of offices, the case of *State ex rel. Crawford* v. *Anderson*, 1912, 155 Iowa 271, 136 N.W.128, sets forth the criteria for incompatibility of offices. It is stated therein (155 Iowa at 273):

"The principal difficulty that has confronted the courts in cases of this kind has been to determine what constitutes incompatibility of offices, and the consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time. Bryan v. Cattell, supra. But that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one 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.' State v. Bus, 135 Mo. 338, 36 S.W. 639, 33 L.R.A. 616; Attorney General v. Common Council of Detroit, supra [112 Mich. 145, 70 N.W. 450, 37 L.R.A. 211]; State v. Goff, 15 R.I. 505, 9 A. 226, 2 Am.St. Rep. 921. A still different definition has been adopted by several courts. It is held that incompatibility in office exists 'where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both'."

See also, *State ex rel. LeBuhn* v. *White*, 1965, 257 Iowa 606, 133 N.W.2d 903. From the above, we are of the opinion that the duties of the councilman as an employee of the Highway Commission are not such as to be

incompatible with his duties as a city councilman. However, there might be a conflict of interest involving the vote in question.

Section 368A.22 (2), 1971 Code of Iowa, provides that no municipal officer or employee shall have an interest, either direct or indirect, in any contract or job or services to be furnished or performed for his municipality. The exceptions to this are basically where a contract is made by the municipality pursuant to competitive bidding. It is apparent that the contract with the Highway Commission was not through competitive bids. Accordingly, it appears that there was a conflict of interest involved with the councilman's vote.

This does not necessarily mean that the vote taken is void. Section 368A.25 provides:

"No ordinance, resolution, or motion voted upon shall be invalid by reason of conflict of interest in an officer of a municipality unless the vote of such officer was decisive to the passage of such ordinance, resolution, or motion. Where a specific majority or unanimous vote of a municipal body is required by statute, such majority or vote shall be computed on the basis of the number of officers not disqualified by reason of conflict of interest."

Thus, only if the councilman's vote was decisive is the entire vote void. In this situation, the councilman's vote was not decisive for passage of the resolution on either the tie vote or when the resolution passed the second time by a vote of 4-2. Accordingly, even though there was a conflict of interest in the vote, we are of the opinion that the vote on the resolution is not invalid.

September 13, 1972

STATE OFFICERS AND DEPARTMENTS: Highway Commission—Reimbursement for Utility Relocation: Section 306A.10 and 306A.11, Code of Iowa, 1971. Reimbursement to utilities is for the nonbetterment costs of relocating facilities. (Schroeder to Coupal, Director of Highways, Iowa State Highway Commission, 9/13/72) #72-9-9

Mr. Joseph R. Coupal, Jr., Director of Highways, Iowa State Highway Commission: This is in response to your inquiry concerning the application of Sections 306A.10 and 306A.11 of the 1971 Code of Iowa to a proposed agreement between the Northwestern Bell Telephone Co. and the Iowa State Highway Commission in regard to the proper reimbursement to that utility for necessary relocation of some of their facilities.

Your request in connection with the Pottawattamie County Project I-80-1(50)19—01-78, posed the following three questions:

1. What is meant by the terms "relocation" and "removal", as utilized in these sections?

2. What does the phrase, "after deducting therefrom any increase in value of the new facility and any salvage value derived from the old facility", mean as utilized in Section 306A.11?

3. Is the replacement cost of a utility facility, different in type and design from the one which it replaced, if not a construction design requirement, the measure of reimbursement to the utility; or is the replacement cost of the utility facility with one of the same type and design, as the one required to be removed or relocated the proper measure of reimbursement and the limitation of the payments author-

ized by Section 306A.10 and 306A.11?

The facts of this situation include a desire by Northwestern Bell to install a different type of facility (underground) than was existing prior to the relocation (aerial). Because of the difference in costs between the two types of facilities, the underground being approximately four times as costly as the aerial, the question arises as to whether this increased cost can be legitimately reimbursed under the governing statutes, Code of Iowa §306A.10, et seq. All three of the questions posed go to this issue.

The title of the act in question is:

"An Act to provide for reimbursement to utilities for nonbetterment costs associated with relocation of facilities occasioned by the federal system of interstate highway and freeway projects." Acts 1959 (58 G.A.) Ch. 205, §1.

The key word here is "nonbetterment." That term and the constitutionality of the act were dealt with in the case of *Edge v. Brice*, 253 Iowa 710, 113 NW2d 755 (1962). In that case, the Iowa Supreme Court upheld the constitutionality of the Act and went on to say,

"The reimbursement is not a gratuity, but an appropriation of state funds for a public purpose. The public purpose to be served is the construction of a highway. The reason for reimbursement is not so utilities can better perform their services. The utilities are no better off after the relocation and reimbursement than they were before. The reimbursement is strictly for nonbetterment costs for which the state will be reimbursed to the extent of 90% by the federal government."

An earlier Attorney General Opinion, June 25, 1965, also stated that reimbursement to utilities was to be on a nonbetterment basis.

The *Edge v. Brice* Case, supra, makes it quite clear that the reimbursement should leave the utility no better off than it was prior to the relocation. The Court went on to say that if the State had not chosen to reimburse the utility, the customers of the utility would have been paying for the burden without receiving any benefit, and that was the reason that reimbursement was granted. The converse would also be true. If the State were to reimburse for costs that resulted in a betterment of facilities, then the public would be paying for a benefit that would go to the utility's customers only. For this reason, the reimbursement must be on a strictly nonbetterment basis.

Applying these authorities to the instant situation would not prevent the utility from installing the more expensive underground facilities on relocation, but it would however prevent the State from reimbursing the extra expense. The extra amount not reimburseable would be the additional funds required to have the facilities placed underground. If the utility wishes to incur the additional costs, then they should be able to install any type of facility they want as long as the State does not incur any of the increases in costs.

The answer to the first question would be that the "relocation" and "removal" refer to the facilities, i.e. the telephone transmission wires in this case. The second question concerning the meaning of "increase in value of the new facility" would provide for a situation such as posed here, when the new facility costs more or is worth more than the old facility, then the difference will be deducted. The previous discussion and

application of Section 306A.11 answers the third question posed, making the facility of the same type and design as the one relocated the proper measure of reimbursement.

The final issue raised then, is whether or not the facilities installed after relocation amount to a betterment as compared to those prior to relocation. Section 306A.11 gives "increase in value" as one criterion of betterment, and requires that it be deducted from the costs for reimbursement. A situation with a 400% cost differential would seem to fall within the category of a betterment. A separate determination of what was a betterment would have to be made in each factual situation.

The proper amount to be paid by the State to a utility for reimbursement of the costs of relocation or removal of its facilities, necessitated by an interstate highway project, is that amount of money necessary to effect such a relocation or removal minus any increase in value of the new facility and any salvage value of the old facility, leaving the utility company no better or worse off financially or physically (plant facilities) than they were before.

September 15, 1972

STATE OFFICERS AND DEPARTMENTS: Authority of Federal and State Meat Inspectors — §§ 189A.5, 189A.7, 189A.10 and 189A.17, Code of Iowa, 1971. Meat inspectors have summary powers to stop the use of unsanitary machinery, the entry of new inventory into unsanitary plants, use of unsanitary meat, and the use of state inspection seals in unsanitary plants without a prior due process hearing to preserve public health, safety, and welfare. (Wietzke to Fischer, State Representative, September 15, 1972) #72-9-10

The Honorable Harold O. Fischer, State Representative: Reference is made to your letter of July 24, 1972, in which you request an opinion of the Attorney General with respect to the following question:

"Does a state or federal meat and poultry inspector have the legal authority to close or otherwise restrict the operation of a licensed locker plant for an alleged violation of sanitary or other rules or regulations and invalidate the owner's rights to carry on a business under the above listed licenses, deprive employees of the right to further employment in that plant because of its being closed, and to deprive the patrons of that processing operation of their right to remove their property from the effected plant without a formal legal hearing?"

Under §189A.5, Code of Iowa, 1971, the Secretary of Agriculture shall:

"1. By regulation require antemortem and postmortem inspections, quarantine, segregation and reinspections with respect to the slaughter of livestock and poultry. . . .

"2. By regulation require the identification of livestock and poultry for inspection purposes and the marking and labeling of livestock products or their containers, or both. . . .

"3. Prohibit the entry into official establishments of livestock products and poultry products not prepared under federal inspection or inspection pursuant to this chapter. . . .

"4. By regulations require that when livestock products or poultry products leave official establishments they shall bear directly thereon or on their containers, or both, all information required . . . and require approval of all labeling and containers to be used for such products when

sold or transported in intrastate commerce to assure that they comply. . . .

"5. Investigate the sanitary conditions of each establishment within subsection 1 of this section and withdraw or otherwise refuse to provide inspection service at any such establishment where the sanitary conditions are such as to render adulterated any livestock products or poultry products prepared or handled thereat.

"6. Prescribe regulations relating to sanitation for all establishments required to have inspection under subsection 1 of this section. . . ."

Under §189A.7, Code of Iowa, 1971, the Secretary of Agriculture is given the following powers in addition to others:

"1. Remove inspectors from any establishment that fails to destroy condemned products as required under subsection 2 of section 189A.5 (a definition section).

"2. Refuse to provide inspection service under this chapter with respect to any establishment for causes specified in section 401 of the federal meat inspection act or section 18 of the federal poultry inspection act.

"3. Order labeling and containers to be withheld from use if he determines that the labeling is false or misleading or the containers are of a misleading size or form.

* * *

"5. By regulations prescribe conditions of storage and handling of livestock products and poultry products by persons engaged in the business of buying, selling, freezing, storing or transporting such articles in or for intrastate commerce to assure that such articles will not be adulterated or misbranded when delivered to the consumer.

* * *

"8. Adopt by reference or otherwise such provisions of the rules and regulations under the federal Acts, with such changes therein as he deems appropriate to make them applicable to operations and transactions subject to this chapter, which shall have the same force and effect as if promulgated under this chapter, and promulgate such other rules and regulations as he deems necessary for the efficient execution of the provisions of this chapter, including rules of practice providing opportunity for hearing in connection with issuance of orders under subsection 5 of section 189A.5 and subsection 1, 2 or 3 of this section and prescribing procedures for proceedings in such cases; however, this shall not preclude a requirement that a label or container be withheld from use, or a refusal of inspection pursuant to the section cited herein pending issuance of a final order in any such proceeding." * * *

Under §§189A.10 and 189A.17, Code of Iowa, 1971, the statutes specifically prohibit and provide penalties for violations of the above rules.

The above Iowa statutes give the Secretary of Agriculture broad powers to require inspection, quarantine, labeling of even their containers, exclusion of products from plants, shipped product be labeled, labeling or containers to be withheld, and the adoption of federal regulations by mere reference or otherwise. The only specific requirement for hearing appears to be prior to final orders and this is specifically excluded for the withdrawal of labels, containers and inspectors. It thus appears the legislature by statute has specifically authorized the Acts complained of and encouraged the adoption of the federal regulations.

In discussing this matter with representatives of the Iowa Department

of Agriculture we are informed that their practice has been to issue slow-down orders stopping the movement of new inventory into plants in which unsanitary conditions have been found. The department also stops the use of machinery until unsanitary conditions have been remedied. Also, the department has on occasion detained unsanitary meat until corrective action can be taken. However, we are informed that they have not as such actually closed a complete plant although it would seem that under certain circumstances the action described above might have that effect. We do understand that the federal meat inspectors may have actually closed entire plants.

In addition, it is our understanding the Iowa Department of Agriculture has adopted the federal regulations with minor modification as authorized above. These regulations and the above reference to federal statutes are given in 21 U.S.C.A. §§601 and 451 which are similar to those given above for the state statute. In discussions with Iowa Department of Agriculture personnel they indicate that state inspection is provided in cooperation with the above federally authorized regulation to ensure local control of inspections by local federally trained people who are more familiar with local conditions, limitations, etc. However, it is possible for these inspections to be performed by the federal government without the benefit of such local control which would be similar to the inspections cited above.

Subsequent discussions have centered upon specific inspection reports you have sent us. I understand these were federal inspections of the listed locker plants and of the Iowa meat inspectors methods so comments refer to both. Most of the specific questions concern violation of specific federal regulations adopted by Iowa as authorized by the above cited statute passed by the Iowa legislature, i.e. labeling of all packages and containers, required head coverings, boots free from blood, etc., impervious walls which excludes unpainted wood walls, and shatterproof light fixtures. One comment you question concerned the dull knife of an inspector which referred to a Iowa Department of Agriculture inspector. Another comment refers to washing carcass while standing on the floor and I understand refers to a federal regulation requiring that a man stand on an elevated platform and wash carcasses from the top down to ensure dirt, etc., is removed and not just moved to the top of the animal.

In summary, explanations exist for the comments made and why the regulations rationally relate to the purpose of the statute.

In the revocation of a license hearings may be required if sufficiently important rights are involved, but there is contrary authority if due process is protected by judicial review. *Smith v. Iowa Liquor Control Commission*, Iowa, 1969, 169 N.W.2d 803; Davis, Administrative Law, Third Edition, West Publishing Company, 1972 Chapter 7 at page 162; *Hagar v. Reclamation District*, 111 U.S. 701, 4 S.C. 663, 28 L.Ed. 569, 1884; *Nickey v. Mississippi*, 292 U.S. 393, 54 S.C. 743, 78 L.Ed. 1323, 1934; *Lichter v. U.S.*, 334 U.S. 742, 68 S.C. 1294, 92 L.Ed. 1694, 1948; *Ewing v. Mytinger and Caselberry*, 339 U.S. 594, 70 S.C. 870, 94 L.Ed. 1088, 1950 (FDA Seizures).

Even this requirement of judicial review may be waived and administrative action upheld, when the case involves national security, burden on the courts, or great hardship or cost making future judicial action meaningless. *Ferguson v. Thomas*, 430 F.2d 852, 5th Cir., 1970; Davis, supra, §7.15, p. 189. Courts also refuse to act unless there is clear illegality or abuse of discretion. *Davis*, supra, §8.13, p. 212. In addition, courts have held that even if a hearing is required, a full trial type hearing may not be required depending upon the needs of the particular parties and purposes of the agency if basic fairness exists, i.e. ICC rate making, parole determination, small claims courts and legislative committees. *Goldberg v. Kelly*, 1970, 397 U.S. 254, 90 S.C. 1011, 25 L.Ed.2d 287; *Dixon v. Alabama State Board of Education*, 1961, 294 F.2d 150 (5th Cir. Cert. Den.) 368 U.S. 930, 82 S.C. 368, 7 L.Ed.2d 193; *Memo* case, 1968, 45 FRD 134; *Wasson v. Trowbridge*, 1967, 382 F.2d 807 (2nd Cir.).

However, the citizen's right to procedural due process, particularly where he has already been licensed, must be balanced against the equally important right of the state to protect the health, safety and welfare of the public through the exercise of its police powers. The government has consistently been permitted to summarily restrain any action in advance of hearing where the public health, safety and welfare are in serious jeopardy, i.e. disease, harmful medicinal preparations, etc. 44 C.J.S. Inspections, §3, p. 398; 16A C.J.S. Constitutional Law, §606, p. 731; §575, p. 607; §599, p. 695; §674, p. 1078.

In *State v. Strayer*, 230 Iowa 1027, 1941, 299 N.W. 912, a board of health ordered that a farmer remove a nuisance from his land for the benefit of the public health. Such order was made without prior notice, and defendant claimed that he had been deprived of his property without "due process". Rejecting this contention the Iowa supreme court stated:

"While the courts have not been uniform in their holdings, we believe that the weight of authority, as well as reason and necessity, prescribe that in cases involving the public health, where prompt and efficient action is necessary, the state or its officers should not be subjected to the inevitable delays incident to a complete hearing before action may be taken." 299 N.W. at 917.

In deciding that an individual's right of due process is pre-empted by the needs of the public welfare, the court relied heavily on another Iowa case, *Loftus v. Dept. of Agriculture of Iowa*, 211 Iowa 566, 232 N.W. 412 (1930). In that case the court upheld the constitutionality of an Iowa law which gave complete discretion to a cattle inspector to determine whether certain animals were so diseased as to warrant immediate slaughtering. The court stated:

"Under these circumstances, the legislation cannot be declared unconstitutional unless the enforcement of the act is so arbitrary and unreasonable as to deny the appellees due process of law. Claim is made by appellees that the machinery of the law does deny due process. Basis for this assertion is founded upon the thought that there is no appeal from the finding of the tester, who representing the state department, goes among the herds and applies the tuberculin test. Without an appeal from the conclusion of this agent to what appellees term 'an impartial or judicial tribunal', appellees say due process of the law has been denied them. Obviously they are not correct in this. If the animal is in fact tubercular and therefore under the Iowa statutes a nuisance, it may be quarantined or summarily slaughtered. Protection to the health of man-

kind cannot be accomplished otherwise. Long delayed court or other procedures would furnish an opportunity for the tubercular germ to infest children and others. Summary action in the premises is essential. Otherwise the government cannot be effective enough to protect its inhabitants against tuberculosis or other plagues. Assuming that appellees' cattle are infected with tuberculosis, due process of law is not denied by a summary quarantine or even destruction of the animals." 232 N.W. at 417.

Thus, the court upheld a statute which, by asserting the priority of the public health, empowered a single health inspector to deprive certain individuals of their property. The court further pointed out that individuals are not without recourse against an inspector who has used faulty judgment or discretion. The court stated:

"Wherefore the owner of cattle is guaranteed a hearing to determine whether the animals are infected with tuberculosis. Events may demand that such hearing be after, rather than before, the condemnation and destruction. Yet the remedy is present all the time. Consequently, due process of law is guaranteed even though the state agents may, perchance, step beyond the realm of the police power, for, if such state representatives destroy healthy cattle, the owner may recover damages for the loss thereof." 232 N.W. at 419.

In a similar case the Iowa supreme court rejected a challenge to the tuberculosis test, which test was conducted "without notice and apportunity to be heard". In *Peverill v. Bd. of Supervisors of Blackhawk County*, 1928, 208 Iowa 94, 222 N.W. 535, 545, the Iowa supreme court held:

"The conclusion we draw from this review of the decisions of the Supreme Court of the United States is that the due process rule is not a limitation upon the right of the state to exercise its police power, unless the attempted exercise of such power is arbitrary and unreasonable, or an improper use of such power. This seems to be the necessary conclusion from these cases. Turning now to the instant case, we find nothing to sustain the contention that the exercise of the police power of this state, by reason of the enactments herein referred to, is arbitrary or unreasonable. Holding, therefore, as we do, that the State of Iowa properly exercised its police power in enacting these statutes, it necessarily follows that the due process clause of the Fourteenth Amendment of the Constitution of the United States does not restrict or limit the right of the state to exercise its police power as it did."

Thus, our court has held that measures calculated to protect the health of the public constitute a legitimate exercise of the state's police powers. Such measures are not to be weighed against claims of deprivation of property and denial of due process, rather the test is whether such an exercise of state police power is arbitrary, unreasonable or improper. Where the health of the public is clearly being protected, it is extremely difficult to show that certain measures are an abuse of the police power.

Finally, in *State v. Schlenker*, 1900, 112 Iowa 642, 84 N.W. 698, the Iowa Supreme Court upheld a statute prohibiting the adulteration of milk. The court repeatedly asserted the priority of the public health over any other interest, saying in relevant part:

"Almost every police regulation affects, to a greater or less extent, some property right; but these rights are subject to such reasonable limitations in their enjoyment as will prevent them from being injurious, and to such reasonable regulations as the legislature, under the constitution, may deem necessary and expedient. * * * Appellee further con-

tends that the statute in question is in violation of the fourteenth amendment to the federal constitution. Such contention is not sound, for it is fundamental that this amendment does not impose any restraints on the exercise of the police power of the state for the protection of the safety, health, or morals of the community." 84 N.W. at 700.

While these Iowa cases do not deal with the specific factual situations described in your letter, the cases do establish that where food products are prepared for general public use, the importance of protecting the public welfare takes precedence over the need for due process. It makes eminently good sense to by-pass the delays of notice, hearing and trial rather than to subject the public to possible disease, contamination or poisoning. Even where the authority to stop a food-processing operation vests in a single individual, the public welfare demands such protection rather than risk imperilment of the general health.

In addition to state inspection of meat the federal government has set certain standards under 21 USCA, §451 et seq (poultry inspection), and 21 USCA, §601 et seq (meat inspection). The Meat Inspection Acts have been declared to be valid in *Pittsburg Melting Co. v. Totten*, 248 U.S. 1, 63 L.Ed. 97, 39 S.Ct. 3, 1918, "The enactment of the statute was within the power of Congress in order to prevent interstate and foreign shipment of impure or adulterated meat food products." 39 S.C., p. 4.

The speedy protection of the public from adulterated food products is of prime importance and takes precedence over private interests. Federal meat inspectors may close a meat packing plant or a locker without a prior hearing. This type of protection of the public health has been upheld by the U.S. Supreme Court on numerous occasions. In *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 94 L.Ed. 1088, 70 S.Ct. 870 (1950), the court refused to sanction the enjoining of federal food and drug inspectors from seizing misbranded vitamins. These injunctions, Justice Douglas declared, would deny the public the protection from potential injury that the congress in enacting the law had provided. He stated:

"Yet it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination." (Cites omitted) 94 L.Ed. 1094.

In an earlier case, *North American Cold Storage Co. v. Chicago*, 211 U.S. 306, 53 L.Ed. 195, 29 S.Ct. 101 (1908), the court had also expressed the same concern for public health:

"We are of opinion, however, that provision for a hearing before seizure and condemnation and destruction of food which is unwholesome and unfit for use is not necessary. The right to so seize is based upon the right and duty of the state to protect and guard, as far as possible, the lives and health of its inhabitants, and that it is proper to provide that food which is unfit for human consumption should be summarily seized and destroyed to prevent the danger which would arise from eating it. The right to so seize and destroy is, of course, based upon the fact that the food is not fit to be eaten. Food that is in such a condition, if kept for sale or in danger of being sold, is in itself a nuisance, and a nuisance of the most dangerous kind, involving, as it does, the health, if not the lives, of persons who may eat it. A determination on the part of the seizing officers that food is in an unfit condition to be eaten is not a

decision which concludes the owner." 53 L.Ed. 199.

To the same effect is *Goldberg v. Kelly*, supra, which quoted with approval the following statement from *R. A. Holman & Co. v. SEC*, 112 U.S. App. DC 43, 47, 299 F.2d 127, 131 cer. den. 370 U.S. 9, 11, 8 L.Ed. 2d 404, 82 S.Ct. 1257 (1962):

"In a wide variety of situations, it has long been recognized that where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing."

It is evident from the foregoing that the overwhelming weight of authority and the statutes are to the effect that where, as here, there is potential for imminent harm to the public health, safety and welfare if meat inspection officials do not act promptly and summarily the right of private individuals to procedural due process must yield to the government's paramount interest in protecting the health of the citizenry subject only to the possible requirement that such state action as is taken be limited to the least restrictive or harmful alternative. This is not to say that a hearing is not required after action by an inspector which question is not presented here. But in this area the legislature has broad discretion, where necessity or compelling public interest requires summary action and only property rights are involved, to determine what public interest requires and what protection is necessary. 16 Am.Jur.2d Constitutional Law §281, p. 544; 2 Am.Jur.2d Administrative Law §406, p. 215.

September 18, 1972

SHERIFF: SPECIAL DEPUTIES: COUNTY OFFICERS: PEACE OFFICERS: ARREST: PUBLIC RECORDS — §§4.1(19), 337.1, 341.1, 742.2, 742.3, 85.62, 748.3(1), 755.3 and .4, 68A.1, Code of Iowa, 1971. A sheriff may appoint "special" or "reserve" deputies without approval of the board of supervisors and without revealing their identities, provided such deputies are not paid by, and do not become employees of, the county. A special deputy sheriff is a peace officer and, unless the sheriff restricts the grant of authority, has the power of a peace officer to make arrests. A sheriff's records with reference to such unpaid deputies are not "public records" within the Examination of Public Records Law. (Turner to Bennett, State Representative, 9/18/72) #72-9-11

The Honorable Vernon N. Bennett, State Representative: By your letter of February 2, 1972, you have requested an opinion of the attorney general as to whether an Iowa sheriff has authority to appoint special deputies and if so, whether special deputies have the power to make arrests. Additionally, you have orally asked whether the sheriff must publicly reveal the identity of his special deputies.

Although I have found no specific reference to "special" deputies as such, in the Iowa Code, I do note that §4.1(19), Code of Iowa, 1971, provides:

"The term 'sheriff' may be extended to any person performing the duties of the sheriff, either generally *or in special cases.*" (Emphasis added)

It is probable that the legislature, by use of the words "generally or in

special cases" has given tacit recognition to the existence of, and the authority to appoint, special deputies. *Bowman v. Overturff*, 1940, 229 Iowa 329, 294 N.W. 568, recognized both general and special deputy sheriffs. The provision is not a model of clarity. In any event, it is clear that by ?4.1(19) the legislature recognized that others perform the duties of sheriff and that, at least when authorized to do so, "generally or in special cases" they fall within the definition of sheriff. Thus, it may be reasonably implied that our general assembly says those authorized to do so, who perform the duties of sheriff, have the powers of sheriff, including the power of arrest.

Aside from §4.1(19), we have found no other *statutory* mention of "special deputy sheriffs". The only sections of the Code we have found bearing on this subject matter are §§337.1 and 341.1, Code of Iowa, 1971:

§337.1:

"Authority to summon aid. The sheriff, by himself or deputy, may call any person to his aid to keep the peace or prevent crime, or to arrest any person liable thereto, or to executive process of law; and when necessary, the sheriff may summon the power of the county. The sheriffs may use the services of the state department of public safety in the apprehension of criminals and detection of crime."

§341.1:

"Appointment. Each county auditor, treasurer, recorder, sheriff, county attorney, clerk of the district court, may, with the approval of the board of supervisors, appoint one or more deputies or assistants, respectively, not holding a county office, for whose acts he shall be responsible. The number of deputies, assistants, and clerks for each office shall be determined by the board of supervisors, and such number together with the approval of each appointment shall be by resolution made of record in the proceedings of such board."

Section 337.1 clearly authorizes the sheriff to call any person to perform duties which he as sheriff also has. While no reference is made to such persons as "special" or any other kind of deputy sheriffs, they would clearly fall within the general assembly's definition of sheriff while performing their duties under such call. Yet, although the statute specifically defines them as sheriffs, no one, even the sheriff and themselves included, would actually think of calling them such in most ordinary instances. Many might even deem it a strange legal fiction that the legislature would define a person to be something he is not.

In absence of statutory prohibition, I can see no reason why the sheriff is not entitled to designate those he summons to his aid to keep the peace, prevent crime and make arrests, and who are not his regular deputies or paid employees of the county, as "special", "non-pay" or "reserve" deputy sheriffs, particularly when a statute says persons performing the duties fall within the term "sheriff". In my view, §§337.1 and 4.1(19) clearly empower the sheriff to appoint aides and designate them special deputy sheriffs.

We deem it important that under §337.1 "when necessary, the sheriff may summon the power of the county" and "may use the services of the state department of public safety in the apprehension of criminals and detection of crime". Section 742.2 of the code provides:

"Calling out power of county. When the sheriff or other officer authorized to execute process has reason to apprehend that resistance will be made, or finds that resistance is made, to the execution thereof, he may command as many male inhabitants of his county as he may think proper, and may call upon the governor for the assistance of the military force to assist him in overcoming the resistance, and, if necessary, in seizing, arresting, and confining the resisters, their aiders, and abettors, to be held for punishment by law."

Section 742.3 makes it a misdemeanor punishable by imprisonment in the county jail for not more than six months or a fine of not more than $100, for any person lawfully required by any sheriff, deputy sheriff, constable, or other officer, to willfully neglect or refuse to assist him in the execution of his office in any criminal case, or in any case of escape or rescue. See also §743.8.

Obviously, when the legislature empowered the sheriff to "summon the power of the county", to "command as many male inhabitants of his county as he may think proper" and to "call upon the governor for the assitance of the military force to assist him" it intended to make, and did make, the sheriff an enormously powerful officer. Posse comitatus is latin for the power or force of the county and, according to Black's Law Dictionary, meant the entire population of a county above the age of fifteen which a sheriff may summon to his assistance in certain cases; as to aid him in keeping the peace, and pursuing and arresting felons, etc. In Ballantine's Law Dictionary, posse comitatus is said to be the name by which is known a company of persons orally summoned by the sheriff to assist him in making an arrest for a felony. At common law it is an offense to refuse to obey such a summons and persons so assisting are given the same protection which surrounds the sheriff while they are acting in concert with him in trying to make an arrest. Sheriff's posses are as well known to western movie fans as they are to the common law. So are deputies.

Thus, in addition to all of the foregoing *statutory* authority, we find ample support for the sheriff's power to appoint special deputies under common law. In *State ex rel Geyer v. Griffin*, 1947 80 Ohio App. 447, 76 N.W.2d 294, the court considered the payment of a special deputy in a widely cited case and said:

"The office of undersheriff or deputy sheriff is a common-law office; and that is the rule unless a change is effected by the Constitution or statute law of the state. In the most ancient times of the English common law, the sheriff and his undersheriff, and such deputy, when appointed, was vested with authority to *perform every ministerial act* that the principal sheriff could perform. Under modern jurisprudence the status of the deputy is in many respects the same. He acts for the sheriff in his name and stead. He is the sheriff's agent and as such agent he may do any ministerial act that his principal may do. He holds an appointment as distinguished from an employment. In the absence of any statutory restriction, the sheriff has full power to appoint his deputy, and he may clothe him with his ministerial duties as effectually as he could constitute him his agent to attend to private business for him as an individual.

* * *

"The time and extent of the exercise of the authority of the sheriff by such special deputy is a matter solely for the determination of the

sheriff, as the deputy acts as his agent. A deputy sheriff may be special in the sense that he is authorized to perform only part of the duties of the sheriff, or may be special in the sense that he is appointed by the sheriff without being assigned to perform any duties of the sheriff but being subject to assignment to duty by the sheriff from time to time as the sheriff in his discretion may determine. In either event he may receive compensation from the county only when he is employed by the sheriff and his compensation fixed by the sheriff and the sheriff certifies his action in this respect to the county auditor, as prescribed by Section 2981, General Code.

"A sheriff being a public officer is presumed to act in good faith and within the scope of his authority. Accordingly, his appointment of deputies who are not then assigned to duty by him is presumed to be done for the purpose of providing a reserve of persons qualified as deputy sheriffs whom he can employ as and when he deems their employment necessary or advisable *to perform any part of the duties of his office.*" (Emphasis added)

A deputy sheriff is appointed to act for the sheriff as an aide, substitute, or alter ego. *Thompson Brothers, et al v. Phillips*, 1924, 198 Iowa 1064, 200 N.W. 727. Special deputies, as well as general deputies or undersheriffs have long been recognized. See *Bowman v. Overturff*, supra, and 80 C.J.S. 154 at 197, Sheriffs, §§2 and 29; 1920 OAG 628 and 1940 OAG 564. There is even authority that non-residents, infants and minors can be appointed deputies or special deputies. 80 C.J.S. 197, Sheriffs, §29 and 47 Am.Jur. 932, Sheriffs, §156. "The phrase 'special and non-pay', as applied to a deputy sheriff, has been held to imply that, while he holds a commission as deputy sheriff, his activities in that respect are limited to performing acts specifically directed, and that he is under no obligation to devote time to investigating criminal offenses." 80 C.J.S. 197, Sheriffs, §29.

The more difficult question is whether their appointment is subject to approval of the board of supervisors and whether the board of supervisors can limit the number of appointments of such special or reserve deputies. §337.1 contains no such limitation on the sheriff's power insofar as persons he summons to aid him and whom we have said he may designate as special or reserve deputies. But §341.1 requires that the appointment of "one or more deputies or assistants" by any county officer, including the sheriff, is subject to the approval of the board of supervisors, which board may limit the number of deputies, assistants or clerks so appointed. These sections should be harmonized, if possible, and not necessarily construed to conflict with each other. I find no section similar to §337.1 which would authorize other county officers to summon aid in the performance of their duties and, in harmonizing §§337.1 and 341.1, it appears more logical to me to assume that §341.1 applies only to regular deputies who are salaried or paid employees of the county. It appears to me that the legislature intended to grant the board of supervisors a check rein on the number of deputies so that these enumerated officers could not saddle their respective counties with unreasonably burdensome salary costs. The supervisors are responsible for appropriating the funds necessary to operate county government.

