REPORT OF THE ATTORNEY GENERAL OF IOWA

IOWA 1996

MILLER

State of Iowa
1996

FIFTY-FIRST BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

BIENNIAL PERIOD ENDING DECEMBER 31, 1996

THOMAS J. MILLER

Attorney General

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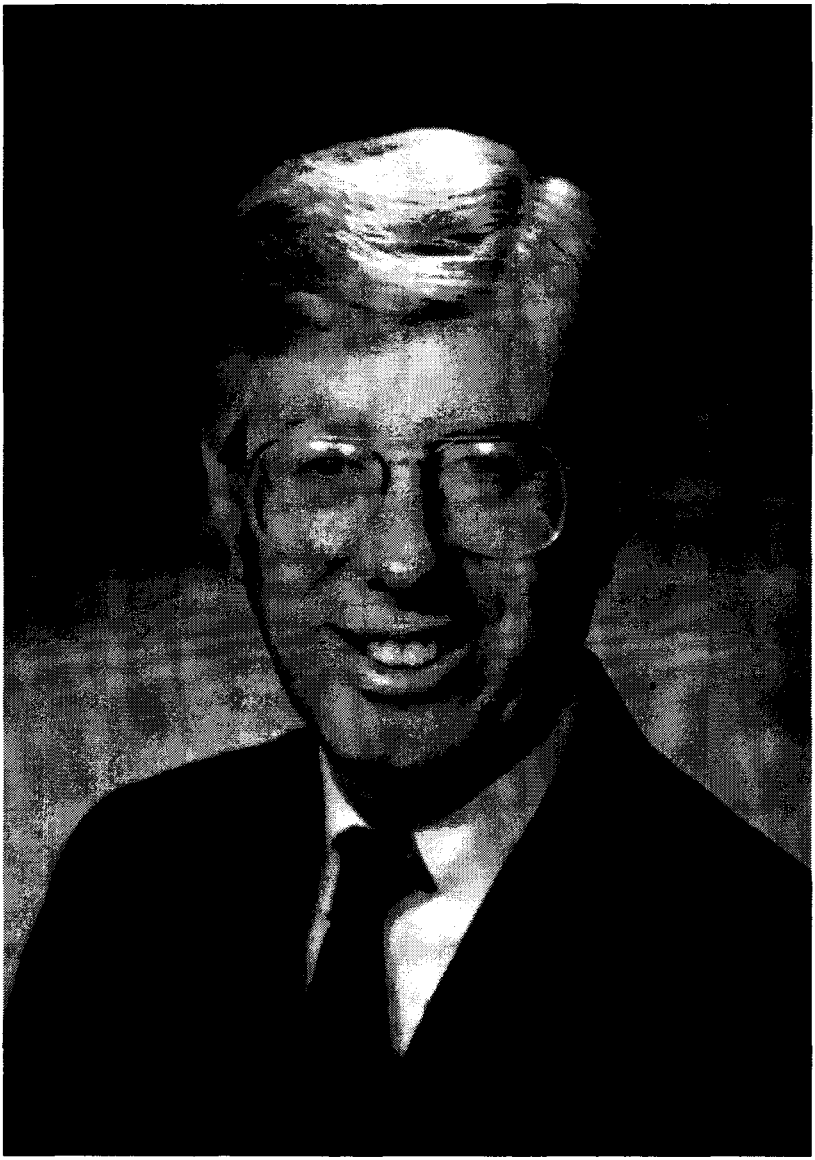
Des Moines

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	1991-1995
Thomas J. Miller	Clayton	1995-



PERSONNEL OF THE DEPARTMENT OF JUSTICE

PERSONNEL 1995 - 1996
ADMINISTRATIVE SERVICES

Thomas J. Miller, 1/79-1/91, 1/95 ..... Attorney General
JD, Harvard 1969
Gordon E. Allen, 8/82 ..... Deputy Attorney General
JD, Iowa, 1972
Charles J. Krogmeier, 5/86 ..... Deputy Attorney General
JD, Drake, 1974
Douglas E. Marek, 8/89 ..... Deputy Attorney General
JD, Drake, 1984
Elizabeth M. Osenbaugh, 1/79-2/94, 8/96 ..... Deputy Attorney General
JD, Iowa, 1971
Julie F. Pottorff, 7/79 ..... Deputy Attorney General
JD, Iowa, 1978
Elisabeth C. Buck, 2/91 ..... Administrator
Julie Fleming, 8/88 ..... Executive Officer
Robert P. Brammer, 11/78 ..... Executive Officer
Karen A. Redmond, 10/80 ..... Executive Officer
Clark R. Rasmussen, 9/92 ..... Program Director
Donald J. Schaefer, 11/91 ..... Data Process Specialist
Michael N. Elings, 9/94 ..... Data Process Specialist
Marilyn Chiodo, 2/91 ..... Administrative Assistant
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 ..... Administrative Assistant
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 ..... Asst Attorney General
JD, Iowa, 1979
Douglas D. Hammerand, 8/96 ..... Asst Attorney General
JD, Drake 1989
James E. Kivi, 2/80 ..... Asst Attorney General
JD, Iowa 1975
Thomas H. Miller, 10/85 ..... Asst Attorney General
JD, Iowa, 1975
Thomas E. Noonan, 6/89 ..... Asst Attorney General
JD, Iowa, 1982
Ronald M. Sotak, 11/96 ..... Asst Attorney General
JD, Drake 1992

Charles N. Thoman, 7/84 ..... Asst Attorney General
JD, Creighton, 1976
Richard A. Williams, 7/75 ..... Asst Attorney General
JD, Iowa, 1971
Steven K. Young, 7/91 ..... Asst Attorney General
JD, Drake, 1981
Connie L. Anderson Lee, 12/76 ..... Legal Secretary

CONSUMER PROTECTION

William L. Brauch, 7/87 ..... Division Director
JD, Iowa, 1987
Raymond H. Johnson, 7/87 ..... Asst Attorney General
JD, Iowa, 1986
Kathleen E. Keest, 9/96 ..... Asst Attorney General
JD, Iowa 1974
Chris T. Odell, 7/90 ..... Asst Attorney General
JD, Gonzaga, 1978
Steven M. St. Clair, 5/87 ..... Asst Attorney General
JD, Iowa, 1978
Carmel A. Benton, 9/89-6/95 ..... Investigator
Susan M. Bulver, 9/95 ..... Investigator
Sandra J. Kearney, 7/90 ..... 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
Vicki S. McDonald, 8/94 ..... Legal Secretary
Marilyn W. Rand, 10/69 ..... Legal Secretary
Judy A. Fast, 7/91-5/96 ..... Secretary/Receptionist
Dorene Stevens, 5/94 ..... Secretary/Receptionist
Natalie L. Kellenberg, 7/96 ..... 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
Susan R. Lodmell, 11/96 ..... Program Planner
Robin Ahnen-Cacciatore, 2/91-9/95 ..... Investigator
Ann M. Cutts, 8/94 ..... Investigator
Melissa Miller, 1/88 ..... Investigator
Alison E. Sotak, 7/92 ..... Investigator
Stephen E. Switzer, 12/89 ..... Investigator
Ruth C. Walker, 2/79 ..... Investigator
Marilyn Monroe, 1/97 ..... Secretary
Edith M. Omlie, 6/89 ..... Secretary/Receptionist

CRIMINAL APPEALS

Bridget A. Chambers, 2/90 ..... Division Director
JD, Iowa, 1985
Richard J. Bennett, 6/86 ..... Asst Attorney General
JD, Iowa, 1978
Martha E. Boesen, 7/91 ..... Asst Attorney General
JD, Notre Dame, 1991
Ann E. Brenden, 3/85 ..... Asst Attorney General
JD, Drake, 1981
Susan M. Crawford, 6/94 ..... Asst Attorney General
JD, Iowa 1994
Karen B. Doland, 7/90 ..... Asst Attorney General
JD, Iowa, 1989
Robert P. Ewald, 2/81 ..... Asst Attorney General
JD, Washburn, 1980
Thomas G. Fisher, 4/91-9/95 ..... Asst Attorney General
JD, Iowa, 1986
Sharon K. Hall, 7/96 ..... Asst Attorney General
JD, Drake 1993
Julie A. Halligan-Brown, 7/87 ..... Asst Attorney General
JD, Iowa, 1987
Thomas D. McGrane, 6/71 ..... Asst Attorney General
JD, Iowa, 1971
Roxann M. Ryan, 9/80 ..... Asst Attorney General
JD, Iowa, 1980
Angelina Smith, 7/94-1/96 ..... Asst Attorney General
JD, Iowa, 1994
Sheryl A. Soich, 2/88 ..... Asst Attorney General
JD, Drake, 1987
Mary E. Tabor, 8/93 ..... Asst Attorney General
JD, Iowa, 1991
Thomas S. Tauber, 7/89 ..... Asst Attorney General
JD, Drake, 1989
Christy J. Fisher, 1/67 ..... Legal Secretary
Shonna K. Swain, 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 ..... Asst Attorney General
JD, Iowa, 1977
David L. Dorff, 4/85 ..... Asst Attorney General
JD, Drake, 1982
Michael H. Smith, 9/84 ..... Asst Attorney General
JD, Iowa, 1977
Michael P. Valde, 3/91-3/96 ..... Asst Attorney General
JD, Iowa, 1976
Richard C. Heathcote, 9/89 ..... Investigator
Colleen Baker, 1/92 ..... Legal Secretary

FARM UNIT

Stephen H. Moline, 6/86-5/89, 7/90 ..... Asst Attorney General
JD, Iowa, 1986
Stephen E. Reno, 7/89 ..... Asst Attorney General
JD, Drake, 1981
Eric J. Tabor, 9/95 ..... Asst Attorney General
JD, Iowa 1980
Harry E. Crist, 7/85 ..... Investigator

JUVENILE LAW UNIT

Marilyn S. Lantz, 8/95 ..... Asst Attorney General
JD, Drake 1975
William C. Roach, 1/79-5/93, 9/95 ..... Executive Officer

LICENSING AND ADMINISTRATIVE LAW

Pamela D. Griebel, 4/91 ..... Division Director
JD, Iowa, 1977
Heather L. Adams, 7/94 ..... Asst Attorney General
JD, Iowa, 1994
Andrew R. Anderson, 7/94 ..... Asst Attorney General
JD, Iowa, 1992
Richard R. Autry, 9/86 ..... Asst Attorney General
JD, Drake, 1986
Sherie Barnett, 7/83-5/95 ..... Asst Attorney General
JD, Drake, 1981
Teresa Baustian, 4/81 ..... Asst Attorney General
JD, Iowa, 1979
Joseph D. Condo, 11/94-3/95 ..... Asst Attorney General
JD, Southern CA, 1991
Jean M. Davis, 7/96 ..... Asst Attorney General
JD, Suffolk 1990
Grant K. Dugdale, 5/91 ..... Asst Attorney General
JD, Iowa, 1987
Linny C. Emrich, 3/94 ..... Asst Attorney General
JD, Iowa, 1985
Jeffrey D. Farrell, 6/91 ..... Asst Attorney General
JD, Iowa, 1989
Scott M. Galenbeck, 1/84 ..... Asst Attorney General
JD, Iowa, 1974
Bruce Kempkes, 9/86-11/92, 4/94 ..... Asst Attorney General
JD, Iowa, 1980
Elisabeth A. Nelson, 8/95 ..... Asst Attorney General
JD, Drake, 1980
Christie J. Scase, 7/85 ..... Asst Attorney General
JD, Drake, 1985
Donald G. Senneff, 7/85 ..... Asst Attorney General
JD, Iowa 1967

Anuradha Vaitheswaran, 5/88 ..... Asst Attorney General
JD, Iowa, 1984
Rose A. Vasquez, 9/85 ..... Asst Attorney General
JD, Drake, 1985
Lynn M. Walding, 7/81 ..... Asst Attorney General
MA, JD, Iowa, 1981
Theresa 0. Weeg, 10/81 ..... Asst Attorney General
JD, Iowa, 1981
Traci L. Weldon, 3/94 ..... Asst Attorney General
JD, Drake, 1990
James S. Wisby, 10/88 ..... Asst 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

David J. Welu, 8/94 ..... Exec Dir, Training Coord
JD, Drake, 1973
Peter J. Grady, 1/95 ..... Asst Attorney General
JD, Iowa 1984
Laura M. Roan, 8/96 ..... Asst Attorney General
JD, Drake 1991
Kevin B. Struve,7/86 ..... Asst Attorney General
JD, Iowa, 1979
Susan K. Adkins, 9/96 ..... Legal Secretary
Peggy L. Baker, 9/94 ..... Legal Secretary
Ann M. Clary, 1/88 ..... Legal Secretary

REGENTS AND HUMAN SERVICES

Diane M. Stahle, 1/95 ..... Division Director
JD, Iowa 1979
Jill A. Cirivello, 6/93-3/96 ..... Asst Attorney General
JD, Hamline, 1991
Kathryn J. Delafield, 3/91-5/95 ..... Asst Attorney General
JD, Iowa, 1982
Barbara E. Galloway, 3/91 ..... Asst Attorney General
JD, Iowa, 1976
Mark L. Greiner, 7/94 ..... Asst Attorney General
JD, Drake, 1994
Christina F. Hansen, 3/91 ..... Asst Attorney General
JD, Drake, 1987
Daniel W. Hart, 7/85 ..... Asst Attorney General
JD, Iowa, 1983
Mark A. Haverkamp, 6/78 ..... Asst Attorney General
JD, Creighton, 1976

Patricia M. Hemphill, 2/83 ..... Asst Attorney General
JD, Drake, 1981
Debora L. Hewitt, 12/92 ..... Asst Attorney General
JD, Drake, 1991
Janet L. Hoffman, 8/94 ..... Asst Attorney General
JD, Iowa, 1990
Robert R. Huibregtse, 6/75 ..... Asst Attorney General
LLB, Drake, 1963
Kevin E. Kaufman, 4/96 ..... Asst Attorney General
JD, Creighton 1986
Tamara A. Lorenz, 5/96 ..... Asst Attorney General
JD, Drake, 1991
Patricia A. McGivern, 9/95 ..... Asst Attorney General
JD, Iowa 1977
Maureen McGuire, 7/83-12/96 ..... Asst Attorney General
JD, Iowa, 1983
Kathrine Miller-Todd, 1/85 ..... Asst Attorney General
JD, Wake Forest, 1974
Michael J. Parker, 7/91 ..... Asst Attorney General
JD, Drake, 1989
Charles K. Phillips, 8/84 ..... Asst Attorney General
JD, Columbia (NY), 1982
M. Elise Pippin, 3/91-10/91, 4/94 ..... Asst Attorney General
JD, Louisville, 1980
Richard E. Ramsay, 12/91 ..... Asst Attorney General
JD, Drake, 1990
Stephen C. Robinson, 8/73 ..... Asst Attorney General
LLB, Drake, 1962
Beth A. Scheetz, 12/91 ..... Asst Attorney General
JD, Drake, 1990
Judy A. Sheirbon, 7/89-2/96 ..... Asst Attorney General
JD, Iowa, 1986
Cecelia C. Wagner, 9/95 ..... Asst Attorney General
JD, George Washington 1988
Mary K. Wickman, 8/89 ..... Asst Attorney General
JD, Iowa, 1986
Marne E. Woods, 6/93 ..... Asst Attorney General
JD, Drake, 1991
Dian M. Gottlob, 9/93-3/96 ..... Paralegal
Lori E. Kern, 11/91 ..... 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 ..... Asst Attorney General
JD, Iowa, 1985
Gerald A. Kuehn, 9/71 ..... Asst Attorney General
JD, Drake, 1967
Valencia V. McCown, 6/83 ..... Asst Attorney General
JD, Iowa, 1983

Marcia E. Mason, 7/82 ..... Asst Attorney General
JD, Iowa, 1982
James D. Miller, 12/79-4/82;10/86 ..... Asst 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
Julie A. Burger, 7/93 ..... Asst Attorney General
JD, Drake, 1991
James F. Christenson, 7/90 ..... Asst Attorney General
JD, Iowa, 1990
Kristin W. Ensign, 10/88 ..... Asst Attorney General
JD, Drake, 1983
Robert J. Glaser, 7/86 ..... Asst Attorney General
JD, Creighton, 1978
Forrest Guddall, 7/94 ..... Asst Attorney General
JD, Gonzaga 1994
William A. Hill, 8/90 ..... Asst Attorney General
JD, Drake, 1989
Robin A. Humphrey, 8/90 ..... Asst Attorney General
JD, Drake, 1985
Greg H. Knoploh, 5/87 ..... Asst Attorney General
JD, Iowa, 1978
Charles S. Lavorato, 9/83 ..... Asst Attorney General
JD, Drake, 1975
Layne M. Lindebak, 7/78 ..... Asst Attorney General
JD, Iowa, 1979
Joanne L. Moeller, 8/84 ..... Asst Attorney General
JD, Iowa, 1984
Shirley A. Steffe, 9/79 ..... Asst Attorney General
JD, Iowa, 1979
Suzie Berregaard Thomas, 7/87-7/95 ..... Asst Attorney General
JD, Drake, 1987
H. Loraine Wallace, 7/96 ..... Asst Attorney General
JD, Iowa 1983
Robert D. Wilson, 12/86-8/95 ..... Asst Attorney General
JD, Iowa, 1981
Connie D. Hadaway, 9/89 ..... Investigator
Marjorie A. Leeper, 7/82 ..... 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, 8/93 ..... 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 ..... Asst Attorney General
JD, Drake, 1982
John W. Baty, 9/72 ..... Asst Attorney General
JD, Drake, 1967
Robin Formaker, 4/84 ..... Asst Attorney General
JD, Iowa, 1979
Noel C. Hindt, 7/89 ..... Asst Attorney General
JD, Iowa, 1983
Mark Hunacek, 7/82 ..... Asst Attorney General
JD, Drake, 1981
Richard E. Mull, 7/78 ..... Asst Attorney General
JD, Iowa, 1977
Carolyn J. Olson, 8/87 ..... Asst Attorney General
JD, Drake, 1984
Carmen C. Mills, 7/82-6/90, 11/91 ..... Paralegal
Michael J. Raab, 1/85 ..... Paralegal
James M. Strohman, 2/88 ..... Executive Officer

UST

Dean A. Lerner, 2/83 ..... Asst Attorney General
JD, Drake, 1981
Robert C. Galbraith, 4/91 ..... Asst Attorney General
JD, Minnesota, 1975
Chester J. Culver, 1/91-8/95 ..... Investigator
Donald D. Stanley Jr, 9/95 ..... Investigator
Ronda K. Kaldenberg, 3/91 ..... Legal Secretary

ATTORNEY GENERAL'S 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.

AREA PROSECUTIONS DIVISION

The primary purpose of the Area Prosecutions Division is to assist local county attorneys in difficult, technical, or multi-jurisdiction 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, six 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. One attorney is assigned on a statewide basis to investigate and prosecute in each of the following specialized areas: 1) violence against women cases; 2) state environmental crimes; 3) pornography; 4) crimes occurring in state penal institutions; 5) state tax cases including personal income tax, corporate income tax, sales tax, and motor fuel tax; 6) medicaid fraud providers and recipients; The specialist positions are variously funded by legislative appropriation, federal grants, and by reimbursement from other state departments.

During the period of this report 318 major cases, including 41 incidents of homicide, were referred from all corners of the state and handled by the division's attorneys.

The Area Prosecutors continue to investigate and prosecute 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 1995-96 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 rule makings, energy efficiency program proposals, energy efficiency cost recovery filings, competitive long distance telephone proceedings, nuclear decommissioning proceedings, notice of inquiries, 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 1995-96, 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 one electric investor-owned utility contending that the utility had excessive earnings during the same period.

During the 1995-96 biennium, the OCA was involved in 109 electric transmission line certificate or renewal cases and 21 gas pipeline certificate or renewal cases. The OCA was involved in 13 formal complaints (initiated after informal attempts to resolve the consumer complaints against utilities were unsuccessful), and monitored over 850 informal complaint filings. There were over 190 purchased gas adjustments filings by utilities. The OCA participated in nearly 70 electric utility service area disputes. In addition, the OCA was involved in 19 rulemaking proceedings and participated in 4 investigation dockets. Also during 1995 and 1996, the OCA participated in proceedings reviewing proposed utility reorganizations involving several of Iowa' s utility holding companies, including IES/Interstate Power Company/Wisconsin Power and Light, Midwest Power/Iowa Illinois Gas and Electric Co. and United Cities Gas/Atmos Energy

Corporation. During the 1995-96 biennium, the OCA was involved in 18 judicial review proceedings in Iowa's District, Appellate and Supreme 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. During the 1995-96 biennium, the OCA participated in several energy efficiency plans and cost recovery proceedings.

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 Iowa Lemon Law.

In addition, the Consumer Protection Division may bring enforcement actions for violations of the Iowa Door to Door Sales Act, the Iowa Drug and Cosmetic Act, the Iowa Motor Vehicle Service Trade Practices Act, the Iowa Car Rental and Collision Damage Waiver Act, the Motor Vehicle Damage Disclosure Law, the Prize Notice Law, and several other state and federal laws and regulations.

The Consumer Protection Division consists of five attorneys, plus six investigators, four secretaries, two receptionists, and the Consumer Education Specialist/Older Iowans Project Coordinator. The Division, through its volunteer program, is fortunate to have the assistance of several volunteer investigators. In addition, the Division occasionally receives help from student interns who handle consumer complaints, do research and perform other important tasks.

During 1995 and 1996, the Division focused on several areas of civil and criminal enforcement, including prosecution of telemarketing fraud through the Attorney General's undercover taping enforcement program. That program became the national model which was employed by federal authorities in the December, 1995 "Senior Sentinel, criminal enforcement program. The Division's telemarketing enforcement program resulted in a 67 percent drop in telemarketing complaints to the Division between 1995 and 1996. The Division also filed criminal charges against several individuals operating a telemarketing scam that targeted small businesses, churches and professional offices involving office supplies. In addition, the Division filed a number of civil lawsuits during 1995 and 1996 in a variety of other areas including charitable solicitations, services for older citizens, mailed prize solicitations, health fraud, and others.

The Division also worked with other state attorneys general and the Federal Trade Commission in settling investigations of several motor vehicle manufacturers relating to auto lease advertising.

The Division further engaged in a number of activities in enforcing Iowa's antitrust laws, including working with other state attorneys general in resolving several investigations.

The Consumer Protection Division engages in many programs of preventative consumer protection designed to deter potential schemes and inform consumers. The Consumer Protection Division's involvement in handling individual consumer complaints, investigating possible deception in 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 either against Iowans or from an Iowa base. The Division 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. In addition, in 1996, the Division enhanced its efforts to educate consumers by implementing a "home page" on the Internet at: http://www.state.ia.us/government/ag/consumer.html. Also in 1996, the Consumer Protection Division began receiving complaints from the public via E-mail at: consumer@max.state.ia.us.

CRIME VICTIM ASSISTANCE PROGRAM

The Crime Victim Assistance Division (CVAD) is responsible for the administration of programs that benefit crime victims at the state level including the Crime Victim Compensation (CVC), Sexual Abuse Examination (SAE) , and Victim Services Grant (VSG) programs.

Funds for these programs, including the operational costs of the division, come primarily from fines and penalties paid by convicted criminals. No tax dollars are used for the CVC and SAE programs which are supported with state and federal criminal fines and penalties, restitution, and civil suit recoveries from the perpetrator or others responsible for the crime.

