State of Iowa
1994

FIFTIETH BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

BIENNIAL PERIOD ENDING DECEMBER 31, 1994

BONNIE CAMPBELL

Attorney General

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ATTORNEYS GENERAL OF IOWA

NAME	HOME COUNTY	SERVED YEARS
David C. Cloud	Muscatine	1853-1856
Samuel A. Rick	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	1967-1979
Thomas J. Miller	Clayton	1979-1991
Bonnie J. Campbell	Polk	1991-1994

PERSONNEL OF THE DEPARTMENT OF JUSTICE

PERSONNEL 1993-1994 ADMINISTRATIVE SERVICES

Bonnie J. Campbell, 1/91-1/95 ..... Attorney General
JD, Drake, 1984
Gordon E. Allen, 8/82- ..... Deputy Attorney General
JD, Iowa, 1972
Charles J. Krogmeier, 5/86- ..... Executive Deputy Attorney General
JD, Drake, 1974
Elizabeth M. Osenbaugh, 1/79-2/94 ..... Deputy Attorney General
JD, Iowa, 1971
John R. Perkins, 12/72-4/93 ..... Deputy Attorney General
JD, Iowa, 1968
Julie F. Pottorff, 7/79- ..... Deputy Attorney General
JD, Iowa, 1978
Roxann M. Ryan, 9/80- ..... Deputy Attorney General
JD, Iowa, 1980
Elisabeth C. Buck, 2/91- ..... Administrator
Julie Fleming, 8/88- ..... Executive Officer
Robert P. Brammer, 11/78- ..... Executive Officer
William C. Roach, 1/79-5/93 ..... Communications Director
Clark R. Rasmussen, 9/92- ..... Program Director
Karen A. Redmond, 10/80- ..... Budget Analyst
Marilyn Chiodo, 2/91- ..... Personnel Technician
Donald Schaefer, 11/91- ..... Data Process Specialist
Michael N. Elings, 9/94- ..... Data Process Specialist
Jane A. McCollom, 10/76- ..... Administrative Assistant
Julie E. Stauch, 7/92- ..... Administrative Assistant
Joni M. Klaassen, 9/85- ..... Administrative Assistant
Cathleen M. White, 2/89- ..... Legal Secretary
Diane Dunn, 10/88- ..... Legal Secretary
Grace Armstrong, 7/89 ..... Accounting Clerk
Jennifer Coolidge, 6/92- ..... Clerk

AREA PROSECUTIONS

Harold A. Young, 7/75- ..... Division Director
JD, Drake, 1967
Virginia D. Barchman, 10/86- ..... Assistant Attorney General
JD, Iowa, 1979
Kathleen M. Deal, 5/91-12/94 ..... Assistant Attorney General
JD, Drake, 1980

Robert J. Glaser, 7/86- ..... Assistant Attorney General
JD, Creighton, 1978
James E. Kivi, 2/80- ..... Assistant Attorney General
JD, Iowa 1975
Douglas E. Marek, 8/89- ..... Assistant Attorney General
JD, Drake, 1984
Thomas H. Miller, 10/85- ..... Assistant Attorney General
JD, Iowa, 1975
Thomas E. Noonan, 6/89- ..... Assistant Attorney General
JD, Iowa, 1982
Charles N. Thoman, 7/84- ..... Assistant Attorney General
JD, Creighton, 1976
Richard A. Williams, 7/75- ..... Assistant Attorney General
JD, Iowa, 1971
Connie L. Anderson Lee, 12/76- ..... Legal Secretary

CIVIL RIGHTS UNIT

Richard R. Autry, 9/86- ..... Assistant Attorney General
JD, Drake, 1986
Teresa Baustian, 4/81- ..... Assistant Attorney General
JD, Iowa, 1979

CONSUMER ADVOCATE

James R. Maret, 4/72- ..... Consumer Advocate
LLB, University of Missouri, 1963
David R. Conn, 9/78-10/94 ..... Attorney 3
JD, University of Iowa, 1978
Daniel J. Fay, 4/66- ..... Attorney 3
JD, University of Iowa, 1965
William A. Haas, 10/84- ..... Attorney 3
JD, Drake University, 1982
Alice J. Hyde, 1/81- ..... Attorney 3
JD, University of Iowa, 1978
Ronald C. Polle, 8/81- ..... Attorney 3
JD, Drake University, 1979
Ben A. Stead, 8/81- ..... Attorney 3
JD, University of Kansas, 1974
Leo J. Steffen, 10/72- ..... Commerce Solicitor
JD, University of Iowa, 1962
Gary D. Stewart, 7/74- ..... Attorney 3
JD, University of Iowa, 1974

Alexis K. Wodtke, 6/82-.....Attorney 3
J.D., Drake University, 1978
Christine A. Collister, 5/88-.....Utility Administrator I
Mark E. Condon, 11/88- .....Utility Specialist
Phyllis C. Costa, 11/90-.....Senior Utility Analyst
Bethanne H. Densmore, 11/92-12/93 .....Utility Analyst I
Charles E. Fuhrman, 9/81- .....Utility Administrator I
Tara Ganpat-Puffett, 11/89-6/93 .....Utility Analyst II
Dawn M. Geiger, 9/93- .....Utility Analyst II
David S. Habr, 10/87-.....Utility Administrator II
Joyette D. Henry, 4/88-.....Senior Utility Analyst
Fasil Kebede, 3/87- .....Utility Specialist
Melody A. Lester, 5/94-.....Utility Analyst I
Chi Li, 9/93- .....Senior Utility Analyst
Joseph W. Murphy, 6/77-.....Utility Administrator I
Sheila A. Parker, 6/88-.....Senior Utility Analyst
Xiaochuan (Larry) Shi, 3/90- .....Utility Reg. Engineer II
Deborah L. Stephens, 12/92-5/94.....Senior Utility Analyst
Brian W. Turner, 7/82- .....Utility Specialist
Gregory Vitale, 8/85-.....Utility Specialist
Ying Yan, 9/93-.....Senior Utility Analyst
Karen M. Goodrich-Finnegan, 7/76- .....Secretary III
Ann M. Kreager, 11/84-.....Secretary II
Sheila M. Maher, 11/81-9/93.....Secretary II
Rose M. Reeder, 8/94- .....Secretary I

CONSUMER PROTECTION

Steven M. St. Clair, 5/87- .....Division Director
JD, Iowa, 1978
William L. Brauch, 7/87-.....Assistant Attorney General
JD, Iowa, 1987
Karen B. Doland, 7/90- .....Assistant Attorney General
JD, Iowa, 1989
Raymond H. Johnson, 7/87-.....Assistant Attorney General
JD, Iowa, 1986
Peter R. Kochenburger, 8/88-3/93.....Assistant Attorney General
JD, Harvard, 1986
Chris T. Odell, 7/90-.....Assistant Attorney General
JD, Gonzaga, 1978
Stephen E. Reno, 7/89-.....Assistant Attorney General
JD, Drake, 1981
Carmel A. Benton, 9/89- .....Investigator
Harry E. Crist, 7/85- .....Investigator
Lise D. Ludwig, 5/85- .....Investigator
Holly G. Merz, 10/88-.....Investigator
Debra A. Moore, 12/84- .....Investigator
Norman Norland, 1/80-.....Investigator

John H. Pederson, 8/91-.....Investigator
Barbara A. White, 8/90-.....Investigator
Janice M. Bloes, 3/78-.....Legal Secretary
Katherine Gray, 3/84-.....Legal Secretary
Sandra J. Kearney, 7/90-.....Legal Secretary
Vicki S. McDonald, 8/94-.....Legal Secretary
Marilyn W. Rand, 10/69-.....Legal Secretary
Judy A. Fast, 7/91-.....Secretary/Receptionist
Dorene Stevens, 5/94-.....Secretary/Receptionist

CRIME VICTIM ASSISTANCE

Martha J. Anderson, 7/89-.....Program Director
Kelly J. Brodie, 7/89-.....Deputy Director
Virginia W. Beane, 6/89-.....Program Planner
Robin Ahnen-Cacciatore, 2/91-.....Investigator
Ann M. Cutts, 8/94-.....Investigator
Alison E. Sotak, 7/92-.....Investigator
Stephen E. Switzer, 12/89-.....Investigator
Ruth C. Walker, 2/79-.....Investigator
Melissa Miller, 1/88-.....Legal Secretary
Judith Webb, 7/94-12/94.....Legal Secretary

CRIMINAL APPEALS

Ann E. Brenden, 3/85-.....Division Director
JD, Drake, 1981
Amy M. Anderson, 7/88-1/94.....Assistant Attorney General
JD, Iowa, 1988
Richard J. Bennett, 6/86-.....Assistant Attorney General
JD, Iowa, 1978
Martha E. Boesen, 7/91-.....Assistant Attorney General
JD, Notre Dame, 1991
Bridget A. Chambers, 2/90-.....Assistant Attorney General
JD, Iowa, 1985
Robert P. Ewald, 2/81-.....Assistant Attorney General
JD, Washburn, 1980
Thomas G. Fisher, 4/91-.....Assistant Attorney General
JD, Iowa, 1986
Julie A. Halligan-Brown, 7/87-.....Assistant Attorney General
JD, Iowa, 1987

Thomas D. McGrane, 6/71- ..... Assistant Attorney General
JD, Iowa, 1971
Angelina Smith, 7/94- ..... Assistant Attorney General
JD, Iowa, 1994
Sheryl A. Soich, 2/88- ..... Assistant Attorney General
JD, Drake, 1987
Mary E. Tabor, 8/93- ..... Assistant Attorney General
JD, Iowa, 1991
Thomas S. Tauber, 7/89- ..... Assistant Attorney General
JD, Drake, 1989
Susan M. Crawford, 6/94 ..... Law Clerk
Christy J. Fisher, 1/67- ..... Legal Secretary
Shonna K. Davis, 5/81- ..... Legal Secretary
Cynthia L. Jacobe, 8/82- ..... Legal Secretary
Mary L. Robertson, 3/92- ..... Legal Secretary

ENVIRONMENTAL LAW

David R. Sheridan, 5/87- ..... Division Director
JD, Iowa, 1978
Timothy D. Benton, 7/77- ..... Assistant Attorney General
JD, Iowa, 1977
David L. Dorff, 4/85- ..... Assistant Attorney General
JD, Drake, 1982
Robert C. Galbraith, 4/91- ..... Assistant Attorney General
JD, Minnesota, 1971
Dean A. Lerner, 2/83- ..... Assistant Attorney General
JD, Drake, 1981
Michael H. Smith, 9/84- ..... Assistant Attorney General
JD, Iowa, 1977
Michael P. Valde, 3/91- ..... Assistant Attorney General
JD, Iowa, 1976
Chester J. Culver, 1/91- ..... Investigator
Richard C. Heathcote, 9/89- ..... Investigator
Colleen Baker, 1/92- ..... Legal Secretary
Ronda K. Tucker, 3/91- ..... Legal Secretary

LICENSING AND ADMINISTRATIVE LAW

Pamela D. Griebel, 4/91- ..... Division Director
JD, Iowa, 1977

Heather L. Adams, 7/94- ..... Assistant Attorney General
JD, Iowa, 1994
Andrew R. Anderson, 7/94- ..... Assistant Attorney General
JD, Iowa, 1992
Sherie Barnett, 7/83- ..... Assistant Attorney General
JD, Drake, 1981
Joseph D. Condo, 12/92-1/94, 11/94- ..... Assistant Attorney General
JD, Southern California, 1991
Lynette A. Donner, 10/86-10/93 ..... Assistant Attorney General
JD, Drake, 1984
Grant K. Dugdale, 5/91- ..... Assistant Attorney General
JD, Iowa, 1987
Linny C. Emrich, 3/94- ..... Assistant Attorney General
JD, Iowa, 1985
Jeffrey D. Farrell, 6/91- ..... Assistant Attorney General
JD, Iowa, 1989
Scott M. Galenbeck, 1/84- ..... Assistant Attorney General
JD, Iowa 1974
Bruce Kempkes, 9/86-11/92, 4/94- ..... Assistant Attorney General
JD, Iowa, 1980
Maureen McGuire, 7/83- ..... Assistant Attorney General
JD, Iowa, 1988
Christie J. Scase, 7/85- ..... Assistant Attorney General
JD, Drake, 1985
Donald G. Senneff, 7/85- ..... Assistant Attorney General
JD, Iowa, 1967
Anuradha Vaitheswaran, 5/88- ..... Assistant Attorney General
JD, Iowa, 1984
Rose A. Vasquez, 9/85- ..... Assistant Attorney General
JD, Drake, 1985
Lynn M. Walding, 7/81- ..... Assistant Attorney General
MA, JD, Iowa, 1981
Theresa O. Weeg, 10/81- ..... Assistant Attorney General
JD, Iowa, 1981
Traci L. Weldon, 3/94- ..... Assistant Attorney General
JD, Drake, 1990
Debra K. West, 11/91-2/94 ..... Assistant Attorney General
JD, Drake, 1990
James S. Wisby, 10/88- ..... Assistant Attorney General
JD, Iowa, 1968
Roxanna Dales, 9/89- ..... Legal Secretary
Ruth Manning, 9/89- ..... Legal Secretary
Lauren Marriott, 8/84- ..... Legal Secretary

PROSECUTING ATTORNEYS TRAINING COUNCIL

Constance C. Welu, 7/93-6/94 ..... Executive Director, Training Coord
JD, Drake, 1986
David J. Welu, 8/94- ..... Executive Director, Training Coord
JD, Drake, 1978
Kevin B. Struve, 7/86- ..... Assistant Attorney General
JD, Iowa, 1979
Edith A. Westfall, 4/92-9/94 ..... Assistant Attorney General
JD, Creighton, 1978
Peggy L. Baker, 9/94- ..... Legal Secretary
Ann M. Clary, 1/88- ..... Legal Secretary
Carol H. Litke, 5/92-3/93 ..... Legal Secretary
Karen M. Snater, 11/91-9/94 ..... Legal Secretary

REGENTS AND HUMAN SERVICES

John M. Parmeter, 11/84-6/94 ..... Division Director
JD, Drake, 1982
Jill A. Cirivello, 6/93- ..... Assistant Attorney General
JD, Hamline, 1991
Kathryn J. Delafield, 3/91- ..... Assistant Attorney General
JD, Iowa, 1982
Barbara E. Galloway, 3/91- ..... Assistant Attorney General
JD, Iowa, 1976
Mark L. Greiner, 7/94- ..... Assistant Attorney General
JD, Drake, 1994
Christina F. Hansen, 3/91- ..... Assistant Attorney General
JD, Drake, 1987
Daniel W. Hart, 7/85- ..... Assistant Attorney General
JD, Iowa, 1983
Mark A. Haverkamp, 6/78- ..... Assistant Attorney General
JD, Creighton, 1976
Patricia M. Hemphill, 2/83- ..... Assistant Attorney General
JD, Drake, 1981
Debora L. Hewitt, 12/92- ..... Assistant Attorney General
JD, Drake, 1991

Janet L. Hoffman, 8/94- ..... Assistant Attorney General
JD, Iowa, 1990
Robert R. Huibregtse, 6/75- ..... Assistant Attorney General
LLB, Drake, 1963
Dawn E. Mastalir, 12/92-5/93 ..... Assistant Attorney General
JD, Iowa, 1991
Kathrine Miller-Todd, 1/85- ..... Assistant Attorney General
JD, Wake Forest, 1974
Michael J. Parker, 7/91- ..... Assistant Attorney General
JD, Drake, 1989
Charles K. Phillips, 8/84- ..... Assistant Attorney General
JD, Columbia (NY), 1982
M. Elise Pippin, 3/91-10/91, 4/94- ..... Assistant Attorney General
JD, Louisville, 1980
Richard E. Ramsay, 12/91- ..... Assistant Attorney General
JD, Drake, 1990
Stephen C. Robinson, 8/73- ..... Assistant Attorney General
JD, Drake, 1962
Beth A. Scheetz, 12/91- ..... Assistant Attorney General
JD, Drake, 1990
Judy A. Sheirbon, 7/89- ..... Assistant Attorney General
JD, Iowa, 1986
Mary K. Wickman, 8/89- ..... Assistant Attorney General
JD, Iowa, 1986
Marne E. Woods, 6/93- ..... Assistant Attorney General
JD, Drake, 1991
Steven K. Young, 7/91- ..... Assistant Attorney General
JD, Drake, 1981
Forrest Guddall, 7/94- ..... Law Clerk
Dian M. Gottlob, 9/93- ..... Law Clerk Lori
Lori E. Kern, 11/91- ..... Legal Secretary
Sharon R. O'Steen, 8/89-6/94 ..... Legal Secretary
Shannon P. Wineland, 7/94- ..... Legal Secretary

REVENUE

Harry M Griger, 1/67-8/71; 12/71- ..... Division Director
JD, Iowa, 1966
Lucille M. Hardy, 5/86- ..... Assistant Attorney General
JD, Iowa, 1985
Gerald A. Kuehn, 9/71- ..... Assistant Attorney General
JD, Drake, 1967
Valencia V. McCown, 6/83- ..... Assistant Attorney General
JD, Iowa, 1983
Marcia E. Mason, 7/82- ..... Assistant Attorney General
JD, Iowa, 1982
James D. Miller, 12/79-4/82;10/86- ..... Assistant Attorney General
JD, Drake, 1977

Rebecca A. Griglione, 3/87-8/87; 1/93-.....Legal Secretary
Connie M. Larson, 6/89-.....Legal Secretary

SPECIAL LITIGATION

Craig A. Kelinson, 12/86-.....Division Director
JD, Iowa, 1976
James F. Christenson, 7/90-.....Assistant Attorney General
JD, Iowa, 1990
Kristin W. Ensign, 10/88-.....Assistant Attorney General
JD, Drake, 1983
William A. Hill, 8/90-.....Assistant Attorney General
JD, Drake, 1989
Robin A. Humphrey, 8/90-.....Assistant Attorney General
JD, Drake, 1985
Greg H. Knoploh, 5/87-.....Assistant Attorney General
JD, Iowa, 1978
Charles S. Lavorato, 9/83-.....Assistant Attorney General
JD, Drake, 1975
Layne M. Lindebak, 7/79-.....Assistant Attorney General
JD, Iowa, 1979
Joanne L. Moeller, 8/84-.....Assistant Attorney General
JD, Iowa, 1984
Stephen H. Moline, 6/86-5/89, 7/90-.....Assistant Attorney General
JD, Iowa, 1986
Shirley A. Steffe, 9/79-.....Assistant Attorney General
JD, Iowa, 1979
Suzie Berregaard Thomas, 7/87-.....Assistant Attorney General
JD, Drake, 1987
Robert D. Wilson, 12/86-.....Assistant Attorney General
JD, Iowa, 1981
Connie D. Hadaway, 9/89-.....Investigator
Marjorie A. Leeper, 7/82-.....Investigator
Karen M. Likens, 8/77-3/93.....Investigator
David H. Morse, 3/78-.....Investigator
Cathleen L. Rimathe, 8/78-.....Investigator
Marcia A. Jacobs, 8/82-.....Legal Secretary
Kathleen A. Pitts, 5/87-.....Legal Secretary
Maureen E. Robertson, 3/92-.....Legal Secretary
Mary L. Sebben, 4/91-.....Legal Secretary
Lorell Squiers, 9/87-.....Legal Secretary

TRANSPORTATION

David A. Ferree, 3/84-.....Division Director
JD, Iowa, 1979
Kerry K. Anderson, 6/91- .....Assistant Attorney General
JD, Drake, 1982
John W. Baty, 9/72-.....Assistant Attorney General
JD, Drake, 1967
Julie A. Burger, 7/93-.....Assistant Attorney General
JD, Drake, 1991
Robin Formaker, 4/84-.....Assistant Attorney General
JD, Iowa, 1979
Noel C. Hindt, 7/89- .....Assistant Attorney General
JD, Iowa, 1983
Mark Hunacek, 7/82-.....Assistant Attorney General
JD, Drake, 1981
Richard E. Mull, 7/78-.....Assistant Attorney General
JD, Iowa, 1977
Carolyn J. Olson, 8/87-.....Assistant Attorney General
JD, Drake, 1984
Carmen C. Mills, 7/82-1/86; 1/87 .....Paralegal
Michael J. Raab, 1/85-.....Paralegal
James M. Strohman, 2/88-.....Paralegal

ATTORNEY GENERAL OFFICE ADMINISTRATIVE DIVISIONS

ADMINISTRATIVE SERVICES DIVISION

The Administrative Services Division performs four main functions: providing administrative management of the department, communicating with the legislature, communicating with the public through the media, and carrying out projects that advance the special priorities of the attorney general.

The administrative functions of the division include managing budget and fiscal matters, determining personnel policies and staffing, coordinating computer support, and managing office facilities.

The division's legislative liaison staff represents the attorney general before the General Assembly by advocating the office's many legislative priorities, answering questions posed by lawmakers, providing information on many matters, and coordinating the interaction between lawmakers and other members of the attorney general's staff.

The division issues news releases, brochures and other material about important matters such as consumer protection warnings or services available to crime victims. It answers wide-ranging questions posed by the media. It also undertakes special awareness projects in cooperation with the media that provide public service announcements in print, on billboards, and on TV and radio.

The administrative services division coordinates and undertakes most of the activity required by special priorities chosen by the attorney general. In 1993-94, such special projects included:

Domestic abuse awareness project. This project included educating the public about the largely-hidden problem of family violence, proposing new domestic abuse and "stalking" laws, conducting forums for clergy and others, and mounting a public service announcement campaign on the theme that "battering women is a crime."

Truth-in-sentencing project. This project involved convening a prestigious "Blue Ribbon Panel on Sentencing" that considered a wide array of issues and suggested proposals to address the problem of overcrowding in the corrections system and the disparity between public expectations and the reality of time served by convicted criminals.

Older Iowan consumer forums. The forums are based on the fact that Iowa has one of the highest percentages of older citizens in the nation, and that "con-artists" often target their schemes especially toward older persons. Forums were conducted in dozens of Iowa communities to alert older citizens about the scams they may encounter and how to avoid being cheated.

Child support awareness project. Unpaid child support is damaging to custodial parents and their children and also to state taxpayers, and delinquent payments may total as much as half a billion dollars in Iowa. The objective of the attorney general's project was to increase public awareness of this problem, drive up voluntary payments, and improve enforcement. The project included billboards, TV ads, radio ads, and print ads placed at no charge by the media companies; a "wanted poster" to dramatize the problem; legislative proposals; and a video to educate teenagers about child support obligations they incur as parents.

Campus rape forums. This project was launched near the end of the biennium and includes on-campus forums headed by the attorney general with the cooperation of the college or university, local law enforcement officials, the county attorney, local rape center advocates, and student leaders. The forums focus campus and community attention on the problem of campus rape, and provide students and members of the community an opportunity to share solutions to the problem.

AREA PROSECUTIONS DIVISION

The primary purpose of the Area Prosecutions Division is to assist local county attorneys in difficult, technical, or multi-jurisdictional felony criminal cases; and in major felony cases where a conflict of interest or the appearance of a conflict precludes the county attorney from handling a prosecution.

The division is staffed by five general trial attorneys, four specialist attorneys, one investigator and one secretary. Three of the general trial attorneys are located in Des Moines, one in eastern Iowa and the other in the western part of the state. The specialty areas each have one attorney assigned: 1) to investigate and prosecute state environmental crimes, 2) to prosecute crimes in state penal institutions, 3) to conduct state tax investigations and prosecutions, and 4) to prosecute medicaid fraud. The specialist positions are funded by various other state departments.

During the period of this report, 345 major cases from all corners of the state were referred to and handled by the division's attorneys.

The Area Prosecutors continue to handle virtually all of the public official misconduct and corruption allegations raised throughout the state. The division

also represents the Commission on Judicial Qualifications, investigating and prosecuting complaints against Iowa judges and magistrates.

OFFICE OF CONSUMER ADVOCATE

The Office of Consumer Advocate (OCA) represents all consumers and the public generally in proceedings before the Iowa Utilities Board, which implements and enforces provisions of Iowa's public utility regulation statutes. The OCA is also independently authorized to investigate the legality of all rates, charges, rules, regulations and practices under the jurisdiction of the board, and may institute proceedings before the board or court to correct any illegality.

Proceedings before the board in which the OCA participated during the 1993-94 biennium included annual reviews of electric and natural gas utilities' fuel purchasing and contracting practices, electric transmission line and gas pipeline certificate cases, formal complaints, investigation dockets or specific utility practices, purchased gas adjustment cases, electric utility service area disputes, rulemakings, energy efficiency program proposals, energy efficiency cost recovery filings, proposed utility reorganization (mergers), and rate cases.

Investigation of the legality of proposed rate increases filed by investor-owned utilities, including both general and energy efficiency cost recovery filings, is the most significant area of the OCA's litigation. To carry out its investigatory duties in a rate case, the OCA uses its technical staff as well as outside consultants at times to analyze the information presented in the filing by the utility company, and review the utility's books and records to determine the reasonable costs of providing utility service. The OCA participates in the case by attending consumer comment hearings, cross-examining utility witnesses at technical hearings, offering evidence through Consumer Advocate sponsored expert witnesses, and filing briefs with the Board. During 1993-94, the OCA represented ratepayers and the general public in the resolution of 25 proposed rate increases filed by electric, natural gas, telephone and water utilities. In addition, the OCA instituted rate reduction proceedings proposing to decrease the rates of two investor-owned utilities, one electric and one telephone, which had excessive earnings during the same period.

During the 1993-94 biennium, the OCA was involved in 110 electric transmission line certificate or renewal cases, 26 gas pipeline certificate or renewal cases and 1 generating plant certificate filing. The OCA was involved in 8 formal complaints (initiated after informal attempts to resolve the consumer complaints against utilities were unsuccessful), and monitored over 700 informal complaint filings. There were over 300 purchased gas adjustments filings by utilities. The OCA participated in 37 electric utility service area disputes. In addition, the OCA was involved in 30 rulemaking proceedings and participated in 3 investigation dockets. Also, during 1993 and 1994, the OCA participated in proceedings reviewing proposed utility reorganizations involving several of Iowa's major utility holding companies, including Iowa Electric/Iowa Southern

Utilities, Midwest Power/Iowa-Illinois Gas and Electric Company. During the 1993-94 biennium, the OCA was involved in 17 judicial review proceedings in Iowa's district and appellate courts.

In 1991, the Utilities Board adopted rules implementing new legislation requiring utilities to spend a fixed percentage of their gross income on energy efficiency plans. The first generation of EEP's for all but one utility were approved by the Board in December 1991 and January 1992. Pursuant to Board regulations, the initial energy efficiency cost recovery proposal was filed on July 1, 1993. Other utilities subsequently filed for cost recovery over the course of the next year. Of the first set of seven cost recovery filings, the OCA reached a settlement agreement in three cases, and litigated the remaining four filings.

CONSUMER PROTECTION DIVISION

The Consumer Protection Division administers and enforces the Iowa Consumer Fraud Act, the Iowa Consumer Credit Code, the Iowa Campground Act, the Iowa Physical Exercise Club Regulation Act, the Charitable Organization Act, and the Cemeteries Regulation Act.

In addition, the Consumer Protection Division may bring enforcement actions for violations of the Iowa Business Opportunity Sales Act, the Iowa Trade School Act, the Iowa Door-to-Door Sales Act, the Iowa Transient Merchants Act, the Iowa Drug and Cosmetic Act, the Iowa Preneed Funeral Sales Act, the Iowa Funeral and Cemetery Services and Merchandise Act, the Iowa Lemon Law, the Iowa Motor Vehicle Services Trade Practices Act, the Iowa Car Rental and Collision Damage Waiver Act, the Motor Vehicle Damage Disclosure Law, and the Prize Notice Law.

The Consumer Protection Division consists of five attorneys, seven investigators, four secretaries, two receptionists, and the Older Iowans Project coordinator. The division, through its volunteer program, has volunteers and interns working for the division handling consumer complaints, doing research, and performing other important tasks.

During 1993 and 1994, the Consumer Protection Division received 10,957 consumer complaints and closed 14,423 consumer complaints. During the same period, the Consumer Protection Division filed 47 lawsuits. During 1993 and 1994, the division saved or recovered $2,546,370.15 for Iowa consumers.

The Consumer Protection Division engages in many programs of preventive consumer protection designed to deter potential schemes and inform consumers. The Consumer Protection Division's involvement in mediating consumer

problems, investigating complaints of deceptive advertising and sales practices, and filing lawsuits has a substantial deterrent effect on persons and companies who might be tempted to engage in fraudulent practices in Iowa. The office attempts to inform the public about both specific and common schemes of fraud through a variety of means including press releases, informational brochures, and public speaking engagements.

The major areas of activity during 1993 and 1994 included prosecutions of frauds against older Iowans, health and nutrition fraud, automobile sales and service practices complaints, debt collection and consumer credit, telemarketing abuses, prize promotions, home improvement problems, and consumer education.

Budget constraints required merger of the Farm Division with the Consumer Protection Division in 1992. Thus, in 1993 and 1994, the Consumer Protection Division included an attorney and investigator who devoted special attention to the problems of farmers as consumers.

CRIME VICTIM ASSISTANCE PROGRAM

The Crime Victim Assistance Program is responsible for the administration of victim programs at the state level. Those programs include Crime Victim Compensation; Sexual Abuse Examination Payment and Victim Services Grants. Funds for these programs come primarily from fines assessed on criminals both at the state and federal levels.

Crime Victim Assistance Board. The Crime Victim Assistance (CVA) Board, created by the 1989 legislature and appointed by the Attorney General, has statutory responsibility for the adoption of rules relating to Crime Victim Assistance program policies and procedures. The board receives and acts on appeals filed for victim compensation and victim program grants.

Crime Victim Compensation. In FY 94, the program provided compensation to 1930 crime victims. A total of $1,778,667 was awarded for expenses incurred by those victims and their families.

No tax dollars are used to fund the Compensation Program. Funding comes from fines and penalties imposed upon criminals; the Federal Victims of Crime Act (VOCA) grant, supported entirely by federal criminal fines; perpetrator restitution moneys; and recoveries from civil actions involving the offender or other third parties responsible for the crime.

Sexual Abuse Examination Payment. The state of Iowa pays for the evidentiary sexual abuse examination regardless of whether the victim has

decided to report the crime. If the victim later decides to report the crime, the prosecutor and law enforcement have the benefit of evidence effectively collected in a timely manner.

Crime Victim Services Grants. The Crime Victim Assistance Program administers five federal and state grant funds that provide funding to local crime victim service programs.

The Victim Service Grant Program distributed $2,419,405 of state and federal money to victim service programs in FY 94. The Victim Grants Administrator contracted with thirty-nine public and nonprofit organizations for the provision of local community-based victim services.

Programs partially funded by the Crime Victim Assistance Division include twenty-nine domestic abuse programs and shelters, twenty-seven rape crisis centers, two programs serving child victims of crime, two programs serving homicide victim survivors and other victims of violent crime and one program serving the victim of drunk drivers and two programs providing statewide services.

CRIMINAL APPEALS DIVISION

The primary responsibility of the Criminal Appeals Division is to represent the state of Iowa in direct appeals of criminal cases. County attorneys prosecute the cases in district court, and the division prosecutes criminal appeals to the Iowa Supreme Court.

In 1993-94, 1362 criminal appeals were taken to the Iowa Supreme Court and 707 defendant-appellant briefs were filed in those cases. The division filed 676 briefs on behalf of the state. The division consists of thirteen attorneys and four support staff.

Other criminal appeal and post-conviction matters handled by the Division include: certiorari petitions to the U.S. Supreme Court related to criminal cases; appeals in post-conviction relief cases under chapter 822; applications for discretionary review by the defendant; all criminal appellate actions initiated by the state; and federal habeas corpus cases.

The Division has published the Criminal Law Bulletin, a periodic update on developments in criminal law in the Iowa Supreme Court and U.S. Supreme Court. It also provides training and advice to prosecutors and police officers around the state, advises the Parole Board, Board of Pharmacy and Bureau of Labor, and advises the Governor's office on extradition matters.

ENVIRONMENTAL AND AGRICULTURAL LAW DIVISION

The Environmental and Agricultural Law Division represents the State of Iowa in issues affecting the environment and agriculture. The majority of the division's work involves representing the Department of Natural Resources, the Department of Agriculture and Land Stewardship, and the Iowa Comprehensive Petroleum Underground Storage Tank Fund Board.

The division prosecutes civil environmental enforcement actions involving water pollution, water supply, solid waste, air pollution, leaking underground storage tanks, hazardous conditions, and flood plains. The division also defends its assigned agencies in citizen suits, civil rights actions, judicial proceedings, and other litigation.

The division routinely advises the Department of Natural Resources concerning statutory and rule interpretations, administrative law questions, and enforcement strategies. The division reviews grants to cities for various environmental construction projects. The division also provides legal assistance to the Department in matters relating to acquisition and management of state-owned lands and waters and development projects on state-owned lands including National Environmental Policy Act requirements, construction contract disputes, drainage disputes, permits and leases for special uses of public lands and waters, and regulations relating to fishing, hunting, trapping, boating and use of state parks.

The division serves as general counsel to the Department of Agriculture and Land Stewardship. General counsel duties include handling administrative contested cases, assisting in rulemaking, reviewing contracts, and handling personnel issues for the Department. The division represents the Department in proceedings to enforce animal health and welfare, pesticide and corporate farming laws. The division handles license suspension or revocation proceedings on behalf of the Department. In addition, the division enforces coal and mineral mining laws and assists the Mines and Minerals Bureau in collecting administrative penalties. The division also represents the 100 soil and water conservation districts by enforcing administrative orders, soil loss limits, and maintenance agreements and by providing title opinions in connection with watershed projects.

The division serves as general counsel to the Iowa Comprehensive Petroleum Underground Storage Tank Fund Board. General counsel duties include advising the board on issues relating to the UST remedial action, insurance, and loan guarantee programs; reviewing and drafting UST legislative proposals; assisting in the rulemaking process; and handling administrative contested cases. General counsel duties also include contract drafting and review, negotiations, and handling personnel issues for the board. In addition, the division handles cost recovery efforts requested by the board and oversees

three private firms which have been contracted to assist in cost recovery efforts and litigation pursuant to Iowa Code chapter 455G.

The division also represents the State Archaeologist, Grain Indemnity Fund Board, and the Iowa Agricultural Development Authority and provides legal assistance to the National Guard and the State Historical Society on real estate matters. The division also advises the Iowa Commissioner to the Midwest Interstate Lowlevel Radioactive Waste Commission, the Iowa Nebraska Boundary Commission, and the Energy Fund Disbursement Council.

LICENSING AND ADMINISTRATIVE LAW DIVISION

The Licensing and Administrative Law Division provides legal services to all levels of state government from the highest elected officials to the employees of the smallest state agencies. The division acts as general counsel handling litigation for and against state officials and agencies, prosecuting administrative hearings, issuing Attorney General's opinions, reviewing and drafting legal documents, and providing day-to-day legal guidance on a wide range of issues. In addition, the division advises county attorneys on questions involving civil law, enforces the public interest in charitable trusts, and disseminates information on key issues affecting government operations, such as open meetings, public records, municipal and county law, gift law, conflicts of interest, and rule-making.

The division advises and represents the State Treasurer, Secretary of State, State Auditor, Commissioner of Insurance, Superintendent of Banking, Iowa College Aid Commission, Iowa Public Television, State Lottery, Judicial Department, and the Departments of Management, Education, Cultural Affairs, Elder Affairs, General Services, Inspection and Appeals, Personnel, Public Safety, Economic Development, Public Health, and Human Rights. Division attorneys prosecute disciplinary cases on behalf of the public before over two dozen professional licensing boards, including the Board of Medical Examiners, the Real Estate Commission, the Dental Examiners, the Pharmacy Examiners, and the Accountancy Board.

In the 1993-94 biennium, the division received approximately 160 new litigation cases, including petitions for judicial review of agency decisions, civil rights proceedings, employment discrimination cases, and contract disputes.

The division authored 43 Attorney General's opinions in the 1993-94 biennium and responded to numerous opinion requests for informal advice. The division

confers with county and city officials concerning county and municipal law and responds to many public inquiries on matters involving government operations.

PROSECUTING ATTORNEYS COORDINATOR

The Prosecuting Attorneys Training Coordinator provides continuing education and training for Iowa prosecuting attorneys and their assistants and other support services to promote the uniform and effective execution of prosecutors' duties. Services are provided to all 99 county attorneys and approximately 235 assistant county attorneys, as well as to other government attorneys and law enforcement officials. The Coordinator is assisted in an advisory capacity by a Council consisting of the Attorney General, the incumbent president of the Iowa County Attorneys Association, and three county attorneys elected to staggered three year terms.

The Prosecuting Attorneys Training Coordinator provided over 450 hours of continuing legal education in 1993-1994, conducting more than 45 separate continuing education events, and trained more than 2,200 prosecutors and law enforcement officials. Training events included annual Spring and Fall County Attorney Conferences, New Legislation Workshops, and specialized training on the topics of Trial Advocacy, Advanced Trial Advocacy, Task Force Management, Drug Investigation and Prosecution, Asset Forfeiture, Impaired Driving Law and Domestic Violence.

In addition to continuing education, the Prosecuting Attorneys Training Coordinator provides administrative support services, technical assistance, and educational publications to prosecutors and law enforcement officials. The Comprehensive Career Criminal and Drug Prosecution Support Program funds specialized prosecutors in county attorney offices across the state, and provides research assistance and training to multi-jurisdictional task forces. The OWI/ Traffic Safety Specialist coordinates the efforts of prosecutors of impaired driving and related offenses through specialized publications, newsletters, and instructional programs. The Prosecuting Attorneys Council administers the Attorney General's asset forfeiture program established by Iowa Code section 809.13, which returns the proceeds of forfeiture cases to governmental agencies to enhance law enforcement within the state.

REGENTS AND HUMAN SERVICES DIVISION

This division performs legal services for the Department of Human Services, the Board of Regents and their institutions. The Department of Human Services' institutions are the four mental health institutions, the two state hospital-schools

and the Iowa Veterans' Home. The Regents' institutions are the three state universities, the Iowa School for the Deaf and the Iowa School for the Blind.

In the area of juvenile law, the division handles delinquency, child in need of assistance and termination of parental rights appeals before the Iowa Supreme Court and the Iowa Court of Appeals. The division also occasionally prosecutes those cases at the trial court level.

In the areas of Medicaid, Aid to Families with Dependent Children, Food Stamps and other programs, the division seeks to recoup overpayments which are made inadvertently and payments which are made as a result of fraud. Additionally, the division seeks reimbursement from third parties who are responsible for injuries sustained by an individual whose medical treatment has been paid by Medicaid. The division represents the Department of Human Services in actions for judicial review of eligibility decisions denying Medicaid, Aid to Families with Dependent Children, Food Stamps and the like.

The division also represents the Department of Human Services and the Department of Inspections and Appeals in actions to establish and collect medical assistance debts resulting from a transfer of assets for less than fair market value.

The division represents the Board of Regents primarily in cases involving civil rights, discrimination and contract claims.

During Federal fiscal year 1994, the division assisted in the collection of $129,956,605.00 in child support collections, and $774,862.86 in Medicaid reimbursement.

REVENUE DIVISION

The Revenue Division advises and represents the Department of Revenue and Finance with respect to various taxes which are administered by the department, including income taxes, franchise tax imposed on financial institutions, state sales and use taxes, cigarette and tobacco taxes, drug tax, motor vehicle fuel taxes, inheritance and estate taxes, property taxes, hotel and motel local option taxes, local option sales taxes, real estate transfer tax, and grain-handling tax. In addition, the division drafts responses to tax opinion requests made to the Attorney General.

During the 1993-1994 biennium, the division participated in the resolution of informal proceedings for 360 protests filed by audited taxpayers. The division also handled 67 contested case proceedings. In the biennium, 44 contested cases were disposed of before the State Board of Tax Review

During the biennium, 60 Iowa district court cases and 5 federal district court cases were handled by the division.

This division was involved in 7 cases in the United States Supreme Court during the biennium either as amicus curiae or, in opposition to certiorari.

On the appellate Iowa court level, the division received decisions in 9 cases from the Iowa Supreme Court and in 1 case from the Iowa Court of Appeals.

A total of 19 responses to requests for opinions of the Attorney General were issued during the biennium. The division also assisted the Department of Revenue and Finance in disposing of 29 petitions for declaratory rulings. In addition, 237 proposed rules of the Department were reviewed for content and legality at the department's request.

As a result of the division's activities on behalf of the Revenue Department during the biennium, $33,751,858 of tax revenue was directly collected or requested refund amounts were not paid.

SPECIAL LITIGATION DIVISION

The Special Litigation Division provides legal representation to the Department of Corrections and defends the state in tort and workers' compensation cases, including defense of the Second Injury Fund. The division's attorneys litigate at all levels of state and federal court, as well as before administrative agencies. The division is charged with the investigation of all administrative claims made to the State Appeal Board under both Iowa Code chapter 25, general claims, and chapter 669, tort claims. Other duties include providing advice to other state agencies concerning risk management and representation of the Civil Reparations Trust Fund with regard to awards of punitive damages.

Tort litigation involves claims of medical malpractice, premises liability, negligent regulation by state agencies, social service liability and civil rights violations, among others. The state, elected officials, agencies and state employees are represented by division attorneys in these suits.

Administrative claims are investigated and recommendations concerning the claims are made to the State Appeal Board. In 1993 and 1994 a total of 6,174 tort and general claims were received for investigation, and 5,418 claims were presented for consideration by the State Appeal Board.

The division advises the Department of Corrections on various legal concerns, including the impact of policy, the effect of new legislation and case law, and contract matters. The attorneys also defend the department and its employees in prisoner civil rights litigation and challenges to prison disciplinary action. The division opened 315 state cases and 390 federal civil rights actions in the

last biennium. At the end of 1994, division lawyers were defending 664 pending cases in state and federal court.

Workers' compensation cases and claims against the Second Injury Fund are initiated as administrative actions before the Industrial Commissioner. Division lawyers were defending 297 workers' compensation and Second Injury Fund cases at the end of 1994. Filings against the Second Injury Fund increased 173 percent in 1994.

TRANSPORTATION DIVISION

Pursuant to Iowa Code section 307.23, a Special Assistant Attorney General and several assistant attorneys general serve as General Counsel to the Iowa Department of Transportation.

The three main areas of litigation activity are tort claims, judicial review proceedings, and condemnation appeals. The legal staff represents the department in tort claims which involve highway accidents or accidents on property owned or controlled by the DOT. During 1993-94, 17 tort cases were opened and 22 were closed, for a total savings of $8,239,387.04 (the difference between the total amount claimed and the amount paid).

The legal staff represents the department when judicial review is sought of department action involving, for example, driver's license revocation or suspension. During 1993-94, 1361 administrative hearings were held. During the same time, 172 judicial review proceedings were opened and 201 were closed. During 1993-94, 26 condemnation appeals were filed and 25 were closed, representing a savings of nearly $603,255.12 (the difference between the total amount claimed and the amount paid).

The division represents the DOT at the trial and appellate level in both federal and state court, in cases involving contract disputes, employment discrimination claims, constitutional challenges, environmental issues and railroad issues.

The legal staff also provides non-litigation services to the department. Consultation routinely occurs with respect to statutes, court decisions, state and federal regulations, contracts, easements, proposed legislation and administrative rules.

State of Iowa
1994

FIFTIETH BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

BIENNIAL PERIOD ENDING DECEMBER 31, 1994

BONNIE CAMPBELL

Attorney General

Published by
THE STATE OF IOWA
Des Moines

ATTORNEYS GENERAL OF IOWA

NAME	HOME COUNTY	SERVED YEARS
David C. Cloud	Muscatine	1853-1856
Samuel A. Rick	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	1967-1979
Thomas J. Miller	Clayton	1979-1991
Bonnie J. Campbell	Polk	1991-1994

PERSONNEL OF THE DEPARTMENT OF JUSTICE

PERSONNEL 1993-1994 ADMINISTRATIVE SERVICES

Bonnie J. Campbell, 1/91-1/95 ..... Attorney General
JD, Drake, 1984
Gordon E. Allen, 8/82- ..... Deputy Attorney General
JD, Iowa, 1972
Charles J. Krogmeier, 5/86- ..... Executive Deputy Attorney General
JD, Drake, 1974
Elizabeth M. Osenbaugh, 1/79-2/94 ..... Deputy Attorney General
JD, Iowa, 1971
John R. Perkins, 12/72-4/93 ..... Deputy Attorney General
JD, Iowa, 1968
Julie F. Pottorff, 7/79- ..... Deputy Attorney General
JD, Iowa, 1978
Roxann M. Ryan, 9/80- ..... Deputy Attorney General
JD, Iowa, 1980
Elisabeth C. Buck, 2/91- ..... Administrator
Julie Fleming, 8/88- ..... Executive Officer
Robert P. Brammer, 11/78- ..... Executive Officer
William C. Roach, 1/79-5/93 ..... Communications Director
Clark R. Rasmussen, 9/92- ..... Program Director
Karen A. Redmond, 10/80- ..... Budget Analyst
Marilyn Chiodo, 2/91- ..... Personnel Technician
Donald Schaefer, 11/91- ..... Data Process Specialist
Michael N. Elings, 9/94- ..... Data Process Specialist
Jane A. McCollom, 10/76- ..... Administrative Assistant
Julie E. Stauch, 7/92- ..... Administrative Assistant
Joni M. Klaassen, 9/85- ..... Administrative Assistant
Cathleen M. White, 2/89- ..... Legal Secretary
Diane Dunn, 10/88- ..... Legal Secretary
Grace Armstrong, 7/89 ..... Accounting Clerk
Jennifer Coolidge, 6/92- ..... Clerk

AREA PROSECUTIONS

Harold A. Young, 7/75- ..... Division Director
JD, Drake, 1967
Virginia D. Barchman, 10/86- ..... Assistant Attorney General
JD, Iowa, 1979
Kathleen M. Deal, 5/91-12/94 ..... Assistant Attorney General
JD, Drake, 1980

Robert J. Glaser, 7/86- ..... Assistant Attorney General
JD, Creighton, 1978
James E. Kivi, 2/80- ..... Assistant Attorney General
JD, Iowa 1975
Douglas E. Marek, 8/89- ..... Assistant Attorney General
JD, Drake, 1984
Thomas H. Miller, 10/85- ..... Assistant Attorney General
JD, Iowa, 1975
Thomas E. Noonan, 6/89- ..... Assistant Attorney General
JD, Iowa, 1982
Charles N. Thoman, 7/84- ..... Assistant Attorney General
JD, Creighton, 1976
Richard A. Williams, 7/75- ..... Assistant Attorney General
JD, Iowa, 1971
Connie L. Anderson Lee, 12/76- ..... Legal Secretary

CIVIL RIGHTS UNIT

Richard R. Autry, 9/86- ..... Assistant Attorney General
JD, Drake, 1986
Teresa Baustian, 4/81- ..... Assistant Attorney General
JD, Iowa, 1979

CONSUMER ADVOCATE

James R. Maret, 4/72- ..... Consumer Advocate
LLB, University of Missouri, 1963
David R. Conn, 9/78-10/94 ..... Attorney 3
JD, University of Iowa, 1978
Daniel J. Fay, 4/66- ..... Attorney 3
JD, University of Iowa, 1965
William A. Haas, 10/84- ..... Attorney 3
JD, Drake University, 1982
Alice J. Hyde, 1/81- ..... Attorney 3
JD, University of Iowa, 1978
Ronald C. Polle, 8/81- ..... Attorney 3
JD, Drake University, 1979
Ben A. Stead, 8/81- ..... Attorney 3
JD, University of Kansas, 1974
Leo J. Steffen, 10/72- ..... Commerce Solicitor
JD, University of Iowa, 1962
Gary D. Stewart, 7/74- ..... Attorney 3
JD, University of Iowa, 1974

Alexis K. Wodtke, 6/82-.....Attorney 3
J.D., Drake University, 1978
Christine A. Collister, 5/88-.....Utility Administrator I
Mark E. Condon, 11/88- .....Utility Specialist
Phyllis C. Costa, 11/90-.....Senior Utility Analyst
Bethanne H. Densmore, 11/92-12/93 .....Utility Analyst I
Charles E. Fuhrman, 9/81- .....Utility Administrator I
Tara Ganpat-Puffett, 11/89-6/93 .....Utility Analyst II
Dawn M. Geiger, 9/93- .....Utility Analyst II
David S. Habr, 10/87-.....Utility Administrator II
Joyette D. Henry, 4/88-.....Senior Utility Analyst
Fasil Kebede, 3/87- .....Utility Specialist
Melody A. Lester, 5/94-.....Utility Analyst I
Chi Li, 9/93- .....Senior Utility Analyst
Joseph W. Murphy, 6/77-.....Utility Administrator I
Sheila A. Parker, 6/88-.....Senior Utility Analyst
Xiaochuan (Larry) Shi, 3/90- .....Utility Reg. Engineer II
Deborah L. Stephens, 12/92-5/94.....Senior Utility Analyst
Brian W. Turner, 7/82- .....Utility Specialist
Gregory Vitale, 8/85-.....Utility Specialist
Ying Yan, 9/93-.....Senior Utility Analyst
Karen M. Goodrich-Finnegan, 7/76- .....Secretary III
Ann M. Kreager, 11/84-.....Secretary II
Sheila M. Maher, 11/81-9/93.....Secretary II
Rose M. Reeder, 8/94- .....Secretary I

CONSUMER PROTECTION

Steven M. St. Clair, 5/87- .....Division Director
JD, Iowa, 1978
William L. Brauch, 7/87-.....Assistant Attorney General
JD, Iowa, 1987
Karen B. Doland, 7/90- .....Assistant Attorney General
JD, Iowa, 1989
Raymond H. Johnson, 7/87-.....Assistant Attorney General
JD, Iowa, 1986
Peter R. Kochenburger, 8/88-3/93.....Assistant Attorney General
JD, Harvard, 1986
Chris T. Odell, 7/90-.....Assistant Attorney General
JD, Gonzaga, 1978
Stephen E. Reno, 7/89-.....Assistant Attorney General
JD, Drake, 1981
Carmel A. Benton, 9/89- .....Investigator
Harry E. Crist, 7/85- .....Investigator
Lise D. Ludwig, 5/85- .....Investigator
Holly G. Merz, 10/88-.....Investigator
Debra A. Moore, 12/84- .....Investigator
Norman Norland, 1/80-.....Investigator

John H. Pederson, 8/91-.....Investigator
Barbara A. White, 8/90-.....Investigator
Janice M. Bloes, 3/78-.....Legal Secretary
Katherine Gray, 3/84-.....Legal Secretary
Sandra J. Kearney, 7/90-.....Legal Secretary
Vicki S. McDonald, 8/94-.....Legal Secretary
Marilyn W. Rand, 10/69-.....Legal Secretary
Judy A. Fast, 7/91-.....Secretary/Receptionist
Dorene Stevens, 5/94-.....Secretary/Receptionist

CRIME VICTIM ASSISTANCE

Martha J. Anderson, 7/89-.....Program Director
Kelly J. Brodie, 7/89-.....Deputy Director
Virginia W. Beane, 6/89-.....Program Planner
Robin Ahnen-Cacciatore, 2/91-.....Investigator
Ann M. Cutts, 8/94-.....Investigator
Alison E. Sotak, 7/92-.....Investigator
Stephen E. Switzer, 12/89-.....Investigator
Ruth C. Walker, 2/79-.....Investigator
Melissa Miller, 1/88-.....Legal Secretary
Judith Webb, 7/94-12/94.....Legal Secretary

CRIMINAL APPEALS

Ann E. Brenden, 3/85-.....Division Director
JD, Drake, 1981
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JD, Iowa, 1988
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JD, Iowa, 1978
Martha E. Boesen, 7/91-.....Assistant Attorney General
JD, Notre Dame, 1991
Bridget A. Chambers, 2/90-.....Assistant Attorney General
JD, Iowa, 1985
Robert P. Ewald, 2/81-.....Assistant Attorney General
JD, Washburn, 1980
Thomas G. Fisher, 4/91-.....Assistant Attorney General
JD, Iowa, 1986
Julie A. Halligan-Brown, 7/87-.....Assistant Attorney General
JD, Iowa, 1987

Thomas D. McGrane, 6/71- ..... Assistant Attorney General
JD, Iowa, 1971
Angelina Smith, 7/94- ..... Assistant Attorney General
JD, Iowa, 1994
Sheryl A. Soich, 2/88- ..... Assistant Attorney General
JD, Drake, 1987
Mary E. Tabor, 8/93- ..... Assistant Attorney General
JD, Iowa, 1991
Thomas S. Tauber, 7/89- ..... Assistant Attorney General
JD, Drake, 1989
Susan M. Crawford, 6/94 ..... Law Clerk
Christy J. Fisher, 1/67- ..... Legal Secretary
Shonna K. Davis, 5/81- ..... Legal Secretary
Cynthia L. Jacobe, 8/82- ..... Legal Secretary
Mary L. Robertson, 3/92- ..... Legal Secretary

ENVIRONMENTAL LAW

David R. Sheridan, 5/87- ..... Division Director
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JD, Iowa, 1977
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JD, Drake, 1982
Robert C. Galbraith, 4/91- ..... Assistant Attorney General
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Dean A. Lerner, 2/83- ..... Assistant Attorney General
JD, Drake, 1981
Michael H. Smith, 9/84- ..... Assistant Attorney General
JD, Iowa, 1977
Michael P. Valde, 3/91- ..... Assistant Attorney General
JD, Iowa, 1976
Chester J. Culver, 1/91- ..... Investigator
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LICENSING AND ADMINISTRATIVE LAW

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JD, Iowa, 1994
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JD, Iowa, 1992
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Scott M. Galenbeck, 1/84- ..... Assistant Attorney General
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Christie J. Scase, 7/85- ..... Assistant Attorney General
JD, Drake, 1985
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JD, Iowa, 1967
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JD, Drake, 1985
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MA, JD, Iowa, 1981
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JD, Drake, 1990
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JD, Drake, 1990
James S. Wisby, 10/88- ..... Assistant Attorney General
JD, Iowa, 1968
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Ruth Manning, 9/89- ..... Legal Secretary
Lauren Marriott, 8/84- ..... Legal Secretary