On the other hand, the sheriff, not the supervisors, is among the officers of his county responsible for enforcement of the laws and the legislature did not intend to leave him without the help he needs. Thus, in my opinion, these sections should be construed to mean that the sheriff

may call any number of special deputies to his aid but that such do not necessarily become employees entitled to compensation. (§337.1) The sheriff may also, subject to approval of the supervisors, appoint one or more regular deputies, assistants and clerks who are employees and compensated by the county. (§341.1) So viewed, these sections seem compatible. But even if they conflict, §337.1 is a specific or special statute which controls over the general statute, §341.1. *Smith v. Newell*, 1962, 254 Iowa 496, 117 N.W.2d 883; *City of Mason City v. Zerbel*, 1958, 250 Iowa 102, 93 N.W.2d 94. Accordingly, I am convinced that approval of the supervisors is not required for the appointment of special deputies.

We have previously said "reserve deputy sheriffs" are covered by the workmen's compensation law and entitled to workmen's compensation for injuries sustained while performing the duties of a law enforcing officer. See §85.62, Code of Iowa, 1966 and 1971, and 1968 OAG 685. But such reserve deputy sheriffs were entitled to workmen's compensation by virtue of the aforementioned statute (§85.62) rather than by the fact that they were employees of the county. §85.62 has since been repealed. See OAG, Lukehart to Landess, July 25, 1972, No. 72-7-19. In any event, the fact that a special deputy sheriff or a reserve deputy sheriff might become entitled to workmen's compensation (a question we do not herein decide) is not decisive of the applicability of §341.1 or whether approval of the board of supervisors is requisite to the validity of the appointment. A deputy sheriff holds an appointment as distinguished from an employment. 47 Am.Jur. 930, Sheriffs, §154.

Moreover, we note that §337.7, as amended by §145, Chapter 1124, 64th G.A., Second Session, provides for the appointment of bailiffs by the sheriff and that bailiffs "shall be regarded as deputy sheriffs". A prior opinion of this office has held that bailiff appointees do not require approval by the board of supervisors. 1962 OAG 116. Cf dicta in majority and concurring opinions in *Smith v. Newell*, supra, which was not faced with the issue concerning *non-paid* or special deputies. Rather, it pertained to bailiffs and regular paid deputies.

No authority we have found suggests any limitations, other than financial, upon the aides available to a sheriff. On the contrary, sheriffs have on occasions throughout history commanded vertiable armies.

A special deputy sheriff is a peace officer under §748.3(1) of the Code which defines peace officers to include sheriffs and their deputies. §755.3 provides that arrests may be made by a peace officer or by a private person and §755.4 enumerates the instances in which peace officers are entitled to make arrests. Moreover, as previously pointed out, §4.1(19) extends the term sheriff to any person performing the duties of the sheriff, either generally or in special cases. Accordingly, unless the sheriff expressly limits the duties and power of a special deputy and it is understood between them that the special deputy has no more power to make an arrest than any other private person, a special deputy is authorized to make arrests as a peace officer.

In answer to your last question, it is my opinion that a sheriff has no duty to publicly reveal the identity of any of his special deputies who are not paid by the county or employees of the county unless he is required to do so by law or by order of court. The sheriff's duties are

prescribed by statute and I find no such requirement in the law. Records which a sheriff may have with reference to special deputies not paid by the county do not fall within the definition of "public records" as defined in Section 68A.1 of the Code, and which provides:

"Wherever used in this chapter, 'public records' includes all records and documents of or belonging to this state or any county, city, town, township, school corporation, political subdivision, or tax-supported district in this state, or any branch, department, board, bureau, commission, council, or committee of any of the foregoing."

A sheriff's records with reference to such special deputies are not required to be kept. They are his own and do not belong to the state, county or any of the other enumerated political subdivisions, governmental organizations, boards or departments. Expressio unius est exclusio alterius. A sheriff may have perfectly valid reasons for concealing the identity of those who aid him in investigating crime and keeping the peace. Undercover agents for example have always been and always will be an effective instrument of sheriffs and police in such matters. If criminals did not act covertly and conceal *their* identities, or if they wore uniforms like soldiers on the battlefield, perhaps special deputies would be unnecessary. In any event, investigating crimes and keeping the peace is, for both sheriffs and their deputies, their raison d'etre.

September 19, 1972

CITIES AND TOWNS: Minimum Age for Policemen — §§80B.2 and 80B.11, Code of Iowa, 1971; Rule 1.1 (80B), IDR. Nineteen year olds may not be selected as policemen at this time when the rules of the Iowa Law Enforcement Academy set the minimum age at twenty-one. (Blumberg to Goen, Dubuque County Attorney, 9/19/72) #72-9-12

Mr. John J. Goen, Dubuque County Attorney: We are in receipt of your opinion request of September 1, 1972, wherein you asked whether a city may recruit, select and appoint individuals 19 years of age as patrolmen, if they meet the other requirements. The question actually is who sets the standards for policemen.

Chapter 80B, 1971 Code of Iowa, dealing with the Iowa Law Enforcement Academy, appears to be controlling. Section 80B.2 reads:

"It is the intent of the legislature in creating the academy . . . to maximize training opportunities for law-enforcement officers, to coordinate training and to set standards for the law-enforcement service . . . ."

Section 80B.11 provides, in part:

"The director of the academy . . . shall promulgate rules and regulations in accordance with the provisions of this chapter and chapter 17A, giving due consideration to varying factors and special requirements of law-enforcement agencies relative to the following:
1. Minimum entrance requirements . . . ."

Therefore, the Law-Enforcement Academy has the authority to set the standards for law enforcement officers in the state.

Rule 1.1, Rules of the Law Enforcement Academy, Iowa Departmental Rules, provides:

"In no case shall any person hereafter be recruited, selected, or

appointed as a law enforcement officer unless such person:

. . .

1.1(2) Has reached his or her twenty-first birthday . . . at the time of his or her appointment."

This rule sets forth the age requirements for law enforcement personnel in the state. Accordingly, nineteen year olds may not be selected as policemen while this rule sets the minimum age as twenty-one.

September 22, 1972

ELECTIONS: County Election Commissioners — Chapter 1025, Acts of the 64th G.A., 2nd Session (1972) limits the amount which may be spent by the elections commissioner to that sum budgeted for 1972 elections and such additional costs as are certified to the board of supervisors for approval and the issuance of anticipatory warrants. (Nolan to Harbor, Speaker of the House of Representatives, 9/22/72) #72-9-13

The Honorable William H. Harbor, Speaker of the House: Your letter of September 19, 1972, requested an opinion regarding a specific duty of county officers as follows:

"Now that county auditors have ben designated to serve as election commissioners, do they, in this capacity, have unlimited spending authority for data processing material, etc., without the approval of a finance committee (board of supervisors)?"

Chapter 1025, Acts of the 64th G.A., Second Session, makes two provisions for the cost of conducting elections. In §3, the Act provides:

"The costs of conducting a special election, general election, and the primary election held prior to the general election shall be paid by the county.

"The cost of conducting other elections shall be paid by the political subdivision for which the election is held. The county commissioner of elections shall certify to the county board of supervisors a statement of cost for an election. The costs shall be assessed by the county board of supervisors against the political subdivision for which the election was held.

"Cost of registration shall not be charged as a part of the election costs."

In addition, §32 of Chapter 1025, supra, provides:

"There is created in the office of the county treasurer of each county a fund to be known as the election expense fund. Annually, the board of supervisors shall levy an amount sufficient to pay the costs of elections and voter registration, pursuant to chapter forty-eight (48) of the Code, incurred by the county. The funds deposited in this account shall be used to pay election and voter registration costs and shall not be appropriated for any other purposes or transferred into any other county fund. Any moneys budgeted by any county for the conducting of elections in the year 1972, shall be transferred to this fund. *If additional funds are needed to register voters, pursuant to chapter forty-eight (48) of the Code, after the effective date of this Act, and until July 1, 1973, such costs shall be certified by the county commissioner of registration to the board of supervisors, who shall, after approving the costs thereof, authorize the issuance of anticipatory warrants* pursuant to section three hundred thirty-four point five (334.5) of the Code, to pay such additional costs. The moneys necessary to redeem such warrants shall be part of the levy for the next year." (Emphasis supplied)

It is our opinion that the county auditor does not have unlimited spending authority in his capacity as election commissioner. The portion of Chapter 1025 emphasized above implies a prerequisite approval by the county board of supervisors for the expenditure of funds over and above that amount budgeted for elections to be held in the year 1972. In future years the cost of data processing material for voter registration and elections should be budgeted so as to be included in the levy for the county election expense fund pursuant to §32 of Chapter 1025, supra.

September 26, 1972

HIGHWAYS: Outdoor Advertising; Mobile Advertising Devices, prohibited from being placed upon Right of Way of Public Highway, Applicability of licensing provision of §321.123, as amended by Ch. 174, §3, Acts of the 64th G.A., 1st Session; permit provisions of Ch. 1068, Acts, 64th G.A., 2nd Session. (1) Advertising devices including those mounted upon trailers are prohibited from being placed upon right of way of any public highway, (2) "Mobile Promoters" are subject to the provisions of the Iowa Junkyard Beautification and Billboard Control Act and Ch. 306B, whichever is stricter, (3) Issuance of an annual license required by §321.123 for such a trailer does not exempt such devices from the provisions of Iowa law pertaining to advertising devices. (Schroeder to Holden, State Representative, 9/26/72) #72-9-14

Representative Edgar H. Holden, Seventy-Fifth District, Scott County: Reference is made to your letter of August 26, 1972, in which you enclosed a newspaper advertisement offering "Mobile Promoters" for rent.

As stated in your letter these "Mobile Promoters" are small trailers similar to boat trailers carrying a billboard with changeable letters. You ask:

1. "Are these "mobile promoters" within the scope and regulation prescribed in House File 734, 64th General Assembly?"

2. "Could the trailer's vehicle license be construed to exempt the sign from sign licensing required in House File 734, 64th General Assembly?"

The Iowa Billboard Control Act is not the only provision regulating billboards in Iowa. Section 319.12 of the Code of Iowa 1971 provides:

"No billboard, advertising sign or device, fence other than right of way boundary fence, or other obstruction except signs or devices authorized by law or approved by the highway authorities shall be placed or erected upon the right of way of any public highway . . ."

The "right of way" of any public highway is defined in Section 10, paragraph 14, of the Billboard Control Act as being:

"Right-of-Way" means land area dedicated to public use for the highway and its maintenance, and includes land acquired in fee simple or by permanent easement for highway purposes, but does not include temporary easements or rights for supplementary highway appurtenances."

Section 10, paragraph 7, of Chapter 1068 (HF 734) Acts of the 64th General Assembly, Second Session, provides:

" 'Advertising device' includes any outdoor sign, display, device, figure, painting, drawing, message, placard, poster, billboard, or any other device designed, intended, or used to advertise or give information in the

nature of advertising, and having the capacity of being visible from the traveled portion of any interstate or primary highway."

Obviously Section 319.12 is broad enough to include such "mobile promoters" as being prohibited from being "placed or erected" within the right of way of any public highway; such devices have not been authorized or approved for that purpose by any highway authorities. Likewise, even though such devices may not be "permanent" devices, there is no such qualification in the Iowa law to exempt mobile advertising devices. Section 10, paragraph 9, of the Billboard Control Act provides:

" 'Erect' means to construct, reconstruct, build, raise, assemble, *place*, affix, attach, create, paint, draw, *or in any other way bring into being or establish*; . . ." (Emphasis supplied)

Such "mobile promoters" may be exempt, however, from the provisions of the Act if they are placed upon the premises of the activity being advertised, and if in the case of devices within 660 ft. of the right of way of any interstate highway, only if they are located within 50 ft. of the activity advertised. Otherwise, each device constitutes a single advertising device at each location it is being used; if visible from any interstate or primary highway it is otherwise subject to the provisions of the Billboard Control Act.

The Act requires applications to be made to the Highway Commission together with a fee to be paid prior to its erection. This would require separate permits to be obtained at each location where it was being used for advertising.

Undoubtedly certain enforcement problems are encountered when such a highly mobile device is used to frustrate the purpose of this legislation. Section 19 of the Act provides for a 30 day notice to the owner of the sign and to the owner of the land upon which the device is located. Only in the case of signs erected in violation of Chapter 306B of the Code is their any criminal misdemeanor provision. (Section 306B.6)

In regard to the second question you have asked, the trailer's license could not be construed to exempt the sign from the permit provisions of the Billboard Control Act. Annual registration fees are required for trailers "operated" upon the public highways of this state (with certain exceptions). (See Section 321.105 of the Code). An advertising device sign is not "operated" upon the highways, however certainly it may be transported upon the highways. It is the trailer which is subject to the annual registration fees specified in Section 321.123, as amended by Chapter 174, Section 3, Acts of the 64th General Assembly. Insofar as the advertising device itself, it is a separate and distinguishable entity which is "designed, intended, or used to advertise or give information in the nature of advertising." It is not necessarily mobile.

It is a rule of statutory construction that in enacting a statute, it is presumed that a just and reasonable result is intended and that a result feasible of execution is intended. (Chapter 77, Section 1, Acts of the 64th General Assembly, 1st Session). It would be unreasonable if an advertiser could circumvent the provisions of the Billboard Control Act merely by mounting the device upon a trailer. It is likewise obvious that although it would be impossible to control all forms of advertising which

are visible upon motor vehicles (because of their mobility) that when the primary purpose of such vehicles is advertising which is not merely incidental to any other activity, it is subject to the regulations which affect any other advertising device similarly situated. In fact, if the mobile promoter were never moved, it would not be subject to the annual registration fee for trailers. Billboard permits are issued only for a specific device at a specific location. Both requirements for "licensing" of trailers and for securing "permits" for advertising devices serve separate and distinct purposes. When a mobile promoter is "placed" at a specific location for advertising purposes it is "erected" within the definition of that word quoted above, and the fact of their being on trailers, licensed, or not, is immaterial insofar as compliance with the Billboard Control Act.

Likewise if the mobile promoters are moved on the highways they also must be licensed, and an advertising permit issued for such a device would not eliminate the need for trailer registration plates.

Section 321.98 provides it is a criminal misdemeanor to operate, or for the owner to permit another to operate, any vehicle required to be registered without the registration plates. Likewise Section 321.99 provides the same penalty for improper use or display of a registration plate not issued for such vehicle. In the case of "homemade" trailers this is a particularly difficult violation to prosecute, since there are no manufacturer's serial numbers with which to permanently identify such vehicles (trailers). Any such practice should be reported to appropriate law enforcement authorities for investigation and possible prosecution.

It is suggested that it may be desirable to enact further appropriate legislation which would specifically cover such activities because of the enforcement difficulties which may be encountered. Such legislation could provide for specific licensing of trailers carrying advertising as well as for monthly, weekly, or daily permits to be issued at each location, generally upon the same size, spacing, and lighting criteria as any other advertising devices. Presently there is no provision for a permit to be issued at less than the initial and annual fee.

September 26, 1972

CITIES AND TOWNS: Lease — Purchase of a Building — Art. XI, §3, Iowa Constitution; §§368.2 and 368.18, Code of Iowa, 1971. A municipality may enter into a lease-purchase agreement as long as the statutory debt limit is not exceeded. A city council may bind a future city council with such an agreement for a reasonable length of time. (Blumberg to Freeman, State Representative, 9/26/72) #72-9-15

Mr. Dennis L. Freeman, State Representative: We are in receipt of your opinion request of August 31, 1972, wherein you asked whether a city can enter into a long term (15 years) lease-purchase agreement of a building for the purpose of office space.

Section 368.18, 1971 Code of Iowa, provides that municipalities, by a three-fourths vote of the council, may purchase buildings for governmental functions. Section 368.2 of the Code provides that municipalities may lease property. Prior opinions of this office have held that municipalities may have lease-purchase agreements, since the word "purchase"

is broad enough to encompass "lease." Haesemeyer to Henke, February 3, 1971, a copy of which is attached hereto. That opinion dealt with the lease-purchase of equipment. However, that discussion is applicable here. Therefore, a municipality may enter into a lease-purchase agreement for a building.

There is a restriction, however, on such an agreement. Article XI, §3 of the Iowa Constitution provides in part that no municipal corporation may "become indebted in any manner or for any purpose to an amount, in the aggregate, exceeding five percentum on the value of the taxable property. . . ." See also section 407.1, Code of Iowa. Therefore, the yearly rental may not put the city over the statutory limit on indebtedness in the years in which the annual rental is paid.

The Supreme Court of Iowa in a recent opinion, *Bachtell* v. *City of Waterloo* (September 19, 1972), discussed a lease-purchase agreement in relation to a city's debt limitation. The Court talked of two situations: (1) where the agreement is merely one of rental or lease; and (2) where the agreement is one of lease-purchase. In the first, the Court stated that where a lease is involved and the rentals are in fact such, courts uniformally hold that such lease of property, even with an option to purchase for an additional fixed price, does not create an indebtedness within the limitation of indebtedness. To clarify this, the Court is saying that the aggregate total of the rental payments over the years is not used to determine whether the debt limitation has been exceeded. Rather, each individual payment is looked at to determine whether the debt limitation for that year will be exceeded.

In the second instance, the Court stated that where the rentals are in fact installment payments on the purchase price, the agreement will be treated as a purchase rather than as a lease. Thus, the aggregate total of rental payments is used to determine whether the debt limitation has been exceeded. Applying this reasoning to the *Waterloo* case, the Court held that the total rental payments caused the city to exceed its debt limitation, and therefore the agreement was void.

In your case, if you enter into a lease-purchase agreement, you should determine if the total payments would cause the city to exceed its debt limitation. If it is merely a lease that is entered into, then you need only determine if the yearly rental will cause the city to exceed its limitation.

It is a general rule that one city council may bind a future council with respect to business enterprises for the city. In *Iowa-Nebraska Light & Power Co.* v. *City*, 1935, 220 Iowa 238, 247, 261 N.W. 423, the Supreme Court of Iowa held that "there is no *constitutional provision* prohibiting the Legislature from empowering one city council from making a contract binding upon future councils." That case concerned a legislative power. In a case concerning a business contract, the Court held the same to be true. *Des Moines* v. *West Des Moines*, 1948, 239 Iowa 1, 30 N.W.2d 500. Therefore, a city council may bind a future council with a contract for a reasonable length of time. We are not prepared, however, to designate what a reasonable length of time would be.

Accordingly, then, we are of the opinion, that a municipality may enter into a lease-purchase agreement for a building, subject to the limitations set forth above. A city council may bind a future council with such an

agreement for a reasonable length of time.

September 26, 1972

STATE OFFICERS AND DEPARTMENTS: Bureau of Labor — §§68A.1, 68A.2, 68A.7, Code of Iowa, 1971; Ch. 1028, §13, Acts of the 64th G.A., 2nd Session. Worksheets and notes prepared by Bureau of Labor inspectors are not "public records", and may be kept confidential. (Voorhees to Addy, Commissioner of Labor, 9/26/72) #72-9-16

Mr. Jerry L. Addy, Commissioner of Labor: Reference is made to your letter of July 26, 1972, in which you asked if the various worksheets and notes prepared by Bureau of Labor inspectors in the course of their duties are "public records" that must be made available for public inspection and copying pursuant to Chapter 68A, Code of Iowa, 1971.

A portion of your letter states:

* * *

"The worksheets contain observations, assumptions, comments, and extraneous information based on the inspector's view of the scene. The purpose of recording all information is to enable the inspector to fully and accurately prepare a case for the issuance of a citation. Often the inspector's work-product will contain discussions with employers and employees. From his preliminary worksheets and other notes, the inspector will recommend citations to the Iowa Occupational Safety and Health Administrator who will make the final determination as to what citations and penalties will be imposed.

* * *

"Materials contained in the worksheets and other file records may contain statements relating to trade secrets and other information which would give advantage to competitors.

* * *

"The Bureau of Labor requests an opinion as to the availability of inspectors worksheets and notes and other file information which has not otherwise been made public. . . ."

Section 68A.2, Code of Iowa, 1971, provides:

"Every citizen of Iowa shall have the right to examine all public records and to copy such records, and the news media may publish such records, *unless some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential.* The right to copy records shall include the right to make photographs or photographic copies while the records are in the possession of the lawful custodian of the records. All rights under this section are in addition to the right to obtain certified copies of records under section 622.46." (emphasis added).

Section 68A.1 defines "public records":

"Wherever used in this chapter, 'public records' includes all records and documents of or belonging to this state or any county, city, town, township, school corporation, political subdivision, or tax-supported district in this state, or any branch, department, board, bureau, commission, council, or committee of any of the foregoing."

However, not all information obtained by an agency or department is considered to be "public records."

"Not every document which comes into the possession or custody of a public official is a public record. It is the nature and purpose of the

document, not the place where it is kept, which determines its status.

* * *

"But this does not require, nor does our statute do so, the disclosure of all records, writings, or reports which are in the files of a public officer at any time to any citizen demanding such information. Such a result would impose an intolerable burden on the public officer. Such an officer must be ever ready to defend his decisions and justify his judgment, but the rule for which appellants contend would be an unreasonable and harmful interference with the day-to-day conduct of public business just when such officer should, and must, be allowed some discretion in making those decisions and in exercising that judgment." *Linder* v. *Eckard*, 1967, 261 Iowa 216, 152 N.W.2d 833, 836.

"A statute providing for inspection of public records by all persons is intended to include *only* those records intended for the use of the public and *not* those intended only for the use of particular public officers." 76 C.J.S., *Records*, §36.

We have previously stated that certain information obtained by the Board of Parole is confidential.

"However, it is our opinion that records of investigations conducted pursuant to requirement of law by public officers for the benefit of the Board of Parole, wherein those furnishing the information must exercise judgment, expressions of opinions and make conclusions should be, as a matter of public policy, confidential." Opinions of Attorney General, 1968, pages 491, 494.

It is apparent that the worksheets and notes described by your letter are for the use of the Bureau of Labor in carrying out their discretionary duties. It would appear to us that this information is not intended for use by the public.

In addition, it is provided that trade secrets are to be kept confidential.

"The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release information:

* * *

"3. Trade secrets which are recognized and protected as such by law.

* * *

"6. Reports to governmental agencies which if released, would give advantage to competitors and serve no public purpose." Chapter 68A.7, Code of Iowa, 1971.

"Notwithstanding any provisions of this Act, all information reported to or otherwise obtained by the commissioner or his representative in connection with any inspection or proceeding under this Act which contains or might reveal a trade secret shall be considered confidential, except that such information may be disclosed to other officers or employees concerned with carrying out this act or when relevant to any proceeding under this Act. In any such proceeding the commissioner, the commission or the court shall issue such orders as may be appropriate to protect the confidentiality of trade secrets." Chapter 1028, Section 13, Acts of the 64th G.A., 2nd Session.

We are therefore of the opinion that inspectors' worksheets, notes, and other materials are not "public records" within the meaning of §68A.1, and may be kept confidential.

September 27, 1972

CITIES AND TOWNS: Retirement Systems — §410.1, Code of Iowa, 1971; §§ 3 and 4, Ch. 108, Acts of the 64th G.A., First Session. Rights in a pension system under Ch. 410 of the Code do not vest until the pension is due the employee. Rights have vested as to those already receiving a pension, which rights shall not be abridged. (Blumberg to Yarham, Cass County Attorney, 9/27/72) #72-9-17

Mr. Ray Yarham, Cass County Attorney: We are in receipt of your opinion request of May 26, 1972, regarding policeman and fireman pension funds. In 1965 the City of Atlantic created a policeman's pension fund under Chapter 410 of the Code of Iowa. Pursuant to that fund three pensions were being paid. In February, 1971, the firemen of Atlantic were included in a pension fund. The first session of the 64th General Assembly then amended Chapter 410 so that it now does not apply to anyone who entered employment after March 2, 1934. Your questions are:

1. "Ever since the enactment of the ordinance of February 1, 1971, the money contributed by the firemen has been withheld from their checks. Should that money be returned to those firemen after the effective date of the act of the 1st session of the 64th General Assembly, or, should that money be kept in the fund to pay the pensions of the two widows and the one policeman?"

2. "Now, a like situation exists concerning the policeman, again from the effective date of the act of the 64th General Assembly, but in regard to the policemen's pension fund. I am not certain that the authorized half-mill levy will forever be enough to pay these three pensions. If not, what should the City do to supplement the fund so as to cover the amounts owing, or should the amounts be pro-rated so that the one-half mill will cover the expense?"

The question becomes one of vesting rights. In other words, do the employees have a vested right to a pension in the future merely by contributing to a fund, or do they have a vested right only upon their retirement or disability. Courts of various jurisdictions have dealt with this specific question, taking various approaches. Most courts agree that a compulsory retirement fund creates no contractual rights. Annot., 52 A.L.R. 2d 437 (1957). In conjunction with this, many courts have held that in the absence of contractual rights there is no vesting of any right prior to the time that retirement or disability occurs. Thus, the statutes authorizing such pensions may be modified or repealed. Examples of such decisions are *Allen* v. *United States*, 148 F.Supp. 817, where it was stated that a federal pension creates no vested rights, and any benefits conferred may be withdrawn at any time within the discretion of Congress; *Bergin* v. *Board of Trustees of Teachers' Retirement System*, 31 Ill. 2d 566, 202 N.E. 2d 489; *Slezak* v. *Ousdigian*, 110 N.W. 2d 1 (Minn.); *Mollner* v. *Omaha*, 169 Neb. 44, 98 N.W.2d 33; and *Creps* v. *Board of Firemen's Relief Retirement Fund Trustees*, 456 S.W.2d 434 (Tex .Civ. App.).

Iowa is within this class of cases. In *Gaffney* v. *Young*, 1925, 200 Iowa 1030, 205 N.W. 865, the Iowa court cited with approval to cases in other jurisdictions for the proposition that a pension "is not a matter of contract or vested right; that it is a mere gratuity or bounty from the sovereign power, to be given, changed, or withheld at its pleasure." In *Nelson* v. *Board of Directors*, 1955, 246 Iowa 1079, 70 N.W.2d 555, the Court held that prospective rights in a pension system "are not vested

or contract rights which may not be adversely affected by subsequent legislation or procedure." Retirement payments are not pure pensions, gratuities or bounties, but are given for services not fully compensated when rendered. Thus, they do not have the character of a property, or a vested, right, or a contract right. Therefore, there is no prohibition upon an adverse effect on such a pension system by subsequent legislation. *Talbott* v. *Independent School District,* 1941, 230 Iowa 949, 299 N.W. 556. See also, *Rockenfield* v. *Kuhl,* 1951, 242 Iowa 213, 46 N.W.2d 17.

The same does not hold true with respect to those pensions already in effect. Once the right to a pension accrues (upon the happening of an event such as death or disability) it becomes vested. *Gaffney* v. *Young,* supra; *Rockenfield* v. *Kuhl,* supra. Thus, subsequent legislation, occurring after the pension has accrued, cannot adversely affect the pension rights.

The next question to answer concerns what is to be done with the employees who have been contributing to a pension fund under Chapter 410. Since there is no vesting of rights prior to the pension, it would logically follow that these employees will not be contributing any more funds and will not be receiving a future pension pursuant to Chapter 410. The recent case of *Johnson* v. *City of Red Oak,* 197 N.W.2d 548 (Iowa 1972), appears to cloud this conclusion. There, the court held that a disabled policeman should receive a pension under Chapter 410, even though he had entered employment after March 2, 1934, and even though the city had not set up a pension system. However, the court emphasized that this case was not affected by important code changes (Chapter 108, §3, Acts of the 64th G.A.) enacted *after* this claim arose. In a note at the bottom of page 549 of the decision, the court stated that section 410.1 "was amended to expressly bar chapter 410 as a remedy for injured policemen and firemen who entered employment after March 2, 1934."

Section 4 of Chapter 108, Acts of the 64th G.A., is also of importance here. That section provides that any rights "that may have accrued to any person pursuant to Chapter four hundred ten (410) of the Code prior to the effective date of this Act shall be preserved." Emphasis should be placed on the fact that the Legislature speaks of those rights which have accrued. Since no rights vest prior to retirement or disability it is obvious that the Legislature only intended that rights of those receiving pensions be preserved. With this in mind, it becomes apparent that a pension system under Chapter 410 for those who entered employment after March 2, 1934, is no longer in existence.

The prior statements that no rights vest prior to the pension are not entirely correct. There can be no doubt that the employees have a right to the money that they have contributed to the fund. An excellent example of this is what happens if a person leaves his employment prior to his retirement. In those cases, the employee is refunded his contribution. IPERS is such a system. The same should hold true if the pension system is discontinued. Thus, the employees who have contributed pursuant to Chapter 410 have rights to that money so contributed.

With respect to the pensions already being given, section 410.1 provides that cities shall annually levy a tax of one-eighth mill for the purposes

of creating a pension fund. That section goes on to provide that cities having a population of more than six thousand five hundred may levy a tax of up to one-half mill for the same purpose. It is further provided that cities, where a retirement system based upon actuarial tables shall be established by law, shall levy a tax sufficient in amount to meet all necessary obligations and expenditures. The section also provides that said obligations and expenditures *shall* be direct liabilities of the cities. From the above discussion, there is no doubt but that the rights of those already receiving pensions shall not be abridged. Thus, the city shall continue to pay said pensions. However, a problem arises as to the sufficiency of the funds from which the pensions are paid.

We do not have any information before us as to whether the city levies a one-eighth, or one-half, mill tax or whether it has a system based upon actuarial tables. For the sake of discussion, let us assume that the city does not use actuarial tables, and levies either one-eighth or a one-half mill. Let us assume further that the funds are insufficient to pay the pensions. What is the liability of the city, if any? Should the pensioners be paid a pro-rate share of the fund until it is used up, or should the city be required to pay the full pensions for their duration?

In *Lage* v. *City of Marshalltown*, 1931, 212 Iowa 53, 235 N.W. 761, the court held that once the right to a pension becomes vested, there is a mandatory duty upon the city to provide a fund sufficient to make the payments. In addition, the pension may be paid only out of the fund authorized by the statute. However, because the court was unable to find any authority for the proposition that the city should be liable for past due pension payments, it was held that the city was not liable for failure to levy a sufficient tax for the fund. In 1934, the statute was amended by adding thereto the sentence on the direct liability of a city. In 1943, the court decided *Mathewson* v. *City of Shenandoah*, 233 Iowa 1368, 11 N.W.2d 571. There, a pensioner sought a mandamus action against the city to compel it to levy an emergency tax so that there would be sufficient funds for his pension. It was held that such an emergency levy was discretionary. Therefore, the city was not compelled to levy such a tax. Unfortunately, there are no other decisions in Iowa regarding this point.

Other jurisdictions have grappled with this problem, and their decisions are divergent. In *Bellus* v. *Eureka*, 71 Cal. Rptr. 135, 444 P.2d 711, the California court held that the city was responsible for payment of pensions, and that funds should come out of the general fund if the pension fund was inadequate. In a similar decision, *Penny* v. *Bowden*, 199 So. 2d 345 (La. 1967), an action was instituted to compel the city to make up deficiencies in the pension fund. The court there compelled the city to make up said deficiencies. This decision was reached, however, pursuant to a statute. In contrast, the Ohio court in *Lakewood Fireman's Relief Pension Fund* v. *Lakewood*, 144 N.E. 2d 128 (Ohio 1957), refused to take money from the city's general fund to meet pension obligations on the ground that one should not impoverish other city functions. See also, *Spina* v. *Consolidated Police, etc., Pension Fund Comm'n*, 41 N.J. 391, 197 A.2d 169. Because the law is unsettled at this time, we are not prepared to speculate whether and in what manner a city is ultimately

responsible for the sufficiency of pension funds.

We are therefore of the opinion that rights in the pension system pursuant to Chapter 410 do not vest until the pension is due the employee. Thus, those employees who have contributed to the system and who entered employment after March 2, 1934, but who are not yet entitled to pensions, have no rights to a future pension pursuant to Chapter 410. They do, however, have a right to the money they contributed. Those who are currently receiving pensions have rights that are vested, which must be preserved. It should be noted that the pension funds for firemen and policemen are to be kept separate. §410.1; *Rockenfield* v. *Kuhl*, supra. This should be kept in mind when refunding the money in the pension systems.

September 27, 1972

ELECTIONS: Eligibility to vote, persons in military service — Art. II, §4, Constitution of Iowa. Servicemen living in federally owned naval housing should be treated the same as everyone else and be allowed to vote if they otherwise qualify. (Haesemeyer to Kemming, Bremer County Attorney, 9/27/72) #72-9-18

Mr. Richard L. Kemming, Bremer County Attorney: By your letter of September 21, 1972, you have requested an opinion of the attorney general with respect to the following:

"Several servicemen living in federally owned Naval housing in Bremer County have requested to vote in this county in the upcoming general election. Accordingly, the Bremer County Auditor has requested an opinion from your office on the following question:

"May a navy recruiter stationed in the Bremer County area and living with his family in naval housing located on a deactiviated Air Force installation in Bremer County vote in this county on state election issues, when the provisions of Article II, Section 4 of the Constitution of the State of Iowa appear to prohibit his voting?"