Crime Victim Assistance Board. The Crime Victim Assistance Board was created by the 1989 legislature and is appointed by the Attorney General. The ten member multi-disciplinary board has statutory responsibility for adoption of rules relating to CVAD programs. The board also receives and acts on program appeals filed by crime victims and service providers.

Crime Victim Compensation. In FY96, the program awarded a total of $2,825,045 compensation to 3,111 victims and their families for injury-related expenses resulting from crime. The average compensation awarded to a victim was $2,973.

The CVC program pays only for expenses not covered by another source such as insurance or government benefit programs. Victims must report the crime to law enforcement, cooperate with the reasonable requests of investigators and prosecutors, and make application for compensation within two years of the crime. Victims are disqualified if their own actions caused the injury through consent, provocation, or incitement of the crime.

Sexual Abuse Examination. In FY96, a total of $342,509 was paid for evidentiary sexual abuse examinations for 1,110 victims. Of those victims, 975 (88%) were under 18 years of age. The average cost of a sexual abuse examination was $281. Victims are not required to apply for the program. Providers submit an invoice and are paid directly for the examinations.

The SAE program pays for evidentiary examinations regardless of whether the victim has decided to report the sexual abuse to law enforcement. If the victim later decides to report the crime, law enforcement officers and prosecutors have the benefit of evidence that was collected in a timely and effective manner.

Victim Services Grant. The CVAD administers four state and federal grant programs that provide partial funding to community based victim service programs. In FY96, a total of $2,584,112 was distributed to programs that provide counseling, advocacy and shelter to crime victims. The programs served 33,151 victims.

Programs partially funded include 29 domestic abuse, 26 rape crisis, 2 prosecutor-based victim service, 1 child victim, and 1 survivors of homicide victims program, and 1 general violent crime program. Also partially funded were the Iowa Coalition Against Domestic Abuse and the Iowa Domestic Abuse Hotline.

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 1995-96, 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.

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 Low-level 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 rulemaking.

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 1995-96 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 1995-96 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 240 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 approximately 59.0 hours of continuing legal education during fiscal year 1996 at 11 separate continuing education events. Training events included annual Spring and Fall County Attorney Conferences, New Legislation Workshops, and specialized training on topics of Search and Seizure, Pharmaceuticals & Methamphetamine, .02, and DUI Homicide.

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. Publications included the dissemination of three monthly newsletters; Annotations, Highway Safety Law Update, and Drug Enforcement Update; Iowa Charging Manual, 4th Edition; and an update to the OWI/Major Traffic Offenses in Iowa - a Prosecution Manual. The Comprehensive Career Criminal and Drug Prosecution Support Program provided funding for specialized prosecutors in county attorney offices across the state, and provided research assistance and training to multi-jurisdictional task forces. The OWI/Traffic Safety Specialist coordinated efforts of prosecutors of impaired driving and related offenses through specialized publications, newsletters, and instructional programs. Through a Governor' s Alliance on Substance Abuse grant, the Prosecuting Attorneys Coordinator developed a Prosecutors Management Support System software program for county attorneys. The Prosecuting Attorneys Training Coordinator administers the Attorney General's asset forfeiture program established by Iowa Code section 809A, 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 addition, the division represents the Department of Human Services in all contested cases involving the child abuse registry, day care licensing and registration, and foster care licensing.

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. The division also 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.

Other areas in which the division provides representation to the Department include child support recovery, foster care recovery and legal settlement.

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

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 1995-1996 biennium, the division participated in the resolution of informal proceedings for 165 protests filed by audited taxpayers. The division also handled 70 contested case proceedings. In the biennium, 37 contested cases were disposed of before the State Board of Tax Review

During the biennium, 39 Iowa district court cases and 17 federal district court cases were handled by the division.

This division was involved in 5 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 handled 9 cases in the Iowa Supreme Court.

A total of 10 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 22 petitions for declaratory rulings. In addition, 359 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, $18,080,569 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 and dental malpractice, premises liability, motor vehicle accidents, social service liability and wrongful discharge from employment, 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 1995 and 1996 a total of 7,473 tort and general claims were received for investigation, and 7, 926 claims were presented for consideration by the State Appeal Board.

The division advises and represents 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 488 state cases and 327 federal civil rights actions in the last biennium. At the end of 1996, division lawyers were defending 545 pending cases in state and federal court. These include several suits where the State is seeking to modify or terminate continuing court supervision of prison conditions and operations.

Workers' compensation cases brought by state employees and claims against the Second Injury Fund are initiated as administrative actions before the Industrial Commissioner. Division lawyers were defending approximately 300 workers' compensation and Second Injury Fund cases at the end of 1996; and are providing legal counsel for the SIF's receivership, which was opened in 1996 because of inadequate resources for the Fund.

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. Seven Assistant Attorneys General, three legal assistants and six support staff provide legal services to the department, including litigation representation and agency advice.

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 1995-96, 20 tort cases were opened and 20 were closed, for a total savings of $11,551,462.79 (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. The Department is represented at the contested case hearing by three legal assistants under the direct supervision of an assistant attorney general. During 1995-96, 1435 administrative hearings were held. The assistant attorneys general handle the judicial review procedures in the district court on behalf of the Department. During the same time, 143 judicial review proceedings were opened and 162 were closed. The legal staff also represents the department in judicial condemnation actions. During 1995-96, 45 condemnation appeals were filed and 51 were closed, representing a savings of nearly $4,044,745.76 (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, and policy matters. Department contracts, easements, and other agreements are reviewed. The legal staff is also consulted with regard to proposed legislation and administrative rules.

REPORT OF THE ATTORNEY GENERAL OF IOWA

IOWA 1996

MILLER

State of Iowa
1996

FIFTY-FIRST BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

BIENNIAL PERIOD ENDING DECEMBER 31, 1996

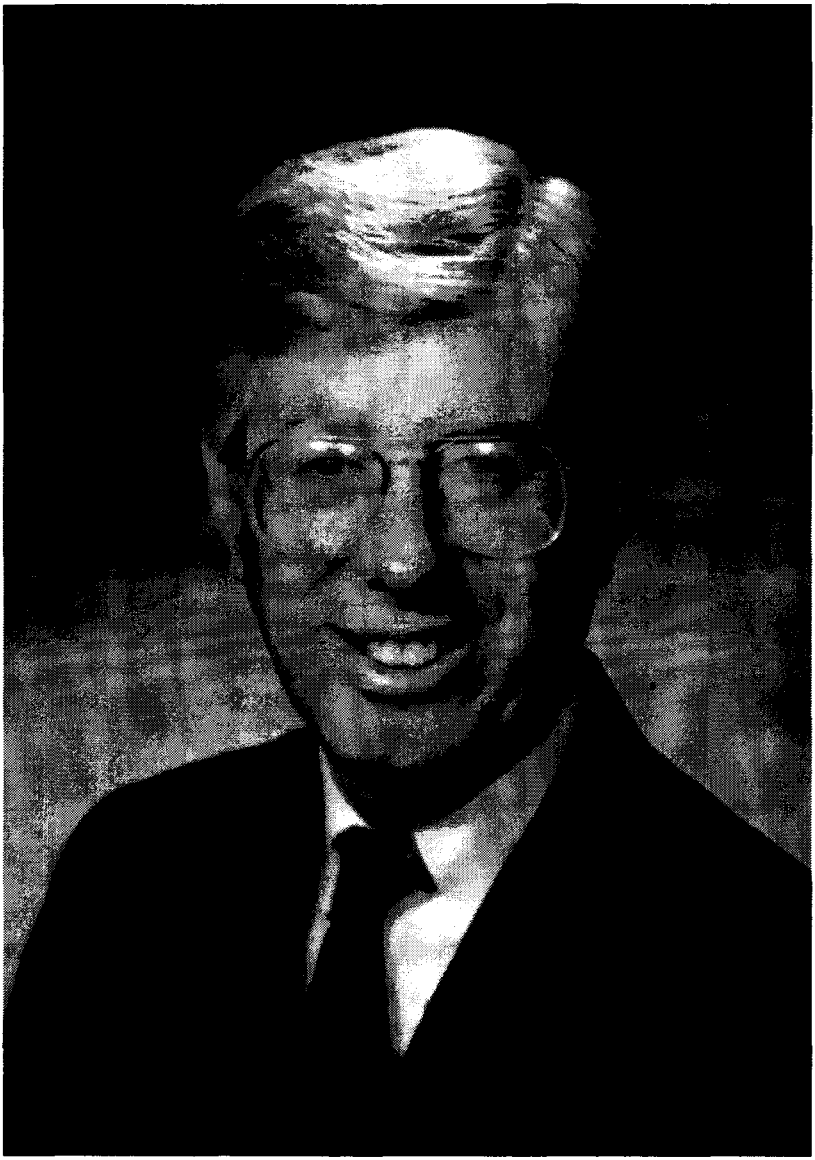
THOMAS J. MILLER

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	1991-1995
Thomas J. Miller	Clayton	1995-



PERSONNEL OF THE DEPARTMENT OF JUSTICE

PERSONNEL 1995 - 1996
ADMINISTRATIVE SERVICES

Thomas J. Miller, 1/79-1/91, 1/95 ..... Attorney General
JD, Harvard 1969
Gordon E. Allen, 8/82 ..... Deputy Attorney General
JD, Iowa, 1972
Charles J. Krogmeier, 5/86 ..... Deputy Attorney General
JD, Drake, 1974
Douglas E. Marek, 8/89 ..... Deputy Attorney General
JD, Drake, 1984
Elizabeth M. Osenbaugh, 1/79-2/94, 8/96 ..... Deputy Attorney General
JD, Iowa, 1971
Julie F. Pottorff, 7/79 ..... Deputy Attorney General
JD, Iowa, 1978
Elisabeth C. Buck, 2/91 ..... Administrator
Julie Fleming, 8/88 ..... Executive Officer
Robert P. Brammer, 11/78 ..... Executive Officer
Karen A. Redmond, 10/80 ..... Executive Officer
Clark R. Rasmussen, 9/92 ..... Program Director
Donald J. Schaefer, 11/91 ..... Data Process Specialist
Michael N. Elings, 9/94 ..... Data Process Specialist
Marilyn Chiodo, 2/91 ..... Administrative Assistant
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 ..... Administrative Assistant
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 ..... Asst Attorney General
JD, Iowa, 1979
Douglas D. Hammerand, 8/96 ..... Asst Attorney General
JD, Drake 1989
James E. Kivi, 2/80 ..... Asst Attorney General
JD, Iowa 1975
Thomas H. Miller, 10/85 ..... Asst Attorney General
JD, Iowa, 1975
Thomas E. Noonan, 6/89 ..... Asst Attorney General
JD, Iowa, 1982
Ronald M. Sotak, 11/96 ..... Asst Attorney General
JD, Drake 1992

Charles N. Thoman, 7/84 ..... Asst Attorney General
JD, Creighton, 1976
Richard A. Williams, 7/75 ..... Asst Attorney General
JD, Iowa, 1971
Steven K. Young, 7/91 ..... Asst Attorney General
JD, Drake, 1981
Connie L. Anderson Lee, 12/76 ..... Legal Secretary

CONSUMER PROTECTION

William L. Brauch, 7/87 ..... Division Director
JD, Iowa, 1987
Raymond H. Johnson, 7/87 ..... Asst Attorney General
JD, Iowa, 1986
Kathleen E. Keest, 9/96 ..... Asst Attorney General
JD, Iowa 1974
Chris T. Odell, 7/90 ..... Asst Attorney General
JD, Gonzaga, 1978
Steven M. St. Clair, 5/87 ..... Asst Attorney General
JD, Iowa, 1978
Carmel A. Benton, 9/89-6/95 ..... Investigator
Susan M. Bulver, 9/95 ..... Investigator
Sandra J. Kearney, 7/90 ..... 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
Vicki S. McDonald, 8/94 ..... Legal Secretary
Marilyn W. Rand, 10/69 ..... Legal Secretary
Judy A. Fast, 7/91-5/96 ..... Secretary/Receptionist
Dorene Stevens, 5/94 ..... Secretary/Receptionist
Natalie L. Kellenberg, 7/96 ..... 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
Susan R. Lodmell, 11/96 ..... Program Planner
Robin Ahnen-Cacciatore, 2/91-9/95 ..... Investigator
Ann M. Cutts, 8/94 ..... Investigator
Melissa Miller, 1/88 ..... Investigator
Alison E. Sotak, 7/92 ..... Investigator
Stephen E. Switzer, 12/89 ..... Investigator
Ruth C. Walker, 2/79 ..... Investigator
Marilyn Monroe, 1/97 ..... Secretary
Edith M. Omlie, 6/89 ..... Secretary/Receptionist

CRIMINAL APPEALS

Bridget A. Chambers, 2/90 ..... Division Director
JD, Iowa, 1985
Richard J. Bennett, 6/86 ..... Asst Attorney General
JD, Iowa, 1978
Martha E. Boesen, 7/91 ..... Asst Attorney General
JD, Notre Dame, 1991
Ann E. Brenden, 3/85 ..... Asst Attorney General
JD, Drake, 1981
Susan M. Crawford, 6/94 ..... Asst Attorney General
JD, Iowa 1994
Karen B. Doland, 7/90 ..... Asst Attorney General
JD, Iowa, 1989
Robert P. Ewald, 2/81 ..... Asst Attorney General
JD, Washburn, 1980
Thomas G. Fisher, 4/91-9/95 ..... Asst Attorney General
JD, Iowa, 1986
Sharon K. Hall, 7/96 ..... Asst Attorney General
JD, Drake 1993
Julie A. Halligan-Brown, 7/87 ..... Asst Attorney General
JD, Iowa, 1987
Thomas D. McGrane, 6/71 ..... Asst Attorney General
JD, Iowa, 1971
Roxann M. Ryan, 9/80 ..... Asst Attorney General
JD, Iowa, 1980
Angelina Smith, 7/94-1/96 ..... Asst Attorney General
JD, Iowa, 1994
Sheryl A. Soich, 2/88 ..... Asst Attorney General
JD, Drake, 1987
Mary E. Tabor, 8/93 ..... Asst Attorney General
JD, Iowa, 1991
Thomas S. Tauber, 7/89 ..... Asst Attorney General
JD, Drake, 1989
Christy J. Fisher, 1/67 ..... Legal Secretary
Shonna K. Swain, 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 ..... Asst Attorney General
JD, Iowa, 1977
David L. Dorff, 4/85 ..... Asst Attorney General
JD, Drake, 1982
Michael H. Smith, 9/84 ..... Asst Attorney General
JD, Iowa, 1977
Michael P. Valde, 3/91-3/96 ..... Asst Attorney General
JD, Iowa, 1976
Richard C. Heathcote, 9/89 ..... Investigator
Colleen Baker, 1/92 ..... Legal Secretary

FARM UNIT

Stephen H. Moline, 6/86-5/89, 7/90 ..... Asst Attorney General
JD, Iowa, 1986
Stephen E. Reno, 7/89 ..... Asst Attorney General
JD, Drake, 1981
Eric J. Tabor, 9/95 ..... Asst Attorney General
JD, Iowa 1980
Harry E. Crist, 7/85 ..... Investigator

JUVENILE LAW UNIT

Marilyn S. Lantz, 8/95 ..... Asst Attorney General
JD, Drake 1975
William C. Roach, 1/79-5/93, 9/95 ..... Executive Officer

LICENSING AND ADMINISTRATIVE LAW

Pamela D. Griebel, 4/91 ..... Division Director
JD, Iowa, 1977
Heather L. Adams, 7/94 ..... Asst Attorney General
JD, Iowa, 1994
Andrew R. Anderson, 7/94 ..... Asst Attorney General
JD, Iowa, 1992
Richard R. Autry, 9/86 ..... Asst Attorney General
JD, Drake, 1986
Sherie Barnett, 7/83-5/95 ..... Asst Attorney General
JD, Drake, 1981
Teresa Baustian, 4/81 ..... Asst Attorney General
JD, Iowa, 1979
Joseph D. Condo, 11/94-3/95 ..... Asst Attorney General
JD, Southern CA, 1991
Jean M. Davis, 7/96 ..... Asst Attorney General
JD, Suffolk 1990
Grant K. Dugdale, 5/91 ..... Asst Attorney General
JD, Iowa, 1987
Linny C. Emrich, 3/94 ..... Asst Attorney General
JD, Iowa, 1985
Jeffrey D. Farrell, 6/91 ..... Asst Attorney General
JD, Iowa, 1989
Scott M. Galenbeck, 1/84 ..... Asst Attorney General
JD, Iowa, 1974
Bruce Kempkes, 9/86-11/92, 4/94 ..... Asst Attorney General
JD, Iowa, 1980
Elisabeth A. Nelson, 8/95 ..... Asst Attorney General
JD, Drake, 1980
Christie J. Scase, 7/85 ..... Asst Attorney General
JD, Drake, 1985
Donald G. Senneff, 7/85 ..... Asst Attorney General
JD, Iowa 1967

Anuradha Vaitheswaran, 5/88 ..... Asst Attorney General
JD, Iowa, 1984
Rose A. Vasquez, 9/85 ..... Asst Attorney General
JD, Drake, 1985
Lynn M. Walding, 7/81 ..... Asst Attorney General
MA, JD, Iowa, 1981
Theresa 0. Weeg, 10/81 ..... Asst Attorney General
JD, Iowa, 1981
Traci L. Weldon, 3/94 ..... Asst Attorney General
JD, Drake, 1990
James S. Wisby, 10/88 ..... Asst 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

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JD, Drake, 1973
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JD, Iowa 1984
Laura M. Roan, 8/96 ..... Asst Attorney General
JD, Drake 1991
Kevin B. Struve,7/86 ..... Asst Attorney General
JD, Iowa, 1979
Susan K. Adkins, 9/96 ..... Legal Secretary
Peggy L. Baker, 9/94 ..... Legal Secretary
Ann M. Clary, 1/88 ..... Legal Secretary

REGENTS AND HUMAN SERVICES

Diane M. Stahle, 1/95 ..... Division Director
JD, Iowa 1979
Jill A. Cirivello, 6/93-3/96 ..... Asst Attorney General
JD, Hamline, 1991
Kathryn J. Delafield, 3/91-5/95 ..... Asst Attorney General
JD, Iowa, 1982
Barbara E. Galloway, 3/91 ..... Asst Attorney General
JD, Iowa, 1976
Mark L. Greiner, 7/94 ..... Asst Attorney General
JD, Drake, 1994
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JD, Drake, 1987
Daniel W. Hart, 7/85 ..... Asst Attorney General
JD, Iowa, 1983
Mark A. Haverkamp, 6/78 ..... Asst Attorney General
JD, Creighton, 1976

Patricia M. Hemphill, 2/83 ..... Asst Attorney General
JD, Drake, 1981
Debora L. Hewitt, 12/92 ..... Asst Attorney General
JD, Drake, 1991
Janet L. Hoffman, 8/94 ..... Asst Attorney General
JD, Iowa, 1990
Robert R. Huibregtse, 6/75 ..... Asst Attorney General
LLB, Drake, 1963
Kevin E. Kaufman, 4/96 ..... Asst Attorney General
JD, Creighton 1986
Tamara A. Lorenz, 5/96 ..... Asst Attorney General
JD, Drake, 1991
Patricia A. McGivern, 9/95 ..... Asst Attorney General
JD, Iowa 1977
Maureen McGuire, 7/83-12/96 ..... Asst Attorney General
JD, Iowa, 1983
Kathrine Miller-Todd, 1/85 ..... Asst Attorney General
JD, Wake Forest, 1974
Michael J. Parker, 7/91 ..... Asst Attorney General
JD, Drake, 1989
Charles K. Phillips, 8/84 ..... Asst Attorney General
JD, Columbia (NY), 1982
M. Elise Pippin, 3/91-10/91, 4/94 ..... Asst Attorney General
JD, Louisville, 1980
Richard E. Ramsay, 12/91 ..... Asst Attorney General
JD, Drake, 1990
Stephen C. Robinson, 8/73 ..... Asst Attorney General
LLB, Drake, 1962
Beth A. Scheetz, 12/91 ..... Asst Attorney General
JD, Drake, 1990
Judy A. Sheirbon, 7/89-2/96 ..... Asst Attorney General
JD, Iowa, 1986
Cecelia C. Wagner, 9/95 ..... Asst Attorney General
JD, George Washington 1988
Mary K. Wickman, 8/89 ..... Asst Attorney General
JD, Iowa, 1986
Marne E. Woods, 6/93 ..... Asst Attorney General
JD, Drake, 1991
Dian M. Gottlob, 9/93-3/96 ..... Paralegal
Lori E. Kern, 11/91 ..... 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 ..... Asst Attorney General
JD, Iowa, 1985
Gerald A. Kuehn, 9/71 ..... Asst Attorney General
JD, Drake, 1967
Valencia V. McCown, 6/83 ..... Asst Attorney General
JD, Iowa, 1983

Marcia E. Mason, 7/82 ..... Asst Attorney General
JD, Iowa, 1982
James D. Miller, 12/79-4/82;10/86 ..... Asst 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
Julie A. Burger, 7/93 ..... Asst Attorney General
JD, Drake, 1991
James F. Christenson, 7/90 ..... Asst Attorney General
JD, Iowa, 1990
Kristin W. Ensign, 10/88 ..... Asst Attorney General
JD, Drake, 1983
Robert J. Glaser, 7/86 ..... Asst Attorney General
JD, Creighton, 1978
Forrest Guddall, 7/94 ..... Asst Attorney General
JD, Gonzaga 1994
William A. Hill, 8/90 ..... Asst Attorney General
JD, Drake, 1989
Robin A. Humphrey, 8/90 ..... Asst Attorney General
JD, Drake, 1985
Greg H. Knoploh, 5/87 ..... Asst Attorney General
JD, Iowa, 1978
Charles S. Lavorato, 9/83 ..... Asst Attorney General
JD, Drake, 1975
Layne M. Lindebak, 7/78 ..... Asst Attorney General
JD, Iowa, 1979
Joanne L. Moeller, 8/84 ..... Asst Attorney General
JD, Iowa, 1984
Shirley A. Steffe, 9/79 ..... Asst Attorney General
JD, Iowa, 1979
Suzie Berregaard Thomas, 7/87-7/95 ..... Asst Attorney General
JD, Drake, 1987
H. Loraine Wallace, 7/96 ..... Asst Attorney General
JD, Iowa 1983
Robert D. Wilson, 12/86-8/95 ..... Asst Attorney General
JD, Iowa, 1981
Connie D. Hadaway, 9/89 ..... Investigator
Marjorie A. Leeper, 7/82 ..... 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, 8/93 ..... 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 ..... Asst Attorney General
JD, Drake, 1982
John W. Baty, 9/72 ..... Asst Attorney General
JD, Drake, 1967
Robin Formaker, 4/84 ..... Asst Attorney General
JD, Iowa, 1979
Noel C. Hindt, 7/89 ..... Asst Attorney General
JD, Iowa, 1983
Mark Hunacek, 7/82 ..... Asst Attorney General
JD, Drake, 1981
Richard E. Mull, 7/78 ..... Asst Attorney General
JD, Iowa, 1977
Carolyn J. Olson, 8/87 ..... Asst Attorney General
JD, Drake, 1984
Carmen C. Mills, 7/82-6/90, 11/91 ..... Paralegal
Michael J. Raab, 1/85 ..... Paralegal
James M. Strohman, 2/88 ..... Executive Officer

UST

Dean A. Lerner, 2/83 ..... Asst Attorney General
JD, Drake, 1981
Robert C. Galbraith, 4/91 ..... Asst Attorney General
JD, Minnesota, 1975
Chester J. Culver, 1/91-8/95 ..... Investigator
Donald D. Stanley Jr, 9/95 ..... Investigator
Ronda K. Kaldenberg, 3/91 ..... Legal Secretary

FEBRUARY 1995

February 6, 1995

COUNTY AND COUNTY OFFICERS: Contracts with private, for-profit corporations to operate county detention facility; bond referendum for "county jail." Iowa Code §§ 331.441, 331.447, 356.1, 356.2, 356.5, 356.36, 356.43, 356A.1, 356A.2, 356A.3, 356A.4, 356A.5, 356A.6, 356A.7 (1995). A county with a detention facility may not contract with a private, for-profit corporation for its operation. Passage of a bond referendum specifically for a "county jail" generally precludes a county from designating the newly finished building as a "county detention facility." (Kempkes to Harper, State Representative, and Ferguson, Black Hawk County Attorney, 2-6-95) #95-2-1

Patricia Harper, State Representative, and Thomas J. Ferguson, Black Hawk County Attorney: A county must furnish "a place for the confinement of prisoners" within or without its borders. Iowa Code § 331.381(17) (1995). This requirement forms the background for your separate opinion requests, which concern a bond referendum for a county jail and the day-to-day operation of a county detention facility. You mention that construction of a new county building, authorized by the public through a bond referendum specifically for a "county jail," is nearly finished and that the county board of supervisors is now considering designating it as a "county detention facility" and contracting with a private, for-profit corporation to operate it. You ask whether the county may enter into a contract with a private, for-profit corporation to operate the facility. You also ask whether the county may, given the specifics of the bond referendum, designate this building as a county detention facility. Application of established principles of review and consideration of our prior opinions lead us to conclude that a county having a detention facility may not contract with a private, for-profit corporation for its operation and that passage of a bond referendum specifically for a "county jail" generally precludes a county from designating the newly finished building as a "county detention facility."