PROSECUTING ATTORNEYS TRAINING COUNCIL

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JD, Drake, 1986
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JD, Iowa, 1979
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Ann M. Clary, 1/88- ..... Legal Secretary
Carol H. Litke, 5/92-3/93 ..... Legal Secretary
Karen M. Snater, 11/91-9/94 ..... Legal Secretary

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John M. Parmeter, 11/84-6/94 ..... Division Director
JD, Drake, 1982
Jill A. Cirivello, 6/93- ..... Assistant Attorney General
JD, Hamline, 1991
Kathryn J. Delafield, 3/91- ..... Assistant Attorney General
JD, Iowa, 1982
Barbara E. Galloway, 3/91- ..... Assistant Attorney General
JD, Iowa, 1976
Mark L. Greiner, 7/94- ..... Assistant Attorney General
JD, Drake, 1994
Christina F. Hansen, 3/91- ..... Assistant Attorney General
JD, Drake, 1987
Daniel W. Hart, 7/85- ..... Assistant Attorney General
JD, Iowa, 1983
Mark A. Haverkamp, 6/78- ..... Assistant Attorney General
JD, Creighton, 1976
Patricia M. Hemphill, 2/83- ..... Assistant Attorney General
JD, Drake, 1981
Debora L. Hewitt, 12/92- ..... Assistant Attorney General
JD, Drake, 1991

Janet L. Hoffman, 8/94- ..... Assistant Attorney General
JD, Iowa, 1990
Robert R. Huibregtse, 6/75- ..... Assistant Attorney General
LLB, Drake, 1963
Dawn E. Mastalir, 12/92-5/93 ..... Assistant Attorney General
JD, Iowa, 1991
Kathrine Miller-Todd, 1/85- ..... Assistant Attorney General
JD, Wake Forest, 1974
Michael J. Parker, 7/91- ..... Assistant Attorney General
JD, Drake, 1989
Charles K. Phillips, 8/84- ..... Assistant Attorney General
JD, Columbia (NY), 1982
M. Elise Pippin, 3/91-10/91, 4/94- ..... Assistant Attorney General
JD, Louisville, 1980
Richard E. Ramsay, 12/91- ..... Assistant Attorney General
JD, Drake, 1990
Stephen C. Robinson, 8/73- ..... Assistant Attorney General
JD, Drake, 1962
Beth A. Scheetz, 12/91- ..... Assistant Attorney General
JD, Drake, 1990
Judy A. Sheirbon, 7/89- ..... Assistant Attorney General
JD, Iowa, 1986
Mary K. Wickman, 8/89- ..... Assistant Attorney General
JD, Iowa, 1986
Marne E. Woods, 6/93- ..... Assistant Attorney General
JD, Drake, 1991
Steven K. Young, 7/91- ..... Assistant Attorney General
JD, Drake, 1981
Forrest Guddall, 7/94- ..... Law Clerk
Dian M. Gottlob, 9/93- ..... Law Clerk Lori
Lori E. Kern, 11/91- ..... Legal Secretary
Sharon R. O'Steen, 8/89-6/94 ..... Legal Secretary
Shannon P. Wineland, 7/94- ..... Legal Secretary

REVENUE

Harry M Griger, 1/67-8/71; 12/71- ..... Division Director
JD, Iowa, 1966
Lucille M. Hardy, 5/86- ..... Assistant Attorney General
JD, Iowa, 1985
Gerald A. Kuehn, 9/71- ..... Assistant Attorney General
JD, Drake, 1967
Valencia V. McCown, 6/83- ..... Assistant Attorney General
JD, Iowa, 1983
Marcia E. Mason, 7/82- ..... Assistant Attorney General
JD, Iowa, 1982
James D. Miller, 12/79-4/82;10/86- ..... Assistant Attorney General
JD, Drake, 1977

Rebecca A. Griglione, 3/87-8/87; 1/93-.....Legal Secretary
Connie M. Larson, 6/89-.....Legal Secretary

SPECIAL LITIGATION

Craig A. Kelinson, 12/86-.....Division Director
JD, Iowa, 1976
James F. Christenson, 7/90-.....Assistant Attorney General
JD, Iowa, 1990
Kristin W. Ensign, 10/88-.....Assistant Attorney General
JD, Drake, 1983
William A. Hill, 8/90-.....Assistant Attorney General
JD, Drake, 1989
Robin A. Humphrey, 8/90-.....Assistant Attorney General
JD, Drake, 1985
Greg H. Knoploh, 5/87-.....Assistant Attorney General
JD, Iowa, 1978
Charles S. Lavorato, 9/83-.....Assistant Attorney General
JD, Drake, 1975
Layne M. Lindebak, 7/79-.....Assistant Attorney General
JD, Iowa, 1979
Joanne L. Moeller, 8/84-.....Assistant Attorney General
JD, Iowa, 1984
Stephen H. Moline, 6/86-5/89, 7/90-.....Assistant Attorney General
JD, Iowa, 1986
Shirley A. Steffe, 9/79-.....Assistant Attorney General
JD, Iowa, 1979
Suzie Berregaard Thomas, 7/87-.....Assistant Attorney General
JD, Drake, 1987
Robert D. Wilson, 12/86-.....Assistant Attorney General
JD, Iowa, 1981
Connie D. Hadaway, 9/89-.....Investigator
Marjorie A. Leeper, 7/82-.....Investigator
Karen M. Likens, 8/77-3/93.....Investigator
David H. Morse, 3/78-.....Investigator
Cathleen L. Rimathe, 8/78-.....Investigator
Marcia A. Jacobs, 8/82-.....Legal Secretary
Kathleen A. Pitts, 5/87-.....Legal Secretary
Maureen E. Robertson, 3/92-.....Legal Secretary
Mary L. Sebben, 4/91-.....Legal Secretary
Lorell Squiers, 9/87-.....Legal Secretary

TRANSPORTATION

David A. Ferree, 3/84-.....Division Director
JD, Iowa, 1979
Kerry K. Anderson, 6/91- .....Assistant Attorney General
JD, Drake, 1982
John W. Baty, 9/72-.....Assistant Attorney General
JD, Drake, 1967
Julie A. Burger, 7/93-.....Assistant Attorney General
JD, Drake, 1991
Robin Formaker, 4/84-.....Assistant Attorney General
JD, Iowa, 1979
Noel C. Hindt, 7/89- .....Assistant Attorney General
JD, Iowa, 1983
Mark Hunacek, 7/82-.....Assistant Attorney General
JD, Drake, 1981
Richard E. Mull, 7/78-.....Assistant Attorney General
JD, Iowa, 1977
Carolyn J. Olson, 8/87-.....Assistant Attorney General
JD, Drake, 1984
Carmen C. Mills, 7/82-1/86; 1/87 .....Paralegal
Michael J. Raab, 1/85-.....Paralegal
James M. Strohman, 2/88-.....Paralegal

JANUARY 1993

January 6, 1993

STATE OFFICERS AND DEPARTMENTS; PUBLIC FUNDS: Reduction of community college appropriations. Iowa Code §§ 8.2(5), 286A.1 (1991); 1992 Iowa Acts, 2nd Extraordinary Sess., ch. 1001, §§ 501, 506 (S.F. 2393); 1992 Iowa Acts, ch. 1246, § 1(10) (H.F. 2465). The Department of Management is not required to exempt appropriations to the Department of Education for funding community colleges from the proportionate reduction of general fund appropriations for general administration to state departments and agencies contained in Senate File 2393. (Osenbaugh to Arnould, Speaker of the House, 1-6-93) #93-1-1(L)

January 8, 1993

INCOMPATIBILITY; GENERAL ASSEMBLY: Simultaneous service in general assembly and on local school board. Iowa Const. art. III, §§ 1, 21, 22; Iowa Code §§ 257.1, 279.8, 279.32 (1991). Membership in the general assembly and on a local school board is not unconstitutional under Iowa Constitution article III, sections 1, 21, or 22. Simultaneous service in the two offices is not incompatible when the school board office is not an office of profit, the legislature does not directly control the amount of money allocated to an individual school district, and there is no overlap in the functions of the two offices as to make membership in both offices "repugnant." 1960 Op. Att'y Gen. 172 is therefore overruled. (Doland to Arnould, Speaker of the House, 1-8-93) #93-1-2(L)

January 14, 1993

GIFTS; STATE OFFICERS AND EMPLOYEES: Officials and lobbyists defined. Iowa Code §§ 68B.2(10), 68B.2(14) (1991). Persons who serve on state advisory bodies which have no final decisionmaking authority do not become "officials" by virtue of that service. Nor do they become "lobbyists" simply because they serve on a state advisory committee which is created to make recommendations for legislative or executive action. (Osenbaugh to Atchison, Director, Dept. of Public Health, 1-14-93) #93-1-3(L)

January 19, 1993

LOBBYISTS; STATE OFFICIALS AND EMPLOYEES: Two-year ban on lobbying. Iowa Code §§ 68B.5A, 68B.7 (1993); 1992 Iowa Acts, ch. 1228. If the two-year ban on all lobbying by all former officials and employees were challenged in a court of law, a court would likely rule that the ban is unconstitutional. A two-year ban on all lobbying by all former officials and employees is not "closely drawn" in furtherance of a compelling state interest. (Pottorff to Priebe, State Senator, 1-19-93) #93-1-4

Berl E. Priebe, State Senator: You have requested an opinion of the Attorney General concerning a two-year ban on lobbying by former officials and employees enacted as part of House File 2466, the Government Ethics Act. Section 68B.5A, as amended by House File 2466, now prohibits officials and employees from becoming lobbyists before the legislature, state agencies or state officials within two years after termination of service or employment.

You have raised constitutional issues concerning the restriction of lobbying activities. You contend that the United States Constitution, through the due

process clause, prohibits a state from acting in a manner that is arbitrary, capricious, or unreasonable. In addition, you point out that the Iowa Constitution expressly confers the right of persons to "make known their opinions to their representatives and to petition for redress of grievances." In light of these constitutional provisions, you inquire whether application of a two-year ban on lobbying violates either the United States Constitution or Iowa Constitution.

In our opinion, if the two-year ban on all lobbying by all former officials and employees were challenged in a court of law, a court would likely rule that the ban is unconstitutional. A two-year ban on all lobbying by all former officials and employees is not "closely drawn" in furtherance of a compelling state interest.

A response to your questions should begin with a summary of the conduct to which the two-year ban applies. The two-year ban on lobbying became effective on July 1, 1992, and applies to those persons who "are employed, hold office, or terminate service or employment on or after" the effective date. Those persons who fit within this time frame are prohibited from becoming a lobbyist "within two years after the termination of service or employment." Iowa Code § 68B.5A (1993). See 1992 Op. Att'y Gen. 154.

A "lobbyist," in turn, is alternatively defined in the statute to include a person who engages in three types of activity:

> (1) Is paid compensation for encouraging the passage, defeat, or modification of legislation or regulation, or for influencing the decision of the members of the general assembly, a state agency, or any statewide elected official.
>
> (2) Represents on a regular basis an organization which has as one of its purposes the encouragement of the passage, defeat, or modification of legislation or regulation, or the influencing of a decision of the members of the general assembly, a state agency, or any statewide elected official.
>
> (3) Is a federal, state, or local government official or employee who represents the official position of the official or employee's agency and who encourages the passage, defeat, or modification of legislation or regulation, or the influencing of a decision of the members of the general assembly, a state agency, or the office of the governor.

Iowa Code § 68B.2(10)(a)-(c) (1993).

Reading the two-year ban on "becoming a lobbyist" in conjunction with these three alternative definitions, it is evident that these provisions prohibit a former official or employee from contacting the legislature, state agencies and state officials after termination of service or employment in a variety of contexts. Construing the definitions of lobbyist, our office recently observed that a person becomes a lobbyist by engaging in the specific conduct delineated in the statute. A lobbyist is: a person who is paid compensation to encourage certain actions by legislators or to influence certain decisions by state agencies or statewide elected officials; a person who represents on a regular basis an organization

that has as one of its purposes encouragement of certain actions by legislators or the influence of certain decisions by state agencies or statewide elected officials; or a person who is a government official or employee who represents the official position of their agency and who encourages certain actions by legislators or influences certain decisions by state agencies or the office of the governor. 1992 Op. Att'y Gen. 199. Former officials and employees subject to the two-year ban on becoming a lobbyist, therefore, are prohibited from engaging in these activities.

Chapter 68B also imposes restrictions on the activities of former officials and employees with respect to matters in which they were directly concerned and personally participated. Under section 68B.7:

> A person who has served as an official, state employee of a state agency, member of the general assembly, or legislative employee shall not within a period of two years after the termination of such service or employment appear before the 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 the person was directly concerned and personally participated during the period of service or employment.[1]

Iowa Code § 68B.7 (1993). The scope of this prohibition is narrowly drawn to restrict contacts after termination of service or employment that would intersect with matters that had been pending before the official or employee left service or employment.

Construing section 68B.7 in 1981, we determined that limiting appearances before state agencies by former officials and employees on matters with which they were directly concerned and personally participated prevents conflicts of interest from arising. The statute is narrowly drafted to reach specific conduct for a definite time period. We concluded in 1981 that it is unlikely that a court would rule that this portion of section 68B.7 is unconstitutional. 1982 Op. Att'y Gen. 278, 280.

Section 68B.7 further limits the activities of those who have served as the head or deputy of a regulatory agency or have served on the regulatory agency itself.[2] The second unnumbered paragraph of section 68B.7 states that:

> A person who has served as the head of or on a commission or board of a regulatory agency or as a deputy thereof, shall not, within a period of two years after the termination of such service accept employment with that commission, board, or agency or receive compensation for any services rendered on behalf of any

[1] Members of the general assembly and legislative employees were added to the scope of § 68B.7 by amendments in House File 2466. These amendments, like the two-year ban on lobbying, became effective on July 1, 1992. 1992 Iowa Acts, ch. 1228, §§ 7, 38.

[2] "Regulatory agencies" are specifically defined in House File 2466 to include sixteen specific agencies. 1992 Iowa Acts, ch. 1228, § 1(20), codified as Iowa Code § 68B.2(20) (1993). The roster of regulatory agencies is unchanged from the previous statute. Iowa Code § 68B.2(13) (1991).

> person, firm, corporation, or association in any case, proceedings, or application before the department with which the person so served wherein the person's 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.

Iowa Code § 68B.7 (second unnumbered paragraph) (1993). Under this provision persons who have served as the head or a deputy of or on a commission or board of a regulatory agency are prohibited within a period of two years after termination of service from employment with that agency or from receiving compensation for certain services if the services are contingent upon specified action.

Enactment of the two-year ban on lobbying in addition to these provisions in section 68B.7 creates overlapping prohibitions. Attempts to influence the decision of a state agency, if done for compensation or while representing on a regular basis a qualified organization or as a government official or employee while representing the official position of the agency, will constitute "lobbying" which is banned for two years. These contacts with agencies by former officials and employees on matters in which the former official or employee had been directly concerned and personally participated are separately banned under section 68B.7. Application of the two-year ban, therefore, will subsume conduct that is already prohibited by section 68B.7.

Application of the two-year ban as amended also reaches conduct for which no conflict of interest is apparent. All officials, state employees, members of the General Assembly and legislative employees are now subject to a ban on all lobbying for two years after termination of service or employment, regardless of whether the lobbying is even remotely connected to their prior service or employment. Clerical personnel in the office of the Secretary of State, for example, are prohibited for two years following termination of employment from representing on a regular basis the local chapter of the Sierra Club in contacting legislators on pending legislation. This would be true even if the activities of the Sierra Club were totally unrelated to the employee's duties within the office of the Secretary of State.

Courts have long recognized that lobbying, whether directed at the legislature or state agencies and state officials, comes within the protection of the First Amendment. *See California Transport Trucking Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S. Ct. 609, 30 L. Ed. 2d 642, 646 (1972); *Taxation With Representation v. Regan*, 676 F.2d 715, 724 (7th Cir. 1982). Any restrictions imposed must serve a compelling state interest. *See United States v. Harriss et al.*, 347 U.S. 612, 74 S. Ct. 808, 98 L. Ed. 989 (1954); *Minnesota State Ethical Practices Board v. National Rifle Association*, 761 F.2d 509 (8th Cir. 1985), cert. denied, 474 U.S. 1082, 106 S. Ct. 853, 88 L. Ed. 2d 893 (1986); *Pletz v. Secretary of State*, 125 Mich. App. 335, 336 N.W.2d 789 (1983). Substantial infringements of the right to lobby not only must be justified by a compelling state interest but that interest must be effectuated in a manner that least restricts lobbying. Government officials must employ means of achieving a

compelling state interest that is "closely drawn to avoid unnecessary abridgment." *Citizens Energy Coalition v. Sendak*, 459 F. Supp. 248, 258 (S.D. Ind. 1978), *aff'd* 594 F.2d 1158 (7th Cir. 1979). Where the restriction amounts to a ban on all lobbying by all former officials and employees on matters that are unrelated to their service or employment we question whether a compelling state interest can be asserted, much less whether a ban on all lobbying is a "closely drawn" means of achieving that end.

The federal government has not extended post-service and post-employment restrictions on officials and employees this far. The Ethics in Government Act of 1978 is viewed as including among its objectives promoting the even-handed exercise of administrative discretion, preventing the exercise of undue influence of former officials with their former agency colleagues and avoiding the appearance of impropriety of public office being used for private gain. Spak, *America for Sale: When Well-Connected Former Federal Officials Peddle Their Influence to the Highest Bidder - a Statutory Analysis and Proposals for Reform of the Foreign Agents Registration Act and the Ethics in Government Act*, Ky. L.J. 237, 267-68 (1989-90).

Toward these ends, all federal executive branch officers and employees are permanently restricted from knowingly making, with the intent to influence, a communication to or appearance before any officer or employee of any department or agency on behalf of any other person in connection with a particular matter involving a specific party in which the person participated personally and substantially as an officer or employee. 18 U.S.C. §207(a)(1). A two-year restriction applies to a matter which a person knows or reasonably should know was pending under his or her official responsibility as an officer or employee within one year before termination of service or employment. 18 U.S.C. §207(a)(2). These prohibitions are somewhat similar to section 68B.7 in that they focus on matters in which the former official or employee was involved or had responsibility.

Bans against knowingly making, with the intent to influence, any communication or appearance before a particular agency or Congress regardless of the subject matter of the communication or appearance do exist, but are more narrowly drawn under federal law than under House File 2466. Certain "senior personnel" of the executive branch and independent agencies are restricted within one year after the termination of service or employment in a senior position from knowingly making, with the intent to influence, any communication to or appearance before any officer or employee of the department or agency within which they served within one year before termination in connection with any matter in which they seek official action. 18 U.S.C. §207(c). "Very senior personnel" of the executive branch and independent agencies, including the Vice President of the United States, are additionally restricted from communicating to or appearing before designated persons outside the department or agency in which they served or were employed. 18 U.S.C. §207(d).

Members of Congress and their staff are similarly restricted for one year after leaving office or employment from knowingly making, with the intent to influence, certain communications or appearances on matters on which they seek action. Members of Congress are restricted from seeking action by a

member, officer or employee of either House of Congress; staff are restricted from seeking action by members of Congress or employees connected to the position in which they were employed. 18 U.S.C. § 207(e).

The federal law significantly differs from section 68B.5. The federal restrictions on communications to or appearances before departments or agencies after termination of service or employment are drawn to address specific matters or to limit contact with entities with which the officer or employee had influence during the period of service or employment. Unlike section 68B.5, these federal restrictions are drawn to target specific areas in which conflicts potentially may arise.

In light of the common law principles applicable to an analysis of restriction of First Amendment rights and the broad scope of the two-year ban on all lobbying under section 68B.5, it is our opinion that, if the ban on all lobbying by all former officials and employees were challenged in a court of law, a court would likely rule that the ban is unconstitutional. A two-year ban on all lobbying by all former officials and employees is not "closely drawn" in furtherance of a compelling state interest.

We do not suggest that a ban on all lobbying by some former officials and employees could not be crafted. Where officials and employees serve or are employed in capacities in which they act on a very broad spectrum of issues in state government, a ban on all lobbying for a finite period of time may be justifiable. We do suggest, however, that a ban on all lobbying by all former officials and employees which sweeps across state government without regard to the capacity in which a former official or employee served or acted cannot be justified in all cases by a compelling state interest. Whether a ban on all lobbying can be applied constitutionally to any particular person, including a legislative staff member, would need to be determined on a case-by-case basis.

This result would be the same under either the United States Constitution or the Iowa Constitution. Article I, section 20 of the Iowa Constitution states that "[t]he people have the right . . . to make known their opinions to their representatives and to petition for redress of grievances." This provision has not been construed in the context in which your questions are posed. The Iowa Constitution, however, cannot diminish the rights conferred by the United States Constitution. Because we conclude that the ban on all lobbying would violate the United States Constitution, it is unnecessary to further analyze the applicability of this section.

We urge the legislature to re-examine this issue in light of the existing provisions of section 68B.7 and constitutional principles focusing on the need for a more narrowly-tailored proscription on lobbying.

January 27, 1993

GENERAL ASSEMBLY; CONSTITUTION; STATE OFFICERS: Simultaneous service in general assembly and on Iowa Sister States board of directors. Iowa Const. art. III, §§ 1, 21, 22; Iowa Code § 18B.3 (1991). Service on the Iowa Sister States board of directors by members of the general assembly does not violate the separation of powers doctrine under Iowa Constitution Article III, section 1 when the function of the board is to simply research and recommend official exchanges between Iowa and

other countries concerning new subject areas in business, media, science, culture, agriculture and sports. (Doland to Connors, State Representative, 1-27-93) #93-1-5(L)

January 27, 1993

MUNICIPALITIES: Municipal Housing Projects. Pre-application Hearing. Iowa Code §§ 403A.4, 403A.20 and 403A.28 (1991). A pre-application hearing is not contemplated by Iowa Code section 403A.28 in requiring a public hearing prior to "undertaking" a housing project. A public hearing, however, must be held prior to the performance or execution of a housing project, or binding contract to do so, including the execution of any contract for financial assistance with the federal government. (Walding to Doderer, State Representative, 1-27-93) #93-1-6(L)

January 27, 1993

LICENSES; MUNICIPALITIES: Use of Plumbers Permit. Iowa Const. art. III, § 38A; Iowa Code § 135.15 (1991). A city has the authority to restrict those engaged in the local plumbing trade to persons who satisfy uniform standards which are reasonable and equitable. A licensed master plumber can be prohibited, by ordinance, from allowing an unlicensed contractor to use a permit applied for and issued to the licensed master plumber. (Walding to Jochum, State Representative, 1-27-93) #93-1-7(L)

January 27, 1993

COUNTIES; CITIES: County board of health; private sewage disposal facilities. Iowa Const. art. III, § 39A; Iowa Code §§ 137.2(1), 137.2(2), 137.2(6), 137.5, 137.7(4), 331.301(1), 331.301(2), 331.301(4), 455B.172(2), 455B.172(3), 455B.172(4), 455B.172(5) (1991). A county does not have authority to unilaterally delegate its responsibility for private sewage disposal facilities under Iowa Code §§ 455B.172(3) and (4) to a city with a population under twenty-five thousand for facilities located within the city's corporate limits. (Sheridan to Daggett, State Representative, 1-27-93) #93-1-8(L)

FEBRUARY 1993

February 17, 1993

MUNICIPALITIES: Franchise Ordinance Referendum. Iowa Code §§ 364.2(4), 364.2(4)(a), 364.2(4)(b) (1993). A referendum is required by Iowa Code section 364.2(4) prior to a city granting a franchise to any person for the erection, maintenance and operation of an electrical plant or system. (Walding to Borlaug, State Senator, 2-17-93) #93-2-1(L)

February 17, 1993

BEER AND LIQUOR: Determination of "good moral character" for licensees. Iowa Code § 123.3(26)(e) (1993). The language found in Iowa Code section 123.3(26)(e) which provides that an individual and their spouse shall be regarded as one person applies only to section 123.3(26)(e) and not to the remainder of section 123.3(26). (McGuire to Angrick, Citizens' Aide/ Ombudsman, 2-17-93) #93-2-2(L)

February 25, 1993

SCHOOLS: Bond Elections; Location of School House Site. Iowa Code §§ 296.2, 297.1 (1993). A site location may be included as part of a ballot question placed before the voters of a school district pursuant to Iowa Code section 296.2. In the event that multiple competing proposals are placed on the ballot at the same election and more than one proposal receives the number of votes necessary for approval, the school board is authorized to choose the proposal receiving the highest number of votes as the sole proposal to be accomplished. (Krogmeier to Baxter, Secretary of State, 2-25-93) #93-2-3(L)

MARCH 1993

March 5, 1993

HOSPITALS: Municipal Hospitals; Regulation of Parking Lot Use; Publication of Minutes. Iowa Code §§ 21.3, 347.28, 392.6 (1993). A municipal hospital may deny use of hospital parking lot to patrons of adjacent private clinic. A municipal hospital board of trustees is not required to publish minutes of its meetings in a newspaper. (Ewald to Black, State Representative, 3-5-93) #93-3-1(L)

March 18, 1993

TAXATION: Tax Sale; Initial Tax Sale And Tax Sale For Subsequent Year's Taxes. Iowa Code § 447.9 (1993). The sale of a parcel at tax sale does not, of itself, preclude another tax sale of the parcel for failure to pay subsequent year's taxes. If such multiple tax sale of the same parcel occurs, the initial tax sale certificate holder will be entitled to a tax deed, upon expiration of the right of redemption, even if the initial holder has not paid the subsequent year's taxes. The subsequent year tax sale certificate holder must serve a notice of expiration of right of redemption on the initial tax sale certificate holder. A redemption from only one of several tax sales of the same property for different tax periods will not prevent a tax deed from being issued to the holder of the unredeemed tax sale certificate. (Griger to Mullin, Woodbury County Attorney, 3-18-93) #93-3-2(L)

March 26, 1993

STATE OFFICERS AND DEPARTMENTS; GENERAL ASSEMBLY: Smoking in Capitol. Iowa Const. art. III, § 9; Iowa Code §§ 2.43, 18.8, 142B.1(2), (3). The Capitol rotunda is a "public place" subject to Iowa Code chapter 142B, the smoking law. In the absence of contrary legislative rules, application of chapter 142B to the Capitol rotunda and the legislative dining room would not unconstitutionally infringe upon the power of each house to control its own procedures and discipline its members as these areas are not used for legislative meetings or deliberations. (Osenbaugh to Halvorson, State Representative, 3-26-93) #93-3-3(L)

March 31, 1993

SCHOOLS: School Districts; Dues Payments to School Associations; Lobbyists. Iowa Code ch. 68B, §§ 279.38, 280.14 (1993). Under section 279.38 a school district is not authorized to pay dues to any equivalent organization other

than the Iowa Association of School Boards. A school district, however, does have implied authority under section 280.14 to hire a lobbyist to act on its behalf. (Weeg to Hansen, State Representative, 3-31-93) #93-3-4(L)

APRIL 1993

April 2, 1993

TREASURER; STATUTORY CONSTRUCTION: Treatment of Outdated State Warrants. Iowa Code §§25.2, 421.45, 556.8, 556.13, 556.18 (1993). Claims based on outdated state warrants are to be handled by the State Appeal Board pursuant to Iowa Code section 25.2 as opposed to the Treasurer of State pursuant to Iowa Code chapter 556. (Barnett to Fitzgerald, Treasurer of State, 4-2-93) #93-4-1(L)

April 2, 1993

STATUTES; PUBLIC EMPLOYEES: Early Retirement. Iowa Code §97B.41(3)(b)(4) (1993), 1992 Iowa Acts, chapter 1220, section 2. Section 2 of the 1992 Iowa Acts, chapter 1220, does not prevent a former employee who is receiving early retirement benefits pursuant to this Act from performing services for the State or a political subdivision of the State as an independent contractor. The definition of the word "employee" in Iowa Code section 97B.41(3)(b)(4) (1993) is not applicable to 1992 Iowa Acts, chapter 1220, section 2. (Barnett to Priebe, Chair, Administrative Rules Review Committee, 4-2-93) #93-4-2(L)

April 2, 1993

COUNTY OFFICERS: Resignation effective date; filling vacancy. Iowa Code §§69.2, 69.14A (1993). A county officer's resignation becomes effective creating a vacancy upon the effective date specified in the resignation or upon submission when no future effective date is specified. Iowa Code section 69.14A(1)(a) allows the committee designated to fill a vacancy in county office to give notice of its intent to fill the vacancy by appointment prior to existence of the vacancy if a resignation is to take effect at a future date. The committee must, however, wait until the vacancy occurs to issue a call for special election to fill the vacancy. (Scase to Halvorson, State Representative, 4-2-93) #93-4-3(L)

April 9, 1993

TAXATION; REAL PROPERTY: Statutory water and sewer lien. Iowa Code §384.84(1) (1993). Statutory lien attaches to property served by various services enumerated in section 384.84(1) even if the current owner of that property did not incur the charges for those services. The only exception where the lien does not attach to the property involves water services incurred by the tenant and which are separately metered and paid directly by the tenant. (Miller to Siegrist, State Representative, 4-9-93) #93-4-4(L)

April 20, 1993

TAXATION: Tax Sales; Application of Law in Effect on Date of Tax Sale. Iowa Code §§446.37 and 447.9 (1993). The law in effect on the date of the tax sale will control as to the minimum time that must elapse from the

date of the tax sale before the notice of expiration of right of redemption can be served. Section 446.37, in effect on the date of the tax sale, will determine the time within which a tax deed must be obtained to avoid cancellation of the tax sale. (Griger to Hansen, State Representative, 4-20-93) #93-4-5(L)

April 20, 1993

SCHOOL BOARDS: School Board Elections; School District Reorganization. Iowa Code §§275.25, 275.41, 275.41(2), 275.41(4-7), 275.41(8) (1993). School board members for a newly-organized school district appointed to the new board pursuant Iowa Code section 275.41 who are subsequently defeated for reelection to the board of the old districts remain members of the board of directors of the newly-organized district. (Valde to Peterson, State Representative, 4-20-93) #93-4-6(L)

April 26, 1993

COUNTIES: Toll Roads. Iowa Const. art. III, §39A; Iowa Code §331.301(7) (1993). Construction and maintenance of a toll road by a county for the purpose of raising revenue would amount to the imposition of a tax. There is no statutory authority, either express or implied, to impose such a tax, and therefore, such a tax may not be levied. (Hindt to Jensen, 4-26-93) #93-4-7

Michael P. Jensen, Monona County Attorney: You have requested an opinion of the Attorney General on the following question:

> Can a county construct and maintain a tax-generating, toll road on any county road, charging a fee to be set by ordinance by the County Board of Supervisors?

It is our opinion, based upon review of the relevant constitutional, statutory, and case law, that a county may not operate a tax-generating toll road.

As part of the Iowa Constitution, counties have been granted "home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government . . . " Iowa Const. art. III, §39A. Authority is given by statute to exercise powers or perform functions which are deemed appropriate to protect and preserve their rights, privileges, and property, or that of their residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of their residents. Iowa Code §331.301 (1993). As explained below however, this authority is limited with respect to a county's ability to impose a tax.

Construction and maintenance of a toll road by a county for the purpose of raising revenue amounts to the imposition of a tax. A tax is defined in Iowa law as "a charge levied to pay the cost of government." *Internorth Inc. v. Iowa State Board of Tax Review*, 333 N.W.2d 471, 476 (Iowa 1983). The toll charge would not constitute a permit or license fee (which may be charged under "home rule") if the purpose of the toll is to raise revenue for secondary roads. Permits or license fees seek only to collect sums necessary to defray the costs of administering the permits or licenses. See 1980 Op. Att'y Gen. 154, 155.

Article III, section 39A, of the Iowa Constitution provides in part as follows:

> [counties] shall not have power to levy any tax unless expressly authorized by the General Assembly.

Iowa Code section 331.301(7) provides:

> A county shall not levy a tax unless specifically authorized by a state statute.

Absent broad "home rule" authority counties may only exercise powers expressly conferred by enabling legislation or necessarily implied by powers conferred. *See State v. Bates*, 305 N.W.2d 426, 427 (Iowa 1981); *Kasparek v. Johnson County Board of Health*, 288 N.W.2d 511, 514 (Iowa 1980). Therefore, counties may only levy taxes in the manner expressly authorized by statute, or in a manner which is necessarily implied by statutes conferring powers.

There is no express authority in the Code for counties to operate toll roads. Iowa Code sections 331.421 through 331.440 authorize counties to collect revenue for secondary roads through the imposition of a property tax. The existence of the property tax provisions imply that toll roads are not necessary. Therefore, the power to operate a toll road is not implied by the statutes.

In conclusion, construction and maintenance of a toll road by a county for the purpose of raising revenue would amount to the imposition of a tax. There is no statutory authority, either express or implied, to impose such a tax, and therefore, pursuant to the provisions of article III, section 39A of the Iowa Constitution and Iowa Code section 331.301(7), such a tax may not be levied.

April 28, 1993

CONFLICT OF INTEREST; INCOMPATIBILITY OF OFFICES: Business between City Officer and City; County Supervisor and Mayor; County Supervisor and Veteran's Affairs Commission. Iowa Code §§ 35B.4, 35B.6(1)(a), 35B.7, 35B.10, 35B.14; 362.5(4), (5), (7), (9), (10); 441.2, 441.6, 441.9, 441.16, 441.31 (1993). It is permitted for a city officer to do business with that city if an enumerated exception in section 362.5 is satisfied. The offices of county supervisor and mayor are incompatible. A position on the Veteran's Affairs Commission is not an office, and is therefore not incompatible with the office of county supervisor. (Condo to Ferguson, Black Hawk County Attorney, 4-28-93) #93-4-8(L)

MAY 1993

May 11, 1993

CRIMINAL PROCEDURE; SCHOOLS; COUNTY ATTORNEYS: Venue for truancy mediation/prosecution. Iowa Code §§ 299.1, 299.2, 299.3, 299.4, 299.5, 299.5A, 299.6, 299.19, 803.2(1), 803.3(1) (1993). When referrals are made for mediation and/or prosecution of violations of the compulsory education provisions, Iowa Code §§ 299.1 - 299.5A, venue lies generally in the violator's county of residence. Under certain circumstances, more than

one county may have a right to proceed with the mediation/prosecution. (Lerner to Lepley, 5-11-93) #93-5-1(L)

May 20, 1993

HIGHWAYS; COUNTIES AND COUNTY OFFICERS: Tree Removal. Iowa Code §§306.3(12), 314.7 (1993); 1992 Iowa Acts, ch. 1153, §1. Amendment of section 306.3 to add definition of public right-of-way has no effect on existing responsibilities of county boards of supervisors or rights of private property owners regarding tree removal for highway purposes. (Anderson to Van Maanen, State Representative, 5-20-93) #93-5-2(L)

JUNE 1993

June 1, 1993

STATE EMPLOYEES: Compensation; Dual Employment. Iowa Code §§15.105, 15.106, 15E.152, 15E.153, 15E.154, 15E.155, 15E.156, 70A.1, ch. 104A (1993); S.F. 2393, §10 (1992 Iowa Acts, ch. 1001, §103, 74th GA., Second Extraordinary Sess.). Iowa Code section 15E.153 does not preclude the Wallace Technology Transfer Foundation from selecting a state employee, specifically the Director of the Department of Economic Development, as its executive director. Senate File 2393, section 10, 1992 Acts of the General Assembly, Second Extraordinary Session, prohibits additional remuneration for a state employee's duties, but does not prohibit an employee from engaging in additional duties for additional remuneration. Finally, Iowa Code section 70A.1 prohibits state employees from receiving additional compensation for services performed during the same time period for which the employee is already receiving state compensation. (Hunacek to Murphy, State Senator, 6-1-93) #93-6-1(L)

June 1, 1993

CHILD ABUSE: Reporting and Investigating; Religious Exemption. Iowa Code §232.68(c) (1993). All children, including those under spiritual treatment, are subject to the same child abuse reporting, investigation and treatment standards provided in the Iowa Code, regardless of the religious exemption provisions of Iowa Code section 232.68(2)(c). (Miller-Todd to Palmer, Director, Iowa Department of Human Services, 6-1-93) #93-6-2

Charles M. Palmer, Director, Iowa Department of Human Services: You have requested an opinion from this office concerning whether all children, including those under spiritual treatment, are subject to the same child abuse reporting, investigation and treatment standards regardless of the religious exemption provisions of Iowa Code section 232.68(2)(c) (1993).

Under Iowa law, a person responsible for the care of a child may be found to have abused a child if the person has failed "to provide for the adequate food, shelter, clothing or other necessary care for the child's health and welfare when financially able to do so or when offered financial or other reasonable means to do so." Iowa Code §232.68(2)(c) (1993). This Code provision includes a religious exemption: "A parent or guardian legitimately practicing religious beliefs who does not provide specified medical treatment for a child for that

reason alone shall not be considered abusing the child. . . ." This same Code provision also allows a court to order the medical service to be provided to the child where the child's health requires it.

In addition to the protection of Iowa Code section 232.68(2)(c), the legislature has provided that a child may be adjudicated to be in need of assistance when the child "is in need of medical treatment to cure, alleviate, or prevent serious physical injury or illness and whose parent, guardian or custodian is unwilling or unable to provide such treatment." Iowa Code § 232.2(6)(e) (1993). This code provision does not have a religious exemption.

Prior to the enactment of Iowa Code section 232.2(6)(e) and Iowa Code section 232.68(2)(c) in 1978, the Iowa Supreme Court took the following position:

> The state has a duty to see children receive proper care and treatment. *In re Loeffelholz*, 162 N.W.2d 415 (Iowa 1968). This means parents have no right to deprive their children of proper medical care. Where the best interests and welfare of children are involved even parental preference based upon asserted religious belief may be required to give way.

In re Karwath, 199 N.W.2d 147, 150 (Iowa 1972).

The intent of the Supreme Court and the intent of the legislature is to ensure that all children within this State receive proper medical care and treatment. To further this intent, the mandatory reporting, investigation and treatment provisions of the Iowa Code must be uniformly applied. Whenever a parent or guardian is alleged to have failed to provide necessary medical treatment because of religious beliefs, such allegations must be investigated. Not only must it be determined whether the child is receiving necessary medical treatment, it must also be determined if the parent or guardian legitimately holds religious beliefs which do indeed prohibit the child's receiving proper medical care. If it is determined the parents do not hold such beliefs or the beliefs do not prohibit the specified treatment, the report may be founded against the parent or guardian depending upon any other reason provided for the lack of treatment. The religious exemption of Iowa Code section 232.68(c)(2) relates only to the culpability of parents; it does not eliminate children of such parents from the investigation process.

Both Iowa Code subsections 232.2(6)(e) and 232.68(2)(c) provide statutory authority for insuring necessary medical treatment for children. The initiation of a child abuse investigation utilizes a mechanism which brings a child to the attention of the juvenile court. Even when a report may be determined to be unfounded, that report must be forwarded to the county attorney and the juvenile court. Iowa Code §§ 232.71(7) and (9) (1993). A child in need of assistance petition may be filed by the Department of Human Services, by a juvenile court officer, or by the county attorney, whether or not a child abuse report is determined to be founded or unfounded. Iowa Code § 232.87(2) (1993). Requiring that the reporting, investigation, and treatment provisions be uniformly applied affords a means by which the intent of the legislature and the Supreme Court can be realized.

In summary, all children, including those under spiritual treatment, are subject to the same child abuse reporting, investigation and treatment standards provided in the Iowa Code, regardless of the religious exemption provisions of Iowa Code section 232.68(2)(c). The religious exemption relates only to the culpability of parents or guardians.

June 18, 1993

CONSTITUTIONAL LAW; ETHICS; LOBBYISTS: Constitutionality of lobbyist regulation. U.S. Const. amends. I, XIV, § 1; Iowa Code §§ 68B.2(12), 68B.36, 68B.37 (1993); 1993 Iowa Acts, ch. 163 (House File 144), §§ 1, 23, 24. Registration and financial disclosure requirements imposed on lobbyists in the ethics law do not violate the First Amendment to the United States Constitution. The definition of "lobbyist" applicable to government officials is not unconstitutionally overbroad or vague, in violation of the First Amendment. The exceptions to the definition of "lobbyist" do not violate the equal protection provision of the Fourteenth Amendment to the United States Constitution. (Condo to Richards, Story County Attorney, 6-18-93) #93-6-3

Mary E. Richards, Story County Attorney: You have requested an opinion addressing the constitutionality of Iowa Code sections 68B.2(12)(a)(3), 68B.2(12)(b), 68B.36, and 68B.37. These sections regulate lobbying by government officials and employees by defining a lobbyist and imposing registration and reporting requirements.[3] Specifically, you have inquired:

> 1) Do sections 68B.36 and 68B.37, which require lobbyists to register and disclose financial information, violate the First Amendment through improper regulation of protected political speech?
>
> 2) Is section 68B.2(12)(a)(3), which defines the term "lobbyist," unconstitutionally overbroad or vague?
>
> 3) Do sections 68B.2(12)(a)(3) and 68B.2(12)(b), which define the term "lobbyist" and enumerate exceptions to the term, violate the Equal Protection clause of the Fourteenth Amendment?

It is our opinion that registration and reporting requirements do not violate the First Amendment, nor is the definition of a lobbyist unconstitutionally overbroad or vague. Further, we are of the opinion that neither the inclusion of government officials and employees as lobbyists, nor the list of exclusions from the definition of lobbyist violate the equal protection provision of the Fourteenth Amendment.

You question the constitutionality of the classification of governmental officers and employees who are regulated as lobbyists under chapter 68B. There are three definitions of the term "lobbyist" that are listed in section 68B.2(12)(a).

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[3] During the pendency of this opinion request, the applicable sections of the Iowa Code were amended. This opinion will address the above questions based on the recent amendments to chapter 68B. 1993 Iowa Acts, ch. 163, sections 1, 23, 24. The citations to chapter 68B in this opinion refer to the amended provisions appearing in the 1993 Iowa Code Suplement.

Section 68B.2(12)(a)(3) states that the term "lobbyist" includes a person who, by acting directly, does the following:

> Represents the position of a federal, state, or local government, in which the person serves or is employed as the designated representative, for purposes of encouraging the passage, defeat, approval, veto, or modification of legislation, a rule, or an executive order by members of the general assembly, a state agency, or any statewide elected official.

Section 68B.36 requires that all "lobbyists" as defined in section 68B.2(12)(a) file a registration statement with the ethics and campaign disclosure board prior to beginning lobbying activities. Section 68B.37 states that a lobbyist must file periodic reports with the appropriate government office. The reports must disclose the following: the lobbyist's clients; campaign contributions made by the lobbyist; the recipient of the campaign contributions; and all expenditures made for lobbying purposes.

Freedom of speech and the right to petition the government for redress of grievances are "among the most precious of the liberties safeguarded by the Bill of Rights." *District 12, United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222, 88 S. Ct. 353, 356, 19 L. Ed. 2d 426, 430 (1967). Communications of a lobbyist with members of government in regard to legislation and other functions of government are clearly protected areas of speech. *Fritz v. Gorton*, 517 P.2d 911, 929 (Wash. 1974), *appeal dismissed*, 417 U.S. 902, 94 S. Ct. 2596, 41 L. Ed. 2d 208 (1974). Generally, state laws which inhibit the exercise of First Amendment rights are unconstitutional unless they serve a compelling state interest. *See Buckley v. Valeo*, 424 U.S. 1, 25, 96 S. Ct. 612, 637-38, 46 L. Ed. 2d 659, 691 (1976); *NAACP v. Alabama*, 357 U.S. 449, 460-463, 78 S. Ct. 1163, 1170-72, 2 L. Ed. 2d 1488, 1498-1500 (1958).

The primary case relating to lobbyist regulation is *United States v. Harriss*, 347 U.S. 612, 74 S. Ct. 808, 98 L. Ed. 989 (1953). In *Harriss*, the U.S. Supreme Court upheld a registration and disclosure law that required lobbyists to register with Congress, state their employer and salary, and file quarterly reports disclosing the lobbyist's contributions and expenditures. The Court identified the compelling state interest that allowed the regulation:

> Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. . . . Toward that end, Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much. It acted . . . to maintain the integrity of a basic governmental process.

Harriss, 347 U.S. at 625, 74 S. Ct. at 816, 98 L. Ed. at 1000-01.

The argument has been made that the *Harriss* decision is limited strictly to so-called "professional lobbyists." *See Commission on Independent Colleges and Universities v. New York Temporary State Commission on Regulation of*

Lobbying, 534 F. Supp. 489, 499 (N.D.N.Y. 1981); *Advisory Opinion on Constitutionality of 1975 P.A. 227 (Questions 2-10)*, 242 N.W.2d 3, 23 (Mich. 1976). The *Harriss* court interpreted the federal statute at issue as regulating those "who for hire attempt to influence legislation or who collect or spend funds for that purpose." *Harriss*, 347 U.S. at 625, 74 S. Ct. at 816, 98 L. Ed. at 1000. The New York statute at issue in *Commission on Independent Colleges* and the Michigan statute at issue in *Advisory Opinion* both had a $1,000 "threshold." If a lobbyist's expenditures exceeded $1,000 annually, the disclosure requirement activated. Both courts upheld this $1,000 limit, despite the argument that an annual expense of $1,000 is far too low to separate "professional lobbyists" from "occasional lobbyists." *Commission on Independent Colleges*, 534 F. Supp at 499; *Advisory Opinion*, 242 N.W.2d at 23. The Michigan Supreme Court has stated that "the rights of legislators, public officials and the public to know the source of monies expended to influence governmental action applies equally to professional lobbyists and those representing their own interests." Advisory Opinion, 242 N.W.2d at 23.

While a government official engaged in lobbying is not necessarily a "professional" lobbyist for hire, the similarities outweigh the differences. Both are being paid for services rendered. The fact that the official may receive no additional compensation beyond a fixed salary for lobbying does not mean that he or she is not being compensated by way of salary for lobbying. *Cf. Secretary of State v. Indiana State AFL-CIO*, 371 N.E.2d 1343, 1344 (Ind. 1978) (union president's salary is partly compensation for his lobbying efforts). Most importantly, each has the same goal: to influence legislation on behalf of a principal. The free speech rights of one are no greater than those of the other, and there is no constitutional basis for distinguishing between the two.

There are three compelling governmental interests that have been found to justify lobbyist registration and disclosure requirements under a strict scrutiny analysis. First, disclosure provides legislators with the information as to where certain funds are coming from, and to discover the particular constituency advocating a position on legislation. *See Harriss*, 347 U.S. at 625, 74 S. Ct. at 816, 98 L. Ed. at 1000-01; *Commission on Independent Colleges*, 534 F. Supp. at 498; *ACLU of New Jersey v. New Jersey Election Law Enforcement Commission*, 509 F. Supp. 1123, 1129 (D.N.J. 1981); *Advisory Opinion*, 242 N.W.2d at 23; *New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Commission*, 411 A.2d 168, 175 (N.J. 1980); *Fritz*, 517 P.2d at 930-31. Second, lobbyist regulation and disclosure serves the needs of the voter. "The voting public should be able to evaluate the performance of their elected officials in terms of representation of the electors' interest in contradistinction to those interests represented by lobbyists." Fritz, 517 P.2d at 931; *see also Commission on Independent Colleges*, 534 F. Supp. at 498; *ACLU of New Jersey*, 509 F. Supp. at 1129; *Advisory Opinion*, 242 N.W.2d at 23; *New Jersey State Chamber of Commerce*, 411 A.2d at 175. Third, "the state has a strong interest in promoting openness in the system by which its laws are created." *ACLU of New Jersey*, 509 F. Supp. at 1129; *see also Buckley*, 424 U.S. at 67, 96 S. Ct. at 657, 46 L. Ed. 2d at 715 ("disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity."); *New Jersey State Chamber of Commerce*, 411 A.2d at 176.

The fact that a statute serves compelling state interests is not enough to meet the requirements of the Constitution. The statute must also be the least restrictive means of furthering those interests. *Buckley*, 424 U.S. at 68, 96 S. Ct. at 658, 46 L. Ed. 2d at 715-16. In the context of financial disclosure by a candidate for office, the *Buckley* court stated that "[i]n this process, we note and agree with appellant's concession that disclosure requirements — certainly in most applications — appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Id.*

Several courts have upheld lobbyist registration and financial disclosure provisions substantially similar to the Iowa statute. In these cases courts have emphasized the fact that the requirements of the law did not go so far as to prevent the exercise of First Amendment rights. The federal district court in *Commission on Independent Colleges* stated that "[t]he governmental interest here is in providing the public and government officials with knowledge regarding the source and amount of pressure on government officials. The legislature has not sought to prohibit any type of lobbying or limit the amount of lobbying that can be undertaken." *Commission on Independent Colleges*, 534 F. Supp. at 498.

The Washington Supreme Court in *Fritz* also stated that regulation and disclosure requirements have a minimal impact on the exercise of First Amendment rights.

> [T]he initiative only requires that one who receives compensation and/or expends funds in lobbying must register and openly and publicly report the nature and extent of his activities in this particular regard. By narrowing its scope to the influence of money upon governmental processes, Initiative 276 avoids unconstitutional restrictions upon the ambit of the guarantees of the First Amendment.

Fritz, 517 P.2d at 929.

Statutes that affect fundamental rights, but do not significantly interfere with those rights, may not be subject to a strict scrutiny analysis. *See Zablocki v. Redhail*, 434 U.S. 374, 386-88, 98 S. Ct. 673, 681-82, 54 L. Ed. 2d 618, 630-32 (1978). At least one court has declined to apply strict scrutiny in this context. The California Supreme Court declared that a lobbyist registration and disclosure law was not subject to strict scrutiny, because registration and disclosure requirements were incidental burdens on First Amendment rights.

> [T]he registration, reporting, and gift provisions are not direct limitations on the right to petition for redress of grievances. Application of the burdens of registration and disclosure of receipts and expenditures to lobbyists does not substantially interfere with the ability of the lobbyist to raise his voice.

Fair Political Practices Commission v. Superior Court, 599 P.2d 46, 54 (Cal. 1979), *cert. denied*, 444 U.S. 1049, 100 S. Ct. 740, 62 L. Ed. 2d 736 (1980).

Even under a strict scrutiny analysis of registration and disclosure requirements, the three compelling state interests cited *supra* are all present. Legislators and the general public both benefit from the knowledge of the source of particular funds. Also, the state's interest in openness in government and the legislative process is promoted. "The compelled disclosure of contributions directly related to lobbying activities is an essential, in fact *the* essential aspect of the regulatory scheme." *ACLU of New Jersey*, 509 F. Supp. at 1135 (emphasis original). In regards to the general validity of lobbyist regulation, "the compelling need for this type of legislation is demonstrated by both common understanding and judicial precedent." *Montana Automobile Association v. Greely*, 632 P.2d 300, 303 (Mont. 1981). It is therefore the opinion of this office that sections 68B.36 and 68B.37 do not violate the First Amendment.

You state in your opinion request section 68B.2(12)(a)(3) is potentially overbroad, because it might regulate protected personal communications that have no relation with lobbying. You further state that the above section is potentially vague, because a person might not know what actions transform a person into a "lobbyist" under chapter 68B. The 1993 amendments to chapter 68B clarify the conduct that makes one a lobbyist. An uncertainty, even if the statute does not in fact regulate protected conduct, could preclude one from engaging in protected First Amendment rights. *See Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d 1115, 1123 n.9 (1st Cir. 1981).

The vagueness and overbreadth doctrines are closely related and are often addressed together. *Commission on Independent Colleges*, 534 F. Supp. at 502; *see also* Note, *The Overbreadth Doctrine*, 83 Harv.L.Rev. 844, 873 (1970) ("[t]he vagueness doctrine . . . has been almost wholly merged with the overbreadth doctrine when statutes covering first amendment activities are at issue"). In the context of lobbyist regulation, the two doctrines overlap, as "in each case the statutory infirmity is that conduct which may not be proscribed consistent with the Constitution is or may be inhibited by the statute." *ACLU of New Jersey*, 509 F. Supp. at 1128.

A law will be struck down for overbreadth when it "does not aim specifically at evils within the allowable area of State control, but, on the contrary, sweeps within its ambit other activities that constitute an exercise" of protected First Amendment rights. *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S. Ct. 736, 742, 84 L. Ed. 1093, 1100 (1940). The amended definition of lobbyist in 68B.2(12)(a) requires that an individual act directly. This would indicate that communications made to someone other than a relevant state official would not be considered lobbying. An overbreadth challenge will fail if the challenged statute is readily subject to a limiting construction. *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S. Ct. 2908, 2916, 37 L. Ed. 2d 830, 840-41 (1973); *see also Dombrowski v. Pfister*, 380 U.S. 479, 490-91, 85 S. Ct. 1116, 1123, 14 L. Ed. 2d 22, 31 (1965). In *Commission on Independent Colleges*, the court followed the "limiting construction" rule.

> [T]hese plaintiffs claim that they feel compelled to curtail any public discussions or communications in order to avoid triggering the disclosure provisions of the lobby law. . . . If this Court found that the lobby law was designed to reach sort of indirect activity which might ultimately impact upon the governmental decision-

> making process, the Court would agree that it would be too difficult for average citizens to evaluate their conduct in light of this statute (emphasis original).

Commission on Independent Colleges, 534 F. Supp. at 496, 502.

Section 68B.2(12)(a)(3) specifically refers to direct action by an appropriate government official. A judicial limiting construction is therefore not necessary, as indirect actions or personal communications are clearly not considered to fall under the definition of lobbying. It is therefore our opinion that section 68B.2(12)(a)(3) is not unconstitutionally overbroad.

A statute will be struck down under the vagueness doctrine if those of ordinary intelligence must necessarily guess at its meaning. *Broadrick*, 413 U.S. at 607, 93 S. Ct. at 2913, 37 L. Ed. 2d at 837; *see also Grayned v. City of Rockford*, 408 U.S. 104, 108-14, 92 S. Ct. 2294, 2298-2302, 33 L. Ed. 2d 222, 227-31 (1972). A Missouri district court, for example, held that the term "lobbying activities with the Missouri General Assembly" was unconstitutionally vague.