Article II, §4, Constitution of Iowa, provides:

"Persons in military service. Sec. 4. No person in the military, naval, or marine service of the United States shall be considered a resident of this State by being stationed in any garrison, barrack, or military or naval place, or station within this State."

On the face of it this would appear to foreclose the right to vote to the individuals you describe. However, in an earlier opinion of the attorney general, 1966 OAG 79, we concluded in effect that persons in the military service residing on or off a federal military reservation are entitled to qualify as electors if they meet the same standards applicable to members of the population generally. We consider this earlier opinion to be soundly reasoned and it is accordingly our opinion now that the servicemen you describe should be treated the same as anyone else and allowed to vote if they otherwise qualify. The only residence standard now present in the Iowa law is found in §4(4) of Chapter 1025, 64th General Assembly, Second Session (1972) which states:

"A person's residence, for voting purposes only, is the place which he maintains as his home with the intent to remain there permanently or for a definite or an indefinite or undeterminable length of time.

"If a person who meets the above requirements moves to a new resi-

dence, within or without the state, and does not meet the voter residency requirements at his new residence he may vote at his former place of residence in Iowa until he meets the voter residency requirements of his new residence."

The view we adopt is consistent with that of the United States Supreme Court, *Carrington v. Rash*, 1965, 380 U.S. 89, 85 S.Ct. 775 and the Federal Statute Law, 50 U.S.C. §1454. See also 34 A.L.R.2d 1196; *Evans v. Cornman*, 398 U.S. 419, 26 L.Ed.2d 370, 90 S.Ct. 1752; 54 Am.Jur.2d, Military, and Civil Defense §287. As stated in *Carrington v. Rash*, supra, "The uniform of our country must not be the badge of disenfranchisement for the man or woman who wears it."

October 3, 1972

CITIES AND TOWNS: Municipal Cable T.V. — Amendment 2, 1968, Iowa Constitution; Ch. 1088, Acts of the 64th G.A., Second Session. Pursuant to Home Rule, a municipality may set up and maintain a cable T.V. system. (Blumberg to Green, Carroll County Attorney, 10/3/72) #72-10-1

Mr. David E. Green, Carroll County Attorney: We are in receipt of your opinion request of June 22, 1972, regarding a municipal cable T.V. system. You specifically asked:

"The Town of Manning, Iowa, a municipal corporation located in the State of Iowa, is the owner of a municipal electric utility which is operated by a duly constituted separate three-man Board of Trustees under the applicable provisions of the Iowa Code. Can a municipal Board of Trustees operating a municipal electric utility also legally construct, operate, and maintain a municipal cable TV system and, if necessary, issue revenue bonds to pay for such a system under either the existing provisions of the Iowa Code or under the provisions of the so-called 'Home Rule Bill' which has recently been enacted?"

You further state that since a municipality can grant a franchise to a private individual or company for a cable T.V. system, it may retain unto itself the power to establish such a system as a municipal utility.

Cable television, hereafter referred to as CATV, is a system whereby electromagnetic waves are received by a central antenna, amplified, and then distributed via cable to subscribers. The distribution can be handled one of two ways. The CATV system may maintain its own distribution system, whereby it erects poles or lays conduits and then strings the cable. Or, it can use an already existing system suitable for handling the signals. Such a system would be a telephone company. *See, Greater Fremont, Inc.* v. *City of Fremont*, 302 F. Supp. 652 (N.D. Ohio, 1968), *aff'd*, 423 F.2d 548 (6th Cir. 1970). Thus, the system we are dealing with is not like a normal television station, but rather is a system for receiving television signals from distant stations to be distributed to subscribers.

The first question to answer is whether CATV is a utility. There are very few decisions on this subject, and none in Iowa. A federal district court in *Greater Fremont, Inc.*, supra, held that CATV was not a public utility and could not be regulated as such. Contrary to this, the Supreme Court of New York held that a master antenna for a CATV system could be considered a "public utility structure." *Staminski* v. *Romeo*, 1970, 62 Misc.2d 1051, 310 N.Y.S.2d 169. The Court based its decision on the fact that it had been determined earlier that the transmission of CATV sig-

nals through a telephone company's wires is a form of telephony or telegraphy, which are regulated as utilities. Therefore, CATV would be subject to regulation. The Court emphasized, however, that law regarding regulation of CATV, especially as a utility, was still in a state of development. Thus, the question of whether a CATV system can be operated and regulated as a public utility cannot be answered at this time.

In the *Greater Fremont* opinion the court touched upon CATV systems operated by municipalities. Cities in Ohio operate under local self-government (home rule) pursuant to Article XVIII §3 of the state constitution, which reads:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limit such local police, sanitary and other similar regulations, as are not in conflict with general laws."

Thus, the court stated that "[t]here is no question that the city could establish and maintain a competing CATV system for the benefit of its residents." Such a power, however, does not necessarily imply a power to regulate CATV. 302 F. Supp. at 665.

Home rule, which came into effect in Iowa with a constitutional amendment in 1968, provides that municipalities may determine their local affairs and government. Amendment two of 1968 added the following to Article III of the Constitution:

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

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

Thus, municipalities now have a wide range of authority and may do things not inconsistent with other statutes and not specifically prohibited. There are no prohibitions in either the present city code or the new one (Chapter 1088, Acts of the 64th G.A., Second Session) preventing a municipality from operating a CATV system. Accordingly, we are of the opinion that municipalities may set up and maintain a CATV system pursuant to home rule. We are not prepared at this time, however, to specify whether or how CATV is to be maintained and regulated by the municipality.

October 6, 1972

CRIMINAL LAW: Child Stealing — Decree of Custody — §706.2, Code of Iowa, 1971. A father may be prosecuted for child stealing under §706.2 where custody of his child under sixteen is granted to the mother by a divorce decree and the father takes the child forcibly and without the mother's consent. (Haskins to Nuzum, Assistant Jasper County Attorney, 10/6/72) #72-10-2

Mr. Bruce J. Nuzum, Assistant Jasper County Attorney: You ask whether a father may be prosecuted for child stealing under §706.2, Code of Iowa 1971, where legal custody of his child who is under the age of sixteen is granted the child's mother by a divorce decree and the father takes the child forcibly and without the consent of the mother and dis-

appears. It is our opinion that the father may be prosecuted for child stealing.

Child stealing is prohibited by §706.2, Code of Iowa, 1971. Section 706.2 states:

"If any person maliciously, forcibly, or fraudulently take, decoy, or entice away any child under the age of sixteen years with intent to detain or conceal such child from its parents, guardian, or other person or institution having the lawful custody thereof, he shall be imprisoned in the penitentiary not more than ten years, or be imprisoned in the county jail not more than one year, or be fined not exceeding one thousand dollars."

The law is settled that a parent who takes a minor child from the parent who has legal custody under a court decree is guilty of child stealing or child kidnapping. See *People* v. *Hyatt*, 18 Cal. App.3d 618, 96 Cal. Rptr. 156 (1971); *State* v. *Crafton*, 15 Ohio App.2d 160, 239 N.E.2d 571 (1968); *Hicks* v. *State*, 158 Tenn. 204, 112 S.W.2d 385 (1928); *State* v. *Taylor*, 125 Kan. 594, 264 P. 1069 (1928); *Com.* v. *Bresnahan*, 255 Minn. 144, 150 N.E. 882 (1926); 51 C.J.S., *Kidnapping* §4, at 506 (1967). However, it should be noted that if the child is taken before the decree is issued granting custody to one parent, the crime of child stealing has not been committed. See *State* v. *Dewey*, 155 Iowa 469, 136 N.W. 533 (1912). But if the taking is after the decree is issued, the crime has been committed.

In conclusion, a father may be prosecuted for child stealing under §706.2 where custody of his child under sixteen is granted to the mother by a divorce decree and the father takes the child forcibly and without the mother's consent.

October 9, 1972

COUNTY AND COUNTY OFFICERS: Gifts and grants — §565.6, Code of Iowa, 1971. Counties in the State of Iowa are authorized to receive grants of federal funds. (Nolan to Harbor, Speaker of the House of Representatives, 10/9/72) #72-10-3

The Honorable William H. Harbor, Speaker of the House: This letter is written in response to your request of August 24, 1972, for an Attorney General's opinion to resolve a question of whether or not local entities of government have the legal right to accept money grants from the Federal Government under such revenue sharing plans as may be enacted by Congress.

Statutory authority for counties and municipalities to receive and use such funds is clearly set out in §565.6, Code of Iowa, 1971, which provides as follows:

"Counties, cities, towns, the park board of any city or town, and civil townships wholly outside of any city or town, and school corporations, are authorized to take and hold property, real and personal, by gift and bequest; and to administer the same through the proper officer in pursuance of the terms of the gift or bequest. No title shall pass unless accepted by the governing board of the corporation, township, or park board. Conditions attached to such gifts or bequests become binding upon the corporation, township, or park board upon acceptance thereof."

A similar question was presented to the Attorney General of Iowa in

1933 at which time in an opinion directed to the State Public Works Committee and found in 1934 OAG 357, he advised:

"There is no question but that the laws of this state authorizes state, counties, or municipal corporations to accept such a grant from the Federal Government. . . . The Supreme Court of Iowa recognized the right and authority of a county to accept gifts in the case of *Way* vs. *Fox,* 119 Iowa 340, 80 N.W. 405. . . .We can see no difference between a gift or grant by the Federal Government and a donation by private individuals. . . .

"In view of the sections of our law herein before quoted, it is our opinion that the state, counties and municipalities not only have authority to enter into a valid agreement with the Federal Government that the grant from the United States Government will be used to aid in financing the construction of public works, but that this grant must be used in accordance with the conditions under which it was granted."

From all of the above it is the opinion of this office that counties in the State of Iowa are not precluded from receiving federal grants made under a federal revenue sharing plan.

October 10, 1972

STATE OFFICERS AND DEPARTMENTS: Department of Health — §§135C.1, 135C.6, 135C.14, Code of Iowa, 1971. Group homes such as "halfway houses" for persons who are able to care for themselves, are not subject to the requirements of §135C.6. Rules and regulations cannot be promulgated for such facilities within the authority of §135C.6. (Voorhees to Grassley, Chr., Legislative Rules Review Committee, 10/10/72) #72-10-4

Representative Charles E. Grassley, Chairman, Legislative Rules Review Committee: This letter is in response to your request for an opinion on the following questions:

"Do group homes such as halfway houses for penal, drug, alcoholic, retarded, neurotic, and other semi-dependent persons come under the definition of Section 135C.6, *Code of Iowa* (1971)? If so, must such facilities meet the requirements of the rules and regulations for health care facilities requiring a safety certificate for licensing purposes?

"Can separate rules and regulations be promulgated for these group-living facilities within the authority of Section 135C.6 of the *Code of Iowa* (1971)?"

We have previously considered this question in Opinion #72-6-17 (Williams to Gillman, Commissioner of Dept. of Social Services, 6/23/72). There we stated:

"Your question refers specifically to 'individuals who are capable of caring for themselves in a foster care arrangement which does not entail health care, but rather a strengthened quality of life through the combining of resources.' The facilities which require licensing under Chapter 135C, 1971 Code of Iowa, extend only to those facilities which admit individuals who are 'unable to sufficiently or properly care for themselves.' Although this would seem to imply more than care for physical or mental illness only, it does not appear to extend to an individual who requires only minimal personal or medical care on an intermittent basis.

* * *

"It would appear that whenever a facility has admitted only individuals who are capable of caring for themselves and do not require 'supervision' as provided in §§135C.1(1) and (2), 1971 Code of Iowa, and defined in

the above-quoted Iowa Departmental Rules, that such a facility would not be subject to the licensing provisions of Chapter 135C, 1971 Code of Iowa."

It should be added that the above would not apply to facilities that provide a significant amount of health care. This could conceivably be the case with certain facilities for alcoholic or drug rehabilitation. However, facilities that do not entail health care for persons who are able to care for themselves would not be subject to the licensing provision of Chapter 135C, nor could any rules be promulgated for these facilities within the authority of §135C.6.

October 10, 1972

COURTS: Additional judgeships, method of computation — Ch. 1124, 64th G.A., Second Session (1972). In computing the formula for judgeships before April 1, 1973, as required by section 6 of the Unified Trial Court Act, the Supreme Court Administrator should include in the filings for the years 1970, 1971 and 1972 only those filings which would have been included prior to the passage of the Unified Trial Court Act. (Turner to Knoke, State Representative, 10/10/72) #72-10-9

The Honorable George J. Knoke, State Representative: You have requested an attorney general's opinion relating to the Unified Trial Court Act enacted in the last session of the legislature. Reference is made to your letter in which you state:

"A question has arisen with respect to the Unified Trial Court Act (Chapter 1124, Acts of the 64th G.A., 2nd Session). According to the act sections 3, 4 and 5 will become effective July 1, 1973. Sections 6 and 7 became effective July 1, 1972.

"Sections 3, 4 and 5 relate to the formula for determining the number of district court judges to which each district is entitled. The primary import of these sections is to remove the 'ceiling' on the number of district court judges authorized for the state. However, section 3 of the act purports to change the type of cases to be considered in the formula for determination of the number of judgeships.

"Section 6 of the act imposes a duty on the Supreme Court administrator to notify the Secretary of State before April 1, 1973, of any additional judgeships 'created by this Act'. A question has arisen as to what cases the administrator should consider in determining whether any additional judges are authorized.

"Section 604.8(2) of the code before and after amendment by the act requires that the figures on filing be the average filed for the previous three-year period. In January, 1973, the three years involved are 1970, 1971 and 1972. The question is should 'small claim and misdemeanors' (the language inserted in that section by the act) be excluded and if so for what years?

"Of course the problem is that the clerks have not kept records of whether a filing was an indictable misdemeanor or a felony for those years, and there was no such thing as a small claim during that period. It is obviously a mistake which I am sure will be corrected by the next General Assembly. However, I would appreciate your opinion on this matter."

The question is whether the Supreme Court Administrator in ascertaining whether any additional judgeships are created "by this act" as required by section 6 should exclude from the filings for the three

previous years "small claims and misdemeanors" as required by section 3.

As you pointed out in your letter section 3 of the act does not take effect until July 1, 1973. Within constitutional limits the legislature determines the effective date of its legislation. A law does not become effective until the legislature so designates. Until a change in the existing law is actually effected by the legislature itself, the existing law is controlling.

The term "small claim" is a word of art. It is defined in section 60 of the act as a class of civil action. No such class or distinction existed prior to this legislation. Section 60 does not become effective until July 1, 1973, and no such classification of civil actions will exist until that time. It would appear that the Supreme Court Administrator could not count something that did not exist.

It would appear that this exclusion of small claim and misdemeanors was intended to be applicable only after July 1, 1973. Perhaps better wording would have been "small claims and misdemeanors *filed after July 1, 1973*". But an act must be judged by what the legislature actually did, not what it should have done.

It is therefore my opinion that in computing the formula for judgeships before April 1, 1973, as required by section 6 of the act, the Supreme Court Administrator should include in the filings for the years 1970, 1971 and 1972 only those filings which would have been included prior to the passage of the Unified Trial Court Act.

October 13, 1972

COUNTY AND COUNTY OFFICERS: Fairgrounds — §§174.14, 345.1, Code of Iowa, 1971, as amended by Ch. 200, Acts, 64th G.A., First Session. County fairgrounds taken for a federal or state project may be relocated without submitting the question to the voters if the cost of relocation does not exceed the amount of damages received for the property taken. An election on the question of the purchase of a new site should be held if petitioned for by 25% of the qualified voters of the county. (Nolan to Hoth, Assistant Des Moines County Attorney, 10/13/72) #72-10-5

Mr. Steven S. Hoth, Assistant Des Moines County Attorney: You have requested an opinion on the question of whether an election is required before any part of $625,000, representing a condemnation award to the county for property taken by the Iowa State Highway Commission, for the construction of U.S. Highway 534 in the City of Burlington, Des Moines County, Iowa, can be used by the Board of Supervisors for the purpose of purchasing a new site and constructing new buildings for county fair purposes under the provisions of §345.1, Code of Iowa, 1971, as amended May 7, 1971. You also ask if the same result obtains if it were established that no election was held in 1947 when the County Fair Association commenced operation.

The answer to your first question may be found in §345.1 as amended, by Ch. 200, Acts, 64th G.A., 1st Sess., which provides:

"Expenditures — when vote necessary. The board of supervisors shall not order the erection of, or the building of an addition or extension to, or the remodeling or reconstruction or relocation and replacement of a

court house, jail, county hospital, county home, or any other county building or facility except as otherwise provided, when the probable cost will exceed ten thousand dollars, nor the purchase of real estate for county purposes exceeding ten thousand dollars in value, until a proposition therefor shall have been first submitted to the legal voters of the county, and voted for by a majority of all persons voting for and against such proposition at a general or special election, notice of the same being given as in other special elections. However, such proposition need not be submitted to the voters if any such erection, construction, remodeling, reconstruction, relocation and replacement, or purchase of real estate which may be accomplished without the levy of additional taxes and the probable cost will not exceed fifty thousand dollars, or when a relocation and replacement is made necessary by the acquisition of county property for a federal or state project, and the cost of relocation does not exceed the amount of the award of damages by the state or federal government."

If the Board of Supervisors can relocate the county fair for an amount less than $625,000, it may, under the last sentence of the amendment, supra, do so without submitting the question of such relocation to the voters. In a previous opinion on this subject (Nolan to Waples, 1970 OAG 213) it was stated that in the event it became necessary for the county to acquire new land for a fairground, the board is authorized under §332.3(12) to purchase the necessary land without holding an election.

In answer to your second question, it is the opinion of this office that the election provided for in §174.14 is authorized only when petitioned for by 25 percent of the qualified voters of the county. Consequently, if there is sentiment in the county against the reestablishment of a county fair on a new site, those persons wishing to test the matter may petition for an election to be had on the question.

October 13, 1972

TAXATION: Iowa Franchise Tax — Net Operating Loss Deduction — §§422.35, 422.60, 422.61, 422.62, Code of Iowa, 1971. In the event that a net operating loss is sustained by a financial institution during a year which is not a "Taxable year" as defined in §422.61(2) for Iowa franchise tax purposes, the net operating loss carryover deduction should be disallowed. (Griger to Sheppard, Office of Auditor of State, 10/13/72) #72-10-6

Mr. Richard G. Sheppard, Supervisor, Savings and Loan Associations, Office of Auditor of State: You have requested the opinion of the Attorney General on the question of whether, for purposes of the Iowa franchise tax imposed on financial institutions, a net operating loss sustained prior to the effective date of said tax can be carried over as a deduction in computing net income for years for which the tax is payable.

The Iowa franchise tax measured by net income on financial institutions was enacted by the legislature in 1970. Chapter 1204, Acts of 63rd G.A., Second Session. The tax is payable for a taxable year coinciding with the 1970 calendar year and for fiscal year taxpayers, the tax due for a taxable year ending in 1970 is, for each month of the taxable year in 1970, one-twelfth of the tax which would be due if the franchise tax had been effective for the entire fiscal year. See Chapter 1204, §4, Acts of 63rd G.A., Second Session.

The terms "Financial institution", "Taxable year", "Taxpayer", and "Net income" are defined in §422.61, Code of Iowa, 1971.

"Taxable year" is defined to mean "the calendar year or the fiscal year ending during a calendar year, for which the tax is payable." "Net income" is defined in relevant part to mean "the net income of the financial institution computed in accordance with §422.35 . . ."

Section 422.35, Code of Iowa, 1971, states in relevant part:

"The term 'net income' means the taxable income less the net operating loss deduction, both as properly computed for federal income tax purposes under the Internal Revenue Code of 1954 . . ."

Section 172 of the Internal Revenue Code provides for the net operating loss deduction and its computation for federal income tax purposes. In view of the fact that your inquiry concerns net operating losses sustained prior to the effective date of the franchise tax, the carryback provisions for such losses to preceding taxable years are inapplicable. Therefore, the real question is whether such net operating loss which is sustained in a "taxable year" for federal income tax purposes but not for Iowa franchise tax purposes can be carried forward to a "taxable year" in which the franchise tax is payable and allowed as a deduction in computing "net income".

In *Reo Motors, Inc. v. Commissioner of Internl Revenue,* 1949, 338 U.S. 422, 70 S.Ct. 283, 94 L.Ed. 245, the Supreme Court stated at 338 U.S. 450:

"The result is that net operating loss must be computed solely on the basis of the statutes in effect during the taxable year when the loss was incurred. Only if such a loss exists under those statutes will a taxpayer have anything that may be carried over or back."

In *Pacific Wholesalers, Inc. v. Mangerich,* 1957, 147 F. Supp. 867, the District Court of Guam had for consideration the question of whether corporate losses sustained in the year 1950 could be carried over to the year 1951 and taken as a deduction where the territorial income tax of Guam, which was based upon the internal revenue code, did not become effective until 1951. The Court held that such corporate losses could not be deducted in 1951 for the reason that the year of the incurring of such losses, 1950, was not a "taxable year" for purposes of the Guam tax.

As previously noted, "Taxable year" is defined in §422.61(2) and such definition is binding upon the courts. *S & M Finance Co., Fort Dodge v. Iowa State Tax Commission,* 1968, Iowa, 162 N.W.2d 505. Section 422.61(2) provides:

" 'Taxable year' means the calendar year or the fiscal year ending during a calendar year, for which the tax is payable."

To apply the definition of "net income" in a manner which would allow the carryover of net operating losses sustained in years which are not "taxable years" for Iowa franchise tax purposes would be inconsistent with the cases heretofore cited and would ignore the concept of "taxable year". Further, in the opinion of the writer, §422.35 in defining "net income" is concerned with the method of computation of taxable income and net operating loss deduction as distinguished from the more fundamental question of whether, for Iowa tax purposes, a net operating loss has, in fact, occurred during a "taxable year."

Therefore, it is the opinion of this office that in the event that a net operating loss is sustained by a financial institution during a year which is not a "Taxable year", as that term is defined in §422.61(2), for Iowa franchise tax purposes, the net operating loss carryover deduction should be disallowed.

October 13, 1972

MOTOR VEHICLES: Inspection — Ch. 183, §12, Acts of the 64th G.A., 1st Session; Ch. 1075, Acts of the 64th G.A., 2nd Session; §§127.11, 321.47, Code of Iowa, 1971. Motor vehicles sold under provisions of Ch. 127 or sold at any sheriff's sale under execution need not be inspected. (Voorhees to Barbee, Dickinson County Attorney, 10/13/72) #72-10-7

Mr. Walter W. Barbee, Dickinson County Attorney: Reference is made to your letter of February 2, 1972, wherein you stated:

"Section 12 of Chapter 183 reads in part: '. . . every motor vehicle . . . when sold at retail within or without this State shall be inspected at an authorized inspection station . . . .'

"Specifically, your opinion is requested as to whether or not a motor vehicle sold to the public at Sheriff's sale under the provisions of Chapter 127, Seizure and Sale of Conveyances, constitutes a sale 'at retail' so as to require inspection under the above cited statute.

"For that matter, is an inspection required following the purchase of an automobile at any Sheriff's sale under general or special execution?"

Section 12 has been amended by Chapter 1075, Acts of the 64th G.A., 2nd Session, to read, in part, as follows:

"After December 31, 1971, every motor vehicle subject to registration under the laws of this state, except motor vehicles registered under section three hundred twenty-one point one hundred fifteen (321.115) of the Code, when first registered in this state or when sold at retail within or without this state, *or otherwise transferred, except transfers by operation of law as set out in section three hundred twenty-one point forty-seven (321.47) of the Code,* shall be inspected at an authorized inspection station . . . ." (emphasis added to portion added by amendment).

Section 321.47 enumerates what constitutes a transfer by operation of law.

"In the event of the transfer of ownership of any vehicle by operation of law as upon inheritance, devise or bequest, order in bankruptcy, insolvency, replevin, foreclosure or *execution sale.* . . ." (emphasis added).

Section 127.11 provides the procedure for forfeiture of conveyances. Section 127.11(6) provides:

"6. Judgment. A judgment of forfeiture shall direct that said conveyance be sold by the sheriff as *chattels under execution,* and a certified copy of such order shall constitute *an execution.*" (emphasis added).

It is apparent that the sale of a forfeited conveyance pursuant to Chapter 127 is considered an execution sale. We are therefore of the opinion that a motor vehicle sold under provisions of Chapter 127 or sold at any sheriff's sale under execution need not be inspected. Such sales are considered to be transfers by operation of law.

October 16, 1972

STATE OFFICERS AND DEPARTMENTS: Highway Commission —

Exchange of land — §§306.9, .13, .16, 332.3(12), (13), (17), Code of Iowa, 1966; Ch. 77, Acts, 64th G.A., First Session; Ch. 163, Acts, 64th G.A., First Session; Ch. 1070, Acts, 64th G.A., Second Session. The Highway Commission and the County Board of Supervisors were not authorized to exchange land. Subsequently adopted enabling legislation is prospective in application and does not make the prior agreement valid. (Schroeder to Coupal, Director of Highways, Iowa State Highway Commission, 10/16/72) #72-10-8

Mr. J. R. Coupal, Jr., Director of Highways, Iowa State Highway Commission: This is in reply to your letter of July 18, 1972, requesting an opinion as to whether an agreement between the Iowa State Highway Commission and the Lee County Board of Supervisors to exchange ownership and maintenance of roads in Lee County is legal and binding upon the county and the Highway Commission. In your letter you state:

"On June 18, 1969, the Iowa Highway Commission entered into an agreement with Lee County relative to the assumption and maintenance of a portion of Lee County's secondary road system."

"A question has arisen as to the legality of this agreement in as much as no legislation specifically authorizing such agreements had been enacted at that time (subsequently such enabling legislation was adopted)."

The agreement to which you refer provides for the Iowa State Highway Commission to add to its Primary Road System 11.93 miles of roads from the County Road System and for Lee County to accept into its system all of Iowa 88, roughly 7.45 miles. The exchange of roads is to take place sometime in 1973.

At the outset it should be noted that, under prior opinions of this office, the exchange of roads that you contemplate was not authorized at the date the agreement was made. Both the County Board of Supervisors and the Highway Commission had the authority to purchase or sell the land, Sections 306.9, .13, .16, and Sections 332.3 (12), (13), (17), Code of Iowa, 1966, but there was no authority for either the County Board of Supervisors or the Highway Commission to exchange land. O.A.G., August 7, 1969, p. 213.

As noted in your letter, subsequent enabling legislation has been adopted, Chs. 163 and 1070, Acts 64th G.A., however, these amendments are prospective in application. A statute is prospective in operation unless it is expressly made retrospective. *Manilla Community School District v. Halverson*, 1960, 251 Iowa 496, 101 N.W. 2d 705; Ch. 77, Acts 64th G.A. These amendments were not expressly made retroactive and do not apply to the agreement entered into on June 18, 1969, between the Iowa State Highway Commission and the Lee County Board of Supervisors.

In summary, it is my opinion that there was no statutory authority for the agreement to exchange property, that the subsequent legislation did not make the prior agreement valid, and that the agreement entered into is not legal and is not enforceable by either the County or the Highway Commission.

October 17, 1972

SCHOOLS: Disability insurance — §§509A.3, 294.16, Code of Iowa, 1971. School districts may make deductions for disability insurance when provided for in a group health and accident policy. (Nolan to Kennedy, State Representative, 10/17/72) #72-10-10

The Honorable Michael K. Kennedy, State Representative: This is written in response to your request for an opinion on the following question:

"May a school district make a payroll deduction for disability insurance purchased by the teachers."

It is now well settled that school districts may make payroll deductions for group insurance purchased for employees pursuant to the provisions of §509A.3, Code of Iowa, 1971. If the disability insurance is a benefit provided under a group health policy, a deduction may clearly be made. On the other hand there appears to be no authority for the school district to make payroll deductions for individual coverage of its teachers except as provided in §294.16 of the Code relating to an individual annuity contract.

October 17, 1972

CITIES AND TOWNS: Joint Low-Rent Housing Projects — §§28E.4, 28E.5 and 403A.9, Code of Iowa, 1971. Two or more municipalities may join together or cooperate, by agreement, in a low-rent housing project. Pursuant to Ch. 28E, a separate entity may be created to carry out the agreement. (Blumberg to Johnson, Deputy Director, Division of Municipal Affairs, Office of Planning and Programming, 10/17/72) #72-10-11

Ray Johnson, Deputy Director, Division of Municipal Affairs, Office of Planning and Programming: We are in receipt of your opinion request of September 18, 1972, concerning municipal housing authorities. Your question concerns the establishment of a multi-municipality housing authority and the appointment of its board of commissioners.

Chapter 403A, Code of Iowa, entitled "Low-Rent Housing law" is the applicable chapter. Section 403A.9 provides that any "two or more municipalities may join or co-operate with one another in the exercise of any or all of the powers conferred hereby for the purpose of financing, planning, undertaking, constructing or operating a housing project or projects." You question how the different municipalities will select the five commissioners provided for in section 403A.5.

Section 403A.9 merely gives the municipalities authority to work together on low-rent housing projects. Chapter 28E is the means by which the municipalities establish their joint enterprises. Section 28E.4 provides:

"Any public agency [political subdivision] of this state may enter into an agreement with one or more public or private agencies for joint or co-operative action pursuant to the provisions of this chapter, *including the creation of a separate entity* to carry out the purpose of the agreement. Appropriate action by ordinance, resolution or otherwise pursuant to law of the governing bodies involved shall be necessary before any such agreement may enter into force." [Emphasis added]

From this, it is apparent that a separate entity, such as one housing authority for two or more municipalities, may be created to carry out the agreement. The composition and nature of the separate entity shall be agreed upon and contained in the agreement pursuant to section 28E.5.

In summary, then, any two or more municipalities may join together or co-operate in a low-rent housing project. These municipalities may

then create a separate entity to exercise such an agreement, with the composition, nature and duration of such entity to be decided and agreed upon by the municipalities.

October 17, 1972

ELECTIONS: Registration of voters, tenth day before election — §48.11, Code of Iowa, 1971, as amended by Ch. 1025, §15, 64th G.A., Second Session, (1972). Where the tenth day before an election falls on a Saturday the office of the commissioner of registration should remain open to allow electors desiring to do so to register. (Haesemeyer to Synhorst, Secretary of State, 10/17/72) #72-10-12

The Honorable Melvin D. Synhorst, Secretary of State: Reference is made to your letter of October 16, 1972, in which you request an opinion of the attorney general with respect to the following:

"Must county auditors accept voter registrations on October 28 even though the auditor's office would normally be closed on that day?"

Section 48.11, Code of Iowa, 1971, as amended by Ch. 1025, §15, 64th G.A., Second Session (1972), provides:

"48.11 Registration time limits. The county commissioner of registration shall register, on forms prescribed by the state commissioner of elections, electors for elections in a precinct until the close of registration in the precinct. An elector may register during the time registration is closed in the elector's precinct but the registration shall not become effective until registration opens again in his precinct.

"Registration shall close in a precinct ten days before an election."

While it might well be that it is a normal practice for the county commissioner of registration to have his office closed on Saturday it seems to us that the manifest spirit and purpose of the law requires that prospective voters be given an opportunity to register on the last available day that the law permits them to do so and to that end where the tenth day before an election falls on a Saturday the registration office should be kept open. This conclusion would seem to be in keeping with an earlier opinion of the attorney general, 1970 OAG 314 and §4.1(23), dealing with computing time.

October 20, 1972

COUNTIES AND COUNTY OFFICERS: Medical Examiner Reports — §§68A.7, 339.4, Code of Iowa, 1971. Medical Examiner's report required by §339.4 is not a confidential public record and may be examined by any citizen of Iowa. (Nolan to Metz, Des Moines County Attorney, 10/20/72) #72-10-13

Mr. E. Dean Metz, Des Moines County Attorney: Your letter concerning the reports of the county medical examiner has been received. You ask whether the Attorney General's opinion of October 27, 1961, to the effect that such reports are not confidential or privileged communications but are public records might still be in effect.

The opinion in question is premised on Chapter 258, Laws of the 58th General Assembly codified as §§339.10 - 339.12 of the 1966 Code of Iowa. All of Chapter 339 of the 1966 Code was subsequently repealed by the Acts of the 63rd General Assembly, Chapter 1280 in 1970. However, the provisions of §339.4, Code, 1971, now require the medical examiner to

reduce his findings to writing and promptly make a full report thereof to the state medical examiner on forms prescribed for such purpose and deliver a copy of said report to the county attorney of his county. This requirement is substantially the same as that which was the subject of the Attorney General Report in 1961. 1960 OAG 135.

We have examined the provisions of Chapter 68A, Code, 1971, pertaining to the examination of public records. Section 68A.7 sets out eleven classes of public records which shall be kept confidential unless otherwise ordered by the court. Among those classes are the following which might have relation to your inquiry:

* * *

"2. Hospital records and medical records of the condition, diagnosis, care or treatment of a patient or former patient, including outpatient.