Section 356A.1 provides counties with the power to establish county detention facilities:

> A county board of supervisors may . . . establish and maintain by lease, purchase, or contract *with a public or private nonprofit agency or corporation*, facilities where persons may be detained or confined pursuant to a court order . . . . The facilities may be in lieu of or in addition to the county jail. *The board shall establish rules and regulations for the operation of each facility. . . . The sheriff shall not have charge or custody of a person detained or confined in such facility or transferred thereto.* Such facility need not contain cells, cell blocks, or bars, if it is not necessary for the protection of the public, as determined by the board.

(emphasis added). Section 356A.2 governs the details of such contracts:

> If the board of supervisors contracts *with a private nonprofit agency or corporation* for the establishment and maintenance of such a facility, the contract shall state the charge per person per day to be paid by the county; that each facility shall insure the performance of the duties of the keeper as defined in section 356.5 [paraphrased *ante*]; the activities and service to be provided those detained or confined; the extent of security to be provided in the best interests of the community; the maximum number of persons that can be detained or committed at any one time; the number of employees to be provided by the contracting *private nonprofit agency or corporation* for the maintenance, supervision, control, and security of persons detained or confined in the facility; *and any other matters deemed necessary by the supervisors.* A contract shall be for a period not to exceed two years . . . .

(emphasis added).

Sections 356A.1 and 356A.2 both refer to the ability of counties to contract with a "public or private nonprofit agency or corporation" to operate their detention facilities. *See generally* Iowa Code ch. 490, (Business Corporation Act), ch. 504A (Nonprofit Corporation Act); *Greene County Rural Elec. Coop. v. Nelson*, 234 Iowa 362, 12 N.W.2d 886, 888 (1944) (construing "nonprofit"). Your opinion request focuses on whether the adjectival phrase "public or private nonprofit" narrowly applies only to the term "agency" or whether it broadly applies to both the terms "agency" and "corporation," If the phrase applies narrowly, private for-profit corporations may contract with a county; if the phrase applies more broadly, private for-profit corporations may not contract with a county.

The terms "agency" and "corporation" are separated in sections 356A.1 and 356A.2 by the term "or." In construing this statutory term we rely on established principles of statutory interpretation. *See generally Dingman v. City of Council Bluffs*, 249 Iowa 1121, 90 N.W.2d 742, 746-48 (1958) (setting forth general rules of interpretation in context of statutes governing issuance of general obligation bonds). When the term "or" is used in a statute it is presumed to be disjunctive unless a contrary legislative intent appears. *Kelly v. Sinclair Oil Corp., 476 N. W.2d 341, 345 (Iowa 1991); Kearney v. Ahmann*, 264 N.W.2d 768, 769 (Iowa 1978). The Supreme Court of Iowa has found a contrary legislative intent and declined to construe the term "or" disjunctively to separate portions of a statute where to do so causes an arbitrary or unreasonable result. *See Iowa Beef Processors, Inc. v. Miller*, 312 N.W.2d 530, 532-33 (Iowa 1981); *Green v. City of Mount Pleasant*, 131 N.W.2d 5, 23 (Iowa 1964); *see also* 1988 Op. Att'y Gen. 31, 35. *See generally* Iowa Code §§ 4.4(3), 4.6(5).

Application of these principles requires that the term "nonprofit" applies both to "agency" and "corporation." The legislative intent that a nonprofit entity perform the function of incarcerating county prisoners would apply equally to agencies and corporations. There appears to be no reason to interpret sections 356A.1 and 356A.2 in a way that allows "for-profit corporations" to contract with counties, but disallows "for-profit agencies" from doing so. As one authority

on statutory interpretation has explained, "Where the sense of the entire act requires that a qualifying word or phrase apply to . . . succeeding sections, the word or phrase will not be restricted to [the immediately succeeding language of that word or phrase]." 2A *Sutherland's Statutory Construction* § 47.33, at 270 (1992). *See generally* Iowa Code § 4.4(2) (legislative rule of construction that entire act presumed to be effective).

Further, restricting the scope of sections 356A.1 and 356A.2 to "for-profit agencies" implies that "for-profit agencies" which could perform this function actually exist. In light of the common meaning of the term "agency," the existence of "for-profit agencies" is unlikely. *See generally Black's Law Dictionary* 42 (1979) ("agency" generally includes any department, commission, administration, authority, board, or bureau of the government); *Webster's Ninth New Collegiate Dictionary* 22 (1979) ("agency" means an administrative division, as of a government).

In view of the foregoing, we conclude that private, for-profit corporations may not contract with a county to operate its detention facility. This common sense interpretation gives effect to the ordinary meaning of "agency" and acknowledges the familiar possibility that corporations may be either public or private, for-profit and nonprofit in nature. *See generally* Iowa Code § 4.1(38) (words shall be construed according to context and approved usage of the language); *State ex rel, Department of Transportation v. General Elec. Credit Corp.*, 448 N.W.2d 335,341 (Iowa 1989) (words should be given ordinary meaning absent persuasive reasons to the contrary).

We now address your question about designating the newly finished county jail as a county detention facility. In doing so, we proceed with the understanding that the county issued general obligation bonds for the construction of a "county jail." *See generally* Iowa Code §§ 331.441(2)(b)(5), 331.441(2)(c)(9), 331.446(1)(i). A county jail, however, is a significantly different species than a county detention facility. *Compare* Iowa Code ch. 356 with Iowa Code ch. 356A. We believe that a county seeking approval from its voters to pay specifically for a "county jail" generally may not designate that new building for another county purpose unless it premises this decision upon a change of circumstances. Section 331.447, which governs ballots for a bond referendum, and our prior opinions point to this conclusion.

Section 331.447 provides for the payment of general obligation bonds through tax levies approved by the voters in a referendum. Depending upon the particular proposition's financial impact, the referendum ballot must substantially follow one of these two forms:

> Shall the county of_____
>
> . . . be authorized to_____(here state purpose of project) at a total cost not exceeding $ _____ and _____ issue its general obligation bonds in an amount not exceeding $ _____ *for that purpose*, and be authorized to levy

> annually a tax not exceeding _____ dollars and _____ cents per thousand dollars of the assessed value of the taxable property within the county to pay the principal of and interest on the bonds?
>
> Shall the county of _____ be authorized to levy annually a tax not exceeding _____ and _____ cents per thousand dollars of the assessed value of the taxable property within the county to pay principal and interest on the bonded indebtedness of the county for the *purpose of* _____ ?

Iowa Code § 331.447(1)(b) (emphasis added).

The requirement that a ballot specify the purpose of the particular good or service underlying the bond referendum carries great significance. It serves to inform voters exactly what their tax dollars will pay for; and if the referendum passes, it passes because the voters agreed to pay for that particular good or service and no other. "The ballot is the instrument by which the voters empower the [government], as their agent, to incur indebtedness or issue the bonds." 15 E. McQuillin, *The Law of Municipal Corporations* § 40.11, at 322 (1985). "[I]f the vote authorizes the incurrence of a debt for a particular purpose, a debt cannot be incurred or the money expended for a different purpose." McQuillin, *supra*, § 40.18, at 348.

Three of our prior opinions emphasize that a referendum authorizing construction of a building for a particular purpose does not necessarily bind the county to utilize a building for that particular purpose in perpetuity. Changing facts and circumstances may allow the county to change the purpose for which a building is used.

In 1980, we considered the power of a county to establish a detention facility utilizing its present jail. 1980 Op. Att'y Gen. 775 (#80-7-17(L)). The underlying facts involved voter authorization, twelve years before the proposed utilization, for constructing and equipping the jail. We explained that under those circumstances a county could utilize its jail for another county purpose:

> While the [county] board probably would have had the power to convert the jail . . . at any time it deemed appropriate, the repeal of section 356.37, which used to mandate that the board . . . provide safe and suitable jails, makes it clear that a board . . . *could find the county jail to no longer be needed in its present form*, thereby allowing conversion of the property as authorized by section 332.3(13) [providing that property no longer needed for the purposes for which it was acquired could be converted to other county purposes.]

(emphasis added).

In 1992, we considered whether a school board could convert a special education school into an elementary education facility. 1992 Op. Att'y Gen. 147. We reasoned:

> The fact that a school building was constructed with bond proceeds from bonds issued for a particular purpose should not permanently restrict the use of the building. The needs of a school district *can be expected to change substantially over time, and the useful life of a school building is likely to span several changes in circumstances.* ...
>
> [A] school board may direct that a building constructed with bond proceeds be used for an alternative educational purpose *in order to meet the changing needs of the district. Whether circumstances render the [school] unsuitable or unnecessary for the education of handicapped children and more suitable for another purpose is for the local school board to determine. A court would not likely reverse the exercise of a school board's discretion in the absence of some showing of fraud, arbitrary action or abuse of discretion.*

(emphasis added).

Last year, we addressed the problem of a ballot involving the specific site for a school. We reasoned that if a school board "chooses to include a site on the ballot issue and the issue is approved, the board is bound to execute the building project on that site, *absent changed or unforeseen circumstances* rendering use of the approved site impossible." 1994 Op. Att'y Gen. 8 (#93-2-3(L)) (emphasis added).

The common thread of these opinions, as well as the import of section 331.447, indicates that a county generally has the obligation to construct the particular building specifically authorized by the voters in a bond referendum. When, however, circumstances change between the time of the bond referendum and the construction of that building, a county may put the building to another county purpose absent a showing of fraud, arbitrary action, or abuse of discretion. The facts and circumstances contained in your separate opinion requests do not indicate any change of circumstances. We thus conclude that the county, which set forth a bond referendum specifically for a "county jail," may not redesignate the newly finished building as a "county detention facility." In doing so, we do not preclude the possibility that sometime in the future the county may redesignate the county jail. *Cf.* 1992 Op. Att'y Gen. 147, 148 (school building constructed with proceeds from bonds issued for particular purpose "should not permanently restrict the use of the building"; bond covenants, however, may restrict the use made of the building).

In summary, a county with an established detention facility may not contract with a private, for-profit corporation for its operation, and passage [1]of a bond referendum specifically for a "county jail" generally precludes a county from redesignating the newly finished building as a "county detention facility."

MARCH 1995

March 21, 1995

COUNTIES; MENTAL HEALTH INSTITUTES: Liability for continued cost of care at private facilities. Iowa Code §§ 222.60, 226.9, 226.18, 226.19, 226.32, 227.11, 227.14, 229.6, 229.14, 230.1, 230.5, 230.8, 230.9, 230.10, 230.15, 230.17, 230.18, 252.2, 252.4, 252.13, 255.16, 331.381, 331.424, 347.16, 444.25 (1995). The county of legal settlement must pay for the continued cost of care provided to indigent, senile patients after their transfer from a state mental health institute to a private facility. (Ramsey and Kempkes to Carter, Jefferson County Attorney, 3-21-95) #95-3-1

Steven B. Carter, Jefferson County Attorney: You have requested an opinion concerning payment for the care of involuntarily committed patients, suffering from senility, after their transfer from a state mental health institute to a private facility. We believe that the county of legal settlement, which bears the cost of their care at a mental health institute if they are indigent, bears the cost of their continued care after their transfer to a private facility. *See generally In re D.N.*, 522 N.W.2d 824, 827-28 (Iowa 1994) (discussing concept of "legal settlement"); *State ex rel. Palmer v. Cass County*, 522 N.W.2d 615, 617-18 (Iowa 1994); 1982 Op. Att'y Gen. 254, 255-259.

Under the common law, public entities generally had no duty to care for the mentally ill or the indigent. *Wood v. Boone County*, 152 Iowa 692, 133 N.W. 377, 378 (1911); *see Cooledge v. Mahaska County*, 24 Iowa 211, 213 (1868). The General Assembly long ago enacted statutes changing this common-law rule. *See* 1898 Op. Att'y Gen. 324. Among others, chapters 227 and 229 (1993) implicate the public's responsibility for the care of indigent patients committed by a court to a hospital or other facility. Our duty is to determine the legislative intent underlying these chapters. *See generally* Iowa Code §§ 4.1, 4.2 (rules governing statutory interpretation); *State v. Wright*, 441 N.W.2d 364, 367 (Iowa 1989) (spirit of statute, as well as words, a proper consideration in statutory interpretation).

Chapter 227 governs county and private hospitals for the mentally ill. Section 227.11 specifically authorizes transfers of senile patients from "state hospitals" which include mental health institutes, see 1980 Op. Att'y Gen. 177, to county or private hospitals if they will receive equal benefit after transfer. When a

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[1] This opinion does not address the issue whether sections 356A.1 and 356A.2 are consistent with the state constitution's prohibition against delegating governmental power. See generally *Polk County v. Iowa State Appeals Bd.*, 330 N.W.2d 267, 273-74 (Iowa 1983).

county does not have proper facilities to care for patients, section 227.14 permits the county, at its expense, to transfer them to a convenient and proper county or private institution. Chapter 229 governs the hospitalization of the mentally ill, which generally includes most mental diseases and disorders. *See* Iowa Code § 229.1(7). Under section 229.14(4), a hospital's chief medical officer may recommend alternative placements to the committing court upon finding that patients are in need of fulltime care and are unlikely to benefit from further treatment by the hospital.

Section 229.42 clearly places the financial responsibility for the care of indigent, senile patients during their stay at a mental health institute upon the county of legal settlement. It does not allocate any financial responsibility for continued care after patients achieve maximum benefit at a mental health institute and undergo transfer to a private facility. Sections 227.11 and 229.15(4), which provide that patients must continue to receive appropriate care after transfer, also do not allocate this financial responsibility.

As a general rule, however, the General Assembly has linked financial responsibility for the care of the indigent or mentally disabled with the county of legal settlement. *E.g.*, Iowa Code §§ 222.60(1), 230.1(1), 230.9, 230.10, 252.13; *see* 1980 Op. Att'y Gen. 425 (county of legal settlement bears cost of psychiatric care for indigent, involuntarily committed patients transferred from state hospital to private facilities; chapter 230 "is founded on a presumption that liability follows settlement"); 1956 Op. Att'y Gen. 95 (county of legal settlement bears cost of support for senile patients undergoing transfer from state hospital to private facility; county may recoup some of its expenditures for support of those senile individuals from State); *see also* Iowa Code § 347.16 (any sick or injured county resident "shall be entitled to care and treatment in any public hospital established and maintained by that county"); *Baker v. Webster County*, 487 N.W.2d 321, 323 (Iowa 1992) (quoting district court: "the legislative scheme contemplates two roles for the players involved: the state as provider [of services for the mentally retarded], and the county as payor"); 1898 Op. Att'y Gen. 324 (county of residence bears responsibility for caring of mentally disabled unfit for treatment at state hospitals and indigent). *See generally* Iowa Code § 4.6(4) (proper to consider similar statutes in statutory interpretation).

In addition, the question of public liability for any social service normally involves policy considerations of the greatest importance for the General Assembly. *See generally 3A Sutherland's Statutory Construction* § 71.01, at 233 (1992) (certain types of legislation affect the whole or major segment of society as distinguished from special interests). In view of this circumstance, the General Assembly which imposed financial responsibility on a county of legal settlement in express terms presumably would have provided similar terms for the termination of this responsibility after patients undergo transfer from a mental health institute. That it provided no express language suggests an intent not to terminate the county's financial responsibility after the point of transfer. *See generally* Iowa R. App. P. 14(f)(13); *White v. Northwestern Bell*, 514 N.W.2d 70,74 (Iowa 1994); *Exira Community School District v. State of Iowa*, 512 N.W.2d 787 (Iowa 1994); *Kohrt v. Yetter*, 344 N.W.2d 245, 248 (Iowa 1984).

Continued care in placements within the community, moreover, furthers the judicially determined legislative intent of the mental health statutes, *State ex rel. Palmer v. Cass County*, 522 N.W.2d at 617-18. The intent of the legislative scheme regarding funding of mental health services is to provide services in the community rather than in one of the four mental health institutes. *Id.* To draw a funding distinction between emergency or critical care provided to patients by a mental health institute and non-emergency care provided to patients in the community by a private facility after their transfer from mental health institutes would tend to frustrate this legislative intent.

Last, nothing in sections 227.10, 227.11, 227.12, 227.13, and 227.14 which set forth procedures for transfers to mental health institutes from county or private facilities indicates a change in the source of public funding for patient care. If anything, the statutory language points to a continued duty on the part of counties to pay for that care. E.g., Iowa Code § 227.10 (transfers of involuntarily committed patients "shall be made at county expense"), § 227.11 ("county chargeable with the expense of a patient in a state hospital" shall, upon order of administrator, remove mentally ill patient to county or private facility), § 227.14 (county without proper facility for mentally ill may provide such care "at the expense of the county" in convenient and proper county or private facility).

In view of the foregoing, we conclude that the county of legal settlement must pay for the cost of care provided to indigent, senile patients after their transfer from a mental health institute to a private facility. The county, however, may be able to seek reimbursement for this cost from various sources. *See generally* Iowa Code §§ 230.15,230.18; 1994 Op. Att'y Gen. 80 (#94-1-1(L)) (county may seek reimbursement from patient for deductible or coinsurance, charged to Medicare patient at mental health hospital, subsequently paid by county to state).

APRIL 1995

April 26, 1995

MUNICIPALITIES; TAXATION: Local option tax. Iowa Code § 422B.1 (1995). When a city lies within two counties, and no one resides in the city's incorporated area lying within one of the counties, a local sales and services tax may not be imposed upon that area of the city. (Kempkes to Bailey, Page County Attorney, 4-26-95) #95-4-1(L)

MAY 1995

May 19, 1995

COUNTY AND COUNTY OFFICERS: Private use of public property; investigating and prosecuting county attorney for improper private use. Iowa Const. art. III, § 31 (1857); Iowa Code §§ 13.2, 66.3, 331.322, 331.754, 331.756, 721.2 (1995). County assessors may use county-owned vehicles and computers for private purposes if facts and circumstances indicate that the use also serves some public purpose. Similarly, part-time county attorneys may allow their private business partners or associates to use county-owned computers and office space for private purposes if facts and circumstances indicate that such use also serves some public purpose. County boards of supervisors could request an area prosecutor from this office to investigate county attorneys allegedly allowing the misuse of county property or request a court to appoint a special prosecutor to investigate any suspected misuse. (Kempkes to Eddie, State Representative, 5-19-95) #95-5-1

Russ Eddie, State Representative: You have requested opinions regarding county property and its alleged misuse. You ask whether county assessors may use county-owned computers and vehicles for private purposes and whether part-time county attorneys may allow their private business partners or associates to use county-owned computers and office space. You also ask whether county boards of supervisors may allow the private use of county property by resolution. Last, you ask who may investigate and prosecute cases in which county attorneys have allegedly allowed the misuse of county property.

Before answering these questions, we note that issues involving the use of public property often do not lend themselves to definitive line-drawing between what is proper and what is improper. 1980 Op. Att'y Gen. 102, 102-03; *see* 15 E. McQuillin, *The Law of Municipal Corporations* § 39.19, at 39 (1985). Accordingly, we iterate certain considerations regarding the scope of our opinions. First, opinions cannot resolve issues of fact; they

> can only address those matters which may be determined as a matter of law. Ultimately, application of [the law] to specific facts requires adjudication [in some form]. 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.

1992 Op. Att'y Gen. 199, 201. We thus cannot precisely define what use of public property might later be found to be improper. *See id.*; 1986 Op. Att'y Gen. 113. Second, opinions cannot comment upon the policy, wisdom, advisability, or inequities of constitutional or statutory provisions. 1980 Op. Att'y Gen. 51; *see Dickinson v. Porter*, 240 Iowa 393, 35 N.W.2d 66, 71 (1948), *appeal dismissed*, 338 U.S. 843. With these limitations in mind, we begin our analysis of your first question by identifying the principles embodied in the applicable constitutional and statutory provisions.

Those public officers in charge of public money or property have a heavy responsibility to assure its proper outlay or use. *See* 1990 Op. Att'y Gen. 79 (#90-7-3(L)). They are "bound to the most meticulous care" in administering their offices and handling public money or property. *State v. Canning*, 206 Iowa 1349, 221 N.W. 923, 924 (1928). This high standard remains applicable even if the amount of money or property is "inconsequential and trivial." *Id.* Both state constitutional and statutory provisions, which generally forbid the private use of public money or property, seek to ensure that public officers do not cross the line of proper outlay or use.

The state constitutional prohibition provides:

> No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered, or the contract entered into; nor, shall any money be paid on any claim, the subject matter of which shall not have been provided for by pre-existing laws, *and no public money or property shall be appropriated for local or private purposes* unless such appropriation, compensation, or claim, be allowed by two-thirds of the members of each branch of the General Assembly,

Iowa Const. art. III, § 31 (1857) (emphasis added). The constitutional prohibition embodies "[o]ne of the fundamentals of popular government," *Love v. City of Des Moines*, 210 Iowa 90, 280 N.W. 373, 375 (1930), which, in conjunction with other provisions, generally forbids the enactment of laws for private benefit, *see, e.g.*, Iowa Const. art. VIII, § I (legislature shall not create corporations by special laws), art. VII, § 1 (state's credit shall not be given, loaned, or used in aid of individuals, associations, or corporations; and state generally shall not assume or become responsible for their debts or liabilities), art. III, § 30 (generally, legislature shall not pass laws unless they are general in nature and of uniform operation), art. I, § 6 (legislature shall not grant to any citizen or class of citizens privileges or immunities that upon the same terms should not equally belong to all citizens).