> There is no reasonable construction that this Court can devise to provide certainty to the term "lobbying activities with the Missouri General Assembly." The term "lobbying" has an indefinite scope, and "lobbying activities" is yet more unclear. Accordingly, § 11 must be declared invalid for its failure to give the plaintiffs fair notice of the conduct proscribed, as required by the due process clause of the Fourteenth Amendment to the United States Constitution.

Greater St. Louis Health Systems Agency v. Teasdale, 506 F. Supp. 23, 41 (E.D.Mo. 1980).

The applicable statutory language in section 68B.2(12)(a)(3) is significantly more narrow than the Missouri statute. The same "limiting construction" rule used in the overbreadth analysis *supra* is also applicable to a vagueness analysis. *See Fantasy Book Shop*, 652 F.2d at 1123; *Commission on Independent Colleges*, 534 F. Supp. at 502. The qualifying language "[r]epresents the position of a federal, state, or local government in which the person serves or is employed as the designated representative, for purposes of encouraging the passage, defeat, approval, veto, or modification of legislation, a rule, or an executive order" is a prerequisite to achieve the status of "lobbyist" in Iowa. While the language is not absolutely precise, a statute need not be painstakingly specific to meet the requirements of the Constitution. *See Commission on Independent Colleges*, 534 F. Supp. at 502.

The above definition of "lobbyist" is sufficiently definite on its face and in a reasonable application of the language to meet constitutional requirements. Therefore, it is our opinion that section 68B.2(12)(a)(3) is not unconstitutionally vague.

The traditional standard of review under an equal protection analysis is that a law making a classification among persons will be upheld so long as it has a rational relation to a legitimate government interest. *See Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58, 108 S. Ct. 2481, 2487, 101 L. Ed. 2d 399,

409 (1988); *Lyng v. Automobile Workers*, 485 U.S. 360, 370, 108 S. Ct. 1184, 1192, 99 L. Ed. 2d 380, 391 (1988). However, when a fundamental right is at issue, a compelling state interest, embodied in a narrowly tailored restriction, is necessary to validate the law making the questioned classification. *See Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 666, 110 S. Ct. 1391, 1401, 108 L. Ed. 2d 652, 669 (1990); *Illinois State Board of Election v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S. Ct. 983, 990, 59 L. Ed. 2d 230, 241 (1979); *Police Department of Chicago v. Mosely*, 408 U.S. 92, 101, 92 S. Ct. 2286, 2293, 33 L. Ed. 2d 212, 220 (1972). On the subject of financial disclosure, a federal district court used the rational basis test to uphold a statutory classification that forced certain government officials to disclose certain campaign finance information. Even though not all officials were required to disclose the information, the case did not warrant strict scrutiny, as the freedoms of expression and association were not "unduly burdened." *Stoner v. Fortson*, 379 F. Supp. 704, 708 (N.D.Ga. 1974); *see also Fair Political Practices Commission*, 599 P.2d at 54.

Section 68B.2(12)(b) exempts eight categories of persons from the definition of "lobbyist." These categories include political party officials, the news media, all federal, state, and local elected officials, congressional and general assembly staff, and agency officials and employees while engaged in certain activities. Also excepted are those who give testimony before the general assembly or a state agency, those whose activities fall under Iowa Code section 17A.4(l)(b) (1993), and members of associations, foundations, or organizations who are either unpaid or not specifically designated as a lobbyist. In our view, these exceptions do not violate equal protection.

Various courts have addressed a number of similar exceptions, and found them to satisfy a particular compelling state interest. The Michigan Supreme Court, in *Advisory Opinion*, addressed the question of whether the exemption of political parties from the definition of "lobbyist" in the Michigan statute violated the equal protection clause. The court found that it did not, stating that "[p]olitical parties have long been subject to distinct and separate regulatory treatment." *Advisory Opinion*, 242 N.W.2d at 24.

Under Iowa Code chapter 56, political parties in Iowa must file reports with the campaign finance disclosure commission. This requirement parallels that which lobbyists must satisfy under chapter 68B. The fact that a political party's officials are exempted does not exempt the party itself from the reporting and disclosure requirements imposed on it by chapter 56.

The news media has been recognized to play a unique role in "informing and educating the public, offering criticism, and providing a forum for discussion and debate." *Austin*, 494 U.S. at 667, 110 S. Ct. at 1402, 108 L. Ed. 2d at 669. Addressing lobbyist regulation specifically, the Michigan Supreme Court stated that "[t]he press exemption properly excludes the acts of talking and writing to public officials for purposes of gathering news and information for dissemination." *Pletz v. Secretary of State*, 336 N.W.2d 789, 803 (Mich.App. 1983). When a member of the media steps outside the scope of employment, the exception no longer applies. "To the extent that members of the press engage in genuine lobbying efforts, they may be regulated, like

all other lobbyists, under applicable provisions of our lobbying laws." *Opinion of the Justices to the Senate*, 392 N.E.2d 849, 852 (Mass. 1979).

These cases demonstrate that a legislature may exempt certain individuals from lobbyist registration and disclosure requirements. Even following a strict scrutiny analysis, the enumerated exemptions from the definition of "lobbyist" advance compelling state interests. Further, a person who is exempt while acting in an official capacity is not given a "blanket exemption" that applies to communications made outside that identified role.

In conclusion, it is the opinion of this office that the definition of a lobbyist and the registration and reporting requirements do not violate any provision of the First Amendment. Further, the definition of a lobbyist and the exclusions from that definition do not violate the equal protection provision of the Fourteenth Amendment.

June 24, 1993

COUNTIES: County Attorney Duties. Iowa Code ch. 331 (1993). The county attorney has a duty to perform all responsibilities enumerated in Iowa Code sections 331.756, 331.323. Beyond those specific duties, any action by the county attorney is solely within his or her discretion. (Reno to Maddox, State Senator, 6-24-93) #93-6-4(L)

JULY, 1993

July 7, 1993

COUNTIES; SANITARY DISPOSAL PROJECTS: Iowa Const. art III, §39A; Iowa Code §§331.301, 331.422, 331.428, 331.432 and 455B.302. A county may not levy a tax for the general fund to pay for operation and maintenance of its sanitary landfill. The Code prohibits appropriations from the general fund for that purpose. There is no express authority from the General Assembly to do so and therefore it would violate the Home Rule Amendment and Iowa Code section 331.301. The effect would be to require cities to participate jointly with counties which would be inconsistent with the provisions of Iowa Code section 455B.302..(Hindt to Drew, Franklin County Attorney, 7-7-93) #93-7-1(L)

July 12, 1993

INSURANCE: Americans With Disabilities Act (A.D.A.). 42 U.S.C. §§12102(2)(A), 12112-12117, 12181(7)(F), 12201(C), 29 C.F.R. §1630. Insurance companies that offer health insurance plans which adversely affect individuals with disabilities covered by the A.D.A. are not "per se" violating the provisions of the Act. Current interpretations of the Act indicate insurance companies may offer such plans if they have followed relevant state insurance law provisions, have applied accepted principles of risk assessment or risk classification, and health benefit plans are not being used as a subterfuge to evade the purposes of the Act. (Sheirbon to Connolly, State Senator, 7-12-93) #93-7-2

The Honorable Mike Connolly, State Senator: You have requested an opinion concerning whether insurance companies are in violation of the Americans with Disabilities Act (hereinafter referred to as the A.D.A.), when the company issues a health insurance plan which excludes or limits coverage for certain disabilities covered by the Act. Your inquiry specifically refers to the general areas of substance abuse or mental health disabilities.[4] For purposes of this opinion we shall assume that a qualified individual with a disability covered by the A.D.A. is being adversely affected by exclusions or limitations in coverage contained in a health insurance plan. The A.D.A. and federal regulations attempt to define and categorize physical or mental impairments that are covered by this Act. *See generally* 42 U.S.C. § 12102(2)(A); 29 C.F.R. § 1630.

The issuance of health insurance plans by insurance companies may come under scrutiny pursuant to the A.D.A. in one of two ways. First, the A.D.A. prohibits discrimination against qualified persons in places of public accommodation. Insurance offices are considered places of public accommodations for purposes of the Act. *See* 42 U.S.C. § 12181(7)(F). Second, the A.D.A. prohibits discrimination against persons with a covered disability in areas including, but not limited to, recruitment, hiring, promotions and fringe benefits such as health insurance plans. 42 U.S.C. §§ 12112-12117.

The A.D.A. specifically addresses the application of its terms to insurance plans as follows:

> (c) Insurance
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> Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict
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> (1) an insurer, hospital, or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
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> (2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (3) a person or organization covered by this chapter from

[4] Your letter mentions substance abuse as a possible disability covered by the A.D.A. The Act specifically excludes from the term "qualified individual with a disability" any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use. The Act discusses in greater detail the use of drug testing or actions taken by an employer when a person is participating in a rehabilitation program. *See* 42 U.S.C. § 12114.

establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapters I and III of chapter.

42 U.S.C. § 12201(c).

The U.S. Equal Employment Opportunity Commission's Technical Assistance Manual gives us some guidance in how the A.D.A. may affect insurance companies. The manual indicates employers may provide the same coverage to employees with disabilities that is provided to other employees even though the plan may adversely affect the disabled employee. An example of such a situation is an employer-sponsored insurance plan that limits coverage of blood transfusions to five a year even though a hemophiliac employee may require more than five transfusions a year.

Generally, an employer may continue offering, and insurance companies may continue selling, health insurance plans that contain pre-existing conditions for exclusions or limit coverage for certain procedures and/or limit particular treatments to a specified number per year even if disabled persons are adversely affected so long as the restrictions apply uniformly to all insured individuals. Such exclusions and limitations in coverage must comply with federal and state insurance requirements and be in accordance with accepted principles of risk assessment or risk classification. The A.D.A. does not prohibit benefit changes based on sound actuarial principles but does prohibit using benefits as a subterfuge to evade the purpose of the Act.

To summarize, an insurance company or employer covered by the A.D.A. which offers a health insurance plan that adversely affects a qualified individual with a disability is not automatically discriminating against that individual as prohibited by the A.D.A. This advice is based on current interpretations of the federal law. The provisions of the A.D.A. must be applied to the facts of each individual situation, taking into consideration the insurance laws of the relevant state, before it can be determined whether there has been a violation of the Act.

July 12, 1993

SCHOOLS: Appropriations; Tuition; School Supply. Iowa Code §§ 282.6, 301.1 (1993); 257.13 (1991). The repeal of the Code section which allowed an increase in funding for school districts with increasing enrollments is reasonably related to a legitimate governmental interest in allocating and controlling state finances. A school district may not assess fees for items which are necessary or essential to the instruction of a class unless such a fee is specifically authorized by the Code; however, a district may assess fees for school supplies which represent the cost of the item or a reasonable rental fee. (Parmeter to Metcalf, State Representative, 7-12-93) #93-7-3(L)

July 12, 1993

STATE OFFICERS AND EMPLOYEES: Appropriations. Iowa Code ch. 8, Iowa Code §8.31 (1993). Language in an appropriations bill that specifies a maximum caseweight factor for certain state employees does not impose an absolute requirement because funds may not be available to hire a sufficient number of employees. However, if sufficient funds have been appropriated by the legislature, they should be allotted by the governor unless the factual circumstances specified in section 8.31 are present and the funds have been withheld in a statutorily permissible, across-the-board way. (Hunacek to Varn, State Representative, 7-12-93) #93-7-4

The Honorable Richard Varn, State Senator: You have requested an opinion of the attorney general concerning the consequences of certain field officers for the Department of Human Services having a caseweight factor in excess of statutory specifications. Although you ask a number of questions in your request, we must, with due respect, decline to answer the first three, which ask whether a statutory violation has occurred and whether the directors of the Department of Human Services and the Department of Management may be held criminally or civilly liable for violation of this statute. This office can only render an opinion on issues of law, meaning those issues which can be answered by statutory construction or legal research. 1972 Op. Att'y Gen. 686. In particular, a question that involves mixed issues of law and fact cannot be resolved in an attorney general opinion. Likewise, our office cannot determine in an opinion whether an individual is guilty of a criminal offense; we have previously stated that "[g]uilt is a matter for the courts and juries to decide." 1972 Op. Att'y Gen. 564, 565.

However, the fourth question you ask, whether the Department of Human Services is required to add additional positions to meet statutory requirements, is one that may be answered, at least in part, by legal analysis. We therefore proceed to discuss this question.

The statutory limitation on DHS field officers' caseweight factors derives from a section of the DHS appropriations bill, which provides in relevant part:

> If the field operations staffing level meets the funded full-time equivalent position limit authorized in this section and a region identifies a critical position vacancy or a position with a caseweight factor greater than 120 percent of the budgeted caseweight factor for the position, the director of human services may exceed the full-time equivalent position limit imposed under this section in the amount necessary to fill the critical position vacancy or to reduce the caseweight factor to the budgeted level . . . The maximum caseweight factor for the fiscal year beginning July 1, 1992 and ending June 30, 1993, is 213 for income maintenance workers and 208 for service workers.

Senate File 2355, 74th G.A., 2d Sess. §28.3 (Iowa 1992).

You advise in your opinion request that these factors have been exceeded, and that the Department of Human Services has been able, as a result of action of the Department of Management, to fill only 10 vacant positions each pay period regardless of the impact upon caseweights. You ask whether the Department of Human Services must fill additional vacancies to reduce the existing caseweights.

At the outset, we note that the first sentence of the statute quoted above makes reference to caseweight factors being in excess of the specified maximum. This language suggests that the limits on caseweight factors are not intended to be absolute.

In addition, it is a standard principle of statutory construction that related statutes must be considered together. *Metier v. Cooper Transport Co.*, 378 N.W.2d 907, 912 (Iowa 1985). Therefore, the appropriations statute must be read in conjunction with other existing statutes, particularly Iowa Code chapter 8, which sets forth procedures regarding the execution of the state budget. In particular, no state agency may spend funds that are in excess of appropriated funds. Iowa Code § 8.38. Furthermore, Iowa Code section 8.30 states that funds that have been appropriated are not available for expenditure until they are allotted as provided for in section 8.31. This section, in turn, gives the director of the Department of Management, subject to review by the governor, the authority through the allotment process to prevent overdrafts or deficits in state funds. We discussed this provision in 1992 Op. Att'y Gen. 97, where we noted: "The purpose of the delegation, to reduce allotments of funds in order to prevent overdrafts or deficits, is well defined and reflects a reasonable legislative judgment that the executive branch of government is best suited to accomplish this purpose." *Id.* at 99. *See also* 1980 Op. Att'y Gen. 786, 796. Reading the appropriations statute together with sections 8.30 and 8.31, as we must, we conclude that language in an appropriations bill which specifies a maximum caseweight factor cannot be considered an absolute requirement and must reflect the fact that funds, even though appropriated, simply may not be available to hire sufficient people to realize this goal.

This observation does not necessarily end the inquiry, however, because the authority of the governor and Department of Management to refuse to allot appropriated funds is limited. In *AFSCME/Iowa Council 61 v. State*, 484 N.W.2d 390, 393-94 (Iowa 1992), for example, the Supreme Court held that the provisions of chapter 8 that have been previously discussed did not allow the state to disregard collective bargaining agreements that were reached with its employees. We therefore think it appropriate to discuss, at least in general terms, the question of when and under what circumstances appropriated funds can be withheld.

Our prior opinions have held that the governor cannot balance the budget by impoundment of specific funds but instead must do so by the across-the-board cuts provided for in section 8.31. 1992 Op. Att'y Gen. 97; 1980 Op. Att'y Gen. 786, 793-797. We have also previously stated "that appropriations are to be allotted in full each quarter provided the estimated budget resources at that time are sufficient to pay all appropriations in full for the fiscal year."

1982 Op. Att'y Gen. 70, 73. In that opinion, we also discussed the roles played by the legislature and the governor in the budget process:

> Unlike the governor, the General Assembly is not limited by the constitution or by statute in making reductions in appropriations. Inherent in the General Assembly's constitutional right to control the public treasury is its authority to specify precisely how much money will be spent and for what purposes. *See* 229 N.W.2d at 709-10. The governor's discretionary authority in the appropriations process is, on the other hand, clearly and considerably limited under § 8.31. Pursuant to the quarterly requisition-allotment system, he may reduce allotments of appropriations only upon finding that estimated budget resources for the entire fiscal year are insufficient to pay all appropriations in full. Thus, the express terms of § 8.31 indicate that it is intended to prevent an overdraft or a deficit rather than to establish a fund surplus.

Id. As we noted earlier, we cannot resolve factual questions in this opinion. We therefore cannot and do not express an opinion as to whether an illegal impoundment of funds has taken place in the situation described in your opinion request. We can say as a general matter, however, that if appropriated funds are available, they should be allotted to the Department of Human Services for use in conformity with legislative intent unless the factual circumstances described in section 8.31 are present and the governor has withheld these funds in a statutorily permissible, across-the-board way.

July 28, 1993

OPEN MEETINGS LAW; State Board Retreats. Iowa Code sections 21.2(1), 21.4 (1993). Retreats by a governmental body are subject to all requirements of Iowa Code chapter 21 if there is a gathering of a majority of the members where there is deliberation or action upon policy matters within the agency's jurisdiction. If retreats do constitute "meetings" under Iowa Code section 21.2(1), proper notice must be given to the public under section 21.4 and a closed session may only be held to the extent expressly permitted by law. A court may assess limited damages and costs to individuals who participate in a violation of the Open Meetings Law, but the actual moneys spent on the meeting are not recoverable from the offending board members. (Olson to Boddicker, State Representative, 7-28-93) #93-7-5(L)

July 28, 1993

DOMESTIC ABUSE; COUNTY ATTORNEY; COURTS: Prosecution of domestic abuse contempt. Iowa Code §§ 13.2(7); 236.3B, 236.8, 236.11, 331.756(1), 598.24, 665.5 (1993), 1993 Iowa Acts 316, ch. 157, § 5 (S.F. 342). County attorneys are authorized but not required by section 236.8 to prosecute contempt actions arising under the Domestic Abuse Act for violations of permanent or temporary protective orders under chapter 598. (Brenden to Appel, Wapello County Attorney, 7-28-93) #93-7-6

Mr. William H. Appel, Wapello County Attorney: Your office has requested an opinion of the Attorney General concerning who is to prosecute certain contempt actions arising under Iowa's domestic abuse statute. Your questions are as follows:

> 1. Is the county attorney required to prosecute contempts under § 236.8 of the Code when the "protective order" is one arising under Chapter 598?
>
> 2. If the county attorney is not required, who, if anyone, is obligated to present the case, and does the court have the authority to appoint the county attorney or other counsel to present the case before it?

It is our opinion that the applicable statutes do not "require" any particular person to prosecute contempt actions under section 236.8 when the protective order arises under chapter 598. However, a recent addition to chapter 236 authorizes county attorneys to prosecute such actions under certain conditions.

Your first question arises from the following emphasized language of Iowa Code section 236.8:

> The court may hold a party in contempt for violation of an order or court-approved consent agreement entered under this chapter, *for violation of a temporary or permanent protective order or order to vacate the homestead under chapter 598*, or for violation of any order that establishes conditions of release or is a protective order in a criminal prosecution arising from a domestic abuse assault.

The underscored language raises an initial question of what the legislature meant in referring to a "temporary or permanent protective order" in this sentence. Specifically, it is unclear whether that clause is also modified by the phrase "under chapter 598" so as to refer to temporary or permanent protective orders *under chapter 598.*

Application of well-established principles of statutory construction lead us to conclude that the "temporary or permanent protective orders" to which section 236.8 refers are those issued in connection with chapter 598 dissolution proceedings.

The statutory construction doctrine of the "last preceding antecedent" provides that a qualifying phrase refers only to the immediately preceding antecedent, unless a contrary legislative intent appears. *State ex rel. DOT v. General Electric Credit Corp. of Delaware,* 448 N.W.2d 335, 345 (Iowa 1989). Application of this doctrine suggests that "chapter 598" modifies only "order to vacate the homestead" and not "temporary or permanent protective order." However, while both antecedents are not separated from the qualifying phrase so as to suggest a legislative intent that both are modified by "under chapter 598," we conclude

that the legislature intended to authorize contempt actions for violations of temporary or permanent protective orders issued in connection with 598 proceedings.

The legislature's failure to tie the "temporary or permanent protective order" phrase to the "chapter 598" qualifier may be due in part to the fact that chapter 598 does not specifically authorize orders for temporary and permanent injunctions. Although not specifically authorized by chapter 598, orders for temporary and permanent injunctions are commonly issued in connection with dissolution proceedings. Such orders presumably are issued under Iowa Rules of Civil Procedure 320 to 333, authorizing injunctions and temporary injunctions as an auxiliary remedy in any action.

In our attempt to give meaning to every part of section 236.8 and do so in a way that is consistent with the "object to be accomplished and the evils and mischief sought to be remedied," *Welp v. Iowa Department of Revenue*, 333 N.W.2d 481, 483-84 (Iowa 1983), we conclude that the reference to "temporary and permanent protective order" in section 236.8 refers to protective orders issued in connection with dissolution proceedings. This construction provides a context in which the phrase "temporary and permanent protective orders" may be enforced and avoids absurd or anomalous results sought to be avoided when performing statutory construction. *State v. Billings*, 242 N.W.2d 726 (Iowa 1976). It would be anomalous to construe section 236.8 as providing a contempt remedy for one's failure to vacate a homestead under chapter 598 but not for the violation of an order to assure another's personal safety issued in connection with the same proceedings.

We now proceed to the question whether the county attorney is required to prosecute contempts under section 236.8 when the "protective order" is one arising under chapter 598.[5]

Chapter 236 does not "require" any particular person or entity to initiate and prosecute the contempt actions arising under section 236.8. A new section of that chapter does, however, authorize a county attorney's office to provide assistance in connection with chapter 236 proceedings:

> A county attorney's office may provide assistance to a person wishing to initiate proceedings pursuant to this chapter or to a plaintiff at any stage of a proceeding under this chapter, if the individual does not have sufficient funds to pay for legal assistance and if the assistance does not create a conflict of interest for the county attorney's office. The assistance provided may include, but is not limited to, assistance in obtaining or completing forms, filing a petition or other necessary pleading, presenting evidence to the

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[5] We assume that your question arises from a situation in which no other attorney has voluntarily appeared for the purpose of prosecuting the subject contempt. In some cases, the attorney who represents the opposing party in the underlying divorce action will undertake the prosecution of such contempts.

> court, and enforcing the orders of the court entered pursuant to this chapter. Providing assistance pursuant to this section shall not be considered the private practice of law for the purposes of section 331.

Senate File 342, 75th G.A., 1st Sess. §2 (Iowa 1993) (to be codified as Iowa Code §236.3B).

The next question is whether this statute authorizes a county attorney to prosecute a section 236.8 contempt action for the violation of a protective order arising under chapter 598. We believe the answer is yes. The statute authorizes county attorney assistance "to a plaintiff at any stage of a proceeding under this chapter." *Id.* One of the proceedings under chapter 236 is a contempt action which is the subject of your inquiry. Iowa Code §236.8 (1993). As such, section 236.3B authorizes a county attorney to prosecute a contempt action under section 236.8 of the Code when the "protective order" is one arising under chapter 598, "if the individual does not have sufficient funds to pay for legal assistance and if the assistance does not create a conflict of interest for the county attorney's office."

The determination that the county attorney is vested with this authority does not settle your question whether the county attorney is "required" to prosecute such actions. By way of analogy, we note that county attorneys are also charged with enforcing all state laws and county ordinances. Iowa Code §331.756(1) (1993). This duty has not been interpreted to require the county attorney to bring a particular criminal prosecution. Instead, the county attorney has wide discretion in determining whether and when to bring criminal charges. *State v. Iowa District Court for Jackson County*, 463 N.W.2d 885, 886 (Iowa 1990). We believe the same discretion is implicit in the determination whether to prosecute a section 236.8 contempt action. *See* Op. Att'y Gen. #93-6-4(L). As such, although the county attorney is authorized to represent the county in a contempt proceeding pursuant to section 236.8, the county attorney is not required to do so in the exercise of prosecutorial discretion.[6]

Such actions can proceed without county attorney involvement. Iowa's contempt provisions clearly provide for initiation by persons other than the county attorney. The general contempt chapter provides for the initiation of a contempt

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[6] Prosecution of such a contempt action would be in the name of and on behalf of the county or state. Section 331.755(2) precludes the county attorney from "[e]ngag[ing] directly or indirectly as an attorney or an agent for a party other than the state or the county in an action or proceeding arising in the county which is based upon substantially the same facts as a prosecution or proceeding which has been commenced or prosecuted by the county attorney in the name of the state or the county." Because the county attorney is acting on behalf of the county in prosecuting a contempt action, the attorney is not precluded by section 331.755(2) from pursuing criminal charges arising from the same conduct.

action by filing an affidavit with the court.[7] Iowa Code § 665.5 (1993). The section does not limit who may file such an affidavit. As such, affidavits have been filed by

> (1) the party entitled to the benefit or protection of the order being violated, *Palmer College of Chiropractic v. District Court*, 412 N.W.2d 617 (Iowa 1987); *McCarthy v. Iowa District Court for Jefferson County*, 386 N.W.2d 122 (Iowa 1986); *Callenius v. Blair*, 309 N.W.2d 415, 416 (Iowa 1981); *Lutz v. Darbyshire*, 297 N.W.2d 349 (Iowa 1980);
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> (2) the county attorney, *State v. Lipcamon*, 483 N.W.2d 605 (Iowa 1992); *State v. Longstreet*, 407 N.W.2d 591 (Iowa 1987); *Murphy v. Wright*, 167 Iowa 75, 148 N.W. 985 (1914); and
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> (3) third parties, *Bump v. District Court of Polk County*, 232 Iowa 623, 5 N.W.2d 914 (1942) (contempt initiated by Bar Association Committee on Unauthorized Practice of Law); *Jordan v. Circuit Court of Wapello County*, 124 Iowa 177 (1886) (affidavit brought by one "Drake").[8]

It is also possible for attorneys other than the county attorney to prosecute contempt proceedings. For example, prosecution of a contempt action by the attorney representing the adverse party in a related, underlying suit has long been the practice in Iowa. Section 598.24 specifically authorizes the recovery of attorney fees, presumably for the privately-retained attorney, for prosecuting a contempt against the defaulting party to a divorce decree. Iowa Code § 598.24 (1993).

In conclusion, we believe that a county attorney may provide assistance to the plaintiff in a contempt action initiated pursuant to section 236.8 for a violation of a protective order under chapter 598, if that individual does not have sufficient funds to pay for legal assistance and if the assistance does not create a conflict of interest for the county attorney's office. The county attorney is not "required" to prosecute such an action.

Your second question asks whether the court has the authority to appoint an attorney to prosecute the subject contempt action. We must respectfully

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[7] Additionally, section 236.11 provides for the initiation of a contempt action without the involvement of either an affidavit or an attorney. Iowa Code § 236.11 (1993).

[8] Contemners have challenged the legitimacy of contempt proceedings when initiated by the county attorney instead of the beneficiary of the order contemned, *Hagedorn v. Rockafellow*, 190 Iowa 553, 555, 180 N.W. 688, 689 (1920), and conversely when initiated by the beneficiary instead of the county attorney. *State v. Rudolph*, 240 Iowa 726, 730-31, 37 N.W.2d 483, 485-86 (1949). The Court has rejected these challenges, deeming the relationship between the initiating party's role and the wording of the proceeding's caption to be irrelevant to its jurisdiction to hear and determine whether a contempt occurred. *Id.*

decline to answer this question. While the Attorney General is authorized to answer questions submitted by county attorneys in connection with our duty to "[s]upervise county attorneys in all matters pertaining to the duties of their offices," Iowa Code section 13.2(7) (1993), this question asks an opinion pertaining to the court's duties, power, and jurisdiction. We are not authorized to opine on the jurisdictional limits of the court. As such, we must decline to answer this question.

In summary, it is our opinion that the applicable statutes do not "require" any particular person to prosecute contempt actions under section 236.8 when the protective order arises under chapter 598, although new section 236.3B authorizes county attorneys to undertake this role.

July 28, 1993

GIFTS: Discounts; Market Value. Iowa Code Supp. §§ 68B.2(9), 68B.2(24) (1993); 1993 Iowa Acts, ch. 163 (House File 144, § 1). A discount on a computer purchase is not a gift prohibited by the gift law, if the purchase price constitutes legal consideration of equal or greater value than the computer products and the discount reflects a list price available to a particular segment of the public. Ultimately, determination of the market value of the computer products is an issue of fact. If the computer retailer is not a "restricted donor" within the scope of one of the four alternative categories set forth in the statute, the gift law does not apply and a discount could not violate the gift law. (Pottorff to Carpenter, State Representative, 7-28-93) #93-7-7(L)

AUGUST, 1993

August 13, 1993

TAXATION: Costs Payable Upon Redemption. Iowa Code § 447.13 (1993). Attorney fees and any portions of abstracting fees in excess of charges for conducting a search of the public records are not authorized costs collectable by county treasurers upon redemption pursuant to section 447.13. (Hardy to Ferguson, Black Hawk County Attorney, 8-13-93) #93-8-1(L)

August 17, 1993

MUNICIPALITIES: Council Members Eligibility for City Employment. Iowa Code §§ 362.5, 362.5(1), 362.5(10), 362.5(11), 372.13(8) (1993). The term "contract," as it is defined in Iowa Code section 362.5, is broadly defined to include any financial or pecuniary interest and does include an employment contract with the city. A mayor's service of mowing a city park is not prohibited under Iowa Code sections 372.13(8) and 362.5 when the city population is 2,500 or less and the service's cumulative total does not exceed $2,500 in a fiscal year because of the exception in Iowa Code section 362.5(11). A city council member is prohibited from receiving additional compensation for her services as a water and sewer superintendent under Iowa Code sections 372.13(8) and 362.5(1). (Doland to Angrick, Citizen's Aide/ Ombudsman, 8-17-93) #93-8-2(L)

August 17, 1993

SCHOOLS: District management levy; audit of fund. Iowa Code §§ 2C.9, 2C.11, 11.6, 24.30, 257.31, 296.7(6) (1993). While either the State Appeal Board or the School Budget Review Committee may amend a school district budget to avoid a misuse of management levy funds, the primary responsibility for identifying misuse of this levy rests with the audit function. When a misuse is disclosed in an audit or reaudit report, appropriate remedial action may be taken by affected taxpayers, the county attorney, or the Attorney General. The Citizens' Aide may also pursue investigation as to whether a misuse of school district funds has occurred, making appropriate referrals if a misuse is found. (Scase to Angrick, Citizens' Aide/Ombudsman, 8-17-93) #93-8-3

Mr. William P. Angrick, III, Citizens' Aide/Ombudsman: You have requested an opinion of the Attorney General regarding the enforcement of statutory restrictions on use of school district management levy revenues. As you note in your request letter, Iowa Code section 296.7(6) (1993) prohibits local school districts from using funds generated through the district management levy to pay the costs of employee benefit plans.[9] *See* 1992 Op. Att'y Gen. 176 [#92-10-5(L)] (copy enclosed). In light of this restriction on the use of district management levy revenues, you ask us to identify the office or governmental agency responsible for ensuring that these funds are not misused.

As you recognize in your request letter, several state agencies play an oversight role in the local school budget process. School districts are subject to Iowa Code chapter 24, titled the "Local Budget Law." Iowa Code § 257.7(1) (1993). The procedure for adoption of local budgets set forth in chapter 24 requires publication of an itemized proposed budget, including expenditures and revenues. Iowa Code §§ 24.3, 24.9 (1993). A public hearing on the proposed budget must be conducted prior to adoption of the budget and certification of tax levies for the upcoming fiscal year. Iowa Code §§ 24.9, 24.17 (1993). Taxpayers who are affected by the proposed budget may file a protest to the budget with the State Appeal Board, which then conducts a hearing on the protest and may revise the budget to conform with requirements of law. Iowa Code §§ 24.27 - 24.30 (1993). We find no statutory grant of authority allowing the State Appeal Board to review or revise a local budget unless a budget protest is filed invoking the Board's jurisdiction.

A second entity which oversees school budgeting is the School Budget Review Committee, created under Iowa Code section 257.30. Among the functions of this Committee is a duty to "review the proposed budget and certified budget of each school district." Iowa Code § 257.31(3) (1993). The Committee is specifically charged with consideration of the unspent balance and cash reserve levy of each school district and is empowered to "make all necessary changes in the district cost, budget, and tax levy." Iowa Code §§ 257.31(7), (9), (15) (1993).

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[9] In 1990 Iowa Acts, ch. 1234, § 74, a limited number of school districts which had contracted long term indebtedness, payable with the management levy, prior to January 1, 1990, are allowed to continue to use management levy funds for payment of employee benefit costs now prohibited by Code § 296.7. This office is currently in the process of preparing an opinion specifically addressing the scope of this "grandfather clause."

In addition, the financial condition and transactions of each public school district must be audited annually by either the auditor of the state or by an Iowa certified public accountant acting in compliance with the standards and procedures established by the State Auditor. Iowa Code §§ 11.6(1)(a), 11.6(7) (1993). Every audit examination must include inquiry as to whether the school authorities are complying with the state laws. Iowa Code § 11.11 (1993). Annual audit reports are to be made available for public and media inspection. Iowa Code § 11.14 (1993). When an audit discloses any irregularity in the collection or disbursement of public funds, copies of the audit report must be filed with the county attorney. Iowa Code § 11.15 (1993). If grounds for removal of a public officer are disclosed, a copy of the report is also to be filed with the Attorney General. Iowa Code § 11.16 (1993).

Apart from the mandatory annual audit, the auditor of the state "may at any time cause to be made a complete or partial reaudit of the financial condition and transactions" of any school corporation if any of the following conditions exist:

> a. The auditor of state has probable cause to believe such action is necessary in the public interest because of a material deficiency in an audit of the governmental subdivision filed with the auditor of state or because of a substantial failure of the audit to comply with the standards and procedures established and published by the auditor of state.
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> b. The auditor of state receives from an elected official or employee of the governmental subdivision a written request for a complete or partial reaudit of the governmental subdivision.
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> c. The auditor of state receives a petition signed by at least fifty eligible electors of the governmental subdivision requesting a complete or partial reaudit of the governmental subdivision. If the governmental subdivision has not contracted with or employed a certified public accountant to perform an audit of the fiscal year in which the petition is received by the auditor of state, the auditor of state may perform an audit required by subsection 1 or 3.

Iowa Code § 11.6(4) (1993).

Finally, the Citizens' Aide may, upon receipt of a complaint or on the Citizens' Aide's own motion, investigate administrative actions of a governmental entity. Iowa Code § 2C.9(1) (1993). Appropriate subjects for investigation by the Citizen's Aide include any action taken by a governmental agency which might be "contrary to law or regulation." Iowa Code § 2C.11(1) (1993).

In light of the number of agencies which have authority to oversee the budgeting and spending practices of local schools, you have asked us to determine who has the primary responsibility for investigating and enforcing the restriction on use of the district management levy contained in Iowa Code section

296.7. We conclude that no one agency is solely responsible for this function. The State Appeal Board clearly has statutory authority to revise tax levies to bring them into conformity with state law if a budget protest is filed. Iowa Code § 24.30 (1993). We do not believe, however, that the State Appeal Board is authorized to order revision of a local tax levy unless a budget protest is before it.

The School Budget Review Committee is required, by Iowa Code section 257.31(3), to review all school district budgets. The Committee is not, however, specifically charged with determining whether all proposed tax revenues are being utilized in accordance with law. While the Committee should serve this function as feasible and may make changes in a school district's budget and tax levy, if needed, we do not believe that a failure of the Committee to correct an improper expenditure provides sanction of the expenditure.

With school districts, as with other public entities, financial audits serve as the primary mechanism for ensuring compliance with state laws relating to the expenditure of tax revenues. When a misuse of funds is discovered during an audit or reaudit, the public, local media, county attorney, and Attorney General should all be informed of this finding through distribution of the audit report. Appropriate action, either in the form of protest of future budgets, the commencement of a certiorari action by affected taxpayers, a prosecution of school board members for misuse of funds, or an action for removal of the board members may then be instituted. *See* 1966 Op. Att'y Gen. 53 [#66-3-7] and 1948 Op. Att'y Gen. 224 (discussing liability and remedies in the event of misuse of funds).

Similarly, the Citizens' Aide, being empowered to investigate the administrative actions of public schools, may pursue investigation to determine whether a school district's management levy funds are used in accordance with the requirements of state law. If a misuse is discovered and the Citizens' Aide determines that criminal or other disciplinary action should be considered, the Citizens' Aide shall notify the school district and refer the matter to appropriate authorities. Iowa Code §§ 2C.16, 2C.19 (1993).

In summary, while either the State Appeal Board or the School Budget Review Committee may amend a school district budget to avoid a misuse of management levy funds, the primary responsibility for identifying misuse of this levy rests with the audit function. When a misuse is disclosed in an audit or reaudit report appropriate remedial action may be taken by affected taxpayers, the county attorney, or the Attorney General. The Citizens' Aide may also pursue investigation as to whether a misuse of school district funds has occurred, making appropriate referrals if a misuse if found.

SEPTEMBER, 1993

September 9, 1993

INCOMPATIBILITY OF OFFICE: Statutory ban. Iowa Code Supp. §§ 39.11, 39.12 (1993); 1993 Iowa Acts, ch. 143, §§ 4-5. For purposes of applying Iowa Code section 39.11, each political subdivision is a different "level of government." A county hospital and a community college are not at the same "level of government." Iowa Code sections 39.11 and 39.12, therefore, do not preclude an individual from simultaneously holding elective offices on the governing bodies of a county hospital and a community college. (Scase to Gustafson, Crawford County Attorney, 9-9-93) #93-9-1(L)

September 14, 1993

COUNTIES: Memorial Hospitals. Iowa Code §§ 37.9, 37.18(3), 76.16, 76.16A, 331.361(2), 347.13(12) and (13), 347.14(15), 347.28-.30 (1993). County memorial hospital commissioners operating under chapter 37 have the authority to close the memorial hospital and cease operations without voter approval. Any sale or lease of a memorial hospital, as a county hospital facility, would be subject to Iowa Code section 347.13(12) and (13), 347.14(15), and 347.28-.30. Thus, if the land or building were acquired by condemnation or purchase or is to be sold or leased to a private hospital or merged area hospital, voter approval is required. Any sale of the hospital land or building would be subject to normal county real estate sale provisions. The notice and hearing requirements in section 347.30 apply to sales or leases of property under sections 347.28 and .29. A county memorial hospital may not file for bankruptcy. (Krogmeier to Kliebenstein, Grundy County Attorney, 9-14-93) #93-9-2

Mr. Don Kliebenstein, Grundy County Attorney: You have requested an opinion from our office concerning the operation and disposition of the Grundy County Memorial Hospital. In your request, you state the following facts and then ask the questions set forth below:

> The Grundy County Memorial Hospital was organized and continues to operate under Chapter 37 of the Code of Iowa. The original facility was constructed in 1952 following the affirmative vote of the electors of Grundy County. No bonded indebtedness remains outstanding for hospital construction costs and the obligation to repay Hill-Burton funds has now expired. The hospital is governed by the Board of Commissioners in accordance with Chapter 37 and it is fully licensed and accredited by the State of Iowa. Title to the real estate upon which the hospital is situated is in Grundy County, Iowa. . . .
>
> 1. Can the Board of Commissioners vote to close the hospital without a vote of the electorate?
>
> 2. Can the Board of Commissioners or the County Board of Supervisors sell or lease the hospital, and if so must competitive bids be taken for either the lease or sale?

3. Can a Chapter 37 hospital file for bankruptcy?

In additional correspondence which you have sent to our office, you accurately point out that Iowa Code chapter 37 does not specifically address the questions that you raise. Pursuant to that chapter, counties and cities may create memorial buildings and monuments to commemorate the service rendered by veterans of the United States. The chapter sets forth a petition and election procedure, as well as authorization for issuing bonds to pay for construction of such facilities. An annual tax levy is also authorized for maintenance and operation of the building or monument. The uses to which a memorial hall or monument may be put include: "county or city hall offices for any county or municipal purpose, community house, recreation center, *memorial hospital*, and municipal coliseum or auditorium." (Emphasis added.) Iowa Code § 37.18(3).

Iowa Code section 37.9 provides for the creation and appointment of a board of commissioners to supervise construction and management of memorial buildings and monuments. However, the authority of the commissioners to sell or lease a memorial is not directly addressed. Section 37.26 gives the commission the authority to "receive and to convey title to real estate, to take mortgage or other security and to release or transfer the same." However, this power is strictly limited to the purposes set forth in sections 37.22 through 37.25, all of which relate to contracts for the construction of the memorial and not the operation or disposition of it.

Iowa Code section 37.9 gives a chapter 37 hospital the authority to "have charge and supervision of the erection of the building or monument, and when erected, *the management and control of the building* or monument." (Emphasis added.) No references are made in chapter 37 to the operations of a memorial hospital. This section seems to be more related to the control of the physical structure itself. However, no provisions are made elsewhere in chapter 37 concerning disposition of the structure.

Iowa Code chapter 347 relates to the construction, management and operation of county hospitals. Section 347.24 specifically addresses the operations of a chapter 37 hospital as follows:

> Hospitals organized under chapter 37 or chapter 347A may be operated as provided for in this chapter in any way not clearly inconsistent with the specific provisions of their chapters.

The use of the word "may" instead of the word "shall" indicates the legislative intent to convey a power upon a county memorial hospital board rather than impose a duty. Iowa Code § 4.1(30). However, we are aware of no other specific power in the Code or direction to memorial hospital boards with regard to the sale, lease or other disposition of memorial hospitals. Statutes upon the same or similar subjects are to be read in pari materia. *In the Matter of the Estate of Lamoureuz*, 412 N.W.2d 628 (Iowa 1987); *Matter of Estate of Bliven*, 236 N.W.2d 366 (Iowa 1975). Reading chapters 37 and 347 together, we conclude the two chapters provide the power and authority for the construction, operations

and management of chapter 37 hospitals. In those areas of the law not addressed in chapter 37, we look to chapter 347 for direction. Therefore, we are of the opinion that a county hospital board, whether operating under chapter 37 or chapter 347, has the power and authority to dispose of county hospital buildings or operations under the provisions of chapter 347.

Iowa Code section 347.14(15) gives a hospital board the authority to sell or lease a county hospital for use as a private hospital or as a merged area hospital. Voter approval is required. Property may be included pursuant to section 347.13(12) but the proceeds from the sale or lease of the property must be used consistent with section 347.14(13) or for the purpose of providing health care for residents of the county. Sections 347.13(12) and (13) provide the authority to accept and dispose of property as follows:

> 12. Accept property by gift, devise, bequest, or otherwise; and, if said board deems it advisable, may, at public sale, sell or exchange any property so accepted upon a concurring vote of a majority of all members of the board of hospital trustees, and apply the proceeds thereof, or property received in exchange therefor, to the purposes enumerated in subsection 13 hereof or for equipment.
>
> 13. Submit to the voters at any regular or special election a proposition to sell or lease any sites and buildings, excepting those described in subsection 12 hereof, and upon such proposition being carried by a majority of the total number of votes cast at such election, may proceed to sell such property at either public or private sale, and apply the proceeds only for:
>
> a. Retirement of bonds issued and outstanding in connection with the purchase of said property so sold:
>
> b. Repairs or improvements to property owned or for the purchase or lease of equipment as the board of hospital trustees may determine.

With these various Code provisions in mind, we now turn to your specific questions. Your first question is whether the board of commissioners could vote to close the hospital without a vote of the electorate. We believe the board could close the hospital without such a vote under chapter 37 which, taken in conjunction with chapter 347, gives the commissioners the authority to control and manage the building and the hospital operations. We believe this inherently includes the discretion to close the hospital and cease operations. There does not appear to be a provision for voter approval.

In your second question you ask whether the board of commissioners or the county board of supervisors can sell or lease the hospital and, if so, whether competitive bids must be taken. We believe that decisions with regard to the sale or lease of the hospital are answered by Iowa Code sections 347.13(12) and (13), and section 347.14(15). If the sale or lease is to a private or merged

area hospital, section 347.14(15) requires voter approval. If the proposed sale or lease is not to such a hospital, then the method by which the land or building was acquired is controlling. If the land, including the building in question, was received by gift, devise, bequest or the like, the trustees may sell or exchange it and apply the proceeds for the limited uses stipulated. Iowa Code § 347.13(13). If the land was received by condemnation or purchase, then it can only be sold or leased after voter approval. Iowa Code § 347.13(13); 1974 Op. Att'y Gen. 524.

With regard to the second part of your second question concerning competitive bidding processes or public notice requirements, we direct your attention to Code sections 347.30, 347.14(15) and 331.361(2). If the sale or lease of the hospital or hospital property is being made to another hospital entity, section 347.14(15) sets forth the specific requirements for voter approval. The general provisions for notice prior to an election would apply to a ballot question under section 347.14(15). *See* Iowa Code § 49.53. Additionally, section 347.30 provides for notice and public hearing before selling or leasing any hospital property being proposed to be sold or leased under sections 347.28 and 347.29. These two sections apply to the leasing or sale of any hospital property not needed for hospital purposes or property received by gift, devise, bequest or otherwise or the proceeds from the sale of such property. Where chapter 347 does not provide a specific notice provision, section 331.361(2) provides for notice and public hearing upon the sale of county property generally. This provision would apply in those areas where chapter 347 does not provide a notice process.

There does not appear to be any specific provision in chapter 37 or chapter 347 with regard to any competitive bidding process for any proposed sale or lease of county hospital property. We believe it prudent to follow the general statutory requirements for county sales of real property in the event any real estate is sold such that the public is aware of the proposal and has an opportunity at a public hearing to express public sentiments with regard to the proposed sale or lease.

Your last question is "can a chapter 37 hospital file for bankruptcy?" Iowa Code sections 76.16 and 76.16A (1993) specifically relate to the bankruptcy filings of a city, county or other political subdivision. Cities, counties and other political subdivisions are generally prohibited from filing for bankruptcy by these sections, except as specifically allowed therein. It does not appear that a county hospital, as a subunit of county government, is allowed to file for bankruptcy pursuant to these provisions of the Iowa Code.

To summarize, county memorial hospital commissioners operating under chapter 37 have the authority to close a memorial hospital and cease operations without voter approval. Any sale or lease of a memorial hospital should be in accord with Iowa Code sections 347.13(12) and (13), 347.14(15), 347.28-.30. Thus, if a proposed sale or lease is to a private hospital organization or a merged area hospital, or the property being sold or leased was required by condemnation or purchase, voter approval is required. If the sale or lease of property is no longer needed for hospital purposes, or was acquired by gift, devise, bequest, or some means other than by condemnation or purchase, then voter approval is not required and the lease or sale may be made at the discretion of the

hospital board. The notice and hearing requirements in section 347.30 apply to sales or leases of property under sections 347.28 and .29. The normal county notice and hearing requirements in section 331.361(2) would apply to other sales or leases of property. A county memorial hospital may not file for bankruptcy.

September 14, 1993

COUNTIES; MENTAL HEALTH: Liability for cost of mental health, mental retardation, developmental disabilities, brain injured and substance abuse care. Iowa Code §§ 125.43, 125.44, 222.60, 222.78, 225C.14, 225C.16, 229.41, 230.1, 230.15, 230.17, 230.25, 230.27, 230.35, 252.1 252.13, 252.14, 252.15 (1993); 1992 Acts, 2nd ex. session, ch. 1001, § 303; 441 IAC 24.1, 441 IAC 39, 441 IAC 153. Counties must pay the expenses attending the taking into custody, care and treatment of persons suffering from mental illness at a state mental health facility for both the mentally ill and the chronically mentally ill. There is no distinction between the indigent and non-indigent regarding commitments to the mental health institutes and commitments pursuant to Iowa Code chapter 222. For services pursuant to chapters 125, 222 and 229, the mandated services must be provided regardless; the only question is whether the party legally liable for the services can pay for the services. A county may require a pre-screening process in order to determine if full time hospitalization is truly needed for those seeking voluntary admission to a state mental health institute. Iowa Code chapter 222 requires the county of legal settlement to pay for costs of admission or commitment or for the treatment, training, instruction, care, habilitation, support and transportation, of patients in a state hospital-school for the mentally retarded, or in a special unit, or any public or private facility within or without the state, approved by the director for the department of human services. A developmentally disabled person may qualify for services as a person with mental illness or mental retardation. Generally, a county is responsible for the costs of substance abusers committed to the mental health institutes. There is no mandate that services be paid for by the county on behalf of the brain injured. Iowa Code section 252.1 sets forth the specific definition of a poor person. The use of the county general relief fund to provide mental health services is discretionary. A county may use all legally available means to collect amounts due the county. The minimum level of funding for the mentally ill at the mental health institutes, the mentally retarded, and the substance abuser committed or admitted to the mental health institute, is that amount sufficient to cover the mandated costs. The minimum level of funding for the brain injured and the developmentally disabled is discretionary. The property tax freeze adopted in 1992 does not alleviate the county from the mandatory obligations for certain services. (Ramsay to Murphy, State Senator, 9-14-93) #93-9-3

The Honorable Larry D. Murphy: Your request for an opinion of the attorney general has been forwarded to me for response. You pose many questions regarding which services a county of legal settlement must pay for certain individuals. We have previously rendered official opinions on many of the questions you pose. *See* Op. Att'y Gen. #87-3-4(L); 1986 Op. Att'y Gen. 10; Op. Att'y Gen. #92-6-5.

1) Your first question is: What bills are a county legally mandated to pay for its residents (indigent and non-indigent, voluntary and involuntary) at public and private facilities in the service areas of:

a) Mental Illness;
b) Chronic Mental Illness;
d) Developmental Disabilities;
e) Chemical Dependency; and
f) Brain Injured

Mental Illness and Chronic Mental Illness at Public & Private Facilities

Iowa Code chapters 229 and 230 govern the expenses attending the taking into custody, care and treatment of persons suffering from mental illness at a state mental health facility. *See* Iowa Code §230.1 (1993). This office has opined that the county of legal settlement is responsible for the costs so mandated. *See* 1992 Op. Att'y Gen. 135. #92-6-5. However, this office has also opined that a county of legal settlement is not statutorily mandated to pay for mental health treatment costs at private facilities. *Id.* There is no change in this responsibility for a person who has chronic mental illness. Rather, the use of the term chronically mentally ill merely describes an individual who has suffered more than one episode of mental illness. *See* 441 IAC 24.1.

Iowa Code chapter 230 does not distinguish between the indigent and non-indigent regarding commitments to the mental health institutes. Iowa Code chapters 229 and 230 require that the county of legal settlement pay the costs associated with the commitment and treatment to a mental health institution. Should it be determined that a person is found able to pay the costs associated with the commitment, that person is legally liable for those expenses and the county may seek recoupment from that person. *See* Iowa Code §230.15.

Finally, Iowa Code chapter 225C allows some distinction between voluntary and involuntary admissions to a mental health institute and the funding responsibilities. When an individual wishes to make voluntary application, that person is required to make application to the clerk of court for admission. Iowa Code §229.41. Additionally, a county of legal settlement may require a pre-screening process before the person is admitted to the mental health institute. Iowa Code §§225C.14 & 225C.16 (1993). This allows the county some discretion in determining whether a person is truly in need of full time hospitalization on a voluntary basis.

Mental Retardation and Developmental Disabilities

Iowa Code chapter 222 requires the county of legal settlement to pay for costs "of admission or commitment or for the treatment, training, instruction, care, habilitation, support and transportation, of patients in a state hospital-school for the mentally retarded, or in a special unit, or any public or private facility within or without the state, approved by the director of the department of human services. . . ." Iowa Code §222.60. The Iowa Supreme Court recently issued an opinion on a county's obligation to provide for the mentally retarded. *Baker v. Webster County*, 487 N.W.2d 321 (Iowa 1992). The *Baker* decision

concludes that a county is responsible for the costs of services provided to a mentally retarded individual only when that person has been placed in a facility pursuant to the Department of Human Services' approval or commitment.

Chapter 222 makes no distinction between indigent and nonindigent individuals. The person on whose behalf the costs have been paid remains liable. Iowa Code § 222.78. Further, Iowa Code section 222.68 requires the county where the person was found during the commitment process to pay the costs in the first instance and seek reimbursement from the county of legal settlement.

Iowa Code chapter 225C governs persons with mental health, mental retardation and developmental disabilities. The Department of Human Services has defined a person with the diagnosis of developmental disabilities as:

> [A] person with a severe, chronic disability which:
>
> 1. Is attributable to mental or physical impairment or a combination of mental and physical impairments.
>
> 2. Is manifested before the person attains the age of 22.
>
> 3. Is likely to continue indefinitely.
>
> 4. Results in substantial functional limitation in three or more of the following areas of life activity: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency.
>
> 5. Reflects the person's need for a combination and sequence of services which are of life long or extended duration.

441 IAC 24.1. This definition of a person with developmental disabilities was adapted from Public Law 99-527, Developmental Disabilities Act of 1984.

The definition of a person with developmental disabilities encompasses those who are physically and mentally disabled with certain life activities restricted. There is no Iowa Code chapter which specifically requires that a county be responsible for the treatment and care of those diagnosed as developmentally disabled. However, since those with a diagnosis of developmental disability may also fall within a definition of mentally retarded or mentally ill, the county may still be responsible for a certain level of care and treatment expenses as discussed above.

Chemical Dependency

This office has issued several opinions regarding the county's obligation for payment of services to those suffering from chemical dependency pursuant to Iowa Code chapter 125. Specifically, 1992 Op. Att'y Gen. 135. #92-6-5 sets

forth the particulars when a county is obligated to pay for treatment of those committed to a chemical dependency facility under chapter 125. Generally, a county is responsible for the costs of substance abusers committed to the mental health institutes. Iowa Code § 125.43 (1993). When a person is committed to a facility that has a contract with the Iowa Department of Public Health, the State of Iowa pays for the care and treatment of the individual so committed. Iowa Code § 125.44.