* * *

"5. Peace officers investigative reports, except where disclosure is authorized elsewhere in this Code. . . ."

Neither the medical examiner nor the state medical examiner is a peace officer within the definition set forth in §748.3, Code of Iowa, 1971. Further, the report of the medical examiner as to cause of death would not ordinarily be a hospital record or medical record of a patient or former patient within the meaning of §68A.7(2) set out above. Therefore, it is my opinion that there is no confidential privilege accorded to the report of the medical examiner and that these reports may lawfully be examined by any citizen as authorized by §68A.2, Code of Iowa, 1971.

October 20, 1972

COURTS: Counsel for Indigents — §§367.1, 367.13, 601.1, 601.128, 601.130, 601.132 and 601.133, Code of Iowa, 1971. Indigency may be determined by a justice of the peace or a municipal judge. Appointment of counsel may be made by a justice of the peace or a municipal judge. Payment of fees are to be made by either the county or the municipality, as the facts so indicate. (Blumberg to Don Carlos, Adair County Attorney, 10/20/72) #72-10-14

Mr. William W. Don Carlos, Adair County Attorney: I am in receipt of your letter of July 27, 1972, in which you requested an opinion of the Attorney General regarding the following questions:

"1. Where an alleged indigent is arrested for a misdemeanor, does the Justice of the Peace or the Municipal Judge make the determination as to his indigency?

"2. Where an alleged indigent is arrested for a misdemeanor, does the Justice of the Peace or the Municipal Judge appoint counsel where a determination of indigency has been made?

"3. If a Justice of the Peace or a Police Judge makes a determination of indigency and appoints counsel, from what funds is the attorney to be paid?"

With regard to your first question, the determination of indigency lies completely within the discretion of the presiding judge or magistrate. There have been no guidelines set down by either the United States Supreme Court or the Iowa Supreme Court regarding this question. It is within the courts' discretion as to indigency. The appointment of an

attorney to represent an alleged indigent misdemeanant is within the power of the judge or magistrate presiding over the case.

The jurisdiction of justices of the peace is coextensive with their respective counties. Section 601.1, 1971 Code of Iowa. Sections 601.132 and 601.133 provide for annual and quarterly reports to the county boards of supervisors and county auditors. Section 601.128 sets forth the fees for justices of the peace. Section 601.130 provides:

"The fees contemplated in sections 601.128 and 601.129 in criminal cases, shall be audited and paid out of the county treasury in any case where the prosecution fails, or where such fees cannot be made from the person liable to pay the same, the facts being certified by the justice and verified by affidavit. The board of supervisors may pay same out of the general fund or the court fund."

It seems reasonable that if the justices' fees are paid by the county if a person is unable to pay them, the fees for a court appointed attorney should also be paid by the county.

Police courts are provided for in Chapter 367 of the Code. Section 367.1 provides that the jurisdiction of police courts in criminal matters shall be the same as justice of the peace and mayors' courts. Section 367.13 provides:

"Police judges in criminal cases under ordinance or state laws shall receive the same fees as justices of the peace receive in similar cases. In criminal cases under ordinance, said fees shall be payable from the municipal treasury, and in criminal cases under state law, said fees shall be payable from the county treasury."

By way of this section, the same should hold true for police courts as for justices of the peace, except that if the criminal charge is based upon a city ordinance, the fees are payable from the municipality.

Accordingly, we are of the opinion that a justice of the peace and a municipal judge may make a determination as to indigency. A justice of the peace and a municipal judge may appoint counsel for an indigent. If a justice of the peace appoints counsel, the fees shall be paid by the county. If a police judge appoints counsel, the fees shall be paid by either the municipality or the county, depending on whether the criminal charge is based upon a city ordinance or a state law.

October 26, 1972

STATE OFFICERS AND DEPARTMENTS: Commerce Commission, public utilities, easements, renegotiations. Chapter 235, sec. 1, 64th G.A., First Session (1971). Easements obtained by public utilities by purchase or condemnation are not subject to renegotiation within 5 years. The renegotiation provision applies only to construction or maintenance damages that were not apparent at the time of settlement and not to easements. (Haesemeyer to Graham, State Senator, 10/26/72) #72-10-16

The Honorable J. Wesley Graham, State Senator: Reference is made to your request for an opinion of the attorney general in which you state:

"Several of the public utility companies are planning to construct a 345,000 volt electric transmission line between Des Moines and Sioux City. This line will cross through Ida County. The 64th G.A. passed a

law requiring that public utilities hold informational meetings before proceeding to acquire easements to cross private property. Such a meeting was recently held in Ida Grove at which time representatives of IPS and the State Commerce Commission were on hand to explain the project and to answer questions.

"One question was regarding the matter of renegotiation within a period of 5 years. The representative of the Commerce Commission answered the question by stating that the privilege of renegotiating within a period of 5 years only applied in the matter of damages and not in connection with the easement. In Chapter 235, page 487 of the Acts of the First Regular Session of the 64th G.A., I quote the last sentence of the paragraph on renegotiation. 'The condemnor or purchaser shall give written notice to the owner of such right of renegotiation at the time said settlement is entered into.' I believe the intent of the legislature was that any renegotiation was to cover the entire settlement with the utility including the securement of the easement.

"I would like an Attorney General's opinion as to whether the settlement for an easement can be renegotiated within a period of 5 years.

"I know some elderly ladies who own property along the route of the proposed electric line and it would be unfair for them not to be in a position to renegotiate after they have heard that other property owners made a better deal.

"In recent years, a fertilizer pipeline crossed this county and the property owners who held out for a better deal received many times the amount per rod as the original easement signers obtained.

"My understanding is that the public utilities will be securing easements in the near future."

The last sentence of the new section added to Ch. 472, Code of Iowa, 1971, by Ch. 235, §1, 64th G.A., First Session (1972) provides:

". . . The condemnor or purchaser shall give written notice to the owner of *such* right of renegotiation at the time same said settlement was entered into." (Emphasis supplied)

In order to determine what the term "such right of renegotiation" means in this last sentence it is necessary to refer to the statute in its entirety. Ch. 235, §1, provides:

"*Renegotiation of damages.* Whenever property or an interest therein has been taken by condemnation or has been purchased for a public use and *a settlement for construction or maintenance damages has been thereafter entered into pursuant to said condemnation or purchase, the owner shall have five years from the date of said settlement to renegotiate construction or maintenance damages not apparent at the time of said settlement.* The condemnor or purchaser shall give written notice to the owner of such right of renegotiation at the time said settlement is entered into." (Emphasis supplied)

On the face of it the Act covers only construction or maintenance damages not apparent at the time of the settlement of damages. The explanation to the original bill, H.F. 29, as introduced into the House of Representatives is consistent with this interpretation. It states:

"This bill requires the landowners be informed that damages may be renegotiated for a period of three years after original settlement for damages."

A review of the legislative history of the Act discloses that the senate changed the wording of the original bill to provide for construction or

maintenance damages and that the house later provided for a five year period rather than three years.

From the wording of the statute and the legislative history it seems clear that the renegotiation provision applies only to construction or maintenance damages that were not apparent at the time of settlement and not to easements.

October 27, 1972

ELECTIONS: Custodial care of polling place — §49.21, Code of Iowa, 1971. Expense of overtime pay of school custodians directly attributable to use of school building for holding primary and general elections may be charged to the county. (Nolan to Braun, Assistant Black Hawk County Attorney, 10/27/72) #72-10-15

Mr. Robert W. Braun, Assistant Black Hawk County Attorney: This is written in answer to your letter setting forth the following situation for an opinion of this office:

"The Black Hawk County Auditor has received a request in proper form for payment of costs incurred by the Waterloo Independent School District as a result of overtime pay to employees resulting from the need to open the school buildings earlier than usual and keep them open longer than usual, on August 1, 1972, for the primary election.

"Section 3, Chapter 1025 of the Acts of the 64th General Assembly, Second Session, states: 'The cost of conducting a special election, general election and the primary election held prior to the general election shall be paid by the county.' However, Section 49.21 of the Code states in part that the taxing authority with control of a building supported by taxation shall '. . . make available the necessary space therein for the purpose of holding elections, without charge for the use thereof'. This last quoted section would appear to be in conflict with Section 297.9 of the Code, wherein the Board of Education is authorized to use the schools for 'election purposes . . . such use to be for such compensation and upon such terms and conditions as may be fixed by said Board . . .'

"There is no question that the school board incurred additional expenses for the overtime pay of certain employees. The specific question presented is whether the schools must make available space without charge for the *use* thereof, including whatever may be incident thereto or whether making available 'space' means just that and any other costs incident to the making available of space should be paid by the county. The requested payment is $826.00. Such a charge multiplied by the number of elections each year is certainly substantial and must be taken into account in determining the levy for the election fund."

I am of the opinion that where overtime custodial costs are incurred in connection with the holding of an election, such costs may be taken into account in determining the levy for the election fund. There appears to be no previous advisory opinion of this office construing the sections of the Code and furnishing a precedent on this particular question. However, it should be noted that the first paragraph of §49.21 states that in townships the trustees shall provide warm and light, suitable places for holding elections "at the expense of the county". The following paragraphs of that section direct that where buildings supported by public taxation are under the control of an authority other than the township trustees, then space in such buildings shall be made available for election purposes without charge, upon application of the trustees or the county auditor. School buildings are clearly covered by this paragraph of §49.21. The power of the directors of the school board to fix terms for compen-

sation for "the proper protection of the schoolhouse and property belonging therein, including that of pupils", pursuant to §297.9 of the Code, does not create a conflict. Where overtime custodial care is necessitated for the protection of school property during the conduct of elections the board may charge such costs to the county even though it may not charge the county for the use of space made available for the holding of the election.

October 30, 1972

ELECTIONS: Absentee ballot counting boards, number of members — §§49.12 and 49.15, Code of Iowa, 1971, and §29, Ch. 1025, 64th G.A. If the number of absentee ballots is so large that a five member board cannot complete the counting of the same by the time the polls close the auditor may ask the board of supervisors to appoint additional people to the absentee ballot counting board. The counting board could be given time off to vote at their own polling places in the event the counting board was expected to be occupied with counting ballots during the entire time the polls were open. (Haesemeyer to Synhorst, Secretary of State, 10/30/72) #72-10-17

The Honorable Melvin D. Synhorst, Secretary of State: We have your letter of October 10, 1972, in which you request an opinion of the attorney general with respect to the following:

"Some questions have been raised by various county auditors with regard to problems they expect to encounter on election day in connection with the new absentee ballot counting boards.

"Sec. 29, Chapter 1025, Acts of the Sixty-fourth General Assembly, Second Session, provides that:

" 'The county board of supervisors shall appoint the absentee ballot counting board in the manner prescribed in Secs. 49.12 and 49.15.' and

" 'The county commissioner of elections shall set the convening time for the absentee ballot counting board allowing a reasonable amount of time to complete counting the ballots prior to the closing of the polls.'

"Sec. 49.12 of the Code limits the number of persons to serve on the election board to five — three judges and two clerks. Some of the auditors have had applications for and expect to receive a very large number of absentee ballots in the November election. Three questions have been asked which appear to require some clarification.

"1. If the number of absentee ballots is so large that the five member board cannot complete the counting of the ballots by the time the polls close, may the auditor:

a. Ask the board of supervisors to appoint additional people to the absentee ballot counting board?

b. Authorize the counting board to continue counting the ballots past the time the polls close at 8:00 P.M.?

"2. If the counting board is asked to convene at 7:00 A.M. — or earlier — can the members be allowed time off to vote at their own polling places? Or could these people vote by absentee ballot on the day prior to election day?"

In answer to your first question it is our opinion that if the number of absentee ballots is so large that a five member board cannot complete the counting of the same by the time the polls close the auditor may ask the board of supervisors to appoint additional people to the absentee ballot counting board. It is true as you point out that §29 of Ch. 1025

says that the absentee ballot counting board is to be appointed "in the manner prescribed in sections 49.12 and 49.15". While §49.12, Code of Iowa, 1971, says that election boards shall consist of three judges and two clerks we do not think that the language "in the manner prescribed" used in §29 when referring to §49.12 operates to limit the size of the absentee ballot counting board to only five members where this would have the effect of making it impossible for such a board to comply with the further explicit requirement of §29 that the board complete its counting prior to the closing of the polls.

In answer to your second question it would be our opinion that the members of the counting board could be given time off to vote at their own polling places in the event the counting board was expected to be occupied with counting ballots during the entire time the polls were open. There is no basis for allowing them to vote absentee in view of the requirement of §53.1 that in order to vote by absentee ballot the voter must expect to be absent from the county on election day.

November 2, 1972

CONSTITUTIONAL LAW: Elections, distribution of political leaflets on the Capitol grounds — §18.5, Code of Iowa, 1971; Ch. 84, §10, 64th G.A., First Session (1971). A regulation of the Executive Council prohibiting the distribution on the Capitol grounds of all printed material may not be enforced to totally bar the orderly distribution of purely political handbills on the Capitol grounds although such activities may be regulated to the extent of preventing littering and the disruption of the orderly conduct of the public business. (Haesemeyer to Jesse, State Representative, 11/2/72) #72-11-1

The Honorable Norman Jesse, State Representative: You have orally requested an opinion from the attorney general with respect to the question of whether or not supporters of Senator George McGovern, the Democratic candidate for President of the United States, who are not themselves state employees, may constitutionally be prohibited from distributing handbills in the public areas of the Capitol Complex by reason of a rule of the executive council prohibiting the distribution or sale of any printed matter or materials on the Capitol grounds and in buildings thereon.

A copy of the rule of the executive council, which was adopted some time ago and prior to the incident which has prompted your request for an opinion, is attached hereto. Since its adoption the executive council rule has been enforced in a uniform and nondiscriminatory way. The question thus becomes one of whether or not a rule of this kind as applied to politically oriented material may be constitutionally enforced under applicable U.S. Supreme Court decisions.

The attached rule was made pursuant to §18.5, Code of Iowa, 1971, which states as follows:

"The executive council shall establish, publish, and enforce rules regulating and restricting the use by the public of the capitol building and the capitol grounds and all buildings and erections thereon."

As of Wednesday, November 1, 1972, such regulations are provided by the general services department pursuant to §19B.10, Code of Iowa, 1971: Acts 1971, (64th G.A.), Ch. 84, §10, and the governor's executive order transferring such executive council powers to the general services de-

partment. However, such changes do not affect the question you asked concerning the constitutionality of such orders.

The U.S. Supreme Court has recently reaffirmed that public property is not necessarily available for speech, pickets or other communicative activities. *Lloyd Corp. v. Tanner*, 1972, 33 L.Ed.2d 131. Citing Mr. Justice Black in *Adderley v. Florida*, 1966, 385 U.S. 39, 17 L.Ed.2d 149, 87 S.Ct. 242:

"The state, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason there is no merit to the petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this 'area chosen for the peaceful civil rights demonstration was not only "reasonable" but also particularly appropriate ***.' Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on, (cites omitted). We reject it again. The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose." 385 US, at 47-48, 17 L.Ed.2d at 156.

However, prior restraint of free speech (including the distributing of handbills) is not favored by the court. *Organization for a better Austin v. Keefe*, 1971, 402 U.S. 415, 29 L.Ed.2d 1, 91 S.Ct. 1575. Although commercial handbills and literature with partial political or religious messages as a sham to cover commercial advertising may be barred from public streets, *Valentine v. Chrestensen*, 1941, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262, states and municipalities cannot "completely bar the distribution of literature containing religious or political ideas on its streets, sidewalks, and public places or make the right to distribute dependent upon a flat license tax or permit to be issued by an official who could deny it at will" even if based upon an absolute property interest and title. The preservation of a free society is "dependent upon the right of each individual citizen to receive such literature as he himself might desire and the streets are the natural and proper place for dissemination of information and opinions. *Marsh v. Alabama*, 1945, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265; *Lovell v. Griffin*, 1937, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949; *Jamison v. Texas*, 1942, 318 U.S. 413, 63 S.Ct. 669, 87 L.Ed. 869; *Martin v. Struthers*, 1942, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313; *Murdock v. Pennsylvania*, 1942, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292; *Flower v. United States*, 1972, 32 L.Ed.2d 653. The mere presumed presence of unwitting listeners or viewers, in a public building does not serve automatically to justify curtailing all speech capable of giving offense. *Cohen v. California*, 1971, 403 U.S. 15, 29 L.Ed.2d 284, 91 S.Ct. 1780. The peaceful expression of political ideas in the public areas of statehouse grounds is protected absent "even handed application of a precise and narrowly drawn regulation evincing a legislative judgment that certain specific conduct (traffic laws or hours of operation) be limited or proscribed." *Edwards v. South Carolina*, 1963, 372 U.S. 229, 9 L.Ed.2d 697, 83 S.Ct. 680; *Cox v. Louisiana*, 1965, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471.

However, government can *regulate* the disposal, broadcasting or littering of literature in the streets since such activity does not necessarily

bear a relationship to the freedom to speak, write, print or distribute information or opinions. *Schneider v. State of New Jersey*, 1939, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155. Constitutional rights are subject to such reasonable regulations as are necessary to promote and preserve the public welfare. 16 Am.Jur.2d 594, Constitutional Law, §302. Such regulation can regulate the use of sound amplification equipment emitting loud and raucous noises as there is no absolute right to free speech or no right to force people to listen. *Kovacs v. Cooper*, 1949, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513. Courts have been held to have the power to bar the broadcasting, recording or photographing of court proceedings where such activities may disrupt the guarantee of a fair trial. 100 A.L.R.2d 1405. Such regulation should have a real, substantial or rational relation to the evil to be prevented. 16 Am.Jur.2d 541, Constitutional Law §279.

Thus, political activities in or near public buildings could be subject to reasonable regulations limiting littering or issuance of or loud and raucous noises and limiting activities to public areas where the normal governmental activities will not be disrupted. Further, regulations could reasonably limit the number of individuals or amount of activity involved in public areas contiguous to offices where the activities of government are being conducted so that reasonable business can be conducted between the public and government employees.

Acordingly, it is our opinion that the supporters of Senator McGovern should be permitted to distribute handbills on the public areas of the Capitol Complex subject to reasonable regulations aimed at preventing littering and the disruption of the orderly conduct of the public business.

November 2, 1972

MOTOR VEHICLES: Temporary Restricted Licenses — §§321.210, 321B.7, Code of Iowa, 1971. A temporary restricted license (work permit) may not be issued to a person whose driving privileges have been revoked under the Implied Consent law. The right to such a work permit is purely statutory, and is not provided for in the Implied Consent statute (Ch. 321B). (Voorhees to Griffin, State Senator, 11/2/72) #72-11-2

Mr. James W. Griffin, Sr., State Senator: This letter is in response to your request for an opinion as to whether the Department of Public Safety may issue a temporary restricted license (work permit) under the authority of §321.210 to an individual whose driver's license has been revoked under §321B.7, the Implied Consent law.

A portion of §321.210 provides:

"The safety commissioner may, on application, issue a temporary restricted license to any person *convicted* whose regular employment is the operation of a motor vehicle or who cannot perform his regular occupation without the use of a motor vehicle, but such person shall not operate a vehicle for pleasure while holding such restricted license." (emphasis added).

A portion of §321B.7 provides:

"If a person under arrest refuses to submit to a chemical test, no test shall be given, but the commissioner of public safety . . . shall revoke his license or permit to drive and any nonresident operating privilege for a period of not less than one hundred twenty days nor more than one year; . . ."

The question of whether a work permit may be issued under the Implied Consent law was dealt with in 1968 Opinions of the Attorney General, page 93, wherein we stated:

"Only in §321.210, dealing with other stated violations, is authority granted for the issuance of a restricted license 'to any person *convicted* whose regular employment is the operation of a motor vehicle or who cannot perform his regular occupation without the use of a motor vehicle.' But in your above case, the license is revoked, not because of a conviction, but because of a refusal to submit to a test for intoxication."

Your letter suggests that this law may be unconstitutional. We disagree. The Iowa Supreme Court in *State* v. *Holt*, 150 N.W.2d 884 (Iowa 1968) stated:

"There is no absolute right to drive on the highway under any and all conditions. It is a privilege, not a right. *Spurbeck* v. *Statton*, 252 Iowa 279, 289, 106 N.W.2d 660. It is a privilege enjoyed under the conditions imposed by the legislature. We know of no reason why the state may not impose such reasonable conditions as the legislature prescribes. No one has to accept the conditions imposed and thus make himself subject thereto. No one is required to have a driver's license except as a precedent to driving. It is a condition imposed by the state. We know of no reason why a person in order to enjoy the privilege so granted may not waive such 'right' as he might otherwise have."

An individual does not have an absolute right to operate a motor vehicle upon the public highways. It is a privilege that is conditioned on compliance with the motor vehicle laws, and may be suspended or revoked for failure to comply with those laws. The "right" to be granted a work permit in lieu of a complete suspension is purely statutory. It is within the discretion of the Commissioner of Public Safety to grant a work permit where it is so provided by statute. There are no such provisions under Chapter 321B. Accordingly, we are of the opinion that a temporary restricted license (work permit) may not be granted to a person whose driving privileges have been revoked under the Implied Consent law.

November 6, 1972

CITIES AND TOWNS: Annexation — Division III, Ch. 1088, Acts of the 64th G.A., Second Session; Ch. 362, Code of Iowa, 1971. If a municipality adopts Division III of the new city code, the City Development Board would have jurisdiction in an annexation. (Blumberg to Henke, Director, Division of Municipal Affairs, Office for Planning and Programming, 11/6/72) #72-11-3

Kenneth C. Henke, Director, Division of Municipal Affairs, Office For Planning and Programming: We are in receipt of your opinion request of October 2, 1972, concerning annexation proceedings by a municipality. Your situation concerns two municipalities who want to annex the same territory. The first has adopted Division III of the new municipal code and annexes pursuant to it, by presenting a petition to the City Development Board. The second has not adopted the new code and proceeds to annex pursuant to Chapter 362, 1971 Code of Iowa. Your question is whether the City Development Board has jurisdiction, and whether a decision by it overrides present law.

We are faced with an anomaly in the law. Sections 1 through 198 of

the new municipal code, Chapter 1088, Acts of the 64th General Assembly, Second Session took effect on July 1, 1972, pursuant to section 9 of the Act. However, a city is not subject to the Act unless the city council, by resolution, elects to act under and be subject to one or more of the divisions or parts of divisions of the Act. In other words, pursuant to section 9, the provisions of the Act are applicable to a city now only if that city elects to do so. If not, said provisions are not applicable until July 1, 1974, whereupon they are applicable to all cities. Thus, you can have cities working either fully or partially under the new code and other cities working entirely under the old code. This can present conflicts between municipalities.

Division III of the new code provides for a city development board. Petitions for annexation are filed with the board to institute proceedings. The board, as a committee, then considers the proposals, holds a public hearing, and renders a decision. If the decision allows the annexation, then a special election is held on the proposal. If a majority of the voters approve the plan, the annexation is completed. An appeal from the board's decision may be taken to a district court.

The procedures under the present code are different. Pursuant to Chapter 362, annexations can be either voluntary or involuntary. If voluntary, the city council institutes proceedings by a public meeting and a resolution. The proposal is then submitted to the voters. If a majority of the voters approve the proposal, the council institutes a suit in equity in district court, whereupon the court may allow the annexation. If the annexation is voluntary, all the property owners of the territory in question may petition the council, or ten percent of said owners may petition. If the former is done, the council need only pass a resolution in favor of the annexation. If the latter is done, the procedure is similar to an involuntary annexation.

All the above procedures are legal, if the appropriate steps are taken, since both the new code and the present one are, or can be, in effect at the same time. There are several fact situations which could exist if two municipalities are attempting to annex the same territory through different procedures. One such example could exist when one procedure is completed before the other. However, there are far too many others on which to speculate. In all probability, it could be stated that the city completing its procedures first would have the right and jurisdiction to the annexation. However, the possibility exists that a court, based upon the facts, may issue a contrary ruling. To complicate matters, there is the possibility, although not probable, that the procedures of both municipalities will be instituted, processed and completed at the same time. We are not prepared at this time to speculate as to how a court would rule among the various fact situations. This is something for the courts to decide if the opportunity for such a decision exists.

Accordingly, we are of the opinion that if a municipality adopts Division III of the new city code, the procedure and sections of that division are controlling and that the City Development Board would have jurisdiction of a matter involving annexation. However, we are not prepared to indicate if and under what circumstances a decision of the Board would override other procedures.

November 6, 1972

SCHOOLS: County Superintendent's bond — §64.8, Code of Iowa, 1971, as amended by Ch. 1081, §9, Acts of the 64th G.A., Second Session. The County Board of Education does not have power to pay the bond required of the County Superintendent in §64.8, Code of Iowa, 1971, as amended by Ch. 1081, §9, Acts, 64th G.A., Second Session. (Nolan to Dunton, State Representative, 11/6/72) #72-11-4

The Honorable Keith H. Dunton, State Representative: This letter is written in response to your request for an Attorney General's opinion on the question of whether the County Board of Education may pay for the bond of the County Superintendent of Schools.

The rule is well established that unless a statute provides that the premium on a public official's bond shall be paid out of public funds, there is no authority for the expenditure of public funds for such purpose. 1925-26 OAG 455.

The County Superintendent of Schools is a county officer within the meaning of §64.8, Code of Iowa, 1971, as amended by Chapter 1081, §9, Acts of the 64th General Assembly, Second Session, and the County Superintendent of Schools is required to file a bond as provided in such section in order to qualify for his office (§273.16). The amount of the bond specified under §64.8 of the Code, supra, is not less than $10,000.00 per annum.

Section 64.11 of the Code makes provision for the reasonable cost of the bonds of the county treasurer, clerk of the district court, county attorney, recorder, auditor, sheriff, medical examiner, members of soldiers relief commission, members of the board of supervisors, engineer and the steward or matron to be paid by the county where the bond is filed. Under other sections of the Code bonds required of township officers and municipal officers are paid for by the township or the cities or towns. Although we have searched diligently, we find no authority under either Chapter 64 or Chapter 273 for the payment of the premium on the bond for the County Superintendent of Schools by any governmental body.

It may be noted that while the compensation of most county officers is fixed by statute, §273.13 specifically provides that the County Board of Education shall appoint a County Superintendent of Schools and fix his salary and travelling expenses. Section 273.13 is silent with respect to the payment of premium on the bond of the superintendent. We cannot construe this silence to imply the existence of an authority to pay such premium.

Accordingly, we must conclude that the County Board of Education does not have the authority to pay the bond for the County Superintendent of Schools.

November 6, 1972

STATE OFFICERS AND DEPARTMENTS: Department of Public Safety — Ch. 1073, Section 11, Acts of the 64th G.A., 2nd Session. A motor vehicle may be transferred without a certificate of inspection, provided that the conditions set out in Ch. 1073, Section 11, are met. (Voorhees to Bidler, Dept. of Public Safety, 11/6/72) #72-11-5

Mr. Carroll L. Bidler, Deputy Commissioner, Department of Public

Safety: This letter is in response to your request for an opinion on the following question.

"Is it unlawful for a motor vehicle dealer to sell or offer for sale a motor vehicle that does not comply with the requirements of Chapter 321 by offering to transfer the motor vehicle under a restricted certificate of title as provided by Section 11 of Chapter 1073?"

A portion of Chapter 1073, Section 11, Acts of the 64th G.A., 2nd Session, provides:

"Notwithstanding the provisions of chapter three hundred twenty-two (322) of the Code, and any other statute to the contrary, the title to a motor vehicle may be transferred without a certificate of inspection as prescribed by chapter one hundred eighty-three (183), Acts of the Sixty-fourth General Assembly, First Session, where such motor vehicle is materially damaged, inoperable, or unsafe for use upon the highway upon compliance with the following conditions: . . ."

The language of this provision is clear. We are therefore of the opinion that a motor vehicle may be transferred without a certificate of inspection, provided that the conditions set out in Chapter 1073, Section 11, are met.

November 6, 1972

LIQUOR, BEER AND CIGARETTES: Liquor Control Department, Private Delivery of Liquor Supplies — §§59 and 28 of Ch. 131, Acts of the 64th G.A., 1st Session. A reading of §28 and §59 of Ch. 131, Acts of the 64th G.A., 1st Session, will show that a common carrier can deliver alcoholic beverages from a state warehouse, store, depot or point of purchase by the state to a liquor license or beer permit holder. (Jacobson to Gallagher, Director, Iowa Beer & Liquor Control Dept., 11/6/72) #72-11-6

Mr. Rolland A. Gallagher, Director, Iowa Beer & Liquor Control Department: This is to acknowledge receipt of your letter dated July 25, 1972, in which you requested an opinion from this office as follows:

"I have had several requests from individuals throughout the state asking if they could start a delivery service for compensation by taking orders from licensees and picking up their order at our state stores and delivering them to the licensee."

You indicated in your letter that your office feels this question is answered by Section 59 of Chapter 131 of the Acts of the 64th General Assembly, First Session. That particular section defines bootlegging as follows:

"Any person who, by himself or through another acting for him, shall keep or carry on his person, or in a vehicle, or leave in a place for another to secure, any alcoholic liquor or beer with intent ot sell or dispense of such liquor or beer by gift or otherwise *in violation of law*, or who shall, within this state, in any manner, directly or indirectly, solicit, take, or accept any order for the purchase, sale, shipment, or delivery of such alcoholic liquor or beer *in violation of law*, or aid in the delivery and distribution of any alcoholic liquor or beer so ordered or shipped, or who shall in any manner procure for, sell, or give any alcoholic liquor or beer to any person under legal age, for any purpose except as authorized and permitted in this Act, shall be a bootlegger and be subject to the general penalties provided by this Act." (Emphasis added.)

It is apparent that it would be illegal to operate a delivery service if it

were done in violation of the law. However, Section 28 of Chapter 131 of the Acts of the 64th General Assembly, First Session, discusses what transportation of alcoholic beverages is permitted. Section 28 states in pertinent part:

"It shall be lawful to transport, carry, or convey alcoholic liquor from the place of purchase by the department to any state warehouse, store, or depot established by the department or from any such place to another and, when so permitted by this Act, it shall be lawful for any common carrier or other person to transport, carry, convey alcoholic liquor sold by a vendor from a state warehouse, store, depot or point of purchase by the state to any place to which such liquor may be lawfully delivered under this Act."

Thus, from a reading of Section 28 and Section 59 together it is apparent that a common carrier could deliver alcoholic beverages from a state warehouse, store, depot or point of purchase by the state to a licensee. Since this procedure would not be in violation of the law, the delivery service would not fall within the purview of bootlegging as defined in Section 59.

Therefore, it is the opinion of this office that individuals could start a delivery service for compensation by taking orders from licensees and picking up their orders at state liquor stores and delivering them to the licensee.

November 6, 1972

CITIES AND TOWNS: Civil Service — Ch. 365, Code of Iowa, 1971. Cities of eight thousand population or over shall institute civil service for paid police and fire departments. (Blumberg to Vogel, Poweshiek County Attorney, 11/6/72) #72-11-7

Mr. Richard J. Vogel, Poweshiek County Attorney: We are in receipt of your opinion request of October 16, 1972, concerning civil service. You specifically asked:

"The question then is, if the population of the City of Grinnell is 8,000 or over, must Grinnell establish Civil Service; and if so, is there anything the police department or policeman's association can do to see that Civil Service is established as provided by law?"

Civil Service is statutory and its requirements can be found in Chapter 365, 1971 Code of Iowa. Section 365.1 provides in part:

"In cities having a population of eight thousand or over, having a paid fire department or a paid police department, the mayor, one year after each regular municipal election, with the approval of the Council, shall appoint three civil service commissioners . . . ."

The word "shall" when used in a statute is ordinarily to be construed as mandatory. *Gibson* v. *Winterset Community School District*, 1966, 258 Iowa 440, 138 N.W.2d 112. See also *Schmidt* v. *Abbot*, 1968, 261 Iowa 886, 156 N.W.2d 649; *Hansen* v. *Henderson*, 1953, 244 Iowa 650, 56 N.W.2d 59. Thus, it is mandatory that a civil service commission be appointed in cities of eight thousand population or over.

In answer to your second question, it appears that a mandamus action might be a proper remedy. However, private counsel should be contacted on such a matter. In addition the State Ombudsman (Citizen's Aide) might be helpful.

Accordingly, we are of the opinion that cities over eight thousand population shall institute civil service for paid police and fire departments.

November 6, 1972

MOTOR VEHICLES: Inspection — Ch. 1075, Acts of the 64th G.A., 2nd Session; §321.47, Code of Iowa, 1971. Motor vehicles transferred pursuant to a dissolution of decree must be inspected. (Voorhees to Faulkner, Mahaska County Attorney, 11/6/72) #72-11-8

Mr. Hugh V. Faulkner, Mahaska County Attorney: Reference is made to your letter of September 19, 1972, wherein you stated:

"A question has arisen in Mahaska County with respect to whether or not it is necessary to have a motor vehicle inspection where title to a motor vehicle is transferred from one party to the other in a dissolution action pursuant to the decree in such action. The statute as originally enacted would not require an inspection. Under Chapter 1075, Laws of the Sixty-fourth G.A. Second Session, the statute has been amended to require inspection:

"'. . . when first registered in this state or when sold at retail within or without this state, or otherwise transferred, except transfers by operation of law as set out in Section three hundred twenty-one point forty-seven (321.47) of the Code . . .'."