The purpose of the constitutional prohibition "is the protection of public funds." 1936 Op. Att'y Gen. 548, 552. The framers sought to prevent any improper use of money or property held in trust for the public by its officers and employees, *see* 15 McQuillin, *supra*, § 39.19, at 37-39, as well as to prevent any governmental favoritism toward private parties, *Love v. City of Des Moines*, 230 N.W. at 375; 1986 Op. Att'y Gen. 113. *See generally* Annot., 5 A.L.R.2d 1182 (1949); Annot., 30 A.L.R. 1035 (1923). The burdens of showing beyond a reasonable doubt a violation of the constitutional prohibition, and of negating every conceivable basis supporting the governmental outlay, apparently rest upon those persons alleging an unconstitutional outlay. *See Dickinson v. Porter*, 35 N.W.2d at 71 (challenge to legislative action).

The statutory prohibition, Iowa Code section 721.2(5) (1995), defines official misconduct to include any

> public officer or employee . . . who knowingly . . . .
>
> *Uses or permits any other person to use* the property owned by the state or any subdivision or agency of the state *for any private purpose and for personal gain, to the detriment of* the state or any subdivision thereof.

(emphasis added). The statutory prohibition seeks to prevent the use of publicly owned property for purposes wholly unrelated to the furtherance of the public interest. 1980 Op. Att'y Gen. 160; 1976 Op. Att'y Gen. 339. Its violation amounts to a serious misdemeanor and requires proof of intentional misconduct by the public officer or employee and resulting injury to the state or subdivision. 4 J. Yeager & R. Carlson, *Iowa Practice* § 463, at 117-18 (1979); see Iowa Code § 721.2; 1984 Op. Att'y Gen. 47; 1980 Op. Att'y Gen. 160; 1978 Op. Att'y Gen. 191 (violation only occurs upon actual improper use); *see also* Yeager & Carlson, *supra*, § 463, at 118, § 390, at 111-13 (Supp. 1994) (noting possible criminal liability of public officer for theft by misappropriation and discussing computer crime under chapter 716A); 1976 Op. Att'y Gen. 69 (noting possible criminal liability of public officer for embezzlement). *See generally* Iowa Code § 721.2.

The statutory prohibition, which is expressly applicable to any "public officer," encompasses county officers. *See* 1980 Op. Att'y Gen. 160, 161-62. In no case has a court specifically addressed the scope of the constitutional prohibition. *See, e.g., Leonard v. State Bd. of Educ.*, 471 N.W.2d 815, 817 (Iowa 1991); *Willis v. City of Des Moines*, 357 N.W.2d 567, 570 (Iowa 1984); *Webster Realty Co. v. City of Fort Dodge*, 174 N.W.2d 413, 416 (Iowa 1970); *Carroll v. City of Cedar Falls*, 221 Iowa 277, 261 N.W. 652, 655 (1935); *Love v. City of Des Moines*, 230 N.W. at 378. Although we have never addressed the issue whether the constitutional prohibition also encompasses county officers, we have assumed that it does. *See* 1986 Op. Att'y Gen. 113; *see also* 1984 Op. Att'y Gen. 47. Our reasoning rests upon *Love v. City of Des Moines*. There, the court held that the constitutional prohibition "operates as a limitation of power, not only upon the legislature, but upon every city council in the state." 230 N.W. at 378. *See Leonard v. State Bd. of Educ.*, 471 N.W.2d at 817, *Carroll v. City of Cedar Falls*, 261 N.W. at 655.

The Supreme Court of Iowa has interpreted the constitutional prohibition to preclude public officers or employees from using publicly owned property for purely private purposes. In other words, a violation occurs in the absence of any "public purpose." *John R. Grubb, Inc. v. Iowa Housing Finance Authority*, 255 N.W.2d 79, 89 (Iowa 1977) (private purpose means an absence of "some principle of public policy"); *Dickinson v. Porter*, 35 N.W.2d at 79 (private purpose means an absence of "all possible public interest"); 1976 Op. Att'y Gen. 339. "[I]t is vital to the legality of any and every payment or promise of public funds that there shall be a consideration in the nature of a *public* benefit." *Love v. City of Des Moines*, 230 N.W. at 375-76. *Accord Carter v. Jernagin*, 227 N.W.2d 131, 134 (Iowa 1975); 1938 Op. Att'y Gen. 461.

The Supreme Court of Iowa has also said that "public purpose" should not be construed narrowly. *Dickinson v. Porter*, 35 N.W.2d at 80. The phrase must

have sufficient flexibility "to meet the challenges of increasingly complex, social, economic, and technological conditions," and the absence of any public purpose must be so clear "as to be perceptible by every mind at first blush." *John R. Grubb, Inc. v. Iowa Housing Finance Authority*, 255 N.W.2d at 93; *see* 1990 Op. Att'y Gen. 79 (#90-7-3(L)) (public-purpose test is flexible and broad); 1979 Op. Att'y Gen. 102 (public-purpose test focuses upon particular facts and circumstances).

Our analysis of your first question assumes that both the constitutional and statutory prohibitions prohibit a public officer or employee from knowingly using or permitting any other person to use public property for private purposes. It also assumes that the county-owned computer and its software amounts to property within the scope of these prohibitions.

Regarding county-owned vehicles, a prior opinion has outlined the scope of their use by county officers for other than public purposes. 1984 Op. Att'y Gen. 47; *see* 1980 Op. Att'y Gen. 160; 1976 Op. Att'y Gen. 339. We emphasized in the opinion that publicly owned vehicles could, under certain circumstances, serve a mixed private-public use. An officer regularly on call, or frequently required to work on official business at home or to leave home on official business at odd hours, could, for example, drive home a publicly owned vehicle. This same officer, however, could not drive it to such places as a party or grocery, which would not serve any public purpose. *See* 1980 Op. Att'y Gen. 160 (private use of publicly owned vehicle cannot rest upon mere pretext of public interest); *see also* Iowa Code § 721.4 (prohibiting use of publicly owned vehicles for political purposes). We suggested that in cases of mixed private-public use the public officer or employee fully reimburse the governmental entity paying the actual cost of mileage allocable to private purposes.

We also suggested that governmental entities, which ordinarily must determine the facts and circumstances regarding the use of publicly owned vehicles, write guidelines for public officers and employees. *Accord* 1980 Op. Att'y Gen. 160 (guidelines deter unauthorized usage, provide bases for factual determinations of mixed usage, and provide notice required by due process regarding unauthorized usage); 1976 Op. Att'y Gen. 339. *See generally John R. Grubb, Inc. v. Iowa Housing Finance Authority*, 255 N.W.2d at 93 (courts give deference to legislative findings on what constitutes a public purpose); *Dickinson v. Porter*, 35 N.W.2d at 79, 80 (legislative declaration of public purpose underlying statute controls courts if "zone of doubt" exists about statute's public purpose). It was important, we believed, to restrict rather than enlarge the private use of publicly owned vehicles in questionable cases. *See* 1980 Op. Att'y Gen. 160 (when public use of publicly owned vehicle merely incidental to primary private use, guidelines should follow fairly restrictive interpretation of public purpose).

The answer to your question about county assessors using county-owned vehicles thus depends on the scope of their official duties, see Iowa Code ch. 441, and the facts and circumstances surrounding any private use. It is clear that any private use of public property, such as driving a vehicle to or from a motel or home, must also serve some public purpose. *E.g.*, 1976 Op. Att'y

Gen. 339 (legislature did not intend to impose undue burdens or hardships on state employees by requiring them to provide own transportation to field office to pick up state-owned vehicle to travel to assignments in field). Assuming the existence of a public purpose, we recommend that counties provide written guidelines setting forth adequate findings of a public purpose for the private use of county-owned vehicles. These guidelines would tend to insulate the county and its officers and employees against formal or informal charges of impropriety. *Cf. Dickinson v. Porter*, 35 N.W.2d at 79, 80 (legislative declaration of public purpose underlying statute controls courts if "zone of doubt" exists about statute's public purpose). We again suggest that these guidelines require full reimbursement for any private use. Based upon actual cost to the county, full reimbursement tends to ensure that the mixed private-public use does not violate the constitutional or statutory prohibition. 1984 Op. Att'y Gen. 47.

Regarding county-owned computers and office space, we initially note that section 331.322(5) requires county boards to furnish offices, fuel, lights, and supplies for county assessors and county attorneys. The predecessor to section 331.322(5) has been the subject of a prior opinion in which this office explained the duties of a county board and a part-time county attorney regarding his or her office:

> The fact that [the office supplied by the county board] would be unsuitable for use in connection with [the county attorney's] private practice [is irrelevant]. *The county attorney's private practice, if any, is entirely separate and distinct from his official business* . . . . If the office
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> . . . offered to the county attorney is suitable for use by the county attorney for the transaction of the county's business, this is all that is required. . . . *The other things named in the statute to be furnished the officer are to be furnished him only in connection with the performance of his official duties and not in connection with his private business.*

1924 Op. Att'y Gen. 140 (emphasis added). *Accord* 1912 Op. Att'y Gen. 864 (county's obligation "does not include supplies which would be used by [the county attorney] in private practice"). *See generally* Iowa Code § 331.322(5) (county boards must provide furnished offices for county attorneys, but not law books; county boards may not "furnish an office also occupied by a practicing attorney to an officer other than the county attorney"); 1940 Op. Att'y Gen. 34 (office includes proper furniture, equipment, and supplies).

This office has, in fact, issued many opinions concerning the private use of public money or property in a variety of contexts. *See, e.g.*, 1994 Op. Att'y Gen. 86 (#94-1-6(L)) (city council should make findings adequately demonstrating that public purpose exists when on-duty firefighters, wearing official uniforms and displaying city fire trucks and equipment, solicit contributions in public for a charity); 1990 Op. Att'y Gen. 79 (#90-7-3(L)) (governmental entity may pay its employees' dues for membership in service club if, for example, their jobs consist of promoting employment in a small

town and membership directly related to accomplishing those jobs); 1986 Op. Att'y Gen. 113 (no per se violation of prohibition occurs when county appropriates money for loans to private businesses for creating jobs if it makes adequate finding of a need to combat adverse economic conditions); 1980 Op. Att'y Gen. 102 (public utility may pay for employee's retirement dinner under proper circumstances and with proper motives); 1978 Op. Att'y Gen. 191 (airport commission may not authorize use of airport for private purpose); 1976 Op. Att'y Gen. 69 (county generally may not pay for employees' parties, banquets, and entertainment unconnected with official business); 1972 Op. Att'y Gen. 395 (town council may not make appropriation to privately operated recreation center); 1972 Op. Att'y Gen. 352 (state may not let inmate drive state vehicle); 1968 Op. Att'y Gen. 357 (executive council may not make appropriation to specifically named person); 1968 Op. Att'y Gen. 80 (legislature may make appropriation to private agricultural producers' associations devoted to promoting matters in which state has vital economic interest); 1940 Op. Att'y Gen. 116 (superintendent of state institution may not drive state vehicle for private purpose).

These opinions illustrate the difficulty in drawing a line between proper and improper private use, particularly when the property is not a publicly owned vehicle and the user is not a public officer or employee. *Compare* 1990 Op. Att'y Gen. 74 (#90-4-5(L)) (counties may charge fee sufficient to cover cost of maintaining private farm lanes in the absence of any statutory prohibition) *with* 1938 Op. Att'y Gen. 837 (county prohibited by statute in all circumstances from letting its machines grade private roads); 1978 Op. Att'y Gen. 191. As we have most recently observed, it is an "extraordinarily delicate matter" for counties and other governing bodies to make policy decisions involving the use of public property for potentially private purposes. 1994 Op. Att'y Gen. 86 (#94-1-6(L)). The quote came from *Leonard v. State Board of Education*, 471 N.W.2d 815, 817 (Iowa 1991).

Leonard v. State Board of Education addressed the impact of the constitutional prohibition outside the context of vehicles and similarly noted the difficulty in making policy decisions regarding property subject to a mixed private-public use. In reviewing a superintendent's private business activities at a public school, the Supreme Court of Iowa noted the rather strong links between his private corporate business and his public office, where, among other things, he stored materials from his private business; performed private business activities during evenings, weekends, and regular working hours; and printed materials relating to his private business, for which he made reimbursement. *Id.* at 816-17. The complaint against these private activities charged that the school, in allowing them to occur, had violated the constitutional prohibition. *Id.* at 817.

In relying upon an administrative agency's factual findings, the court observed that "[t]here was certainly nothing clandestine" about the superintendent's private business activities, which were educational in nature; that there was a corporate by-law providing a share of the profits to the school and no "monetary profit" to him or his associate from the operation of the private business; that there was a benefit derived by the school from the operation of the private

business; and that, due to the reimbursement, there was "no cost" to the school for the printing services. *Id.* at 816-17. The administrative agency's findings, moreover, signalled that the superintendent had not violated the constitutional prohibition:

> [The administrative agency responsible for making initial conclusions of law determined there was no constitutional violation] . . . because of the educational nature of the enterprise and the benefit derived by the [school]. We find no cause, on these facts, to interfere with this determination.
>
> To be sure, it is an extraordinarily delicate matter to balance the practical and real educational benefit to the public against the incidental private advantage which might accrue to an enterprise by reason of its presence on school property. It seems that the local [school] board and the superintendent struck that balance with utmost care. They went to great pains to extend an educational advantage to the district, and to protect against the expenditure of any public funds on the [private] enterprise. Some might contend the challenged policy was unwise. We cannot find it illegal.

Id. at 817. *See State v. McGraw*, 480 N.E.2d 552, 554-55 (Ind. 1985) (defendant cannot be convicted of knowingly exerting unauthorized control over public property when no proof suggested use of publicly owned computer for private business cost the public anything).

The answer to your question about county assessors using county-owned computers and part-time county attorneys allowing their private business partners or associates to use county-owned computers and office space must begin with *Leonard v. State Board of Education.* In that case, the court indicated its reluctance to second-guess decisions by public entities regarding the private use of their public properties and effectively held that facts and circumstances, viewed in their entirety, might indicate a mixed private-public use of that property. 471 N.W.2d at 816-17.

It is clear that a public purpose must be served in order to allow the private use of county-owned computers by county assessors and of county-owned computers and office space by private business partners or associates of part-time county attorneys. *See generally* 1980 Op. Att'y Gen. 160 (private use cannot rest upon mere pretext of public interest); 1980 Op. Att'y Gen. 51 (in interpreting shadowy areas of constitutional law, past custom and usage entitled to consideration); 1978 Op. Att'y Gen. 191 (airport commission may not allow its employees to use airport property during nonbusiness hours; use to which property put determines public purpose; if use is for government, who uses property and when not necessarily controlling); 1924 Op. Att'y Gen. 140 (quoted ante; county attorney may not use county-furnished office supplies in private practice); 1912 Op. Att'y Gen. 864 (county's obligation does not include supplies for use by county attorney in private practice). We note, however, that identification of a public purpose when a vehicle is involved is significantly different than when office equipment such as a computer is involved. Travel

in a vehicle can have a mixed use for which a small portion of the trip for private purposes can be identified and segregated in order to reimburse the county; reimbursement in these circumstances is easily calculable on a cents-per-mile basis. The use of a computer, by contrast, is less likely to present a mixed private-public use situation; the work being performed is easily identifiable as either public or private in nature.

We would not, however, foreclose the possibility that office equipment such as a computer could be used in a joint project for which a public purpose exists and use by the county assessor or part-time county attorney for private purposes could be separately identified and reimbursed. *See Leonard v. State Board of Education*, 471 N.W.2d at 816-17. In the event that a public purpose is identified, we recommend that counties make written findings adequately identifying the public purpose and that the county assessor or part-time county attorney (or their private business partners or associates) make full reimbursement for any private use of the county-owned computer.

Our conclusion does not preclude a reversal of roles between counties and their county assessors or part-time county attorneys over ownership of equipment or other property. *See, e.g.*, 1940 Op. Att'y Gen. 34 (county may allow county attorney reasonable rental for public use of private office); *see also* 1924 Op. Att'y Gen. 140; 1916 Op. Att'y Gen. 178; 1914 Op. Att'y Gen. 161. In other words, neither the constitutional nor the statutory prohibition prevents county assessors or part-time county attorneys from leasing their own equipment or property to counties for use in official business. *See generally* Iowa Code §§ 331.342 (county officer may, under certain circumstances, have interest in contract with county), 721.11 (public officer may, under certain circumstances, have interest in public contracts). Absent any other constitutional or statutory directive, this reversal of roles provides an alternative to counties and their county assessors or part-time county attorneys who wish to share the use of computers or other equipment.

Your question about investigating county attorneys allegedly allowing the misuse of county property for private purposes initially requires an examination of chapter 331, which sets forth the powers and duties of county attorneys. Section 831.756 requires them to enforce all state laws and prosecute (or assist in the prosecution of) actions brought under chapter 66 to remove persons from public office. Normally, the filing of any criminal charges based upon violations of section 721.2(5) and presumably violations of the state constitution rests in the sound discretion of county attorneys or their assistants. 1986 Op. Att'y Gen. 11 3; 1980 Op. Att'y Gen. 105. *See generally* Iowa Code § 331.756(4). This principle obviously cannot apply, however, when county attorneys are potential criminal defendants for allegedly allowing the misuse of county property. *See* Annot., 84 A.L.R.3d 106, 119 (1978) (prosecuting attorney under investigation automatically disqualified in most jurisdictions); *see also* Iowa Code of Professional Responsibility Canons 1, 5, 9. As our supreme court has observed, county attorneys "ought always . . . be above suspicion" in the performance of official duties. *State v. Orozco*, 202 N.W.2d 344, 346 (Iowa 1972).

Three possibilities readily present themselves to county boards reasonably suspecting official misconduct on the part of county attorneys. *Cf.* 1976 Op. Att'y Gen. 869 (commission on campaign finance disclosure must, by statute, have "reasonable belief" of statutory violation before commencing investigation). One, a county board could refer the matter to this office, which has supervisory power over county attorneys in all matters pertaining to their duties. *See* Iowa Code § 13.2(7). Our powers include the authority to file petitions to remove from office elected officials who allegedly commit misconduct. Iowa Code § 66.3(1). Two, if the matter of the county attorney's alleged misconduct has been brought properly before a court, *e.g.*, Iowa Code ch. 66, a county board could petition the court to appoint a special prosecutor on the ground that the county attorney and his or her assistants suffer from a "disability" preventing them from legally representing the county under such circumstances, *see* Iowa Code § 331.754 (providing appointment power for county attorney with "disability"); *Polk County Conference Bd. v. Sarcone*, 516 N.W.2d 817, 821 (Iowa 1994) (county attorney's conflict of interest constitutes "disability" for purpose of section 331.754). Three, the county board could request a court to appoint a special prosecutor under its inherent power over quasi-judicial offices. *See Webster County Bd. of Supervisors v. Flattery*, 268 N.W.2d 869, 877 (Iowa, 1978) ("no doubt" courts may appoint prosecutor to perform essential criminal-justice duties); *see also State v. Brandt*, 253 N.W.2d 253, 262 (Iowa 1977); *Guinn v. Mahaska County*, 155 Iowa 527, 136 N.W. 929, 932 (1912); *State v. Miller*, 132 Iowa 587, 109 N.W. 1087, 1088 (1906); *Bevington v. Woodbury County*, 107 Iowa 424, 78 N.W. 222, 223-24 (1899); *Holmes v. Clayton County*, 32 Iowa 15, 16 (1871); *White v. Polk County*, 17 Iowa 413, 414 (1864); *State v. Warren*, 180 So.2d at 299; 1938 Op. Att'y Gen. 586; 1928 Op. Att'y Gen. 442; *State Attorneys General*, supra, at 27 *et seq. Cf. Taylor County v. Standley*, 79 Iowa 666, 44 N.W. 911, 912 (1890) (express managerial power over county affairs implies existence of power to employ special prosecutor to investigate county attorney).

It is important to emphasize, however, that county boards may only initiate the process for investigating alleged misconduct. The decision whether to file charges against a county attorney remains with the special or area prosecutor, who possesses considerable discretion in making that decision. *See, e.g., State v. Hall*, 395 N.W.2d 640, 642-43 (Iowa 1986); 1978 Op. Att'y Gen. 590; 1940 Op. Att'y Gen. 5.

In summary, we make three qualified conclusions. First, county assessors may use county-owned vehicles and computers for private purposes if facts and circumstances indicate that the use also serves some public purpose. It is recommended, however, that the counties issue written guidelines regarding such use and that county assessors make full reimbursement for any private use. Second and similarly, part-time county attorneys may allow their private business partners or associates to use county-owned computers and office space for private purposes if facts and circumstances indicate that such use also serves some public purpose. It is recommended, however, that counties make written findings adequately identifying the public purpose or purposes advanced by allowing the private use and that part-time county attorneys or their business partners or associates make full reimbursement for any private use. Third, county boards of supervisors could request an area prosecutor from this office to investigate county attorneys allegedly allowing the misuse of county property

or request a court to appoint a special prosecutor to investigate any suspected misuse. It should be noted, however, that a prosecutor possesses considerable discretion in deciding whether to file charges against a county attorney for any misuse of county property.

May 24, 1995

LABOR: Application of child labor laws to emancipated minors. Iowa Code §§ 92.1, 92.3, 92.5, 92.8 (1995). The various employment restrictions in chapter 92 apply to all persons under eighteen years of age regardless of their emancipation. (Kempkes to Johnson, Deputy Labor Commissioner, 5-24-95) #95-5-2(L)

JUNE 1995

June 7, 1995

COUNTIES AND COUNTY OFFICERS: Constructing radio tower and leasing it to private party. Iowa Code §§ 23A.2, 331.301, 331.361 (1995). A county board of supervisors may arrange to construct a radio tower for a public purpose and lease part of it to a private party competing against owners of existing radio towers if the lease results from specific authorization in an ordinance. (Kempkes to Gipp, State Representative, 6-7-95) #95-6-1(L)

TAXATION; COUNTIES: Low-income individuals between the ages of 23 and 65 are entitled to file claims for rent reimbursements and property tax credits. However, there is no obligation to fund the low-income fund in order to provide for the claimed reimbursements or credits. Iowa Code §§ 425.17(2), 425.18, 425.39 and 425.40 (1995). (Miller to Bernau, State Representative, 6-7-95) #95-6-2(L)

MUNICIPALITIES: Cable television franchises. Iowa Code § 364.2(4); 47 U.S.C. § 541. The cable television consumer protection and competition act of 1992, which prohibits a franchising authority from unreasonably refusing to grant a cable television franchise, preempts state law provisions which provide that a franchise may be granted only if an ordinance is passed and approved at an election. (Hunacek to Grundberg, 6-7-95) #95-6-3(L)

June 13, 1995

CONSTITUTIONAL LAW: ITEM VETO. Iowa Const., art. III, § 16; Iowa Code § 99E.10; 1994 Iowa Acts, ch. 1199, § 12; 1995 Iowa Acts, ch. 220, § 16, Senate File 481, § 16. The appropriation of "remaining revenues" to the Iowa State Fair Foundation in subsection 16(40) of Senate File 481 includes only those revenues that are left after deducting the amounts appropriated by the legislature in subsections 1 through 39. The funds item vetoed by the Governor remain in the Lottery Fund until further appropriated during the next legislative session. It is unnecessary to determine whether subsection 16(40) invades the Governor's item veto power. (Miller and Pottorff to

Murphy, State Senator, and Millage, State Representative, 6-13-95) #95-6-4

Larry Murphy, State Senator, and David Millage, State Representative: You have requested an opinion of the Attorney General concerning item vetoes of the appropriation of lottery revenues for the 1994-95 fiscal year in Senate File 481. Section 16 of Senate File 481 provides that, after $34,400,000 is transferred and credited to the general fund during the 1994-95 fiscal year, revenues shall be transferred in descending priority as delineated in forty subsections. Thirty nine subsections make specific appropriations to numerous agencies for a wide range of purposes. The final subsection, subsection 40, appropriates the "remaining revenues" in the following language:

> The remaining revenues to the Iowa state fair foundation for capital projects and major maintenance improvements at the Iowa state fairgrounds. If the remaining lottery revenues do not equal $5,500,000, then
>
> the remaining amount necessary to equal $5,500,000 is appropriated from the rebuild Iowa infrastructure fund to the Iowa state fair foundation for the fiscal year beginning July 1, 1995, and ending June 30, 1996.