Brain Injured

No specific Iowa Code chapter mandates that an Iowa county must pay for services delivered to those with brain injuries. Should the brain injured person also be a person with mental illness or mental retardation, services may be available through programs for the mentally ill at the state mental health institutes, or through programs for the mentally retarded for services approved by the Department of Human Services pursuant to section 222.60. Further, mental health services may be provided to these individuals through the local community mental health centers.

2) Your second question is: What standard should a county use to determine if the patient is indigent?

Iowa Code chapter 252 describes support for the poor. A poor person is defined as: "[T]hose who have no property, exempt or otherwise, and are unable, because of physical or mental disabilities, to earn a living by labor. . . ." Iowa Code § 252.1 (1993). Further the definition of a poor person is not to be construed ". . . to forbid aid to needy persons who have some means, when the board shall be of the opinion that the same will be conducive to their welfare and the best interests of the public." *Id.*

The Iowa Supreme Court recently opined on the issue of a county's discretionary function to distribute money pursuant to support of the poor. *Jones v. Madison County*, 492 N.W.2d 690 (Iowa 1992). Concerning the decision to grant relief to a poor person, the court stated: "It is the county board that establishes the eligibility rules, reviews the application, makes a record of the proceedings, and determines the form and amount of assistance to be given." *Id.* at 695. Therefore, while there may be certain mandates on the counties to provide services to those with mental illness, mental retardation, and chemical dependency, funds from the support of the poor fund may be spent in a more discretionary manner. This is not to say that a county may use discretion in paying for statutory services pursuant to Iowa Code chapters 125, 222 and 229. Rather, the *Jones* decision applies to cases where a county has determined to pay for services or the granting of relief to poor persons for other services not administered pursuant to the Iowa Code or Iowa Administrative Code.

3) Your third question is: What means can a county official use to collect un-reimbursed costs for the eligible services from legally responsible persons or a person?

Generally, for monies expended pursuant to Iowa Code chapter 230, collection can be accomplished by imposing personal liability pursuant to Iowa Code

section 230.15. The county auditor, upon the direction of the board of supervisors shall enforce the obligations placed upon a person for support provided pursuant to chapter 230. The board of supervisors is empowered to compromise any and all liabilities imposed pursuant to chapter 230. Iowa Code § 230.17. Finally the duty to collect the amounts due the county falls upon the board of supervisors and the collection of the claims are statutorily part of the duties of the county attorney's office. Iowa Code § 230.27. For monies spent pursuant to chapter 252 the county may recover those monies pursuant to section 252.13. The county may hold certain family members liable for monies spent as well as the estate of the person granted relief. You may want to contact the offices of the county attorney within your district to seek advice on this matter.

It can be noted, however, that while collection efforts may use all legally available means, there are limitations. *See* Iowa Code §§ 230.15, 230.25, 230.35, 252.14 & 252.15. This office has opined that a county may not establish accounts receivable nor keep an index for the cost associated with civil commitments of mentally ill persons. Op. Att'y Gen. #88-1-3(L). For the limited number of Medicare and Medicaid eligible persons who receive services from a state mental health institution, a county may only recover costs from the patient for deductible or non-covered services. Op. Att'y Gen. #90-5-2(L). Under Iowa Code section 230.15 liability of mentally ill persons or others obligated for their support is initially limited to a monetary amount equal to 100 percent of the costs of care and treatment a mentally ill person would incur at a mental health institute during a 120 day period. The formula does not consider the number of days that the individual is actually hospitalized or the costs actually incurred in a county care facility. After the monetary limit is reached, liability is determined by a second formula. Op. Att'y Gen. #90-7-6(L). Finally, a county board of supervisors may make a reasonable assessment of the ability to pay of persons legally liable for the support of patients in the mental health or alcoholism treatment programs. Such an assessment is limited to a person's present ability to pay for support, based on the person's nonexempt assets and the economic needs of the person and his/her family. The board may subsequently review the ability to pay of persons legally liable for the programs. Such redetermination applies only to current charges, and may not be applied retroactively. Op. Att'y Gen. #79-6-22.

4) Your fourth question is: what is the minimum level of mental health care funding that a county must finance for:

a) mental illness;
b) chronic mental illness;
c) mental retardation;
d) developmental disabilities;
e) chemical dependency;
f) brain injured?

As was stated above, there are certain services a county of legal settlement must provide to those who are in need of the service. A county must pay the costs associated with the commitment, care and treatment for those suffering from mental illness and chronic mental illness at a mental health institute.

Iowa Code § 230.1. The same is true for those suffering from mental retardation who are committed or placed at a state hospital-school or any other public or private facility approved by the Department of Human Services. Iowa Code § 222.60. Further, when an individual is committed to a facility for substance abuse treatment pursuant to Iowa Code chapter 125, the county of legal settlement must pay for services in certain instances as outlined above. The county has little discretion in the amount to budget; rather, the county must fund the obligation.

Iowa Code section 225C.23 specifically requires that brain injury be recognized as a disability. However, if a person's sole diagnosis is developmentally disabled or brain injured, the county's funding obligation is discretionary. A county may determine that it wishes to fund services for individuals through the Social Service Block Grant funding system found in the Iowa Administrative Code. *See* 441 IAC 39 and 441 IAC 153. However, if a person has a sole diagnosis of being brain injured, the Social Services Block Grant funds do not provide specific services for these individuals. In order for the brain injured to receive services through the Social Services Block Grant funding system, that person must also carry a diagnosis of developmentally disabled, mental retardation, or mental illness. Because there is no statutory mandate to provide services to individuals with a developmental disability or brain injury diagnosis, a county may determine what level, if any, it wishes to fund for services for which the individual may qualify.

5) Your fifth question is: Does the property tax freeze language put a limitation on the financial/legal responsibilities of the county in the providing of mental health services?

In 1992, the Iowa General Assembly in special session placed a freeze upon the county's ability to add additional taxing authority when funds are insufficient to cover the basic levies as established by law. 1992 Acts, 2nd ex. session, ch. 1001, § 303. While there may be a freeze upon a county's ability to tax at a greater level when funds are insufficient to cover the basic levy, this does not alleviate the county from the mandatory obligations for certain services as provided by law. The statutory requirements for services for the mentally ill and mentally retarded still obligate the county to pay for certain services regardless of the property tax freeze.

The freeze upon the county's ability to add additional taxing authority has certain exceptions. The freeze is limited and a county may seek to add additional levies under certain circumstances. Specifically, section 303(4)(b) states in part:

> Additional costs incurred by the city or county due to any of the following circumstances shall be the basis for justifying the excess in property tax dollars: . . .
>
> (3) Need for additional moneys for health care, treatment and facilities, including mental health and mental retardation care and treatment pursuant to section 331.424, subsection 1, paragraphs "a" through "h".

Ch. 1001 § 303(4)(b)((3). Therefore, should a county determine that there will be a shortfall in the budget to cover the costs of those services, additional levies may be added.

To summarize the answers to the questions you pose in your letter:

1) Counties must pay the expenses attending the taking into custody, care and treatment of persons suffering from mental illness at a state mental health facility for both the mentally ill and the chronically mentally ill. There is no distinction between the indigent and non-indigent regarding commitments to the mental health institutes. A county may require a prescreening process in order to determine if full time hospitalization is truly needed for those seeking voluntary admission to a state mental health institute.

2) Iowa Code chapter 222 requires the county of legal settlement to pay for costs of admission or commitment or for the treatment, training, instruction, care, habilitation, support and transportation, of patients in a state hospital-school for the mentally retarded, or in a special unit, or any public or private facility within or without the state, approved by the director for the Department of Human Services. There is no distinction between the indigent and non-indigent for persons who fall under chapter 222.

3) While there is no specific Iowa Code section which requires a county to pay for the treatment and care of those diagnosed as developmentally disabled, a developmentally disabled person may still qualify for services as a person with mental illness or mental retardation and thus place a statutory mandate of services upon a county.

4) Generally, a county is responsible for the costs of substance abusers committed to the mental health institutes.

5) No specific Iowa Code chapter mandates that services be paid for by the county on behalf of the brain injured.

6) Iowa Code section 252.1 sets forth the definition of a poor person and is very specific. Should a county grant relief from the general relief fund pursuant to chapter 252, the relief is discretionary. However, for services pursuant to chapters 125, 222 and 229, the mandated services must be provided regardless; the only question is whether the party legally liable for the services can pay for the services.

7) A county may use all legally available means to collect amounts due the county.

8) The minimum level of funding for the mentally ill at the mental health institutes, the mentally retarded, and the substance abuser committed or admitted to the mental health institute, is that amount sufficient to cover the mandated costs. The minimum level of funding for the brain injured and the developmentally disabled is discretionary.

9) The property tax freeze does not alleviate the county from the mandatory obligations for certain services as provided by law.

September 14, 1993

ETHICS; PUBLIC OFFICIALS; PUBLIC EMPLOYEES: Authority of Ethics and Campaign Disclosure Board. 1993 Iowa Acts, ch. 163 (House File 144, §§ 1, 2, 3, 6, 7, 8, 9, 10, 11, 14, 15, 16); Iowa Code Supp. §§ 68B.2(16), 68B.32, 68B.32A, 68B.32B (1993). The Ethics and Campaign Disclosure Board does not have authority to promulgate rules governing or to impose penalties against local officials and employees under chapter 68B. (Condo to Williams, Executive Director, Ethics and Campaign Disclosure Board, 9-14-93) #93-9-4(L)

September 27, 1993

COUNTIES; PUBLIC RECORDS: Official Publications. Iowa Code §§ 349.2, 349.5, 349.6 (1993). Subscriber lists submitted for the purpose of a contest for designation as an official county newspaper are "public record," but the lawful custodian must ultimately decide whether the records are open to public inspection. (Donner to McLaren, State Representative, 9-27-93) #93-9-5

The Honorable Derryl McLaren, State Representative: We are in receipt of your request for an opinion of the Attorney General concerning subscriber lists submitted to the county board of supervisors pursuant to Iowa Code chapter 349. You point out that a newspaper applying to become designated as an official county newspaper by a county board of supervisors is required, in the case of a contest between newspapers, to submit a sealed envelope containing the names of that newspaper's bona fide yearly subscribers living within the county. Iowa Code § 349.5 (1993). The county auditor opens these envelopes while the board of supervisors is in session, and the newspaper or newspapers with the largest number of subscribers are designated as an official county newspaper. Iowa Code §§ 349.2, 349.6.

With reference to this process you pose the following question:

> Are subscriber lists submitted to the county board of supervisors pursuant to Iowa Code chapter 349 for the purpose of determining the official county newspapers considered "public records" open to public inspection?

We conclude that a subscriber list submitted under chapter 349 is a "public record." The lawful custodian must ultimately decide whether these records are open to public inspection.

A public record is defined in pertinent part as "all records, documents, tape, or other information, stored or preserved in any medium, of or belonging to . . . any county . . ." Iowa Code § 22.1. The Iowa Supreme Court has found that this definition reaches writings held by public officers in their official capacities regardless of origin. *Howard v. Des Moines Register & Tribune Co.*,

283 N.W.2d 289, 299-300 (Iowa 1979), *cert. denied*, 445 U.S. 904, 100 S. Ct. 1081, 63 L. Ed. 2d 320 (1980) (information provided to governor's office constitutes public record). This office, moreover, has opined that "public records" include any comprehensible writing developed and/or maintained by a public body or official as a convenient, appropriate, or customary method by which the body or official discharges a public duty. 1982 Op. Att'y Gen. 215.

Examples of items which we have opined to be "public records" include: packets of informational material prepared by a city administrator for use at an open meeting of the city council, 1982 Op. Att'y Gen. 215; minutes of open meetings of governmental bodies, 1980 Op. Att'y Gen. 88; a police department operation manual, 1980 Op. Att'y Gen. 825; a verification of age form required to be executed for purchase of liquor, 1984 Op. Att'y Gen. 88; and tax protests filed by taxpayers, 1992 Op. Att'y Gen. 1.

Applying the analysis set forth in case law and in our opinions, the subscription lists appear to be the type of information previously found to be "public records." The lists are held by the county officials in their official capacity. The lists, moreover, are clearly essential to the county board of supervisors in the discharge of its public duties. *See* 1982 Op. Att'y Gen. 215.

An analogy to the lists provided to the county board of supervisors in the process of determining an official newspaper is found in *Bruner v. Varley*, 411 N.W.2d 150 (Iowa 1987), in which the Iowa Supreme Court concluded that telephone company documents introduced as evidence by the Consumer Advocate during a rate setting hearing before the Iowa State Commerce Commission were public records. *Bruner v. Varley*, 411 N.W.2d at 153. Submission of newspaper subscription lists to a governmental body for the purpose of determining which newspapers will be designated as "official newspapers" would similarly indicate that the lists become public record under the *Bruner* holding.

Although we conclude that newspaper subscriber lists submitted to a county board of supervisors under chapter 349 become "public records," this determination does not resolve whether the records are available for public inspection or, nevertheless, may be kept confidential. A public record may be kept confidential under statutes or law outside chapter 22. *See, e.g.*, Iowa Code § 422.20 (tax return information); Iowa Code § 692.2-3 (criminal history and intelligence data); Iowa Code § 272C.6(4)(investigative files of professional licensing boards). In addition, discretion is vested in the lawful custodian to determine whether these lists fit within any of 29 categories of confidential records listed in Iowa Code section 22.7. *See* 1980 Op. Att'y Gen. 825, 825-26 [#80-9-19(L)]; 1982 Op. Att'y Gen. 512, 515.

Under section 349.5 subscriber lists are submitted *in a sealed envelope* and submitted only in case of a contest. Iowa Code § 349.5 (emphasis added). A contest, in turn, exists when more applications are filed than there are newspapers to be selected. Iowa Code § 349.5. Until the envelopes are opened, the sealing itself should be construed to render the lists confidential for purposes of examination and copying pursuant to chapter 22. *Cf.* Iowa Code § 21.5(4)

(closed session minutes and tape recording of a closed session sealed). After the lists are opened, however, the lists may remain confidential only if the lists are confidential under another provision of law.

In the absence of additional authority outside chapter 22 to maintain the confidentiality of the lists, the lawful custodian of the lists should consider the application of the categories of confidential records itemized in Iowa Code section 22.7.[10] We cannot determine through the opinion process whether any particular category of confidential records is applicable. This requires a factual determination by the lawful custodian. *See* 1972 Op. Att'y Gen. 686. We can, however, address the legal bases upon which confidentiality may be asserted.

Section 22.7 provides for public records to be kept confidential as "trade secrets" under Iowa Code section 22.7(3), or as "reports to governmental agencies which, if released, would give advantage to competitors and serve no public purpose" under Iowa Code section 22.7(6). Neither of these provisions appear applicable as a matter of law.

A "trade secret" is defined as:

> [I]nformation, including but not limited to a formula, pattern, compilation, program, device, method, technique, or process that is both of the following:
>
> a. Derives independent economic value, actual or potential, from not being generally known to, and by not being readily ascertainable by proper means by a person able to obtain economic value from its disclosure or use; and
>
> b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Iowa Code § 550.2(4). It does not appear that the subscription list meets this test. A competitor who could obtain economic value from the list would likely be able to obtain this information by "proper means," such as a telephone survey of county residents.

Nor does it appear that the subscriber list qualifies for confidential treatment under section 22.7(6). Assuming the information would "give an advantage to competitors," release of the subscriber list appears to fail the second part of the test, i.e., that the release "would . . . serve no public purpose" in that the list was used as evidence to decide the question of what newspaper should be designated as an official newspaper. *See* 1980 Op. Att'y Gen. 372, 373.

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[10] Even if no provision of law otherwise authorizes the lists to be kept confidential, the newspapers may decide whether to seek an injunction under Iowa Code section 22.8. In order to obtain an injunction under this section, a newspaper must show that examination would substantially and irreparably injure a person or persons. Iowa Code § 22.8(1).

We conclude that the newspaper subscriber lists submitted to a county board of supervisors under chapter 349 are public records. The lawful custodian must ultimately decide whether these records are open to public inspection.

September 27, 1993

COUNTIES; TRANSPORTATION: Workers' compensation payment from secondary road fund. Iowa Constitution, Article VII, section 8; Iowa Code § 331.429(2). Expenditures from the secondary road fund are limited by Article VII, section 8 of the Iowa Constitution, and Iowa Code section 331.429(2). Salaries and other employment related costs of road department personnel, including workers' compensation payments, constitute costs incident to maintenance and repair of secondary roads within the meaning of Iowa Code section 331.429(2). The conclusion reached in 1976 Op. Att'y Gen. 715 is affirmed. Contrary prior opinions, 1928 Op. Att'y Gen. 353, 1962 Op. Att'y Gen. 173, 1980 Op. Att'y Gen. 220 are hereby overruled. (Hindt to Johnson, State Auditor, 9-27-93) #93-9-6

The Honorable Richard D. Johnson, State Auditor: You have requested an opinion of the Attorney General as to whether monies in the secondary road fund established pursuant to Iowa Code section 331.429 may be used by a county to pay workers' compensation insurance premiums. We assume for purposes of this opinion the premiums for workers' compensation insurance would relate to employees of the County Engineer's office and the secondary road department.

As you point out in your request and referenced correspondence, four previous opinions of this office have addressed this question. In 1928 Op. Att'y Gen. 353, 1962 Op. Att'y Gen. 173, and 1980 Op. Att'y Gen. 220, we opined secondary road fund monies could not be used to pay workers' compensation premiums. In 1976 Op. Att'y Gen. 715 we opined they could. As noted, there is an apparent conflict or inconsistency in these opinions. The 1976 opinion essentially overrules the 1928 and 1962 opinions. However, 1980 Op. Att'y Gen. 220 reaffirms the 1928 and 1962 opinions without mentioning the 1976 opinion. It is the policy of this office not to overrule previous opinions unless they are clearly erroneous. The rationale is so that state officials who rely on the opinions may do so with some degree of certainty. *See* 1980 Op. Att'y Gen. 107, 108. When there is a conflict in the opinions, as in this case, this purpose is not served. Therefore, we believe it appropriate to revisit the issue.

Expenditures of money in the secondary road fund are limited in two ways: by Article VII, section 8 of the Iowa Constitution, the "antidiversion amendment," and by Iowa Code section 331.429(2). The antidiversion amendment applies here because a portion of the money in secondary road funds consists of road use tax funds. *See* Iowa Code § 331.429(1) (1993). Many previous opinions of this office have addressed the issue of what is permissible under the antidiversion amendment of the Iowa Constitution. A thorough discussion of these opinions is contained in 1988 Op. Att'y Gen. 82. Relevant are the provisions of that amendment which require the funds to be used for "construction, maintenance, and supervision of the public highways". The provision has been construed broadly. *See* 1972 Op. Att'y Gen. 115 (state highway patrol salaries sufficiently related to highway purposes); 1984 Op. Att'y Gen.

154 (allowing payment of highway tort claims from the Road Use Tax Fund). *See also Edge v. Brice*, 113 N.W.2d 755 (Iowa 1962). As noted by the Supreme Court in *Edge v. Brice*, the purpose of the amendment is to prevent funds from being used for governmental purposes "totally foreign" to highways. It is our opinion that payment of workers' compensation insurance premiums covering secondary road employees is permissible under Article VII, section 8 of the Iowa Constitution under the analysis of these authorities.

The question then becomes whether such expenditures are permissible under the limiting statute, Iowa Code section 331.429(2). That section provides as follows:

> 2. The board may make appropriations from the secondary road fund for the following secondary road services:
>
> a. Construction and reconstruction of secondary roads and costs incident to the construction and reconstruction.
>
> b. Maintenance and repair of secondary roads and costs incident to the maintenance and repair.

Various other expenditures related to secondary roads are also authorized by this section.

Personnel in the county engineer's office and secondary road department perform "construction and reconstruction" and "maintenance and repair of secondary roads" as set forth in subsections (a) and (b). The question is whether the cost of workers' compensation insurance covering the employees of these departments is a cost incident to such construction, reconstruction, maintenance and repair. "Incident" when used as an adjective means "occurring or likely to occur especially as a minor consequence." *See Webster's Seventh New Collegiate Dictionary* 423 (G & C Merriam Company, 1967). We think a court is likely to construe the language of Iowa Code sections 331.429(2)(a) and (b) as broadly as permissible under the constitutional provision. Salaries, health insurance premiums, social security and other pension benefits and other employee related costs for county engineer or secondary road department employees are all incident to the costs of performing their duties. Therefore, we conclude that expenditures from the secondary road fund for payment of workers' compensation insurance covering county engineer and secondary road department employees is permissible under the provisions of section 331.429(2).

In summary, expenditures from the secondary road fund are limited by Article VII, section 8 of the Iowa Constitution, and Iowa Code section 331.429(2). Under these provisions, the expenditure of funds for payment of workers' compensation premiums covering secondary road workers is not totally foreign to construction, maintenance, and supervision of the public highways. Salaries and other employment related costs of road department personnel, including workers' compensation insurance payments, constitute costs incident to maintenance and repair of secondary roads within the meaning of Iowa Code section 331.429(2).

To the extent the salary can be paid from road use tax funds, payment of employee benefits and costs, such as workers' compensation, may be paid from the fund as well. Contrary conclusions in 1928 Op. Att'y Gen. 353, 1962 Op. Att'y Gen. 173, 1980 Op. Att'y Gen. 220 are hereby overruled.

September 27, 1993

STATE OFFICES AND DEPARTMENTS: Reimbursement for travel expenses. Iowa Code sections 97B.8, 421.31 and 421.39 (1993). IPERS investment board members should be reimbursed for their actual in-state travel expenses, subject to limitations under Iowa Code section 421.39 and Department of Revenue and Finance rules and procedures. (Olson to Hanson, Director of Department of Personnel, 9-27-93) #93-9-7

Ms. Linda G. Hanson, Director, Iowa Department of Personnel: You have requested an opinion of the Attorney General concerning claims for expenses submitted by the Iowa Public Employees' Retirement System (IPERS) investment board members. We understand your question to be whether the Department of Revenue and Finance has authority to limit the amounts of reimbursement. For reasons that follow, we believe that it does.

The IPERS investment board was created by Iowa Code section 97B.8. The board consists of nine members, including two legislators and the director of the department of personnel. Section 97B.8 provides that all board members shall be paid their "actual expenses" incurred in performing their board duties; section 2.10(6) includes a similar provision for legislators who serve on statutory boards.

Our Code search disclosed that the term "actual expenses" occurs in one hundred nineteen Code sections. The Code provides that members of literally dozens of state boards, commissions, and councils are to be reimbursed for "actual expenses" while performing official duties. The term "actual expense" we believe is synonymous with "actual cost," which has been defined as the exact sum expended rather than the average or proportional part of the cost. *Black's Law Dictionary* 54 (rev. 4th ed. 1968). Actual cost is the cost actually incurred; money actually paid out; the exact sum expended rather than the average or proportional part of the cost, or the estimated cost. 1A C.J.S. *Actual* 771-72.

On its face, section 97B.8 seems to authorize a carte blanche expense account for board members. When read in conjunction with Iowa Code section 421.39, however, we do not believe that that was the legislature's intent. The ultimate goal in statutory interpretation, of course, is to determine and effectuate the intent of the legislature. *Beier Glass Co. v. Brundige*, 329 N.W.2d 280 (Iowa 1983). Statutes relating to the same or closely allied subjects are considered to be in pari materia and must be construed, considered and examined in light of their common purposes and intent. *Rush v. Sioux City*, 240 N.W.2d 431 (Iowa 1976).

The legislature has by section 7E.5(d) delegated to the Department of Revenue and Finance the responsibility for revenue collection and financial management. One of the director's financial management duties is to approve claims for expense reimbursements in accordance with the factors in section 421.39. Those factors include whether the claims are lawful, authorized, proper, and reasonable. We believe that the legislative intent in placing the oversight of claims with a single department was to provide uniformity and consistency to the claims process. Considering the many state boards, commissions, and councils whose members submit expense claims, such a procedure is both reasonable and necessary.

To carry out the legislative mandate, the director of the Department of Revenue and Finance is empowered, pursuant to section 421.14, to adopt agency rules. The department's rules provide that "all travel claims submitted shall be the actual expense incurred (not exceeding maximum limitations) by the claimant. . ." 701 IAC 201.1(1). Reimbursements are limited to "an allowance for subsistence and transportation, and other actual and necessary travel expenses incurred by travel in performance of official duties subject to applicable limitations." 701 IAC 201.2(2). We have previously opined that where a statute allows discretionary approval of expense claims, implicit in the power of approval "is the power to deny or allow to any extent the claims submitted for reimbursement. . . " 1980 Op. Att'y Gen. 444 (#79-10-10(L)); 1986 Op. Att'y Gen. 107 (#86-8-6(L)) (county board of supervisors may limit amount of reimbursement to officers and employees for actual expenses incurred while attending meetings pertaining to county government).

In construing a similar statute, the Supreme Court held that agencies may, by regulations promulgated under the Code, determine what constitutes "actual reasonable expenses." *Lickteig v. Iowa Department of Transportation*, 356 N.W.2d 205 (Iowa 1984). A rule is within an agency's power if a rational agency could conclude that the rule is within its delegated authority. *Dunlap Care Center v. Iowa Department of Social Services*, 353 N.W.2d 389 (Iowa 1984). An agency's interpretation of its own regulation should be followed unless there are compelling indications that it is incorrect. *Anderson v. Heckler*, 726 F. 2d 455 (8th Cir. 1984).

Another duty of the director of the Department of Revenue and Finance is to establish a pre-audit system of settling all claims against the state and to pre-audit all accounts submitted for the issuance of warrants. Iowa Code § 421.31(2)(3). The department's pre-audit procedure applicable to in-state travel expenses for board, commission, advisory council, and task force members of state government outlines reimbursement policy. You have indicated that that procedure was applied to the IPERS board members' expense claims. We believe the procedure was authorized, reasonable and proper.

In conclusion, state government board members should be reimbursed for their actual expenses, rather than their average or estimated expenses, subject to applicable limitations under Iowa Code section 421.39 and Department of Revenue and Finance rules and procedures.

OCTOBER 1993

October 1, 1993

TAXATION; COUNTIES: Eligibility to vote on issuance of general obligation bonds intended for water service areas. Iowa Code § 331.441(2)(b)(12) (1993). Only the electorate within the benefited water service area is entitled to vote on the issuance of general obligation bonds issued for this essential county purpose. (Miller to Parker, Warren County Attorney, 10-1-93) #93-10-1

Mr. Kevin Parker, Warren County Attorney: The Attorney General has received your opinion request concerning Iowa Code subsection 331.441(2) (1993). Your question is whether the entire electorate of Warren County is eligible to vote regarding the issuance of general obligation bonds intended to fund an expansion of a water service area, or whether only the electorate within the water service area boundaries for which the bonds are intended is eligible to vote.

For the reasons stated in this opinion, only the electorate within the water service area boundaries is entitled to vote on the issuance of the bonds.

The Warren County Board of Supervisors is contemplating the designation of a special taxing district for the purpose of assisting Warren Water, a water service area, to expand their service area. General obligation bonds are intended to be issued to fund this proposed expansion. This is authorized under subparagraph 331.441(2)(b)(12) and is defined by paragraph 331.441(2)(b) to be an essential county purpose.

Normally, general obligation bonds issued for an essential county purpose are "payable from the levy of ad valorem taxes *on all taxable property within the county* through its debt service fund. . . ." (Emphasis added.) *See* § 331.441(2)(a). Iowa Code section 331.447 also provides that "the bonds are payable from the levy of unlimited ad valorem taxes on all the taxable property within the county through its debt service fund. . . ." In addition, Iowa Code section 331.443 does not provide for a right of petition for election regarding the issuance of general obligation bonds designated exclusively for an essential county purpose listed under paragraph 331.441(2)(b).

However, when involving special taxing districts designated for funding local water services, subparagraph 331.441(2)(b)(12), as amended by 1992 Iowa Acts, ch. 1102, § 1, provides for two exceptions to the general procedures outlined above. First, subparagraph subdivision 331.441(2)(b)(12)(a) specifically provides that

> [T]he county's debt service tax levy for county general obligation bonds issued for the purposes set out in this subparagraph *shall be levied only against real property within the county which is included within the boundaries of the special taxing district.*

(Emphasis added.) Therefore, the obligation to pay these bonds is limited solely to the taxable property within the special taxing district, not to the taxable property within the entire county. Secondly, subparagraph subdivision 331.441(2)(b)(12)(b) provides that "[G]eneral obligation bonds for the purposes outlined in this subparagraph are subject to the right of petition for an election as provided in section 331.442, subsection 5, paragraphs "a", "b", and "c", without limitation on the amount of the bond issue or the size of the county. . . ."

There is no state or federal constitutional right to petition for an election regarding the issuance of bonds by a local governmental body. *Cf. Richards v. City of Muscatine*, 237 N.W.2d 48, 55 (Iowa 1975) (procedural due process was not violated by statute authorizing issuance of urban renewal bonds without prior notice and opportunity for hearing as such decisions are legislative in character). Any right of petition for an election regarding the issuance of general obligation bonds is a statutory right conveyed by the legislature.

The question, therefore, is whether the legislature, in allowing the right of petition at all, intended to convey this right to the entire electorate of the county or just those within the boundaries of the special taxing district. The general statutory scheme does not provide for any right of petition for an election regarding the issuance of general obligation bonds for an essential county purpose. Therefore, absent clear statutory language conveying such a right, it cannot be assumed that a portion of the electorate representing an area not obligated to pay the bonds would be entitled to vote on their issuance. Here, the term "county" is referenced in subparagraph subdivision 331.441(2)(b)(12)(b), but it is not used in the context of describing the area which is entitled to vote. Rather, it is used in the context of eliminating the limitations set forth in subsection 331.442(5), thereby insuring all bond issues involving water service districts are subject to a right of petition for an election regardless of the amount of the bond issue or the size of the area involved.

The statute, in this case, only provides for the electorate within the intended water service boundaries to be entitled to vote on the issuance of the general obligation bonds.

October 22, 1993

REAL PROPERTY; TAXATION: Abandoned railroad right-of-way. Iowa Code §§ 327G.77, 327G.78, 447.9, 448.6 (1993); Iowa Code chapters 446, 447, 448 (1993). When railroad right of way is abandoned and chapter 327G applies, the transfer of ownership to adjacent landowners occurs at the time of the abandonment. The county may tax an adjacent landowner on that property even if no affidavit of ownership has been filed. If the property is subsequently sold at a tax sale, that sale is not rendered void simply by virtue of an adjacent landowner subsequently filing an affidavit of ownership. (Hunacek to Wink, 10-22-93) #93-10-2(L)

NOVEMBER, 1993

November 2, 1993

DRUG TESTING; MOTOR VEHICLES: Random drug testing of intrastate truck drivers. Iowa Code §730.5 (1993); 761 IAC 520.1 (321); 49 C.F.R. §§391.109, 391.111. Iowa motor carriers are prohibited from requiring intrastate operators of commercial vehicles to submit to random drug testing. (Ewald to Rosenberg, State Senator, 11-2-93) #93-11-1

The Honorable Ralph Rosenberg, State Senator: You have requested an opinion of the Attorney General on the following question:

> May an Iowa motor carrier require its employees who operate commercial vehicles exclusively in intrastate commerce to submit to random drug testing?

The Iowa legislature has generally prohibited Iowa employers from randomly testing employees for drugs. Iowa Code § 730.5 (1993). However, the proscription does not apply to drug tests required under federal statutes or regulations adopted as of July 1, 1990. Iowa Code § 730.5(2) (1993).

The drug testing provisions of the federal motor carrier safety regulations were adopted in 1988. *See* 53 Fed. Reg. 47151 (November 21, 1988). These regulations now generally require motor carriers to conduct annual random drug tests on at least 50 percent of their employees who drive commercial motor vehicles. 49 C.F.R. §391.109. However, the regulations apply only to *inter*state drivers, because "commercial motor vehicle" is defined by federal law to include only vehicles operated in *inter*state commerce. 49 App. U.S.C.A. §2503(1); 49 C.F.R. §391.85. *Compare* Iowa Code §§321.1(1)(d) and 321.1(12) ("commercial motor vehicle" and "commercial vehicle" defined without reference to intrastate or interstate commerce). At this point in the analysis Iowa motor carriers would clearly have no authority to randomly test *intra*state truck drivers.

An administrative rule of the Iowa Department of Transportation (DOT) must also be considered. *See* 761 IAC 520.1(321), copy attached. The rule generally makes all Iowa operators of "commercial vehicles," as defined by Iowa law,[11] subject to the federal motor carrier safety regulations. 761 IAC 520.1(2). This subrule has the effect of making all Iowa *intra*state *and inter*state commercial vehicle operators subject to the federal random drug testing

[11] *See* Iowa Code § 321.1(12) ("commercial vehicle" means vehicle or combination of vehicles with gross weight or gross vehicle weight rating of 10,000 pounds or more, vehicle designed to carry 16 or more persons, or vehicle used to transport hazardous material). This definition would include virtually all "commercial motor vehicles." *See* Iowa Code § 321.1(10)(d) ("commercial motor vehicle" means motor vehicle or combination vehicles with gross vehicle weight rating or gross combination weight rating of 26,000 pounds or more, motor vehicle designed to carry 16 or more persons, or motor vehicle used to transport hazardous materials). *See also* Iowa Code § 321.1(90) ("vehicle" defined) and § 321.1(42)(a) ("motor vehicle" defined).

regulations. However, in the same rule the DOT specifically exempts "intrastate operations" from those regulations. 761 IAC 520.1(1)(a).

Reading all of the above provisions together, we conclude that Iowa motor carriers are prohibited from requiring *intra*state operators of commercial vehicles to submit to random drug testing. *See Coleman v. Iowa District Court For Linn County*, 446 N.W.2d 806 (Iowa 1989) (statutes should be read together and, if possible, harmonized); *Fernandez v. Iowa Dept. of Human Services*, 375 N.W.2d 701 (Iowa 1985) (administrative rules have force of law and are presumed valid as long as they are reasonable and consistent with legislative enactments).

We note that the federal regulations expressly allow states to adopt laws which do not prevent compliance with federal law, 49 C.F.R. §390.9, and we see no conflict between Iowa and federal law.

We also see no conflict between Iowa's random drug testing statute and the DOT rule. As explained above, the Iowa statute defers to federal law. The federal law by its own terms does not apply to *intra*state drivers. The DOT rule generally adopts the federal safety regulations for both *intra*state and *inter*state drivers, but then exempts *intra*state operations from the random drug testing provisions. Of course, *intra*state carriers and drivers are still subject to the other provisions of the federal motor carrier safety regulations, unless exempted under Iowa Code sections 321.449 or 321.450. *See* 761 IAC 520.1(2).

November 8, 1993

MOTOR VEHICLES; HIGHWAYS: Authority of county or city to impose weight restrictions. Iowa Code §§ 321.1, 321.236, 321.471, and 321.473 (1993). Local authorities do not have the authority to impose restrictions on the use of implements of husbandry on highways within their jurisdiction. Local authorities are authorized to regulate the use of highways under their jurisdiction as long as the rule bears a reasonable relationship to the preservation of the safety of the traveling public or the protection of highway surface and structures. In regulating trucks or other commercial vehicles pursuant to section 321.473, the definition of "truck" should be related to the type of problem the ordinance is designed to address and the restriction imposed by the local authority. A comma has been inadvertently placed between farm and feeds in section 321.473. The legislature clearly intended permits to be issued to persons moving feeds and fuel to any farm. (Burger to Lievens, Butler County Attorney, 11-8-93) #93-11-2(L)

November 8, 1993

AGRICULTURE; CORPORATE FARMING: Ownership of cattle or control of feedlot by beef processor. Iowa Code §§ 9H.1(12), 9H.1(17), and 9H.2 (1993). Iowa Code section 9H.2 does not prohibit a beef processor from owning cattle and contracting with a third-party feedlot owner to raise its cattle, as long as the beef processor does not control or own the feedlot. (Moline to Priebe, State Senator, 11-8-93) #93-11-3

The Honorable Berl E. Priebe, State Senator: You have requested an opinion of the Attorney General interpreting Iowa Code section 9H.2 as it applies to the contract feeding of cattle owned by a "processor" as defined in section 9H.1(17). The basic inquiry you present is as follows:

> Does 9H.2 prohibit a processor from contracting with a feedlot owner for that owner to feed cattle owned by the processor, perhaps even using feed also owned by the processor.

It appears that the question you ask must ultimately be resolved by private legal advice in any specific instance involving contract feeding of livestock. The function of an Attorney General's opinion is to resolve a specific question of law to guide public officials. However, we cannot structure legal transactions for private entities. We have no ability to know all of the facts and circumstances involved. Therefore, any attempt by us to assume the details of a private legal transaction would be unfair and have a high risk of inaccuracy. This is especially true in the context of section 9H.2 as our review of that section establishes that its application to a given transaction, i.e. a contract feeding agreement, would depend in large part on the specific factual circumstances of the agreement between the beef processor and the feedlot owner. Our review of section 9H.2 identifies some of the factual circumstances that should be considered as part of the analysis to determine if a given contract feeding relationship is in violation of section 9H.2.

The issue raised in your request focuses on the prohibitions contained in section 9H.2. When considering the scope of those prohibitions, it is necessary to first look at the objective that the legislature sought to accomplish and the evils and mischiefs sought to be remedied in order to reach an interpretation of those prohibitions that would best effectuate the purpose of section 9H.2. *Krueger v. Iowa Department of Transportation*, 493 N.W.2d 844, 845 (Iowa 1992).

The legislature's purpose in enacting section 9H.2 was to "preserve free and private enterprise, prevent monopoly, and protect consumers, . . ." Iowa Code § 9H.2. Given the above-stated purpose, it is clear that the evil the legislature wished to address was injury to consumers caused by increased market concentration in the beef industry. Iowa Code § 9H.2. Therefore, the specific prohibitions contained in section 9H.2 need to be construed to effectuate the legislature's intent that consumers are to be protected from harm associated with loss of market competition in the beef industry. *Krueger v. Iowa Department of Transportation*, 493 N.W.2d 844, 845 (Iowa 1992).

The means chosen by the legislature to attain its stated purpose was to enact Iowa Code section 9H.2. The relevant portion of that statute states:

> In order to preserve free and private enterprise, prevent monopoly, and protect consumers, it is unlawful for any processor of beef or pork or limited partnership in which the processor holds partnership shares as a general partner or partnership shares as

> a limited partner, or limited liability company in which a processor is a member, to own, control, or operate a feedlot in Iowa in which hogs or cattle are fed for slaughter.

Iowa Code §9H.2 The use of terms like "free enterprise" and "monopoly" in section 9H.2 establishes that the legislature was concerned about harm to consumers resulting from the ability of beef processors to control two or more steps in the production and distribution chain, i.e. the feeding and the slaughtering of beef. The legislature determined that beef processors can harm consumers through increased "vertical integration" of the beef industry. *United States v. Lynch*, 699 F.2d 839, 852 (7th Cir. 1982) (defines vertical integration as ". . . the performance of two or more steps in the chain of production and distribution . . .")

While the legislature was concerned about vertical integration of the cattle industry, it stopped short of completely prohibiting beef processors from owning cattle in Iowa. Instead, the legislature expressly prohibited processors from owning "feedlots" in Iowa, i.e. having title to the real estate where cattle are raised. Iowa Code § 9H.2. However, the legislature did not stop with regulating the ownership of the real property where cattle are raised; it also expressly regulated certain conduct. Specifically, the legislature expressly prohibited beef processors from "operating" or "controlling" cattle feedlots, even if the processors did not actually "own" the real estate where the feedlot was located. Iowa Code § 9H.2.

"Control" and "operate" address two separate types of activities. Iowa Code § 9H.2. "Control" refers to activities relating to the economic value of the cattle raised in those feedlots. Iowa Code § 9H.2. In a cattle feedlot, the major economic decisions that affect consumers concern the purchase and sale of the cattle in the feedlot.

If a beef processor owns cattle in a contract feeding relationship and retains the power to decide how many cattle are going to be raised in a feedlot and to require that its cattle raised in a feedlot must be slaughtered at its processing plant, the processor would be eliminating much of the market competition that the legislature intended to protect when it prohibited processors from "controlling" cattle feedlots in Iowa. Iowa Code § 9H.2. Therefore, the contract feeding of cattle owned by beef processors where the processors retain that kind of economic control would be included within the prohibited activities identified in section 9H.2.

"Operate" refers to decisions that relate to the production of cattle in feedlots. Iowa Code § 9H.2. In a cattle feedlot those production decisions would include, but would not be limited to, the following: the type and amount of feed used, selection and timing of veterinary care, selection of nonprescription medications, and decisions relating to capital improvements. While retention of a single type of production decision would not necessarily result in a processor "operating" a feedlot, it is clear that the more control a processor retains over those production decisions, the more likely it will be found to be "operating" a feedlot in violation of the prohibitions contained in section 9H.2.

The legislative purpose in prohibiting processors from operating feedlots concerns the protection of owner-operated family farms. This purpose is evidenced by additional prohibitions contained in Iowa Code chapter 9H. Specifically, the prohibitions are against corporate ownership of farm land except for "family farm corporations". Iowa Code § 9H.1(9). Therefore, the contract feeding of cattle owned by a beef processor where the processor, as opposed to the feedlot owner, retains authority to make all the significant production decisions would be included within the prohibited activities identified in section 9H.2.

In summary, Iowa Code section 9H.2 does not prohibit a beef processor from owning cattle and contracting with a third-party feedlot owner to raise its cattle, as long as the beef processor does not control or own the feedlot.

November 16, 1993

COUNTIES; TAXATION: Property Tax Limitation Applicable To Local Emergency Management Commission. Iowa Code §§ 29C.17, 331.422, 331.424(1)(p), 331.427(2)(a), 444.25 (1993). The property tax limitation provisions of section 444.25 do apply to the county-wide special levy authorized under section 29C.17 to fund the local emergency management commission. (Miller to Richards, Story County Attorney, 11-16-93) #93-11-4(L)

November 18, 1993

COUNTIES; OPEN MEETINGS; SCHOOLS; SUPERVISORS, BOARD OF: Advisory Committees. Iowa Code §§ 1.17, 4.4(2), 4.6(7), 7.20, 17A.2, 17A.6(b), 21.2(1), 68B.2(21), 274.1, 274.7, 279.8, 279.20, 331.301, 331.302(1), 473.8 (1993); 1993 Iowa Acts ch. 25, § 1. Advisory bodies created by school boards and county boards of supervisors to develop and make recommendations on public policy issues are included within the expanded definition of governmental bodies subject to the Open Meetings Law, despite the legislature's use of the phrase "created by executive order of a political subdivision." Use of the term "executive order" confines the authority to create such advisory committees to those elected entities with final executive authority for the political subdivision, rather than restricting the manner in which such advisory committees are created. (Tabor to Stilwill, Acting Director, Dep't of Education, and Sarcone, Polk Co. Att'y, 11-18-93) #93-11-5

Mr. Ted Stilwill, Acting Director, Department of Education, and Mr. John P. Sarcone, Polk County Attorney: You have both requested opinions of the Attorney General interpreting how an amendment to the Open Meetings Law which expands the definition of "governmental bodies" applies to advisory committees appointed by school boards and county boards of supervisors, respectively. The amendment, approved on April 15, 1993, adds a new category to the definition of governmental bodies in Iowa Code section 21.2(1), providing as follows:

> Governmental body means:
>
> An advisory board, advisory commission, advisory committee, task force, or other body created by statute or executive order of this state or created by an executive order of a political subdivision of

> this state to develop and make recommendations on public policy issues.

1993 Iowa Acts ch. 25, § 1 (S.F. 319) (to be codified at Iowa Code § 21.2(1)(h)).

Both inquiries focus on the words "created by an executive order of a political subdivision of this state." The request from the Department of Education first specifically asks "whether a school board has the authority to issue an executive order, and, if so, what constitutes an executive order by the school board." In posing this question, the requestor reminds us that Iowa school districts do not operate by home rule, but rather possess only those powers expressly granted by the legislature or necessarily incident to those expressly granted. *See Sioux City Community School District v. Iowa State Board of Public Instruction*, 402 N.W.2d 739, 741 (Iowa 1987). Second, if school boards are not considered to be issuing executive orders when appointing committees to gather information, review alternatives and make recommendations, then the requestor asks:

> [A]re any school-board appointed advisory boards, commissions, committees, task forces or other bodies designed to provide information to the school board for its review and decision subject to the open meetings law under the new section?

Third, the Department of Education questions whether the term "political subdivision" refers only to the school board or encompasses school officials, such that committees appointed by the superintendent would be subject to the amendment.

In the same vein, Mr. Sarcone inquires whether "this provision applies to advisory boards or committees appointed by a county board of supervisors" given that such boards do not act by "executive order," but rather "exercise a power or perform a duty only by passage of a motion, a resolution, an amendment or an ordinance" under Iowa Code section 331.302(1) (1993).

It is our opinion that advisory bodies appointed by school boards and county boards of supervisors to develop and make recommendations on public policy issues are included within the expanded open meetings coverage despite use of the phrase "created by executive order." We believe that use of the term "executive order" confines the authority to create such advisory committees to those elected entities with final executive authority for the political subdivision, rather than restricting the manner in which such advisory committees are created.

As the Department of Education notes in its request, the governor's power to issue executive orders is provided in numerous code sections. *See, e.g.*, Iowa Code §§ 1.17 (order accepting cession of federal jurisdiction over lands); 7.20 (order directing agencies to lease vacant buildings); 17A.2 (defining certain executive orders as rules under Administrative Procedures Act); 17A.6(b) (proclamations and executive orders by governor to be published in Iowa Administrative Law Bulletin); 473.8 (orders responding to energy emergency). Both requestors point out that the legislature has not explicitly provided the authority to issue executive

orders to political subdivisions. Nevertheless, the drafters' inexact use of the term "executive order" must not serve as an excuse to defeat the manifest intent of the legislature.

The polestar of statutory construction is the search for the true intention of the legislature. *American Home Products v. Iowa State Board of Tax Review*, 302 N.W.2d 140, 143 (Iowa 1983). By passing this amendment, the legislature clearly aimed to extend open meeting mandates to both advisory bodies created by state government action and advisory bodies created by local government action. The legislature's desire can be detected from the development of the definition of "governmental bodies."

In the past, the definitions of "governmental bodies" have been limited to bodies possessing decisionmaking or policymaking authority. Boards and commissions which perform purely advisory functions have consistently been found outside the reach of Iowa's open meetings law. *See, e.g., Donahue v. State*, 474 N.W.2d 537, 539 (Iowa 1991) (faculty judicial panel is not governmental body because its findings are not binding on regents); 1980 Op. Att'y Gen. 148, 153 (peer review committee of the Board of Engineering Examiners not delegated any decisionmaking authority, thus not "governmental body"); 1988 Op. Att'y Gen. 75 [#88-2-6(L)] (committee appointed by school board to make recommendation about distribution of "phase III" funds pursuant to Iowa Code section 294A.15 serves only advisory function and thus not subject to open meetings law).

In 1989 the legislature amended the definition of "governmental bodies" to include "an advisory board, advisory commission, or task force created by the governor or the general assembly to develop and make recommendations on public policy issues." Iowa Code § 21.2(1)(e). This office interpreted that amendment as applying only to advisory bodies formed to advise the governor or general assembly, and not to human growth and development resource committees created by statute to advise local school boards. Op. Att'y Gen. # 91-2-3(L). That 1991 opinion highlighted the significantly different wording used by the legislature in subsections (e) and (a) of section 21.2(1), and concluded that "[i]f the legislature had intended to include all advisory commissions created 'by statutes of this state' it would have used that terminology."[12] *Id.*

Apparently in response to that opinion, during its 1993 session, the legislature further amended section 21.2(1) to include not only all advisory committees

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[12] Iowa Code § 21.2(1)(a) uses the phrase "expressly created by the statutes of this state." This replaced the words "created or authorized by the law of this state" in the former statute at Iowa Code § 28A.1(1). *See Greene v. Athletic Council of Iowa State University*, 251 N.W.2d 559, 562 (Iowa 1977) (finding that statute creating board of regents "authorized" creation of athletic counsel); *see also id.* (Harris, J., dissenting) ("Plainly, the athletic council was not 'created' by the laws of this state").

This office subsequently opined that a statute which does not itself establish a peer review committee, but merely permits a state board, in its discretion, to form such a committee has not "expressly created" the committee. 1980 Op. Att'y Gen. 148, 150. While new subsection (h) omits the modifier "expressly," we believe "created by statute" would be subject to the same interpretation, that is the statute itself must establish the advisory committee and not merely permit or authorize its constitution.

created by the statutes of this state or by executive order, but all those created by a comparable enactment of the political subdivisions of this state. The term "executive order" appears in both halves of the amendment. To give the latter half of the amendment no effect because the inclusion of the term "executive order" creates some ambiguity would be contrary to the rules of statutory construction. Iowa Code § 4.4(2). The legislature is presumed to have enacted each part of a statute for a purpose and to have intended that each part be given effect. *Hammer v. Branstad*, 463 N.W.2d 86, 92 (Iowa 1990) (refusing to render section of comparable worth law meaningless as to the only category of employees to which it applied).

To resolve the ambiguity presented by the legislative juxtaposition of "executive order" and "political subdivision," we may seek guidance from the statutory preamble or policy statements. *See DeMore by DeMore v. Dieters*, 334 N.W.2d 734, 737 (Iowa 1983); *see also* Iowa Code § 4.6(7). The open meetings law expressly states: "[a]mbiguity in the construction or application of this chapter should be resolved in favor of openness." Iowa Code § 21.1; *see Donahue*, 474 N.W.2d at 539 (open meetings law to be liberally construed to prevent "star chamber" sessions of public bodies). Thus, we conclude that the legislature intended to extend coverage of the open meetings law to certain advisory bodies created by political subdivisions.

Another maxim of statutory construction is that words are generally given their common meaning. *Peterson v. Schwertly*, 460 N.W.2d 469, 470 (Iowa 1990). When in doubt, Iowa courts have looked to dictionary definitions of words in question. *See Smith v. City of Fort Dodge*, 160 N.W.2d 492, 497-98 (Iowa 1968) (meaning of "substantial"). An "executive order" is commonly defined as "a rule or order having the force of law issued by an executive authority of a government, usually under power granted by a constitution or delegated by legislation." *Webster's New International Dictionary Unabridged* (3d ed. 1966). Both the governor and local elected boards possess final authority to execute certain laws.

The governor's power to issue executive orders arises from article IV, section 9 of the Iowa Constitution, stating that the governor "shall take care that the laws are faithfully executed" and from specific legislative grants. *See* 1982 Op. Att'y Gen. 87 (governor has no prerogative powers, but possesses only such powers and duties as are vested in the office by constitutional or statutory grant); *see also* Note, Gubernatorial Executive Orders as Devices for Administrative Direction and Control, 50 Iowa L. Rev. 78, 85 (1964) (four legal bases exist for issuance of executive orders: general and specific constitutional authority; general and specific statutory authority).

By the same measure, school district boards of directors and county boards of supervisors are empowered by statute to conduct the affairs of their respective political subdivisions. *See, e.g.*, Iowa Code §§ 274.1, 274.7, 279.8 (directors of school corporation shall exercise all powers granted by law and shall make rules for its own government and that of the directors, officers, employees, teachers and pupils); Iowa Code § 331.301(1) and (2) (county board of supervisors may "exercise any power and perform any function it deems appropriate to

protect and preserve the rights, privileges, and property of the county or of its residents, and to preserve and improve the peace, safety, health, welfare and comfort, and convenience of its residents"). Thus, as executive authorities of political subdivisions, school boards and boards of supervisors may take administrative action analogous to the governor's executive orders. *See generally Salisbury Laboratories v. Iowa Dep't of Envtl. Quality*, 276 N.W.2d 830, 835-36 (court took judicial notice of two indicia of executive order issued by DEQ: (1) order issued as public document and (2) issued pursuant to statute).

Having thus concluded that advisory committees appointed by school boards and county boards of supervisors may be subject to the open meetings law under the amended definition of "governmental bodies," we must not be "oblivious to the practical effect" of our statutory construction. *AFSCME v. State*, 484 N.W.2d 390, 395 (Iowa 1992); *see* Iowa Code § 4.4(3) (1993). We doubt that the legislature intended to pull every informal, ad hoc group formed at the behest of a local public official under the open meetings law. *See Emmetsburg Ready Mix Co. v. Norris*, 362 N.W.2d 498, 499 (Iowa 1985) (spirit of statute must be considered, as well as the words; construction should be sensible, workable, logical; inconvenience and absurdity should be avoided).

Where, then, is the line to be drawn between advisory committees that constitute "governmental bodies" under the amendment and those exempt by practical necessity? The Department of Education's third question presupposes a useful dividing line. We do not believe that the legislature intended the term "political subdivisions" to encompass individuals such as superintendents or other school administrators. Such individuals would be considered employees of a political subdivision. *See* Iowa Code § 279.20 (1993), *see also* Iowa Code § 68B.2(21) (1993).

The legislature apparently used "political subdivision" in subsection (h) as shorthand for "a board, council, commission, or other governing body of a political subdivision" as used in section 21.2(1)(b). Accordingly, a functional interpretation of "executive order" is an order or rule issued by the governing body of a political subdivision, that is the popularly elected body with final executive authority, comparable to the governor on a state level. Thus, elected school boards possess authority to issue such orders, while board-appointed superintendents do not. As a result, the term "executive order" as used in the legislative amendment delimits the entities capable of creating this new variety of "governmental bodies," as opposed to modifying the means by which such advisory committees are created.

This reading of "created by an executive order of a political subdivision" is consistent with our interpretation of "formally and directly created" as used in subsection (c). This office has construed "formally and directly" to mean created by the vote of a delegating body upon a resolution or motion or equivalent means, but not constituted or appointed by an intermediary or representative of that delegating body such as an executive director or secretary. 1980 Op. Att'y Gen. 148, 150-51.

Finally, not all advisory committees created by governing bodies of political subdivisions will be subject to the open meetings law pursuant to new subsection

(h). Only those advisory committees created "to develop and make recommendations on public policy issues" will be considered "governmental bodies." For instance, a task force created to measure the extent of a problem and deliver raw data to the board of supervisors or school board would not be covered because it would not be charged with recommending any particular course of action. On the other hand, we do not see the phrase "public policy issues" as limiting the application of the amendment, given that governing bodies of political subdivisions consider nothing but public policy issues. *See* Iowa Code §§ 331.301(1) (1993) (grant of home rule powers does not include power to enact private or civil law governing civil relationships); 274.1, 274.7, 279.8 (1993) (school board's authority is limited to school matters).