Section 321.47 enumerates certain transfers that constitute a transfer by operation of law:

"In the event of the transfer of ownership of any vehicle by operation of law as upon inheritance, devise or bequest, order in bankruptcy, insolvency, replevin, foreclosure or execution sale, . . ."

A transfer upon a dissolution is not one of those enumerated by §321.47. Since the statute does not provide an exception to the inspection requirement, we are of the opinion that a motor vehicle transferred pursuant to a dissolution decree must be inspected. *Expressio Unius Est Exclusio Alterius. Dolson* v. *City of Ames,* 1960, 251 Iowa 464, 101 N.W.2d 711; *Archer* v. *Board of Education,* 1960, 251 Iowa 1077, 104 N.W.2d 621; *North Iowa Steel Company* v. *Statley,* 1961, 253 Iowa 355, 112 N.W.2d 364.

November 7, 1972

MOTOR VEHICLES: Inspection — Ch. 183, §12, Acts of 64th G.A., 1st Session; Ch. 1075, Acts of 64th G.A., 2nd Session; §321.47, Code of Iowa, 1971. Motor vehicles sold at any sheriff's sale need not be inspected since such a sale is a transfer by operation of law. (Voorhees to Nuzum, Assistant Jasper County Attorney, 11/7/72) #72-11-9

Mr. Bruce J. Nuzum, Assistant Jasper County Attorney: Reference is made to your letter of July 6, 1972, wherein you asked for an opinion on the following question:

"1. Where a Sheriff has levied execution upon a nonexempt motor vehicle and then sells the motor vehicle, must the motor vehicle be inspected, and repaired if necessary to pass inspection, prior to the sale and transfer of title under section 321.47?"

The question was considered in a previous opinion (Voorhees to Barbee, Dickinson County Attorney, #72-10-7) wherein we stated:

" 'Section 12 (of Chapter 183, Acts of the 64th G.A., 1st Session) reads in part: ". . . every motor vehicle . . . when sold at retail within or without this State shall be inspected at an authorized inspection station . . . ."

" 'Specifically, your opinion is requested as to whether or not a motor vehicle sold to the public at Sheriff's sale under the provisions of Chapter 127, Seizure and Sale of Conveyances, constitutes a sale "at retail" so as to require inspection under the above cited statute.

" 'For that matter, is an inspection required following the purchase of an automobile at any Sheriff's sale under general or special execution'."

"Section 12 has been amended by Chapter 1075, Acts of the 64th G.A., 2nd Session, to read, in part, as follows:

" 'After December 31, 1971, every motor vehicle subject to registration under the laws of this state, except motor vehicles registered under section three hundred twenty-one point one hundred fifteen (321.115) of the Code, when first registered in this state or when sold at retail within or without this state, *or otherwise transferred, except transfers by operation of law as set out in section three hundred twenty-one point forty-seven (321.47) of the Code,* shall be inspected at an authorized inspection station . . . '." (emphasis added to portion added by amendment).

"Section 321.47 enumerates what constitutes a transfer by operation of law.

" 'In the event of the transfer of ownership of any vehicle by operation of law as upon inheritance, devise or bequest, order in bankruptcy, insolvency, replevin, foreclosure or *execution sale* . . ." (emphasis added).

* * *

". . . We are therefore of the opinion that a motor vehicle sold . . . at any sheriff's sale under execution need not be inspected. Such sales are considered to be transfers by operation of law."

The remaining questions you asked are apparently moot since they would apply only if an inspection was required.

November 7, 1972

CITIES AND TOWNS: Cemeteries — §§359.32, 368.28 and 404.10, Code of Iowa, 1971. A cemetery association cannot require a city to provide funds for it. A city may require information as to how its public funds are being used. A city only has authority to control the sale of cemetery lots in cemeteries it controls. (Blumberg to Thomas, Mills County Attorney, 11/7/72) #72-11-10

James A. Thomas, Mills County Attorney: We are in receipt of your opinion request of September 29, 1972, concerning annual payments by a city to an incorporated cemetery association. The city of Hastings has been providing funds to the Hastings Cemetery Association, but now wishes to discontinue such payments. You specifically asked:

"1. Can an independent cemetery association which is incorporated require the Town of Hastings to provide an annual expenditure to the association without showing a need for such funds?

"2. Assuming the Hastings Cemetery Association has been using town funds, can they be required to show the Town Council all financial data regarding their transactions, and can they be required to follow management practices recommended by the Town of Hastings in regards to the sale of lots?"

Section 404.10, Code of Iowa, provides for a city fund known as the municipal enterprises fund. Subsection two of that section provides in part that said fund may be used "for any cemetery owned and controlled by any private or incorporated cemetery association . . . ." This establishes the authority by which Hastings provided funds for the Hastings Cemetery Association. The word "may" has been defined as expressing ability, competency, liberty, permission or possibility. Black's Law Dictionary 1131 (4th ed. 1951). Thus, the statute provides that the city has the power to spend its fund this way, but that the power is discretionary. If a city can exercise discretion in making such payments, it must also have the discretion to discontinue them. We can find no authority for the proposition that an incorporated cemetery association can require a city to make payments to it.

In answer to your next questions, it would seem to be a matter of public policy that the public has a right to know where and how its funds are being spent. Thus, the city may check into how its funds are being used. This does not mean, however, that a city may require that it be allowed to see all the financial data and records of transactions regarding funds not supplied by the city. In addition, cities have the authority and duty to provide for the sale of cemetery lots and make rules and regulations therefor the same as township trustees. See section 368.28 and 359.32. However, this authority can only be exercised over cemeteries that the city controls. Thus, if the city does not control the cemetery, it may not require the cemetery association to follow its recommended practices for sale of lots.

Accordingly, we are of the opinion that a cemetery association may not require a city to provide funds for it. A city may require information as to how its public funds are being used, but may not require information on all other transactions not involving public funds. A city only has authority over sale of cemetery lots in those cemeteries it controls.

November 7, 1972

SCHOOLS: School Construction — §§23.2, 23.18, 297.7, Code of Iowa, 1971. Use of "design-build" method of obtaining bids for schools is not prohibited. (Nolan to Peckosh, Jackson County Attorney, 11/7/72) #72-11-11

Mr. Thomas F. Peckosh, Jackson County Attorney: This letter is written in response to your request for an opinion on the question of whether a school board may advertise and take bids for the construction of a school building utilizing the "design-build" plan?

Your letter states that the school districts anticipate a savings to the taxpayer with the "design-build" concept through the use of teaching and administrative staff services in the school district and other available expert advice without the formal employment of an architect on a percentage fee arrangement. Specifically, the contemplated advantages and problems you foresee are as follows:

"The general plans and specifications will require the bidder to provide the architectural and additional engineering services necessary to complete detailed plans, drawings and specifications, along with the actual bid on his own plans, drawings and specifications.

* * *

"The Board understands that one argument against such an approach be that because the bidders are not bidding on the exact same building in every detail, competition on the exact same set of plans and specifications does not exist, and there would be some difficulty in determining which bid submitted was the lowest and best. However, the Board is impressed by the fact that a significant savings is realized by eliminating the percentage fee of an architect, and that other savings and competition will develop with each bidder attempting to create the most economical building within the requirements of the general plans and specifications.

"This approach to the bidding procedure for the construction of school buildings has been used in other states, but to the knowledge of the local school officials, the idea has not been used in this state. . . .

"The question then which requires an Opinion is whether or not this approach to the construction of a school building conforms with the provisions of Section 23.2 and other applicable provisions of the Code of Iowa."

Iowa Code §297.7 pertaining to the erection or repair of schoolhouses provides:

"The provisions of sections 23.2 and 23.18 shall be applicable to the construction or repair of school buildings. Before erecting any school building at a cost of more than five thousand dollars, the board of directors shall consult with the building consultant in the department of public instruction as to the most approved plan for such building."

Section 23.2 provides:

"Notice of hearing. Before any municipality shall enter into any contract for any public improvement to cost five thousand dollars or more, the governing body proposing to make such contract shall adopt proposed plans and specifications and proposed form of contract therefor, fix a time and place for hearing thereon at such municipality affected thereby or other nearby convenient place, and give notice thereof by publication in at least one newspaper of general circulation in such municipality at least ten days before said hearing."

Section 23.18, provides:

"Bids required — procedure. When the estimated total cost of construction, erection, demolition, alteration or repair of any public improvement exceeds five thousand dollars, the municipality shall advertise for bids on the proposed improvement by two publications in a newspaper published in the county in which the work is to be done, the first of which shall be not less than fifteen days prior to the date set for receiving bids, and shall let the work to the lowest responsible bidder submitting a sealed proposal; provided, however, if in the judgment of the municipality bids received be not acceptable, all bids may be rejected and new bids requested. All bids must be accompanied, in a separate envelope, by a deposit of money or certified check in an amount to be named in the advertisement for bids as security that the bidder will enter into a contract for the doing of the work. The municipality shall fix said bid security in an amount equal to at least five percent, but not more than ten percent of the estimated total cost of the work. The checks or deposits of money of the unsuccessful bidders shall be returned as soon as the successful bidder is determined, and the check or deposit of money of the successful bidder shall be returned upon execution of the contract documents. This section shall not apply to the construction, erection, demolition, alteration or repair of any public improvement when the contracting procedure for the doing of the work is provided for in another provision of law."

The problem of preparing plans and specifications suitable for adver-

tisement under the "design-build" concept is, apparently, not insurmountable. Although the sections of the Code cited above appear to anticipate the formulation of plans and specifications by an architect, the statute requires only that such plans and specifications must be adopted by the municipality. It is well settled that bidders must be duly informed by the officer soliciting bids as to the nature, quality and quantity of the work to be done for a municipal corporation to the end that they may bid intelligently and that the parties may enter into a binding contract. 1938 OAG 38. However, a municipality has been recognized as having authority to consider and adopt one of several different plans submitted by bidders to meet standard specifications for a bridge project. 1925 OAG 480.

Assuming that the school board could adopt general specifications in such complete detail as to meet school needs and ensure fair competition, and it also follows the statutory requirements for notice and hearing as prescribed in §§23.2 and 23.18, supra, there would appear to be no legal prohibition against the use of the "design-build" plan.

November 7, 1972

SCHOOLS: Merged Area Superintendents — §280A.23(9), Code of Iowa, 1971. Fringe benefits in the form of use of school car or low rent lease of house on school property are not precluded by §280A.23(9) which fixes a ceiling on the superintendent's salary, but board contributions to a deferred compensation plan would be a violation of the law. (Nolan to Smith, Auditor of State, and Radl, State Representative, 11/7/72) #72-11-12

The Honorable Lloyd R. Smith, Auditor of State; The Honorable R. M. Radl, State Representative: This opinion is written in response to your request for an interpretation of Chapter 280A.23(9), Code of Iowa, 1971, which gives area school boards authority to set the area superintendent's salary. The section of the Code cited provides:

"The area board, when setting the salary of the area superintendent, shall take into consideration the salaries of administrators of educational institutions in the area, and the enrollment of the area schools; the salary range shall be from seventeen thousand dollars to twenty-five thousand dollars per annum. The superintendent shall not be required to hold any teacher's certificate."

Your specific question is whether or not the statute authorizes additional non-cash benefits such as (1) unrestricted use of an automobile, including all expenses; (2) housing at a rental cost substantially below prevailing rates in the community; and (3) board contributions to a deferred compensation or retirement plan ranging up to 15 percent of the maximum salary.

Salary is a fixed annual or periodical payment for services dependent on the time and not on the amount of services. 38 Words and Phrases 51. Salary and compensation in general usage are synonymous. *Kellog v. Story County*, 1935, 219 Iowa 399, 257 N.W. 778.

Giving consideration to the three items specified in your letter it is our view that §280A.23(9) does not preclude the area board from authorizing items one and two. With respect to item one an automobile furnished by the area board for the use of the superintendent is public property. Section 740.20, Code of Iowa, 1971, prohibits the use of public

automobiles for any private purpose. With respect to item two, the area directors have authority, pursuant to §280A.23(5) to enter into contracts and take other necessary action to ensure efficient operation and management of the school or college and maintain and protect the physical plant, equipment, and other property of the school or college. If in the exercise of discretion afforded under this section of the Code the area board leases a house on the campus to the superintendent at a nominal rental, such fringe benefit would not be an impermissible addition to salary in violation of §280A.23(9). There are numerous cases in other jurisdictions which hold that "salary" does not include the value of living quarters furnished. See *Kommers v. Plagi,* 111 Mont. 293, 108 Pac.2d 208; *State, ex rel. Gentch v. Hirstuis,* 35 OCD 233, 25 Cir.Ct. RNS 177.

With respect to item three, board contributions to a deferred compensation or retirement plan ranging up to 15 percent of the maximum salary would appear to be in violation of §280A.23(9) and also any contribution of this nature made after July 1, 1971, would be contrary to the order of the Linn County District Court in the case entitled *Merged Area X District v. Iowa Employment Security Commission,* Equity No. 91583.

The board is authorized to purchase an annuity contract for the superintendent and make payroll deductions for the purpose of paying the entire premium due and to become due under such annuity contract as authorized by §280A.23(10). The board is also authorized and directed by §97B.11 to match contributions in the amount of three and one-half percent of covered wages as a contribution to the Iowa Public Employees Retirement System. Contributions to the state retirement system or for social security coverage are not deemed salary within the meaning of §280A.23(9). See *Erie County v. Hoch,* 270 N.Y.S.2d 225, 26 A.D.2d 4. The term salary is not defined for purposes of the Iowa Public Employees Retirement Act (Ch. 97B) but appears to be covered under the definition of wages in §97B.41(1a) as including all remuneration for employment including the cash value of remuneration paid in a medium other than cash except when such remuneration paid in a medium other than cash is necessitated by the convenience of the employer. In any event a contribution in the form of deferred compensation would violate both the letter and the spirit of §280A.23.

November 13, 1972

SCHOOLS: Special Education, sections 257.25(5), 280.22, 281.8 and 282.3, Code of Iowa, 1971. School districts and county school systems may provide special education programs for the profoundly handicapped but are not required to furnish schooling and services for children whom the board determines would receive no benefit. (Nolan to Lipsky, State Representative, 11/13/72) #72-11-13

The Honorable Joan Lipsky, State Representative: By your letter of October 28, 1972, the following questions were submitted for an Attorney General's opinion:

"1. Are local public school districts required under current statutes to provide school programs and services for profoundly handicapped children? If not required, is it permissive for them to do so?

"2. Is it permissive for county school systems to provide programs

and services for profoundly handicapped pupils when such services are not specifically delineated in the Department of Public Instruction's rules, regulations or standards?"

The statutory provisions which appear to be pertinent to question 1 are §§257.25(5), 280.22, 281.8 and 282.3, Code of Iowa, 1971. Section 257.25 is the section of the Code which sets forth the educational standards for schools in the State of Iowa. This Code section requires the State Department of Public Instruction to provide rules to implement a minimum standard which includes:

"257.25(5). Provision for special education services and programs, which may be shared by public schools, shall be made for children requiring special education, who are or would otherwise be enrolled in kindergarten through grade eight of such schools."

Rules to meet the statutory requirement have been formulated by the State Department of Public Instruction and are found in Chapter 12 of the department's rules, pages 657-661, Iowa Departmental Rules, 1971.

Rule 12.1(1) provides:

"Education for children requiring *special education* shall include process, programs, therapy, supplemental instruction, supplemental assistance, special equipment, special materials, special transportation, payment of tuition, supplemental services, or other activities, singularly or in combination, provided to handicapped children."

Rule 12.13(7) requires that special permission be obtained from the state division of special education prior to the placement of a pupil with a measured I.Q. of "30 or less on an individual test of intelligence administered by an approved psychologist", thus apparently permitting the exclusion of the class of children with this type of profound handicap.

Code §280.22, provides:

"The board in each school district shall make provision whereby special education services are made available to all handicapped pupils enrolled in kindergarten and all grades of its schools. Programs offered under this section shall comply with rules and standards promulgated by the state board of public instruction and shall be subject to approval and reimbursement of excess costs as provided in chapter 281. Programs offered under this section may be carried on by co-operative arrangements between districts and county boards of education as provided by chapter 281."

Section 281.8, provides:

"It shall not be incumbent upon the school districts or county boards of education to keep a child requiring special education in regular instruction when the child cannot sufficiently profit from the work of the regular class room, nor to keep such child requiring special education in the special class or instruction for children requiring special education when it is determined that the child can no longer benefit therefrom, or needs more specialized instruction which is available in special state schools."

Section 282.3, provides in pertinent part:

"1. The board may exclude from school . . . any child who in its judgment is so abnormal that his attendance at school will be of no substantial benefit to him, or any child whose presence in school may be injurious to the health or morals of other pupils or to the welfare of such

school."

The sections set out above appear to permit school districts to provide school programs and services for profoundly handicapped children but such children may be excluded from the special education programs maintained by the school districts where the district determines that such child cannot benefit from its program.

County school systems are also authorized pursuant to §273.22(10) to provide "courses and services for physically, mentally and educationally handicapped" children. Approval of the State Board of Public Instruction is required for all courses and services furnished by the county board. The prerequisite approval of the state board necessarily implies that these same standards applied to a school district will be applied to the county school system in connection with special education programs. Further, a county board of education is authorized under the same section to lease or purchase land and to hold the land as their own subject to the approval of the State Board of Public Instruction in order to establish and organize special education classes. 1966 OAG 282.

In addition to the statutes pertaining to the maintenance of special education classes and programs in a school district or county school system there is specific provision for the education and treatment of severely handicapped children in the hospital-school for the handicapped maintained in conjunction with the State University of Iowa and the University Hospital at Iowa City pursuant to §263.9. Code §263.10, provides:

"Every resident of the state who is not more than twenty-one years of age, who is so severely handicapped as to be unable to acquire an education in the common schools, and every such person who is twenty-one and under thirty-five years of age who has the consent of the state board of regents, shall be entitled to receive an education, care, and training in the institution, and nonresidents similarly situated may be entitled to an education and care therein upon such terms as may be fixed by the state board of regents. The fee for nonresidents shall be not less than the average expense of resident pupils and shall be paid in advance. Residents and persons under the care and control of a director of a division of the department of social services who are severely handicapped may be transferred to the hospital-school upon such terms as may be agreed upon by the state board of regents and such director."

The term "severely handicapped" is defined in §263.11:

"The term 'severely handicapped' shall be interpreted for the purpose of this division as the following:

"1. Persons who are educable but severely physically and educationally handicapped as a result of cerebral palsy, muscular dystrophy, spina bifida, arthritis, poliomyelitis, or other severe physically handicapped conditions, and

"2. Persons who are not eligible for admission to the schools already established for the deaf, blind, epileptic, or feeble-minded."

November 15, 1972

TAXATION: Documentary Stamp Tax — Ch. 428A, Code of Iowa, 1971, as amended by Ch. 1106, Acts of 64th G.A., Second Session, imposes the Iowa documentary stamp tax upon the consideration paid or to be paid for transfer of realty. Deeds executed as instruments corrective of title

are exempt from the tax even if consideration is given. (Griger to Gunderson, Pocahontas County Attorney, 11/15/72) #72-11-14

Mr. Charles A. Gunderson, Pocahontas County Attorney: You have requested an Attorney General's Opinion with reference to the applicability of the real estate transfer tax imposed by Chapter 428A, Code of Iowa, 1971, as amended by Chapter 1106, Acts of the 64th G.A., Second Session. The substance of your inquiry is, by what method, if any, is the tax determined in the following situations:

1. Deeds for exchange of real estate, with or without part of the consideration in cash.

2. Deeds which confirm, correct, modify or supplement a deed previously recorded but which have present consideration. An example would be where a person quit claims his interest as a compromise with the consideration far less than the value of the property.

3. Deeds which confirm, correct, modify or supplement title where no deed has been previously recorded but which have present consideration. An example would be where a person quit claims his interest to a person in adverse possession or to a person claiming title pursuant to Iowa Land Title Examination Standards 4.4 or 9.18 [no former deed] as a compromise with the consideration far less than the value of the property.

4. Deeds which are part gift and part sale. An example would be where a person sells real estate to a relative for a substantial consideration which is far less than actual market value, and which avoids capital gains tax but creates a gift recognized by federal gift tax law.

Moreover, you state as your basic inquiry:

"Whether the amount of the real estate transfer tax is based on the actual market value of all considerations given or on the actual market value of the property covered by the deed in these four situations. Additionally, for quit claim deeds, do we consider the value of the property covered by the language of the deed or the value of the property which the transferor thought he was losing?"

Section 428A.1, Code of Iowa, 1971, as amended by Chapter 1106, §1, Acts of the 64th G.A., Second Session, provides as follows with respect to transfers of real estate for a consideration:

"When there is consideration and the actual market value of the real property transferred is in excess of five hundred dollars the tax shall be fifty-five cents for each five hundred dollars or fractional part of five hundred dollars in excess of five hundred dollars. The term 'consideration' as used in this chapter, means the full amount of the actual sale price of the real property involved paid or to be paid, including the amount of an encumbrance or lien on the property, whether assumed or not by the grantee."

The situations presented in your request will be treated individually.

I. *Deed for exchange of real estate, with or without part of the consideration in cash.* Chapter 1106 imposes the real estate transfer tax on the basis of the "actual sale price" paid for the property to be transferred. In the case of an exchange of realty, the consideration is in actuality the specific property received by the grantor in exchange for the transferred property. The real estate received by the grantor clearly constitutes a valid consideration. It is the "actual price paid". But the tax is $.55 for each $500 of such price paid. Therefore, in order to compute the amount of tax due, it is necessary to reduce the value of

the consideration to a dollar amount. The sale price of property which is traded for other property cannot be anything else but the value of the thing received. This was the holding of a Utah Supreme Court decision, *Van Leeuwen v. Huffaker*, 1931, 78 Utah 521, 5 P.2d 714, which found that the value of property received by a principal in exchange for his property is the basis upon which a broker's commission is figured in a contract to pay a percentage of the sale price.

The most objective measure of the value of property given as consideration for a transfer of real estate would be its so-called "market value", i.e.: the fair and reasonable cash price which could be obtained for the property at a voluntary sale between a buyer who desires but is not compelled to buy and a seller who desires but is not compelled to sell. *First National Bank of Estherville v. City Council of Estherville*, 1907, 136 Iowa 203, 112 N.W. 829; *Hawkeye Portland Cement Company v. Board of Review of Madison Township*, 1928, 205 Iowa 161, 217 N.W. 837.

Thus, where a real estate transfer is affected by means of an exchange of realty, the grantor's liability for the documentary stamp tax should be computed upon the fair market value of the property he has received as consideration for the transfer.

If consideration consists of both property and cash the tax is figured on the basis of the value of the property plus any cash payments paid or to be paid.

II. *Deeds which confirm, correct, modify or supplement a deed previously recorded but which have present consideration. An example would be where a person quit claims his interest as a compromise with the consideration far less than the value of the property.*

Section 428A.2 as amended by Chapter 1106, §2, Acts of the 64th G.A., Second Session, lists a number of situations in which no real estate transfer tax liability will attach. Section 428A.2(10) provides that:

"The tax imposed by this chapter shall not apply to:

* * * *

10. Deeds which, without additional consideration, confirm correct, modify, or supplement a deed previously recorded."

The exemption statute is written in quite explicit language. The only instruments falling within its provisions are deeds given *without* consideration for the purpose of confirming, supplementing, correcting or modifying a deed which has previously been recorded. It is a general rule of construction that tax exemption statutes are strictly construed against the taxpayer and in favor of the taxing authority. *S & M Finance Company of Fort Dodge v. Iowa State Tax Commission*, 1968, Iowa, 162 N.W.2d 505. In the instant situation the deed is given for a consideration. This fact alone takes the transaction out of the exemption statute. Therefore, liability for the real estate transfer tax does arise. The extent of such liability is dictated by the basic tax imposition statute. §428A.1, which imposes the tax on the "actual sales Price." This would indicate that even though the consideration given for a quit claim deed is far less than the market value of the real estate, the tax is limited to the former.

III. *Deeds which confirm, correct, modify or supplement title where no deed has been previously recorded but which have present consideration. An example would be where a person quit claims his interest to a person in adverse possession or to a person claiming title pursuant to Iowa Land Title Examination Standards 4.4 or 9.18 [no former deed] as a compromise with the consideration far less than the value of the property.*

Section 428A.1, as amended by §1 of Ch. 1106, Acts of the 64th G.A., Second Session, expressly states that "when the deed instrument or writing is executed and tendered for recording as an instrument corrective of title, and so states, there shall be no tax." Thus, where a deed is given simply to correct the title, there will be no tax, provided that the deed specifically states that it is being executed as an instrument corrective of title. However, where an interest in realty is conveyed for a consideration which appears to be the case in the adverse possession example you pose, a tax will be imposed on the amount of that consideration in accordance with §428A.1, as amended, since this is more than a correction of title.

IV. *Deeds which are part gift and part sale. An example would be where a person sells real estate to a relative for a substantial consideration which is far less than actual market value, and which avoids capital gains tax but creates a gift recognized by federal gift tax law.* Section 428A.1 provides that, "when there is no consideration . . . there shall be no tax." Moreover, §428A.2(11) states that among those deeds exempted from the real estate transfer tax are, "Deeds between husband and wife, or parent and child, without actual consideration." It is quite clear, therefore, that an outright gift of a deed is exempt from the tax under one or the other of the above sections.

A deed which is part gift and part sale in reality amounts to a deed given for a consideration which is well below the fair market value of the property transferred. It is a type of transfer which is taxable to the extent of the consideration paid.

November 15, 1972

COUNTIES AND COUNTY OFFICERS: Bonds of constables and justices of the peace — §§64.8 and 64.9, Code of Iowa, 1971, as amended by H.F. 69 and S.F. 428, Acts, 64th G.A., Second Session (1972). The bond for constables and justices of the peace is $500.00. (Haesemeyer to Atwell, Office of Auditor of State, 11/15/72) #72-11-15

Mr. H. E. Atwell, Supervisor of County Audits, Office of Auditor of State: This opinion is in response to your request dated September 13, 1972. Your letter states:

"House File 69 and Senate File 428 were both passed by the 64th General Assembly and became effective July 1, 1972.

"In both of the above bills Sections 64.8 and 64.9 of the 1971 Code were amended. Since they read differently, which one should prevail?"

This matter may be concluded by stating that these two amendments, H.F. 69 and S.F. 428, are not inconsistent in that H.F. 69 became effective July 1, 1972, while S.F. 428, §§94 and 95, don't become effec-

tive until July 1, 1973. The effective dates of S.F. 428 were placed inconspicuously at the end of the Act in §283(3).

However, we did discover an inconsistency in H.F. 69, §§9 and 10, itself. Section 9 of this amendment sets the bonding amount for county officers, including constables and justices of the peace, at $10,000. Section 10 of the amendment sets the bond rate for constables and justices of the peace at $500. A number of Iowa cases take the position that when there are two inconsistent Acts, where one deals with generalities and the other relates to special terms the Act in special terms will prevail. *In re Sale of Liquor in Valley Junction,* 169 Iowa 162, 150 N.W. 86 (1915); *Story County v. Hansen,* 178 Iowa 452, 159 N.W. 1000 (1916); *U.S. v. Windle,* 185 F.2d 196 (C.C.A. Iowa 1971); and *In re Brown,* 329 F. Supp. 422 (D.C. Iowa 1971). Section 9 deals with a large class of county officers' bonds, while Section 10 specifically separates *constables* and *justices of the peace* from the others and sets a lower bonding rate. The court will probably enforce the amount set in Section 10.

The problem you raise is illustrative of a number of difficulties occasioned by the recently adopted practice of the general assembly of setting forth at length statutes being amended with added matter shown by underlining or italics and deleted matter by strike-through. In so doing the introductory words "Section ..... is amended to read as follows", are used.

The code editor has brought to our attention numerous instances where words have been added without underlining or italics, language has been restored to code provisions without italics or underlining which had previously been repealed, and possibly instances where matter has been omitted without any strike-through being shown.

The confusion, uncertainty and consternation which such errors will cause for the bench, bar and public as a whole is manifest. Accordingly, it is our opinion that whenever the general assembly enrolls an Act by quoting a statute in toto from the code, with certain words printed with strike-through letters and other words underlined, that these stricken and underlined words are the sole amendments contemplated by the Act.

To completely lay the matter to rest it would be our recommendation that the legislature clarify the issue by appropriate legislation, perhaps by an amendment to Chapter 4 of the Code.

November 21, 1972

STATE OFFICERS AND DEPARTMENTS: Appointment of agents to vote for commission members — Ch. 1286, Laws of 63rd G.A., Second Session, H.F. 1339. Commission members do not have authority to appoint agents to vote at meetings but can delegate ministerial duties. (Wietzke to Knoblauch, State Representative, 11/21/72) #72-11-16

The Honorable Charles E. Knoblauch, State Representative: In your letter of October 26, 1972, you requested an Attorney General's opinion concerning the following question about procedures adopted by the Iowa American Revolution Bicentennial Commission:

"It appears that there have been times when a quorum was not present

of members appointed to this commission by the Governor, the President of the Senate and the Speaker of the House. It appears that the Commission took it upon themselves to decide that those duly appointed people could allow a 'representative' to be present and cast a vote on their behalf.

* * *

"I am just wondering if this is legal? At this or these meetings we establish policy, employ persons to work with the programs and as of recent meetings we have not had persons appointed to the commission attend these sessions. . . ."

Chapter 1286, Laws of the 63rd General Assembly, Second Session, H.F. 1339, provides as follows:

"Section 1. There is hereby established a commission to be known as the Iowa American revolution bicentennial commission, hereinafter referred to as the commission, for the purpose of planning, encouraging, developing and coordinating the commemoration of the American revolution bicentennial.

"1. The Iowa commission shall be composed of:

a. Two members of the senate appointed by the president of the senate, each of whom shall be a member of a different political party.

b. Two members of the house of representatives, appointed by the speaker of the house of representatives, each of whom shall be a member of a different political party.

c. The secretary of state, superintendent of the state historical society, curator of the Iowa state department of history and archives, director of the state conservation commission, president of the state university of Iowa, president of Iowa state university of science and technology, president of the university of northern Iowa, director of the Iowa development commission, chairman of the Iowa state fair and world food exposition study committee, and the secretary of the Iowa state fair board.

d. Seven citizens of the state appointed by the governor, one of whom shall be designated by the governor as chairman of the commission.

"2. Members of the commission shall serve without compensation.

"3. The commission may recommend additional persons to assist it in its work, and the governor shall appoint such persons, and any others he deems necessary, to serve as honorary members.

* * *

"5. Vacancies shall be filled in the same manner in which the original appointments are made."

It is obvious in the above statute that there is no authorization for deputies, assistants, or representatives to act for the members of the commission. In Iowa, although ministerial duties may be delegated, an officer may not delegate to an agent power to do an act required by statute involving judgment and discretion unless authorized by statute. *State v. Johnston,* 1962, 253 Iowa 674, 113 N.W.2d 309; *Thede v. Thornburg,* 1929, 207 Iowa 639, 223 N.W. 386; *Kinney v. Howard,* 1907, 133 Iowa 94, 110 N.W. 282; 67 C.J.S. 449, Officers, §148.

In a recent Iowa Supreme Court case *Bunger v. Iowa High School Athletic Association,* 1972, 197 N.W.2d 555, the court invalidated the delegation of school board rule-making powers to an athletic association saying:

"Rule-making by school boards involves the exercise of judgment and discretion. The legislature has delegated rule-making to those boards, and the general principle is that while a public board or body may authorize performance of ministerial or administrative functions by others, it cannot re-delegate matters of judgment or discretion. (Citations omitted) The Kinney case involved an invalid re-delegation by a school board, and this court stated, 'while it is a general rule that power conferred upon a public board or body cannot be delegated, yet a public corporation or municipality or instrumentality of government may, like a private corporation or person, do its ministerial work by agents or committees. . . . Where the act to be done involves judgment or discretion, it cannot be delegated to an agent or committee.' (Cites omitted) The general principle is stated thus in 2 Am.Jur. 2d Administrative Law §222 at 52:

"It is a general principle of law, expressed in the maxim 'delegatus non potest delegare,' that a delegated power may not be further delegated by the person to whom such power is delegated, and that in all cases of delegated authority, where personal trust or confidence is reposed in the agent and especially where the exercise and application of the power is made subject to his judgment or discretion, the authority is purely personal and cannot be delegated to another unless there is a special power of substitution either express or necessarily implied."