Senate File 481, 76th G.A., 1st Sess., § 16(40) (Iowa 1995),

The Governor item vetoed twenty-seven of the thirty-nine appropriations, but did not item veto subsection 16(40) which provides for disposition of the "remaining revenues." The appropriations item vetoed total $2,224,000, the largest of which is $500,000 for a fee-based child day care program for public employees officed at or near the state capitol.

On June 1 the Governor transmitted Senate File 481 with his item veto message to the Secretary of State. In his veto message the Governor specifically addressed the disposition of the item-vetoed funds. He rejected the possibility that vetoed funds become part of the "remaining revenues" in the Lottery Fund which are appropriated in subsection 16(40) to the Iowa State Fair Foundation. The Governor asserts that he cannot be denied:

> the authority to veto separate and distinct items in an appropriation bill. To accept that the legislature could devise a way to evade the Governor's veto of individual items by reappropriating disapproved items and making them part of an expenditure of funds for another purpose in the same bill would ignore this basic principle of item veto law. Further, the legislature's attempt to construct such a device results in an unconstitutional invasion of the Governor's line item-veto authority. [Veto Message to Secretary of State Pate, June 1, 1995.]

Ultimately, the Governor concluded that the total amount item vetoed remains in the Lottery Fund to be transferred and credited to the general fund at the end of this fiscal year as provided in chapter 1199, section 12, of the 1994 Iowa Acts.

In light of the veto message and the Governor's direction that the vetoed funds be transferred to the general fund, you ask us to determine the disposition of the funds. You inquire whether subsection 16(40) invades the Governor's item veto authority as asserted in the Governor's item veto message? Can the Governor order the item-vetoed funds transferred and credited to the general fund? If, in fact, subsection 40 invades the Governor's item veto authority, should the item-vetoed funds be transferred to the CLEAN Fund?

It is our opinion that the appropriation of "remaining revenues" to the Iowa State Fair Foundation in subsection 16(40) of Senate File 481 includes only those revenues that are left after deducting the amounts appropriated by the legislature in subsections 1 through 39. The funds item vetoed by the Governor remain in the Lottery Fund until further appropriated during the next legislative session. It is unnecessary, therefore, for us to determine whether subsection 16(40) invades the Governor's item veto power.

In 1985 the General Assembly passed the Iowa Lottery Act authorizing the creation and operation of a lottery. 1985 Iowa Acts, ch. 33, § 101. At that time a Lottery Fund was created in the office of the State Treasurer. 1985 Iowa Acts, ch. 33, § 120. All revenues received for the sale of lottery tickets or shares are deposited into this fund. Iowa Code § 99E.20(2) (1995).

Several specific statutes address the disposition of lottery revenues in this fund. Under section 99E.10(1) prizes that are paid to winning ticket holders are appropriated from the fund. Iowa Code § 99E.10(1) (1995). Section 99E.10 further provides for deductions from lottery revenues for a number of purposes, including deposits to support the Gamblers' Assistance Fund and payments of the expenses for conducting the lottery and enforcing the lottery laws. Iowa Code § 99E.10(1)(a),(c),(e) (1995).

In addition, for the fiscal year beginning July 1, 1993, thirty-three million dollars transferred to the general fund and $500,000 was deposited into the Iowa State Fair Foundation Fund. Iowa Code § 99E.10(1)(e) (1995). Thereafter, for the fiscal period beginning July 1, 1994 and ending June 30, 1996, $500,000 annually was to be deposited into the Iowa State Fair Foundation. Expenses for marketing, educational and informational material were capped at four percent of the lottery revenues. Lottery revenues remaining after expenses were determined were to transfer to the Environment, Agriculture, and Natural Resources (CLEAN) Fund on a monthly basis. *Id.* Section 99E.34 directed the State Treasurer to make allotments of money to separate accounts within the CLEAN Fund, including the Iowa Resources Enhancement and Protection Fund and the Soil Conservation Account. Iowa Code §§ 99E.34(1)(a)(b) (1995).

In 1994 the General Assembly specifically overrode transfers to the CLEAN Fund by providing that:

> notwithstanding the requirement in section 99E.10, subsection 1, to transfer lottery revenue remaining after expenses are deducted, notwithstanding the requirement under section 99E.20, subsection 2, for the commissioner to certify and transfer a portion of the lottery fund to the CLEAN fund, and notwithstanding the appropriations and allocations in section 99E.34, all lottery revenues received during the fiscal year beginning July 1, 1994, and ending June 30, 1995, after deductions as provided in section 99E.10, subsection 1, and as appropriated under any Act of the Seventy-fifth General Assembly, 1994 Session, shall not be transferred to and deposited into the CLEAN Fund but shall be transferred and credited to the general fund of the state.

1994 Iowa Acts, 75th G.A., ch. 1199, § 12. Under this language, lottery revenues received in the 1994-95 fiscal year and not otherwise deducted under section 99E.10(1) or appropriated under an act of the 1994 session of the General Assembly "shall be transferred and credited to the general fund." Accordingly, the revenues were redirected from the CLEAN Fund to the general fund.

Subsequently, in Senate File 481, the General Assembly further addressed the disposition of lottery revenues received during the 1994-95 fiscal year:

> Notwithstanding 1994 Iowa Acts, chapter 1199, section 12, of the lottery revenues remaining after $34,400,000 is transferred and credited to the general fund of the state during the fiscal year beginning July 1, 1994, the following amounts shall be transferred in descending priority order ....

S.F. 481, § 16. The forty specific appropriations — of which the Governor item vetoed twenty-seven — immediately follow.

We note there is no question that the item vetoes of the twenty-seven appropriations are valid. The appropriation of money is essentially a legislative function. *Welden v. Ray*, 229 N.W.2d 706, 709 (Iowa 1975). The legislature may both appropriate money and specify how the money shall be spent. *Id.* at 709. "[I]tem veto provisions are designed to increase the governor's role in overall budgetary management." Appel, *Item Veto Litigation in Iowa: Marking the Boundaries Between Legislative and Executive Power*, 41 Drake L. Rev. 1, 56 (1992). "The governor may approve appropriation bills in whole or in part, and may disapprove any item of an appropriation bill . . . ." Iowa Const. art. III, § 16, amend. 27, *See Colton v. Branstad*, 372 N.W.2d 184, 188 (Iowa 1985). The only issues for our resolution concern the disposition of the lottery funds for which the specific appropriations were item vetoed.

Ordinarily, a valid item veto of an appropriation renders the appropriation void. *Rios v. Symington*, 172 Ariz. 3, 11, 833 P.2d 20, 28 (1992); *Stopczynski v. Governor*, 92 Mich App. 191, 201, 285 N.W.2d 62, 66 (1979); *Ruoff v. Rosellini*, 55 Wash.2d. 554, 557, 348 P.2d 971, 972-73 (1960); 1977-78 Mich. OAG No. 5394. In other jurisdictions this impact on the vetoed appropriation is often expressly stated in the constitutional provision that authorizes the item veto. Although the Iowa Constitution does not expressly state that a valid item veto renders the appropriation "void," this is the ultimate result. Iowa Const., art. III, § 16, amend. 27 (only that part of the appropriation bill approved by the governor becomes law). *See Welden v. Bay*, 229 N.W.2d at 715 ("items" must be separate and severable parts of an appropriation bill).

Once an appropriation is voided by a veto, the item-vetoed funds are left "unappropriated" and the disposition of the funds is resolved by reference to the state statutes. *See Rios v.* Symington, at 11, 833 P.2d at 28. To determine the disposition of the item-vetoed funds in Senate File 481, therefore, it is necessary to construe those statutes governing the disposition of lottery revenues. Those statutes include sections 99E.10 and 99E.34 as well as the amendment to these sections in the 1994 Iowa Acts and the subsequent amendment to the 1994 Iowa Acts in Senate File 481 itself,

In order to construe the 1994 and 1995 amendments, we turn to principles of statutory construction. Consistent with the general rule that a statute should be read as a whole, the provisions introduced by an amendatory act should be read together with the parts of the original section that were left unchanged as if they had been enacted as one section. Effect should be given to each part and they should be interpreted so that they do not conflict. IA *Sutherland Statutory Construction*, § 22.34 (5th Ed. 1992). *Contra Women Aware v. Reagen*, 331 N.W.2d 88, 91 (Iowa 1983) (where amending act rewrites a statute "to read as follows" provisions of the original statute not carried forward are deemed repealed). An act which purports to amend an existing statute is presumed to have a different meaning. 1A *Sutherland Statutory Construction*, at § 22.29; *Palmer v. Board of Supervisors*, 365 N.W.2d 35, 37 (Iowa 1985).

Applying these principles, we conclude that section 16 of Senate File 481 amended the 1994 Iowa Acts to change the disposition of "remaining" lottery revenues to the Iowa State Fair Foundation. Iowa Code section 99E.10 had provided for lottery revenues remaining after expenses were determined to transfer to the CLEAN Fund on a monthly basis. This was amended in 1994 when the General Assembly enacted chapter 1199, section 12, stating that lottery revenues after deductions and appropriations on June 30, 1995 "shall not be transferred to and deposited into the CLEAN Fund but shall be transferred and credited to the general fund of the state." 1994 Iowa Acts, ch. 1199, § 12. Finally, section 16 of Senate File 481 provided that, notwithstanding section 12, lottery revenues remaining after $34,400,000 is transferred and credited to the general fund "shall be transferred in descending priority order" culminating under subsection 16(40) with the transfer of "the remaining revenues" to the Iowa State Fair Foundation. In our opinion, these legislative enactments constitute a progression of three changed locations for the lottery

revenues: the CLEAN Fund, the general fund and, finally, the Iowa State Fair Foundation Fund.

We are unable to concur in the item veto message to the extent it asserts that principles of constitutional law underpinning the item veto authority justify transferring the item-vetoed funds to the general fund despite the most recent amendment to the 1994 Iowa Acts. The Iowa Supreme Court has recognized that in limited circumstances the legislature may unconstitutionally restrict the governor's item veto authority in drafting appropriations. In *Welden v. Ray* the Court expressed concerns about the use of "lump sum appropriations" in which amounts are appropriated to an agency in one lump sum followed by specific subdivisions itemizing expenditure of the lump sum in specified amounts for named purposes. In these circumstances the Court indicated a governor may not be required to veto the entire lump sum in order to item veto specific subdivisions. *Welden v. Ray*, 229 N.W.2d at 714. *See* 1988 Op. Att'y. Gen. 39, 41.

The Court has not addressed the issue raised in the item veto message, i.e., whether the legislature may thwart the budgetary impact of an item veto by redirecting item-vetoed funds to another purpose. We find it unnecessary to resolve this issue, because we do not construe Senate File 481 to redirect the item-vetoed funds to the Iowa State Fair Foundation. Like the appellate courts, we do not address constitutional questions when issues may be resolved on statutory grounds. *Diehl v. Beer and Liquor Control Department*, 422 N.W.2d 480, 481 (Iowa 1988); 1982 Op. Att'y. Gen. 527, 529.

In our view, appropriation of the "remaining revenues" to the Iowa State Fair Foundation does not encompass the funds left unappropriated by the twenty-seven item vetoes. In construing the meaning of the terms "remaining revenues" the goal is to ascertain and give effect to the legislative intent. *H & Z Vending v. Department of Inspections and Appeals*, 511 N.W.2d 397, 398 (Iowa 1994). Three factors persuade us that the legislature intended "remaining revenues" to include only those revenues which are left in the Lottery Fund after deduction of the preceding thirty-nine appropriations.

First, the term "remaining" is a relative, qualifying term limiting the revenues appropriated to the Iowa State Fair Foundation. Generally, relative or qualifying words refer only to the immediately preceding antecedent unless a contrary legislative intent appears. *Department of Transportation v. General Electric Credit Corporation*, 448 N.W.2d 335, 345 (Iowa 1989). Applying this principle, "remaining revenues" should only include those revenues if any left after the last of the preceding appropriations. This is a more narrow reference than a reference to the recapture of any funds left unappropriated following an item veto.

Second, the General Assembly has used different terms when transferring unappropriated lottery funds at the end of the fiscal year. Section 99E.32, repealed in 1994, had provided for the State Treasurer to make allotments into separate accounts from the Iowa Plan Fund for economic development, Iowa Code § 99E.32 (1993). Section 7 included a nonreversion provision. Iowa

Code § 99E.32(7) (1993). Specifically overriding the nonreversion language in 1991, the General Assembly stated that "all funds in the surplus account of the Iowa plan fund that remain unappropriated on June 30, 1991, shall be transferred to the general fund of the state." 1991 Iowa Acts, ch. 260, § 1006. The use of this language in 1991 to transfer the entire balance of the account significantly differs from the terms "remaining revenue."

Third, this resolution of the disposition of the item-vetoed funds strikes a desirable balance between the powers of the executive and legislative branches. Although we have expressed no view on the merits of the claim that section 16 of Senate File 481 as drafted invades the governor's item veto power, we do not foreclose the possibility that this drafting mechanism could present constitutional issues in some circumstances. Statutes should be construed to avoid unconstitutional results. *Knepper v. Monticello State Bank*, 450 N.W.2d 833, 838 (Iowa 1990); *Bevel v. Civil Service Commission*, 426 N.W.2d 380, 382 (Iowa 1990). Our construction of the "remaining revenues" in subsection 16(40) avoids this issue. Under our construction of the language the General Assembly clearly provides for the expenditure of state funds through prioritized, specific appropriations while the Governor retains his role in overall budgetary management by blocking the spending of state funds through exercise of his item veto authority.

In summary, it is our opinion that the appropriation of "remaining revenues" to the Iowa State Fair Foundation in subsection 16(40) of Senate File 481 includes only those revenues that are left after deducting the amounts appropriated by the legislature in subsections 1 through 39. The funds item vetoed by the Governor remain in the Lottery Fund until further appropriated during the next legislative session. It is unnecessary, therefore, for us to determine whether subsection 16(40) invades the Governor's item veto power.

June 20, 1995

TREASURER: Investment of public funds. Iowa Code §§ 12B.5,12B.10 (1995). Iowa Code section 12B.10(4)(e) (1995), which prohibits the treasurer from investing in reverse repurchase agreements, does not prevent the treasurer from investing state operating funds in securities lending transactions collateralized by cash or securities. Iowa Code section 12B.5 (1995), which provides a criminal penalty for loaning public funds or otherwise using public funds for a private purpose, does not prevent the treasurer from engaging in securities lending transactions with funds in the state operating portfolio provided that the transactions do not further a private purpose. (Barnett to Fitzgerald, State Treasurer, 6-20-95) #95-6-5(L)

SHERIFF; CIVIL SERVICE; PUBLIC RECORDS: Use of reserve deputy sheriffs; duties of county civil service commission in appointing and promoting regular deputy sheriffs and in allowing access to service records by regular deputy sheriffs. Iowa Code §§ 80D.6, 80D.8, 80D.9, 80D.10, 80D.11, 80D.12, 91B.1, 331.652, 341A.6, 341A.8 (1995). A county may assign to reserve deputies those duties of a regular, full-time deputy for which the reserve

deputies are properly trained and supervised to perform, even though such assignment may reduce overtime payments to regular, full-time deputies. Although a county civil service commission may arrange, compile, and administer competitive tests to determine the relative qualifications of persons seeking employment as regular deputies, the Law Enforcement Academy must design and prepare practical tests to determine the ability of persons to perform the duties of a regular deputy. A county civil service commission must allow regular deputies to inspect their respective service records in order to identify inaccurate or misleading information. (Kempkes to Van Fossen, State Representative, 6-20-95) #95-6-6(L)

AUGUST 1995

August 2, 1995

COUNTIES AND COUNTY OFFICERS: Smoking restrictions in county jails. Iowa Code §§ 142B.1, 142B.2, 142B.3, 331.361, 331.653, 331.658, 356.2, 356.5, 356.44 (1995). County sheriffs, and not county boards of supervisors, must implement and primarily enforce restrictions against smoking in county jails. (Kempkes to Barry, Cass County Attorney, 8-2-95) #95-8-1

James P. Barry, Cass County Attorney: You have requested an opinion whether county boards of supervisors may enact restrictions against the smoking of tobacco within county jails. Our primary task is to ascertain the intent of the General Assembly in enacting Iowa Code chapter 142B (1995), which, since 1978, has restricted smoking in certain public places. *See, e.g.*, 1992 Op. Att'y Gen. 17. *See generally* 1978 Iowa Acts, 67th G.A., ch. 1061. We conclude that county sheriffs, not county boards, must implement and primarily enforce smoking restrictions in county jails.

Chapter 142B is entitled "Smoking Prohibitions." Section 142B.1(3) defines "smoking" as the carrying of or control over a lighted cigar, cigarette, or pipe, or other lighted smoking equipment. Enforceable by civil fine, *see* Iowa Code §§ 142B.6, 805.8(11), section 142B.2(1) sets forth a general prohibition against smoking and an exception for certain workplaces;

> A person shall not smoke in a *public place* . . . except in a designated smoking area. . . . This prohibition does not apply to *factories, warehouses, and similar places of work not usually frequented by the general public*, except that an employee cafeteria in such place of work shall have a designated nonsmoking area.

(emphasis added). *See generally* Iowa Code § 4.1(30)(a) (legislature's use of "shall" normally imposes a duty).

Chapter 142B seeks to improve or preserve the public health and safety. Such a statute should receive a liberal construction or interpretation to achieve its underlying purposes. *See Shinrone Farms, Inc. v. Gosch*, 319 N.W.2d 298,

302 (Iowa 1982); *see* 3A *Sutherland's Statutory Construction* § 71.02, at 235 (1992) (public health statutes, even ones penal in nature, should receive "an extremely liberal construction to accomplish and maximize their beneficient objectives"); *see also* Iowa Code § 4.2 (statutes in general should be liberally construed with a view to promoting their objects), § 4.4(5) (statutes presumably favor public interest over any private interests).

Similarly, the particular structure of chapter 142B, which sets forth a general smoking prohibition and exceptions thereto, also has an impact upon its construction or interpretation. Statutory language that qualifies the application of a general provision or rule normally receives a narrow construction, with "all doubts and implications . . . resolved in favor of the general provision or rule" rather than the qualifying language. *Menke v. City of Carroll*, 474 N.W.2d 579, 580 (Iowa 1991); *accord* 2A *Sutherland's Statutory Construction* § 47.08, at 156, § 47.11, at 165-66 (1992).

Application of these two principles leads to the conclusion that the general smoking prohibition in section 142B.2(1) applies to county jails. Our analysis initially examines the exception for certain workplaces in section 142B.2(1), then proceeds to examine additional qualifying language in section 142B.1(3).

Section 142B.2(1) provides that the general smoking prohibition does not apply to "factories, warehouses, and similar places of work not usually frequented by the general public." The ordinary meanings of those terms, *see* Iowa Code § 4.1(38), simply cannot be stretched to encompass county jails. "Factories" are structures for manufacturing or producing, and "warehouses" are structures for the storage of merchandise or commodities. *Black's Law Dictionary* 1420 (1979); *Webster's Ninth New Collegiate Dictionary* 407, 1309 (1979).

Section 142B.2(1) also provides that the general smoking prohibition applies to any "public place." Section 142B.1(3) defines that phrase to mean

> *any enclosed indoor area* used by the general public or *serving as a place of work containing [250] or more square feet of floor space*, including, but not limited to, all restaurants with a seating capacity greater than fifty, all retail stores, lobbies and malls, offices, including waiting rooms, and other commercial establishments; public conveyances . . . ; educational facilities; hospitals, clinics, nursing homes, and other health care and medical facilities; and auditoriums, elevators, theaters, libraries, art museums, concert halls, indoor arenas, and meeting rooms.

(emphasis added). This definition implicates three questions.

First: The list of buildings, facilities, or areas specifically identified as public places does not include "county jails." That omission, however, does not operate as a limitation upon the general definition of "public place": the phrase "including, but not limited to" certainly indicates a legislative intent to identify

only some of the buildings, facilities, or areas affected by the general smoking prohibition. *See* 1994 Op. Att'y Gen. 98 (#94-5-6(L)); 2A *Sutherland's*, *supra*, § 47.07, at 152.

Second: In addition to providing a general definition of "public place" and listing specific buildings, facilities, and areas that are public places, section 142B.1(3) lists specific buildings, facilities, or areas that are not public places. (This list qualifies the general smoking prohibition in effectively the same way that section 142B.2(1) excepts "factories, warehouses, and similar places of work" from the general smoking prohibition.) The qualifying language of section 142B.1(3) provides that "public place" does not include a retail store selling certain amounts of tobacco; a private, enclosed office; a student's room at an educational facility and a resident's room at a health-care facility; and a sleeping room in a motel or hotel. A county jail obviously does not fit within the ordinary definitions of any of these descriptive words or phrases.

Third: Section 142B.1(3) additionally defines "public place" as "any enclosed indoor area used by the general public or serving as a place of work containing [250] or more square feet of floor space." This definition would encompass county jails, which serve as workplaces for various jail personnel, if they have floor space measuring more than 250 square feet. *Cf. Washington v. Tinsley*, 809 F. Supp. 504, 509 (S.D. Tex. 1992) (ordinance that prohibited smoking in any public building included jail). No reason appears to exclude prisoners or jail personnel from the scope of chapter 142B, and "[g]ranting an inmate the right to smoke would be ironic when such privilege is often denied nonincarcerated citizens," 1989 Tex. Op. Att'y Gen. JM-1089.