In sum, it is our opinion that advisory bodies created by school boards and county boards of supervisors to develop and make recommendations on public policy issues are included within the expanded definition of governmental bodies subject to the Open Meetings Law, despite the legislature's use of the phrase "created by executive order of a political subdivision." We conclude that "executive order" confines the authority to create such advisory committees to those elected entities with final executive authority for the political subdivision, rather than restricting the manner in which such advisory committees are created.

November 22, 1993

PUBLIC OFFICIALS; COUNTIES AND COUNTY OFFICERS: Refusal to accept salary increase. Iowa Code §§ 331.215(1), 331.907(1) (1993). A member of a board of supervisors may not decline to receive an increase in salary established or provided by law. Any agreement to accept a salary different than that established by law is against public policy. 1934 Op. Att'y Gen. 58 is overruled. (Krogmeier to Lytle, Van Buren County Attorney, 11-22-93) #93-11-6(L)

November 24, 1993

DUE PROCESS: DESTRUCTION OF PROPERTY: Destruction of dogs. Iowa Code §§ 351.26, 351.27, 351.37 (1993). Dogs are considered property of which an owner is not ordinarily deprived without an opportunity for notice and a hearing. However, the summary destruction of that property is authorized by statute in those instances where the animal presents a threat to the public safety and welfare or is not wearing a collar with a license tag attached. The destruction of dogs in these limited circumstances is not in conflict with section 351.37 which requires the apprehension of any dog not wearing a valid rabies vaccination tag. (Vasquez to Brunkhorst, State Representative, 11-24-93) #93-11-7

The Honorable Bob Brunkhorst, State Representative: You have requested an opinion of the Attorney General on several questions concerning the killing of dogs under Iowa Code sections 351.25, 351.26 and 351.27. Specifically you inquire:

1. Would due process protection be violated if a peace officer kills a licensed dog based on the observations of an individual but without

> personally witnessing the dog worrying, chasing, maiming, or killing a domestic animal?
>
> 2. Would the killing of a licensed dog by an individual without notice or an opportunity for a hearing violate due process guarantees?
>
> 3. Would liability attach to the peace officer, the individual, or the peace officer's employer if due process protections were violated?
>
> 4. Are Iowa Code sections 351.26 and 351.27 (which provide for killing of dogs under certain circumstances) inconsistent with Iowa Code section 351.37 (which requires the apprehension and impoundment of dogs running at large without a valid rabies vaccination tag or producible certificate)?

We must decline your request for an opinion as to question number three. You are essentially asking this office to speculate as to liability which might be incurred should due process violations be found. An Attorney General's opinion is not an appropriate means for resolving a question of potential liability.

This office cannot, through the opinion process, determine whether individuals have violated a specific law for the reason that no mechanism exists to find fact or to provide those persons with an opportunity to be heard. The function of an opinion is to decide specific questions of law by the use of statutory construction or legal research. An opinion cannot decide issues that turn on factual matters. *See* 1972 Op. Att'y Gen. 686. Legal advice concerning potential liability should be provided by the lawyer who would defend the governmental officer involved in the lawsuit.

Your first question focuses on Iowa Code section 351.27[13] which states:

> It shall be lawful for any person to kill a dog, licensed and wearing a collar with license tag attached, when such dog is caught in the act of worrying, chasing, maiming, or killing any domestic animal or fowl, or when such dog is attacking or attempting to bite a person.

This statute provides that killing a dog is lawful when the dog is "caught in the act" of prohibited conduct.

The Iowa Supreme Court addressed the basis upon which a statute may be

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[13] Although you frame your question in terms of a peace officer who kills a dog under these circumstances, you should note that the statute applies to "any person . . . ." Iowa Code § 351.27 (1993).

invoked in the early case of *Marshall v. Blackshire*, 44 Iowa 475 (1876). In *Marshall* the Court reviewed a statute substantially similar to section 351.27 which provided: "It shall be lawful for any person to kill any dog caught in the act of worrying, maiming, or killing any sheep or lamb or other domestic animals." *Id.* at 477. The plaintiff sought recovery for the value of the dog which the defendant had killed in defense of his chickens. *Id.* at 475. Addressing the issue of jury instructions, the Court concluded that:

> If [defendant] caught the dog in the act of killing or worrying his chickens he was justified in killing him. The fact that his chickens were afraid of the dog, and ran from it, would not authorize the killing, unless the dog was worrying or killing them. To worry means to run after, to chase, to bark at.
>
> It was not necessary that the dog should have been at the very instant of the shooting, in the act of worrying or killing the defendant's chickens, in order to justify the shooting of it, but if the dog had been worrying or killing the defendant's chickens, upon his premises, and at the time he was killed, his conduct was such as to create in the mind of the defendant a reasonable apprehension of continued or renewed worrying or killing, and while under such apprehension, exercising the care and prudence which reasonable men usually exercise under like circumstances, he shot the dog, the shooting was rightful and the plaintiff cannot recover.

Id. at 477.

Applying the Court's reasoning to section 351.27, a dog must be either in the act of worrying, chasing, maiming, or killing or have engaged in such conduct and give a reasonable basis to conclude that the conduct will be continued or renewed in order to apply the statute.

We cannot resolve through the opinion process whether the statute has been properly invoked in any particular case. The *Marshall* decision suggests, however, that, where the prohibited conduct has ceased at the time an animal is killed, the present conduct must be sufficient to create a reasonable apprehension that the conduct will be continued or renewed.

You have further asked whether a person who kills a licensed dog without providing notice or an opportunity for a hearing to the owner violates due process guarantees. The Fourteenth Amendment to the U.S. Constitution states in part that no state shall "deprive any person of life, liberty, or property, without due process of law . . . ." We recognize, therefore, "that if an individual is threatened with state action which will deprive him of life, liberty or property, he is entitled to due process." *State v. Grimme*, 274 N.W.2d 331, 336 (Iowa 1979). However, "[w]hat due process is due depends upon the nature of the governmental function and individual interest involved." *Id.*

Dogs have long been considered property for due process purposes. "Under the common law, as well as by the law of most, if not all, states, dogs are so far recognized as property that an action will lie for their conversion or injury . . . ." *Sentell v. New Orleans & Carrollton Railroad Co.*, 166 U.S. 698, 700, 17 S. Ct. 693, 694, 41 L. Ed. 1169, 1170 (1897). In Iowa these common law property principles are codified in Iowa Code section 351.25 which states: "All dogs under six months of age, and all dogs over said age and wearing a collar with a valid license tag attached thereto, shall be deemed property. Dogs not so provided with license tag shall not be deemed property."[14]

Although licensed dogs are considered property of which an owner cannot ordinarily be deprived without due process of law, dogs have been regarded as being of an imperfect or qualified nature. *Sentell*, 166 U.S. at 700, 17 S. Ct. at 701, 41 L. Ed. at 1170. In *Sentell*, the Supreme Court said: "It is true that under the Fourteenth Amendment no state can deprive a person of his life, liberty, or property without due process of law; but in determining what is due process of law we are bound to consider the nature of the property, the necessity for its sacrifice, and the extent to which it has heretofore been regarded as within the police power." *Id.* at 705, 17 S. Ct. at 696, 41 L. Ed. at 1172.

From time to time the concepts of police power and due process collide. *Walker v. Johnson County*, 209 N.W.2d 137, 139 (Iowa 1973). In some very limited instances where police power is properly exercised, it is well recognized that affected property owners "are not entitled to prior notice and hearing, even where total destruction of the property is required to protect public health and public property." *Id.*

This principle has previously been applied to animals in *Loftus v. Dep't of Agriculture of Iowa*, 211 Iowa 566, 232 N.W. 412 (1930). In that case the plaintiff raised a constitutional due process challenge to legislation which permitted the testing for, and destruction of, tuberculin infected cattle. In support of its decision, the Court stated:

> If the animal in fact is tubercular and therefore under the Iowa statutes a nuisance, it may be quarantined or summarily slaughtered. Protection to the health of mankind cannot be accomplished otherwise. Long-delayed court or other procedures would furnish an opportunity for the tubercular germ to infest children and others . . . . Assuming that appellee's cattle are infected with tuberculosis, due process of law is not denied by a summary quarantine or even destruction of the animals. *Id.* at 576, 232 N.W. at 417.

In *Sentell*, the U.S. Supreme Court acknowledged that under certain circumstances, dogs could also be the subject of summary destruction. The Court stated:

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[14] Ultimately, whether dogs are property for due process purposes is a question of constitutional law for the courts to decide. *See Junkins v. Branstad*, 421 N.W.2d 130 (Iowa 1988).

> Even if it were assumed that dogs are property in the fullest sense of the word, they would still be subject to the police power of the state, and might be destroyed or otherwise dealt with as in the judgment of the legislature is necessary for the protection of its citizens. That a state, in a bona fide exercise of its police power, may interfere with private property, and even order its destruction, is as well settled as any legislative power can be, which has for its objects the welfare and comfort of the citizen.

166 U.S. at 704, 17 S. Ct. at 695, 41 L. Ed. at 1171.

In 1929 the Iowa Supreme Court echoed the sentiments of the *Sentell* decision with its ruling in *Mendenhall v. Struck*, 207 Iowa 1094, 224 N.W. 95 (1929). The Court acknowledged that the statute governing the licensing of dogs was an exercise of the state's police power and that Iowa, like other jurisdictions, recognized that dogs were property deserving of due process protection. A balance, however, needed to be struck between property rights in dogs and the health, safety and welfare of the people. *Id.* at 1097, 224 N.W. at 97.

With its enactment of Iowa Code section 351.27, the legislature, exercising its police power, has established specific instances where the summary destruction of a licensed dog is permitted. Pursuant to section 351.27, a licensed dog may be killed when that dog is caught in the act of worrying, chasing, maiming, or killing any domestic animal or is attempting to attack or bite a person. This legislature has statutorily provided for the summary destruction of dogs under the circumstances where the public's safety and well being outweighs the due process interests of the owner.

Finally, you have asked whether Iowa Code sections 351.26 and 351.27 are inconsistent with Iowa Code section 351.37. Section 351.26 states:

> 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.

By contrast, section 351.37 provides for the apprehension and impoundment of any dog not wearing a valid rabies vaccination tag. It states:

> Any dog found running at large and not wearing a valid rabies vaccination tag and for which no rabies vaccination certificate can be produced shall be apprehended and impounded.
>
> When such dog has been apprehended and impounded, the official shall give written notice in not less than two days to the owner, if known. If the owner does not redeem the dog within seven days of the date of the notice, the dog may be humanely destroyed or

> otherwise disposed of in accordance with law. An owner may redeem a dog by having it immediately vaccinated and by paying the cost of impoundment.
>
> If the owner of a dog apprehended or impounded cannot be located within seven days, the animal may be humanely destroyed or otherwise disposed of in accordance with law.

Iowa Code § 351.37.

Sections 351.26 and 351.27 and section 351.37 address different issues in the regulation of dogs. Sections 351.26 and 351.27 concern dogs that are engaged in particular, harmful behavior or are not wearing a license tag. Section 351.37, by contrast, concerns dogs that are not wearing a valid rabies vaccination tag and for which no rabies vaccination certificate can be produced. Only in the latter case is the owner afforded written notice by statute.

In construing these statutes, we apply principles of statutory construction. Generally, statutes dealing with the same subject matter are considered together and must be harmonized in light of their common purpose. *Metier v. Cooper Transportation Co., Inc.*, 378 N.W.2d 907, 912 (Iowa 1985). Under this principle, the statutes may be read together and each given effect.

These three sections demonstrate a legislative determination to treat different violations with differing degrees of severity. A dog may not have a valid rabies vaccination tag, but may, nevertheless, have a license tag which identifies its owner. According to section 351.37, written notice shall be given within two days of the dog's apprehension if the owner is known. Upon receiving the notice, the owner is able to prevent the dog's impending destruction by redeeming the dog within seven days of the notice. By contrast, sections 351.26 and 351.27 provide for the destruction of a dog without prior notice when the dog is not wearing a collar with a license tag attached or when the dog is engaged in specific conduct regardless of whether the dog is wearing a license tag.

In conclusion, dogs are considered property of which an owner is not ordinarily deprived without an opportunity for notice and a hearing. However, the summary destruction of that property is authorized by statute in those instances where the animal presents a threat to the public safety and welfare or is not wearing a collar with a license tag attached. The destruction of dogs in these limited circumstances is not in conflict with section 351.37 which requires the apprehension of any dog not wearing a valid rabies vaccination tag.

November 24, 1993

SCHOOLS: Suspension of transportation; cancellation of classes. Iowa Code §§ 285.1(1), 285.1(4), 285.1(8) (1993). Iowa Code section 285.1(8) allows a school board to suspend student transportation services only if the board determines that weather, road, or other conditions make running the buses unadvisable and the district schools are closed. (Scase to Connolly, 11-24-93) #93-11-8(L)

November 29, 1993

COUNTIES; LABOR: Overtime Pay; Salaries of Deputy Sheriffs. Iowa Code § 331.904(2) (1993); 29 U.S.C. § 207 (1993); 29 C.F.R. § 553 (1993). Limitations imposed on salaries of deputy sheriffs by Iowa Code section 331.904(2) do not violate the federal Fair Labor Standards Act. State statute providing ceilings on the total annual compensation of deputy sheriffs is not preempted by the overtime pay provisions of the Fair Labor Standards Act because 1) the FLSA specifically contemplates state regulation, 2) it is possible to comply with both, and 3) the state statute does not operate to frustrate or impair the objectives of the FLSA. The limitation on total annual compensation in Iowa Code section 331.904(2) does not provide a defense to FLSA overtime pay violations. Conversely, the FLSA does not provide a defense to a violation of Iowa Code section 331.904(2) in a situation where it is possible to comply with both. (Marek to Gettings, State Senator, 11-29-93) #93-11-9(L)

DECEMBER 1993

December 2, 1993

COURTS; INTEREST: Interest charges on fines and criminal court costs. Iowa Code § 909.6 (1993), 1993 Iowa Acts, ch. 110, § 13. Interest accrues only on unsatisfied fines imposed by a judge. Interest does not accrue on unpaid criminal court costs or on unpaid scheduled fines. (Humphrey to Vander Hart, Buchanan County Attorney, 12-2-93) #93-12-1(L)

December 2, 1993

TAXATION: Sales tax; Limousine service. Iowa Code § 422.43(11) (1993). If a funeral director offers the service of prearranged transportation of persons in a limousine and charges a fee for the limousine, that fee constitutes taxable gross receipts from "limousine service" under section 422.43(11). (Mason to Dieleman, State Senator, 12-2-93) #93-12-2

The Honorable William W. Dieleman, State Senator: You have asked for an opinion of the Attorney General as to the authority of the Iowa Department of Revenue and Finance to interpret "limousine service," as used in Iowa Code section 422.43(11), more broadly than intended by the legislature. Limousine service, including driver, is included in section 422.43(11) as one of the services subject to the tax imposed on gross taxable services. According to your opinion request, you believe that the department has erroneously interpreted limousine service to include the use of a limousine by funeral directors.

Although weight should be given to the department's interpretation of a tax statute, the department does not have the power to change the legal meaning of statutes. *Sorg v. Iowa Dept. of Revenue*, 269 N.W.2d 129, 131 (Iowa 1978); *Iowa National Industrial Loan Co. v. Iowa Dept. of Revenue*, 224 N.W.2d 437, 441 (Iowa 1974). We do not believe, however, that the department has attempted to change the meaning of section 422.43(11) by its interpretation of "limousine service." Many services provided by funeral directors, including ones involving

transportation, are not taxable. For example, the department does not consider the charges made by funeral directors for the hearse or for vehicles transporting flowers to be taxable. If it is separately itemized, only the charge made by the funeral director for limousine transportation of people is considered to be taxable as limousine service. *See* 701 IAC 18.21 and 26.80. This is an optional service separate from the funeral itself.

Regulations of the Federal Trade Commission require funeral providers to give those inquiring about funeral arrangements or the prices of funeral goods or services a written list specifying the cost of each item offered for sale. 16 C.F.R. § 453.2(b)(4) (1993). Items required to be listed separately on the price list, if offered for sale, include the charge for a limousine. 16 C.F.R. § 453.2(b)(4)(ii)(L) (1993). As contemplated by the Federal Trade Commission regulations, the provision of a limousine is a separate item from the hearse and from the transfer of the remains. 16 C.F.R. § 453.2(b)(4)(ii) (1993). When a funeral director complies with the regulations by separately itemizing charges for property provided, such as burial containers, and for taxable services and nontaxable services, tax is due only upon the gross receipts from the sale of tangible personal property and taxable services. 701 IAC 18.21.

The polestar of statutory interpretation is that a court searches for the legislative intent as shown by what the legislature said rather than what it should or might have said. Iowa R. App. P. 14(f)(13); *Ruthven Consolidated School District v. Emmetsburg Community School District*, 382 N.W.2d 136, 140 (Iowa 1986). Where the language of the statute is clear and plain, the department is not free to construe the statute in a way contrary to the plain language. *Welp v. Iowa Dept. of Revenue*, 333 N.W.2d 481, 483 (Iowa 1983). A legislator's private interpretation of the statute is not considered, "even if the legislator was actively involved in drafting and enacting the legislation." *Ruthven Consolidated School District*, 382 N.W.2d at 140.

Statutory words are generally presumed to be used in their ordinary and usual sense and with the meaning commonly attributable to them. *Sorg v. Iowa Department of Revenue*, 269 N.W.2d 129, 132 (Iowa 1978). We believe that the department's interpretation of limousine service, at 701 IAC 26.80, as being "one which provides a large or luxurious automobile with a driver by prearrangement" is consistent with the commonly understood meaning of limousine service. If a funeral director offers the service of prearranged transportation of persons in a limousine and, as required by the FTC, separately itemizes a fee for the limousine, that fee constitutes gross receipts from limousine service. The statute does not require a "line drawing" process in determining whether the choice of destinations is sufficient or the other services provided are such as to cause the limousine transportation to be nontaxable.

December 7, 1993

STATE OFFICERS AND DEPARTMENTS; AREA AGENCIES ON AGING: Instrumentalities of the State Defined. Iowa Code §§ 12B.10, 12B.10A, B, C, 12C.1, 12C.4 and 231.32(2) (1993). Private, nonprofit entities designated as area agencies on aging are both "instrumentalities of the state" and "quasi-public state entities" within the definition of "public funds" set

forth in Iowa Code section 12C.1(2)(b) (1993), and, as such, are subject to the investment standards and restrictions set forth in chapter 12B and the depository provisions set forth in chapter 12C. (Senneff to Murphy, State Representative, 12-7-93) #93-12-3(L)

December 21, 1993

CONSTITUTIONAL LAW; STATUTORY CONSTRUCTION: Investment of Public Funds; Custodial Agreements for Public Funds; Constitutionality of the Purchase of Corporate Stock, Including Mutual Funds Organized as Corporations; Deferred Compensation. Art. VIII, § 3, Constitution of Iowa; Iowa Code §§ 12B.10, 12B.10C, 509A.12 (1993). Public employers may continue to invest deferred compensation funds in the investments authorized in Iowa Code section 509A.12 even though the particular investment is not listed in Iowa Code section 12B.10. Iowa Code section 12B.10C is generally applicable to custodial agreements related to deferred compensation investments. A court would likely hold that a statute which clearly authorizes the State to invest deferred compensation funds in corporate stock at the direction of an employee does not violate article VIII, section 3 of the Iowa Constitution. (Barnett to Fitzgerald, Treasurer of State, 12-21-93) #93-12-4

The Honorable Michael L. Fitzgerald, State Treasurer: You have requested an opinion of the Attorney General with respect to several issues which have arisen concerning the operation of deferred compensation plans offered by the state of Iowa and by political subdivisions of the state of Iowa pursuant to Iowa Code section 509A.12 (1993). You have specifically asked us to respond to the following three questions:

1. Are public employers that invest deferred compensation funds allowed to invest such funds only in the investments allowed in Iowa Code section 12B.10 (1993)?

2. Are custodial agreements for deferred compensation funds subject to the provisions of Iowa Code section 12B.10C (1993)?

3. Does article VIII, section 3 of the Iowa Constitution prevent the State from investing deferred compensation funds in stock or in mutual funds which are organized as corporations?

Iowa Code section 12B.10 (1993) provides investment standards and requirements to be followed by the state treasurer, state agencies and political subdivisions and also specifies types of investments which may be made by these entities. The prior version of Iowa Code section 12B.10 was codified as Iowa Code section 452.10 (1991). Section 452.10 was rewritten in 1992 in Senate File 2036. 1992 Iowa Acts, chapter 1156, section 16.

The amendments made by Senate File 2036 include the addition of the first paragraph in section 12B.10(1). This new paragraph provides that "[i]n addition to investment standards and requirements otherwise provided by law, the

investments of public funds by the treasurer of state, state agencies authorized to invest funds, and political subdivisions of this state, shall comply with this section, except where otherwise provided by another statute specifically referring to this section." The investment standards and requirements referenced in this paragraph are apparently now included in Iowa Code subsections 12B.10(2)-(3) (1993) which were also added by Senate File 2036. *Cf.* Iowa Code § 12B.10 (1993) *with* Iowa Code § 452.10 (1991).

The second paragraph of section 12B.10(1) existed in substantially similar form in Iowa Code section 452.10 (1991). This paragraph provides in part that "the treasurer of state and the treasurer of each political subdivision[15] shall invest, *unless otherwise provided*, any public funds not currently needed in investments authorized by this section." § 12B.10(1) (emphasis added). We previously interpreted the emphasized language as it then appeared in section 452.10 as referring to other statutory provisions which authorized certain types of public funds to be invested in investments other than the ones listed in section 452.10 (1991). 1992 Op. Att'y Gen. 86, 92.

Iowa Code section 509A.12 authorizes public employers to provide deferred compensation plans to public employees. This section provides in part that "[a]t the request of an employee the governing body or the county board of supervisors shall by contractual agreement acquire an individual or group life insurance contract, annuity contract, security or any other deferred payment contract for the purpose of funding a deferred compensation program for an employee." Section 509A.12 was not amended by or otherwise referenced by Senate File 2036.

When construing legislation the purpose is to determine the legislature's intent. *See, e.g., Havil v. Iowa Department of Job Service*, 423 N.W.2d 184, 186 (Iowa 1988). When two separate pieces of legislation are involved which deal with overlapping subject matter, the courts generally attempt to harmonize both statutes to give effect to both provisions. *E.g., Office of Consumer Advocate v. Iowa State Commerce Commission*, 376 N.W.2d 878, 881 (Iowa 1985). Courts are also cognizant of the practical effects of their construction and avoid construing legislation in ways which produce illogical or impractical results. *See, e.g., AFSCME/Iowa Council 61 v. State*, 484 N.W.2d 390 (Iowa 1992); *Iowa Beef Processors v. Miller*, 312 N.W.2d 530, 532-33 (Iowa 1981).

The first paragraph in section 12B.10(1) clearly indicates that the investment standards and requirements contained in Iowa Code section 12B.10 are in addition to all other requirements and standards required by law unless another statute specifically referring to section 12B.10 provides otherwise. Accordingly, the investments standards and requirements in subsections 12B.10(2) and 12B.10(3) are applicable to deferred compensation investments as section 509A.12 does not specifically exempt such investments from these standards and requirements.

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[15] The second paragraph of section 12B.10(1) does not specifically reference state agencies while the first paragraph specifically references state agencies authorized to invest funds. We do not consider this difference to be significant with respect to whether section 12B.10 limits the investments available under section 509A.12.

The second paragraph of section 12B.10(1) refers to types of permissible investments and indicates that public funds are to be invested in the investments specified in section 12B.10 unless otherwise provided. Unlike the first paragraph of section 12B.10, the second paragraph does not require that a statute providing other investment authority specifically refer to section 12B.10 to be effective. In our opinion the difference in the language in these two provisions is significant. This difference indicates the legislature's intent to continue to allow other types of investments to be made with certain public funds provided another statute specifically authorizes the investment.

In reaching our conclusion we have considered the practical effect of interpreting section 12B.10 as limiting the types of investments which may be made with deferred compensation funds pursuant to section 509A.12. If section 12B.10 is interpreted as limiting the investment choices in section 509A.12 different public employers would be permitted to offer different types of investments to public employees under their respective deferred compensation programs. *Cf.* Iowa Code § 12B.10(4) (1993) (investments for the treasurer of state and state agencies) *with* Iowa Code § 12B.10(5) (1993) (investments for political subdivisions). This result would be illogical as the retirement goals of public employees are generally the same regardless of the identity of the public employer. Moreover, the permissible investments available to political subdivisions pursuant to section 12B.10(5) do not include commonly offered deferred compensation investments such as life insurance contracts or annuity contracts.[16] If section 12B.10(5) contains the only permissible investments for the deferred compensation funds of employees of the political subdivisions, the ability of these public employers to offer their employees the opportunity to invest in these popular retirement investments would be curtailed. We do not believe that such an impractical result was intended by the legislature. Accordingly, it is our opinion that public employers may continue to invest deferred compensation funds in the investments authorized by Iowa Code section 509A.12, however, such investments must comply with the investment standards and requirements specified in Iowa Code subsections 12B.10(2) and (3).[17]

You have also asked whether Iowa Code section 12B.10C (1993) is applicable to custodial agreements affecting deferred compensation funds. Section 12B.10C provides that the treasurer of state is to adopt rules requiring the inclusion

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[16] The investment authority of the State is substantially expanded by section 12B.10(4) which allows investments authorized by Iowa Code section 97B.7(2)(b) except common stock. Section 97B.7(12)(b) contains the "prudent person" investment standard applicable to investments by the Iowa Public Employee Retirement System.

[17] Although it is our opinion that a court would not construe section 12B.10 in a manner which would result in the inconsistent funding of deferred compensation plans based only on the identity of the public employer, it is possible that a court could construe section 12B.10 as limiting the investments available for deferred compensation funds. For this reason, if public employers intend to continue to offer deferred compensation investments which are not expressly permitted by section 12B.10, we think that it would be advisable to amend either section 509A.12 or section 12B.10 to specifically allow such investments for deferred compensation plans.

in public funds custodial agreements of provisions necessary to prevent the loss of public funds. The Treasurer's rules appear at 781 IAC 15.1-15.5.

The term "public funds" as used in section 12B.10C is defined in Iowa Code section 12C.1(2)(b) (1993) as including "moneys of the state or a political subdivision or instrumentality of the state." A variety of political subdivisions are specified in section 12C.1(2)(b) as being included in the scope of this provision, and administrative rules of the treasurer of the state of Iowa further define the extent of this provision. 781 IAC 3.2, 13.2, 14.2; *see also* Op. Att'y Gen. #93-12-3(L) (area agencies on aging are within the scope of section 12C.1(2)(b)).

If the funds of a public employer are generally within the scope of section 12C.1(2)(b), the deferred compensation funds of that employer are generally subject to section 12B.10C as deferred compensation funds are invested by a public employer in the name of the public employer. Moreover, applicable internal revenue provisions require that deferred compensation funds remain the sole property of the public employer, subject to the claims of the general creditors of the employer, until the funds are made available to plan participants or beneficiaries. *See* 26 U.S.C.A. § 457(b)(6) (West Supp. 1993). Deferred compensation funds are not restricted solely to the purpose of paying benefits under deferred compensation. *Id.*

The purpose of section 12B.10C is to ensure that funds invested by governmental units are not inadvertently lost through the inadequate drafting of custodial agreements. We can think of no reason that it would be generally less important to provide for the safe custody of deferred compensation funds than to provide for the safe custody of other funds belonging to a governmental unit. Moreover, section 12B.10C contains exemptions for specific custodial agreements, specific public funds and specific governmental entities. § 12B.10C. Although some of these exemptions may be applicable to some custodial agreements which affect deferred compensation investments, there is no general exemption for all deferred compensation custodial agreements. Where the legislature specifically addresses various exemptions, it can be presumed that no other exemptions are intended. *Utilities Co. v. Iowa Commerce Commission*, 372 N.W.2d 274, 278 (Iowa 1985). Accordingly, if the funds of a public employer are generally included within the definition of "public funds" in section 12C.1(2)(b), it is our opinion that public funds custodial agreements related to the deferred compensation funds of that employer must also comply with section 12B.10C unless one of the specific exemptions in section 12B.10C is applicable.

You have also asked whether the Iowa Constitution prohibits the State from investing deferred compensation funds in corporate stock or in mutual funds organized as corporations.[18] Article VIII, section 3 of the Iowa Constitution provides that "[t]he State shall not become a stockholder in any corporation, nor shall it assume or pay the debt or liability of any corporation, unless incurred

[18] We have previously indicated that article VIII, section 3 does not prevent political subdivisions from becoming corporate shareholders. 1988 Op. Att'y Gen. 10, 11.

in time of war for the benefit of the State." Iowa Const. art. VIII, § 3. We have previously indicated that this provision prevents the treasurer of the state of Iowa from purchasing stock on behalf of the State.[19] 1988 Op. Att'y Gen. 87, 88. We have also previously indicated that investment in a mutual fund is an equity investment which may result in the investor owning shares of corporate stock in an investment company if the company is organized in a corporate form.[20] *See* 1988 Op. Att'y Gen. 87, 88. If an investment in a mutual fund results in the State owning corporate stock, we consider such an investment to be an investment in corporate stock for purposes of determining whether the investment of deferred compensation funds by the State is constitutionally prohibited. Accordingly, for purposes of responding to your question we do not distinguish further between a purchase of shares in a mutual fund organized as a corporation and the purchase of shares in other types of corporations.

When construing a constitutional provision the goal is to determine the intent of the framers of the constitution. *E.g., Redmond v. Ray*, 268 N.W.2d 849, 853 (Iowa 1978). To determine the intent of the framers it is necessary to consider not only the language of the constitutional provision, but also the object or the evil sought to be remedied, the circumstances at the time the provision was adopted, and the intent that the provision should endure through time. *E.g., Edge v. Brice*, 253 Iowa 710, 718, 113 N.W.2d 755, 759 (1962). In some cases the literal language of the constitutional provision may need to be disregarded if a literal interpretation would do violence to the general meaning of the provision. *Ex rel Johnson*, 257 N.W.2d 47, 50 (1977).

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[19] Not all constitutional provisions prohibiting a governmental unit from becoming interested in corporate stock have been construed as applicable to stock purchases by the governmental units when those purchases are made in the ordinary course of business for purposes of investment and not for the purpose of assisting a private corporation in its work. *See Almond v. Day*, 197 Va. 782, 91 S.E.2d 660, 667-68 (1956). The exact wording of article VIII, section 3 is not, however, as susceptible to this limited interpretation as the language used in many other constitutions. *See Almond v. Day*, 91 S.E.2d at 667 (court indicated that it would have reached a different result if language in constitution was more similar to the language in the Iowa Constitution); *see also Sprague v. Straub*, 252 Or. 507, 451 P.2d 49, 52-55 (1969) (court indicated that it does not necessarily agree with the reasoning of the court in *Almond v. Day* but ultimately concludes that the constitutional provision at issue prohibits all ownership in stock). Although an argument can be made that article VIII, section 3, does not prohibit investment by the treasurer in corporate stock, we have previously concluded that such purchases are prohibited by this constitutional provision. *See* 1988 Op. Att'y Gen. 87, 88. We are bound by a prior opinion unless we find it to be clearly erroneous in this regard.

[20] Investment companies may be organized as face-amount certificate companies, unit investment trusts or management companies. 15 U.S.C.A. § 80a-4 (West 1981). Management companies are classified as either open-end or closed-end companies. *Id.* § 80a-5 (West 1981 & Supp. 1992). Open-end management companies are often referred to as mutual funds and may be organized as corporations, unincorporated associations or business trusts. *See* 1 L. Loss & J. Seligman, *Securities Regulation*, at 245 (3rd ed. 1989).

It can be argued that the business structure of a mutual fund should not be solely determinative of whether an investment in a mutual fund is constitutionally permissible and that the underlying investment vehicle for the fund's assets should also be considered. We do not find it necessary to resolve this question in this opinion.

Because the Iowa Supreme Court has not construed article VIII, section III under circumstances which provide guidance in answering your question, we examine the intent of the framers of the constitution to ascertain the purpose of this provision. At the time article VIII, section 3 was included in the Iowa Constitution, the framers of our constitution clearly intended to prevent the State from becoming a stockholder in railroad corporations which were promising to construct railroads across the state of Iowa. *See* 1988 Op. Att'y Gen. 10, 10-11 (discussion of the constitutional debates surrounding this provision and related provisions); *See also Debates of the Constitutional Convention of the State of Iowa* (1857) at 292-306 [hereinafter cited as *Debates of 1857*]. *See generally Sprague v. Straub*, 252 Or. 507, 451 P.2d 49, 52-53 (1969) (discussion of the origins of similar provisions in a variety of state constitutions); Annot., 152 A.L.R. 495, 496 (1944). The purchase of stock by the State was viewed as a method of financing railroads with public money which was likely to result in the loss of public money and the incurrence of public debt. *See also Debates of 1857* at 289-306. Although the stockholder prohibition was clearly intended to prevent the State from purchasing stock in railroad corporations, it is less clear what broader purpose this provision was intended to serve. *See also Debates of 1857* at 289-306. Possibly the framers viewed all stock purchases by the State as likely to result in the loss of public money. *See also Debates of 1857* at 289-306. It is also possible that the framers included the stock purchase prohibition to prevent the State from becoming entangled in private business. *See also Debates of 1857* at 289-306.

Regardless of which of these various purposes was present in the minds of the framers in 1857, it does not appear that the investment of deferred compensation funds in corporate stock by the State at the direction of a state employee would be likely to frustrate any of these purposes. The deferred compensation plans maintained by the State are defined contribution retirement plans which are funded by employee wages which have been earned by, but not paid to, state employees.[21] *Cf.* Op. Att'y Gen. #91-6-7 at p. 3 (discussion of the nature of a deferred compensation annuity contract in the context of the insolvency of a public unit). The risk of loss arising from a particular investment choice by an employee rests with the employee, not the State. Pursuant to Iowa Code section 509A.12 employees indicate to the State which investments are to be made on the employee's behalf. *See* Iowa Code § 509A.12 (1993). Accordingly, the investment of deferred compensation funds in corporate stock at the direction of a public employee does not appear to create a risk of loss of public moneys or to entangle the State in the affairs of private businesses.

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[21] Specific statutory provisions have for several years authorized the State's public employee pension funds to invest in stock. *See* Iowa Code §§ 97A.7, 97B.7, and 602.9111 (1993). Unlike deferred compensation funds these funds are segregated by law from all other assets of the State and are held as trust funds. *See* 1988 Op. Att'y Gen. 10, 13. Several courts have indicated that funds held by a governmental entity as trustee are not subject to a variety of state constitutional provisions which prevent governmental entities from obtaining an interest in corporate stock. *See Sendak v. Trustees of Indiana University*, 254 Ind. 390, 260 N.E.2d 601, 602-03 (1970); *Louisiana State Employees' Retirement System v. State*, 423 So. 2d 73, 75 (La. Ct. App. 1983); *Sprague v. Straub*, 253 Or. 552, 451 P.2d 49, 55-59 (1969). *Bolen v. Board of Firemen, Policemen and Fire Alarm Operators' Trustees of San Antonio, Texas*, 308 S.W.2d 904, 905-06 (Tex. Civ. App. 1957).

We have, however, identified one reported decision in which an intermediate appellate court construed a state constitutional provision prohibiting the state of Oregon from becoming interested in corporate stock as prohibiting deferred compensation investments in corporate stock. *See ICMA Retirement Corp. v. Executive Department*, 92 Or. App. 188, 757 P.2d 868, 870-71 (1987). In *ICMA Retirement Corp.*, a provider of deferred compensation plans sought review of a declaratory ruling issued by the Oregon Investment Council and Executive Department which held that the State's investment of deferred compensation funds in a trust which invested in corporate stock would be unconstitutional. *ICMA Retirement Corp.*, 757 P.2d at 868-69. In considering the appeal the Oregon Court of Appeals construed article XI, section 6 of the Oregon Constitution which provides in part that "[t]he, state shall not subscribe to, or be interested in the stock of any company, association or corporation." *ICMA Retirement Corp.*, 757 P.2d at 869. The court affirmed the declaratory ruling indicating that this constitutional provision prohibited the state of Oregon from investing deferred compensation funds of state employees in a trust[22] which was invested in corporate stock. *ICMA Retirement Corp.*, 757 P.2d at 870-71. The decision relied on a prior decision of the Oregon Supreme Court which interpreted the constitutional prohibition in the Oregon Constitution as being a general prohibition against the purchase of stock by the state of Oregon. *ICMA Retirement Corp.*, 757 P.2d at 870. In reaching its decision the court focused on the element of stock ownership and rejected several arguments asserting that no purpose would be served by extending the prohibition to deferred compensation investments based on the nature of such investments. *ICMA Retirement Corp.*, 757 P.2d at 869-870.

If the Iowa Supreme Court were asked to determine the constitutionality of a statute which clearly allowed the State to invest deferred compensation funds in corporate stock at the direction of an employee,[23] the burden of establishing the unconstitutionality of the statute would be on the party challenging the constitutionality of the statute. *State v. Codbersen*, 493 N.W.2d 852, 856 (Iowa 1992). The interpretation of the constitutional prohibition by the legislature, as evidenced by the statute, would be carefully considered by the court, but the court would not be bound by the legislature's interpretation.

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[22] In this opinion we address only the constitutionality of a State investment of deferred compensation funds in corporate stock or mutual funds organized as corporations. We do not address the constitutionality of investments made by the State for other purposes or the constitutionality of deferred compensation investments which may fluctuate in value based on an investment in stock but in which the State does not actually become a stockholder.

[23] At the present time there is no statutory authority which clearly indicates that the legislature interprets article VIII, section 3, as not prohibiting the State from investing deferred compensation funds in corporate stock. Section 509A.12 authorizes investments in securities, but there are many securities other than corporate stock, and section 509A.12 is also applicable to public employers other than the State. If the State intends to offer employees the opportunity to invest in corporate stock or in mutual funds organized as corporations, it should first seek an amendment to section 509A.12 which clearly indicates that the legislature considers such an investment by the State to be constitutional. *See generally*, Iowa Code § 12C.13 (1993) (example of a legislative funding intended to support the constitutionality of a statute).

See e.g., Edge v. Brice, 253 Iowa 710, 717-18, 113 N.W.2d 755, 759 (1962). In our opinion, the Court would be likely to hold that such a statute was constitutional. We are, however, unable to indicate with certainty what the position of the Iowa Supreme Court would be, and a literal reading of the constitutional provision could result in a holding that such a statute was unconstitutional. The State's deferred compensation administrator should consider the impact of such a holding prior to offering State employees the opportunity to invest deferred compensation funds in corporate stock.

In summary it is our opinion that public employers may continue to invest deferred compensation funds in the types of investments authorized in Iowa Code section 509A.12 even though such investments are not authorized in Iowa Code section 12B.10. We are also of the opinion that Iowa Code section 12B.10C is generally applicable to custodial agreements affecting deferred compensation investments. And finally, it is our opinion that a statute clearly authorizing the State to invest deferred compensation funds in corporate stock at the direction of an employee would not violate article VIII, section 3 of the Iowa Constitution.

JANUARY 1994

January 6, 1994

COUNTIES; MENTAL HEALTH: Patient Payments. Iowa Code §§230.1, 230.15, 230.20(6), and 230.25 (1993). 42 U.S.C. §§1395cc(1)(O), (2)(A). A county of legal settlement may seek reimbursement from a Medicare recipient for payments made by the county pursuant to chapter 230 which represent the deductible or coinsurance payments to the Medicare Program. (Ramsay to Olesen, Adair County Attorney, 1-6-94) #94-1-1(L)

January 11, 1994

CONSTITUTIONAL LAW; CORPORATIONS; PUBLIC FUNDS: Ownership of corporate stock by a state agency. Iowa Const. art. VIII, §3; Iowa Code ch. 15E (1993). The Iowa Product Development Corporation is an agency of state government that is subject to the provisions of article VIII, section 3 of the Constitution, and therefore is generally prohibited from directly owning stock in private corporations. (Krogmeier to Johnson, State Auditor, 1-11-94) #94-1-2

The Honorable Richard D. Johnson, State Auditor: You have requested an opinion of the Attorney General involving the application of article VIII, section 3 of the Constitution of the State of Iowa. Specifically, you have asked whether this constitutional provision prohibits the Iowa Product Development Corporation from acquiring ownership of stock in a corporation through purchase, exchange, or any other means.

Article VIII, section 3, of the Constitution provides as follows:

> The state shall not become a stockholder in any corporation, nor shall it assume or pay the debt or liability of any corporation, unless incurred in time of war for the benefit of the state.

Several prior opinions of this office are relevant to your question. In 1988 Op. Att'y Gen. 10, we considered the application of article VIII, section 3 of the Constitution to local governments and in the course of that discussion made reference to the historical underpinnings of the constitutional provision. The relevant portion of that opinion is as follows:

> Ownership of stock in private corporations by governmental entities has been a matter of public concern and debate since 1844, when our first state constitution was proposed by the territorial legislature. *See Shambaugh, Fragments of the Debates of the Iowa Constitutional Conventions of 1844 and 1846* (1990) at 150-51 *et seq.* In Art. VIII, §2, of what is now known as the 1846 Constitution of Iowa, the drafters provided that "the state shall not directly or indirectly become a stockholder in any corporation." Following enactment of that constitution a number of cities and counties in Iowa issued bonds in order to raise money to purchase stock in railroad companies which promised to provide rail service to the

> political subdivision. During the 1857 constitutional convention, delegates debated whether to prohibit local governments from purchasing stock in private corporations. Following extensive debate, the convention voted to continue the prohibition against the state becoming a stockholder in any corporation, Art. VIII, § 3, but rejected several attempts to extend that prohibition to city and county governments. *See Debates of the Constitutional Convention of the State of Iowa*, (1857) at 290-95, 297-300, 302, 305, 312-13, 315-16, 319-20, 325, 337-38, 341-43, 415-19, 426, 773-79, 794, 1022-24.

1988 Op. Att'y Gen. at pp. 10-11.

In 1988 Op. Att'y Gen. 87, we held that investment in stock is prohibited for the Treasurer of State under art. VIII, § 3 of the Constitution. 1988 Op. Att'y Gen. 87, 88.

In 1986 Op. Att'y Gen. 19, we concluded that the Iowa Product Development Corporation is a unit of state government to which state laws apply, unless otherwise provided for. In that opinion we stated:

> Although the Iowa Product Development Corporation is denominated a corporation and granted certain corporate powers in section 28.87, it is our view that the Corporation is a unit of state government to which state laws should apply, unless provided otherwise in the statutes. Taken together, the various statutes pertaining to the Corporation demonstrate that the legislature intended it to be a governmental body. Section 28.83(1) describes it as a "quasi-public instrumentality" and states further that the exercise of its powers is "an essential governmental function." The board of directors serve at the pleasure of the governor and are subject to the requirements of Iowa Code section 69.16 and 69.19 (1985). § 28.83(2). The Corporation has, pursuant to Iowa Code chapter 17A, promulgated administrative rules. *See* 642 I.A.C. *et seq.* Under section 28.87(4), the approval of the director of the department of general services is required from the Corporation to acquire, lease, or otherwise dispose of property. The Corporation's assistants, agents, and other employees are considered to be state employees. § 28.87(7). Finally, in 1984, the General Assembly amended section 28.88(3) to provide that the Corporation keep confidential information on the applications for financial assistance, notwithstanding the state's open meetings and public records laws. *See*, 1984 Iowa Acts, chapter 1164, § 3. The implication from this amendment is that prior to its passage, the General Assembly regarded the Corporation as subject to these provisions, another indication that the Corporation is a governmental body. The conclusion we must draw from these provisions is that the Product Development Corporation is a part of state government

> and subject generally to the laws governing those bodies, except where the General Assembly has provided otherwise.[24]

1986 Op. Att'y Gen. at pp. 27-28.

This conclusion is consistent with the test developed by the Iowa Supreme Court for determining whether an entity or unit of the state is a state agency. In *Graham v. Baker*, 447 N.W.2d 397 (Iowa 1989), the Court applied a functional test in determining agency status, looking at several factors, including the scope of the putative agency's authority, how it was administered and controlled, the source of its funds, the derivation of its rules, and the selection of its members. 447 N.W.2d at 399. In applying the test enunciated by the Court in *Graham*, and in reviewing the current statutory provisions creating the Iowa Product Development Corporation, specifically sections 15E.81 through section 15E.94, we affirm our 1986 opinion and continue to find the Iowa Product Development Corporation is a governmental body to which article VIII, section 3 applies.

Although article VIII, section 3, applies to the Iowa Product Development Corporation, it has been held that constitutional provisions such as the one in question do not in all cases prohibit ownership of stock by state agencies or instrumentalities. 81A C.J.S. States § 208. For example, we have opined that deferred compensation investments in stock are not prohibited. Op. Att'y Gen. 93-12-4. In addition, several courts have held that similar provisions do not prevent the state from holding stock as a trustee. Op. Att'y Gen. 93-12-4.

Our previous opinions and the applicable case law indicates that article VIII, section 3 of the Constitution was adopted because of a concern over excessive government entanglement in the activities of private corporations, the avoidance of a risk of loss of public funds due to private corporate activity and avoiding the incurrence of public debt for private activity. Op. Att'y Gen. 93-12-4, pp. 7-8. In analyzing a particular investment transaction by the Iowa Product

[24] The cited provisions in Iowa Code chapter 28 are now renumbered in Iowa Code chapter 15E (1993).

Development Corporation, a court would consider all of these factors. While we believe that under the existing statutory authority of the Iowa Product Development Corporation it is possible to structure the transactions in such a way as to avoid a conflict with the constitutional provision,[25] any such analysis of a particular transaction is not an appropriate matter to be considered in an Attorney General's opinion as we would need to be familiar with the particular transaction in question. Any such analysis would be better provided in the course of advice from our office to the Department of Economic Development and the Iowa Product Development Corporation in the conduct of their day-to-day activities.

In conclusion, we find that the Iowa Product Development Corporation is an agency of state government that is subject to the provisions of article VIII, section 3 of the Constitution, and therefore is generally prohibited from directly owning stock in private corporations.

January 13, 1994

INSURANCE; SCHOOLS; TAXATION: Use of management levy for employee benefits and early retirement. Iowa Code §§ 279.46, 296.7, 298.4 (1993); Iowa Code § 296.7 (1987); 1990 Acts, ch. 1234, § 74. All indebtedness contracted for, general obligation bonds issued, and insurance agreements entered into or renewed on or after May 2, 1990, are subject to the current version of section 296.7, and therefore the district management levy may not be used to fund these employee benefit plans. The management levy may be used to fund early retirement benefits. (Condo to Stilwill, Acting Director, Department of Education, 1-13-94) #94-1-3(L)

January 13, 1994

COUNTIES: Group insurance for officers and employees. Iowa Code §§ 509A.1, 509A.3, 509A.8 (1993). The county board of supervisors is authorized to provide group insurance plans to county officers and employees under Iowa Code chapter 509A. The supervisors have discretion to formulate rules for the operation of group insurance plans provided to county officers and employees and may limit the contribution which will be made with county funds. (Scase to Dickinson, State Representative, 1-13-94) #94-1-4(L)

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[25] Iowa Code sections 15E.87(2) and (8) give the Iowa Product Development Corporation broad powers to structure its financing of private projects. To the extent that authority currently exists in chapter 15E, the Iowa Product Development Corporation could, consistent with article VIII, section 3, participate in certain types of transactions which would not involve a pledging of the state's debt capacity, utilizing public funds for the direct purchase of stock or excessively entangling the state in private business transactions. For example, we note that the Montana Science and Technology Alliance, an entity created by the Montana legislature in 1985, participates in a venture capital financing program consistent with Montana's constitutional limitation on purchasing or owning stock that is similar to article VIII, section 3. In the typical arrangement, the company issues a debenture for the amount of the Montana agency's investment. The debenture is backed by shares of the company's stock. However, and most importantly, the stock is not acquired by the Montana agency. The Montana agency, at some future point in time, disposes of the debenture to a third party and uses the funds obtained to replenish its venture capital fund. *See* Profiles of Selected State Technology Programs, Battelle Memorial Institute, December 1993.

January 14, 1994

COUNTIES; REAL PROPERTY: Subdivision platting. Iowa Const. art. III, § 39A; Iowa Code §§ 354.1, 354.2, 354.3, 354.4, 354.6, 354.8, 354.9 (1993). Iowa Code section 354.6(1) allows filing of a plat of survey in lieu of a subdivision plat unless a local ordinance requires filing of a subdivision plat. (Smith to Beekman, Plymouth County Attorney, 1-14-94) #94-1-5

Mr. John C. Beekman, Plymouth County Attorney: You have requested an opinion of the Attorney General concerning the subdivision platting requirements of Iowa Code section 354.6(1) (1993). We paraphrase your first question as whether Iowa Code section 354.6(1) allows filing of a plat of survey in lieu of a subdivision plat when repeated division of a tract creates a new parcel required to be described by metes and bounds. It is our opinion that the statute allows filing of a survey plat in lieu of a subdivision plat. Your second question is whether a county may adopt subdivision platting thresholds more stringent than the thresholds in section 354.6(1). It is our opinion that Home Rule authority enables enactment of more stringent subdivision platting thresholds.

Your request states that a "piece of property" larger than forty acres was divided in 1978 to create a ten-acre parcel that was described by metes and bounds on a recorded plat of survey. You have further explained that the ten-acre parcel is now being divided into two parcels. The new division will create three parcels within the tract that was divided in 1978. We assume the parcels resulting from the new division can be accurately described only by employing a "metes and bounds description" as defined in Iowa Code section 354.2(10). Otherwise, neither a plat of survey nor subdivision plat would be required.[26]

We begin our analysis with the language of Iowa Code section 354.6(1) which, in relevant part, states:

> A subdivision plat shall be made when a tract of land is subdivided by repeated divisions or simultaneous division into three or more parcels, any of which are described by metes and bounds description for which no plat of survey is recorded.[27]

Arguably, the meaning of section 354.6(1) is unambiguous. Three elements trigger the subdivision platting requirement: simultaneous or repeated division of a tract into three or more parts, creation of one or more parcels described by metes and bounds, and failure to file a plat of survey for each parcel described by metes and bounds. Thus, if a plat of survey complying with section 354.4

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[26] For example, if the irregular ten-acre parcel lay in the southwest corner of a forty-acre tract and the new division conveyed that part of the parcel consisting of the south 200 feet of the west 300 feet of the forty acre tract, no plat of any kind would be required because the description would be by "specific quantity," distinguished from metes and bounds in a previous opinion (#92-6-4(L)).

[27] The quoted language was enacted as 1990 Iowa Acts, ch. 1236, section 20 (creating new Iowa Code section 409A.6 (recodified as section 354.6)).

were filed for each parcel described by metes and bounds, the third element of the subdivision platting requirement would be missing.

This interpretation of the subdivision platting threshold in section 354.6(1) is consistent with the legislative purposes of chapter 354 as stated in sections 354.1 and 354.3. Filing of a plat of survey provides an accurate, clear and concise legal description which reduces potential for a boundary dispute or other real estate title problem. A plat of survey also provides county officials with information needed for assessment and taxation, and for entry on the transfer and plat books. Other purposes of the subdivision platting law are related to the authority of local governmental bodies to plan and regulate orderly development. Iowa Code §§ 354.1(4), 354.8, 354.9. These purposes are served if the statute allows local governments to determine when a plat is required.

Thus, we next consider your question whether a county may adopt a subdivision platting threshold more stringent than the threshold in section 354.6(1). We have previously opined that counties had authority under the County Home Rule Amendment, Iowa Const. art. III, § 39A, to adopt subdivision platting thresholds more stringent than the threshold set forth in a predecessor statute (Iowa Code section 409.1 (1979)). 1982 Op. Att'y Gen. 302 (#81-11-10(L)).[28]

The analysis in our previous opinion applies to the amended statute. The 1990 revision of the platting code included enactment of the express statements of legislative purpose presently codified in section 354.1.[29] These purposes include encouraging local governments to plan for land development and establish ordinances regulating the division and use of land and allowing "the widest possible latitude for cities and counties to establish and enforce ordinances regulating the division and use of land, within the scope of, *but not limited to*, . . . this chapter." [Emphasis added.]

While allowing such latitude to local governments, the 1990 amendment significantly narrowed the scope of the subdivision platting threshold by including the express limitation to those divisions creating metes and bounds descriptions and the further limitation to only those metes and bounds descriptions for which no plat of survey is recorded. The statement of purposes in section 354.1 would conflict with these limitations if they were interpreted to preempt local governments from adopting more stringent subdivision platting thresholds.

In conclusion, it is our opinion that Iowa Code section 354.6(1) allows filing of a plat of survey in lieu of a subdivision plat unless a local ordinance requires filing of a subdivision plat.

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[28] *See* also 1980 Op. Att'y Gen. 597 (#80-2-9) (cities have Home Rule power to adopt platting thresholds more stringent than those in a predecessor of section 354.6(1)).

[29] 1990 Iowa Acts, ch. 1236, § 15 (creating new Iowa Code section 409A.1, recodified as section 354.1 (1993)).