Therefore, members of the commission do not have the power to appoint representatives to cast a vote in their behalf at commission meetings, except for special committees to plan, develop and coordinate special activities as contained in section 2 of the above-cited law.

November 27, 1972

CIVIL RIGHTS — HANDICAPPED. Chapter 105A as amended by Chapter 1032, Acts of the 64th G.A., Second Session and Chapter 104A. Under the provisions of Chapter 105A, Code of Iowa, 1971, the failure to provide physical access for the physically disabled to places of employment, public accommodations and housing may, under some circumstances constitute an illegal and discriminatory practice. Where such a practice is established, it is within the power of the Iowa Civil Rights Commission to compel a respondent to provide such physical access as part of a remedy. The failure of the State of Iowa, or any of its political subdivisions, to follow the guidelines of Chapter 104A, Code of Iowa, 1971, "Building Entrance for Handicapped Persons", when constructing public facilities with public monies, does constitute a prima facie violation of Chapter 105A and is therefore subject to the enforcement provisions of Chapter 105A.9, Code of Iowa, 1971. (Conlin to Hayes, Ex. Dir. Iowa Civil Rights Com., 11/27/72) #72-11-17

Alvin Hayes, Jr., Executive Director, Iowa Civil Rights Commission: We have your recent request for an opinion on the following questions:

"1. Does the failure to provide physical access for physically disabled persons to places of employment, public accommodations and housing constitute an illegal and discriminatory practice under the Iowa Civil Rights Act?

"2. If it does constitute an illegal and discriminatory act, could the Commission compel the respondent to provide such physical access as part of the remedy where discrimination has been established?

"3. Would the failure of the state or any of its political subdivisions to follow the guidelines of Chapter 104A, 'Building Entrance for Handicapped Persons,' when constructing public facilities with public monies, constitute a prima facie violation of Chapter 105A?"

Iowa is one of the very few states that prohibits discrimination in employment, housing and public accommodations on the basis of physical

or mental disability. Chapter 105A was amended by Chapter 1032, Acts of the 64th G.A., Second Session, p. 129 to include such discrimination. The amended statute provides as follows:

" 'Disability' means the physical or mental condition of a person which constitutes a substantial handicap. In reference to employment, under this chapter, 'disability' also means the physical or mental condition of a person which constitutes a substantial handicap, but is unrelated to such person's ability to engage in a particular occupation."

Section 105A.7(1) now reads as follows:

"1. It shall be unfair or discriminatory practice for any:

"a. Person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the race, creed, color, sex, national origin, or religion, or disability of such applicant or employee, unless based upon the nature of the occupation. If a disabled person is qualified to perform a particular occupation, by reason of training or experience, the nature of that occupation shall not be the basis for exception to the unfair or discriminatory practices prohibited by this subsection."

Sections 105A.8 and 105A.13 have also been amended to prohibit discrimination on the basis of disability in public accommodations and housing.

There is no direct authority extant in this area. However, recent cases have affirmed the constitutional rights of the physically and mentally disabled. (*See Pennsylvania Assoc. for Retarded Children* v. *Commonwealth of Pa.*, 334 F.Supp. 1257 (E.D. Pa. 1971); *King-Smith* v. *Aaron*, 455 F.2d 378 (3rd Cir. 1972), *rev.* 317 F.Supp. 164 (W.D. P.2d 1970)); and other courts have suggested their support of this proposition, though not reaching the specific merits of a case because of procedural grounds. (*See Heumann* v. *Board of Education of N.Y.*, 320 F.Supp. 623 (S.D. N.Y. 1970); *Reid* v. *Board of Education of N.Y.*, 453 F.2d 238 (2nd Cir. 1971)).

On analogous grounds, it has been established that in the area of employment, employers must take care that all company facilities are available to all employees on a nondiscriminatory basis. The fact that an employer may have to provide separate company facilities for employees of each sex under state law will not justify discrimination. An employer will be deemed to have engaged in an unlawful employment practice if it refuses to hire or otherwise adversely affects the employment opportunities of employees or job applicants in order to avoid the provision of such restrooms for persons of that sex. (*See E.E.O.C., Sex Discrimination Guidelines*, 41 CFR 60-20.3(e), ¶4340.02(e)).
Under government contracts, employers cannot discriminate on the basis of sex because there are no restrooms or associated facilities unless the contractor can show that to construct such facilities would be unreasonable, such as for excessive expense or lack of space. (*See OFCC, Sex Discrimination Guidelines*, 41 CFR 60-20.3(e, ¶4340.02(e)).

The above reasoning would suggest that the same requirements pertaining to facilities for employees on the basis of sex would be applicable to requiring physical accessibility for the physically disabled. Each case must be decided on its own facts, measuring the expense and feasibility

of providing access to persons of limited mobility. It is immaterial that this discrimination may be unintentional — the effect is the same as if this class was blatantly excluded from certain areas of the public life. If, in a particular case, discrimination has occurred, the commission, as part of the remedy could order the installation of access facilities under Chapter 105A.9(12) which provides in pertinent part as follows:

"If, upon taking into consideration all the evidence at a hearing, the Commission shall find that a respondent has engaged in, any discriminatory or unfair practice . . . the Commission shall . . . cause to be served . . . an order requiring affirmative action . . . as in the judgment of the Commission shall effectuate the purposes of this chapter."

The failure of the state and its political subdivisions to follow the guidelines of Chapter 104A "Building Entrance for Handicapped Persons" would probably be prima facie violation of Chapter 105A and also might be a violation of the constitutional guarantees of equal protection. Chapter 104A applies only to new construction.

Based on statistics from the National Center for Health, Department of Health, Education and Welfare, it can be estimated that between 1/10 to 1/3 of Iowa's population, anywhere from 280,000 to 900,000 persons, are in some way restricted in their mobility and would be beneficially affected by increased accessibility to public building.

The urgency of clearly establishing the requirement that public buildings are accessible to all is evidenced by the American Institute of Architect's estimate that more buildings will be built in the rest of this century than have been constructed since Columbus' arrival in America. The continued construction of inaccessible buildings will create enduring problems to be dealt with by numerous persons in the years to come.

The failure to provide such accessibility effectively serves to discriminate against a substantial number of persons. By hindering this class's freedom of selection of housing, public accommodations and employment, such fundamental rights as the right to work and to participate in the election process are in turn adversely affected.

In summary, it is the opinion of this office that under the provisions of Chapter 105A, Code of Iowa, 1971, the failure to provide physical access for the physically disabled to places of employment, public accommodations and housing may, under some circumstances constitute an illegal and discriminatory practice. Where such a practice is established, it is within the power of the Iowa Civil Rights Commission to compel a respondent to provide such physical access as part of a remedy.

Also, the failure of the State of Iowa, or any of its political subdivisions, to follow the guidelines of Chapter 104A, Code of Iowa, 1971, "Building Entrance for Handicapped Persons", when constructing public facilities with public monies, does constitute a prima facie violation of Chapter 105A and is therefore subject to the enforcement provisions of Chapter 105A.9, Code of Iowa, 1971.

November 27, 1972

CIVIL RIGHTS: 105A.7, Code of Iowa, 1971. When it is shown that an individual has been discriminated against in employment classification on the basis of sex, that individual is entitled to not only back pay

from the time of the discrimination, but also a seniority date consistent with the date that she would have been classified in the higher grade, but for the illegal discrimination. (Conlin to Hayes, Ex. Dir. Iowa Civil Rights Com., 11/27/72) #72-11-18

Alvin Hayes, Jr., Executive Director, Iowa Civil Rights Commission: The Iowa Civil Rights Commission, in its letter of October 24, has requested an opinion from this office as to whether or not the refusal to set the date of a complainant's appointment to a particular job at the date she would have begun work at that job had she not been discriminated against constitutes an act of discrimination in itself. You ask whether the premise for this conclusion would not be that had it not been for the employer's act of discriminatorily refusing to hire her for the position on the basis of her sex, she would have begun working in that position and accrued merit seniority from that date for purposes of pay increases. It is the opinion of this office that based on the facts set out below this refusal does indeed constitute an act of discrimination prohibited under Iowa law.

A brief summary of the facts as we understand them is as follows. An employer subject to the Iowa Merit Employment Rules initially hired the complainant at a lower position in the relative ranking of positions in the employers' department. After interviewing for a position higher in that ranking and being denied the job, she filed a complaint based on sex discrimination with th Iowa Civil Rights Commission. Thereafter, on March 16, 1972, the employer promoted her to the higher position for which she had interviewed, and seemingly admitting their prior act of discrimination, granted her back pay from January 1, 1972, the date she would have been granted the higher position had she not been discriminated against. However, the employer refuses to establish that date, January 1, 1972, as the effective date of appointment to the new position, thus denying her the right to salary increase at a time consistent with her actual period of employment. By maintaining March 16, 1972, as both her effective and actual date of employment in the new position, the employer is consequently requiring this employee to wait until a later date for higher pay.

You have stated that the employer relies on certain Merit Employment Rules for its position in this matter. We can assume that the following rules are those to which they refer:

Rule 4.5(2)(a) —

"Merit pay increases shall not be automatic or retroactive . . . ."

Rule 4.5(2)(b) —

"Probationary and permanent classified employees shall be eligible and may be given consideration by the appointing authority for a one step merit pay increase at the beginning of the pay period following the satisfactory completion of the periods of service prescribed below for progression from step to step within the pay grade for the class to which their positions are allocated. The periods of service shall be exclusive of time spent on educational leave, leave without pay, and periods during which service was rated less than satisfactory as reflected by an official performance rating . . . ."

Rule 4.5(2)(c) —

"Any type of pay increase given an individual, other than an adjustment incident to an upward revision of the range of the class in which he is employed, and exceptionally meritorious service raise, pay for leadworker duty assignment or special duty assignment shall establish a new anniversary date for purposes of eligibility for merit increases."

In reading these three rules together it can be seen that it is contemplated that an employee subject to these regulations will receive a pay increase only after completing a required period of service in the particular job classification. However, the regulations obviously do not consider a situation where an employee has been unlawfully discriminated against and consequently retained in the wrong job classification initially. The rules also fail to contemplate the possibility that the agency itself would admit such an error and award back pay to the employee from the date she should have been placed in that job had she not been unlawfully discriminated against.

Under Iowa Code Section 105A.7(1)(a) it is unlawful for a "person to refuse to . . . classify . . . any employee because of . . . sex . . . unless based upon the nature of the occupation." Both the Iowa Legislature and the Iowa Supreme Court in their decision in *Ironworkers Local No. 67* v. *Hart*, 191 N.W.2d 758 (Iowa 1971), have stated that the provisions of this statute should be interpreted broadly to effectuate its purposes. Thus, it would seem that it would not be at all beyond the scope of the Act to expect that an employer who grants back pay to an employee who has been discriminated against should also put her in the same position she would have been in had such discrimination not taken place.

The Iowa Civil Rights Act is "another manifestation of a massive national drive to right wrongs prevailing in our social and economic structures for more than a century." *Ironworkers Local No. 67* v. *Hart*, *supra*. Analogous language is incorporated in federal legislation, Title VII of the 1964 Civil Rights Act, 42 USC 2000(e). Thus, case law interpreting the latter statute should be applicable to interpretations of our state act.

In *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969) the the federal court stated the general principle that,

"The clear purpose of Title VII is to bring an end to the proscribed discriminatory practices and to make whole . . . those who have suffered by it."

In many federal cases, making the complainant whole involves more than just injunctive relief and back pay. Numerous cases have dealt with righting the effects of past discriminatory wrongs.

In *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849 (1971) the Supreme Court stated that,

"The objective of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees."

* * *

". . . practices . . . neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."

These words of admonishment are applicable to the facts you present here in that although the Merit Employment Rules are neutral on their face, because of past discrimination against the complainant, they operate to "freeze" her into a position of status quo for a period of time. The Supreme Court in *Griggs* has ruled this to be a forbidden practice.

In *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), the Court of Appeals held that although Lorillard discontinued its overt racial hiring policies and permitted black workers to transfer into previously all-white departments, because white workers hired at the same time as their black co-workers ended up with greater periods of service in that department, relief should be granted to the black workers to remedy these continuing effects of past discrimination.

In *United States* v. *Continental Cas. Co.*, 319 F.Supp. 161 (E.D. Va. 1970), the same situation arose where blacks were required to forfeit promotional security in order to transfer to better jobs because of past discrimintory practices. The federal court there enjoined the application of such a policy. See also *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970).

Finally, in a decision of the Equal Employment Opportunity Commission (CCH Emp. Prac. Guide ¶6255, May 19, 1971), it was held that the charging party was not only entitled to back wages, but "all other benefits which would have accrued to her as a saleslady or a clerical employee had she not been segregated out of those classifications when hired." She was granted the same job title, wage rate, *job seniority* and other benefits of employees hired on or about the charging party's initial hiring date. "To do less," the Commission held, "would be to perpetuate the effects of past discrimnation."

In conclusion, it is the opinion of this office that the intention of the legislature was to remedy *all aspects* of discrimination based on sex, and that the essence of the case law interpreting such legislation dictates that the effects of past discrimination should also be remedied. In order to make the complainant in this case whole and keep her from being frozen into a status quo position for a time, it is mandatory that her employer grant her all the benefits which would have accrued to her had she been employed in the higher position she now occupies since January 1, 1972, including her right to subsequent pay increases when due.

November 27, 1972

CRIMINAL LAW: Peace Officers, Authority to Make Arrests — §§748.3, 755.4, 755.6, Code of Iowa, 1971. Iowa statutes do permit arrests by Iowa peace officers for criminal violations of immigration laws where federal statutes permit the arrest. United States immigration Officers may make arrests for violations of State and local laws in the State of Iowa the same as a private citizen (1) for a public offense committed or attempted in his presence and (2) where a felony has been committed, and he has reasonable grounds for believing that the person to be arrested has committed it. (Turner to Williams, Dist. Dir. U.S. Dept. of Justice, Immigration & Naturalization Svc., 11/27/72) #72-11-19

Mr. R. C. Williams, District Director, United States Department of Justice, Immigration and Naturalization Service: I am in receipt of your letter in which you inquire as to (1) the authority of Iowa peace officers to make warrantless arrests for criminal violations of 8 U.S.C. 1324

relating to smuggling, transportation, concealing, etc. illegal aliens in or through the State of Iowa; and, (2) the authority of United States Immigration officers to make warrantless arrests in the State of Iowa for violations of Iowa law.

I agree with your conclusion that Iowa peace officers have sufficient authority to make arrests for a violation of 8 U.S.C. 1324.

Subdivision (b) of 8 U.S.C. 1324 is set out as follows:

"No officer or person shall have authority to make any arrest for a violation of any provision of this section except officers and emloyees of the Service designated by the (United States) Attorney General, either individually or as a member of a class, and all other officers whose duty it is to enforce criminal laws."

The above quoted section permits that class of officers whose duty it is to enforce criminal laws to make arrests for violations of that specific section. Section 748.4 of the 1971 Code of Iowa sets forth the duty of Iowa peace officers to preserve the peace, ferret out crime, and apprehend and arrest all criminals. It is therefore apparent that they come within the language of the class of persons described in subsection (b) of 8 U.S.C. 1324.

Having determined that the aforementioned federal statute permits Iowa peace officers to make arrests for violations of said section, I can find no Iowa law prohibiting such action. As stated previously, Iowa peace officers have the duty to apprehend and arrest *all* criminals — not just violators of State law, Section 748.4, 1971 Code of Iowa. 1971 Iowa Code provision 755.1 empowers peace officers to make warrantless arrests, under certain conditions, for *public* offenses. Thus, it is apparent that Iowa statutes do permit arrests for criminal violations of immigration laws where, as in the case of 8 U.S.C. 1324, federal statutes permit the arrest.

In response to the second part of your question relating to the powers of U.S. Immigration officials to make arrests for State crimes, a discussion of Chapter 755 of the 1971 Code of Iowa which authorizes arrests by peace officers and private citizens is relevant.

Section 755.4 of the Code is set out as follows:

"755.4 Arrests by peace officers. A peace officer may make an arrest in obedience to a warrant delivered to him; and without a warrant:

"1. For a public offense committed or attempted in his presence.

"2. Where a public offense has in fact been committed and he has reasonable grounds for believing that the person to be arrested has committed it.

"3. Where he has reasonable grounds for believing that an indictable public offense has been committed and has reasonable grounds for believing that the person to be arrested committed it.

"4. Where he has received from the department of public safety or from any other peace officer of this state or the United States an official communication by bulletin, radio, telegraph, telephone, or otherwise, informing him that a warrant has been issued and is being held for the arrest of the person to be arrested on a designated charge."

The term "peace officer" is defined in Section 748.3 of the 1971 Code of Iowa:

"748.3 'Peace officer' defined. The following are 'peace officers.'

"1. Sheriffs and their deputies.

"2. Constables.

"3. Marshals and policemen of cities and towns.

"4. All special agents appointed by the commissioner of public safety and all members of the state department of public safety excepting members of the clerical force.

"5. All agents appointed by the secretary of the board of pharmacy examiners.

"6. Such person as may be otherwise so designated by law."

It is therefore apparent that if United States Immigration officers are to have the powers of arrest provided in Section 755.4, they must be determined to be "peace officers." And it is equally apparent that if they are to have that designation, it must come from the operation of paragraph six of Section 748.3. Nowhere in the Iowa law can I find such a designation. Thus, you are advised that U.S. Immigration officials acting in their official capacity in the State of Iowa have no authority to make arrests as peace officers under Section 755.4 for violations of State crimes.

Notwithstanding the above, a private person by authority of Section 755.6, 1971 Code of Iowa, may arrest (1) for a public offense committed or attempted in his presence and (2) where a felony has been committed, and he has reasonable grounds for believing that the person to be arrested has committed it. Therefore, within the above limitations designated for private persons you are advised that United States Immigration officers may make arrests for violations of State and local laws in the State of Iowa.

December 1, 1972

CITIES AND TOWNS: Ward Changes — Election of Councilmen — Chapters 1024 and 1088, Acts of the 64th G.A., Second Session; §§363.8, 363.9, 363.33 and Chapter 363A, Code of Iowa, 1971. In cities operating under two year terms for councilmen where ward changes were made in 1972, those councilmen shall represent their old wards until the next general election in 1973. In cities operating under four year terms for councilmen where ward changes were made in 1972, those councilmen whose wards have been changed shall stand for election at the next general election in 1973. Where a city, presently under the Mayor-Council form with an even number of councilmen, adopts the Mayor-Council form under the new municipal code and must change the number of councilmen to an odd number, all councilmen shall stand for election at the next general election after the change. (Blumberg to Synhorst, Secretary of State, 12/1/72) #72-12-1

The Honorable Melvin D. Synhorst, Secretary of State: We are in receipt of your opinion request of May 30, 1972, regarding changes of city council members. You specifically asked:

"As a result of the action taken by cities pursuant to House File 1265, Acts of the Sixty-Fourth General Assembly, Second Session, there have been many questions directed to this office regarding the effect of ward

boundary changes on the terms of present city council members who are elected from wards of the city.

When ward boundaries were changed, if two council members elected by ward vote have been placed in one ward, does the 'misplaced' council member serve as the representative of the ward from which he was elected until his term expires if he was elected to a two year term? If the term of the 'misplaced' council member does not expire until 1975, must he run for re-election in the next general municipal election in 1975?

Some cities operating under the Mayor-Council form of government with an *even* number of council members are planning to change, or have changed, the number of council members to an *odd* number as provided by the new Municipal Code of Iowa, Forms of Government.

Must the names of *all* of the council members provided for under the new Mayor-Council form of government be placed on the ballot for the next regular municipal election, or do those members whose terms do not expire until 1975 serve until that time?"

Primarily, two ways for a change in wards exist. In the first, re-apportionment and population shifts based upon the latest dicennial census and Chapter 1024, Acts of the Sixty-Fourth General Assembly, Second Session, have caused changes in ward boundaries. Your first questions refer to this type of situation. In the second, a city has adopted a new form of government pursuant to the new municipal code, Chapter 1088, Acts of the Sixty-Fourth General Assembly, Second Session. Your last question refers to this situation.

The basis for reapportionment and ward boundary changes is to insure and enhance equal representation. The Iowa supreme court has held that the overriding objective must be substantial equality of population among the various districts so that the vote of any citizen is approximately equal in weight to the vote of any other citizen. *In re Legislative Districting of General Assembly*, 1972, 193 N.W.2d 784; *Rasmussen* v. *Ray*, 1970, 175 N.W.2d 20. A more succinct phrase is "one man, one vote." This principal is the same whether we are concerned with State legislative districts or city wards. This was the intent and goal of the Supreme Court in the above cases, and of the Legislature in passing Chapter 1024, Acts of the Sixty-Fourth General Assembly.

Municipal general elections are held every other year in odd numbered years. Section 363.8, 1971 Code of Iowa; section 61, Chapter 1088, Acts of the Sixty-Fourth General Assembly. Unless specifically provided, the terms of elected city officials are two years. Section 363.9, 1971 Code of Iowa; section 62, Chapter 1088, Acts of the Sixty-Fourth General Assembly. In those cities with two year terms where ward boundaries have been changed in 1972 pursuant to Chapter 1024, Acts of the Sixty-Fourth General Assembly, the incumbent councilmen will continue to represent their old wards until the next general election in 1973.

Some forms of municipal government provide for four year staggered terms of councilmen. Consequently, the terms of those councilmen elected in 1971 do not expire until 1975. The question becomes whether those councilmen whose terms do not expire until 1975 should have to run for re-election in 1973. There can be no doubt that those councilmen whose wards were not changed in 1972 do not have to run for re-election in 1973 unless their term expires at that time. However, logic, equity and justice require a different conclusion when wards have been changed.

As noted above, the purpose of reapportionment and reprecincting is to insure the principal of "one man, one vote." A logical extension of this principal is an opportunity to choose a representative. Any time there is a change in a ward, such as we have had in 1972, there is a change in the complexion of the electorate of that ward. To require the electorate of a new ward to accept the representation of an incumbent, chosen by the old electorate, beyond the next general election is repugnant and contrary to the principal of equal representation. The purpose of reapportionment and reprecincting is not only to provide for more equal representation, but also to provide for representation, as soon as possible. To keep the incumbent in office in a new ward beyond the next general election is contrary to this belief and principal. It is in the best interest of the electorate that elections for new wards be held at the next general election. Consequently, we are of the opinion that all incumbent councilmen whose wards have been changed in 1972 should run for re-election in 1973.

In answer to your final question, we are also of the opinion that all councilmen should run for re-election at the next general election. If a city adopts a form of government under the new municipal code, Chapter 1088, Acts of the Sixty-Fourth General Assembly, it is, in effect, adopting a new form of government, even though its old form is similar to the new. When a new form of government is adopted, an election is required to be held at the time of the next general election to choose officials for the new form. Section 363.33, 1971 Code of Iowa; section 48(5), Chapter 1088, Acts of the Sixty-Fourth General Assembly.

Under the present Mayor-Council form, it is possible to have an even number of councilmen. Chapter 363A, 1971 Code of Iowa. However, the Mayor-Council form under the new code provides for an odd number of councilmen. Thus, if a city presently operates under the Mayor-Council form with an even number of councilmen, and adopts the Mayor-Council form under the new code, it will be required to change its number of councilmen. This should be done at the next general election. Applying the reasoning of the previous answer, all councilmen for the new Mayor-Council form should stand for election at the next general election.

Accordingly, we are of the opinion that:

1. Where ward changes have been made in 1972, in cities operating under two year terms for councilmen, those councilmen shall represent their old wards until the next general election in 1973.

2. Where ward changes have been made in 1972 in cities operating under four year terms for councilmen, those councilmen whose wards have been changed shall stand for election at the next general election in 1973.

3. Where a city presently operating under the Mayor-Council form, pursuant to Chapter 363A, with an even number of councilmen adopts the new Mayor-Council form under the new municipal code and must change its number of councilmen to an odd number, all councilmen shall stand for election to the new form at the next general election after the change.

December 1, 1972

TAXATION: Sale for Delinquent Taxes of Second Story of Building §§446.7, 446.18, 446.19, 428.1, 368.4, 368.9, 569.8. Where there is separate ownership of the second story of a building, said second story should be listed and assessed for property taxes in the name of the owner thereof and in the event of a tax sale for delinquent taxes thereon, only such second story should be sold. If the county purchases such second story at tax sale, it must dispose of the property by means of public auction. If a city condemns such building, pursuant to §368.9, while the second story thereof is owned by the county, the county would be responsible for the costs of demolishing its portion of said building. (Griger to Williams, Humboldt County Atty. 12/1/72) #72-12-2

Mr. Richard A. Williams, Humboldt County Attorney: This will acknowledge receipt of your letter in which you have requested the opinion of the Attorney General. You state that the second story of a building was separately owned, had fallen delinquent in real estate taxes, and was purchased by Humboldt County at scavenger tax sale. You ask the following questions:

1). Can the county treasurer legally sell the second story of a building at tax sale?

2). Could the taxes due on the second floor of this building be collected from the owner of the first floor and the land itself, and if he would not pay them, could the entire piece of property be treated as is normally done for delinquent taxes, namely, the sale of property at the December tax sale?

3). Should the county take title to the second story and fail to sell it at public auction, could the county then dispose of the property in some manner such as giving it to the owner of the land and the first story?

4). If the county takes title to the second story and the city acts to condemn the building while it is in the ownership of Humboldt County, would the county be responsible for the costs of demolishing a portion of the building?

In regard to your first question, separate ownership of different floors of the same building is permitted in Iowa. *Ottumwa Lodge v. Lewis*, 1871, 34 Iowa 67; *Jackson v. Bruns*, 1906, 129 Iowa 616, 106 N.W. 1. Since this individual ownership is permissable, it follows that the various floors could be separately listed and assessed for property tax purposes in accordance with §428.1, Code of Iowa, 1971. Therefore, if taxes become delinquent on one of the independently owned floors, the county treasurer should sell such story at annual tax sale pursuant to §446.7, Code of Iowa, 1971. If the treasurer is not able to sell the property at the annual tax sale or at the scavenger tax sale pursuant to §446.18, the county must bid for the property in accordance with the clear provisions of §446.19.

With reference to your second question, you state that the second story of this building has been separately listed and assessed for taxation apart from the rest of the building and the land. Real estate taxes are a tax against the real estate and unpaid taxes are a lien against that particular real estate. *Laubersheimer v. Huiskamp*, 1967, 260 Iowa 1340, 152 N.W.2d 625. Further, taxes should generally be assessed in the name of the owner of the property which is the subject of the tax. 84 C.J.S. *Taxation* §92; §428.1, Code of Iowa, 1971. Therefore, it is clear

that the delinquent taxes attributable to the second story of the building would not constitute a lien upon the remainder of the building or the land. *Laubersheimer v. Huiskamp*, supra. Your second question is answered in the negative.

The answer to your third question is that §569.8, Code of Iowa, 1971, requires a county, which acquires title to real estate by virtue of a tax sale, to dispose of the property solely by means of a public auction. 1968 O.A.G. 1015. Therefore, the county cannot give this property to the owner of the first story.

With reference to your fourth question, §368.9, Code of Iowa, 1971, provides in part that cities and towns

". . . shall have power to provide for the removal, repair, or dismantling of any dangerous building or structure and to assess the cost thereof against the property."

Section 368.4, Code of Iowa, 1971, provides:

"Wherever provision is made in this Code that municipal corporations shall have power to do or cause to be done certain acts and assess the cost thereof against the property, but fails to specify the manner of collection, the clerk of such municipal corporations shall certify said cost to the county auditor and it shall then be collected with, and in the same manner as, general property taxes."

The Iowa Supreme Court has held that §368.9 applies to school buildings owned by a school district in *Cedar Rapids Community School Dist. v. City of Cedar Rapids*, 1960, 252 Iowa 205, 106 N.W.2d 655. In so holding, the Court cited *Cook County v. City of Chicago*, 1924, 311 Ill. 234, 142 N.E. 512 in which the Illinois Court held that a county was required to comply with fire regulations of a city within the limits of which it erected a county building. Therefore, it is clear that if the city acts in accordance with §368.9 to condemn the building while the second story thereof is owned by Humboldt County, the county would be responsible for the costs of demolishing its portion of said building.

December 7, 1972

CIVIL RIGHTS: Chapter 105A, Code of Iowa, 1971, 42 USC 2000(e), 29 CFR Part 30. Proof of compliance with 29 CFR Part 30 may be accepted by the Department of Public Instruction as sufficient proof of compliance with Chapter 105A, Code of Iowa, 1971 and 42 USC 2000(e). (Conlin to Smith, Deputy State Superintendent, 12/7/72) #72-12-3

Richard M. Smith, Deputy State Superintendent, Department of Public Instruction: We have your letter requesting an opinion of the Attorney General concerning whether the Department of Public Instruction may consider proof of compliance with 29 CFR Part 30, U.S. Department of Labor as sufficient indication of compliance with state and federal laws governing Equal Employment Opportunity.

A review of Labor Title 29, CFR Part 30, shows that it is directed at the same problems as 42 U.S.C. 2000(e) and Chapter 105A, Code of Iowa, 1971. The regulations are similar in scope and purpose to regulations issued by the Equal Employment Opportunity Commission. All three acts are consistent in their goals of the elimination of discrimination because of race, color, religion, sex and national origin.

Proof of compliance with 29 CFR Part 30, which attempts to guarantee equal opportunity in the recruitment, selection, employment and training of apprentices in labor unions, shall be considered sufficient proof of compliance with Chapter 105A, Code of Iowa, 1971, unless there is some other indication of violation. The Department of Public Instruction is entitled to rely on the federal agency's determination, and cannot be held responsible for any errors or for any lack of vigorous enforcement on the part of that agency. Of course, an individual union may be found guilty of violating Chapter 105A even where compliance with 29 CFR Part 30 has been secured and the Department of Public Instruction could then take appropriate action concerning the distribution of funds.

December 8, 1972

STATE OFFICERS AND DEPARTMENTS: School Budget Review Committee — Section 13, Chapter 165, Acts of the 64th General Assembly, First Session; Section 5, Chapter 1107, Acts of the 64th General Assembly, Second Session. Supplanting of federal funds is a unique and unusual circumstance for which the School Budget Review Committee may increase budgets by granting additional supplemental state aid. (Blumberg to Benton, Chairman, School Budget Review Committee, 12/8/72) #72-12-4

Robert D. Benton, Chairman, School Budget Review Committee: We are in receipt of your opinion request of December 5, 1972, regarding the powers of the School Budget Review Committee. Specifically, you asked:

"The Committee therefore requests your opinion as to whether the language of Section 13, subsection seven of Chapter 165, Acts of the 64th General Assembly, First Session, as amended by Section five, of Chapter 1107, Acts of the 64th General Assembly, Second Session, provides the necessary authority so that Federal funds to Iowa for the current year will not be jeopardized. Does the fact that Federal funds supplant State and/or local funds in 140 districts constitute circumstances which are unique and unusual so that the School Budget Review Committee may correct the problem in these 140 districts?"

Section 13, Chapter 165, Acts of the Sixty-fourth General Assembly, First Session, sets forth the duties of the School Budget Review Committee (SBRC). Subsection 5 of that section provides:

"The committee may authorize a school budget in excess of limitations provided in sections nine (9) and ten (10) of this division as follows:

. . .

b. Additional supplemental state aid may be paid to any district from any discretionary funds appropriated specifically to the committee for this purpose."

This means that the School Budget Review Committee may increase school budgets by granting additional state aid.

Subsection 7 of section 13, as amended by section 5, Chapter 1107, Acts of the Sixty-fourth General Assembly, Second Session, provides:

"The committee, when making decisions relating to school budgets, shall consider each district's circumstances and facts which are unique and unusual, including but not limited to any unusual increases or decreases in enrollments, natural disasters, unusual transportation problems, and initial staffing problems."

"Unusual" and "unique" mean uncommon, rare, exceptional. Black's Law

Dictionary; Webster's New World Dictionary. There can be no doubt that inadvertent supplanting of federal funds is an unusual circumstance. Chapter 165 became effective on July 1, 1972. The computations for the school budgets were made according to that law, but some federal funds were inadvertently left in the computations. This was the first time that these computations were made this way, and this will be the last, since the law has been amended for the 1973-1974 school year by Chapter 1107, Acts of the Sixty-fourth General Assembly. Thus, the supplanting is an unusual circumstance for the current year within the meaning and intent of section 7 of Chapter 165.

Accordingly, we are of the opinion that the School Budget Review Committee may increase the budgets of school districts affected by supplanting, because such is an unusual and unique circumstance.