In reaching our conclusion, we note that public smoking restrictions or bans have been applied to jails in other states without extended discussion about their applicability. *See, e.g., Washington v. Tinsley*, 809 F. Supp. at 507-09 (ordinance that prohibited smoking in any public building encompasses jail); *Doughty v. County of Weld*, 731 F. Supp. 423, 424-28 (D. Colo. 1989) (ordinance that prohibited smoking in any public building encompasses jail); *Elliott v. Weld* County Commr's, 796 P.2d 71, 72 (Colo. App. 1990) (statute that authorized regulation of smoking in any public place encompasses jail); *see also* 1989 Tex. Op. Att'y Gen. JM-1098 (statute requiring safe, suitable, properly ventilated, and clean jail permits imposition of smoking restrictions). We additionally note that although smoking restrictions or bans may be perceived as impinging upon constitutional rights, court challenges based upon such perceptions have not met with success. Annot., "Nonsmoking Regulations,," 65 A.L.R.4th 1205, 1209 (1988); *see, e.g., Washington v. Tinsley*, 809 F. Supp. at 507; *Doughty v. County of Weld*, 731 F. Supp. at 424-28; *Stanfield v. Hay*, 849 S.W.2d 551, 553-54 (Ky. App. 1992); *Reynolds v. Romano*, 446 N.Y.S.2d 353, 353 (App. Div. 1982); *Rossie v. State*, 395 N.W.2d 801, 806-08 (Wis. App. 1986), *review denied*, 401 N.W.2d 10; *see also* 225 Ala. Op. Att'y Gen. 15 (1991); Note, 42 Drake L. Rev. 593, 649 (1993) (concluding that smoking ban in any public building would withstand state constitutional challenge).

We now need to determine which public entity must implement and primarily enforce chapter 142B in county jails, which may or may not be located within

the four walls of county courthouses. That issue requires an examination of chapters 331 and 356 as well as chapter 142B.

Chapter 331 sets forth the general powers and duties of county boards of supervisors. Section 331.361 provides county boards with general duties and powers regarding county property. *See, e.g.*, 1974 Op. Att'y Gen. 663 (county board shall designate office for sheriff). Section 331.381(17) requires county boards to furnish places for prisoner confinement. *See, e.g.*, Iowa Code chs. 356, 356A; 1970 Op. Att'y Gen. 83 (county board may acquire real estate for county jail). Section 331.322(10) requires county boards to inspect county jails.

Chapter 331 also sets forth the general powers and duties of county sheriffs. Section 331.653(35) embodies the common-law rule that county sheriffs shall have "charge of" county jails. Section 331.658 requires that county sheriffs provide prisoners with board, care, and supplies and provide county boards with access to county jails for determining whether prisoners are actually receiving county supplies for their board and care.

Chapter 356 governs county jails. Section 356.2 provides that county sheriffs shall have charge and custody of prisoners in county jails. Section 356.5 requires jailkeepers — supervised by county sheriffs, 1984 Op. Att'y Gen. 167 — to maintain county jails in a clean and healthful condition. Section 356.36 provides the Department of Corrections with the power to require minimum standards for county jails. Section 356.44 provides that, subject to judicial approval, county sheriffs shall formulate rules for the conduct and behavior of prisoners in county jails. *Compare* Iowa Code § 356.44 *with* Iowa Code § 356A.1 (county boards shall establish rules and regulations for "county detention facilities," which may be established in lieu of county jails).

Section 331.653(35), which codifies the common law, particularly appears to provide county sheriffs with the authority to restrict smoking in county jails absent chapter 142B. *See generally* Iowa Code § 4.6(4) (in determining legislative intent underlying ambiguous statute, proper to consider common law). A review of chapter 142 reveals no legislative intent to reallocate that authority.

Section 142B.6 provides that chapter 142B shall be implemented in an equitable manner throughout the state and shall supercede the inconsistent or conflicting laws of localities. Who bears the responsibility for implementing and primarily enforcing chapter 142B in an equitable manner is set forth in section 142B.3: "The person having *custody or control* of a public place . . . shall make reasonable efforts to prevent smoking in the public place . . . by posting appropriate signs indicating no-smoking or smoking areas." (emphasis added). *See* Iowa Code § 4.1(30)(a) (legislature's use of "shall" normally imposes a duty), § 142.1(3) (person in "custody or control" of facility shall provide sufficient number of rooms in which smoking is not permitted to accommodate all persons who desire such rooms), § 142B.2(2) (smoking areas "may" be designated by person having "custody or control" of public place), § 142B.4 (person in "custody or control" shall cause no-smoking signs to be posted and failure to do so may lead to civil fine under sections 142B.6 and 805.8(11)); *see also* 1990 Op. Att'y Gen. 18 (#89-5-5(L)) (county attorney may prosecute

violations of chapter 142B). *See generally* Iowa Code § 4.1(20) (legislature's use of "person" generally includes governments or other legal entities).

Ownership of a building, facility, or area does not necessarily equate with custody or control. *See* 1988 Op. Att'y Gen. 67 (#88-1-11(L)). In addition, the outside walls of a building or facility do not necessarily enclose a single "public place" such that a single person or entity must have custody or control over every room or area inside it. County boards, for example, cannot implement and enforce smoking restrictions throughout every room or area within county courthouses. *Id.* (county board cannot designate smoking or nonsmoking areas in portions of county courthouse assigned to judiciary or its employees).

It is true that county boards have custody or control over county jails in some respects and that they have a general duty to protect the public health, safety, and welfare. *E.g.*, Iowa Code §§ 331.301(1), 331.322(10), 331.361, 331.381(17). Day-to-day operation or management of county jails, however, tends to fall outside their scope of responsibility. Presumably due to public-safety considerations, county sheriffs have primary responsibility in this area as a general rule. *See* 1984 Op. Att'y Gen. 167 (sheriff clearly has responsibility for operation of county jail); *see also Smith v. Miller*, 241 Iowa 625, 40 N.W.2d 597, 598 (1950) (common law, in addition to statutes, imposes duty upon county sheriff to protect prisoners from harm); 1989 Tex. Op. Att'y Gen. JM-1098. *See generally* 1984 Op. Att'y Gen. 101 (discussing duties of county board and sheriff regarding prisoners); 1984 Op. Att'y Gen. 167 (discussing duties of county board and sheriff regarding his or her equipment).

Section 356.44, for example, requires county sheriffs to formulate rules for prisoner conduct and behavior, and section 356.5 requires their jailkeepers to maintain jails in a clean and healthy condition. Perhaps most important, section 331.653(35) specifically places county sheriffs in charge of county jails.

We believe that sections 142B.3(2) and 331.653(35) effectively place upon county sheriffs the responsibility for keeping jails in compliance with chapter 142B, because, in this particular context, "charge of" seems to equate with or include "control of." *See Black's*, *supra*, at 211, 298 ("Charge" means an obligation or duty; "control" means power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee); *Crabb's English Synonyms* 155, 531 (1917) ("control" indicates a restraint against individuals; "charge" imposes a responsibility or indicates something to look after); *Webster's*, *supra*, at 186, 245 ("charge" means management or supervision; "control" means power or authority to guide or manage or regulate). We therefore conclude that county sheriffs, and not county boards, must implement and primarily enforce chapter 142B in county jails. *Cf. Doughty v. County of Weld*, 731 F. Supp. at 428 (noting fact that sheriff implemented and enforced smoking ban in jail); 1989 Tex. Op. Att'y Gen. JM-1098 (sheriff has primary responsibility to make reasonable rules relating to prisoners and jail operations, including ones restricting smoking). *See generally* 1978 Op. Att'y Gen. 223 ("jail premises" means on the same lot as jail and not necessarily same building).

In summary, county sheriffs, and not county boards of supervisors, must implement and primarily enforce restrictions against smoking in county jails.

COUNTIES AND COUNTY OFFICERS: County hospital trustees; Conflict of interest. Iowa Code § 347.9 (1995). A person whose spouse is employed by a county hospital is ineligible to serve as a hospital trustee for that hospital. (Adams to Blessum, Madison County Attorney, 8-2-95) #95-8-2

A. Zane Blessum, Madison County Attorney: You have requested an opinion from the Attorney General concerning the eligibility of three individuals to serve as county hospital trustees. You indicate that the hospital at issue is a county hospital operating pursuant to Iowa Code chapter 347 (1995). Section 347.9 provides for the appointment and election of hospital trustees and imposes the following limitation on eligibility for this position:

> A person or spouse of a person with medical or special staff privileges in the county public hospital or who receives direct or indirect compensation from the county public hospital or direct or indirect compensation from a person contracting for services with the hospital shall not be eligible to serve as a trustee for that county public hospital.

Iowa Code § 347.9.

You present three situations for our consideration. First, you indicate that the spouse of a hospital trustee is an employee of the hospital's clinic. You note that employees of the clinic are employees of the hospital. Second, you state that another trustee is the president of a local bank. While the trustee does not own any shares of stock in the bank, you note that the hospital deposits funds in the bank and uses the bank for other services. Finally, you indicate that the spouse of another trustee supplies the hospital with vending machines. This trustee and her spouse also own a corporation which supplies soft drinks and food to the hospital.

I.

Section 347.9 provides three distinct limitations on eligibility to serve as a county hospital trustee. First, this provision clearly prohibits a person from serving as a trustee if either that person or his or her spouse has medical or special staff privileges at the hospital. Your first request focuses on whether the phrase "or spouse of a person" also applies to the two succeeding limitations: receiving direct or indirect compensation "from the county public hospital" or "from a person contracting for services with the hospital." If the phrase applies narrowly, a person would be ineligible to serve as a trustee if either that person or his or her spouse has medical or special staff privileges, but would not be ineligible if his or her spouse receives compensation from the hospital or from a person contracting for services with the hospital. If the phrase broadly applies to each limitation, a person would be ineligible to serve as a trustee if either that person or his or her spouse (1) has medical or special privileges at the hospital, (2) receives compensation from the hospital, or (3) receives compensation from a person contracting for services with the hospital.

In construing this provision, we are guided by a fundamental principle of statutory interpretation that "the construction of any statute must be reasonable." *Janson v. Fulton*, 162 N.W.2d 438, 442 (Iowa 1968); *see* 2A *Sutherland's Statutory Construction* § 45.12, at 61 (1992). An interpretation which results in an unreasonable consequence is to be avoided. *State v. Green*, 470 N.W.2d 15, 18 (Iowa 1991); 82 C.J.S. *Statutes* § 326, at 626 (1953). A statute should be given an interpretation which is "sensible, workable, practical and logical." *Farmers Coop. Elevator Co. v. Union State Bank*, 409 N.W.2d 178, 181 (Iowa 1986). Towards this end, we consider "the language used in the statute, the objects sought to be accomplished, [and] the evils and mischief sought to be remedied." *Metier v. Cooper Transp. Co.*, 378 N.W.2d 907, 912 (Iowa 1985).

The purpose behind section 347.9 is to prevent a county hospital trustee from taking advantage of his or her public position to benefit personally. *See* 1980 Op. Att'y Gen. 600. This purpose is certainly served by prohibiting a person from serving as a trustee if either that person or his or her spouse has medical or special staff privileges with the hospital. This purpose is equally furthered, however, by prohibiting a person from serving as a trustee if his or her spouse receives compensation from the hospital or from a person contracting for services with the hospital. Indeed, hospital trustees not only have the power to control and supervise "physicians, nurses, and attendants," they also have a duty to "[e]mploy an administrator, and necessary assistants and employees, and [to] fix their compensation." Iowa Code § 347.13(5), (6). Trustees are further authorized to "[d]o all things necessary for the management, control and government" of the county hospital. Iowa Code § 347.14 (11). *See also* Iowa Code §§ 347.13(1) (trustees shall "provide and equip suitable hospital buildings"); 347.13(3) (trustees shall procure equipment and supplies).

Hence, there appears to be no reason to interpret section 347.9 in a way which would prohibit a trustee from serving if his or her spouse has medical or special staff privileges with the hospital but which would allow a trustee to serve if his or her spouse receives compensation from the hospital or from a person contracting for services with the hospital. As one authority on statutory interpretation has stated, "[w]here the sense of the entire act requires that a qualifying . . . phrase apply to . . . succeeding sections, the . . . phrase will not be restricted to the [language immediately succeeding that phrase]." 2A *Sutherland's, supra*, § 47.33, at 270, *See also* Iowa Code § 4.4(3) (legislative rule of construction that a reasonable result is intended in enacting a statute). In view of the foregoing, we conclude that a hospital trustee is ineligible to serve if either the trustee or his or her spouse has medical or special staff privileges, receives direct or indirect compensation from the hospital,[2] or

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[2] A prior opinion of this office likewise stated that a person is ineligible to serve as a hospital trustee if he or she is employed by the county hospital. *See* 1974 Op. Att'y Gen. 769. Although this opinion was issued before the 1986 enactment of the pertinent part of section 347.9, the analysis contained therein remains relevant to the question at hand: "It would be an impropriety for [a trustee who is employed by the hospital] to pass on the question of how much he or she should be paid as an employee, whether he or she should be retained in employment, and any other possibility of self dealing. Many times the mere appearance of such an impropriety is worse for the public trust than any action taken." *Id.*

receives direct or indirect compensation from a person contracting for services with the hospital.

Your first question also requires an interpretation of the phrase "direct or indirect compensation." The legislature did not provide a definition of these terms in the statute, so we can assume that the words should normally be given their plain or ordinary meaning. *See American Asbestos Training Center, Ltd. v. Eastern Iowa Community College*, 463 N.W.2d 56, 58 (Iowa 1990); *see also* 2A *Sutherland's*, *supra*, § 47.28, at 248-49. The Iowa Supreme Court has held that examining dictionary definitions is an acceptable method of ascertaining the meaning of statutory terms. *See, e.g., State v. Simmons*, 500 N.W.2d 58, 59 (Iowa 1993); *see also* Iowa Code § 4.1(38). In addition, this office has frequently interpreted Iowa Code sections 331.342 and 362.5, which prohibit an officer or employee from having a "direct or indirect" interest in a county or city contract, Our prior interpretations of this phrase provide guidance in interpreting the words "direct" and "indirect" as used in section 347.9.

The word "compensation" is defined as "[r]emuneration for services rendered, whether in salary, fees, or commissions." *Black's Law Dictionary* 283 (1990). "Direct" is defined as "immediate, proximate, . . . the opposite of indirect." *Black's Law Dictionary* 459 (1992). "Indirect" has been defined as "not immediate or direct, but roundabout or secondary." 1994 Op. Att'y Gen. 119 (#94-7-4) (*quoting Webster's New World Dictionary*, 716 (1976)); *see also* 1980 Op. Att'y Gen. 580; 1976 Op. Att'y Gen. 551; 1956 Op. Att'y Gen. 59. Thus, if a spouse receives remuneration from the hospital for his or her services, the spouse receives compensation from the hospital.

In sum, section 347.9 precludes a person whose spouse is employed by a county hospital from serving as a hospital trustee for that hospital.

II.

The second situation you present involves a trustee who is currently the president of a local bank. While the trustee does not own any shares of stock in the bank, you note that the hospital deposits funds in the bank and uses the bank for other services.

Section 347.9 clearly prohibits a person from serving as a trustee if he or she receives "direct or indirect compensation from a person contracting for services with the hospital." Assuming that the trustee in his **or** her capacity as bank president receives compensation from the bank, your question focuses on whether the bank is a "person contracting for services with the hospital."

The term "person" is not defined in chapter 347. "Person" is generally defined in Iowa Code chapter 4, however, to include an "individual, corporation, limited liability company, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other legal entity." Iowa Code § 4.1(20). This definition is broad enough to include legal entities organized as banks pursuant to chapter 524. *See* Iowa Code § 524.103.

The issue thus becomes whether the bank is "contracting for services with the hospital." You state that the hospital deposits funds in the bank and also uses the bank for other banking services, but you do not further explain the nature of the relationship between the bank and the hospital. A bank deposit does create a contractual relationship between the bank and the depositor, *See generally Peterson v. Carstensen*, 249 N.W.2d 622, 624 (Iowa 1977). However, we are unable to resolve as a matter of law whether the bank has contracted for "services" with the hospital in this context. If, after reviewing the arrangement between the two parties, you determine that the contract is one for services, the bank president would be ineligible to serve as a hospital trustee. If the contract is not one for services, then the bank president would not be ineligible to serve as a hospital trustee. Iowa Code § 347.9.

III.

The final situation you present for our review involves a trustee whose spouse supplies the hospital with vending machines. You state that the vending machines are placed in the hospital for the convenience of hospital patients and staff. You further state that the hospital pays no fees to the spouse for the vending machines, and that the spouse pays no fees to the hospital. In addition, this trustee and spouse own a corporation which supplies soft drinks and food to the hospital.

A.

As discussed above, if a person's spouse receives direct or indirect compensation from a county hospital, the person is ineligible to serve as a trustee for that hospital. Iowa Code § 347.9. However, it appears from the facts you provide that the trustee's spouse is not receiving any compensation, either direct or indirect, from the hospital. Under this arrangement, the person would not be ineligible to serve as a trustee.[3]

B.

You further state that this same trustee also owns a corporation which supplies soft drinks and food to the hospital. When a trustee provides goods, as opposed to services, to a county hospital, section 347.15 applies. This section provides as follows:

> A trustee shall not have, directly or indirectly, any pecuniary interest in the purchase or sale of any commodities or supplies procured for or disposed of by a county hospital. This section does not apply to a purchase or sale of commodities or supplies which benefits a trustee if the benefit to the trustee does not exceed one thousand five hundred dollars in a fiscal year or to a purchase

[3] While section 347.9 does not directly apply to this factual situation, we question the propriety of granting the trustee's spouse the right to place the machines in the hospital at the exclusion of other vendors.

or sale made by a trustee of the board of hospital trustees through competitive bid which is issued in written form and is publicly invited and opened.

Hence, if upon further examination of this agreement you find that the trustee has a pecuniary interest in the sale of commodities or supplies to the hospital, the provisions of section 347.15 must be followed. The trustee would not be ineligible to serve based upon the above facts, but any sale of commodities or supplies to the hospital which benefits the trustee must either fall under the monetary limit or be made through the competitive bidding process.

August 15, 1995

PROFESSIONAL LICENSING BOARDS: Powers and duties of the Board of Medical Examiners, the Board of Physician Assistant Examiners, and the Physician Assistant Rules Review Group. Iowa Code §§ 17A.4, 148.13, 148C.1, 148C.3, 148C.6A, 148C.7 (1995). The Physician Assistant Rules Review Group must review and approve drafted rules before the filing of a Notice of Intended Agency Action by the Board of Physician Assistant Examiners; each member of the Physician Assistant Rules Review Group should have a meaningful opportunity to review drafted rules before voting to approve them. The Board of Physician Assistant Examiners has limited powers that may affect the "conduct" of supervising physicians; however, the Board of Medical Examiners has the power to discipline them. The Board of Physician Assistant Examiners has no authority over the eligibility of supervising physicians; however, it has rulemaking authority over the licensing of physician assistants (subject to approval by the Physician Assistant Rules Review Group). (Kempkes to Collins, Board of Medical Examiners, 8-15-95) #95-8-3(L)

August 23, 1995

CITIES: Military leave for city employees. Iowa Code §§ 29A.1, 29A.28 (1995). A city must pay its employees on military leave their full, normal civilian pay when they have been properly ordered to active state or federal service, but only for a maximum of thirty days per year. A city must pay its firefighters and police officers on military leave the amount they would receive if present on the job for the city. A city need not reimburse its employees for time or expense incurred in traveling to military duty assignments. (Kempkes to Tinsman, State Senator, 8-23-95) #95-8-4(L)

SEPTEMBER 1995

September 12, 1995

COUNTIES: Loans or transfers from county road use tax funds for non-road purposes. Iowa Constitution article VII, section 8; Iowa Code §§ 309.10, 310.27, 331.429 and 331.432 (1995). Expenditures from the secondary road fund and the farm-to-market road fund are limited by article VII, section 8 of the Iowa Constitution. Iowa Code section 331.432 prohibits transfers

or loans from either road fund to another county fund for purposes unrelated to highways. (Olson to Van Maanen, 9-12-95) #95-9-1

Harold Van Maanen, Speaker Pro Tempore: You have requested an opinion of the Attorney General concerning the authorized use of road use tax funds[4] allocated to counties. Your question is whether a county may loan its road use tax funds to other county funds. The loaned money would be used for purposes other than roads and repaid prior to the end of the fiscal year in which the loan occurred. We conclude that moneys from the road use tax fund cannot be loaned or transferred to any other county fund for purposes unrelated to highways.

The road use tax fund is a "special fund"[5] subject to article VII, section 8 of the Iowa Constitution, the "antidiversion amendment", which provides:

> All Motor Vehicle registration fees and all licenses and excise taxes on motor vehicle fuel, except cost of administration, shall be used exclusively for the construction, maintenance and supervision of the public highways exclusively within the state or for the payment of bonds issued or to be issued for the construction of such public highways and the payment of interest on such bonds.

> When a constitutional provision creates or sets aside a special fund for a particular purpose, the fund may not be transferred to any other fund or diverted to any other purpose. *Des Moines Solid Waste Agency v. Branstad*, 504 N.W.2d 889, 890 (Iowa 1993). Iowa Constitution article VII, section 8 prohibits a transfer of road use tax money to another fund, such as the general fund. 1991 Op. Att'y Gen. 8, 13.

In our opinion the constitutional prohibition also applies to loans from the road use tax fund. In general, a "loan" is the delivery of money to another who agrees to repay it with accrued interest. *Black's Law Dictionary*, 1085 (rev. 4th ed. 1968). The term "delivery" is synonymous with "transfer". *Id.* at 515. Lending money from the road use tax fund to other county funds would still be a diversion of road moneys, albeit a temporary one. The special road fund can only be used for purposes related to the state's public highways.

This office has on many occasions addressed permissible uses of the road use tax fund. We discussed the following limitations on expenditures from the secondary road fund in Op. Atty Gen. #93-9-6:

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[4] Under Iowa Code section 312.2 (1995) the primary road fund and two county funds (the secondary road fund and the farm-to-market road fund) are derived from the road use tax fund. A farm-to-market road is a type of secondary road. See Iowa Code §§306.3(2), (11) (1995).

[5] A "special fund" is defined in Iowa Code section 8.2(9) (1995) as "any and all government fees and other revenue receipts earmarked to finance a governmental agency to which no general fund appropriation is made by the state."

> 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*, 253 N.W.2d 755 (Iowa 1966). 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.

Under Iowa Code section 331.429(2), appropriations from the secondary road fund are limited to the secondary road services listed there, including construction, reconstruction and maintenance of secondary roads; construction and maintenance of bridges in certain cities; special drainage assessments benefitting secondary roads; interest and principal payments on county bonds issued for secondary roads, bridges, or culverts; secondary road equipment, materials and supplies as well as facilities in which to store, repair and service them. Loans to other county funds are not among the listed services, and thus are implicitly excluded. Legislative intent is expressed by omission as well as inclusion. *Barnes v. Iowa Dept. of Transp.*, 385 N.W.2d 260, 263 (Iowa 1986).

In addition to the secondary road fund, a county is permitted to maintain "general," "rural services," "debt service," and "other funds in accordance with generally accepted accounting principles." Iowa Code §§ 331.427 — .431 (1995). Transfers between some of these funds are authorized in section 331.432. For example, transfers may be made from the general or rural services funds to the secondary road fund in accordance with section 331.429(1)(a) and (b) upon resolution of the county board of supervisors. However, section 331.432 provides, "Moneys credited to the secondary road fund for the construction and the maintenance of secondary roads shall not be transferred." This prohibition applies to the whole secondary road fund, because once road use tax funds are commingled with other sources, the entire secondary road fund is subject to the antidiversion amendment. 1984 Op. Att'y Gen. 154, 155 (citing *Frost v. State*, 172 N.W.2d 575, 582 (Iowa 1969)).