January 27, 1994

CONSTITUTIONAL LAW; CONFLICT OF INTEREST; GIFTS: Solicitation of charitable contributions by uniformed firefighters. Iowa Const. art. III, § 31; Iowa Code §§ 68B.2A, 68B.22, 721.2 (1993). Uniformed public employees may not solicit funds for charitable organizations unless their employer has determined that the activity serves a public rather than a private purpose. Before authorizing employees to use city time, uniforms, and equipment to raise funds for charity, the city council must make findings that the fundraising activity serves a public purpose, and that the donations are used to further a public purpose. Public employees are prohibited from soliciting funds for charity if either they or their families receive a personal gain or advantage. (Olson to Hahn, State Representative, 1-27-94) #94-1-6(L)

January 27, 1994

APPROPRIATIONS: Cash reserve fund and limitation on general fund expenditures. Iowa Code §§ 8.54, 8.56, 8.57, 8.58 (1993). The appropriation to the cash reserve fund, made pursuant to Code section 8.57, is a general fund expenditure which is to be included with all other general fund expenditures when determining compliance with the Code section 8.54(3) limitation on general fund expenditures. (Scase to Senators Boswell and Murphy and Representatives Van Maanen and Corbett, 1-27-94) #94-1-7

The Honorable Leonard Boswell, State Senator; The Honorable Larry Murphy, State Senator; The Honorable Harold Van Maanen, State Representative; and The Honorable Ron Corbett, State Representative: You have jointly requested an opinion of the Attorney General regarding the impact of the general fund expenditure limitation upon the annual appropriation to the cash reserve fund. Specifically, you ask us to clarify the "status of the appropriation under section 8.57, subsection 1, paragraph 'a' [to cash reserve fund] as being subject to the 99 percent expenditure limitation [imposed by section 8.54] and the significance of section 8.58 to that appropriation."

Resolution of this inquiry requires interpretation of Iowa Code sections 8.54, 8.56, 8.57, and 8.58 (1993). Our analysis will be guided by familiar principles of statutory construction. "[T]he ultimate goal in interpreting statutes is to ascertain and give effect to the legislature's intent." *John Deere Dubuque Works v. Weyant*, 442 N.W.2d 101, 104 (Iowa 1989). "We seek a reasonable interpretation that will best effect the purpose of the statute and avoid an absurd result. We consider all portions of the statute together, without attributing undue importance to any single or isolated portion." *Id.*

In 1992 the Iowa general assembly enacted statutory provisions creating the cash reserve fund and a deficit reduction account, amending the method of appropriating moneys to the economic emergency fund, and imposing a limitation on general fund expenditures. Iowa Code §§ 8.54 - 8.57 (1993). The apparent intent of the 1992 legislation was to eliminate deficit spending, require the accumulation of reserve and emergency funds apart from the general fund to provide a cushion in the event of future unanticipated spending needs, and provide a method for eliminating the existing GAAP deficit.

Iowa Code section 8.56 creates the "cash reserve fund," to be maintained separate from the general fund. Section 8.57 establishes a standing appropriation to fund the cash reserve fund, budget deficit reduction account, and economic emergency fund. The section 8.57 appropriation is dedicated first to the cash reserve fund pursuant to the following formula:

> 1. a. For each fiscal year beginning on or after July 1, 1993, there is appropriated from the general fund of the state an amount to be determined as follows:
>
> (1) If the balance of the cash reserve fund has not yet at any point reached four percent of the adjusted revenue estimate during a budget year, the amount appropriated shall be determined under this subparagraph.
>
> (a) The amount appropriated under this subparagraph is the amount necessary for the cash reserve fund to reach the cash reserve goal percentage of the adjusted revenue estimate for the fiscal year. However, moneys appropriated under this subparagraph shall not exceed more than one percent of the adjusted revenue estimate for the fiscal year.
>
> (b) The "cash reserve goal percentage" for the fiscal year beginning July 1, 1993, is one percent; for the fiscal year beginning July 1, 1994, is two percent; for the fiscal year beginning July 1, 1995, is three percent; for the fiscal year beginning July 1, 1996, is four percent; and for fiscal years beginning on or after July 1, 1997, is five percent.
>
> (2) If at any point in any prior fiscal year the balance of the cash reserve fund reached four percent of the adjusted revenue estimate for that fiscal year, the moneys appropriated under this paragraph for a fiscal year shall be one percent of the adjusted revenue estimate for the fiscal year.
>
> . . .
>
> b. Commencing on June 30, 1993, the surplus existing in the general fund of the state at the conclusion of the fiscal year is appropriated for distribution as provided in this section. As used in this paragraph, "surplus" means the excess of revenues and other financing sources over expenditures and other financing uses for the general fund of the state in a fiscal year.

Iowa Code § 8.57(1). Moneys in the cash reserve fund "shall only be appropriated by the general assembly for nonrecurring emergency expenditures and shall not be appropriated for payment of any collective bargaining agreement or arbitrator's decision negotiated or awarded under chapter 20." Iowa Code

§ 8.57(3). An appropriation from cash reserve must be the only subject matter of the appropriation bill and the reasons the appropriation is necessary must be stated in the bill. Iowa Code § 8.56(4)(a).

If the section 8.57(1) appropriation would cause the balance of the cash reserve fund to exceed the cash reserve goal percentage of the adjusted revenue estimate for a fiscal year, the appropriation is directed to the deficit reduction account to be used by the department of management for the purpose of eliminating Iowa's GAAP deficit. Iowa Code § 8.57(2). "To the extent that moneys appropriated under [section 8.57(1)] exceed the amounts necessary for the cash reserve fund to reach its maximum balance and the amounts necessary to eliminate Iowa's GAAP deficit, the moneys shall be appropriated to the Iowa economic emergency fund." Iowa Code § 8.57(3).

The economic emergency fund, like the cash reserve fund, is separate from the general fund. Moneys in the economic emergency fund may be appropriated only for "emergency expenditures." Iowa Code § 8.55(3). "The maximum balance of the fund is the amount equal to five percent of the revenue estimate for the fiscal year. If the amount of moneys in the Iowa economic emergency fund is equal to the maximum balance, moneys in excess of this amount shall be transferred to the general fund." Iowa Code § 8.55(3).

Iowa Code section 8.54 imposes the limitation on general fund expenditures, providing, in relevant part, as follows:

> 2. There is created a state general fund expenditure limitation for each fiscal year beginning on or after July 1, 1993, calculated as provided in this section.
>
> 3. Except as otherwise provided in this section, the state general fund expenditure limitation for a fiscal year shall be ninety-nine percent of the adjusted revenue estimate.
>
> . . .
>
> 5. For fiscal years in which section 8.55, subsection 2, results in moneys being transferred to the general fund, the original state general fund expenditure limitation amount provided for in subsection 3 shall be readjusted to include the moneys which are so transferred.
>
> 6. The scope of the expenditure limitation under subsection 3 shall not encompass federal funds, donations, constitutionally dedicated moneys, and moneys in expenditures from state retirement system moneys.
>
> 7. The governor shall submit and the general assembly shall pass a budget which does not exceed the general fund expenditure

> limitation. The governor in submitting the budget under section 8.21, and the general assembly in passing a budget, shall not have recurring expenditures in excess of recurring revenues.

For purposes of sections 8.54 and 8.57, the term "adjusted revenue estimate" is defined as "the appropriate revenue estimate for the general fund for the following fiscal year as determined under section 8.22A, subsection 3, adjusted by subtracting estimated tax refunds payable from that estimated revenue and adding any new revenues which may be considered to be eligible for deposit in the general fund."

You have asked us to determine whether the section 8.57 appropriation is subject to the ninety-nine percent general fund expenditure limitation imposed by section 8.54. Upon examination of the controlling statutory provisions, we conclude that the cash reserve appropriation should be considered a general fund expenditure subject to the section 8.54 limitation.

The maxim "expressio unius est exclusio alterius" is a long-recognized principle of statutory construction.

> In the field of statutory interpretation, legislative intent is expressed by omission as well as by inclusion; express mention of certain conditions of entitlement implies the exclusion of others. *Barnes v. Iowa Dept. of Transpo., Motor Vehicle Div.*, 385 N.W.2d 260 (Iowa 1986). The express mention of one thing in a statute implies the exclusion of others. *North Iowa Steel Co. v. Staley*, 253 Iowa 355, 112 N.W.2d 260 (1962).

1988 Op. Att'y Gen. 87, 89.

By its terms, subsection 8.57(1)(a) states that the cash reserve funds are "appropriated from the general fund." Subsection 8.54(3) imposes an across-the-board limitation on general fund expenditures, which are not to exceed ninety-nine percent of the adjusted revenue estimate. Subsection 8.54(6) does except certain revenues and expenditures from this limitation, providing that "federal funds, donations, constitutionally dedicated moneys, and moneys in expenditures from state retirement system moneys" are beyond the scope of the subsection (3) limitation. No other revenues or general fund expenditures are expressly excluded from calculation of the expenditure limitation. Absent expressed exclusion of the general fund appropriation to the cash reserve fund from the scope of the general fund expenditure limitation, we find no statutory

basis to conclude that this appropriation should be treated any differently than other general fund appropriations.[30]

Nor do we believe that interpreting the section 8.54(3) limitation on general fund expenditures to include the section 8.57(1)(a) appropriation is inconsistent with the intent of these provisions. The result of this interpretation is that budgeted general fund expenditures, including the section 8.57(1)(a) appropriation to reserve funds and deficit reduction, cannot exceed ninety-nine percent of anticipated revenues. If actual revenues meet or exceed anticipated revenues, a general fund surplus of at least one percent of revenues will exist at the conclusion of each fiscal year. The surplus is appropriated by section 8.57(1)(b), to be distributed pursuant to section 8.57(1)(a). Initially, this surplus distribution will increase the existing cash reserve fund balance, bringing that balance closer to the annual goal and reducing or eliminating the need for a section 8.57(1)(a) appropriation in the following fiscal year. Ultimately, when the cash reserve fund has attained its maximum balance, the GAAP deficit has been eliminated, and the economic emergency fund has reached its maximum balance, the surplus will flow back into the general fund where it will act to increase the general fund expenditure limitation pursuant to section 8.54(5).

You note in your request that Iowa Code section 8.58 may be relevant to resolution of this issue. The first unnumbered paragraph of section 8.58 provides as follows:

> To the extent that moneys appropriated under section 8.57 [to the cash reserve fund and economic emergency fund] do not result in moneys being credited to the general fund under section 8.55, subsection 2, moneys appropriated under section 8.57 and moneys contained in the cash reserve fund and Iowa economic emergency fund shall not be considered in the application of any formula, index, or other statutory triggering mechanism which would affect appropriations, payments, or taxation rates, contrary provisions of the Code notwithstanding.

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[30] Iowa Code section 8.54 was adopted within 1992 Iowa Acts, chapter 1227. The version of section 8.54 which initially passed the Senate on March 19, 1992, contained a provision limiting general fund expenditures to 100% of estimated revenues less the cash reserve shortfall percentage. In the amended version, passed by the House on April 4, 1992, the expenditure limitation was set at 99% of estimated revenue with the appropriation to the economic emergency fund expressly excluded from the 99%. The version of section 8.54 finally adopted into law was the product of conference committee negotiations. As discussed above, the section 8.54 expenditure limitation does not expressly exclude the appropriation for the cash reserve, deficit elimination, and the economic emergency fund.

We note that two bills currently before a subcommittee of the House Appropriations Committee [Senate File 81, which was passed by the Senate on February 8, 1993, and House Study Bill 62] contain proposed amendments to section 8.54(6) adding language specifically excepting the section 8.55, 8.56, and 8.57 appropriations from calculation of the general fund expenditure limitation.

This provision was adopted in 1992 within the same act that established the cash reserve appropriation and limitation on general fund expenditures. *See* 1992 Iowa Acts, ch. 1227, §§ 4, 6-8. As we read section 8.58, it directs that the cash reserve and emergency fund balances and annual appropriations are to be kept distinct from the general fund and are not to be brought into the equation when making calculations to determine future appropriations, payments, or taxation rates.

We do not believe, however, that section 8.58 directly impacts calculation of the general fund expenditure limitation under section 8.54. The general fund expenditure limitation is determined by calculating the "adjusted revenue estimate" and multiplying that amount by ninety-nine percent. Existing fund balances and standing appropriations do not affect this calculation. Given that the cash reserve appropriation and cash reserve fund and Iowa economic emergency fund balances are not factors in the initial section 8.54 calculation, section 8.58 does not impact that calculation.

In summary, it is our opinion that the appropriation to the cash reserve fund, made pursuant to section 8.57, is a general fund expenditure which is to be included with all other general fund expenditures when determining compliance with the section 8.54(3) limitation on general fund expenditures.

FEBRUARY 1994

February 11, 1994

COUNTY AND COUNTY OFFICERS: Board of Supervisors; Appointment of General Assistance Director. Iowa Code §§ 68B.2A, 252.26, 252.33 (1993). The language of Iowa Code section 252.26 requires the county board of supervisors to appoint a natural person to the position of general assistance director rather than an agency. (Robinson to Haskovec, Howard County Attorney, 2-11-94) #94-2-1(L)

February 11, 1994

CRIMINAL LAW: CHILD STEALING: Prosecution of biological father. Iowa Code § 710.5 (1993). A biological father to a child born out of wedlock is a "relative" under section 710.5 regardless of whether paternity has been acknowledged or adjudged. For purposes of criminal prosecution under section 710.5, a biological father may purposely "assume" custody of the child without any pre-existing custodial rights to the child. (Allen to Angrick, Citizen Aide/Ombudsman, 2-11-94) #94-2-2

Mr. William P. Angrick II, Citizens' Aide/Ombudsman: You have requested an opinion of the Attorney General concerning the application of Iowa Code

section 710.5 (1993) to a biological father who takes and conceals a child born out of wedlock from the custodial mother. Your letter poses the following specific questions:

> 1. Under which of the following circumstances may the father of a child born out of wedlock be deemed a "relative" of the child: a. paternity has neither been acknowledged or adjudged; b. paternity has been acknowledged by the father but never been adjudged by a court; c. paternity has been adjudged by a court?
>
> 2. Can a father who is a relative of a child born out of wedlock "assume" custody of the child when he has never had any legal custodial rights to the child? Does the term "assume" infer some pre-existing right?

Our conclusion is that a biological father to a child born out of wedlock, is deemed to be a "relative" under section 710.5, regardless of whether paternity has been acknowledged or adjudged. Further, we conclude for purposes of this statute only, such a biological father may purposely assume the custody of a child even if he has never had legal custodial rights to the child. We have also concluded that the word "assume" does not infer a pre-existing right to custody. The issue raised by your question is whether a criminal prosecution can proceed. We do not suggest by this opinion any answer to a broader question as to whether, and under what circumstances, an unwed biological father may lawfully obtain custody.

In 1975 the Iowa legislature passed a statute imposing a criminal penalty for child stealing in Iowa. Iowa Code § 710.5 (1993). Section 710.5 provides:

> A person commits a class "C" felony when, knowing that the person has no authority to do so, the person forcibly or fraudulently takes, decoys, or entices away any child with intent to detain or conceal such child from its parents or guardian, or other persons or institution having the lawful custody of such child, *unless the person is a relative of such child, and the person's sole purpose is to assume custody of such child.* (Emphasis added.)

Under this statute a defendant is guilty of child stealing, if the state proves (in addition to the other elements of the crime) that the defendant was not a relative of the child and that the defendant did not take the child for the sole purpose of assuming custody. Iowa Criminal Jury Instructions § 1000.9(5a). If the defendant is a relative, the state must prove that the defendant did not take the child for the sole purpose of assuming custody. *Id.* at 5b. The state is required to prove these elements beyond a reasonable doubt. Iowa Criminal Jury Instructions § 100.2. If the state is unable to prove either of these elements, the defendant is not guilty of child stealing.

In applying this statute to biological fathers, we must determine whether a biological father is considered a relative under section 710.5. In reviewing

statutory provisions, we apply the familiar rules of construction. Words are given their ordinary meaning unless defined by the legislature or possessed of a particular and appropriate meaning in law. *Good v. Iowa Civil Rights Commission*, 368 N.W.2d 151, 155 (Iowa 1985). The legislature did not define the word "relative" for purposes of section 710.5, nor does the word have a special meaning in law. A relative is defined in Webster's Dictionary as "a person connected with another by blood or affinity, especially one allied by blood." *Webster's Third New International Dictionary* 1938 (unabridged 3rd ed. 1966). Similarly, Black's Law Dictionary defines relative as "a kinsman, a person connected with another by blood or affinity." *Black's Law Dictionary* 1479 (rev. 4th ed. 1968). Because the biological father is a "relative by blood" under either of these definitions, the father of a child born out of wedlock must be considered a relative for purposes of applying section 710.5.

Including biological fathers in the definition of relative is consistent with the interpretation of the term elsewhere in the Iowa Code. For example, sections 232.87 - 232.103 allow the juvenile court to transfer custody of a child in need of assistance temporarily to a relative, or to a parent. If the father or mother of a child born out of wedlock has a legal right to custody, the custody of the child is transferred to the father or mother based on their status as a parent. If no legal right to custody exists, the biological parent is appropriately considered a relative for purposes of section 232.102(1)(a) and custody may be temporarily transferred. Under these statutes, a biological father may be considered a "relative" even when he has no legal custodial rights. *In re B. L.*, 470 N.W.2d 343 (Iowa 1991); *In re J. R. H.*, 358 N.W.2d 311 (Iowa 1984).

In conclusion, a biological father that is "related by blood" is a relative under section 710.5. Therefore, we conclude that the status of "relative" is not dependent upon whether (a) paternity has been acknowledged or adjudged, (b) paternity has been acknowledged by the father but never adjudged by the court, or (c) paternity has been adjudged by the court.

To establish one of the elements, the state needs to prove that the putative father and the child are not relatives. If the unwed father and child are related by blood, to show a violation of the statute, the state must prove that the father did not take the child to "assume" custody.

To answer the second question we must first determine what the legislature meant by the word "assume". Here also, the legislature did not specially define "assume". The word means "to take to or upon oneself; arrogate, seize, usurp." *Webster's Third New International Dictionary* 133 (unabridged 3rd ed. 1966). Black's Law Dictionary similarly defines "assume" as meaning "to undertake; to take on or upon one's self." *Black's Law Dictionary* 157 (rev. 4th ed. 1968). At least one court has interpreted the word "assume" to include responsibilities taken upon one's self "rather than those... imposed by law." *Larson Construction Co. v. Oregon Automobile Insurance*, 450 F.2d 1193, 1195 (9th Cir. 1991). If the legislature had intended to require that there be a prior right to custody, they would have used different terms. For instance, the legislature, in Iowa Code section 232.101(1), used the express words "retain custody" to convey the idea that a prior right to custody was required. *In re B. L.*, 470 N.W.2d 343

(Iowa 1991). Based on ordinary definitions of common usage, and because the legislature used the word "assume" rather than the word "retain", we conclude that the biological father does not need a prior legal right to take on, or "assume", custody of the child for purposes of section 710.5.

The burden is on the state to prove that the defendant did not take the child for the sole purpose of assuming custody. It is important to note that taking a child to assume custody involves more than having physical care of the child. Custody refers to a parent's rights and responsibilities toward the child in matters involving the child's legal status, education, medical care, and religious instructions. *In re Marriage of Will*, 489 N.W.2d 394 (Iowa 1992). To find a biological father guilty of child stealing, the state would have to prove that his purpose in taking the child was other than to assume all of the parental rights and responsibilities of the child.

This opinion is limited to the use of the words "relative" and "assume" in a criminal statute. As noted, the legislature chose not to define those words in the statute. We would be remiss if we did not acknowledge in this opinion the questions raised by the necessary reliance on the common usage definitions of those terms, and which questions the legislature may wish to address, by providing a definition. For example, a person who believes he is the father, because of an acknowledged paternity, or cohabitation, may not be a "relative," if later found unrelated by blood.

In conclusion, we are of the opinion that for the purposes of section 710.5 the biological father is deemed a relative. Also, since the term "assume" does not imply a pre-existing right, for purposes of this criminal statute, only, an unwed biological father may "assume" custody of a child even if he has never had legal custodial rights to the child.

MARCH 1994

March 21, 1994

COUNTIES: Chapter 347A Hospital; Certification of Budget. Iowa Code §§ 24.2(1), 24.2(4), 24.17, 347A.1, 347A.3 (1993). The board of hospital trustees for a hospital organized under Iowa Code chapter 347A must certify its annual budget under chapter 24 of the Code. (Mason to Hahn, State Representative, 3-21-94) #94-3-1(L)

APRIL 1994

April 5, 1994

CONSTITUTIONAL LAW: MOTOR VEHICLE: Differential treatment based on age. U.S. Const. amend. XIV and Iowa Const. art. I, § 6; Iowa Code Supp. § 321.196 (1993); and 761 IAC 605.26(2). While the Iowa

Department of Transportation's rule allowing renewal of driver's licenses by mail for people at least seventeen years and eleven months but under sixty-five years does disparately impact upon drivers over the age of sixty-four, a rational reason exists for the classification. Therefore, the rule does not appear to unconstitutionally discriminate against those drivers over age sixty-four. (Burger to Tyrrell, State Representative, 4-5-94) #94-4-1(L)

April 5, 1994

COUNTIES: Design and construction of county hospital addition competitive bidding. Iowa Code §§ 331.341(1), 347.13(2), 384.96, 384.97, 384.102 (1993). The plans, specifications and entire contract for a proposed building must be available to enable contractors to competitively bid on the project and allow for inspection by all interested parties and bidders. Soliciting a package bid to both design and build a county hospital addition is not authorized and would be contrary to the competitive bidding process. (Olson to Lytle, Van Buren County Attorney, 4-5-94) #94-4-2(L)

April 29, 1994

COUNTIES; MENTAL HEALTH: Payment to County Hospitals. Iowa Code §§ 125.82; 229.1(14); 347.16(2) & (3); 665.2, 665.3 (1993). Free care and treatment must be provided to the sick and injured resident indigents at county hospitals. A county of legal settlement may be required to pay a county hospital for the care and treatment of those who are indigent for costs including those associated with the admission or commitment for substance abuse or mental health treatment regardless of admission status. A court order requires that a county hospital admit the person for treatment regardless of the definition of acute care pursuant to Medicare, Medicaid or other third party payment systems. (Ramsay to Grundberg, State Representative, 4-29-94) #94-4-3(L)

MAY 1994

May 2, 1994

CLERK OF COURT: Filing of pleadings and other documents without social security number. Iowa Code §§ 602.6111, 602.8102(74), (98) (1993 Supp.). Due to federal restrictions on the use of social security numbers, federal disclosure requirements, and current Iowa law describing the duties of clerks of courts, clerks should not refuse pleadings which do not contain a federal identification number or alternative drivers' license number. The sufficiency, validity, or correction of a document filed in violation of section 602.6111 should be determined by the court. (Kelinson to Boyd, State Court Administrator's Office, 5-2-94) #94-5-1(L)

May 2, 1994

MUNICIPALITIES; ZONING: Municipal immunity from zoning ordinance. Iowa Code § 414.1 (1993). A city may or may not be bound by its own zoning ordinance. The determination of whether it is depends on a balancing of the competing interests involved. (Hunacek to Black, State Representative, 5-2-94) #94-5-2(L)

May 2, 1994

MUNICIPALITIES: POLICE OFFICERS AND FIREFIGHTERS PENSION FUND: City control over excess funds. Iowa Code §§411.3, 411.38(3) (1993). The General Assembly did not provide for a transfer of excess funds back to a city participating in the statewide retirement system for police officers and firefighters. Section 411.38(3) provides in such circumstances that a city can only reduce its contribution, or its and its members' contributions, into the state system. (Kempkes to Koenigs, State Representative, 5-2-94) #94-5-3

The Honorable Deo A. Koenigs, State Representative: The issue brought to the Attorney General on March 3, 1994, is whether Iowa Code chapter 411 (1993) permits a city to use excess funds, which it paid into the statewide retirement system for police officers and firefighters, "for city projects wholly unrelated to the state retirement system." After examining chapter 411, the Attorney General has concluded that cities do not have such power.

A. Statutory background

The General Assembly originally enacted laws providing for cities and their own boards of trustees to operate separate retirement systems for police officers and firefighters appointed under the civil service laws. *See, e.g.*, Iowa Code §411.2 (1991). *See generally* 4 E. McQuillin, *The Law of Municipal Corporations* §12.141 *et seq.* (1990); 3A *Sutherland's Statutory Construction* §73.03, at 342-44 (1992); 60A Am. Jur. 2d *Pensions and Retirement Funds* §533 *et seq.* (1988). It later enacted laws mandating that after January 1, 1992, all city retirement systems terminated and became replaced by a single statewide retirement system for city and state police officers and firefighters. 1991 Iowa Acts, 74th G.A., ch. 52, §4, at 76; *see* Iowa Code §411.35 (1993). Of importance to this opinion, the state system assumed ownership of the assets of each city's terminated system. Iowa Code §411.35(2).

A single board of trustees governs the state system's operations, and an actuary determines each city's fair share, which, at the outset, included the value of its own terminated system's assets. Iowa Code §§411.5(9), (11); 411.8; 411.35. In section 411.38(3), the General Assembly recognized the potential problem of one city initially contributing more to the statewide system than another:

> It is [our] intent . . . that a terminated . . . retirement system shall not subsidize any portion of any other system's unfunded liabilities in connection with the transfer to the statewide system. The actuary . . . shall determine if the assets of a terminated . . . retirement system would exceed the amount sufficient to cover the accrued liabilities of that terminated system as of January 1, 1992, using the alternative assumptions and the proposed assumptions.

Iowa Code §411.38(3). After defining those two actuarial assumptions, the General Assembly explained how they could affect a city's financial position in the state system:

> If the determination by the actuary using the alternative assumptions reflects that the assets of the terminated system exceed the amount sufficient to cover the accrued liabilities as of January 1, 1992, *all excess funds . . . shall be used only as approved by the city council of the participating city.* The city council *may approve use of the excess funds to reduce only the city's contribution* to the statewide system, *or* the city council *may approve use of the excess funds to reduce the city's contribution and the members' contributions to the statewide system. . . .*
>
> If the determination by the actuary . . . using the proposed assumptions reflects that the assets of the terminated system do exceed the amount sufficient to cover the accrued liabilities as of January 1, 1992, *all excess funds . . . shall be used only to reduce the city's contribution rate to the statewide system. The participating city shall determine what portion of the excess fund shall be applied to reduce the city's contribution rate for a given year.*

Id. (Emphasis added.)

B. Control over excess monies

When the actuary determines under either actuarial method the existence of excess funds in the state system, section 411.38(3) grants the participating city limited power over them. Two arguments support this conclusion.

First, the General Assembly in section 411.38(3) chose to define city power over excess funds immediately after recognizing their possible existence. Such a circumstance implies that no other powers exist. *See District Township v. City of Dubuque*, 7 Iowa (C. Cole) 262, 275-76 (1858) (affirmative words "may, and often do, imply a negative of what is not affirmed, as strongly as if expressed"; if "a thing is limited to be done in a particular form or manner, it includes a negative that it shall not be done otherwise"); 1A *Sutherland's, supra*, § 24.04, at 437 ("if a statute directs an act to be done in a particular form or manner, and because it introduces a new rule although phrased in the affirmative, it implies a negative"). *Cf. Coleman v. Iowa Dist. Court*, 446 N.W.2d 806, 807 (Iowa 1989) (statutes should be read together and, if possible, harmonized). In archaic legal terminology, *expressio unius est exclusio alterius*: the mention of one thing is the exclusion of another. *See State v. Akers*, 435 N.W.2d 332, 334 (Iowa 1989).

Second and more important, all monies in the state system are owned by the State under the control of its board of trustees. *See* Iowa Code §§ 411.7 (state system, through board of trustees, has full power over its funds); 411.8(1) (all assets of each terminated city retirement system shall be credited to state system); 411.11 (city shall make annual contributions to state system); 411.38(2) (city shall make payments to the state system sufficient to cover accrued liabilities of terminated system and make additional annual contributions if necessary). Nothing in chapter 411 indicates that ownership of excess funds

may transfer back to a city. *Cf. Cremer v. Noble*, 304 N.W.2d 215, 217 (1981) (chapter 411 does not suggest General Assembly wished to provide for reimbursement of benefits paid or payable to pension fund by pensioner after successful tort claim against third party). Indeed, the General Assembly expressly provided that the state system could not assign any rights to its monies absent a specific provision for such assignment. *Compare* Iowa Code §411.13 (1993) (monies in fund "are not subject to execution, garnishment, attachment, or any other process whatsoever, and are unassignable except as in this chapter specifically provided") *with* Iowa Code §411.18 (1991) (city board of trustees for pension fund may transfer investment authority).

C. Conclusion

Chapter 411 does not provide for a transfer of excess funds back to a city participating in the statewide retirement system for police officers and firefighters. Section 411.38(3) provides in such circumstances that a city can only reduce its own contribution, or its and its members' contributions, into the state system.

May 6, 1994

REAL PROPERTY; UNDERGROUND FACILITIES: Excavation in the area of underground facilities. Iowa Code §480.4 (1993). The phrase "if known" in section 480.4(1)(b) applies to the range, township, section, and quarter section. The statewide notification center is not responsible for obtaining that information if the excavator fails to provide it. If, after receiving notice from the notification center, the facility operator requires additional information to locate and mark the underground facility, the operator should contact the excavator. (Olson to Siegrist, State Representative, 5-6-94) #94-5-4(L)

May 11, 1994

JUVENILE LAW: Taking Into Custody of Truants. Iowa Code §§232.19, 299.10, 299.11 (1993); 42 U.S.C. 5633(a)(12). Iowa Code sections 232.19, 299.10, and 299.11 (1993) provide for the taking into custody of truant juveniles by police for the purpose of placement at school only if police have been designated as local truancy officers. (Phillips to Rafferty, State Representative, 5-11-94) #94-5-5(L)

May 19, 1994

COUNTIES: Board of Supervisors; Auditor. Iowa Code §331.506(3)(a) (1993). Power to issue warrants. Iowa Code section 331.506(3)(a) (1993) provides county boards of supervisors with the power to delegate the initial responsibility to county auditors for issuing warrants to pay all "fixed charges." Accordingly, a county board may resolve to let a county auditor reimburse a county officer for regularly occurring outlays associated with attending a school of instruction or seminar as long as the underlying prices or rates can be fairly characterized as invariable by standards or conditions provided within the resolution or upon receipt of information sufficiently verifying their invariability. (Kempkes to Martin, Cerro Gordo County Attorney, 5-19-94) #94-5-6(L)

May 19, 1994

COUNTIES: Rural services and general funds; sanitary disposal projects. Iowa Code §§ 331.428, 455B.302 (1993): Closure of sanitary disposal projects. Iowa Code section 331.428 (1993) prohibits a county board of supervisors from appropriating monies from its general fund for closing its sanitary disposal project. (Kempkes to TeKippe, Chickasaw County Attorney, 5-19-94) #94-5-7

Mr. Richard P. Tekippe, Chickasaw County Attorney: You have requested an opinion from the Attorney General concerning a county that, pursuant to a 1992 order from the Department of Natural Resources, has become the temporary permittee of a sanitary disposal project solely for purposes of its closure. The county board of supervisors has effectively acknowledged that the county bears the financial responsibility for the closure of this privately owned project. *See generally* 1994 Acts, 75th G.A., ch. ———, §——— (H.F. 2055) (Iowa Code § 455B.302 (1993) amended to provide that county has lien upon property of privately owned landfill for any closure costs incurred by county). The county board, however, wants to know whether to pay the closure costs from the county's general fund, which normally pays for benefits shared by all county residents, or from its rural services fund, which normally pays for benefits resulting to its rural residents. We conclude that the county board cannot pay for the project's closure from the general fund. *Cf.* 1994 Op. Att'y Gen. (#93-7-1(L)) (county owning or operating sanitary disposal project may not levy tax for the general fund to be used for operating and maintenance costs).

A county board once held the power to determine a need for and location of public disposal grounds. Iowa Code § 332.31 (1981). It could levy a tax on county properties outside of incorporated areas for the grounds and their operations. Iowa Code § 332.32 (1981). Any income to the county from cities disposing of their solid wastes at the grounds became funneled to the township dump fund. Iowa Code §§ 332.33-.34 (1981).

Later, the General Assembly expressly recognized that the "protection of the health, safety, and welfare of Iowans and the protection of the environment required the safe and sanitary disposal of solid waste." Iowa Code § 455B.301A (1993). *See generally* Iowa Code §§ 455A.15-.16, 455D.2, 455E.3, 455F.2; *Central Iowa Refuse Systems, Inc. v. Des Moines Metro Solid Waste Agency*, 715 F.2d 419, 427-28 (8th Cir. 1983), *cert. denied*, 471 U.S. 1003; *Town of Grimes v. Polk County Bd. of Adjustment*, 243 N.W.2d 625, 628 (Iowa 1976). Pursuant to this policy, the General Assembly required every county to provide for the establishment and operation of a sanitary disposal project for final disposition of solid waste by its residents. Iowa Code § 455B.302. *Accord* Iowa Code § 331.381(1), (16). *See generally* Iowa Code § 455B.301(18) (defining sanitary disposal project).

Counties could execute leases with public or private agencies and "do all things necessary not prohibited by law" for "the establishment and operation of sanitary disposal projects, and generally administration of the same." Iowa Code § 455B.302. They could also establish, operate, and finance a joint disposal

project with other counties and cities. Iowa Code ch. 28E, §§ 28F.1-.3, ch. 28G. To pay its share of the operating expenses for such a project, a county could establish rates and charges for the disposal of its solid waste. Iowa Code § 28F.5. To close a project simply required the county or its lessee to cease operations pursuant to plan. Iowa Code § 455B.301(6).

Before enacting these changes in the laws governing the disposal of solid waste, however, the General Assembly reorganized the financing of certain county projects and services. 1983 Iowa Acts, 70th G.A., ch. 123, at 213-55. It specifically permitted counties to maintain "general," "rural services," "secondary road," and "debt service" funds, as well as "other funds [established] in accordance with generally accepted accounting principles." Iowa Code §§ 331.427-.431 (1993). Of importance to this opinion, the General Assembly in Iowa Code section 331.428 provided:

> 2. [A county] board may make appropriations from the rural services fund for rural county services, *including but not limited to* the following:
>
> a. Road clearing, weed eradication....
>
> b. Maintenance of a county library....
>
> c. Planning, *operating*, and maintaining sanitary disposal projects....
>
> ...
>
> 3. *Appropriations specifically authorized to be made from the rural services fund shall not be made from the general fund*, but may be made from other sources.

(Emphasis added.)

The General Assembly defined "rural county services" to mean services "primarily intended to benefit those persons residing in the county outside of incorporated city areas, including secondary road services, but excluding services financed by other statutory funds." Iowa Code § 331.421(2). It provided that while county boards may turn to other sources for providing rural county services, which are primarily funded by taxes upon properties outside cities, Iowa Code §§ 331.422(2), 331.423(2), 331.428(1), they may not obtain such monies from the general fund, Iowa Code §§ 331.428(3), 331.432.

The General Assembly defined "general county services" to mean services "primarily intended to benefit all residents of a county, including secondary road services, but excluding services financed by other statutory funds." Iowa Code § 331.421(1). It provided that while county boards may turn to other sources for providing general county services, which are primarily funded by taxes

upon most properties inside the county, Iowa Code §§ 331.422(1), 322.423(1), 331.427, they may not obtain such monies from the rural services fund, Iowa Code §§ 331.427(3), 331.432.

The General Assembly did not include disposal projects in the multitude of projects and services to be financed with revenues from the general fund. *See* Iowa Code § 331.427(1)-(2). It did, however, specifically refer to disposal projects in the rural services fund, which permits county boards to make appropriations for the "[p]lanning, operating, and maintaining" of a project. Iowa Code § 331.428(2). It also provided that appropriations "specifically authorized from the rural services fund shall not be made from the general fund . . . ." Iowa Code § 331.428(3). Thus, if the closing of a disposal project falls within the scope of section 331.428(2), which identifies projects and services to be financed from the rural services fund, then the county board cannot resort to the general fund for closure costs.

It has been emphasized, however, that section 331.428(2) makes no specific mention of "closing" a disposal project and that the county, which was never "operating" the project in terms of solid waste disposal, will merely close it pursuant to an administrative order. It has thus been suggested the county board must turn to its general fund for monies needed for closure. This suggestion misses the mark for three reasons.

First, section 331.428(2) specifically authorizes a county board to make appropriations from the rural services fund for rural county services "including but not limited to" the planning, operating, and maintaining of a disposal project. This broad language does not limit a county board to appropriate monies from the rural services fund for those three activities only. *See generally State v. Hopkins*, 456 N.W.2d 894, 896 (Iowa 1991) (generally improper to search for statutory meaning when language plain and meaning clear).

Indeed, when read in conjunction with the county's power under section 455B.302 to "do all things necessary" for a project's operation, section 331.428 necessarily implies that a county board should initially resort to the rural services fund for closing a project that it or its licensee has established, operated, and maintained. *See* 1987-88 Va. Op. Att'y Gen. 87 (1987 WL 271698) (local government has responsibility, as owner or operator, for closing waste management facility; the authority to own or operate necessarily implies the authority to close). *Cf.* 1994 Op. Att'y Gen. ——— (#93-9-2) (county hospital board, charged with managing county hospitals, has implied power and authority of closure). *See generally* Iowa Code § 4.6(4) (proper to consider laws upon same or similar subject for purposes of statutory construction); *Coleman v. Iowa Dist. Court*, 446 N.W.2d 806, 807 (Iowa 1989) (statutes should be read together and, if possible, harmonized).

Such a conclusion reflects the practical realities that normally surround the financing of joint city-county disposal projects. Cities foregoing the establishment of their own projects may contract with a county or its licensee to dispose of their solid wastes at the county's project. *See generally* Iowa Code §§ 28E.3, 28E.11, 28E.16, 28E.40, 28F.1, 28F.3, 28F.5, 28G.4, 331.381(16),

455B.302, 455B.305, 455B.306; 567 IAC 100.1, 101.4, 101.6(1). Under such an arrangement, city residents presumably pay their fair share of the county project's operating expenses through fees charged by the licensee. *See generally* Iowa Code §§28G.4, 331.422, 331.428(2)(c), 455B.302, 455B.310. In addition, those fees presumably pay the city residents' fair share of the closure costs of the county's project, because a prospective licensee must file a "closure plan," provide a "financial assurance instrument," and, if granted a license, maintain a "closure account." *See generally* Iowa Code §455B.306; 567 IAC 102.10(10), 102.14(9).

Second, words and phrases in the Iowa Code shall be construed liberally and in accordance with the context and the approved usage of the language. Iowa Code §§4.1(38), 4.2; *see Polk County Drainage Dist. Four v. Iowa Natural Resources Council*, 377 N.W.2d 236, 241 (Iowa 1985); *State ex rel. Iowa Dep't of Water, Air, and Waste Management v. Grell*, 368 N.W.2d 139, 141 (Iowa 1985) (court "not disposed to give a narrow or technical reading" of natural resources laws); *Sutherland's Statutory Construction* §75.01, at 405-06; §75.06, at 430-32 (1992); *see also In re Greater Morrison Sanitary Landfill*, 435 N.W.2d 92, 98-100 (Minn. Ct. App. 1989) (construing statute to impose financial responsibility for closing landfill upon all current and former owners and operators). When undefined, words and phrases in the Iowa Code normally have their common meanings. *State v. Hennenfent*, 490 N.W.2d 299, 300 (Iowa 1992).

In view of these principles, we note that "to operate" does not necessarily equate with creating a product or providing a service, such as the disposing of solid waste; it may simply mean "to act, or exert a power in order to bring about some end or purpose. . . ." *Crabb's English Synonyms* 24 (1917). *Accord Webster's Third New International Dictionary* 1580 (1967). It may be synonymous with to own, control, possess, or have. *State v. Thomason*, 224 Iowa 499, 276 N.W. 619, 620 (1937); *Commonwealth v. Babb*, 70 A.2d 660, 662 n.2 (Pa. Super. 1950); *Funk & Wagnalls Standard Handbook of Synonyms* 230 (1947); *Webster's New World Dictionary* 1015 (1976).

Third, the Department of Natural Resources apparently considers the closure of a disposal project to fall within the scope of its operation. *See* 567 IAC 102.2(4) (closure permit is one of four types required to "construct or operate" a disposal project); *see also* 567 IAC 102.14(a) ("owner or operator" must notify department concerning disposal project's closure). *See generally* Iowa Code §4.6(6) (proper to consider administrative construction of statute for determining legislative intent); *Hennessey v. Cedar Rapids Community School Dist.*, 375 N.W.2d 270, 273 (Iowa 1985) (administrative interpretation of statute entitled to great weight, particularly when legislature refuses to intervene over a long period of time).

In summary, section 331.428 prohibits county boards of supervisors from appropriating monies from their general funds for closing sanitary disposal projects.

May 24, 1994

COUNTIES: Chapter 347A Hospital; real property lease to ambulance service. Iowa Code §§347.24, 347.28, 347A.1 (1993), 1981 Iowa Acts (69th G.A.) ch.

117. The board of hospital trustees of a hospital organized under Iowa Code chapter 347A may lease a portion of the hospital grounds to an ambulance service. (Smith to McNertney, Kossuth County Attorney, 5-24-94) #94-5-8(L)

May 24, 1994

COUNTIES: Agricultural Areas; Home Rule. Iowa Const. art. III, § 39A. Iowa Code ch. 352; §§ 352.1, 353.6; ch. 455B; § 455B.134 (1993); §§ 352.2, 352.7, 352.11 (Supp. 1993). Under chapter 352 the county board of supervisors is authorized to adopt a proposal for the creation or expansion of an agricultural area as submitted, to adopt the proposal with any modifications the supervisors deem appropriate, or to reject the proposal if the supervisors believe it to be contrary to the expressly stated purposes of chapter 352. The board does not have authority to adopt ordinances which regulate waste storage facilities for livestock feeding operations in an agricultural area, because regulation of waste storage facilities has been preempted by state law. Land disposal of animal waste, however, is open to local regulation to the extent that any local ordinance does not conflict with the rules of the Department of Natural Resources governing waste storage facilities. (Pottorff and Benton to Chambers, Hamilton County Attorney, 5-24-94) #94-5-9

Mr. Patrick B. Chambers, Hamilton County Attorney: On May 17, 1994, you requested an opinion of our office concerning the establishment of agricultural areas in Hamilton County pursuant to Iowa Code chapter 352. You pose six questions focusing on the role of the county board of supervisors in passing on a request to establish an agricultural area and the authority of the board to impose regulations and procedures on agricultural areas that are adopted. It is evident from your questions that you are particularly concerned about agricultural areas that are to be used for large scale hog production. Specifically you ask:

1. Does the Board of Supervisors have the authority to deny the request to establish an agricultural area?

2. Must the Board approve the request to establish an agricultural area?

3. Can the Board deny the request to establish an agricultural area based only on the size of the hog facility to be built?

4. Does the Board have the authority to establish regulations which affect "farm operations" such as requirements of having specific methods of waste disposal?

5. Can the Board establish procedures for waste disposal and/or discharge standards within agricultural areas?

6. Can the Board establish regulations that limit the size of livestock facilities?

It is our opinion that under chapter 352 the county board of supervisors is authorized to adopt a proposal for the creation or expansion of an agricultural area as submitted, to adopt the proposal with any modifications the supervisors deem appropriate, or to reject the proposal if the supervisors believe it to be contrary to the expressly stated purposes of chapter 352. The board does not have authority to adopt ordinances which regulate waste storage facilities for livestock feeding operations in an agricultural area, because regulation of waste storage facilities has been preempted by state law. Land disposal of animal waste, however, is open to local regulation to the extent that any local ordinance does not conflict with the rules of the Department of Natural Resources governing waste storage facilities.

Creation of agricultural areas is one of three methods set out in chapter 352 to protect agricultural land from nonagricultural development pressures. Additional methods referred to in chapter 352 include creation of county land preservation and use plans and policies or adoption of an agricultural land preservation ordinance. Iowa Code § 352.1 (1993).

Chapter 352 establishes some specific criteria for a proposal to create or expand an agricultural area. Creation or expansion of an agricultural area is initiated by farmland owners. An "owner of farmland" is entitled to submit a proposal for creation or expansion of an agricultural area. Land shall not be included in the proposal without the consent of the owner. The agricultural area must include "at least three hundred acres of farmland," unless the farmland is adjacent to land subject to an agricultural land preservation ordinance or adjacent to land located within an existing agricultural area. Iowa Code § 352.6 (Supp. 1993).

An agricultural area can be devoted to hog production under the terms of chapter 352. Except as provided in chapter 352, "the use of the land in agricultural areas is limited to farm operations." Iowa Code § 352.6. A "farm operation" is defined to include raising, caring, feeding, handling and transporting livestock as well as the treatment and disposal of wastes resulting from livestock. Iowa Code § 352.2(6) (Supp. 1993). Livestock expressly includes swine. Iowa Code § 352.2(8) (Supp. 1993); Iowa Code § 267.1(2) (1993). A "farm operation," moreover, is specifically defined to include the creation of noise, odor, dust and fumes. Iowa Code § 352.2(6) (Supp. 1993).

In the absence of statutes limiting civil suits, the Iowa Supreme Court has enjoined as a nuisance the disposal of the waste products from hog confinement operations. In *Valasek v. Baer*, 401 N.W.2d 33 (Iowa 1987), the court recognized that collecting manure in lagoons and then spreading it over farmland as fertilizer creates an "uncommonly offensive smell." *Id.* at 35. Ultimately, the court required owners of the hog confinement operation to change the manner and location at which the manure was spread in order to protect the interests of neighboring land owners. *Id.* at 37.

Although the *Valasek* decision recognized the problems created by waste disposal at hog confinement operations, chapter 352 limits the nuisance actions which can be brought against hog confinement operations that are located within

agricultural areas. Under chapter 352 a farm operation "located in an agricultural area shall not be found to be a nuisance regardless of the established date of operation or expansion of the agricultural activities of the farm or farm operation." Iowa Code § 352.11(1). Section 352.11(1) limits nuisance actions to those based on negligence or those against farm operations that are in violation of a federal statute or regulation or state statute or rule. Iowa Code § 352.11(1) (Supp. 1993). Statutes limiting nuisance actions against agricultural activities have been enacted in other states. *See, e.g., Laux v. Chopin Land Associates*, 550 N.E.2d 100 (Ind. App. 1990); *Finlay v. Finlay*, 18 Kan. App. 2d 479, 856 P.2d 183 (1993).

Read in conjunction with the definition of a farm operation, section 352.11(1) purports to preclude private nuisance actions against hog producers based on raising, caring, feeding, handling and transporting hogs as well as the treatment and disposal of wastes resulting from hogs and based on the noise, odor, dust and fumes generated by the hog production business. In circumstances in which this limitation applies, a private landowner could file a nuisance action only where negligence or violation of a federal statute or regulation or state statute or rule is alleged.[31]

Creation of an agricultural area requires adoption of a proposal by the county board of supervisors. The duties of the board are to be completed on a sixty-day time frame. "Within thirty days of receipt of a proposal for an agricultural area which meets the statutory requirements, the county board shall provide notice of the proposal by publishing notice in a newspaper of general circulation in the county." The board shall hold a "public hearing on the proposal" within forty-five days of receipt of the proposal. Iowa Code § 352.7(1). Next, within sixty days after receipt of the proposal, the board shall "adopt the proposal or any modification of the proposal that it deems appropriate, unless to do so would be inconsistent with the purposes of this chapter." Iowa Code § 352.7(2).

In 1983 the Attorney General examined the scope of authority of the county board of supervisors to approve, modify, or deny a proposal to create an agricultural area under this statutory language.[32] This office concluded that the board is authorized to "adopt a proposal as submitted, to adopt the proposal with any modifications the supervisors deem appropriate, or to reject the proposal if the supervisors believe it to be contrary to the expressly stated purposes of the Act." 1984 Op. Att'y Gen. 2, 4-5.

The "expressly stated purposes of the Act," in turn, are found in section 352.1. This section states in part:

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[31] At least one district court has ruled that section 352.11(1) does not prevent a person whose land lies outside an agricultural area from bringing a nuisance suit against a person who has created the nuisance within the agricultural area. *Weinhold v. Wolff*, Buena Vista County No. 23571 (Ruling issued April 13, 1994). Interlocutory appeal on this issue was denied recently by the Iowa Supreme Court.

[32] The statutes were originally enacted as Iowa Code chapter 93A. In 1986 the statutes were moved to Iowa Code chapter 176B. Finally in 1993 the statutes were moved to Iowa Code chapter 352.

> It is the intent of the general assembly and the policy of this state to provide for the orderly use and development of land and related natural resources in Iowa for residential, commercial, industrial, and recreational purposes, preserve private property rights, protect natural and historic resources and fragile ecosystems of this state including, forests, wetlands, rivers, streams, lakes and their shorelines, aquifers, prairies, and recreational areas to promote the efficient use and conservation of energy resources, to promote the creation and maintenance of wildlife habitat, to consider the protection of soil from wind and water erosion and preserve the availability and use of agricultural land for agricultural production, through processes that emphasize the participation of citizens and local government.

Relying on the statutory statement of the purposes of the Act, the 1983 opinion concluded that a board could reject a proposal for an agricultural area "if in their discretion the supervisors believe, and make a specific finding, that the policy in favor of agricultural land preservation is in a given case outweighed by other policy considerations set forth in the Act." 1984 Op. Att'y Gen. at 5.

Policy considerations which may outweigh a policy in favor of agricultural land preservation in any particular proposal for an agricultural area are found in section 352.1. These policies include the "orderly use and development of land and related natural resources in Iowa" for several purposes in addition to agricultural purposes, including "residential, commercial, industrial, and recreational purposes." These policies also recognize an interest in preservation of "private property rights" and protection of "natural and historic resources and fragile ecosystems." *See* Iowa Code § 352.1.

The 1983 opinion specifically noted that a county comprehensive zoning plan may reflect the county's policy for the "orderly use and development of land" in the county. A zoning plan, therefore, "may be a relevant factor" for a board to consider in "weighing the purposes of the Act and deciding whether creation of an agricultural area in a given situation would be appropriate." 1984 Op. Att'y Gen. at 9.

We do not construe the 1983 reference to comprehensive zoning plans to be an exclusive reference to relevant factors. A variety of considerations may fall under the policies articulated in section 1. For example, either county land preservation and use plans and policies or agricultural preservation ordinances authorized under chapter 352 could be considered for the same reason that comprehensive zoning plans are relevant. When it is known that the farm operation will impact neighboring land owners, protection of their private property rights should be considered. In light of the limitation on nuisance actions that will result from creation of the agricultural areas, the property rights of landowners may be affected permanently by adoption of the agricultural area.[33]

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[33] It is undecided whether courts will apply section 352.11(1) in derrogation of a pre-existing use.

As an alternative to adopting or rejecting a proposal for an agricultural area, a board may adopt "any modification of the proposal it deems appropriate, unless to so do would be inconsistent with the purpose of this chapter." Iowa Code § 352.7(2) (Supp. 1993). The board's authority to modify a proposal under this language is quite broad. *Cf. Osborne v. Iowa Natural Resources Council*, 336 N.W.2d 745, 748 (Iowa 1983) (agency authorized by statute to impose "such conditions and terms as the director or council may prescribe" in a permit). Any modification, however, must be tied to the same policies of chapter 352 that underlie the authority to adopt or reject a proposal. *See* 1984 Op. Att'y Gen. 27 [#83-3-20(L)] (board prohibited from rejecting a proposal solely on technical mistakes subject to modification).

These policies include the "orderly use and development of land and related natural resources in Iowa" for "residential, commercial, industrial, and recreational purposes" and an interest in preservation of "private property rights" and protection of "natural and historic resources and fragile ecosystems." *See* Iowa Code § 352.1. Modification of a proposal, for example, could limit the size of a hog confinement operation if the size limitation was consistent with the policies set forth in the chapter

In addition to the adoption, modification, or rejection of a proposal for an agricultural area, the board may have limited authority to regulate some aspects of farm operations. Chapter 352 does not impose requirements for waste disposal and does not expressly empower the board to impose these requirements. Any authority for a board to regulate these matters must be found in the board's Home Rule powers.

The Iowa Constitution grants Home Rule to counties subject to certain limitations, including that the exercise of the power not be, "inconsistent with the laws of the General Assembly." Iowa Const. art. III, § 39A. Counties are empowered to set standards which are higher or more stringent than those imposed by state law, unless a state law provides otherwise. Iowa Code § 331.301(6).

There are two ways in which a county ordinance may be found to exceed the county's authority under Home Rule. First, a local ordinance is "inconsistent" with the laws of the General Assembly and, therefore, preempted when the ordinance "prohibits an act permitted by a statute, or permits an act prohibited by a statute." *City of Des Moines v. Gruen*, 457 N.W.2d 340, 342 (Iowa 1990). A local ordinance is also preempted by state law when the ordinance invades an area of law reserved by the legislature to itself. *Id.* at 342.

The state has already entered the field of waste disposal from animal feeding operations in connection with water pollution control. Iowa Code § 455B.173(1) provides that the Iowa Department of Natural Resources (DNR) shall develop comprehensive plans and programs for the prevention, control and abatement of water pollution. Section 455B.173(2) further requires the DNR to "establish, modify, or repeal water quality standards, pretreatment standards and effluent standards."

The DNR has adopted administrative rules for comprehensive waste control and permit requirements for both open feedlots and confinement feeding operations in chapter 65. 567 IAC 65 (Appendix B). For example, open feedlots are required to obtain both operation and construction permits from the DNR if the feedlot's capacity exceeds certain numbers of livestock, e.g., 1,000 beef cattle. All open feedlots are, at a minimum, required to remove "settleable solids" before these wastes enter a stream or other water of the state. 567 IAC 65.2(1). DNR rules identify waste control systems, for example waste-retention basins or terraces, which may be used to control wastes from open feedlots.

Confinement feeding operations are generally not required to obtain an operation permit, but must obtain a construction permit under certain circumstances. Confinement operations that use an anaerobic lagoon, for example, are required to obtain a permit. 567 IAC 65.6(1). The minimum level of waste control for a confinement facility is the retention of all wastes produced in the enclosure between periods of waste disposal. 567 IAC 65.2 (3). The rules specify that control of wastes from confinement feeding operations may be accomplished through earthen waste storage structures, formed waste-storage tanks, or other waste control methods. 567 IAC 65.2(3).

In addition to regulations intended to prevent wastes from livestock facilities from entering the state's surface or groundwater, the DNR has adopted regulations concerning waste containment facilities. DNR rules provide requirements for anaerobic lagoons which may reduce odor emissions. 567 IAC 23.5.