December 12, 1972

CITIES AND TOWNS: Civil Service — §§365.1 and 365.6, Code of Iowa, 1971. Paid, full time firemen in a city over eight thousand population shall be covered by civil service in Chapter 365. (Blumberg to Vogel, Poweshiek County Attorney, 12/12/72) #72-12-5

Mr. Richard J. Vogel, Poweshiek County Attorney: We are in receipt of your opinion request of November 22, 1972, concerning the Grinnell, Iowa, fire department. You have stated that the fire department is a volunteer one, with the exception of three firemen who are paid, full time employees. Your question is whether these three firemen are to be covered under civil service.

Chapter 365, 1971 Code of Iowa, entitled "Civil Service" is applicable. Section 365.1 provides that in cities having a population of eight thousand or over, and having a paid fire or police department, the mayor shall appoint civil service commissioners. This makes civil service in cities over eight thousand mandatory. Section 365.6(2) provides that in cities under fifteen thousand, civil service shall apply only to members of the police and fire departments. The population of Grinnell is over eight, but under fifteen thousand. Therefore, section 365.6(2) applies.

Accordingly, we are of the opinion that the paid firemen in the Grinnell fire department shall be covered by civil service as provided for in Chapter 365.

December 12, 1972

COUNTY AND COUNTY OFFICERS: Field assessor serves at pleasure of assessor and when field assessor's work is completed, the restrictions of §441.53 no longer apply to him. (Nolan to Briles, State Senator, 12/12/72) #72-12-6

The Honorable James E. Briles, State Senator: Reference is made to your request for an interpretation of §441.53, Code of Iowa, 1971. The facts prompting your request are that a town assessor was asked to resign by the county assessor for taking an active part in the primary campaign of a relative. The town assessor claims that she is employed only in the months of January and February each year and receives no money after that, and consequently, is not precluded from taking part in partisan politics inasmuch as the total work of the town assessor is completed in two months of employment. The county assessor, on the

other hand, considers the town assessor to be continually employed as an assessor and consequently precluded from participating in partisan politics.

Section 441.53, Code, 1971, provides as follows:

"Neither the assessor nor any employee of the assessor's office shall directly or indirectly contribute any money or anything of value to any candidate, his agent or personal representative, for nomination or election to any office, or to any campaign or political committee, or take an active part in any political campaign, except to cast his vote, or to express his personal opinion, nor shall any such candidate, person, representative, agent, or committee, solicit such contribution or active political support from any such officer or employee. Any person convicted of violating any provision of this chapter shall immediately be dismissed from office or may be punished as for an indictable misdemeanor."

In an opinion dated February 19, 1962 (1962 OAG 114) the Attorney General advised that a deputy assessor is bound by the same limitation as the assessor under the statute, i.e. to devote his entire time to the duties of the office and not to engage in any occupation or business interfering or inconsistent with such duties. Section 441.13 provides:

". . . The assessor shall select field men, so far as possible, from the eligible list of deputy assessors. Their compensation shall be fixed as provided in section 441.16. They shall serve at the pleasure of the assessor."

Such field men should be notified when their work is completed so that they will be able to proceed with such other business activities as they may have without fear of misfeasance.

If the town assessor had completed all work required and was not actually employed on county business after the town assessment was completed in February, the requested resignation had no effect or meaning. It is the view of this office that the law contemplates that field assessors are to be appointed as needed and after their work is completed they are not subject to the restraints imposed by Code §441.53.

December 12, 1972

CITIES AND TOWNS: Election of Councilmen — Section 50, Chapter 1088, Acts of the 64th General Assembly, Second Session. When a city operating under the present Mayor-Council form of government with an even number of councilmen adopts the same form under the new municipal code, and changes to an odd number of councilmen, either mandatorily or by choice, all councilmen shall stand for election at the next regular municipal election after the change. (Blumberg to Synhorst, Secretary of State, 12/12/72) #72-12-7

The Honorable Melvin D. Synhorst, Secretary of State: This is in reference to the opinion of December 1, 1972, which we issued to you concerning the election of city councilmen. In that opinion, we stated that cities currently operating under the Mayor-Council form of government with an even number of councilmen will have to change to an odd number of councilmen if they adopt the Mayor-Council form under the new municipal code. It has been brought to our attention that this statement is not a correct interpretation of the new code provisions. Therefore we are writing this in clarification.

Section 50 of Chapter 1088, Acts of the Sixty-Fourth General Assem-

bly, Second Session, provides that in the Mayor-Council form under the new municipal code, there shall be an odd number of councilmen, totaling not less than five. However, the second paragraph of that section provides an exception in that a city governed by the Mayor-Council form with two councilmen elected at large and one councilman from each of four wards, may continue as such until the form of government is changed pursuant to section 48 or 55 of Chapter 1088. Accordingly, our opinion is that cities presently operating under the Mayor-Council form with an even number of council must change to an odd number of councilmen when the same form is adopted under the new municipal code, with the exception that Mayor-Council forms with two at-large councilmen and one from each of four wards, may continue to operate as such. Thus, when a city operating under the Mayor-Council form with an even number of councilmen adopts the same form under the new municipal code, and changes to an odd number of councilmen, either mandatorily or by choice, all councilmen shall stand for election at the next regular municipal election after the change.

In addition to the above, the prior opinion made several references to the "next general election." This should be clarified to read "the next regular municipal election."

December 13, 1972

TAXATION: Moneys and Credits Tax — Chapter 429, Code of Iowa 1966; Repealed by Chapter 1204 §16 Acts of the 63rd G.A., Second Session. Moneys and credits taxes due under Chapter 429, Code of Iowa 1966 can no longer be assessed and demanded for omitted property held by individuals or estates for years prior to the repeal of said Chapter 429. (Kuehn to Kliebenstein, Grundy County Attorney, 12/13/72) #72-12-8

Mr. Don Kliebenstein, Grundy County Attorney: You have requested an Attorney General's Opinion with reference to the authority of the County Treasurer to currently assess moneys and credits taxes on omitted property for the years prior to the repeal of Chapter 429 of the Iowa Code. Specifically your question is as follows:

"Section 633.474 of the Code of Iowa requires the County Treasurer to certify that all personal taxes due and to become due in estate matters are paid in full before the estate may be closed.

The question has arisen as to whether or not omitted moneys and credit taxes may now be assessed for years prior to the repeal and required to be paid by the county treasurers as a condition to the issuance of the personal tax certificate."

Statutory authority for the assessment and collection of the moneys and credits tax was Chapter 429, Code of Iowa. Chapter 429 was repealed by the Legislature in Chapter 1204 §16 Acts of the 63rd G.A., Second Session, which provided:

"Chapters Four hundred twenty nine (429) and Four hundred thirty (430), Code 1966, are hereby repealed."

This repeal went into effect July 1, 1970.

In order to answer the question that has been proposed, it is necessary to first review the substance and content of Chapter 429 of the Code of Iowa. The pertinent section of the moneys and credits tax statute is

found at §429.2, Code of Iowa 1966, which provides:

"Moneys, credits, and corporation shares or stocks, except as otherwise provided, cash, circulating notes of national banking associations, and United States legal tender notes, . . . shall be assessed . . . and shall be taxed upon the uniform basis throughout the state of five mills on the dollar of actual valuation, same to be assessed and collected where the owner resides. For the years 1966 and subsequent years, the property of an individual, administrator, executor, guardian, conservator, and trustee, including property held by an agent or nominee thereof, described in and subjected to taxation at the rate of five mills by this section shall not be assessed for the purpose of collecting the said tax of five mills and no tax shall be levied or collected thereon from any individual or any such fiduciary by reason of this section . . ."

As is evident from the literal reading of the statute, Chapter 429 imposed a five mill tax on moneys and credits. However it also provided that for the year 1966 and years subsequent thereto the property of an individual or administrator, executor, guardian, conservator and trustee shall not be assessed for this five mill tax. Thus in and after 1966 it appears that individual taxpayers were no longer taxed for the five mill tax imposed by Chapter 429. This would mean then, that the five mill tax could not be assessed in and after 1966, except that omitted property could be assessed and taxed by the county treasurer within five years after the assessment should have been made. This five year limitation and the time at which it was to begin running is set out in §443.12, Code of Iowa 1971. Thus as of 1966 the five mill tax of Chapter 429 was dead as to most individuals, even though it had not been formally repealed, and was not formally repealed until 1970.

Beginning in 1966, no original assessments for this tax could be made due to the provisions of §429.2. Furthermore, the statute of limitations set out in §443.12, Code of Iowa 1971, provides that assessment and demand of omitted taxes can be made only within five years of the date the original assessment should have been made. It follows then, that since no original assessment could have or should have been made in and after 1966, no subsequent assessment and demand for omitted moneys and credits could possibly be made after 1970, since the five year statute must necessarily have expired.

In conclusion, it is the opinion of the Attorney General that the five mill moneys and credits tax imposed by Chapter 429 of the Iowa Code cannot now be assessed and thereby demanded for omitted property held by individuals or estates by county treasurers for years prior to the repeal of said Chapter 429. It follows that the county treasurers cannot require payment under these facts as a condition to the issuance of the personal tax certificates.

December 13, 1972

SCHOOLS: Directors, §613A.7, Code of Iowa, 1971. School Boards are authorized to purchase errors and omissions coverage if desired. (Nolan to Smith, Deputy State Superintendent, 12/13/72) #72-12-9

Dr. Richard N. Smith, Deputy State Superintendent, Department of Public Instruction: In response to your request for an opinion as to whether or not the general authorization to purchase tort liability insurance set forth in §613A.7, Code of Iowa, 1971, includes authorization for

a school board to purchase errors and omissions coverage, we advise that the section cited does provide such authority. A similar question was posed with respect to county boards of supervisors and was the subject of an opinion issued by the Attorney General on March 2, 1970. 1970 OAG 462. A copy of the 1970 opinion is enclosed for your convenience.

December 14, 1972

COUNTIES AND COUNTY OFFICERS: Incompatibility, Ch. 1124, §§31 and 35, Acts of the 64th G.A., Second Session; §748.2, Code of Iowa, 1971; Art. III, Constitution of Iowa. Offices of County Treasurer and Judicial Magistrate are incompatible. (Nolan to Bauch, Tama County Attorney, 12/14/72) #72-12-10

Mr. Jared O. Bauch, Tama County Attorney: This is written in reply to your request for an opinion of the Attorney General on whether it would be legal for an individual to hold the offices of county treasurer and part-time magistrate at the same time. From your letter we note the following:

"The question has been raised as to whether or not the County Treasurer could serve as a part-time magistrate. Tama County is entitled to have the services of two part-time magistrates. I think the question is whether or not there is an incompatibility of offices in this situation. First impressions indicate to me that they are not necessarily incompatible. If you can give me a short statement in this regard, I would appreciate it.

"I should perhaps point out that since we are a rural community, the chief Judge of our district has indicated that there will be a good deal of flexibility in scheduling so that these positions can be filled and it would not appear that holding both positions at the same time necessarily creates a scheduling conflict. In other words, the holder of the Office of Treasurer could be scheduled to hold his judicial Magistrate's court during the evening hours at set times."

Many opinions have been written by this office advising that certain public offices are incompatible and others are not incompatible. In recent years the Supreme Court decision in *State ex rel LeBuhn v. White*, 1965, 257 Iowa 606, 133 N.W.2d 903, established the rule of law on the question in this state. The court there states:

". . . . . the test of incompatibility is whether there is any inconsistency in the functions of the two, as where one 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'."

Under the new unified court law, Chapter 1124, Acts of the 64th General Assembly, Second Session, the magistrate whether he be a full time or part-time magistrate is a judicial officer. Under §31 of the Act, supra, judicial magistrates will have jurisdiction over nonindictable misdemeanors as well as other powers set out in §748.2 of the Code. While certain administrative reports are required of the judicial magistrate (§35, Acts, supra), the magistrate is not an administrative officer. On the other hand, the county treasurer is an administrative officer.

Article III of the Constitution of Iowa provides that the powers of government of Iowa shall be divided into three separate departments — the Legislative, the Executive and the Judicial and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others. In view of such a constitutional prohibition it is my view that the duties

of the judicial magistrate and the county treasurer are inherently inconsistent and repugnant and that it would be improper from a consideration of public policy for an incumbent to hold both offices simultaneously.

Accordingly, it is my opinion that an incompatibility exists in the offices of judicial magistrate and county treasurer. See *Ward v. Village of Monroeville,* .....U.S....., decided Nov. 14, 1972, 41 LW 4011.

December 15, 1972

COUNTIES AND COUNTY OFFICERS: County Attorney — §341.1, Code of Iowa, 1971; 1970 OAG 607; §§332.9, 332.10, Code of Iowa, 1971; 1938 OAG 714, 716; Ch. 340, Code of Iowa, 1971. Board of Supervisors is not limited by provisions of Ch. 340, Code of Iowa, in fixing the compensation of the County Attorney's secretary. (Nolan to Erhardt, Wapello County Attorney, 12/15/72) #72-12-11

Mr. Samuel O. Erhardt, Wapello County Attorney: We have your letter requesting an opinion by the Attorney General on the matter of the salary of the county attorney's secretary. In that letter you state the following:

"I have checked the Code and I am unable to find a salary control as far as the Secretary in the County Attorney's office would be concerned, limited only to what the Board of Supervisors would fix and determine.

"I would like an opinion on this matter before the end of the year, if possible, as the salary increases must be applied for prior to the end of the year when the Budget is set."

Under §341.1, Code of Iowa, 1971, each county attorney may, "with the approval of the board of supervisors, appoint one or more . . . . assistants . . . . for whose acts he shall be responsible. The number of . . . . assisstants, and clerks for each office shall be determined by the board of supervisors, and such number together with the approval of each appointment shall be by resolution made of record in the proceedings of such board."

The county attorney may select and appoint his own secretary, Turner to Goen, Dubuque County Attorney, 1/6/71. The Board of Supervisors is obliged to furnish the county attorney suitable office space in the county court house or make some provision to repay him for rent of an office elsewhere. 1970 OAG 607.

Sections 332.9 and 332.10, Code of Iowa, have been liberally construed to permit county boards of supervisors to furnish secretarial help and supplies to various county officers. In a 1938 opinion issued by this office the following appears at 1938 OAG 714, 716:

"It is accordingly the opinion of this department that there is express statutory authority . . . for a board of supervisors, in the exercise of its discretion, to furnish stenographic assistance for the county attorney to the extent that such assistance is required in the discharge of the official business of that office.

"However, as a condition precedent to the incurring of a legal obligation on the part of the county for the expense of stenographic assistance in the office of the county attorney, the appointment of such an assistant or clerk must have the approval of the board by resolution made of record in the proceedings of the board. At such time of approval of the appointment it would be incumbent upon the board of supervisors to fix

the compensation to be paid the appointee. What the amount of such compensation should be is necessarily a question that alone can be determined by the board, dependent upon the extent to which service will be rendered the county in aid of the discharge of the official duties arising in the office of the county attorney."

The secretary does not qualify as a deputy or as an assistant county attorney and accordingly is not entitled to receive statutory compensation prescribed by Chapter 340, Code of Iowa. However, it is our view that the Board of Supervisors is not limited by the provisions of Chapter 340, supra, in fixing the compensation of the county attorney's secretary.

December 15, 1972

STATE OFFICERS & DEPARTMENTS: Beer and Liquor Control Department; Application for beer permit — size of "retail area" to be licensed. Chapter 131 §§129(5), 134(3) and 3(31), Acts of the 64th General Assembly, First Session, 1971. The term "retail area", as used in the statutes dealing with beer permits and charges therefore, encompasses the rooms or enclosures where alcoholic beverages or beer are sold. (Jacobson to Gallagher, Director Iowa Beer & Liquor Control Dept., 12/15/72) #72-12-12

Mr. Rolland A. Gallagher, Director, Iowa Beer & Liquor Control Department: This is to acknowledge receipt of your letter dated September 19, 1972, in which you requested an opinion from this office regarding the following:

"Chapter 131 of the Acts of the 64th General Assembly, first session, Division 2: Beer Provisions, Section 129, paragraph 5, reads as follows: States the number of square feet of interior floor space which comprises the retail sales area of the premises for which the permit is sought.

"Section 134 of the same Chapter, paragraph 3 and 4, lists four different possible fees for a Class 'C' beer license ranging from $75.00 annually to $300.00 annually, based on the number of square feet in the retail area.

"We are requesting an opinion of the definition of the 'retail area', as many applicants are confused, as are we, as to exactly what this means. To date we have used the entire dimensions of the building, less storage area, as our definition of a 'retail area'."

An analysis of §§131.129(5), 131.134(3), and 131.3(31), Acts of the 64th General Assembly, First Session, will show that the "retail area" encompasses the rooms or enclosure where alcoholic beverages or beer are sold.

Section 131.129(5) states: "A Class 'C' permit shall be issued by the director to any person who is the owner or proprietor of a grocery store or pharmacy, who:

* * *

"5. States the number of square feet of interior floor space which comprises the retail sales area of the premises for which the permit is sought."

Section 131.134(3) states in pertinent part:

"3. The annual fee for a Class 'C' permit shall be graduated on the basis of the amount of interior floor space which comprises the retail sales area of the premises covered by the permit . . . ."

Finally, Chapter 131, §3 paragraph 31 states:

" 'Licensed premises' or 'premises' means all rooms or enclosures where alcoholic beverages or beer are sold or consumed under authority of a

liquor control license or beer permit."

In both §131.129(5) and §131.134(3) the retail sales area is defined as that area, in square feet, which is covered by the permit. Inasmuch as the authority of a license or permit extends to all rooms or enclosures where alcoholic beverages or beer are sold or consumed under authority of a liquor control license or beer permit, it is the opinion of this office that the retail sales area is the area of the licensed premises, nothing more and nothing less. Therefore, the fee for a Class "C" beer permit must be based on the number of square feet of floor space of the rooms or enclosures where the beer is sold.

December 18, 1972

COURTS: Judicial Magistrates — Ch. 1124, §185, Acts of the 64th General Assembly, Second Session; §606.13, Code of Iowa, 1971; 1972 OAG #72-12-10. Offices of Judicial Magistrate and Deputy Clerk of Court are not incompatible. (Nolan to Berkland, Palo Alto County Attorney, 12/18/72) #72-12-13.

Mr. Roger A. Berkland, Palo Alto County Attorney: This is written in reply to your letter requesting an opinion of the Attorney General. You ask if the positions of Judicial Magistrate and Deputy Clerk may be combined. In a letter to you sent from the Judicial Magistrate Appointing Commission in your county, the following appears:

". . . As a member of the committee to implement the Judicial Magistrate in this County, we have run into a problem as far as obtaining a qualified individual to be appointed as Judicial Magistrate. One of the problems deals with the amount of the salary involved in this matter.

"We have also determined that a Deputy Clerk will be necessary to handle the extra paper work which will result from the duties of the Judicial Magistrate. We have checked with the County Clerk's office and at this time, no Deputy Clerk has been hired.

"The committee has raised the question as to whether or not the Judicial Magistrate and the Deputy Clerk's job could be consolidated to be held by one person. This would enable us to pay an individual in the neighborhood of $10,000.00 per year to carry out the duties of the Judicial Magistrate."

This office has advised that the Office of Judicial Magistrate is not compatible with the Office of County Treasurer. Nolan to Bauch, 1972 OAG #72-12-10. That opinion rests on our view that the constitutional distribution of power precludes the combinations of offices which are properly classified as judicial or executive. However, it is our view that the Office of the Clerk of Court is an administrative office within the judicial branch of government and therefore no inherent inconsistency arises.

We note that for many years the justices of the peace, who the judicial magistrates will replace, performed the administrative duties transferred by Chapter 1124, Acts of the 64th General Assembly, Second Session, to the Clerk of Court. Further, although §606.13 of the 1971 Code of Iowa prohibits the clerk or deputy clerk from holding the office of justice of the peace, the amendment enacted by the 64th General Assembly (Ch. 1124, §185) merely strikes the words pertaining to holding the office of justice of the peace and does not substitute a prohibition against serving as Judicial Magistrate.

Accordingly, it is the opinion of this office that the duties of Judicial Magistrate and Deputy Clerk of Court are not incompatible and that the two offices may be held simultaneously by one person.

December 18, 1972

TAXATION: Property tax status of property leased to County — §§427.1(2), 427.1(9), Code of Iowa, 1971. Exemptions from property tax provided in §§427.1(2) and 427.1(9) are not applicable to a county where the property is leased to and used by the county but is owned by a private non-exempt property owner. (Griger to Hughes, Assistant Dubuque County Attorney, 12/18/72) #72-12-14

Mr. Dave Hughes, Assistant Dubuque County Attorney: You have requested the opinion of the Attorney General as follows:

"The Supervisors of Dubuque County have leased a home on a long term lease from a private property owner. The lease agreement states that the County, as Tenant, shall pay any and all real property taxes assessed against the property during the term of this lease. This payment is in addition to the payment made to the property owner.

Under the foregoing set of facts, is the property taxable or would it be exempt under Section 427.1(2)."

Section 427.1(2), Code of Iowa, 1971, provides for property tax exemptions as follows:

"The property *of* a county, township, city, town, school corporation, levee district, drainage district or military company of the state of Iowa, when devoted to public use and not held for pecuniary profit." (emphasis supplied)

One of the requirements for exemption under §427.1(2) is that the property be "of" a county. In *Laurent v. City of Muscatine*, 1882, 59 Iowa 404, 13 N.W. 409, the Iowa Supreme Court held that an exemption statute which covered grounds and buildings "of" literary, scientific, benevolent, agricultural and religious institutions and societies would not apply to exempt from taxation property owned by a private individual, though the property was used for a school and a church. The Court stated at 59 Iowa 406:

"In view of the oft repeated rule that taxation is the rule and exemption the exception, we think this property is not exempt. In our opinion, use and ownership, either legal or equitable, should combine, in order to effect the exemption."

Therefore, it is clear that this property is not exempt from taxation under §427.1(2).

However, the question then arises whether this property could be tax exempt under the provisions of §427.1(9), Code of Iowa, 1971, which preclude taxation of the following classes of property:

"All grounds and buildings used or under construction by literary, scientific, charitable, benevolent, agricultural, and religious institutions and societies solely for their appropriate objects, not exceeding three hundred twenty acres in extent and not leased or otherwise used or under construction with a view to pecuniary profit. All deeds or leases by which such property is held shall be filed for record before the property herein described shall be omitted from the assessment. All such property shall be listed upon the tax rolls of the district or districts in

which it is located and shall have ascribed to it an actual fair market value and an assessed or taxable value, as contemplated by section 441.21, whether such property be subject to a levy or be exempted as herein provided and such information shall be open to public inspection."

In the case of *In re Estate of Spangler*, 1910, 148 Iowa 333, 127 N.W. 625, the Iowa Supreme Court held that a county was a "charitable institution" within the scope and meaning of a statute exempting from Iowa inheritance tax, devises and bequests to or for charitable institutions. The Court stated that such tax exemption should be liberally construed.

However, §427.1(9) is not liberally construed by the Iowa Supreme Court. Recently, the Court has curbed and restricted the types of exemptions sought under this statute. See *Wisconsin Evangelical Lutheran Synod v. Regis*, 1972, Iowa, 197 N.W.2d 355; *Evangelical Luth. G. S. Soc. v. Board of Rev. Des Moines*, 1972, Iowa, 200 N.W.2d 509. In these cases, the Court strictly construed the provisions of §427.1(9) and resolved all doubts in favor of taxation.

In re Taft's Estate, 1939, 110 Vt. 266, 4 A.2d 634 involved the question of whether a bequest made to a city for school purposes was exempt from Vermont inheritance tax under a statute which exempted bequests to a city for cemetery purposes and which exempted bequests to charitable institutions. The Vermont Court held that the term "charitable institutions" in the exemption statute was not intended to include cities. The Court noted that the exemption statute first dealt with a limited exemption of bequests to cities for cemetery purposes and next with other named exempt recipients, incdluding charitable institutions. The Court concluded that if there were any doubt about the exemption, the express mention of exemption for bequests to cities for cemetery purposes implied the exclusion of cities within the ambit of charitable institutions. This rule of statutory construction, namely, the express mention of one thing in a statute implies the exclusion of others, is utilized by the Iowa Supreme Court. *Dotson v. City of Ames*, 1960, 251 Iowa 467, 101 N.W.2d 711.

As noted, §427.1 of the Code provides for a tax exemption for property *owned* by a county in subsection two (2) thereof. Subsequently, in subsection nine (9), an exemption is provided for all grounds and buildings *used* by charitable institutions solely for their appropriate objects. The exemption contained in §427.1(9) is geared to use of property, not ownership. *Evangelical Luth. G.S. Soc. v. Board of Rev. Des Moines*, supra. *In re Spangler's Estate*, supra, did not involve a situation where the exemption statute expressly mentioned counties as well as charitable institutions. Further, a liberal construction of the exemption statute was applied therein. Therefore, that case is distinguishable from the instant situation which is more akin to that found in *In re Taft's Estate*, supra.

Therefore, it is the opinion of this office that §427.1 exempts from property tax the property of a county as set forth in §427.1(2) and that the provisions of §427.1(9) which exempt from taxation the buildings and grounds used by a charitable institution are inapplicable where the property used by a county is owned by a private non-exempt property owner. This opinion may be inconsistent with a previous unpublished opinion of the Attorney General, O.A.G. McKay to Farnsworth, Septem-

ber 24, 1965, a copy of which is attached hereto. To the extent of any inconsistency, the latter opinion is overruled.

December 19, 1972

IOWA WATER POLLUTION CONTROL COMMISSION—Sewage Works Construction Fund — Priorities for Use of Grant if Construction Costs Paid — §455C.6, Code of Iowa, 1971. This section establishes priorities for the use of Sewage Works Construction Fund Grants if the construction costs of the project have been paid. (Davis to Brown, Hearings Officer, Dept. of Health, 12/19/72) #72-12-15

Mr. J. Edward Brown, Hearings Officer, State Department of Health: You have requested an opinion of the Attorney General relating to construction of Section 455C.6, Code of Iowa, 1971, as to whether a mandatory priority is established between the three enumerated purposes for which funds from state grants may be used if the cost of construction of the eligible project has already been paid.

The particular part of the Code section you have reference to states as follows:

"However, if such costs have been paid by the municipality, then such payment may be used by the municipality for:

1. The payment of outstanding bonds or obligations incurred for any such eligible project.

2. Any improvement or extension of an eligible project.

3. Any other lawful municipal purpose determined to be necessary, reasonable, and in the interest of the public welfare."

The legislature has indicated in Section 2 of Chapter 48, Laws of the 64th General Assembly, First Session that, as a matter of statutory construction, "the entire statute is intended to be effective".

Subparagraphs 1 and 2 of Section 455C.6, Code of Iowa, 1971, are such lawful municipal purposes as are set out in subparagraph 3. No legislative purpose is served by setting out with such specificity the payment of bonds for an eligible project as subparagraph 1 and improvement or extension of an eligible project as subparagraph 2 unless it was intended that sewage works construction funds be first used for sewage works, if the project for which the grant was given has already been funded.

The legislature establishes a "Sewage Works Construction Fund" in Chapter 455C, Code of Iowa, 1971, all of which, except subparagraph 3 of Section 455C.6 relates to such construction. The legislative purpose as established in Section 455C.2, Code of Iowa, 1971, is to "assist such municipality in the construction of sewage treatment works". Establishment of a priority for subparagraphs 1 and 2 in Section 455C.6 effectuates this purpose.

We therefore determine that Section 455C.6, Code of Iowa, 1971, establishes a priority and that, if the costs of construction of an eligible project for which the grant is given have been paid by the municipality, then the grant funds must first be applied to the payment of outstanding bonds or obligations incurred for any such eligible project; must secondarily be applied to any improvement or extension of an eligible project, and only thereafter applied to any other lawful municipal purpose deter-

mined to be necessary, reasonable and in the interests of the public welfare.

December 19, 1972

STATE OFFICERS AND DEPARTMENTS: Merit Employment Department, Civil Rights Commission, Jurisdiction of Complaints of Racial Discrimination: §§19A.8, 19A.9, 19A.14, 19A.18, 19A.20, 19A.22, 105A.2, 105A.5, 105A.7, 105A.8, Code of Iowa, 1971. The Merit System has the primary responsibility for eliminating discrimination within covered agencies. (Haesemeyer to Keating, Director, Merit Employment Dept., 12/19/72) #72-12-16

Mr. W. L. Keating, Director, Merit Employment Department: Reference is made to your request for an opinion of the attorney general with respect to the following:

"The Iowa Merit Employment Commission respectfully requests the opinion of the Attorney General as to the proper interpretation of apparent coexisting responsibility in the area of discriminatory practices contained in Chapter 19A and 105A, Code of Iowa, 1971.

"105A.2(5) Definitions provides 'Employer' means the State of Iowa or any political subdivision, board, commission, department, institution, or school district thereof and every other person employing employees within the state.

"105A.5(2) Enumerating duties of the Civil Rights Commission provides: 'To receive, investigate and pass upon complaints alleging unfair or discriminatory practices.'

"105A.7(1) In defining 'Unfair Employment Practices' provides: 'It shall be an unfair or discriminatory practice for any: a. Person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of race, creed, color, sex, national origin or religion of such applicant or employee, unless based upon the nature of the occupation.'

"And 105A.5(8) provides: 'To cooperate, within the limits of any appropriations made for its operation, with other agencies or organizations, both public and private, whose purposes are consistent with those of this chapter, and in the planning and conducting of programs designed to eliminate racial, religious, cultural and inter-group tensions.'

"Whereas, the Merit Act provides:

"19A.18. 'No person shall be appointed or promoted to, or demoted or discharged from, any position in the merit system, or in any way favored or discriminated against with respect to employment in the merit system because of his political or religious opinions, or affiliations or race or national origin or sex or age.'

"And, 19A.22: 'The provisions of this Chapter, including but not limited to its provisions on employees and positions to which the merit system apply shall prevail over any inconsistent provisions of the Code and subsequent Acts unless such subsequent Acts provide a specific exemption from the merit system.'

"Since the inception of the merit system, there has been confusion among the agencies, with the classified service, relative to the position and authority of the Civil Rights Commission with respect to similar coverage within the provisions of the Merit Act. Further, there has been no coordination, as provided under 105A.5(8) in these areas. The Merit Commission respectfully asks the Attorney General is the authority of the two acts:

1. Exclusive
2. Coexisting
3. Coordinative
4. Or, does one succeed the other in specific areas?"

In addition to the statutes which you have cited, the following sections of the Code of Iowa, 1971, are relevant:

"19A.8 Director's duties. The director, as executive head of the department, shall direct and supervise all of the administrative and technical activities of the department. In addition to the duties imposed by the director elsewhere in this chapter, it shall be his duty:

* * *

"9. To perform any other lawful acts which he may consider necessary or desirable to carry out the purposes and provisions of this chapter.

* * *"

"19A.9 Rules adopted. The merit employment commission shall adopt and may amend rules for the administration and implementation of this chapter in accordance with chapter 17A. The director shall prepare and submit proposed rules to the commission. The rules shall provide:

* * *

"15. For imposition, as a disciplinary measure, of a suspension from the service without pay for not longer than thirty days.

"16. For discharge, suspension, or reduction in rank or grade for any of the following causes: Failure to perform assigned duties, inadequacy in performing assigned duties, negligence, inefficiency, incompetence, insubordination, unrehabilitated alcoholism or narcotics addiction, dishonesty, any act or conduct which adversely affects the employee's performance or the agency employing him, and any other *good cause* for discharge, suspension, or reduction. The person discharged, suspended, or reduced shall be given a written statement of the reasons for his discharge, suspension, or reduction within twenty-four hours after the discharge, suspension, or reduction. A copy thereof shall be filed with the director. All persons concerned with the administration of this chapter shall use their best efforts to insure that this chapter and rules hereunder shall not be a means of protecting or retaining unqualified or unsatisfactory employees, and to cause the discharge, suspension, or reduction in rank of all employees who should be discharged, suspended, or reduced for any of the causes stated in this subsection."

"19A.20 Penalty. Any person who willfully violates any provision of this chapter or any rules adopted in accordance with this chapter shall be guilty of a misdemeanor and upon conviction shall be punished therefor by a fine of not more than one hundred dollars or by imprisonment in the county jail for not more than thirty days."

The above sections of the Code of Iowa, 1971, establish means by which the merit system may deal with discriminatory practices in covered agencies. First, the director may suspend, reduce or discharge an offending employee if there is "good cause". Since discrimination within the merit system is specifically prohibited, §19A.18, Code of Iowa, 1971, a finding of such illegal practice would certainly constitute good cause for the director to suspend, reduce or discharge the offending subordinate. Second, the director of the merit system may "perform any other lawful acts," §19A.8(9), Code of Iowa, 1971, entirely at his own discretion, in furtherance of the broad purposes of Chapter 19A. Finally,

pursuant to §19A.20, Code of Iowa, 1971, the director of the merit system, or anyone else, may file a complaint alleging criminal violation of the provisions of Chapter 19A and, in particular, §19A.18.