The farm-to-market road fund is also subject to the antidiversion amendment. 1972 Op. Att'y Gen. 380, 382. Farm-to-market funds may be used for the establishment, construction, reconstruction or improvement of the farm-to-market road system, and occasionally for local secondary roads. Iowa Code §§ 309.10; 310.4. Under the conditions described in Code section 310.27 the

department of transportation may temporarily allocate moneys from the farm-to-market road fund for use in other farm-to-market projects. With approval of the director of management, the department may also temporarily transfer money from the farm-to-market road fund to the primary road fund, with the requirement that it be repaid within sixty days. *Id.* The primary road fund is, of course, under the same constitutional restrictions as the two county road funds.

At your request, we have also considered Code sections 331.477 and .478, which concern county authorization for current and noncurrent debt. We conclude that neither statute purports to authorize loans or advances from county road use tax funds for non-road debt. Payment of bonds and interest for the construction of public highways is, however, specifically allowable under Iowa Constitution article VII, section 8.

In summary, Iowa Code section 331.429(2) limits expenditures from the secondary road fund to the services listed there. The farm-to-market road fund may only be used for road purposes described in Code sections 309.10, 310.4 and 310.27. The road use tax fund must be used for the construction, maintenance and supervision of state highways because the fund contains money subject to the antidiversion amendment, article VII, section 8 of the Iowa Constitution. Both county road funds are subject to this constitutional provision, and may not be loaned or transferred to another county fund for purposes unrelated to highways.

September 13, 1995

COUNTIES; SHERIFFS: Power to hire deputy sheriffs. Iowa Code §§ 331.322, 331.323, 331.652, 331.903 (1995). County supervisors have discretionary power to determine the number of deputy sheriffs who shall serve their respective counties. County sheriffs have no power to hire deputy sheriffs without approval from their county boards of supervisors. (Kempkes to Kruse, Appanoose County Attorney, 9-13-95) #95-9-2(L)

TAXATION: FRANCHISE TAX: Nondiscrimination Against Income From Federal Securities. Iowa Code sections 422.60 and 422.61 (1995); 31 U.S.C. § 3124(a). The disallowance of a deduction for the expense allocable to an investment in an investment subsidiary in computing the "net income" for use as the measure of the Iowa franchise tax does not violate 31 U.S.C. § 3124(a) or discriminate against federal securities in violation of the constitutional doctrine of intergovernmental immunity. (Mason to Dinkla, State Representative, 9-13-95) #95-9-3(L)

September 26, 1995

TAXATION: Homestead tax credit. Residents of multiple housing cooperatives may be entitled to a homestead tax credit even if the apartment unit is constructed on a long-term leasehold interest. Iowa Code §§ 425.11(2), 499A.14. (Miller to Bernau, State Representative, 9-26-95) #95-9-4(L)

SHERIFFS: ELECTIONS; Qualifications for serving as county sheriff. Iowa Code § 331.651 (1995). Qualifications newly required for county sheriffs apply to all persons, including incumbents, who are elected or appointed to the position of county sheriff after June 30, 1994. (Kempkes to Lynch, Davis County Attorney, 9-26-95) #95-9-5(L)

OCTOBER 1995

October 25, 1995

HOSPITALS; CITIES. Proposed transfer of city hospital property by city council and hospital trustees; voter approval. Iowa Code §§ 347.13, 347.14, 347.28, 364.1, 364.7, 384.23, 384.24, 392.6 (1995). All the property of a city hospital may be transferred to a privately operated nonprofit corporation for use in providing health-care services to the public when the city council and hospital trustees jointly agree that this transfer will best serve the interests of the public. The real property of a city hospital may be leased at nominal rent to a privately operated nonprofit corporation for use in providing health-care services to the public when the city receives valuable consideration in a form other than rent. The property of a city hospital, subject to certain conditions, may be transferred in its entirety to a privately operated nonprofit corporation for use in providing health-care services to the public without voter approval. (Kempkes to Boswell, President of Senate, and Boggess, State Representative, 10-25-95) #95-10-1

Leonard *L. Boswell, President of the* Senate, and *Effie Lee Boggess, State Representative:* You have made two opinion requests about a proposed agreement effectively leading to the merger of property held by a public hospital and a nonprofit hospital. In terminating the City of Clarinda Municipal Hospital and the Shenandoah Memorial Hospital, this agreement would create a privately operated nonprofit corporation that acquires all their assets and assumes all their liabilities. The new nonprofit corporation would then use their combined assets in providing health-care services to the residents of both cities. We understand that members of the public will be strongly encouraged to use the new nonprofit corporation for their health-care services and that the Clarinda City Council and the Board of Hospital Trustees for Clarinda Municipal Hospital jointly approve of the proposed agreement.

Among other things, this agreement provides that the real property associated with Clarinda Municipal Hospital would be leased to the new nonprofit corporation. It is anticipated that the lease, among other things, would require (a) the new nonprofit corporation to maintain the property, including all structural elements; (b) any capital improvements made by the new nonprofit corporation to become part of the property; and (c) termination of the lease in the event the new nonprofit corporation discontinues its use of the property for providing health-care services to the public, with possession of the property reverting to the city. It is also anticipated that the lease would permit the automatic renewal of the lease term and the rent of ten dollars per year. You ask whether the city may enter into this lease of real property and whether

the transfer of city hospital property in its entirety requires voter approval. Under the particular facts and circumstances, we conclude that the city may enter into the lease and that the transfer does not require voter approval.

I.

In order to arrive at these conclusions, we need to pinpoint the statutory authority for the proposed transfer of city hospital property in its entirety. That authority is set forth in Iowa Code chapters 347, 364, 384, and 392 (1995).

We initially examine chapter 384, which governs city finance. In its division governing the issuance of general obligation bonds, it impliedly gives a city the authority to establish a city hospital. 1988 Op. Att'y Gen. 10, 13; *see* Iowa Code § 384.24. *See* generally Iowa Const. amend., § 38A (granting home rule authority to cities). For example, section 384.24(4)(c) specifically defines an "essential corporate purpose" of a city to mean the "acquisition, construction, reconstruction, enlargement, improvement, and equipping of" a city hospital "and the acquisition of real estate therefor."

Chapter 364 sets forth the general powers and duties of a city acting through its city council. Section 364.7 gives a city council, subject to certain conditions, the authority to dispose of the city's real property.

Chapter 392 addresses various subjects involving city administration, and among them lies the operation of a city hospital. Among other things, section 392.6 provides that hospital trustees shall be elected and shall have broad authority to provide for the "management, control, and government" of a city hospital. *See Koelling v. Board of Trustees*, 259 Iowa 1185, 146 N.W.2d 284, 290 (1966); *Phinney v. Montgomery*, 218 Iowa 1240, 257 N.W. 208, 210 (1934).

Although entitled "County Hospitals," chapter 347 contains certain provisions governing a city hospital. Section 347.28 provides that a city hospital "may lease or sell any of its property which is not needed for hospital purposes to any person, upon approval by the board of trustees." *See generally* Iowa Code § 4.1(30)(c) ("may" normally confers a statutory power).

Given the circumstances underlying your opinion requests, these chapters do not have any ambiguity regarding the authority to transfer the property of the city hospital in its entirety. See generally *Stroup v. Reno*, 530 N.W.2d 441, 443 (Iowa 1995) (unambiguous statutes normally require no construction or interpretation); *State v. Hopkins*, 465 N.W.2d 894, 896 (Iowa 1991) (generally improper to search for statutory meaning when language plain and meaning clear). The city council and hospital trustees may therefore agree to transfer all the property of the city hospital to the new nonprofit corporation pursuant to the proposed agreement. We offer, however, two observations regarding the language in section 347.28 that permits hospital trustees to lease or sell *"any* [city hospital] property which is *not needed for hospital purposes* . . . ."

One observation regards the physical aspect of the hospital property encompassed by section 347.28. The word "any" appears comprehensive in scope. *See Iowa-Illinois Gas & Elec. Co. v. City of Bettendorf*, 241 Iowa 358, 41 N.W.2d 1, 45 (1950) ("any" a synonym of "all" and commonly means without limitation or restriction); 3A C.J.S. *Any* 900 (1973) ("any" usually excludes idea of distinction). We therefore believe that "any . . . property" includes any real property titled in the name of the city hospital itself. *See Cole v. City of Osceola*, 179 N.W.2d 524, 530-31 (Iowa 1970) ("any property" in zoning ordinance held to include residences); *United States v. Taylor*, 13 F.3d 786, 790 (4th Cir. 1994) ("any property" in forfeiture statute unambiguous and includes real property); 2A *Words & Phrases* 195-96 (1953) (collecting cases in which "any property" construed to include real property).

The other observation regards the utilitarian aspect of the hospital property encompassed by section 347.28. Although the proposed agreement apparently involves a going concern in present need of its assets for use in providing health-care services, it also involves the lease of all the real property associated with the city hospital to the new nonprofit corporation. This circumstance, in which a city hospital no longer has any underlying real property, suggests all remaining hospital property may no longer be "needed for hospital purposes." *Cf. Foote Memorial Hospital, Inc. v. Kelley*, 211 N.W.2d 649, 659-60 (Mich. 1973) (in upholding wholesale transfer of city hospital property as part of proposed agreement resulting in provision of health-care services by privately operated nonprofit corporation, court rejected argument that property actually needed for current hospital purposes). In this vein, we note that hospital trustees have broad discretion in deciding what property falls within the category of "not needed" and thereby amounts to a proper subject of a sale or lease. *See Davis v. City of Santa Ana*, 239 P.2d 656, 662 (Cal. App. 1952); *In re Petition of City of Beaverton*, 727 P.2d 171, 174 (Or. App. 1986); 10 E. McQuillin, *The Law of Municipal Corporations* § 28.37, at 92-93, § 28.38.20, at 112 (1990).

In view of the foregoing, we conclude the city council and hospital trustees may agree to transfer the property of the city hospital in its entirety to the new nonprofit corporation pursuant to the proposed agreement.

II.

Next, we need to address the question whether the city may enter into the proposed lease with the new nonprofit corporation, a private entity, when the city will receive rent of only ten dollars per year. Our analysis takes into account that a city has broad discretion in disposing of its property and that a disposition will not be overturned absent an abuse of this discretion. *Cather & Sons Const., Inc. v. City of Lincoln*, 264 N.W.2d 413, 420 (Neb. 1978); 10 McQuillin, *supra*, § 28.42, at 129.

> Section 364.7 provides that a city may not dispose of an interest in real property by sale, lease for a term of more than three years, or gift, except in accordance with the following procedure:

> (1). The council shall set forth its proposal in a resolution and shall publish notice . . . of the resolution and of a date, time and place of a public hearing on the proposal.
>
> (2). After the public hearing, the council may make a final determination on the proposal by resolution.
>
> (3). A city may not dispose of real property by *gift* except to a governmental body for a public purpose. . . .

(emphasis added). "Most often, this section applies to real property owned by a city in its general governmental capacity. In other words, it applies to vacated streets and alleys, parks, playgrounds, parking lots, buildings, and the like." 1978 Op. Att'y Gen. 801, 802.

An answer to your question necessarily depends upon the specific details of the transaction between the city and the new nonprofit corporation and may depend upon consideration of other, unknown information. *See Robert's River Rides, Inc. v. Steamboat Development Corp.*, 520 N.W.2d 294, 300 (Iowa 1994) (distinguishing between "lease" and "license"); 10 McQuillin, supra, § 28.42, at 129. Accordingly, it is important to limit our answer to the known facts and circumstances.

With this limitation in mind, we believe that the proposed lease complies with section 364.7(3). It is true that the new nonprofit corporation will pay only nominal rent to the city. Such a circumstance, viewed in isolation, would likely amount to a "gift" of public property. *See, e.g., Hill v. Thompson*, 564 So.2d 1, 7-10 (Miss. 1989). *See generally Black's Law Dictionary* 619 (1979) ("gift" commonly means a voluntary transfer of property to another made gratuitously and without consideration). It is also true, however, that the new nonprofit corporation will provide additional consideration to the city in forms other than rent and that this additional consideration factors into the abuse-of-discretion equation. *See Cather & Sons Const., Inc. v. City of Lincoln*, 264 N.W.2d at 420-21; *Grimm v. City of Pittsburgh*, 279 A.2d 379, 381 (Pa. Commw. 1971).

The additional consideration proffered by the new nonprofit corporation suggests the city would not make a gift of its property in the lease in violation of section 364.7(3). For example, the lease requires the new nonprofit corporation to (a) maintain the property in its entirety, including all structural elements; (b) effectively relinquish its ownership interest in any capital improvements to the property that it designs, builds, and uses; and (e) continue providing health-care services to the public, a responsibility the city had previously assumed. We understand that these services which have been valued at $88,000, but will not be billed to the city include respite care, "meals on wheels," health screening, field trips, volunteer staff committee groups, school programs, support groups, indigent care, wellness/senior program, health fair, colo-rectal program, employee speakers, senior housing, continuing education, and public education.

Of particular importance, the character of the property as essentially public in nature will be unaffected by the lease terms, which also provide that in the event the property is no longer used for providing health-care services to the public, the lease will be terminated and possession of the property will revert to the city. Thus, although the city will discontinue its role in the day-to-day management of its hospital, the city has contractually ensured that its property will only be used for providing health-care services to and for the benefit of the public.

Similar dispositions of city property made in the best interests of the public have been upheld. *See, e.g., South Side Dist. Hospital v. Hartmann*, 153 P.2d 539-40 (Ariz. App. 1944) (leases to nonprofit district hospital of hospital property and equipment required payment of debts, maintenance of property and equipment, and continued public use in addition to rent of one to two dollars per year); *Raney v. Lakeland*, 88 So.2d 148, 150-52 (Fla. 1956) (lease to private, nonprofit corporation of land required construction and maintenance of library for public use in addition to rent of one dollar per year); *City of New Orleans v. Disabled American Veterans*, 65 So.2d 796, 797 (La. 1953) (lease of property required payment of insurance premiums, maintenance of property, assumption of risk for injury or damage, and continued public use in addition to rent of one dollar per year); *see also Grimm v. City of Pittsburgh*, 279 A.2d at 381 (sale of vacant lots for one dollar to development authority made in city's best long-term interest even though other bidder offered $53,000). *Cf. Lien v. City of Ketchikan*, 383 P.2d 721 (Alas. 1963) (lease of city hospital to charitable nonprofit corporation required maintenance and operation of hospital in addition to rent of ten dollars per year; various arguments against lease rejected); *Abernathy v. City of Irvine*, 355 S.W.2d 159 (Ky. 1961), *cert. denied*, 371 U.S. 831 (1962) (lease of county-city hospital to charitable nonprofit corporation required maintenance of property, payment of insurance premiums, and continued public use; various arguments against lease rejected). *See generally Foote Memorial Hospital, Inc. v. Kelley*, 211 N.W.2d 649 (Mich. 1973); 10 McQuillin, *supra*, § 28.42, at 129 & nn. 1, 12, § 28.42.20, at 144, § 28.44, at 159; Annot., "Lease of Municipal Property," 47 A.L.R.3d 19, 34-36 & nn. 17-19 (1973).

Under the particular facts and circumstances, we conclude the city may lease the real property of the city hospital under the proposed agreement to the new nonprofit corporation.

III.

Last, we need to determine whether the electorate must approve the transfer of city hospital property pursuant to the proposed agreement. Two related arguments suggest the transfer may be accomplished without voter approval.

First, no statute expressly requires voter approval in such circumstances. *See* 10 McQuillin, *supra*, § 28.44.05, at 165 (voter approval of sale or lease of city property "frequently is not required"). A recent opinion addressed a similar issue and determined that hospital trustees may close a county memorial hospital without voter approval. 1994 Op. Att'y Gen. 35, 37. In making this determination,

we took specific note that "[t]here does not appear to be a provision for voter approval." *Id.* Such an approach aligns with the general rule of interpretation that precludes adding words or phrases to statutes. See Iowa R. App. P. 14(f)(13) (determining legislative intent requires consideration of what was actually written in statutes, not what should or might have been written); *State v. Byers*, 456 N.W.2d 917, 919 (Iowa 1990) (generally impermissible to extend or enlarge statutory terms).

Second and similarly, many statutes expressly require voter approval for various matters involving public health-care services or facilities. *See, e.g.*, Iowa Code ch. 145A (cities may plan formation of public corporation to establish and operate area hospital, which, under certain circumstances, may be subject to special election); *Lewis v. City of Seminole*, 195 P.2d 267, 267 (Okla. 1948). Compare Iowa Code §§ 37.2(1), 37.3, 331.361(4), 347.7, 347.13(13), 347.14(15), 347.23, 347.28, 347.23A, 347B.1 with Iowa Code § 347.7 (hospital trustees may use unappropriated monies "without authority from the voters of the county" for county hospital buildings). *Cf.* Iowa Code § 388.2 (city may dispose of city utility "subject to the approval of the voters"). *See generally* Iowa Code § 4.6(4) (determining legislative intent may involve consideration of laws upon same or similar subjects); 1996 Op. Att'y Gen. _____(#95-3-1). This circumstance indicates the General Assembly did not impliedly intend for voter approval of the transfer of city hospital property pursuant to a proposed agreement resulting in the provision of health-care services by a privately operated nonprofit corporation. *See State v. Azneer*, 526 N.W.2d 299, 300 (Iowa 1995); 1994 Op. Att'y Gen. 23 (#94-7-3(L)).

We therefore conclude that the transfer of city hospital property pursuant to the proposed agreement does not require voter approval.

IV.

To reiterate our conclusions: First, all the property of a city hospital may be transferred to a privately operated nonprofit corporation for use in providing health-care services to the public when the city council and hospital trustees jointly agree that this transfer will best serve the interests of the public. Second, the real property of a city hospital may be leased at nominal rent to a privately operated nonprofit corporation for use in providing health-care services to the public when the city receives valuable consideration in a form other than rent. Third, the property of a city hospital, subject to certain conditions, may be transferred in its entirety to a privately operated nonprofit corporation for use in providing health-care services to the public without voter approval.

NOVEMBER 1995

November 22, 1995

COUNTY OFFICERS; ELECTIONS: Initiative or referendum on matters affecting county board of supervisors. Iowa Code §§ 331.201, 331.203, 331.306 (1995). An election ballot may set forth a proposal increasing the number of county supervisors from three to five, but may not set forth proposals decreasing their salary, eliminating their benefits, or altering their status from full-time to part-time by decreasing their hours. (Kempkes to Jackson, Des Moines County Attorney, 11-22-95) #95-11-1

Patrick C. Jackson, Des Moines County Attorney: You have requested an opinion regarding direct legislation, commonly known as the "initiative" and the "referendum," by a county's electorate on matters affecting a county board of supervisors. See generally *Murphy v. Gilman*, 204 Iowa 58, 214 N.W. 679, 682 (1927); 1972 Op. Att'y Gen. 263; 1 M. Libonati & J. Martinez, *Local Government Law* ch. 9 (1989); Note, "Limitations on Initiative and Referendum," 3 Stan. L. Rev. 497 (1951); 42 Am. Jur. 2d Initiative and Referendum (1969). Initiative is the submission of a proposed act to the electorate for enactment or rejection. 5 E. McQuillin, *The Law of Municipal Corporations* § 16.52, at 256 (1989). Referendum is the submission of an enacted act to the electorate for approval or rejection. Id. § 16.53, at 257.

You mention that a group has begun to circulate a petition proposing to (a) increase the number of county supervisors from three to five; (b) decrease their salary; (c) eliminate their benefits (presumably group health insurance); and (d) alter their status from full-time to part-time by decreasing their hours of work. You ask whether these four proposals may be placed on an election ballot. We conclude a ballot may set forth the proposal increasing the number of county supervisors from three to five, but may not set forth the proposals affecting their salary, benefits, and hours. These conclusions primarily rest upon our analysis of Iowa Code chapter 331 (1995).

Chapter 331 governs the composition of county boards of supervisors. Section 331.201(1) provides that each board "shall consist of three members unless the membership is increased to five as provided in section 331.203." *See generally* Iowa Code § 4.1(30)(a) ("shall" normally imposes a statutory duty). Section 331.203 requires county supervisors to submit this matter to the electorate if they receive proper petitions to do so. *See generally* Iowa Code § 331.205 (imposing special requirements in certain circumstances).

Chapter 331 also sets forth many of the powers, duties, and responsibilities of county supervisors. In general, "A power of a county is vested in [its] board [of supervisors], and a duty of a county shall be performed by or under the direction of the board except as otherwise provided by law." Iowa Code § 331.301. This broad statutory grant to county supervisors has a constitutional basis: counties have power, "not inconsistent with the laws of the general assembly, to determine their local affairs and government . . . ." Iowa Const. amend. 39A (1978).

Chapter 331, moreover, sets forth the mechanics of determining compensation for elective county officers such as county supervisors. *See* Iowa Code § 331.907(1). County supervisors "shall receive an annual salary or per diem compensation as determined under section 331.907...." Iowa Code § 331.215(1). Section 331.907(1) requires county compensation boards, on an annual basis, to prepare compensation schedules for succeeding fiscal years. Iowa Code § 331.907(1). Section 331.907(2) then requires the county compensation board to submit this recommended compensation schedule

> to the board of supervisors for inclusion in the county budget. The board of supervisors shall review the recommended compensation schedule for the elected county officers and determine the final compensation schedule which shall not exceed the compensation schedule recommended by the county compensation board. . . .

Last, chapter 331 sets forth the mechanics for direct legislation upon county matters. Section 331.306 provides:

> If a petition of the voters is *authorized by this chapter*, the petition is valid if signed by [a sufficient number of] eligible electors of the county . . . .
>
> Petitions *authorized by this chapter* shall be filed with the board of supervisors . . . . If the petition is found to be valid, the board of supervisors shall . . . notify the county commissioner of elections to submit the question to the qualified electors at the general election. . . .

(emphasis added). *See generally* 1989 Iowa Acts, 73rd G.A., ch. 136, § 69, at 281.

I.

You have asked whether a ballot may contain a proposal to increase the number of county supervisors from three to five. Sections 331.201(1) and 331.203 specifically provide that a ballot may set forth such a proposal if the county supervisors have received a valid petition. Clear and unambiguous statutes require no construction or interpretation. *Stroup v. Reno*, 530 N.W.2d 441, 443 (Iowa 1995).

II.

You have also asked whether a ballot may contain proposals affecting the salary, benefits, and hours of county supervisors. Preliminarily, we will determine whether county supervisors have any authority to determine these matters.

County supervisors have statutory power to affect the status of other county officers or employees. County supervisors, for example, may determine the full-time or part-time status of county attorneys. Iowa Code § 331.752; *accord Committee on Professional Ethics v. Liles*, 430 N.W.2d 111, 112 (Iowa 1988). They also may determine the full-time or part-time status of deputy officers. 1990 Op. Att'y Gen. 81 (#90-8-1(L)); *see* Iowa Code § 331.903. Although no statute specifically provides that county supervisors may determine their own status, such power would appear to fall within the broad power of counties to determine their "local affairs and government" in a manner consistent with state law. *See generally* Scheidler, "Implementation of Constitutional Home Rule in Iowa," 22 Drake L. Rev. 294, 306-07 (1973). Comprising the governing body of a county, see Iowa Code § 331.301, county supervisors thus have the power to determine their status as full-time or part-time county officers.