Iowa law also sets minimum separation distances to neighboring residences or public use areas for the construction of new, or the expansion of existing anaerobic lagoons and earthen waste slurry storage basins. For example, anaerobic lagoons or earthen waste storage basins used as part of a confinement feeding operation must, under certain circumstances, be located at least 1,250 feet from an adjoining residence or public use area. Iowa Code § 455B.134(3)(f)(1) (1993).

The DNR has exclusive jurisdiction over some regulatory matters. In *DeCoster v. Franklin County*, 497 N.W.2d 849 (Iowa 1993), the Iowa Supreme Court considered whether a livestock waste storage basin was exempt from a county zoning ordinance. In holding that the livestock waste storage basin was exempt from county zoning under Iowa Code chapter 358A, the court distinguished between "private sewage disposal facilities" over which the DNR and counties have concurrent jurisdiction and waste disposal systems for livestock confinement facilities. *Id.* at 853. The court concluded that section 455B.172 confers jurisdiction on the department of natural resources:

> . . . to adopt standards for the commercial cleaning of pits used to collect waste in livestock confinement structures and for the disposal of waste from the facilities. The department is exclusively responsible for adopting the standards and issuing licenses. County boards of health are empowered to enforce the standards and licensing requirements established by the departments. Nothing

> in this section, however, confers jurisdiction on the county to regulate the construction of livestock waste holding basins.

Id. at 853.

While *Decoster* is not directly controlling, we believe it suggests that the area of waste storage facilities for animal feeding operations is a matter of state-wide concern, not subject to local regulation in the absence of direct legislative authority. Indeed, the pervasiveness of state regulation indicates that in this area the state reserved regulation to itself. *See Board of Supervisors v. Valadco*, 504 N.W.2d 267, 272 (Minn. App. 1993). It is our opinion that the board does not have authority to adopt ordinances which apply to waste storage facilities for livestock feeding operations in an agricultural area, because these ordinances have been preempted by state law.

The state, by contrast, has not adopted requirements for the land disposal of animal waste. The DNR has adopted rules governing the land application of solid wastes, but these rules specifically exclude animal manure. 567 IAC 121. The DNR provides "Guidelines" for land disposal of animal waste in chapter 65 of its rules, 567 IAC 65 (Appendix B), but animal feeding operations are not required to follow these practices. The "guidelines," moreover, do not address odor at all. The implication is that the state has left this area open to local regulation, to the extent that any local ordinance does not conflict with the DNR rules governing waste storage facilities.

Any authority for the board to establish regulations that limit the size of livestock facilities must also be found in the county's Home Rule powers. There is no state law which pervasively regulates in this area. *DeCoster* determined that a waste storage basin is exempt from county zoning. *DeCoster v. Franklin County*, 497 N.W.2d at 853. A local ordinance, moreover, may not "prohibit an act permitted by a statute." *City of Des Moines v. Gruen*, 457 N.W.2d at 342. The county, therefore, may not by ordinance prohibit an operation within an agricultural area based on its size which would otherwise be permitted under chapter 352. While precluded from adopting an ordinance of this type, the board may consider the size of a potential farm operation in an agricultural area in determining whether creation or expansion of a specific agricultural area would be consistent with the purposes of the chapter.

In summary, it is our opinion that under chapter 352 the county board of supervisors is authorized to adopt a proposal for the creation or expansion of an agricultural area as submitted, to adopt the proposal with any modifications the supervisors deem appropriate, or to reject the proposal if the supervisors believe it to be contrary to the expressly stated purposes of chapter 352. The board does not have authority to adopt ordinances which regulate waste storage facilities for livestock feeding operations in an agricultural area, because regulation of waste storage facilities has been preempted by state law. Land disposal of animal waste, however, is open to local regulation to the extent that any local ordinance does not conflict with the rules of the Department of Natural Resources governing waste storage facilities.

JUNE 1994

June 8, 1994

LABOR, BUREAU OF: Providing bond by out-of-state contractor. Iowa Code § 91C.7(2), (3) (1993). Iowa Code section 91C.7(2), (3) (1993) requires that out-of-state contractors provide bonds and not letters of credit for projects and that sureties give timely written notice to start the process for release of a bond. (Kempkes to Meier, Labor Commissioner, 6-8-94) #94-6-1(L)

June 8, 1994

BEER AND LIQUOR: Use of Coupons. Iowa Code § 123.186 (1993). Conflict between federal and state regulatory schemes for the alcoholic beverages industry, based on the Twenty-first Amendment of the United States Constitution, should be resolved in favor of the state regulatory scheme. The Alcoholic Beverages Division of the Iowa Department of Commerce, however, exceeded its statutory authority under Iowa Code section 123.186 in promulgating a rule regulating the use of coupons by the alcoholic beverage industry contrary to "the substance" of the federal "tied-house" regulations. (Walding to Bisignano, State Senator, 6-8-94) #94-6-2

The Honorable Tony Bisignano: You have requested an opinion regarding the use and validity of "in-store" coupons[34] in the merchandizing of wine by vintners and wine wholesalers[35] in Iowa. Analysis of the issue presented involves the Twenty-first Amendment to the United States Constitution, the "tied-house" law of the Federal Alcohol Administration Act, 27 U.S.C. § 205(b), a federal regulation promulgated by the Bureau of Alcohol, Tobacco and Firearms (the "BATF"), 24 C.F.R. § 6.96(a), a state statute, Iowa Code § 123.186, and an administrative rule of the Alcoholic Beverages Division of the Iowa Department of Commerce, 185 IAC 16.14, or, more precisely, the relationship between those provisions.

I. CONFLICTS OF LAW

Over a half century ago, the United States Congress, in an effort to prevent unfair competition in the alcoholic beverages industry in the wake of prohibition's repeal, enacted the "tied-house" law. This law prohibits alcoholic beverage industry members from "inducing" retailers to purchase their products "to the exclusion" of others' products by giving money or other things of value to retail vendors. The "tied-house" law, however, also authorized the Treasury Secretary to promulgate regulations exempting certain services from the prohibition.

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[34] These coupons, according to your letter, include: "those types of coupons placed by producers or wholesalers of wine on the neck of wine bottles or as tear off stickers advertising an immediate discount off the regularly listed shelf price of wine at the check-out counter."

[35] The term "wholesaler" is defined in Iowa Code section 123.3(36) ((1993), and would not include vintners, brewers and distillers.

Pursuant to that provision, the BATF promulgated a regulation to permit the use of coupons in the alcoholic beverage industry.[36] The use of coupons to promote alcoholic beverage products, according to the federal regulation, is permitted provided the coupons are not restricted to any particular retailer and are limited to reimbursing retailers for usual and customary handling fees along with the coupon's face value.

At the same time, the use of coupons in the promotion of alcoholic beverages in Iowa is regulated by an administrative rule of the Alcoholic Beverages Division. According to 185 IAC 16.14:

> An industry member may offer coupons to the public for mail-in rebates on alcoholic liquor, wine and beer. An industry member must offer all retailers the opportunity to participate in the coupon offering. A retailer may offer its own coupons to consumers, and the retailer's own coupons may be mail-in rebates or instant rebates at the cash register. An industry member is prohibited from reimbursing the retailer more than the ordinary and customary handling fee for redeeming coupons.

The Iowa provision, unlike the federal "tied-house" regulation, restricts the use of coupons by industry members[37] to "mail-in" rebates. The use of coupons by retailers is unrestricted by federal and state regulations alike. To the extent that the BATF regulation allows for the use of coupons other than "mail-in" rebates, the two regulatory schemes are in conflict. A resolution of that conflict, and a determination of which scheme the alcoholic beverage industry must follow in Iowa, requires a review of the Twenty-first Amendment to the Constitution of the United States.

Section two of the Twenty-first Amendment provides:

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[36] Coupons. An industry member may furnish to consumers, coupons which are redeemable at a retail establishment under the following conditions:

(1) The coupon may not specify a particular retailer or group of retailers where such a coupon may be redeemed.

(2) An industry member may reimburse a retailer for the face value of all coupons redeemed, and pay a retailer a usual and customary handling fee for the redemption coupons.

(3) Payment for the redemption of coupons shall be made directly to the retail entity to reduce the cost of sales. An industry member may not pay officers, employees or representatives of retailers or wholesalers for the redemption of coupons.

[37] An "industry member" and a "retailer", as the terms are used in this rule, are defined in 185 IAC 16.1 as follows:

> (1) Industry member means an alcoholic beverages manufacturer, including a distiller, vintner or brewer, bottler, importer, wholesaler, jobber, representative, broker, agent, officer, director, shareholder, partner or employee of each of the above.
>
> (2) Retailer means the holder of an alcoholic beverage license or permit, agents, officers, directors, shareholders, partners, and employees who sell alcoholic liquor, wine and/or beer to consumers for consumption on or off the premises of the licensee or permittee.

> The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the law thereof, is hereby prohibited.

The Twenty-first Amendment was ratified in 1933, and repealed the Eighteenth Amendment's ban on intoxicating liquor. In construing section two of the Twenty-first Amendment, the Fifth Circuit Court of Appeals in a similar interplay between a Florida statute and a federal regulation offered the following guidance in resolving conflicts between regulatory schemes:

> Typically, litigated cases under the Twenty-first Amendment involve state laws which are more restrictive than federal law. Indeed, the purpose of the Amendment was to permit "dry" states to regulate, to the point of exclusion, the flow of alcohol across their borders. Accordingly, the Twenty-first Amendment protects a state which chooses to impose a burden on the sale of alcohol which would be impermissible under the Commerce Clause if the item burdened was not alcohol. [Footnotes omitted.]

Wine Industry of Florida, Inc. v. Miller, 609 F.2d 1167, 1170 (5th Cir. 1980). In an earlier review, the same court resolved a conflict in favor of a state regulatory scheme over the BATF regulation by concluding:

> Thus, any analysis of the validity of a state statute regulating liquor does not proceed via the traditional route for testing the constitutionality of a state's statutes. We must proceed from a vantage point of presumed state power and then ask whether there are any limitations to that power, always keeping in mind that where intoxicating liquors are concerned, great deference must be accorded a comprehensive state regulatory scheme . . . .
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> [T]he Twenty-first Amendment "demands wide latitude for regulation by the State" where liquor destined for use, distribution, or consumption is entirely within the state. *Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 42, 86 S. Ct. 1254, 1259, 46 L. Ed. 2d 336 (1966).

Castlewood International Corporation v. Simon, 596 F.2d 638, 642-43 (5th Cir. 1979). Accordingly, any conflict between a state regulation and a BATF regulation, based on the Twenty-first Amendment, should be resolved in favor of the state scheme. Thus, the alcoholic beverage industry should comply with the state rules regulating alcoholic beverages to the extent that the state rules conflict with federal regulations.

II. SCOPE OF DELEGATED POWERS

Our review requires us to next determine the extent of the authority of the Alcoholic Beverages Division to implement a rule regulating the use of coupons in alcoholic beverage promotions. A rule adopted by an agency, to be valid, must be within the scope of powers delegated to the agency by statute. *Barker v. Dept. of Transportation*, 431 N.W.2d 348, 349-350 (Iowa 1988); *Iowa-Illinois*

Gas & Elec. v. Iowa State Commerce Commission, 334 N.W.2d 748, 752 (Iowa 1983). An agency rule is presumed valid, with the burden on a challenger to demonstrate that a "rational agency" could not have concluded that the rule was within the agency's delegated authority. *Iowa-Illinois Gas & Elec. v. Iowa State Commerce Commission*, 334 N.W.2d at 751-52. The final determination of whether an agency could have rationally concluded that it had statutory authority for a rule rests with the courts. *Id.* at 752.

In our view, the Alcoholic Beverages Division exceeded its statutory authority in promulgating a rule regulating the use of coupons by the alcoholic beverage industry contrary to "the substance" of the federal "tied-house" regulations.[38] We believe a court, faced with the issue, would conclude that the Iowa administrative rule is not consistent with the statutory authority of the Alcoholic Beverages Division.

The Alcoholic Beverage Division relies on section 123.186 as its statutory authority for regulating the use of coupons. That section provides:

> The [alcoholic beverages] division shall adopt as rules *the substance* of the federal regulations 27 C.F.R. pt. 6, 27 C.F.R. pt. 8, 27 C.F.R. pt. 10, and 27 C.F.R. pt. 11 as they relate to transactions between wholesalers and retailers. [Emphasis added.]

Under this language, the Alcoholic Beverages Division is authorized to adopt "the substance" of the federal "tied-house" regulations.

In our opinion, the agency rule in question goes beyond "the substance" of the federal regulation pertaining to alcoholic beverage coupons. The state rule, as previously discussed, *supra* at 3, is more restrictive than its federal counterpart in that the agency rule restricts the use of coupons to "mail-in" rebates. The federal provision merely regulates the application of alcoholic beverage coupons and not the types of coupons permitted. Stated alternatively, the state administrative rule exceeds "the substance" of the federal regulation by attempting to regulate coupons based on their form as well as their application. In our view, therefore, a rule creating a dichotomy between "mail-in" and "instant" rebates exceeds the authority delegated to the Alcoholic Beverage Division by section 123.186 and the federal "tied-house" regulations.[39] A review of the other provisions of chapter 123, including Iowa Code sections 123.21

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[38] Section 123.186 limits the requirement that the Alcoholic Beverages Division adopt "the substance" of the federal "tied-house" regulations "to transactions between wholesalers and retailers." While the agency is not required to adopt such rules for distillers, vintners and brewers, we question whether separate statutory authority exists for the agency to promulgate rules regulating the use of coupons by those producers.

[39] The soundness of BATF's "tied-house" regulation has recently been called into question and found to be inconsistent with the federal "tied-house" law. *See Fedway Associates, Inc. v. U.S. Treasury*, 976 F.2d 1416 (D.C. Cir. 1992); *Foremost Sales v. Director, Bureau of Alcohol, Tobacco and Firearms*, 860 F.2d 229 (7th Cir. 1988). To the extent the BATF subsequently amends "the substance" of the federal "tied-house" regulations pertaining to the use of alcoholic beverage coupons, it would impact the manner in which the alcoholic beverage industry is permitted to promote their products in Iowa.

(administrator's authority for rulemaking) and 123.45 (restrictions on business interests), does not reveal any other statutory authority for promulgation of the rule.[40]

III. CONCLUSION

In summary, conflict between federal and state regulatory schemes for the alcoholic beverages industry, based on the Twenty-first Amendment of the United States Constitution, should be resolved in favor of the state regulatory scheme. The Alcoholic Beverages Division, however, exceeded its statutory authority under section 123.186 in promulgating a rule regulating the use of coupons by the alcoholic beverage industry contrary to "the substance" of the federal "tied-house" regulations.

June 20, 1994

MUNICIPALITIES: Municipal Housing Agencies, Municipal Home Rule. Iowa Const. art. III, § 38A; Iowa Code §§ 364.1, 364.2(1), 364.2(2), 403A.3, 403A.5 (1993). A city council may abolish its municipal housing agency without contravening state law. (Tabor to Bisignano, State Senator, 6-20-94) #94-6-3(L)

June 20, 1994

COURTS: Judicial nominating commissioners, eligibility for judicial appointment. Iowa Code §§ 46.3, 46.4, 46.14 (1993). A member of a judicial nominating commission who resigns prior to the expiration of his or her term is not eligible for nomination to fill a vacancy during the remainder of the unexpired term, even if the vacancy occurred after the commissioner's resignation. (Scase to McNeal, State Representative, 6-20-94) #94-6-4(L)

June 20, 1994

COUNTIES AND COUNTY OFFICERS: Salaries: Authority to provide overtime pay to assistant county attorneys and deputy officers other than those in the sheriff's office. Iowa Code § 331.904(1), (3) (1993). Iowa Code section 331.904(1), (3) (1993) prohibits a county board of supervisors from paying overtime to assistant county attorneys and deputy officers other than those in the sheriff's office if such payment boosts their salaries above the statutory maximums. (Kempkes to Blessum, Madison County Attorney, 6-20-94) #94-6-5(L)

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[40] Prior statutory authority to restrict the use of coupons was granted to the Alcoholic Beverages Division. With the privatization of wine in 1985, the Iowa General Assembly made it a prohibited act for any holder of a vintners certificate of compliance or wine wholesaler to "offer to any purchaser of wine any rebate or coupon as an incentive to purchase wine." *See* Iowa Code section 123.181(3) (1987), as enacted by 1985 Iowa Acts, ch.. 32, § 72. That prohibition, however, was repealed in 1989. *See* 1989 Iowa Acts, ch. 252, § 5.

JULY 1994

July 1, 1994

ELECTIONS; GAMBLING: Special Elections; Gambling Games. Iowa Code § 99F.7(10) (Supp. 1993); 1994 Iowa Acts, ch. 1021. There is no statutory basis in House File 2179 to impose a time limitation for scheduling a second special election on the question of conducting gambling games at the Waterloo Greyhound Park. The board of supervisors of a county in which a qualified licensee of a pari-mutuel racetrack requests a license to operate gambling games is required to submit to the county electorate a proposition to approve or disapprove the operation of gambling games at pari-mutuel racetracks at a special election "at the earliest practicable time," even though the electorate recently disapproved the same proposition. (Pottorff to Lind, State Senator; Harper, State Representative; and Shoultz, State Representative, 7-1-94) #94-7-1

The Honorable Jim Lind, State Senator; the Honorable Patricia Harper, State Representative; the Honorable Donald Shoultz, State Representative: You have requested an opinion of the Attorney General regarding the authority of Black Hawk County to hold a second special election on whether gambling games should be allowed at the Waterloo Greyhound Track. On May 17, 1994, the Black Hawk County electorate disapproved a public measure to conduct gambling games.

The day following the election we received an oral request from the Secretary of State for advice on whether and when a second election could be held. We issued a letter of informal advice on the same day, May 18, 1994, stating that a second election on the question of conducting gambling games at the Waterloo Greyhound Park may be held at any time upon the request of the licensee. We now confirm the informal advice through this opinion.

In 1994 the legislature enacted a statute permitting the conduct of gambling games at Iowa's pari-mutuel racetracks, if approved by a majority of the voters in the county. 1994 Iowa Acts, ch. 1021, § 17. This statute amended Iowa Code section 99F.7(10)(c) (Supp. 1993) to authorize an election on gambling games under the following terms:

> If, after January 1, 1994, section 99F.4, subsection 4, or 99F.9, subsection 2, is amended or stricken, including any amending or striking by this Act, or a licensee of a pari-mutuel racetrack who held a valid license issued under chapter 99D as of January 1, 1994, requests a license to operate gambling games as provided in this chapter, the board of supervisors of a county in which excursion boat gambling has been approved or in which the licensee of a pari-mutuel racetrack requests a license to operate gambling games shall submit to the county electorate a proposition to approve or disapprove the conduct of gambling games on excursion gambling boats or the operation of gambling games at pari-mutuel racetracks at a special election at the earliest practicable time.

In the same statute the legislature spelled out the consequences of voter disapproval:

> If excursion boat gambling is not approved by a majority of the county electorate voting on the proposition at the election, paragraph "b" does not apply to the licenses and the commission shall cancel the licenses issued for the county within sixty days of the unfavorable referendum. If the operation of gambling games at the pari-mutuel racetrack is not approved by a majority of the county electorate voting on the proposition at the election, the commission shall not issue a license to operate gambling games at the racetrack.

Further, the legislature addressed specifically the resubmission of the proposition in the event that it was approved by a majority of the electorate:

> If the proposition to operate gambling games on an excursion gambling boat or at a racetrack enclosure is approved by a majority of the county electorate voting on the proposition, the board of supervisors shall submit the same proposition to the county electorate at the general election held in 2002 and, unless the operation of gambling games is not terminated earlier as provided in this chapter or chapter 99D, at the general election held at each subsequent eight-year interval.

Id. at § 17. Under this language the legislature insured that the proposition would be resubmitted to the voters in the event that the voters approved the proposition; however, the legislature did not address whether and when the proposition could be resubmitted to the voters in the event the voters disapproved the proposition.

In analyzing the statute we follow principles of statutory construction. When a statute enumerates conditions governing a subject matter, the courts may not impose additional conditions. *Lindstrom v. Aetna Life Ins. Co.*, 203 N.W.2d 623, 627 (Iowa 1973). The statute provides only two conditions precedent for submission of the proposition to the electorate: 1) if either section 99F.4(4) or 99F.9(2) is amended or stricken after January 1, 1994; or 2) if a licensee of a pari-mutuel racetrack who held a valid license issued under chapter 99D as of January 1, 1994, requests a license to operate gambling games.

In the event that either of these conditions is met, the board of supervisors of a county in which excursion boat gambling has been approved or in which the licensee of a pari-mutuel racetrack requests a license to operate gambling games "*shall* submit to the county electorate a proposition to approve or disapprove the conduct of gambling games on excursion gambling boats or the operation of gambling games at pari-mutuel racetracks at a special election at the earliest practicable time." 1994 Iowa Acts, ch. 1021, § 17 (emphasis added). The statute does not include any requirement that the proposition not have

been previously presented to the electorate. Accordingly, we are not free to impose this as a condition precedent to scheduling a special election.

The language of this statute, moreover, imposes a mandatory duty on the board of supervisors to call a special election when the conditions of the statute are met. Ordinarily the use of the term "shall" is mandatory and imposes a legal duty. Iowa Code § 4.1(30)(a) (1993); *Willett v. Cerro Gordo County Board of Adjustment*, 490 N.W.2d 556, 559 (Iowa 1992). In other contexts scheduling an election where statutory conditions have been met is viewed as mandatory, rather than discretionary. *See Lame et al. v. Kramer*, 259 Iowa 675, 682-83, 145 N.W.2d 597, 601-02 (1966) (mandatory duty to schedule a franchise election upon filing of proper petition); 1972 Op. Att'y Gen. 329, 331 (mandatory duty to schedule a special election for selecting a supervisor representation plan upon filing of a proper petition).

That the statute does not include any time limitation on resubmission of the issue to the electorate following disapproval is significant. The Iowa Supreme Court has ruled that "where a special election is held and an adverse decision is rendered on the proposition submitted, that adverse decision does not preclude a subsequent election on the same or similar proposition, except where a limitation is expressly provided by statute." *Iowa Power & Light Co. v. Hicks*, 228 Iowa 1085, 1090, 292 N.W. 826, 828 (1940).

In reaching this conclusion the Court specifically rejected the district court reasoning that, where a reasonable time has not elapsed and no change of circumstances has transpired from the first election, it would be an "idle formality to ask the electors to speak again on the question that had been answered fairly in the negative." *Id.* at 1087, 292 N.W. at 827. The Court contrasted statutes authorizing the franchise election in issue with statutes authorizing other elections for which time limitations on resubmission of issues to the voters were expressly provided:

> There is no limitation as to the time when or the number of times the voters might be called upon to decide the question
>
> . . . .
>
> We cannot recognize any restriction as to the latter, in this respect, without adding to the statute what it does not contain. Our duty is to execute the law, not to make it.

Id. at 1090, 292 N.W at 828, *quoting from Calhoun County v. Galbraith*, 99 U.S. 214, 219, 25 L. Ed. 410, 412 (1878).

In 1971 this office reached the same conclusion with respect to elections to propose a benefited water district. Following the defeat of a proposal on a tie vote, the Attorney General opined that the office "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." 1972 Op. Att'y Gen. 120, 121.

Indeed, in other contexts the legislature has specifically imposed time limits within which a second election on the issue may *not* be held. The same section amended by 1994 Iowa Acts, ch. 1021, Iowa Code section 99F.10, includes provision for a referendum on the conduct of gambling games on an excursion gambling boat to be initiated by petition. After this form of referendum is held, however, "another referendum requested by petition shall not be held for at least two years." Iowa Code § 99F.7(10)(a) (1993).

A variety of election statutes similarly provide time limits within which a second election may *not* be held on the same issue. *See, e.g.*, Iowa Code § 257.27 (1993) ("If the voters do not approve adoption of the instructional support program, the board shall wait at least one hundred twenty days following the election before taking action to adopt the program or resubmit the proposition."); Iowa Code § 260C.28 (1993) ("If a majority of those voting on the question at the election does not favor authorization of the board to make a levy under subsection 2, the board shall not submit the question to the voters again until twelve months have elapsed from the election."); Iowa Code § 275.22 (1993) ("If the majority of the votes cast is opposed to the proposition, a new petition describing the identical or similar boundaries shall not be filed for at least six months from the date of the election."); Iowa Code § 275.36 (1993) ("If a proposition for a change in the number of directors or in the method of election of school directors submitted to the voters under this section is rejected, it shall not be resubmitted to the voters of the district in substantially the same form within the next three years; if it is approved, no other proposal may be submitted to the voters of the district under this section within the next six years."); Iowa Code § 303.33 (1993) "If an election is held to terminate a [historical preservation district] under this section and such attempt fails, another referendum for termination of the district in question shall not take place for a period of two years."); Iowa Code § 331.207 (1993) ("A supervisor representation plan adopted at a special election shall remain in effect for at least six years.").

The statutory language itself further supports the view that there is no time limitation on resubmission of the proposition to the electorate following disapproval. In the event that the proposition is approved, the statute specifically provides that the board of supervisors "shall submit the same proposition to the county electorate at the general election held in 2002." 1994 Iowa Acts, ch. 1021, § 17. It is a well-established principle of statutory construction that "expressio unius est exclusio alterius" or the expression of one thing is the exclusion of another. *Fort Dodge v. Janvrin*, 372 N.W.2d 209, 212 (Iowa 1985). Under this principle the expression of a time limitation for resubmission in the event of approval implies the exclusion of a time limitation in the event of disapproval.

In summary, there is no statutory basis to impose a time limitation for scheduling a second special election on the question of conducting gambling games at the Waterloo Greyhound Park. Accordingly, it is the opinion of this

office that the board of supervisors of a county in which a qualified licensee of a pari-mutuel racetrack requests a license to operate gambling games is required to submit to the county electorate a proposition to approve or disapprove the operation of gambling games at pari-mutuel racetracks at a special election "at the earliest practicable time," even though the electorate recently disapproved the same proposition.

July 1, 1994

STATE JUDICIAL NOMINATING COMMISSION: Use of former congressional districts for achieving area representation on commission. Iowa Code §§ 46.1, 46.2 (1993). The federal constitutional requirement of "one person, one vote" does not apply to the process concerning appointments to the Supreme Court of Iowa. No constitutional violation thus results if the State Judicial Nominating Commission continues to be based upon Iowa's former congressional districts and not upon its current ones. (Kempkes to Neuhauser, State Representative, 7-1-94) #94-7-2(L)

July 12, 1994

STATE OFFICERS AND DEPARTMENTS: Disposition of unclaimed, seized, and forfeited property. Iowa Code §§ 80.39, 809.5, 809.13 (1993). Section 80.39 allows the Department of Public Safety to dispose of "unclaimed property" in any lawful way. Section 809.5 allows a state agency to dispose of "seized property" in any reasonable manner. Section 809.13 allows a state agency or local law enforcement agency to use "forfeited property" to enhance enforcement of the criminal laws and does not allow either agency to give it to private organizations. (Kempkes to Baker, State Representative, 7-12-94) #94-7-3(L)

July 12, 1994

CITY OFFICERS AND EMPLOYEES: Interest in public contracts. Iowa Code §§ 331.342, 362.2(15), 362.5 (1993). The general prohibition in Iowa Code section 362.5 (1993) against city officers or employees having a direct or indirect interest in a contract with a city applies even if they abstain from awarding the contract. City officers or employees have an "indirect interest" in contracts between their unemancipated minor children and the city. Persons on city boards and commissions serving other than fixed terms, but having all the other attributes of "officers," should comply with section 362.5. (Kempkes to Ritchie, Buena Vista County Attorney, 7-12-94) #94-7-4

Mr. Corwin R. Ritchie, Buena Vista County Attorney: You have requested an opinion from the Attorney General generally regarding Iowa Code sections 331.342 and 362.5 (1993), which respectively govern county and city officers or employees interested in privately contracting with their public employers. In answering your specific questions regarding cities, we have concluded

(1) persons serving on city boards or commissions may not contract with the city for more than the statutory maximum of $1,500 per year even if they do not participate in awarding the contract;

(2) the unemancipated and presumably minor children of such persons, hoping to serve as lifeguards or maintenance workers, may not contract with the city for more than $1,500 per year; and

(3) persons serving on city boards or commissions probably amount to "officers" — statutorily defined in part as those persons appointed to fixed terms — even if a city eliminates fixed terms of service for their positions.

Chapter 331 governs county officers and employees. Chapter 362 governs city officers and employees. Although the two chapters do not parallel one another word-for-word, they use similar language and undoubtedly have similar goals.

Section 331.342 broadly defines a contract as a claim against or agreement with a county and generally prohibits a county officer or employee from having a "direct or indirect interest" in a contract with the county. After setting forth nine exceptions to this general prohibition, section 331.342 then excepts otherwise-prohibited contracts for goods and services benefiting a county officer or employee if the county's purchases amount to less than $1,500 in a fiscal year. *See* Iowa Code § 331.342(10).

Section 362.2(15) provides that unless the context otherwise requires a city "officer" means a natural person elected or appointed to a fixed term and exercising some portion of city power. Section 362.5 then defines a contract in virtually the same way as section 331.342 and generally prohibits a city officer or employee from having a "direct or indirect interest" in a contract with the city. Section 362.5 sets forth twelve exceptions to this general prohibition, including one that excludes otherwise-prohibited contracts for goods and services benefiting a city officer or employee if the purchases by a city, with a population under 2,500, amount to less than $1,500 per fiscal year. Iowa Code § 362.5(10).

I.

Courts divide on the issue whether city officers have a conflict of interest under the common law when they, hoping to contract with the city, took no part in awarding the contract. 63A Am. Jur. 2d *Public Officers and Employees* § 322, at 898, § 340, at 916 (1984). In concluding such a conflict exists, some courts presume that the officers' public positions might enable them to exert undue influence upon other members of councils, boards, or commissions. *Id.* § 340, at 916; *accord* 3E. McQuillin, *Law of Municipal Corporations* § 12.136, at 630-31 (1990). Three arguments tend to suggest that section 362.5 codified this common-law reasoning.

First, the General Assembly provided a fairly lengthy list of exceptions to the general prohibition in section 362.5 and did not set forth a separate exception relating to nonparticipation. *See generally* Iowa R.App.P. 14(f)(14) (search for legislative intent focuses upon what legislature said, not what it should or might have said); *Lacina v. Maxwell*, 501 N.W.2d 531, 533 (Iowa 1993) (express mention of one thing in statute implies exclusion of others); *State v. Hopkins*, 465 N.W.2d 894, 896 (Iowa 1991) (generally impermissible to search for statutory meaning when language plain and meaning clear); *State v. Perry*, 440 N.W.2d 389, 391 (Iowa 1989) (when statutory terms explicit and fairly certain, rules of statutory

construction become inapplicable unless strict application leads to injustice, absurdity, or contradiction); *In re Estate of Mills*, 374 N.W.2d 675, 677 (Iowa 1985) (where statute enumerates certain exceptions, it is presumed that legislature intended no others); *State v. Pilcher*, 242 N.W.2d 348, 359-60 (Iowa 1976) (court may not, under guise of statutory construction, extend or enlarge statutory terms); 1976 Op. Att'y Gen. 81; 1976 Op. Att'y Gen. 551; 2A *Sutherland's Statutory Construction* § 47.11, at 165 (1992).

Second and similarly, the General Assembly certainly knew how to draft a separate exception relating to nonparticipation. In section 362.5(5), for example, the General Assembly excluded contracts from the general prohibition in which an officer or employee has an interest solely by reason of employment and his or her duties of employment "do not directly involve the procurement or preparation of any part of the contract."

Third, the savings provision in section 362.6 — upholding city contracts involving an officer's conflict of interest unless he or she casts the decisive vote on their passage — makes little sense if section 362.5 by implication already upholds such contracts if the officer never participates in awarding them. *See generally* Iowa Code § 4.6(4), (5).

We thus conclude that the general prohibition in section 362.5 against city officers or employees having a direct or indirect interest in contracts with a city applies even if they abstain from awarding those contracts

II.

The answer to your question about unemancipated minor children creating an indirect interest for a city officer or employee requires us to review the well-settled principles guiding conflicts-of-interest cases: that the applicable laws have a practical focus, that they demand complete loyalty to the public, that they encompass situations in which the mere possibility of conflict exists, and that they seek to promote confidence in the integrity and impartiality of public officers and employees. *Bluffs Development Corp. v. Board of Adjustment*, 499 N.W.2d 12, 15 (Iowa 1993); *Borlin v. City of Council Bluffs*, 338 N.W.2d 146, 150 (Iowa 1983); *Wilson v. Iowa City*, 165 N.W.2d 813, 822-23 (Iowa 1969); *Bay v. Davidson*, 133 Iowa 688, 111 N.W. 25, 26 (1907); 10A McQuillin, *supra*, § 29.97, at 13-22; 63A Am. Jur. 2d, *supra*, § 322, at 898-99.

Courts divide on the issue whether city officers or employees have a conflict under the common law when their immediate family members contract with the city. *See* 2M. Libonati & J. Martinez, *Local Government Law* § 11.10, at 56 (1991); 63A Am. Jur. 2d, *supra*, § 341, at 916-17; Annot., "Public Contracts — Interest of Officer," 74 A.L.R. 792 (1931). The Supreme Court of Iowa has recently discussed the issue whether, under the common law, the adult children of a city officer or employee may properly contract with the city. Although the court broadly stated that "family relationships" alone cannot create conflicts of interest under the common law, it narrowly held that a member of a county board who voted against the issuance of a landfill permit had no conflict of

interest merely because his adult son, a maintenance worker for a city near the landfill, opposed issuance of the permit. *Bluffs Development Corp. v. Board of Adjustment*, 499 N.W.2d at 17; *see Wayman v. City of Cherokee*, 204 Iowa 675, 215 N.W. 655, 656 (1927) (question of fact whether city council member, in business with adult son, had conflict of interest under common law when their contract not part of son's contract with city).

Our office has similarly interpreted section 362.5 which, unlike the common law, encompasses "indirect interests", as it applies to a contract involving an adult child. *See* 1980 Op. Att'y Gen. 300. We observed broadly that a "mere familial relationship" did not in itself present a conflict of interest, but added that "an actual financial or beneficial interest or condition which was outrageous or unjustly favorable to the family member in the award of the contract" might present one. From the particular facts presented to us, we concluded that a city council member did not have any financial or beneficial interest in the employment of his adult child as a policeman.

Whether a conflict of interest arises under section 362.5 through the unemancipated minor children of city officers or employees begins with the common meaning of its key words. *See generally* Iowa Code §§ 4.1(38), 4.2. "Indirect" means not immediate or direct, but roundabout or secondary. *Webster's New World Dictionary* 716 (1976). "Interest" means a share in something or an advantage or benefit. *Id.* at 734.

Our office has concluded these words meant that the existence of a marital relationship does create a conflict for a public officer. 1980 Op. Att'y Gen. 580; *see* 1976 Op. Att'y Gen. 551; *but see* 1974 Op. Att'y Gen. 127; 1972 Op. Att'y Gen. 338; 1966 Op. Att'y Gen. 38. *Cf.* 1924 Op. Att'y Gen. 238 (nepotism statute, now Iowa Code § 71.1, generally precludes parole board from employing member's daughter to work as board's stenographer). Thus, when the spouse of a city council member worked at and owned stock in an engineering firm performing services for the city, the city council member had an indirect interest in the underlying contracts:

> In other words, because the engineering firm would profit from a contract with the city and the spouse of the city official would then own six percent . . . of a more profitable corporation, the city official will also benefit from her spouse's share of a more profitable corporation. In this case the city official's interest would be termed an indirect one, as it is not possible nor is it necessary to be able to directly trace the profit from the corporation to the spouse's share of stock and then to the city official's benefit. *It is enough that because of the marital relationship this city official will be in a better financial position as a result of the awarding of the contract.*

1980 Op. Att'y Gen. 580 (emphasis added).

The General Assembly has never reacted to this opinion by changing chapter

362. *See State Attorneys General: Powers and Responsibilities* 74 (L. Ross, ed. 1990) (longstanding practice consistent with opinion from Attorney General evidences lack of legislative concern about its conclusion). *Cf. Henessey v. Cedar Rapids Community School Dist.*, 375 N.W.2d 270, 273 (Iowa 1985) (administrative interpretation of statute entitled to weight, particularly when legislature refuses to intervene over a long period of time). Recently, however, the General Assembly did pass a new law governing gift-giving to public officials. It generally prohibited persons from making gifts to public officials and their "immediate family members," which, according to the statutory definition, included spouses and minor children. 1992 Acts, 74th G.A., ch. 1228, § 9, at 511 (codified at Iowa Code §§ 68B.2(8), 68B.7B(1)).

In view of the foregoing, we conclude that under section 362.5 city officers or employees have indirect interests in contracts with the city involving their unemancipated minor children. Such an interpretation eliminates any suspicion of favoritism and furthers perhaps the most important policy underlying conflicts-of-interest laws: to maintain public confidence in government. 63A Am. Jur. 2d, *supra*, § 322, at 898-99. To the city officer or employee, little if any financial difference certainly exists between a spouse contracting with the city and an unemancipated minor child contracting with the city. In both instances the city officer or employee has a financial interest in a very real sense with the awarding of the contract. *Cf.* Iowa Code of Judicial Conduct § 3(D)(1) (1989) (judge disqualified from proceeding in which the judge's impartiality "might reasonably be questioned," such as when the judge "knows that the judge's . . . minor child residing in the judge's household has a financial interest in the subject matter in controversy").

III.

The question whether persons on city boards and commissions serving without fixed terms may contract as they please with the city focuses, at the outset, upon the language of section 362.2(15). It defines a city "officer" as "a natural person elected or appointed to a fixed term" and, more important, "exercising some portion of the power of a city." Technically, then, persons serving without fixed terms do not come within the statutory definition of "officers" and, accordingly, their contracts with a city apparently do not come within the scope of section 362.5. At least four arguments, however, suggest that they should not contract with their cities beyond the limits of section 362.5.

First, the General Assembly clearly intended that its definition of a city officer in section 362.2(15) need not apply in all circumstances: it emphasized in the opening sentence to section 362.2 that this specific definition applied "unless the context otherwise requires." Thus, for the narrow purpose of section 362.5, "officer" might encompass persons having all the attributes of statutorily defined officers except for their serving fixed terms, particularly since no reason exists for treating them differently for purposes of conflicts-of-interest laws than those persons statutorily defined as officers. *See* 2 Libonati & Martinez, *supra*, § 11.10, at 56 (courts have gone beyond letter to spirit of statutes governing conflicts of interest). *See generally State v. Taylor*, 260 Iowa 634, 144 N.W.2d 289, 292 (1966) (identifying characteristics of "public office" under

common law; serving fixed term only one of several indicia). Indeed, the general prohibition against contracts between city officers and cities cannot be evaded by "mere device or subterfuge," 10A McQuillin, *supra*, § 29.97, at 13, or by other actions that would "wholly circumvent and defeat the purpose of the statute," *Peet v. Leinbaugh*, 180 Iowa 937, 164 N.W. 127, 129 (1917). *Cf.* 63A Am. Jur. 2d, *supra*, § 30, at 686-87 (person who has acted as public officer estopped from denying he occupied office).

Second and similarly, "fixed" has many meanings; its specific meaning will depend upon the purpose of the particular statute. *Watson v. Southwest Messenger Press, Inc.*, 299 N.E.2d 409, 413 (Ill. App. 1973); *Empey v. Yost*, 44 P.2d 774, 775 (Wash. 1935). *See generally* Iowa Code §§ 4.1(38), 4.2, 4.4(5), 4.6(1). It need not signify a specific period of time, but only some degree of constancy. *State v. Blecha & Owen Transfer*, 213 Iowa 1269, 239 N.W. 125, 128 (1931); Op. Att'y Gen. #94-5-6(L). *See generally* 63A Am. Jur. 2d, *supra*, § 6, at 670 (person "may be none the less a public officer because his term is not definitely established").

Third, persons serving on city boards or commissions without fixed terms could still fall within the scope of section 362.5 as "employees," which the General Assembly did not specifically define. *Cf.* Iowa Code § 85.61 (for purposes of workers compensation statutes, employee includes any elected or appointed official); Iowa Code § 25A.2(3) (for purposes of tort claims statutes, employee includes officers, agents, employees, and persons acting on behalf of State or its agencies in any official capacity); *Midwest Monument Corp. v. Stephens*, 291 N.W.2d 896, 903 (Iowa 1980) (for purposes of "blue sky" statutes, employee includes corporate officers and directors). Public policy tends to suggest an all-inclusive definition of the word. *See State ex rel. Cochran v. Zeigler*, 199 Iowa 392, 202 N.W. 94, 95 (1925) (purpose of conflicts-of-interest statute to conserve and protect the public interest by securing honesty and efficiency in administering public business).

Fourth, even if persons serving on city boards or commissions without fixed terms do not amount to "officers" or "employees" under section 362.5, this circumstance does not necessarily mean they may contract as they please with a city. The common law may rein them in: the Supreme Court of Iowa long ago rejected as "wholly untenable" the argument that conflicts-of-interest statutes displaced the common law. *Bay v. Davidson*, 111 N.W. at 27.

IV.

In summary, the general prohibition in section 362.5 against city officers or employees contracting with a city applies even if they abstain from awarding the contract; city officers or employees have indirect interests in contracts between their unemancipated minor children and the city; and persons on city boards or commissions serving without fixed terms, but having the attributes of officers, should comply with section 362.5.

AUGUST 1994

August 1, 1994

CHILD ABUSE INFORMATION: Sealing and expunging by agents; redissemination to other states. Iowa Code §§ 235A.13, 235A.15(2)(e)(4) and 235A.18 (1993). All information maintained by child protective centers as agents for the Department of Human Services is child abuse information and subject to the provisions of section 235A.18. Medical records generated by a contracting physician at the request of the centers and maintained in the physician's files are not child abuse information. All information contained in founded and undetermined child abuse files of the Department is legally accessible to child protection agencies in other states. (Miller-Todd to Palmer, Director, Iowa Department of Human Services, 8-1-94) #94-8-1(L)

August 1, 1994

MUNICIPALITIES: Conflicts of interest; residency requirement. Iowa Code §§ 47.4, 69.2(3) and 384.51 (1993). An engineer whose partnership will be awarded a contract to design and supervise construction of a street has a common law conflict of interests which disqualifies the engineer as a city council member from voting on the project. A city council member who owns property in an area to be specially assessed for a public improvement may participate in the project proceedings pursuant to Iowa Code section 384.51. The council member may not, however, become involved on behalf of the city in negotiations to purchase the property for the improvement. A vacancy is created on the city council if a council member ceases to be a resident of the ward represented. (Ferree to Tinsman, State Senator, 8-1-94) #94-8-2

The Honorable Maggie Tinsman, State Senator: You have asked for an Attorney General's opinion addressing potential conflicts of interests of city council members. The potential conflicts relate to a proposed city street construction project which will be funded, in part, by special assessments. One council member is a partner in an engineering firm which, you state, would likely design and supervise construction of the street. Another member owns property abutting the improvement, and part of the property would need to be acquired to build it. In your request you seek guidance on whether the council members should participate in actions concerning the project. You also ask if a council member may serve out a term if the member moves from the ward from which elected because their property is taken for the project.

I.

Conflicts of interests in Iowa are defined by statute and by common law principles. 1982 Op. Att'y Gen. 220, 221. According to Iowa Code section 362.5:

> A city officer or employee shall not 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 the officer's or employee's city. A contract entered into in violation of this section is void.

This statute, however, includes several exceptions to the general ban against city officers or employees having an interest in municipal contracts. One exception is found in Iowa Code section 362.5(5), which permits a city officer or employee to have an interest in:

> Contracts in which a city officer or employee has an interest solely by reason of employment, or a stock interest of the kind described in subsection 9, or both, if the contract is for professional services not customarily awarded by competitive bid, if the remuneration of employment will not be directly affected as a result of the contract, and if the duties of employment do not directly involve the procurement or preparation of any part of the contract.

This subsection excludes from the statutory ban on interest in municipal contracts any contract in which a city officer or employee has an interest solely due to employment or a stock interest as defined by statute. The availability of that exception, however, is conditioned on whether the contract is for professional services which are not customarily bid, whether the remuneration of employment will be directly affected as a result of the contract, and whether the duties of the officer or employee directly involve procuring or preparing the contract.

We are told that the engineer in question has filed an affidavit of compliance with section 362.5(5). If the content of the affidavit satisfies the conditions of section 362.5(5), then the city council member does not have a statutory conflict of interest which would render the contract void.

As your request suggests, however, even though the engineer's firm may not be prohibited from contracting with the city, there remains the question of whether or not he may participate in council actions on the project, as well as on other matters possibly affecting the availability of funding for this project. *See* Iowa Code § 362.6. In contrast to the foregoing purely statutory analysis, the approach taken by the courts on conflict of interest questions is demonstrated in the case of *Wilson v. Iowa City*, 165 N.W.2d 813 (Iowa 1969).

In *Wilson*, Hickerson was a member of the city council as well as a key employee of a property owner in an urban renewal area. The question was whether this circumstance created a potential conflict voiding certain council actions on the urban renewal project. The court held it did, stating:

> The employer-employee relationship has always been recognized as one source of possible conflict of interest. It would perhaps be more accurate to describe this, as some writers have done, as a conflict of duties rather than conflict of interest. When one is committed to give loyalty and dedication of effort to both his public office and his private employer, when the interests of those two may conflict, one is faced with pressures and choices to which no public servant should be unnecessarily exposed.

. . .

> In reaching this conclusion we state there is no evidence Mr. Hickerson was actuated by anything except his sincere convictions nor that his motives were in any way selfish or contrary to the welfare of the public. We can only repeat it is the possibility of such things which makes the rule applicable here.

Id. at 823.

The engineer that you describe has a similar conflict. Partners occupy fiduciary relationships toward each other. *Blake v. Huffman*, 248 Iowa 938, 946, 83 N.W.2d 460, 464 (1957). Clearly, his duties to the public and to his partnership may conflict, for council approval of the project will mean work for his partnership. It matters not whether a public official places one duty above the other, "it is the potential for conflict of interest which the law desires to avoid." *Wilson*, 165 N.W.2d at 822.

Several of the questions you pose concern the extent to which the council member may participate in decisions related to the road extension project other than the ultimate vote to decide whether to fund the project. To the extent that a conflict exists, participation in the making of a contract by a public official or employee is not limited to the final contract decision. *Stigall v. City of Loft*, 375 P.2d 289, 291 (Cal. 1962). The deliberation, negotiation, discussions, reasoning, planning and *quid pro quo* which precedes the final decision are also deemed to be a part of the making of an agreement. *Id.* To limit the application of a conflict to persons who participate only in the final formation of a contract would permit those who have a conflict to engage in the preliminary, but often crucial stages of a transaction, and then to insulate themselves from the conflict by withdrawing from the final decision. *U.S. v. Mississippi Valley Co.*, 364 U.S. 520, 81 S. Ct. 294, 5 L. Ed. 2d. 268 (1961). Prior opinions of this office have concurred in that view. 1982 Op. Att'y Gen. 266 (advised a member of an Area Education Association to abstain from participation in a decision regarding a student if those decisions impact on whether the student will be eligible to continue receiving services purchased from that board member's employer); 1978 Op. Att'y Gen. 11 (concluded that a municipal housing agency board member should not participate in any action by the agency affecting property owned by the member's spouse when the property might be included in a rent subsidy program operated by the agency). *See also* Iowa Code § 15A.2 (1993) (prohibits a municipal officer or employee from participating "in the decision-making process" pertaining to the use of public funds for economic development projects).

II.

Your next question has to do with a city council member whose property abuts, and some of which may even be taken for, the improvement. That situation is somewhat different from the engineer's.

Iowa Code section 384.51 provides in part "ownership of property to be assessed by an improvement does not, except for fraud or bad faith, disqualify a council member from voting on any measure." We have found no case or previous Attorney General opinion addressing this provision. Therefore, we must as a matter of first impression determine legislative intent. *John Deere Dubuque Works v. Weyant*, 442 N.W.2d 101, 104 (Iowa 1989) ("When interpreting a statute, our ultimate goal is to ascertain and give effect to the intention of the legislature."). Whether the council member may participate in actions concerning the public improvement, including the valuation of the member's own property, hinges on the definition of "measure." Initially, however, it is worthwhile to briefly describe the procedure by which the cost of a public improvement is specially assessed against benefitted property. Iowa Code §§ 384.37-384.79.

The process of constructing a public improvement to be paid for by special assessments is begun either upon the city's own initiative or upon the petition of all affected property owners. Iowa Code §§ 384.38 and 384.41. To assist in making an initial evaluation of the project, the city council must arrange for engineering services to prepare plats, schedules, estimates of cost, plans, and specifications, and to supervise construction of the proposed improvement. Iowa Code § 384.42(1). The council must also adopt a preliminary resolution containing a description of the proposed improvement, the location of the improvement, an order to the engineer, a description of the properties believed to be specially benefited by the improvement, a statement of the proportion of the total cost to be assessed, and a name for the improvement. Iowa Code § 384.42(2)(3). Upon completion of the plat, the city council next determines the fair market value of the properties to be assessed. Iowa Code § 384.46. A special assessment may not exceed 25 percent of the value of the property as shown on the schedule approved by the council. Iowa Code § 384.62. Once the engineer's and council's work is complete, the council may amend any of the items or adopt them as filed. Iowa Code § 384.48. If at that stage the council determines the work should proceed, it shall propose a resolution of necessity describing the improvement, setting a hearing on the proposed improvement and stating that the relevant information regarding the project is on file in the clerk's office. Iowa Code § 384.49. The council, after hearing all objections and endorsements to the project and assessments, may adopt or amend and adopt the proposed resolution of necessity. Iowa Code § 384.51. Adoption of a proposed resolution of necessity requires, in all instances, a super majority vote of the council. "The adoption of a resolution of necessity is a legislative determination that the improvement is expedient and proper and that property assessed will be specially benefited by the improvement and this determination of the council is conclusive." Iowa Code § 384.51. When the project is completed and accepted, the council must, by resolution, adopt a final assessment schedule. Iowa Code §§ 384.58-.60. For a general description of the special assessment process *see Slater v. Incorporated Town of Adel*, 324 N.W.2d 482 (Iowa 1982), and cases cited therein.

We now return to the definition of measure. That term is defined in Iowa Code section 362.2(13) as "an ordinance, amendment, resolution or motion." Resolution or a motion "means a council statement of policy or a council order for action to be taken . . . ." Iowa Code § 362.2(21). As used in the context

of the procedure for imposing special assessments, "measure" refers to broad or general actions pertaining to the project or all those located in the area to be assessed. These are legislative actions affecting numerous properties and citizens.

The preliminary resolution and the resolution of necessity are clearly within the definition of a measure. We believe that the legislature had good reasons to qualify council members who are property owners within the assessment district to vote on these matters. First, because of the super majority requirements it would be exceedingly difficult to adopt a resolution of necessity if a council member is disqualified from participating. Second, the council member is only one of a larger group affected by the action. The burdens and benefits of the project are spread generally across the assessment area. Third, to the extent that there are special benefits to properties within the assessment area there is a concomitant special assessment to pay for those benefits. The council member must accept the burdens as well as the benefits. Iowa Code § 384.61; *City of Clive v. Iowa Concrete Block and Material*, 298 N.W.2d 585 (Iowa 1980).

We need now consider whether a council member may participate in valuing that member's own property and determining the benefits conferred on it by the project. While this may at first seem more problematic, we believe the legislature concluded that the potential conflicts were acceptable for all the reasons previously stated. In addition, it would lead to an incongruous result were the council member prohibited from participating in valuing her own property under Iowa Code section 384.46 while passing on the same matter when adopting the resolution of necessity later in the process. Iowa Code §§ 384.48-.51. In construing legislation we, like the courts, attempt to avoid absurd results. *John Deere Dubuque Works v. Weyant*, 442 N.W.2d 101, 104 (Iowa 1989).

The result we reach appears to be in accord with the majority of authorities.

> A public official is not, because of his office, ineligible to be an assessor, and the great weight of authority holds that the ownership of property in the city, and even in the district affected, does not disqualify, although in the latter situation there is a minority view.

2 Antieu, Municipal Corporation Law § 14.17 (1987).

> The overwhelming majority of courts which have considered this issue have held that the ownership of property in a local improvement district (LID) does not disqualify a council member from participating in proceedings to form a LID or assess property levies.

Simmons v. City of Moscow, 720 P.2d 197, 201 (Idaho 1986).

III.

Next, you state that property, including the residence, of a council member may be needed for the completion of the project. You then ask if the council member should be involved in discussions regarding the acquisition of the property.

The city and the property owner are acting as buyer and seller in the transaction. The duty to the public as council person is to represent the best position of the buyer. As owner of the property, the council member is its seller. These positions undoubtedly have the potential to be antagonistic. One cannot represent them both, just as one cannot objectively and dispassionately negotiate with oneself. The temptation, though not exercised, to place self-interest above the faithful discharge of public duty, is too great to tolerate. *Wilson v. Iowa City*, 165 N.W.2d 813, 819 (Iowa 1969). This same rationale precludes the council from entering into contracts with its members. Iowa Code § 362.5. The council member should not participate on behalf of the city in discussions or negotiations concerning the purchase of the property.

IV.

Finally, you ask whether the council member, if forced to move from the represented ward because the residence is taken for the project, may serve out the member's unexpired term. We have determined in prior opinions that, under circumstances in which residence is imposed as a qualification to hold office, violation of the requirement creates a vacancy in the office. *See* 1980 Op. Att'y Gen. 494, 495; 1976 Op. Att'y Gen. 730, 730-31; 1976 Op. Att'y Gen. 123; 1972 Op. Att'y Gen. 18, 19. In each of these opinions we determined that vacancies resulted under the current or earlier versions of Iowa Code section 69.2 based upon residency requirements contained in the respective statute creating or defining the office in question. For example, in 1972 Op. Att'y Gen. 18, we held, for a school board director elected to represent one of the director-districts for which residence was a requirement, that later moving from the director-district to a different part of the same school district created a vacancy under section 69.2. In that opinion, the director-district statute, Iowa Code section 275.12(2) (1971) (now section 275.12(2)(b)), required residency in the director-district. Likewise, in 1976 Op. Att'y Gen. 123, we opined that a county supervisor elected at-large in a county where members of the board are required to reside in designated districts (*see* Iowa Code section 331.206(c)), is elected "for" the district and a vacancy is created under section 69.2 if the supervisor moves from that district during the term of office.