It appears that the legislature intended the merit system to have primary responsibility for eliminating discrimination within covered departments and provided the means for doing so. Chapter 19A manifests the legislature's concern that our state employment system should stand as a fair, honorable and efficient model to all other employers, public and private. Thus, the merit system has been given the immediate means to correct injustices as soon as they arise.

It is clear also, however, that the legislature intended Chapter 105A to apply to the state. Thus, §105A.2(5) which you have quoted specifically includes the state and its agencies within the definition of employer. However, while the civil rights commission may function as a safety check on the employment practices of the merit system, its responsibility has been superseded, but not eliminated, by the more recent expression of legislative intent, §19A.22, Code of Iowa, 1971. If an instance of discrimination should arise which is not acted upon from within the merit system, the civil rights commission may prosecute the violation. This is not to say, however, that an aggrieved employee could by-pass the merit system and lodge his complaint with the civil rights commission or being dissatisfied with how he fared in appeals to the appointing authority and the merit employment commission present his case de novo to the civil rights commission. The latter agency is not constituted to second guess the merit employment commission or to serve as a third level of appeal from the merit commission decisions. Under §19A.14 review of such decisions is obtained by way of certiorari to the district court.

December 20, 1972

SCHOOLS: Apportionment of Assets & Liabilities: §275.29, Code of Iowa, 1971. What is equitable in a given situation is a matter of fact rather than law and not properly the subject of an opinion of this office. (Nolan to Carlson, State Senator and Willits, State Representative, 12/20/72) #72-12-17

The Honorable Reinhold O. Carlson, State Senator; The Honorable Earl M. Willits, State Representative: By separate letters you each presented the following question for an opinion by the Attorney General:

"Are the property owners annexed by another school district, by agreement of the two school boards, obligated to continue to pay for outstanding bonds of the former district and also obligated to pay for outstanding bonds at the time of annexation for the new district? What many of the property owners are concerned about is that this is double taxation, further that they have no privileges or rights in the former school district."

Where territory has been attached to any school district for school purposes there must be an equitable apportionment of all the assets and liabilities. *Albin v. Board of Directors of Independent District of West Branch*, 1882, 58 Iowa 77, 12 N.W. 134. The present statutory provisions governing the reorganization of school districts (Ch. 275, Code of Iowa, 1971) contemplate a plan of division of assets and liabilities by joint agreement on an equitable division of assets and distribution of liabilities

of the affected school corporations or parts thereof. (Section 275.29) What is equitable in a given situation is a matter of fact rather than law and not properly the subject of an opinion by this office.

December 20, 1972

STATE OFFICERS AND DEPARTMENTS: Iowa Board of Medical Examiners: Section 148.5, Code of Iowa, 1971, Chapter 137, Acts of the 64th General Assembly, First Session. The Board of Examiners have broad discretion in the issuance of resident physician's licenses. The Board of Medical Examiners and the advisory committee on physician's assistant programs have the discretion to determine what is an approved program. Chapter 137, Section 7, Sixty-fourth General Assembly, First Session is ambiguous and unenforceable. (Bowles to Saf, Executive Secretary, Iowa Board of Medical Examiners, 12/20/72) #72-12-18

Ronald V. Saf, Executive Secretary, Iowa State Board of Medical Examiners: We are in receipt of your letter of November 16, 1972, in which you request an opinion of this office on the following questions:

"Whether or not the Board of Medical Examiners has the authority to issue a resident physician's license under the provision of Section 148.5, without requiring satisfactory evidence that the applicant has completed one year of internship training in a hospital approved by this Board?"

and:

"What constitutes 'an approved program,' under the provisions of Chapter 137 Laws of the 64th General Assembly, First Session?"

and finally with reference to that same Chapter 137 of the Laws of the 64th General Assembly, First Session:

"Whether or not it is the intention of the legislature that each of the twenty-two (22) institutions seeking program approval be required to file an application with this Board and pay the $50.00 application fee?"

With respect to your first question concerning Section 148.5 of the Code of Iowa, it is the opinion of this office that the Board of Medical Examiners may issue a resident physician's license without any requirement that evidence of internship at an approved hospital be furnished.

Section 148.5 provides in part:

"Any physician who is a graduate of a medical school and is serving only as a resident physician and who is not licensed to practice medicine and surgery in this state shall be required to obtain from the medical examiners a temporary or special license to practice as a resident physician. The license shall be designated 'Resident Physician License' and shall authorize the licensee to serve as a resident only under the supervision of a licensed practitioner of medicine and surgery, in an institution approved for this purpose by the medical examiners. * * *

The medical examiners shall determine in each instance those eligible for this license, whether or not examinations shall be given, and the type of examination. The granting of a resident physician license does not in any way indicate that the person so licensed is necessarily eligible for regular licensure, nor are the medical examiners in any way obligated to so license such individual. The medical examiners shall revoke said license at any time they shall determine either that the caliber of work done by a licensee or the type of supervision being given such licensee does not conform to reasonable standards established by the medical examiners." [Emphasis added]

Clearly this section vests broad direction in the Board as to the issuance of resident physician licenses. The only mandatory requirements set forth in the section are that the applicant be a graduate of a medical school, not licensed to practice medicine and surgery in this state, and will be serving only as a resident physician under the supervision of a physician licensed in this state. No mention whatsoever is made of internship. Also, the Board has broad powers of revocation which would serve to further lessen the necessity for proof of internship.

In regard to the second question, concerning what constitutes an approved program under Chapter 137, First Session, 64th General Assembly, it appears that the legislature has left the specific determination to the discretion and wisdom of the Board of Medical Examiners acting in conjunction with the new authorized advisory committee on physicians' assistant programs.

While leaving it within the Board and Advisory Committee's discretion to determine exactly what will be sufficient to constitute an approved program, the legislature has indicated some basic criteria which must be considered. These basic factors are found in Section 2 of Chapter 137 of the Laws of the Sixty-fourth General Assembly, First Session.

Section 2 reads in part:

" . . . In developing criteria for program approval, the Board shall give consideration to and encourage the utilization of equivalency and proficiency testing and other mechanisms whereby full credit is given to trainees for past education and experience in health fields. The Board shall adopt and publish standards to insure that such programs operate in a manner which does not endanger the health and welfare of patients who receive services within the scope of the program. The Board *shall review the curriculum, faculty and the facilities of such programs and shall issue certificates of approval. . . .*" [Emphasis added]

The legislature has, without specifying the qualitative standards to be applied, indicated what areas must be considered. The Board with its greater expertise in these areas is better qualified to set specific qualitative standards for approval and while the Board must consider those areas specifically set forth by the legislature, it may decide that other areas are also germane to the quality of the total program and give consideration to those areas as well.

In answer to the third question, Section 7 of Chapter 137 provides in part that:

"A fee of ten dollars shall be charged for each application to the board by a physician to supervise each physician's assistant. A fee of fifty dollars shall be charged for each approval initially granted by the board [.] . . . A fee of fifty dollars shall be charged to each applicant seeking program approval by the board."

In reading Section 7 we are unable to determine who is required to pay the fees. This section is worded very ambiguously. It is unclear as to whether a fifty dollar fee is required from each physician's assistant, who have program approval, or if the fee is required from the physician or from the educational institution. Furthermore, the word "applicant" is used confusingly. One could interpret the word "applicant" to mean the one seeking program approval or the one seeking to become a physician's assistant. "Applicant" could even be read as to mean the physician

who is applying to the board to supervise a physician's assistant.

The word "approval" is also used ambiguously. In one sentence in section 7 it states a fifty dollar fee shall be charged *for each approval initially granted.* It is unclear whether the legislature meant that it was the physician's supervision program that is approved or if it is the physician's assistant, himself, that is being approved, and therefore must pay the fifty dollar fee.

Since several parts of section 7 and several individual words are used confusingly or with a dual meaning, we are of the opinion that section 7, as presently worded, is unenforceable due solely to its clouded language.

December 20, 1972

ELECTIONS: Split ticket voting, two or more offices of the same class. §49.96, Code of Iowa, 1971. Method of counting votes where crossover voting occurs in class of two or more identical offices explained. (Haesemeyer to Anderson, Washington County Attorney, 12/20/72) #72-12-26

Mr. Tracy Anderson, Washington County Attorney: This will confirm the advice I gave you over the telephone today that in the following situation votes are cast for all Democratic candidates except "C" and a vote is cast for "A".

☐ REPUBLICAN	☒ DEMOCRATIC
* * *	* * *
For	For
County Supervisor	County Supervisor
(Vote for two)	(Vote for two)
☒ A.	☐ C.
☐ B.	

If the single crossover vote was for "B" instead of "A" there would still be no vote cast for "C".

Our opinion in these respects is consistent with our prior opinion of September 11, 1972, to Secretary of State Synhorst and with §49.96, Code of Iowa, 1973, which provides:

"Where two or more offices of the same class are to be filled at the same election, and all of the candidates for such offices, for whom the voter desires to vote, appear upon his party ticket at the top of which he has marked a cross or check in the circle, he need not otherwise indicate his vote for such candidate; but if the name of any candidate for whom he desires to vote for such office appears upon a different ticket, then as to such group of candidates the cross or check in the circle does not apply and to indicate his choice the voter must place a cross or check in the square opposite the name of each such candidate for whom he desires to vote whether the same appears under such marked circle or not."

December 21, 1972

STATE OFFICERS AND DEPARTMENTS: Water Quality Commission: Chapter 1119, Laws of the 64th General Assembly, Second Session. The provisions of Section 304(h)(D) of the Federal Water Pollution Control Act Amendments of 1972 apply to members of the Water Quality Commission of the Department of Environmental Quality.

(Davis to Orb, Technical Secretary Iowa Water Pollution Control Comm., 12/21/72) #72-12-19

Joseph E. Orb, Technical Secretary, Iowa Water Pollution Control Commission: You have requested an opinion as to the applicability of Section 304(h)(D) of the Federal Water Pollution Control Act Amendments of 1972 to the members of the Water Quality Commission of the Department of Environmental Quality established by Chapter 1119 of the Laws of the 64th General Assembly, Second Session.

The relevant passage of Section 304 of the Federal Act reads:

(h) The Administrator shall . . . (2) within sixty days from the date of enactment of this title promulgate guidelines establishing the minimum procedural and other elements of any State program under section 402 of this Act which shall include: . . .

(D) funding, personnel qualifications, and manpower requirements (including a requirement that no board or body which approves permit applications or portions thereof shall include, as a member, any person who receives or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit)."

The term "significant portion of his income" is defined (for most purposes) as "ten per cent (10%) of gross personal income for a calendar year" in the proposed guidelines issued by the Administrator of the Environmental Protection Agency.

The statutory authority of the Water Quality Commission of the Department of Environmental Quality which is relevant to this question is:

"Sec. 5. Each Commission shall . . .

2. Establish policy for the implementation of all programs under its jurisdiction . . .

4. Adopt, modify or repeal rules and regulations necessary to implement the programs assigned to it . . .

"Sec. 33. The (water quality) commission shall:

2. Establish, modify, or repeal quality standards and effluent standards for the water of the state . . .

3. Establish, modify, or repeal rules and regulations specifying the conditions under which the executive director shall issue, revoke, modify, or deny permits for the installation or operation of disposal systems, or for the discharge of sewage, industrial waste or other wastes, or for the disposal of water wastes resulting from poultry and livestock operations . . .

4. Recognize existing permits for the continuance of every disposal system operating under legal authority. The commission may direct the executive director to modify or revoke such permits in the same manner as other permits."

The sole authority to issue permits relating to water pollution is found in Section 33(3), wherein the executive director is given that authority subject to conditions established by rule of the Water Quality Commission. Further, the Water Quality Commission has the authority to direct the modification or revocation of any permit under Section 33(4).

This latter power, coupled with the powers contained in Section 33(2)

and Section 33(3) leads to the inescapable conclusion that Section 304(h)(D) applies to the members of the Water Quality Commission of the Department of Environmental Quality and in order for the commission to be eligible for certification of compliance with the federal Act, each member or candidate for appointment must demonstrate individually the inapplicability of this exclusion.

December 21, 1972

SCHOOLS: Sale of School Property — §§278.1, 297.18, 297.19 Code of Iowa, 1973. School property directed to be sold by the electors pursuant to §278.1 may be disposed of on such terms as the electors specify. (Nolan to Martinson, Buchanan County Attorney, 12/21/72) #72-12-20

Mr .Kenneth W. Martinson, Buchanan County Attorney: Reference is made to your request for an opinion of the Attorney General relative to the power of the Independence Community School District to sell real property owned by the school district at public auction. The specific questions posed by your letters of July 17, 1972, and August 1, 1972, are as follows:

1. May the board of directors of a community school district which is situated wholly within a city and whose high school average daily attendance is more than 500 pupils, sell school-owned property valued at more than $10,000 at public auction if a ballot proposition specifically authorizing such sale at public auction is approved by a majority of legal voters of the school district at a regular election?

2. If it is determined that a public auction can indeed be conducted on the school-owned properties, would it be valid for the school board to sell the properties *either* at public auction or by sealed bids if a ballot proposition specifically authorizing such exercises of narrow discretion by the school board were approved by the electorate at the regular election?

We are advised by your recent letter that the electorate did in fact authorize the sale of the properties by the school board.

It is our opinion that both questions which you submitted should be answered affirmatively. Under §278.1, Code of Iowa, 1973, which is controlling here, the following appears:

"The voters at the regular election shall have power to:

* * *

"2. Direct the sale, lease, or other distribution of any schoolhouse or site or other property belonging to the corporation, and the application to be made of the proceeds thereof, provided however, that nothing herein shall be construed to prevent the sale, lease, exchange, gift or grant and acceptance of any interest in real or other property by the board of directors without an election to the extent authorized in section 297.22."

In 1960 OAG 177 the Attorney General advised that the school board has the authority to dispose of urban school property without reference to Code §297, but that such disposition can only be made for adequate consideration.

Where the electors of a school district authorize the sale of school

property "for such consideration and upon such terms as may in the judgment of said Board be in the best interest . . .", this office advised that the electors merely recognized that the board had discretionary power within the limits of the law and did not invest the board with powers to deal with this real estate differently than real estate which they were otherwise authorized to sell or lease. Sections 297.18 and 297.19 contemplate that the property to be sold be appraised and that the sale be at the appraised value by public sale to the highest bidder.

If the electorate authorizes such a sale either by public auction or sealed bids, the school property may be disposed of upon such terms as the electors direct upon the proposition submitted to them. Accordingly, if the electors specifically authorize sale of school property at public auction, sale by sealed bid would not be authorized and visa versa. On the other hand, if the electors authorize sale of such property either by public auction or by sealed bid, the board might employ either method of sale.

December 26, 1972

SCHOOLS: Vocational Education Reimbursement — Ch. 45, Acts, 64th General Assembly, First Session. School districts and area schools may be reimbursed under Ch. 45, Acts, 64th G.A., First Session, for developing and conducting vocational programs. A school district may enter into an agreement for the area school to provide such instruction for the high school students, but the school district would not be entitled to reimbursement for the students tuitioned to the area school. (Nolan to Smith, Deputy State Superintendent, 12/26/72) #72-12-21

Dr. Richard N. Smith, Deputy State Superintendent, Department of Public Instruction: This is written in reply to your request for an opinion of the Attorney General on the following question:

Whether under Chapter 45, Section 1(3), Acts of the 64th G.A., which appropriates funds "for aid to school districts and area schools for development and conduct of programs of vocational education in accordance with the provisions of Chapter 258 and Chapter 280A of the Code", or other statutes, a school district can enter into an agreement with a merged area, whereby the area school would provide a vocational education program for the students enrolled in the school district high school, with the area school then receiving reimbursement from state and federal funds that would be otherwise payable to the school district if it operated its own vocational program in its high school.

I am of the opinion that one or more school districts may legally enter into an agreement with a merged area pursuant to statutory authority contained in §280A.1(5), §282.7 and §28E.4, Code of Iowa, 1971. While such agreement may provide for the students from the various school district high schools to be accepted for vocational training, I find no authority for the school district to claim reimbursement from state and federal funds that would otherwise be payable to such school district if it operated its own vocational program in its high school and to pay over such funds to the area school. Section 282.7 provides that the "tuition for a child enrolled in a vocational program outside of his own school district shall be paid by the resident district" but it is silent as to reimbursement.

Section 1(3), Ch. 45, Acts of the 64th G.A., appropriates funds to both area schools and secondary schools "for aid to school districts and area

schools for development and the conduct of programs of vocational education in accordance with the provisions of chapted two hundred fifty-eight (Ch. 258) and chapter two hundred eighty A (Ch. 280A) of the Code, and further, to purchase instructional equipment for vocational and technical courses of instruction in such schools".

Under §258.5, in order to qualify for reimbursement of expenditures, a school corporation must maintain an "approved vocational school, department, or classes in accordance with the rules and regulations established by the state board and the state plan for vocational education". When such plan is approved, the state board shall "reimburse such school corporation at the end of the fiscal year for its expenditures for salaries and authorized travel of vocational teachers" (§258.5). The statutory provision does not appear to authorize reimbursement for the tuition paid by a resident school district for the program furnished to a child outside of that district. Therefore, it is our view that state and federal funds otherwise payable to a school district if it operated its own vocational program in its high school are not available to that school for the purpose of further reimbursing an area school for the maintenance of a program to which high school students are tuitioned. However, an area school providing such a program would apparently be entitled to seek reimbursement for its expense from the appropriation made to area schools.

December 26, 1972

COUNTIES AND COUNTY OFFICERS: Courthouse — §§332.3(15), 444.10, Code of Iowa, 1971. The court expense fund cannot be used to defray the cost of remodeling the courthouse to provide additional courtroom space. (Nolan to Goetz, Johnson County Attorney, 12/26/72) #72-12-22

Mr. Carl J. Goetz, Johnson County Attorney: This is written in reply to your request for an opinion of the Attorney General on a matter involving the proposed plan to remodel and construct additional courtroom space within the Johnson County Courthouse at a probable expenditure in excess of $50,000. According to your letter it has been proposed that the Board of Supervisors levy the additional taxes to increase the Court Fund with the intention of paying these expenditures from the Court Fund. The specific questions raised by your request are as follows:

"1. Can the Court Expense Fund be used to provide additional courtroom space by remodeling and reconstruction of present space?

"2. Does Section 332.3(15) limit expenditures for the purpose of providing courtroom space to the General Fund?

"3. In the event that Court Expense Fund can be used for the purpose of providing courtroom space is this expenditure subject to the limitations set forth in Chapter 345 of the Code of Iowa?"

In answer to your first question, it is the opinion of this office that the Court Expense Fund cannot be used to provide additional courtroom space.

The duty to furnish quarters for the court is imposed upon the Board of Supervisors under §332.3(15). Supervisors are authorized under §345.1 to make necessary additions or to remodel or reconstruct a court-

house without submitting such proposal to the voters at a general or special election when the funds are available in the General Fund and the project may be accomplished without the levy of additional taxes and the probable cost will not exceed $50,000.'

Under §444.10, Code of Iowa, 1971, the county may create a fund to be known as the Court Expense Fund where ordinary county revenues are found to be insufficient to pay all expenses incident to the maintenance and operation of the courts. However, such fund is to be used only for the purpose of paying expenses chargeable to the court. The Court Expense Fund was not intended as an aid to or part of the County General Fund but was intended to provide a additional tax levy to be used as an auxiliary fund only when necessary to supplement the appropriations for court use. 1948 OAG 224.

Accordingly, it is our view that the remodeling and reconstruction to create additional courtroom space is not properly taxable against the Court Expense Fund. 1932 OAG 81.

The second question you presented is answered affirmatively, for reasons stated above.

Inasmuch as the Court Expense Fund is not available for providing courtroom space, it appears that your third question is moot.

December 27, 1972

ELECTIONS — Effect of Conviction in Foreign Country on eligibility to vote and hold public office. Article II, §5, Constitution of Iowa, §§43.17, 57.1, 331.1, Code of Iowa, 1973. Although each case would have to be decided on its own particular facts, normally a person convicted of an infamous crime in Canada would not be eligible to vote or hold office in Iowa. This is not to say however that all foreign convictions would carry with them this disqualification. It is conceivable that where the criminal laws of a country do not afford an accused with even the most rudimentary due process the tribunal hearing a challenge to the right of an individual convicted in such country to hold office in Iowa might well conclude that a conviction in these circumstances was insufficient for the purpose of Article II, §5. (Haesemeyer to Goetz, Johnson County Attorney, 12/27/72) #72-12-23

Mr. Carl J. Goetz, Johnson County Attorney: You have requested an opinion of the Attorney General with respect to the question of whether or not a person who has been convicted in Canada of an offense denominated by Canadian statutes as Break, Enter and Theft is eligible to vote and hold public office in this state.

While we understand that you have a particular situation and individual in mind we will not presume to adjudicate the merit of that case but since in any given case, especially where a foreign conviction is involved, there are going to be factual questions involved, we will confine ourselves to the bare legal question you present namely, assuming that an individual has in fact been regularly convicted of Break, Enter and Theft in Canada, may that person vote and hold office in the state of Iowa.

Article II, §5, Constitution of Iowa, provides:

No idiot, or insane person, or person convicted of any infamous crime, shall be entitled to the privilege of an elector."

Normally, to be eligible for public office one must be a qualified elector. See e.g. §331.1, Code of Iowa, 1971, (County Supervisors). Moreover, candidates in the primary election must make and file an affidavit that they are eligible for the office they are seeking. §43.17. A violation of Chapter 43 is punishable by a fine of not less than one hundred dollars nor more than five hundred dollars or imprisonment in the county jail not less than thirty days nor more than six months. §43.120.

A recent note in 39 A.L.R. 3d entitled "Elections: Effect of Conviction Under Federal Law, or Law of Another State or Country, on Right to Vote or Hold Public Office" states:

"A careful search has disclosed no cases dealing with the effect of a conviction of a crime in another country on the individual's right to vote or hold public office in one of the states." (39 A.L.R. 3d, 303, 304 Footnote 3)

However, there are sources that seem to indicate that a foreign conviction would disqualify a citizen of these rights. 25 Am. Jur. 2d 782 §94 *Elections*, discusses disqualification but this reference fails to cite a case supporting their contention advocating disqualification for a foreign conviction. A note at 149 A.L.R. 1067, refers to "foreign countries" and disqualification from voting but, the case the author of the annotation was considering involved a federal court conviction and the opinion fails to mention foreign jurisdictions, see *State ex. rel. Barrett v. Satorious*, 1943, 351 Mo. 1237, 149 A.L.R. 1067, 175 S.W. 2d 787; *State v. Langer*, 1934, 65 N.D. 68, 256 N.W. 377.

Offering some assistance to this matter, a 1940 Attorney General's opinion stated that any person charged with and convicted of the commission of a crime where punishment may be imprisonment in a penitentiary or men's reformatory is a "person convicted of an infamous crime", 1940 OAG p. 368. This definition was also used in a 1916 action, *Blodgett v. Clarke*, 1916, 177 Iowa 575, 159 N.W. 243. In 1948 another Attorney General's opinion reiterated the earlier opinion's definition of an "infamous crime", 1948 OAG p. 270. The latest case dealing with the definition arose in 1957 in *State ex. rel. Dean v. Haubrich*, 1957, 248 Iowa 978, 83 N.W. 2d 451. In that case, the court merely reinforced these prior decisions and opinions and held that an "infamous crime" is one that is punishable by imprisonment in the penitentiary. Under present Iowa law, the crime of Breaking and Entering is punishable by imprisonment in the penitentiary, Chapter 708, Code of Iowa, 1971. Thus, there can be no doubt that when committed in Iowa, Breaking and Entering is an "infamous crime." Under Canadian law the offense of Breaking and Entering is punishable by imprisonment in a penitentiary for life when the subject of the breaking is a dwelling house and 14 years for other places. This certainly would indicate that the Canadian offense is also an "infamous crime". (See *Revised Statutes of Canada*, Vol. II, 1970, Ch. C-34 Crim. Code §306).

A 1912 Attorney General's opinion states that Art. II, §5 *is not limited to convictions in state court;* even though the opinion was specifically dealing with federal jurisdictions, there seems to be ample reason to conclude that the section should also apply to convictions in foreign courts. It hardly seems consistent to take away the right to vote or hold office of an Iowa citizen for the conviction of an "infamous crime" in

any one of the states of the Union and any federal court but not to disqualify him for a conviction in a foreign land, especially a neighboring country such as Canada which shares our common law heritage.

The 1940 Attorney General's opinion cited above also stated that where a person is charged with and convicted of a crime for which punishment may be imprisonment in a penitentiary but the court suspends sentencing during good behavior, the party is still deprived of his privileges as an elector, 1940 OAG p. 368. The 1948 Attorney General's opinion also cited above, found that one convicted of a crime punishable by imprisonment in a penitentiary is not a qualified elector within the meaning of the state constitution and therefore is not qualified to hold office, *although punishment may not actually be inflicted*, 1948 OAG p. 270. Several jurisdictions have held that a guilty plea and a probationary period still disqualifies a citizen from voting or holding office: *United States v. Watkinds*, 1881, 7 Sawy. 85, 6F. 152, (9th Cir. Ct. Oregon); *Stephens v. Toomey*, 1959, 51 Cal. 2d 864, 338 P 2d 182; and *People v. Weinberger*, 1964, 21 A.D. 2d 353, 251 N.Y.S. 2d 790.

It might also be noted that in *State ex. rel. Dean v. Haubrich*, supra., the court held that the election of an unqualified candidate is a nullity.

Consistent with this, §57.1 of the Iowa Code provides in relevant part:

"The election of any person to any county office . . . may be contested by any person eligible to such office . . . and the grounds therefore shall be as follows: . . . 3. That the incumbent has been *duly convicted* of an infamous crime before the election, and the judgment has not been reversed, annulled, or set aside, nor has the incumbent been pardoned, at the time of the election." (Emphasis added.)

Accordingly, it is our opinion that a person who has been convicted of an infamous crime in Canada is not eligible to vote or hold office in Iowa. However, as we said at the outset, each case must be considered on its particular facts. We are not prepared to say that all foreign convictions of infamous crimes would disqualify an Iowa citizen from public office.

It is conceivable that where the criminal laws of a country do not afford an accused with even the most rudimentary due process the tribunal hearing a challenge to the right of an individual convicted in such country to hold office in Iowa might well conclude that a conviction in these circumstances was insufficient for the purpose of Article II, §5.

December 28, 1972

STATE OFFICERS AND DEPARTMENTS—Commission on Alcoholism. Contract with county for treatment and rehabilitation of alcoholics authorized. §§123B.1, 123B.4, 230.4, Code of Iowa, 1971. The Iowa State Commission on Alcoholism may contract with Polk County for the treatment and rehabilitation of alcoholics. (Nolan to O'Hara, Acting Director Iowa State Commission on Alcoholism, 12/28/72) #72-12-24

Mr. G. Stuart O'Hara, Acting Director, Iowa State Commission on Alcoholism: This is written in response to your request for an Attorney General's opinion as to whether it would be legal for the Iowa State Commission on Alcoholism to contract with the Polk County Board of Supervisors for the treatment and rehabilitation of alcoholics. The plan contemplates a contract whereby Polk County would establish a down-

town service center in the City of Des Moines and provide counseling and referral services as well as treatment and rehabilitation for alcoholics.

Chapters 123A and 123B, Code of Iowa, 1971, are applicable to this situation. The provisions of these chapters do authorize the contract procedure outlined by your letter, if the proposed service center qualifies as a "facility" as defined in §123B.1(2). Section 123B.4 provides for the *Commission* to contract with a care-giving facility.

In an opinion dated August 11, 1969, 1970 OAG 217, the Attorney General advised that alcoholics may be treated at a local mental health center. A county having a population in excess of 35,000 may establish such a center under §230.24, Code, 1971.

It should be noted that §123B.4 requires the Commission to formulate, adopt and promulgate rules pursuant to Ch. 17A, Code, setting minimum qualifications for a "qualified facility" prior to allocating funds to it by contract pursuant to §123B.4.

December 29, 1972

ELECTIONS: Vacancies on city councils; manner of filling. §§69.8, 69.13, 368A.1, Code of Iowa, 1973. Vacancies on city councils should be filled by the remaining members. A special election is not authorized. (Haesemeyer to Andersen, State Representative, 12/29/72) #72-12-25

The Honorable Leonard C. Andersen: By your letter of December 22, 1972, you have requested an opinion of the Attorney General with respect to the following:

"When a vacancy appears on the City Council, either by death or resignation, before the end of the term, can the remaining council members appoint the successors, or does there have to be a special election?

"The question arises here in Sioux City as two council members were elected to other offices in the November election and have resigned their council seats, effective January 1st."

In our opinion the remaining council members can and should appoint successors to take the places of the two members who have resigned. There is no provision for a special election to fill these offices because the only statutory authorization for such an election was repealed this year. Section 69.13, Code of Iowa, 1971, which was repealed effective April 8, 1972, by Section 35, Chapter 1025, 64th G.A. (Second Session) formerly provided:

"If a vacancy occurs in an elective office in a city, town, or township ten days, or a county office fifty days, or any other office sixty days, prior to a general election, it shall be filled at such election, unless previously filled at a special election."

Of course §69.13 would not have applied to the situation you described in any event because the vacancies do not occur within ten days prior to a general election.[1] In any event with the repeal of §69.13 of the 1971 Code the only provision remaining in Chapter 69 which provides for special elections to fill vacancies authorizes such special elections only for the offices of Representative in Congress or Senator or Representative in the General Assembly. There being no statutory provision for a

special election to fill municipal offices we must conclude that no special election can be held. *Expressio Unius Est Esclusio Alterius.*

Apart from the foregoing however there is ample authority both in the statutes of this state, prior opinions of the Attorney General and decisions of the Iowa Supreme Court to sustain our conclusion that vacancies on a city council are properly filled by appointment by the remaining members on the city council. §368A.1, Code of Iowa, 1973, provides in relevant part:

"In all municipal corporations, except when otherwise provided by laws relating to a specific form of a municipal government, the council shall:

* * *

"Elect by ballot persons to fill vacancies in offices not filled by election

---

[1] The term general election as used in §69.13 insofar as cities and towns is concerned refers not to the general election for federal, state and county officers held in November of even numbered years but to the time set by law for the holding of municipal elections which under §363.8, Code of Iowa, 1973, is the Tuesday next after the first Monday in November of odd numbered years.

by the council, and the person receiving a majority of the votes of the whole number of members shal lbe declared elected to fill the vacancy.

* * *"

State ex. rel. Dean v. Haubrich, 1957, 248 Iowa 978, 83 N.W.2d 451, was a case involving a situation where a mayor was disqualified from holding office by reason of his conviction of an infamous crime.

In its opinion the court states:

"On April 20, 1956, at a special meeting of the town council of Mapleton a resolution was passed stating defendant was not eligible to be elected as mayor, and the office was declared vacant. There was no harm in the adoption of the resolution to this effect, but it had no legal significance. Defendant's election and qualification were nullities and the office was already vacant. The previous mayor had not qualified as a holdover. In the same resolution the council proceeded to fill the vacancy, *as they now had a right to do.*"

The court then went on to quote the text of §368A.1(8) of the Code. It is thus evident that the Iowa Supreme Court considered §368A.1(8) as authorizing town councils to fill vacancies in their own ranks.

In an earlier case, *City of Nevada v. Slemmons*, 1953, 244 Iowa 1068, 59 N.W.2d 793, 43 A.L.R.2d 693, the Iowa Supreme Court decided that the provision in §368A.1(8) that the person receiving a majority of the votes of the "whole number of members" shall be declared elected to fill the vacancy was intended to relate to "whole *remaining* members" of the council after the vacancy and not the "whole number of members" originally elected.

The court in *City of Nevada v. Slemmons*, supra., also rejected the argument advanced by appellees that under Article IV §10, Constitution of Iowa, the vacancy should be filled by the Governor. The court simply noted that that constitutional provision only came into play where no

mode was provided by the Constitution and Laws for filling such vacancies. And that what is now §368A.1(8) did provide such a mode.

It is true that Chapter 69 does not specify the manner and by whom vacancies in city and town offices are to be filled in the place where one would normally expect it, to wit §69.8. However, as we have seen, the omission is filled by §368A.1(8). In addition to the Iowa Supreme Court decisions referred to above, there are a number of opinions of the Attorney General all of which indicate that a city council is on sound ground in filling vacancies in its own membership. 1909 OAG p. 104, 1909 OAG p. 276, 1909 OAG p. 358, 1910 OAG p. 157.

The recently enacted Home Rule For Cities bill, Chapter 1088, 64th G.A., Second Session (1972) is probably not relevant to any discussion of the question you raised because the provisions of that act will not become effective until July 1, 1974. But in any event, it is worth noting that §59(2) provides:

"A vacancy in an elective city office during a term of office must be filled by the council for the period of time until the next regular city election."

I trust the foregoing answers the questions you have raised.

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