We have previously discussed the creation of a vacancy under section 69.2 where a ward elected city council member moves from their ward to another part of the city. In 1976 Op. Att'y Gen. 730, we opined that "If a city council member elected from a ward moves out of that ward a vacancy is immediately created, . . ." That opinion addressed primarily the process for filling such a vacancy and did not go into any detailed analysis for the conclusion quoted above. However, based upon the analysis in the other opinions cited above, we believe it to be the correct conclusion.

Following the same line of reasoning in these prior opinions, we look to both section 69.2 and to the underlying statute defining ward-elected council positions to determine whether residency is a requirement for holding office. We assume your question relates to a council member elected from a ward in a mayor-council form of city government under Iowa Code sections 372.4 and 372.13(11). Specifically, section 372.13(11) provides for four options for the election of council members, as follows:

> Eligible electors of a city may petition for one of the following council representation plans:
>
> a. Election at large without ward residence requirements for the members.
>
> b. Election at large but with equal-population ward residence requirements for the members.
>
> c. Election from single-member, equal-population wards, in which the electors of each ward shall elect one member who must reside in that ward.
>
> d. Election of a specified number of members at large and a specified number of members from single-member, equal-population wards.

Iowa Code § 372.13(11)(a)-(d) (1993). The last three options contain a residency requirement. Also, section 372.4 authorizes a six member council where two are at-large and four are elected "from each of four wards, . . ." Assuming the council member that you refer to has been elected under any of the forms of city council organization which require ward residency, as in sections 372.3 or 372.13(11), then a vacancy exists when the member no longer resides in the ward.

Several factors may be considered in determining whether the council member remains a resident of the ward if forced to move as in your example. *Paulson v. Forest City Community School District*, 238 N.W.2d 344 (Iowa 1976); *Bryan v. Cattell*, 15 Iowa 538, 553 (1864). One factor is whether the member registers to vote in a different ward. Iowa Code § 47.4. One may also consider whether the member acquires replacement housing inside or outside the ward, whether the absence from the ward appears, by actions taken all together, to be lasting or temporary, and any declarations of intent to change residence permanently. Illustrative cases include *State ex rel. Killpack v. Hemsworth*, 112 Iowa 1, 83 N.W. 728 (1900) (Justice of the peace held still to be resident of town although he left for two months to work elsewhere. A vacancy in the office was not created by his absence.); *Deitz v. City of Madora*, 333 N.W.2d 702 (N.D. 1983) (Mayor of town held to be resident of city where he was active in civic matters, had home for business purposes and declared intent to be legal resident of city, although he also owned and resided in a home in another town where his children lived and attended school.); *Independent School District*

of Manning v. Miller, 189 Iowa 123, 178 N.W. 323 (1920) (Treasurer of school board held to have changed residence when he sold his business, declared intention to move and moved. Office of treasurer became vacant when he ceased to be a resident of the school district).

We cannot in this opinion determine all of the facts that may impact upon a particular instance where a council member involuntarily moves from their ward. Any claim of continued residency, absent a specific place of residence, would have to be based on facts indicating a clear intent to return to the ward as soon as arrangements can be made to do so. All of the factors mentioned above should be considered in determining whether ward residency has been terminated in the situation that you describe.

CONCLUSION

In sum, an engineer whose partnership will be awarded a contract to design and supervise construction of a street has a conflict of interest which disqualifies the engineer as a city council member from voting on the project. A city council member who owns property in the area to be specially assessed may participate in the project proceedings pursuant to Iowa Code section 384.51. The member may not, however, become involved on behalf of the city in negotiations to purchase their own property for the improvement. A vacancy is created on the city council if a council member ceases to be a resident of the ward represented.

August 23, 1994

COUNTY MEDICAL EXAMINERS: Status as county officers; insurance coverage; fees and expenses; signature on death certificates. Iowa Code §§ 97B.41(8)(b)(3), 144.28, 331.301(11), 331.801, 331.802, 331.803, 670.8 (1993). County medical examiners are not "employees" who may receive State retirement benefits, but are "officers" the county must defend in tort cases involving their official duties; counties may purchase insurance coverage for their medical examiners in lieu of defending and indemnifying them against losses from tort claims; county medical examiners may, under certain circumstances, charge a fee for certifying the cause of death even though they forego viewing the deceased; the county in which a death occurred does not necessarily become responsible for its medical examiner's fee and expenses incurred in conducting a preliminary investigation or performing an autopsy; and physicians other than county medical examiners may sign a death certificate only if the death does not affect the public interest. (Kempkes to Welsh, State Senator, 8-23-94) #94-8-3(L)

August 23, 1994

ELECTIONS; MUNICIPALITIES: City offices. Iowa Const. art. III, § 38A; Iowa Code § 372.4 (1993). A city ordinance providing for the election of municipal officials, unless specifically authorized by statute, would be preempted by the state's election laws. In its regulation of elections, the legislature has enacted a broad and detailed scheme which would preclude local regulation in this area. (Walding to Baxter, Secretary of State, 8-23-94) #94-8-4

The Honorable Elaine Baxter, Secretary of State: You have requested an opinion of the Attorney General regarding the authority of a city to provide for the election of city offices. You note, by way of example, that many cities with the mayor-council form of government provide for the election of city treasurers and that some cities include park boards on the ballot. Accordingly, we have been asked whether "cities have authority to adopt ordinances or city charters which require the election of officers which are not specified in the Code of Iowa."

In Iowa, cities are governed by any of six forms of government. Iowa Code § 372.1 (1993). The six forms are mayor-council, commission, council-manager-at-large, council-manager-ward, home rule charter and special charter. Iowa Code §§ 372.1(1) through (6). In turn, each separate form proscribes different methods of governing a municipality, including the election of officers. See Iowa Code §§ 372.4 through 372.12.

I. THE HOME RULE AMENDMENT.

At the outset, we note that the central issue presented is whether Iowa law preempts a city from providing for the election of municipal officers not authorized by statute. A response to that question requires an examination of Iowa's Home Rule Amendment.

Pursuant to Article III, section 38A of the Iowa Constitution, cities in Iowa exercise home rule powers. The Home Rule Amendment, in part, provides:

> 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.

Iowa Const. art. III, § 38A. Thus, the Home Rule Amendment grants cities home rule power to enact ordinances "not inconsistent with the laws of the general assembly." *See Kunkle Water & Electric, Inc. v. City of Prescott*, 347 N.W.2d 648, 656 (Iowa 1984); 1992 Op. Att'y Gen. 8 (#91-3-1(L)).

The Iowa Supreme Court has set forth several principles to guide a determination whether a local ordinance is preempted by state law. According to the Iowa Supreme Court:

> It is a well established principle that municipal governments may not undertake to legislate those matters which the legislative branch of state government has preserved to itself. There are alternative ways for a state legislature to show such a preservation. One is of course by specific expression in a statute. Another is . . . by covering a subject by statutes in such a manner as to demonstrate a legislative intention that the field is preempted by state law.

City of Council Bluffs v. Cain, 342 N.W.2d 810, 812 (Iowa 1983).

A recent opinion of the Attorney General examined the judicial guidelines for determining whether Iowa law preempts cities and counties from enacting pesticide regulations. 1992 Op. Att'y Gen. 68. In reviewing limitations on a political subdivision's home rule powers, we observed:

> Both of the constitutional provisions granting home rule powers to cities and counties provide that local governments may not enact ordinances "inconsistent" with the laws of the general assembly. When an ordinance is inconsistent with state law, it has been preempted. In Iowa the test as to whether an ordinance is inconsistent is whether the ordinance prohibits an act permitted by statute, or permits an act prohibited by statute. *City of Council Bluffs v. Cain*, 382 N.W.2d at 812. A municipal ordinance also is preempted by state law when the ordinance invades an area of law reserved by the legislature to itself. *City of Des Moines v. Gruen*, 457 N.W.2d at 342.

1992 Op. Att'y Gen. 68, 70. Accordingly, a city, under home rule, is preempted from enacting an ordinance if the field has been reserved by state law.

II. ELECTION LAWS.

The focus of our review, therefore, is whether the area of elections has been reserved by state law. Guidance on this issue can be gained from prior opinions of the Attorney General.

In a 1992 opinion, we responded to several questions you posed concerning the authority of a city to hold elections on matters that were not specifically authorized or required by state law. 1992 Op. Att'y Gen. 169. In reliance on earlier opinions, we concluded that "elections may only be held on matters which are specifically authorized by the Constitution or statutes of the state." *Id.* at 170. In reaching that conclusion, we observed:

> The central theme of all of these prior opinions is that elections may only be called pursuant to the authority of state law or constitution. No independent authority to specify questions on the ballot or to conduct elections not required or authorized by law is granted to any city, county or school district.

Id. at 171. The state's election laws, according to the prior opinions, are comprehensive and detailed in providing the method of conducting an election in Iowa, including the designation of which offices are elective. In a 1972 opinion, for instance, the Attorney General stated:

> All government elections in Iowa are authorized by statute. Since our election laws are so carefully detailed and prescribed, I must

> conclude that in the absence of constitutional or statutory authority, such submissions to the voters are unlawful.

[Footnotes omitted.] 1972 Op. Att'y Gen. 263, 264. The general assembly may cover a subject in such a manner as to manifest an intention that the field has been occupied. *City of Council Bluffs v. Cain*, 342 N.W.2d 810, 812 (Iowa 1983); 1992 Op. Att'y Gen. 68, 71. The long-standing view of the Attorney General's office has been that political subdivisions are preempted from enacting local ordinances in the area of elections.

It is the policy of the Attorney General's office not to reverse opinions unless determined to be "clearly erroneous". 1992 Op. Att'y Gen 169, 171, *citing* 1980 Op. Att'y Gen. 107, 108. We cannot conclude that our 1992 opinion was "clearly erroneous." Accordingly, it is our opinion that a city ordinance providing for the election of municipal officials, unless specifically authorized by statute, would be preempted by the state's election laws. In its regulation of elections, the legislature has enacted a broad and detailed scheme which would preclude local regulation in this area.

We note that our conclusion is consistent with public policy. A contrary result would mean that a city, by ordinance, could provide for the election of all public officers not specifically prohibited by statute; as a consequence, the list of candidates certified to the county auditor and the printed ballot for municipal elections could become unmanageable. It is for this reason, in part, that the legislature has determined that the election of local public officials should be established by statute rather than by ordinance.

Applying our conclusion and the *Cain* analysis to Iowa Code ch. 372, a city ordinance cannot prohibit the election of a city office required by state law. Equally, a city is precluded from enacting an ordinance permitting an election of a city office which is prohibited by state statute. An example where a state statute requires an election is found under the mayor-council form of government. According to section 372.4: "A city governed by the mayor-council form has a mayor and five council members elected at large . . . ." A city under the mayor-council form, therefore, may not enact an ordinance providing for the appointment of a mayor or the council; an ordinance providing for the appointment of the mayor or council would pose an irreconcilable conflict with section 372.4. Thus, where a state statute provides for the election of a city office, a city is preempted from enacting an ordinance providing for the appointment of the position.

An example of a state statute prohibiting the election of a city office is found under the council-manager forms. *See* Iowa Code §§ 372.6 and 372.7. A city with either of the two council-manager forms is preempted from enacting an ordinance providing for the election of a city treasurer. Pursuant to Iowa Code section 372.8(2)(n): "The city manager shall . . . [a]ppoint a treasurer subject to the approval of the council." A city, accordingly, is preempted from enacting an ordinance providing for the election of a city office where state law provides for an alternative method of selection.

Finally, the example provided in your request regarding the method of designating a city treasurer under the mayor-council form of government falls into this latter category. Section 372.4, in pertinent part, provides that: "Other officers must be selected as directed by the council." Because the legislature used the term "selected", rather than "elected", we believe that the city treasurer may not be elected in such cities. In construing a statute, statutory language is to be given its usual and ordinary meaning unless it would frustrate the intent of the legislature. *State v. Bartusek*, 383 N.W.2d 582, 583 (Iowa 1986). Also, we note that recent legislation to amend Iowa's election laws failed to include a provision that would have amended section 372.4 to provide: "The mayor may appoint a city treasurer or the council may, by ordinance, provide for the election of the treasurer." Legislative history can be considered to determine legislative intent. *De More by De More v. Dieters*, 334 N.W.2d 734, 737 (Iowa 1983). Moreover, the striking of a provision before enactment of a statute is an indication the statute should not be construed to include the deleted language. *Chelsea Theatre Corp. v. City of Burlington*, 258 N.W.2d 372, 374 (Iowa 1977). Thus, an ordinance providing for the election of a city treasurer under the mayor-council form would be irreconcilable with section 372.4.

III. CONCLUSION.

In summary, a city ordinance providing for the election of municipal officials, unless specifically authorized by statute, would be preempted by the state's election laws. In its regulation of elections, the legislature has enacted a broad and detailed scheme which would preclude local regulation in this area.

August 23, 1994

TAXATION: Sales of Homesteads to Collect Taxes. Iowa Code §§ 422.26 and 561.16 (1993). Section 422.26 is a "special declaration of statute to the contrary" under section 561.16 so that the Iowa Department of Revenue and Finance is authorized to seek the sale of homesteads to effect collection of any taxes collected pursuant to section 422.26. (Hardy to Bair, Director of Revenue, 8-23-94) #94-8-5(L)

August 29, 1994

ELECTIONS; GAMBLING: Special elections; Excursion Boat Gambling. Iowa Code § 99F.7(10) (Supp. 1993); 1994 Iowa Acts, ch. 1021, § 17. Iowa Code section 99F.7(10)(c), as amended by 1994 Iowa Acts, ch. 1021, § 17, requires the supervisors of a county which has approved excursion boat gambling to submit the question of approval of excursion boat gambling to the electorate of the county even if there is currently no excursion boat licensed to operate in the county. Action must be taken by the supervisors to call the election as quickly as the election process will allow. (Scase to Baxter, Secretary of State, 8-29-94) #94-8-6(L)

SEPTEMBER 1994

September 12, 1994

APPROPRIATIONS: Cash Reserve Fund; Economic Emergency Fund; GAAP Deficit Reduction Account; Income Tax Rate Tables. Iowa Code §§ 8.55, 8.57, 8.58, 422.4, 422.5, 422.21. Surplus existing in the general fund was appropriated on June 30, 1994, for purposes of section 8.57. Section 8.58 limits moneys appropriated under section 8.57 from being considered in the application of the automatic downward adjustment of the personal income tax rate table under chapter 422 until statutory maximums are reached in the Cash Reserve Fund, GAAP Deficit Reduction Account and the Economic Emergency Fund. The Director of the Department of Management, not the Attorney General, must determine whether, in fact, there was an "unobligated balance" of at least $60 million in the general fund on June 30, 1994. (Pottorff to Rife, State Senator, 9-12-94) #94-9-1

The Honorable Jack Rife, Senate Minority Leader: You have requested an opinion of the Attorney General concerning resolution of a potential conflict between Iowa Code section 8.57, which appropriates a general fund surplus into various accounts for purposes of eliminating the deficit under Generally Accepted Accounting Principles (GAAP) and accumulating reserve and emergency funds, and section 422.4, which requires an automatic downward adjustment of personal income rate tables under certain circumstances when there is a surplus in the general fund.

You point out that section 8.57 establishes a procedure for making appropriations from any general fund surplus to the Cash Reserve Fund, GAAP Deficit Reduction Account and the Economic Emergency Fund. At the same time you state that section 422.4 provides for the annual automatic downward adjustment of personal income rate tables in any year in which the "unobligated general fund balance" on June 30 is $60 million or more. Section 8.58, however, expressly limits moneys appropriated under section 8.57 from being considered "in the application of any formula, index, or other statutory triggering mechanism which would affect appropriations, payments, or taxation rates, contrary provisions of the Code notwithstanding."

With respect to these statutory provisions, you pose the following questions:

1. Section 8.57 establishes the procedure for making appropriations to the Cash Reserve Fund, GAAP Deficit Reduction Account and the Economic Emergency Fund and requires any general fund surplus to be appropriated to these funds. When does the appropriation of any general fund surplus under section 8.57 occur?

2. Section 422.4 requires the annual automatic downward adjustment of personal income tax tables in any year when the unobligated general fund balance on June 30 is $60 million or more. Do the appropriations required under section 8.57 constitute obligations of the general fund?

3. Does section 8.58, which prohibits moneys appropriated under section 8.57 from being considered "in the application of any formula, index, or other statutory triggering mechanism which would affect appropriations, payments, or taxation rates," include the automatic downward adjustment of the personal income tax rate table under section 422.4?

4. In light of the three preceding questions, did an "unobligated balance" of at least $60 million exist on June 30, 1994, which would trigger the indexation of personal income tax rates?

It is our opinion that surplus existing in the general fund was appropriated on June 30, 1994, for purposes of section 8.57. Section 8.58 limits moneys appropriated under section 8.57 from being considered in the application of the automatic downward adjustment of the personal income tax rate table under chapter 422 until statutory maximums are reached in the Cash Reserve Fund, GAAP Deficit Reduction Account and the Economic Emergency Fund. The Director of the Department of Management, not the Attorney General, must determine whether, in fact, there was an "unobligated balance" of at least $60 million in the general fund on June 30, 1994.

The State Budget and Financial Control Act was signed into law by Governor Branstad on June 2, 1992, at a time when the State was spending at annual deficits under GAAP of $338.3 million in the fiscal year ending June 30, 1991 and an estimated $419.5 million for the fiscal year ending June 30, 1992. *See* Official Statement: State of Iowa Tax and Revenue Anticipation Notes, Series 1992A, Table 1. The Act, along with amendments passed later that same month in legislation raising the sales tax, was aimed at achieving "state budget and financial control by requiring certain financial practices." 1992 Iowa Acts, ch. 1227; 1992 Iowa Acts, ch. 1001 (Second Extraordinary Session). Toward that end, the Act specifically created a "cash reserve fund" and a "deficit reduction account" and amended the method of appropriating money into the economic emergency fund. 1992 Iowa Acts, ch. 1227, §§ 3 - 6. *See* 1994 Op. Att'y Gen. ——— (#94-1-7).

The Act included a mechanism for appropriating moneys from any surplus in the general fund into these accounts in a specific priority. "Commencing June 30, 1993, the surplus existing in the general fund of the state at the conclusion of the fiscal year is appropriated for distribution . . . ." Further, "[f]or each fiscal year beginning on or after July 1, 1993," amounts are to be appropriated to the cash reserve fund "in the amount necessary for the cash reserve fund to reach the cash reserve goal percentage of the adjusted revenue estimate for the fiscal year," but "not exceed more than one percent of the adjusted revenue estimate for the fiscal year." Iowa Code § 8.57(1)a(1)(a) (1993).

Once the Cash Reserve Fund reaches its annual goal, any remaining "surplus in the general fund" rolls over into other accounts. To the extent that moneys appropriated to the Cash Reserve Fund would exceed the statutory ceiling, "the moneys are appropriated to the department of management to be spent for the purpose of eliminating Iowa's GAAP deficit . . . After the elimination

of the GAAP deficit, any moneys in the GAAP deficit reduction account shall be appropriated to the Iowa economic emergency fund." Iowa Code § 8.57(2) (1993), as amended by 1994 Iowa Acts, ch. 1181, § 10. The Economic Emergency Fund, in turn, has a maximum balance "equal to five percent of the adjusted revenue estimate for the fiscal year." In the event that the amount of money in the Economic Emergency Fund is equal to the maximum balance, moneys in excess of that amount "shall be transferred to the general fund." Iowa Code § 8.55(2) (1993). Amounts remaining after these priorities are satisfied, therefore, return again to the general fund. At the same time that the legislature created this priority for immediate use of any surplus in the general fund, the legislature protected the priority of the uses by enacting a statute to override any provisions of law which would otherwise affect appropriations, payments, or taxation rates in the face of a surplus in the general fund:

> To the extent that moneys appropriated under section 8.57 do not result in moneys being credited to the general fund under section 8.55, subsection 2, moneys appropriated under 8.57 and moneys contained in the cash reserve fund and Iowa economic emergency fund shall not be considered in the application of any formula, index, or other statutory triggering mechanism which would affect appropriations, payments, or taxation rates, contrary provisions of the Code notwithstanding.

Iowa Code § 8.58 (1993).

Chapter 422 contains provisions that, indeed, require an automatic downward adjustment of personal income rate tables under certain circumstances when there is a surplus in the general fund. Section 422.4(1)(d), cited in your opinion request, defines the annual inflation factor in terms of the unobligated state general fund balance. Iowa Code § 422.4(1)(d) (1993), as amended by 1994 Iowa Acts, ch. 1107, § 11. Sections 422.5(6) and 422.21 further authorize application of the inflation factor to calculation of the state tax rates and implementation of the calculated tax rates in each tax year. Iowa Code § 422.5(6) (1993); Iowa Code § 422.21 (1993), as amended by 1994 Iowa Acts, ch. 1165, § 16.

In order to construe these statutory provisions, we rely on the same principles of statutory construction that would be applied by a court. The goal of statutory construction is to ascertain and give effect to legislative intent. Statutes should be given a reasonable interpretation that will best effect the purpose of the statute. *John Deere Dubuque Works v. Weyant*, 442 N.W.2d 101, 104 (Iowa 1989). Where more than one statute is pertinent to the inquiry, we consider them together in an attempt to harmonize them. *American Asbestos Training Center v. Iowa Community College*, 463 N.W.2d 56, 58 (Iowa 1990).

Applying these principles to the questions you pose, the appropriation of any general fund surplus under section 8.57 occurs on June 30 at the conclusion of each fiscal year. Section 8.57 provides a formula for an annual appropriation into the various funds established by the State Budget and Financial Control Act. "For each fiscal year beginning on or after July 1, 1993, there is appropriated from the general fund of the state an amount to be determined

as follows . . . ." Iowa Code § 8.57(1)(a). As part of that formula, the express terms of section 8.57 state that "[c]ommencing June 30, 1993, the surplus existing in the general fund at the conclusion of the fiscal year is appropriated for distribution . . . ." Iowa Code § 8.57(1)(b) (1993).

Reading these provisions together, we conclude that any appropriation of surplus from the general fund occurs on June 30 of each year. A "fiscal year" begins on July 1 and concludes on June 30. *See generally Colton v. Branstad*, 372 N.W.2d 184, 185 (Iowa 1985). Under the clear terms of the statute, the actual appropriation of surplus from the general fund occurs "at the conclusion of the fiscal year." Iowa Code § 8.57(1)(b) (1993). It must, therefore, occur on June 30.

Regardless of the exact date of the appropriation of the surplus in the general fund under section 8.57, any surplus so appropriated to the Cash Reserve Fund, the GAAP Deficit Reduction Account or the Economic Emergency Fund through section 8.57 can not be considered part of an "unobligated general fund balance" for purposes of a downward adjustment of personal income tax tables under chapter 422. Section 8.58 expressly states "[t]o the extent that moneys appropriated under section 8.57 do not result in moneys being credited to the general fund under section 8.55, subsection 2, "moneys appropriated under section 8.57 . . . shall not be considered in the application of any formula, index, or other statutory triggering mechanism which would affect appropriations, payments, or taxation rates, contrary provisions of the Code notwithstanding."

Moneys appropriated under section 8.57, in turn, result in moneys being credited to the general fund under section 8.55(2) only if the amount in the Economic Emergency Fund is equal to the statutory maximum balance, i.e., five percent of the adjusted revenue estimate for the fiscal year. Iowa Code § 8.55(2) (1993). In this event, the "excess" is returned to the general fund. *Id.* Further, because the Economic Emergency Fund receives surplus from the general fund through section 8.57 only after statutory amounts for the Cash Reserve Fund and the GAAP Deficit Reduction Account are satisfied, any downward adjustment of personal income tax tables must be delayed until after all these goals are met and there remains a surplus of $60 million or more.

Legislative history confirms that section 8.58 was intended to override any adjustment of personal income tax tables. When the Economic Emergency Fund was created in 1984, the legislature expressly provided that it would be considered part of the general fund for purposes of determining the annual inflation factor under chapter 422. 1984 Iowa Acts, ch. 1305, § 21. Subsequently in 1992, at the same time section 8.58 was enacted, the specific statutory authority to include the Economic Emergency Fund as part of the general fund for this purpose was deleted. 1992 Iowa Acts, ch. 1227, § 5.

Even if an adjustment of personal income tax tables were made, the result to an individual taxpayer would be quite small. According to figures from the Department of Revenue and Finance, for example, a person whose taxable income is $32,220 would realize a savings of $5.25 in state taxes.

Although you ask our office to determine whether there was an unobligated balance of at least $60 million in the general fund on June 30, 1994, the Attorney General is not the appropriate official to make that determination. This office renders opinions on issues of law, meaning those issues which can be answered by statutory construction or legal research. 1992 Op. Att'y Gen. at 59-60; 1972 Op. Att'y Gen. 686, 687. Under chapter 422, the Director of the Department of Management certifies by October 10 the unobligated general fund balance on June 30, 1994. *See* Iowa Code § 422.4(1)(d) (1993), as amended by 1994 Iowa Acts, ch. 1107, § 11.

In summary, it is our opinion that surplus existing in the general fund is appropriated on June 30, 1994, for purposes of section 8.57. Section 8.58 limits moneys appropriated under section 8.57 from being considered in the application of the automatic downward adjustment of the personal income tax rate table under chapter 422 until statutory maximums are reached in the Cash Reserve Fund, GAAP Deficit Reduction Account and the Economic Emergency Fund. The Director of the Department of Management, not the Attorney General, must determine whether, in fact, there was an "unobligated balance" of at least $60 million on June 30, 1994.

September 15, 1994

COUNTY OFFICERS AND EMPLOYEES: County sheriff conducting polygraph examinations of candidates for civil positions in county jail. Iowa Code §§ 331.651(7), 331.653(35), 331.658, 331.903(1), 356.1, 356.2, 356.3, 356.6, 356.44, 356.49, 730.4 (1993). Although section 730.4 allows county sheriffs to conduct polygraph examinations of candidates for the positions of "peace officer" or "corrections officer," these phrases generally exclude such positions in the county jail as janitor, maintenance worker, secretary, clerk, intern, or other such civil employees. (Kempkes to Ferguson, Black Hawk County Attorney, 9-15-94) #94-9-2(L)

September 16, 1994

STATE OFFICERS AND DEPARTMENTS; MUNICIPALITIES; SCHOOLS: Energy bank program: competitive bidding on energy conservation measures; tort liability in design and construction of energy conservation measures. Iowa Code §§ 73A.2, 297.7, 331.241(1), 384.95(1), 384.99, 473.2, 473.3, 473.19, 473.20, 669.14(9), 670.4(8) (1993). Various statutes require counties, cities, and school corporations participating in the energy bank program, Iowa Code ch. 473 (1993), to administer and use competitive-bidding procedures for capital improvements, which would include the implementation of energy conservation measures when the estimated cost exceed statutory limitations; in any event, public policy suggests all public entities administer and use competitive-bidding procedures in such circumstances. Public entities may consult with the private sector, such as an energy savings company, in preparing their proposals for energy conservation measures. Public entities may be protected by the tort claims acts from certain claims of negligence relating to the design or construction of energy conservation measures. (Kempkes to Wilson, Director, Department of Natural Resources and Ramirez, Director, Department of Education, 9-16-94) #94-9-3(L)

September 16, 1994

COUNTIES AND CITIES: County's power to disapprove proposed plat for subdivision located within extraterritorial jurisdiction of city. Iowa Code §§ 306.4(2),(3), 331.362, 354.8, 354.9, 354.11(1) (1993). A county board of supervisors acting pursuant to ordinance may disapprove a proposed subdivision plat showing a dedication of land to the county for public thoroughfares, and both a county and city may provide reasonable standards or conditions affecting proposed subdivisions located outside the city's boundaries but within the city's extraterritorial jurisdiction. (Kempkes to Mullin, Woodbury County Attorney, 9-16-94) #94-9-4(L)

OCTOBER 1994

October 7, 1994

MOTOR VEHICLES: Juvenile Adjudications and Proof of Financial Responsibility. Iowa Code §§ 232.55, 321.213, 321.213A (Supp. 1993), 321A.17 (1993). Pursuant to new Iowa Code section 321.213A, as enacted by 1994 Iowa Acts, ch. 1172, § 34, the Department of Transportation is required to suspend the driver's license of a juvenile who has been adjudicated to have committed certain delinquent acts. Because an adjudication is not a conviction, the Department of Transportation cannot require proof of financial responsibility for suspension of licenses under section 321.213A. (Burger to Rensink, Director, Department of Transportation, 10-7-94) #94-10-1(L)

NOVEMBER 1994

November 29, 1994

ELECTIONS; VOTER REGISTRATION: Disclosure of social security numbers. 1994 Iowa Acts, chapter 1169, §§ 12, 38, 39, 40; Iowa Code §§ 4.10, 48.5(2), 48.6(10) (1993); Iowa Code §§ 48A.11, 48A.37, 48A.38, 48A.39 (1995). Inclusion of voter social security numbers on voter information lists provided pursuant to section 48A.38 neither violates 42 U.S.C. §405(c)(2)(viii)(I) nor unconstitutionally infringes upon an individual's right to vote. (Scase to Bullard, State Registrar of Voters, 11-29-94) #94-11-1

Russ Bullard, State Registrar of Voters: You have requested an opinion of the Attorney General addressing the legality of including registered voters' social security numbers on the lists of voter information sold pursuant to new Iowa Code section 48A.38, as adopted by 1994 Iowa Acts, ch. 1169 (Senate File 2228), §39. Current Iowa law regarding the maintenance and dissemination of voter registration records (Iowa Code chapter 48) will be repealed and replaced by provisions within chapter 1169, effective January 1, 1995. Specifically, you ask whether the practice of including social security numbers on voter information lists pursuant to new Code section 48A.38 is allowed by 42 U.S.C. §405(c)(2)(viii)(I) through (IV) and, if so, whether the practice would withstand a judicial challenge.

The state registrar of voters is required to maintain voter registration records. 1994 Iowa Acts, ch. 1169, §38 [to be codified as Code §48A.37(1)].[41] Pursuant to chapter 1169, §39 [to be codified as Code section 48A.38(1)] and current Code section 48.5(2), "[a]ny person may request of the registrar and shall receive, upon payment of the cost of preparation, a list of registered voters and other data on registration and participation in elections . . ." The voter information lists provided by the registrar "shall be in the order and form specified by the list purchaser, and shall contain the registration data specified by the list purchaser, provided compliance with the request is within the capability of the record maintenance system used by the registrar."[42] 1994 Iowa Acts, ch. 1169, §39 [to be codified as code §48A.38(1)(c)].

Iowa law requires, and will continue to require, the voter registration form to include a request for the registrant to provide his or her social security number. 1994 Iowa Acts, ch. 1169 §12 [to be codified as Code §48A.11(1)(e)]; Iowa Code §48.6(10) (1993). Social security numbers included on voter registration forms are included in the registration records maintained by the registrar and, upon request, social security numbers have traditionally been included on voter information lists provided by the registrar pursuant to Code section 48.5(1)(a). You ask whether this practice may continue.

The federal statute at issue, 42 U.S.C. §405(c)(2)(vii)(I), provides that "Social Security account numbers . . . that are obtained or maintained by an authorized person pursuant to any provision of law, enacted on or after October 1, 1990, shall be confidential, and no authorized person shall disclose any such social security account number . . ." An "authorized person" is defined in 42 U.S.C. §405(c)(2)(vii)(III) as "an officer or employee . . . of any State or agency of a State . . . who has or had access to social security account numbers . . . pursuant to any provisions of law enacted on or after October 1, 1990."

Resolution of your first inquiry requires determination of whether the provision of new Iowa Code chapter 48A relating to the collection of voter social security numbers, which replaces a similar provision within repealed Code chapter 48, constitutes a law "enacted on or after October 1, 1990." If so, 42 U.S.C. §405(c)(2)(vii)(I) prohibits disclosure of social security numbers collected pursuant to this provision. If not, this section of federal law does not present a barrier to ongoing dissemination of social security information.

Iowa Code section 4.10 (1993) provides that "[a] statute which is re-enacted, revised or amended is intended to be a continuation of the prior statute and

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[41] Unless otherwise noted, provisions within new Iowa Code chapter 48A are consistent with analogous provisions within Iowa Code chapter 48.

[42] Statutory limitations are placed upon the use of voter information:
> Information about individual registrants obtained from voter registration records shall be used only to request the registrant's vote at an election, or for another genuine political purpose, or for a bona fide official purpose by an elected official, or for bona fide political research, but shall not be used for any commercial purposes. A person who uses registration information in violation of this section commits a serious misdemeanor.

1994 Iowa Acts, ch. 1169, §40 [to be codified as Code §48A.39].

not a new enactment, so far as it is the same as the prior statute." This general principal of statutory construction is consistent with holdings of the Iowa Supreme Court recognizing that the simultaneous repeal and reenactment of all or a part of a legislative act does not result in an interruption of the statute's operation. *E.g., Wharton v. Iowa Bd. of Parole,* 463 N.W. 2d 416, 417 (Iowa 1990); *State ex rel. Iowa Air Pollution Control Comm'n. v. Winterset,* 219 N.W. 2d 549, 551-52 (Iowa 1974).

In response to the National Voter Registration Act of 1993, codified as 42 U.S.C. §1973gg, the Iowa legislature revised many of Iowa's voter registration laws during the 1994 legislative session. To effectuate this revision, the legislature repealed Iowa Code chapter 48 and simultaneously adopted new Iowa Code chapter 48A. 1994 Iowa Acts, ch. 1169, §§ 1-42, 66-67. The repeal of chapter 48 and adoption of chapter 48A become effective January 1, 1995. *Id.* §68. In order to determine whether the statutory provisions authorizing the collection of voter social security numbers is newly enacted or reenacted by Senate File 2223, we must compare the terms of the old and new Code sections.

Requirements for voter registration forms are included both in section 48.6 of the current Code and section 48A.11 which becomes effective on January 1, 1995. Section 48A.6(10) provides that "[t]he registration form shall require the following information to be provided: the social security number of the applicant, if available." Section 48A.11(1)(e) provides that "[e]ach voter registration form shall provide for the registrant to provide the following information: (e) social security number of the registrant (optional to provide)." While it could be argued that requesting a social security number "if available" is different from directly informing the registrant that providing their social security number is optional, section 48.6(10) has not been interpreted as requiring electors to provide their social security number in order to register to vote. To the contrary, administrative rules adopted by the state Voter Registration Commission prohibit election officials from refusing "to register or accept a registration for an elector who declines to reveal the elector's social security number. . ." 821 IAC 2.2(4).

With regard to the collection of voter social security numbers, Code section 48A.11(1)(e) is substantially the same as section 48.6(10). Application of Code section 4.10 leads us to determine that section 48A.11(1)(e) is not a newly enacted provision. Rather, section 48A.11(1)(e) is a continuation of current Code section 48.6(10). A provision requiring the inclusion of a blank for a registrant to provide their social security number, if available, has been included in section 48.6 since 1971. *See* 1971 Iowa Acts, ch. 98, §3. Because Iowa's system of collecting and maintaining social security numbers in conjunction with voter registration was enacted prior to October 1, 1990, disclosure of social security numbers collected pursuant to this system is not prohibited by 42 U.S.C. §405(c)(2)(vii)(I).

Having determined that this federal statute does not require the omission of social security numbers from voter information lists, we turn to your second inquiry. As you note, a federal court recently held that the voter registration system in place in Virginia, which required social security numbers on voter

registration applications and made voter registration lists with the social security numbers available to the public, infringed on the right to vote. *Greidinger v. Davis*, 988 F.2d 1344 (4th Cir. 1993). In light of this decision, you ask whether inclusion of social security numbers on the voter information lists would withstand judicial scrutiny.

Review of the *Greidinger* decision reveals that the only significant distinction between Virginia's voter registration system and Iowa's system is that Iowa registrants, while asked to provide their social security numbers, are not denied registration if they decline to provide this information. The provisions for public access to registration information in the Iowa statutes are virtually identical to those in place in Virginia. We believe, however, that Virginia's mandatory requirement for registrants to provide their social security numbers was central to the federal court's ruling. In assessing the impact of the registration scheme on the right to vote, the federal court recognized that "the Virginia statutes at issue, for all practical purposes, condition Greidinger's right to vote on the public disclosure of this [social security number]." 988 F.2d at 1352. It was the fact that Greidinger could not vote unless he supplied his social security number, thus consenting to public disclosure of that number, which lead the federal court to conclude that mandatory public disclosure of a voter's social security number placed a substantial burden on exercise of the right to vote.

This analysis would not apply to Iowa's registration scheme because Iowa does not require a registrant to provide his or her social security number. Pursuant to section 48A.11, the right to vote will not be denied if registrants refuse to provide their social security numbers. Therefore, even though the public will have access to social security numbers which registrants provide, an individual's right to vote is not conditioned upon providing this information. For this reason, we believe that the Iowa voter registration and information disclosure scheme would likely withstand a judicial challenge premised on the argument upheld in *Greidinger*.

We point out that public disclosure of social security numbers may raise significant privacy issues. As the *Greidinger* court recognized:

> At the time of [enactment of the Privacy Act of 1974], Congress recognized the dangers of widespread use of SSNs [social security numbers] as universal identifiers. In its report supporting the adoption of this provision, the Senate Committee stated that the widespread use of SSNs as universal identifiers in the public and private sectors is 'one of the most serious manifestations of privacy-concerns in the Nation.'
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> . . .
>
> Since the passage of the Privacy Act, an individual's concern over his SSNs confidentiality and misuse has become significantly more compelling. For example, armed with one's SSN, an unscrupulous individual could obtain a person's welfare benefits or Social

> Security benefits, order new checks at a new address on that person's checking account, obtain credit cards, or even obtain the person's paycheck. In California, reported cases of fraud involving the use of SSNs have increased from 390 cases in 1988 to over 800 in 1991. Succinctly stated, the harm that can be inflicted from the disclosure of a SSN to an unscrupulous individual is alarming and potentially financially ruinous.

Greidinger v. Davis, 988 F.2d at 1353-54 (citations and footnote omitted). Congressional concern regarding access to social security numbers is further evidenced by the prohibition on disclosing social security numbers collected pursuant to laws enacted after October 1, 1990. *See* discussion regarding 42 U.S.C. § 405(c)(2)(vii)(I), above.

Care should be taken to protect the privacy interests of Iowa electors. This may be accomplished, in part, by clearly disclosing the voluntary nature of the request and identifying potential disclosures of social security numbers collected during voter registration. The Privacy Act of 1974 requires the inclusion of such disclosures when requests for social security numbers are made.

In summary, we conclude that continued inclusion of voter social security numbers on voter information lists provided pursuant to section 48A.38 neither violates 42 U.S.C. § 405(c)(2)(viii)(I) nor unconstitutionally infringes upon an individual's right to vote.

November 29, 1994

JUVENILE LAW; CONFIDENTIALITY: Release of mental health information. Iowa Code §§ 228.6, 228.9, 232.97, 232.101, 232.102, 232.147(3)(6), 235A.2(a)(1) (1993); 441 IAC 182.5(5)(a)(3), (c)(5), (f)(7), 182.9(2)(d) and 185.10(4), (5), (6)(h) and (8)(d). With the exception of "psychological test materials" which are subject to the requirements of Iowa Code section 228.9, Department of Human Services rules found at 441 IAC 182.5(5)(a)(3), (c)(5), (f)(7), 182.9(2)(d) and 185.10(4), (5), (6)(h) and (8)(d) which require the release of treatment information by a service provider to a child's attorney, do not conflict with other statutes and administrative rules on confidentiality but merely facilitate the exchange of information otherwise available to the child's attorney or guardian ad litem. (Wickman to Halvorson, State Representative, 11-29-94) #94-11-2(L)

DECEMBER 1994

December 15, 1994

STATE OFFICERS AND EMPLOYEES; ETHICS; LOBBYING: Two-year ban. Iowa Const. art. 1, §§ 7, 20; Iowa Code §§ 68B.2(13), 68B.5A (Supp. 1993). Within two years of terminating service, former legislators may (1) communicate on behalf of a bank with individual legislators and officers

or employees of state agencies, unless the former legislators act directly to encourage the passage, defeat, approval, veto, or modification of legislation, a rule, or an executive order; (2) help a corporation obtain a permit or grant by communicating with state officers or employees; and (3) volunteer assistance to help a community obtain a grant from a state program. (Kempkes to Kersten, State Senator, 12-15-94) #94-12-1

The Honorable James B. Kersten, State Senator: You have requested an opinion regarding the impact of statutory restrictions on your activities after retirement from the General Assembly. Iowa Code section 68B.5A (Supp. 1993) provides that a member of the General Assembly shall not become a lobbyist within two years after terminating legislative service. Section 68B.2(13)(a) defines a "lobbyist" as a person who, by acting directly,

> (1). *Receives compensation* to encourage the passage, defeat, approval, veto, or modification of *legislation, a rule, or an executive order* by the members of the general assembly, a state agency, or any statewide elected official.
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> (2). *Is a designated representative* of an organization which has as one of its purposes the encouragement of the passage, defeat, approval, veto, or modification of *legislation, a rule, or an executive order* before the general assembly, a state agency, or any statewide elected official.
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> . . .
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> (4). *Makes expenditures of more than one thousand dollars* in a calendar year, other than to pay compensation to an individual. . . specified under subparagraph (1) or to communicate with only the members of the general assembly who represent the district in which the individual resides, *to communicate in person* with members of the general assembly, a state agency, or any statewide elected official for purposes of encouraging the passage, defeat, approval, veto, or modification of *legislation, a rule, or an executive order.*

Iowa Code § 68B.2(13)(a)(1), (2), (4) (emphasis added). *See generally* Iowa Code § 68B.2 (defining "agency," "agency of state government or state agency," "legislative employee," "member of the general assembly," "official," "state employee," and "statewide elected official"); 1 *Sutherland's Statutory Construction* § 13.02, at 657-61, § 13.04, at 663-67 (1994); 51 Am. Jur. 2d *Lobbying* § 1, at 991 (1970).

Section 68B.2(13)(b), however, provides that the definition of lobbyist excludes

> (4). Persons whose activities are limited to appearances *to give testimony or provide information* or assistance *at sessions* of

> committees of the general assembly *or at public hearings* of state agencies *or* who are giving testimony or providing information or assistance *at the request of* public officials or employees.
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> . . .
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> (7). An individual who is a member, director, trustee, officer, or committee member of a business, trade, labor, farm, professional, religious, education, or charitable association, foundation, or organization who either *is not paid* compensation *or is not specifically designated* as provided in [section 68B.2(13)(a)(1)-(2)].
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> (8). Persons whose activities are limited to submitting data, views, or arguments *in writing*, or requesting an opportunity to make an oral presentation under section [17A.4(1), which sets forth the procedure for adopting administrative rules].

Iowa Code § 68B.2(13)(b)(4), (7), (8) (emphasis added).

Directing our attention to section 68B.2(13), you present three questions about the scope of the restrictions on lobbying within section 68B.5A(1), (4), which, upon violation, may lead to criminal penalties. *See* Iowa Code § 68B.25 (violation of chapter 68B a serious misdemeanor and may lead to reprimand, suspension, dismissal, or other sanction). First, whether former legislators, employed by a bank for work other than "lobbying," may communicate with individual state legislators and officers or employees of state agencies about various matters involving the bank. Second, whether former legislators may help a corporation obtain various permits or grants by speaking with state officers or employees. Third, whether former legislators may volunteer assistance to help a community obtain an unknown grant from a state program.

Before responding to these questions, we emphasize that an opinion from the Attorney General

> can only address those matters which may be determined as a matter of law. Ultimately, application of [chapter 68B] to specific facts requires adjudication, either through the complicated processes in [chapter 68B] or by criminal prosecutions. The function of an opinion is to decide a specific question of law or statutory construction; it cannot resolve issues which are dependent upon factual matters. 1972 Op. Att'y Gen. 686. Thus, we cannot precisely define what behavior might later be found to constitute lobbying.

1992 Op. Att'y Gen. 199. *Accord* 1992 Op. Att'y Gen. 154.

With this limitation in mind, we conclude that former legislators may, within two years of terminating service, (1) communicate on behalf of a bank with individual legislators and officers or employees of state agencies, unless the

former legislators act directly to encourage the passage, defeat, approval, veto, or modification of legislation, a rule, or an executive order; (2) help a corporation obtain a permit or grant by communicating with state officers or employees; and (3) volunteer assistance to help a community obtain a grant from a state program.

I.

The General Assembly enacted legislation in 1992 banning all lobbying, which it broadly defined in chapter 68B, by all former governmental officers and employees for two years. *See* 1992 Iowa Acts, 74th G.A., ch. 1228, § 1, at 507-08 (amending Iowa Code § 68B.2 (1991)), § 5, at 510-11 (amending Iowa Code § 68B.5 (1991)); 1992 Iowa Acts, 74th G.A. (1st Extra. Sess.), ch. 1002, § 1, at 958. This across-the-board ban applied to all persons employed or holding office on July 1, 1992. It prohibited them from making contact with legislators, agency personnel, and state officers or employees in a variety of contexts.

Within a year after the enactment of the 1992 legislation, this office issued an opinion on its constitutionality. After noting the constitutional basis for the right to lobby and the heightened review of any governmental action restricting that right, we concluded that the 1992 legislation violated the federal constitution:

> When [a] restriction [such as now contained in chapter 68B] amounts to a ban on all lobbying by all former officials and employees on matters that are unrelated to their service or employment we question whether a compelling state interest can be asserted, much less whether a ban on all lobbying is a "closely drawn" means of achieving that end.

1994 Op. Att'y Gen. ——— (#93-1-4). *Accord Sutherland's, supra*, § 13.04, at 663-64, § 13.16, at 684-87; *see Cole v. Brown-Hurley Hardware Co.*, 139 Iowa 487, 117 N.W. 746, 749 (1908).

The General Assembly reexamined and rewrote chapter 68B in 1993. *See* 1993 Iowa Acts, 75th G.A., ch. 163, at 329-50. Significantly, it limited lobbying in section 68B.2(13)(a) to actions directly seeking to encourage the passage, defeat, approval, veto, or modification of "legislation, a rule, or an executive order," and it created a three-tiered scheme within section 68B.5A to restrict lobbying, for two years after termination of service, to encompass three classes of state governmental officers and employees. *See generally* Iowa Code § 68B.5A(1), (4) (a "statewide elected official, the executive or administrative head of an agency of state government, the deputy executive or administrative head of an agency of state government, or a member of the general assembly" shall not act as a lobbyist for two years after terminating service), Iowa Code § 68B.5A(2), (5) (a "head of a major subunit of a department or independent state agency, full-time employees of an office of a statewide elected official, or a legislative employee whose position involves a substantial exercise of administrative discretion or the expenditure of public funds" shall not, for two

years after terminating service, act as a lobbyist before the agency in which he or she was employed or before agencies or officials or employees with whom he or she had substantial and regular contact as part of his or her former duties); Iowa Code § 68B.5A(3), (6) (a "state or legislative employee who is not subject to [section 68B.5A(2)]" shall not, for two years after terminating service, act as a lobbyist in relation to any particular case, proceeding, or application with respect to which he or she was directly concerned and personally participated as part of the former employment).

II.

Section 68B.2(13), which defines lobbying and delineates specific exclusions to that definition, attempts to reduce doubts about what is and what is not permissible conduct. The statutory language is broad, *see* 1992 Op. Att'y Gen. 154, and the legislative intent is clear: to prevent undue influence from seeping into the workings of state government through the activities of its former members, thereby maintaining or increasing public confidence in the honesty and efficiency of state government. *See* 1994 Op. Att'y Gen. ——— (#93-1-4); *Sutherland's, supra*, § 13.03, at 661-62. Accordingly, the General Assembly's two-year ban in section 68B.5A seeks to control "the actual or apparent diversion of the former public employment itself into a *unique* advantage." Lacovara, "Restricting the Private Practice of Former Government Lawyers," 20 Ariz. L. Rev. 369, 373 (1978). *See generally Barker v. Wisconsin*, 841 F. Supp. 255, 260 (D. Wis. 1993); Mundheim, "Conflict of Interest and the Former Governmental Employee: Rethinking the Revolving Door," 14 Creighton L. Rev. 707, 711-15 (1980-81); Spak, "America For Sale: When Well-Connected Federal Officials Peddle Their Influence to the Highest Bidder," 78 Ky. L.J. 237, 238-41, 281-82 (1989-90); Note, "Conflicts of Interest: State Governmental Employees," 47 Va. L. Rev. 1034, 1038 (1961); Note, "Conflicts of Interest of State Legislators," 76 Harv. L. Rev. 1209, 1209, 1227-28 (1963).

Control over the activities of former legislators occurs in section 68B.2(13)(a) in at least two ways. First, lobbyists are primarily defined by their direct activities and not necessarily the titles they bring with them into the rotunda of the Capitol or the doorways of state agencies. *See generally* 1992 Op. Att'y Gen. 154. Persons may become lobbyists simply by engaging in the specific conduct described in section 68B.2(13)(a), *see* 1992 Op. Att'y Gen. 199, even though they (or their employers or clients) avoid using the terms "lobbyists" to describe themselves or "lobbying" to describe their activities. Second, lobbyists need only act directly to "encourage" the passage, defeat, approval, veto, or modification of legislation, a rule, or an executive order and, in doing so, receive compensation, be designated as representatives of an interested organization, or make expenditures of a specified amount to communicate in person with certain state officers or employees. *See generally* Iowa Code § 68B.2(7) (defining compensation).

To "encourage" commonly means to spur on, stimulate, foster, or give help or patronage to. *Webster's Ninth New Collegiate Dictionary* 372 (1979). Its synonyms include to forward, to promote, and to prompt. *Funk and Wagnall's Standard Handbook of Synonyms* 176 (1947). "Encouragements acts as a

persuasive. . . . The idea of exerting an influence to the advantage of an object is included in the signification of [this term]. . . . [E]ncourage is partial as to the end, and indefinite as to the means: We may encourage a person in anything . . . *and by any means*. . . . " *Crabb's English Synonyms* 302-03 (1917) (emphasis added). We note that two brochures issued on behalf of the General Assembly define a lobbyist to include someone who simply encourages the passage, defeat, or modification of legislation "by conveying information and opinions" or by "communicating views and information" to legislators. Iowa Legislative Information Office, "What is a Lobbyist?" & "How to Lobby: A Citizen's Guide." *Accord North American Social Workers v. Harwood*, ——— F. Supp. ——— (D. R.I. 1994) (lobbying under Rhode Island law includes presentation of statistical and numerical information pertinent to pending legislation).

Not every communication of views or information, however, amounts to lobbying. For example, section 68B.2(13)(b) specifically excludes certain activities from the definition of lobbying. Perhaps more important, lobbying only arises under section 68B.2(13)(a) if a person acts directly to encourage the passage, defeat, approval, veto, or modification of either "legislation, a rule, or an executive order." *See* Iowa Code § 68B.2(13)(a)(1)-(2), (4). See generally Sutherland's, supra, §§, § 13.19, at 690-91, § 13.25, at 699-700. Conduct not seeking to influence one of these three targets falls outside the definition of lobbying in section 68B.2(13)(a) even if the person is paid by an employer or client, is designated as a representative of an organization, or is speaking in person to an individual legislator, state officer, or state employee.

As a final comment, we note that other considerations may affect former legislators seeking to act on behalf of a new employer or client. *See* Iowa Code § 68B.7 (other activities — two-year ban); Iowa Code of Professional Responsibility DR 9-101(B) (prohibiting an attorney's private employment in any manner in which he or she had substantial responsibility during prior public employment); G. Hazard, *Ethics in the Practice of Law* 107-19 (1978); Kaufman, "The Former Government Attorney and the Canons of Professional Ethics," 70 Harv. L. Rev. 657 (1957); Note, 90 Yale L.J. 189, 199-209 (1980) (suggesting that fiduciary duty exists on part of former public officer or employees, enforceable by equitable right of action).

III.

In summary, we conclude that former legislators may, within two years of terminating service, (1) communicate on behalf of a bank with individual legislators and officers or employees of state agencies, unless the former legislators act directly to encourage the passage, defeat, approval, veto, or modification of legislation, a rule, or an executive order; (2) help a corporation obtain a permit or grant by communicating with state officers or employees; or (3) volunteer assistance to help a community obtain a grant from a state program.

December 15, 1994

TAXATION: Real Estate Transfer Tax Where Mortgage Debt Is Not Assumed. Iowa Code § 428A.1 (1993). An existing mortgage upon real estate purportedly transferred as a gift is "consideration," as that term is used in section 428A.1, even if the mortgage is not assumed by the transferee. Accordingly, the transfer tax is imposed on transfers involving such consideration. (McCown to Richards, Story County Attorney, 12-15-94) #94-12-2(L)

December 21, 1994

STATE OFFICERS AND DEPARTMENTS; SCHOOLS AND SCHOOL DISTRICTS: Powers of area education agencies. Iowa Code §§ 273.2, 273.3, 274.1, 297.2, 297.6, 297.22 (1993). Area education agencies may not buy property from sources other than school districts. (Kempkes to Ramirez, Director, Department of Education, 12-21-94) #94-12-3(L)

December 21, 1994

FIRE DISTRICTS; CITIES: Power of benefited fire district to levy tax independent of contract with city. Iowa Code § 357B.3 (1993). If a fire district has elected to impose the maximum tax levy under section 357B.3(1), it may levy an additional tax under section 357B.3(2) only if the first levy proves insufficient for funding fire protection. If, however, a district has elected to contract with a city to provide fire protection, it may not supplement the funds received under that contract by independently levying a tax pursuant to section 357B.3(2). (Kempkes to Connors, State Representative, 12-21-94) #94-12-4(L)

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