In addition, county supervisors have the power to fix their salaries (subject to the recommended maximums of county compensation boards). *See* Iowa Code § 331.907(2). County supervisors also have the power to provide for their own benefits, such as group health insurance and deferred compensation. *See* 1994 Op. Att'y Gen. 83 (#94-1-4(L)); 1992 Op. Att'y Gen. 27 (#91-6-5(L)); 1986 Op. Att'y Gen. 91 (# 86-3-4(L)).

You have, however, asked whether the county's electorate may also determine the salary, benefits, and hours for county supervisors through the election process. The answer to this question lies with section 331.306, which limits the power of direct legislation by the electorate to petitions "authorized by" chapter 331. It is clear that chapter 331, in its many provisions, does not provide for petitions to determine the salary, benefits, or status of county supervisors and that a ballot thus may not set forth these matters for determination by the electorate. It is equally clear that *City of Clinton v. Sheridan*, 530 N.W.2d 690 (Iowa 1995), which you mention, does not affect this conclusion.

City of Clinton v. Sheridan involved a city council's unsuccessful attempt to place proposed safety ordinances on a referendum ballot despite a city charter, adopted pursuant to home-rule authority, that expressly provided for initiative and referendum on proposed and existing ordinances. *Id.* at 692. On appeal, the Supreme Court of Iowa noted that cities had home-rule authority "not inconsistent with" state law and rejected the argument that this phrase required specific statutory authority for an initiative or referendum on city matters. *Id.* at 693-95. Rather, the court suggested, an irreconcilable conflict or inconsistency arises when a city charter or ordinance "prohibits an act permitted by statute or permits an act prohibited by statute" or "invades an area of the law reserved by the legislature to itself." Id. at 693.

The court found no irreconcilable conflict between state law and the city charter that permitted the referendum even though the General Assembly had provided that city power may be exercised only by passage of an ordinance by city councils. *Compare id.* at 693 *with id.* at 695 (Ternus, J., dissenting); 1992 Op. Att'y Gen. 169; 1976 Op. Att'y Gen. 681; 1972 Op. Att'y Gen. 263. Accordingly, it held that the proposal to approve or reject the safety ordinances should have been placed on the referendum ballot. 530 N.W.2d at 695.

This synopsis of *City of Clinton v. Sheridan* makes it clear that the case has no direct relevance to the three proposals affecting the county supervisors. *City of Clinton v. Sheridan* simply did not involve any statute resembling section 331.306, which expressly limits direct legislation by the electorate on county matters to petitions authorized by chapter 331. Section 331.306 "by express and unambiguous statutory language," *id.* thus manifests a legislative intent to preempt initiative and referendum powers on the part of the county electorate.

III.

In summary, an election ballot may set forth the question whether the number of county supervisors should be increased from three to five, but may not set forth questions affecting their salary, benefits, or hours.

November 29,1995

MUNICIPALITIES : City utilities: Powers and duties in imposing and collecting fees or charges for "connections" between property and city sewer or water utilities. Iowa Code §§ 364.3(4), 384.38(3), 384.50, 384.51, 384.84(1), 384.84(6) (1995). Cities need to give notice and conduct a public hearing before passing an ordinance for the imposition and collection of a fee to offset the costs of extending city sewer or water lines to the near vicinity of properties located within a proposed sewer or water district. Cities need not, however, give notice and conduct a public hearing before passing an ordinance for the imposition and collection of charges to offset the costs of joining a building located upon a particular piece of property to existing city utility lines, including those lines extended by the creation of a new sewage or water district to the near vicinity of the property. (Kempkes to Gries, State Representative, 11-29-95) #95-11-2(L)

DECEMBER 1995

December 5, 1995

COUNTIES: County Attorney; Effective date of sharing agreement. Iowa Code § 331.753 (1995). Iowa Code subsection 331.753(2) provides that a multi-county agreement to share the services of a county attorney shall be effective "January 1 of the year following the next general election at which the county attorney is elected as provided by this section and section 39.17." A sharing agreement may not provide an earlier effective date, even if the county boards of supervisors and the incumbent county attorneys consent. (Scase to Dawson, Osceola County Attorney, 12-5-95) #95-12-1

Harold *D. Dawson, Osceola* County Attorney: You have requested an opinion of the Attorney General addressing the establishment of a multi-county county attorney's office. You indicate that you have submitted your resignation from the office of Osceola County Attorney to be effective January 1, 1996; that the term of office for which you were elected extends through January of 1999; and that the county board of supervisors is exploring the possibility of entering into an agreement with Lyon County to share the services of a county attorney.

Iowa Code section 331.753 (1995) allows for the sharing of county attorneys, providing as follows:

> 1. If two or more counties agree, pursuant to chapter 28E, to share the services of a county attorney, the county attorney shall be elected by a majority of the votes cast for the office of county attorney in all of the counties which the county attorney will serve as provided in the agreement. The election shall be conducted in accordance with section 47.2, subsection 2.
>
> 2. The effective date of the agreement shall be January 1 of the year following the next general election at which the county attorney is elected as provided by this section and section 39.17.

In light of these provisions, you ask whether the Osceola and Lyon County boards of supervisors may enter into a 28E agreement to share the services of a county attorney and have the effective date of the agreement be a date prior to January 1 of 1999. We believe that even if the counties and both current county attorneys agree, section 331.753(2) will not allow a sharing agreement to be effective prior to January 1, 1999.

This conclusion is based upon the plain language of subsection 331.753(2) and well-established principles of statutory interpretation. Subsection 331.753(2) expressly provides that the effective date of an agreement to share the services of a county attorney "shall be January 1 of the year following the next general election at which the county attorney is elected . . ." "Shall" is a mandatory term, imposing a duty. Iowa Code § 4.1(30)(a) (1995). The next general election for the office of county attorney will be in November of 1998. Therefore, application of this provision would result in a January 1, 1999, effective date for the sharing agreement under consideration.

While the legislature could have provided for a by-pass of the section 331.753(2) provision upon consent of the incumbent county attorneys, as was done with the section 331.752 provision for changing the part-time/full-time status of the county, attorney, it did not do so.[6] The rules of statutory interpretation prohibit us from implying a consent provision.

> In interpreting statutes, we try to give effect to legislative intent. When the statutory language is plain and its meaning is clear, we should not reach for meaning beyond the statute's express terms or resort to rules of statutory construction. In searching for legislative intent, we are bound by what the legislature said, not

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[6] Code section 331.752 allows a board of supervisors to change the status of a county attorney from part-time to full-time or from full-time to part-time. The board resolution making the change is to include an effective date not less than sixty days from the date of adoption. If the incumbent county attorney objects to the status change in either case, the effective date is to be "delayed until January 1 of the year following the next general election at which a county attorney is elected." Iowa Code 331.752(2), (3) (1995).

> by what it should or might have said. So we cannot under the guise of statutory interpretation enlarge or otherwise change terms of a statute.

Krull v. Thermogas Co. of Northwood, Iowa, 522 N.W.2d 607, 612 (Iowa 1994) (citations omitted).

The Osceola and Lyon County boards of supervisors may pursue negotiations and enter into a 28E agreement to share the services of a county attorney at any time. Subsection 331.753(2) provides that a multi-county agreement to share the services of a county attorney shall be effective on "January 1 of the year following the next general election at which the county attorney is elected as provided by this section and section 39.17." A sharing agreement may not provide an earlier effective date, even if the county boards of supervisors and the incumbent county attorneys consent.

1996
JANUARY 1996

January 10, 1996

CONSTITUTIONAL LAW; ELECTIONS: Scheduling of political party precinct caucuses. U.S. Constitution, First Amendment; Iowa Code § 43.4 (1995). Louisiana district conventions constitute the first determining stage of the presidential nomination process. Section 43.4 obligates the Iowa Republican Party to schedule its caucuses "at least eight days earlier" than the Louisiana district conventions; however, applying the statute to require the Iowa Republican Party to reschedule the caucuses if it declines to do so likely would be ruled unconstitutional by a court. (Miller to Horn and Boswell, State Senators, 1-10-96) #96-1-1

Wally E. Horn and Leonard Boswell, State Senators: In light of recent events surrounding the Louisiana Republican Party scheduling nominating conventions on February 6, 1996, you have jointly requested an opinion of the Attorney General interpreting Iowa Code section 43.4. This statute requires precinct caucuses in Iowa to be "at least eight days earlier than the scheduled date for any meeting, caucus or primary which constitutes the first determining stage of the presidential nominating process in any other state. . . ."

It is our understanding that the Louisiana Republican Party has scheduled conventions to be held in each of the state's seven congressional districts on February 6,1996. At these conventions each congressional district will nominate three delegates and three alternates to the 1996 Republican National Convention. Twenty-one of the party's twenty-seven delegates to the national convention will be nominated at the February 6, 1996, congressional district conventions. These delegates may remain uncommitted or may elect to sign a written pledge obliging them to support a particular candidate for President. The remaining

six at-large delegates and the twenty-one district delegates will be officially selected at the time of the Republican State Presidential Convention, to be held within ninety days of the district conventions. Only those persons nominated as district delegates or alternates at the district conventions may be designated as district delegates.

With respect to this process in Louisiana, you specifically ask whether the congressional district conventions scheduled for February 6, 1996, constitute the "first determining stage of the presidential nomination process." It is our opinion that the Louisiana district conventions do constitute the first determining stage of the presidential nomination process. Section 43.4 obligates the Iowa Republican Party to schedule its caucuses "at least eight days earlier" than the Louisiana district conventions; however, applying the statute to require the Iowa Republican Party to reschedule the caucuses if it declines to do so likely would be ruled unconstitutional by a court.

The first unnumbered paragraph of section 43.4 includes the following provisions regarding the scheduling of precinct caucuses in Iowa:

> Delegates to county conventions of political parties and party committee members shall be elected at precinct caucuses held not later than the fourth Monday in February of each even-numbered year. *The date shall be at least eight days earlier than the scheduled date for any meeting, caucus or primary which constitutes the first determining stage of the presidential nominating process in any other state, territory or any other group which has the authority to select delegates in the presidential nomination.* The state central committee of the political parties shall set the date for their caucuses.

Iowa Code § 43.4 (1995) (emphasis added).

In construing the phrase "first determining stage," we follow established principles of statutory construction:

[I]f a statute is clear, we do not search for its meaning beyond the statute's expressed language. And we give words in a statute their ordinary meaning if there is no legislative definition or no particular and appropriate meaning in law.

Martin v. Waterloo Community School District, 518 N.W.2d 381, 383 (Iowa 1994). "We give precise and unambiguous language its plain and rational meaning as used in conjunction with the subject considered, absent legislative definition or particular and appropriate meaning of law." *Stroup v. Reno*, 530 N.W.2d 441, 443-44 (Iowa 1995). "Using a dictionary has been recognized as an acceptable method of ascertaining the meaning of statutory language." *State v. Jones*, 524 N.W.2d 172, 174 (Iowa 1994). *See also State v. Gilmore*, 522 N.W. 2d 595, 597 (Iowa 1994) ("[r]ules of statutory construction are not resorted to unless

there is ambiguity present. Ambiguity is present if reasonable minds may differ or be uncertain as to the meaning of the statute.") (citations omitted).

While the phrase "first determining stage" has not been defined by the legislature, we believe that the statutory meaning is plain. This statute provides a mechanism for maintaining Iowa's caucuses as the first-in-the-nation. In broad terms, the statute requires the scheduling of Iowa's caucuses at least eight days prior to "any meeting, caucus or primary which constitutes the first determining stage of the presidential nominating process in any other state . . ." The dictionary definitions of the word "determine" include: "to fix conclusively or authoritatively" and "to settle or decide by choice of alternatives or possibilities." Webster's New Collegiate Dictionary 307 (1979). *Accord Committee of Professional Ethics, etc. v. Crary*, 245 N.W.2d 298, 303 (Iowa 1976) (holding that the word "determine," in the context of a court rule requiring the court to "determine the matter . . . means adjudicate an issue, settle by authoritative sentence, decide").

Section 43.4 requires that the Iowa caucus date is to be eight days in advance of the "first determining stage" of any other state's presidential nominating process. In qualifying the terms "determining stage" by the use of the word "first," the legislature anticipated that a state presidential nominating process may encompass more than one stage. Therefore, the decision made at a meeting need not be the final selection of delegates in order for the meeting to constitute the "first determining stage" of the nominating process.

In order to apply section 43.4 to the Louisiana district conventions, we must consider the function of the conventions. Only those individuals nominated at the district conventions to serve as delegates or alternates may later be designated as the district delegates to the national convention. Individuals must be nominated at these conventions, therefore, in order to be eligible to be selected to serve as delegates. In fact, for all practical purposes, the nomination of delegates which will occur at the February 6 conventions appears to be binding on the party. The selection of delegates which will take place at the state convention merely reaffirms the nominations. Because individuals must be nominated at the conventions in order to serve as delegates, we believe that these conventions constitute "the *first determining stage* of the presidential nominating process." This is true even though the *final* selection of district delegates to the national convention will not occur until after the February 6, 1996, conventions.

Although we consider the statute and the obligations imposed on the Iowa Republican Party to be clear, it is our view that ultimately the Party must decide whether it will follow the statutory provisions. Chapter 43 imposes penalties for willfully neglecting to perform a duty imposed by chapter 43, or willfully performing a duty in such a way as to hinder the objects of the chapter. Iowa Code § 43.119. Nevertheless, an attempt to require the Iowa Republican Party to move its caucuses to a date eight days in advance of the Louisiana district conventions, or an attempt to impose penalties for failure to do so, raises issues of constitutional dimension.

The United States Supreme Court in *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 109 *S.* Ct. 1013, 103 L. Ed. 2d 271 (1989), recognized that state statutes which intrude into the internal processes of political parties may violate the associational rights of the political parties. "[A] political party's 'determination . . . of the structure which best allows it to pursue its political goals, is protected by the Constitution.' Freedom of association also encompasses a party's decisions about the identity of, and the process for electing, its leaders." *Id.* at 229, 109 *S.* Ct. at 1023, 103 L. Ed. 2d at 286, *quoting from, Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986) (citations omitted).

Eu struck down statutes dictating the organization and composition of the governing bodies of political parties, requiring limits on the term of office for the state central committee chair and requiring that the chair rotate between residents of northern and southern California. Analyzing the burden on the associational rights of the political parties, the Court delineated the manner in which the state statutes curtailed the discretion of the parties to function:

> By requiring parties to establish official governing bodies at the county level, California prevents the political parties from governing themselves with the structure they think best. And by specifying who shall be the members of the parties' official governing bodies, California interferes with the parties' choice of leaders. A party might decide, for example, that it will be more effective if a greater number of its official leaders are local activists rather than Washington-based elected officials. The Code prevents such a change. A party might also decide that the state central committee chair needs more than two years to successfully formulate and implement policy. The Code prevents an extension of the chair's term of office. A party might find that a resident of northern California would be particularly effective in promoting the party's message and in unifying the party. The Code prevents her from chairing the state central committee unless the preceding chair was from the southern part of the state.

Id. at 230, 109 S. Ct. at 1024, 103 L. Ed. 2d at 286-88 (footnote omitted). The Court concluded that these roadblocks to choices in party governance erected by state statute presented especially serious constitutional issues, because they obstructed party members in associating with "one another in freely choosing their party leaders." *Id.* at 230, 109 S. Ct. at 1024, 103 L. Ed. 2d at 286-88.

The Court has long recognized the rights of political parties to control their own internal nomination and delegate selection processes and has struck down state statutes that abridged those rights. In *Democratic Party of United States v. Wisconsin*, 450 U.S. 107, 101 S. Ct. 1010, 67 L. Ed. 2d 82 (1981), the Court ruled that the State could not require a political party to be bound by the results of an "open" primary in which nonparty members were allowed to vote. "[A] State . . . may not constitutionally substitute its own judgment for that of the party. A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected

by the Constitution." *Id.* at 123-24, 101 S. Ct. at 1020, 67 L. Ed. 2d at 96. For the same reason five years later, in *Tashjian v. Republican Party of Connecticut*, the Court struck down a state statute that required a closed primary when the state Republican Party chose to open its primary to independent voters. *Id.* at 229, 107 S. Ct. at 556, 67 L. Ed. 2d. at 533. *See Heitmanis v. Austin*, 899 F.2d 521 (6th Cir. 1990) (Michigan state statutes requiring state legislators be seated as delegates to the national convention unconstitutional). *See* also 1990 Op. Att'y Gen. 61, 63-64 (associational rights of political parties implicated in determining whether vacancy is created on a county central committee by operation of statute).

More recently, applying *Eu* the Eighth Circuit ruled unconstitutional state laws that both require political parties to nominate candidates by primary election and require political parties to pay the cost of that primary election. *Republican Party v. Faulkner County*, 49 F.3d 1289, 1297-1301 (8th Cir. 1995). The Eighth Circuit Court observed that "[t]he Supreme Court has recognized that the vitality of American democracy depends upon political action initiated by citizens and unfettered by government interference and control... In essence the internal affairs of political parties are off-limits to state regulation, unless the State finds it necessary to meet a compelling interest." *Id.* at 1294.

To assess the constitutionality of a state election law, courts must determine whether the law burdens the rights protected by the First and Fourteenth Amendments. If so, the law can survive constitutional scrutiny only if the State shows that the law advances a compelling state interest. *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. at 222, 109 S. Ct. at 1019, 103 L. Ed. 2d at 281. Election laws may burden the associational rights of political parties by limiting a party's discretion "to organize itself, conduct its affairs and select its leaders." A State "cannot justify regulating a party's internal affairs without showing the regulation is necessary to insure an election that is orderly and fair." *Id.* at 230, 109 S. Ct. at 1024, 103 L. Ed. 2d at 287-88.

Requiring the Iowa Republican Party to reschedule its caucuses at this date would create significant logistic hurdles. According to the Director of Elections, currently there are over 2000 precincts in Iowa. Rescheduling the precinct caucuses in order to precede the Louisiana district conventions by "at least eight days" would require the Party to locate a very large number of available facilities on short notice. Even if the Iowa caucuses are rescheduled, Louisiana might move its conventions to an even earlier date, and the terms of the Iowa statute would then require that the Iowa caucuses be moved a second time. A requirement to reschedule the caucuses may be disruptive to the Party's internal nominating process.[7]

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[7] A private action to enforce the Voting Rights Act in Louisiana is now pending. This litigation confronts the serious issue of the potential effect of the district conventions on the rights of African-Americans to participate in the delegate selection process in Louisiana. If a court blocks the district conventions in Louisiana, the Iowa Republican Party will not need to reschedule its caucuses in order to retain its first-in-the-nation status.

Although the State's interest in retaining first-in-the-nation status for its caucuses is significant, the question in a constitutional analysis would be whether that status is "necessary to insure an election that is orderly and fair." We cannot say that the Iowa Republican Party must move its precinct caucuses ahead of the Louisiana district conventions to insure the presidential nominating process in Iowa is "orderly and fair." If a court were faced with evidence that rescheduling the caucuses would burden the Iowa Republican Party, we believe that a court likely would rule that applying section 43.4 to require the Party to move its caucuses at this time is unconstitutional.

January 30, 1996

COUNTIES: Home Rule. Confinement Feeding Operations. Iowa Const. art.III, § 39A; 1995 Iowa Acts, ch. 195, §§ 16, 17, 22, 24, 25, 28, 36; Iowa Code §§ 331.301(1), 331.301(3), 331.301(4), 331.301(6), 455B.162, 455B.162(1), 455B.163, 455B.172(3), 455B.173, 455B.203 (1995); IAB Vol. XVIII, No. 10 (11/8/95) p. 690, ARC 6008A. Proposed county ordinances which would regulate confinement feeding operations by establishing requirements for land disposal of animal waste, separation distances, and construction permits for confinement buildings are preempted by 1995 Iowa Acts, chapter 195. (Benton to Van Der Maaten, Winneshiek County Attorney, 1-30-96) #96-1-2

Andrew R. Van Der Maaten, Winneshiek County Attorney: You have requested an Attorney General's opinion on the extent to which the animal feeding operations bill, House File 519, enacted in 1995 may preempt the authority of Winneshiek County to enact a local regulatory scheme for hog confinement units. Citizens in Winneshiek County have approached the board of supervisors to request that the board pass a county ordinance to regulate the location, construction, and waste disposal of hog confinement units in Winneshiek County. Towards that end, the following county ordinances have been proposed:

1. An ordinance setting forth requirements for land disposal of animal waste from a hog confinement facility constructed after the date of the ordinance and built to hold in excess of 1,000 head of hogs.

2. An ordinance establishing set back requirements from lot lines and establishing a distance from which a hog confinement building in excess of 1,000 head, must be built from residences, commercial enterprises, religious institutions, or educational institutions (assuming the ordinance required greater separation distances than contained in Iowa Code section 455B.162(1)).

3. An ordinance requiring a construction permit for a hog confinement building in excess of 1,000 head. Said permit to include an engineer's design of the building, its location, a statement of manure management, identification of potential hazards such as sink hole, tile system, etc., and the requirement that an engineer certify that the building was properly constructed.

You ask whether House File 519 preempts the county's ability to enact each of these local ordinances.

I. PREEMPTION

Before turning to this legislation, the principles governing the preemption doctrine in Iowa should be reviewed. Iowa Constitution article III, section 39A grants counties home rule power and authority not "inconsistent with the laws of the general assembly." The statutes which implement the home rule amendment make clear that counties are granted broad authority over their local affairs.

For example, Iowa Code section 331.301(1) states that except as expressly limited by the Constitution, and if not inconsistent with the laws of the general assembly, a county may "exercise any power and perform any function it deems appropriate to protect the rights, privileges, and property of the county or of its residents." An exercise of a county power is not inconsistent with a state law unless it is "irreconcilable" with a state law. Iowa Code § 331.301(4) (1995). While a county shall not set standards which are lower or less stringent than state law, it may set standards which are higher or more stringent than state law, unless state law provides otherwise. Iowa Code § 331.301(6) (1995).

The Iowa Supreme Court has reaffirmed the scope of local authority under home rule in examining whether local ordinances have been preempted.[8] A local government may enact an ordinance in matters which are also the subjects of state statutes. *City of Des Moines* v. Gruen, 457 N.W.2d 340, 342 (Iowa 1990). Limitations on a local government's power over local affairs are not implied; they must be imposed by the legislature. *Police Officers' Ass'n v. Sioux City*, 495 N.W.2d 687,693-94 (Iowa 1993). However, despite the general power granted to local governments under home rule, local ordinances are subject to preemption by the laws of the general assembly.

Generally, preemption may arise in two ways. 1994 Op. Att'y Gen. 102, 107. A municipal ordinance is "inconsistent" with a law of the general assembly and, therefore preempted by it, when the ordinance prohibits an act permitted by statute, or permits an act prohibited by statute. *City of Des Moines*, 457 N.W.2d at 342. A local ordinance is also preempted when the ordinance invades an area of the law reserved by the legislature to itself. *Id.* The "reservation" branch of the preemption doctrine can also arise in two ways. One method is by specific expression in a state statute. *City of Council Bluffs v. Cain*, 342 N.W.2d 810, 812 (Iowa 1983). The other method 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. *Id.*

In considering your question our first task is to determine whether the proposed ordinances invade an area of the law that the legislature has "reserved"

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[8] Our office has previously noted that Supreme Court discussions on municipal home rule are looked to for guidance in county home rule issues. 1992 Op. Att'y Gen. 86, 90.

to itself by either express statement or by covering the area with pervasive legislation so as to manifest an intent to preempt the field. If the proposed ordinances are preempted under this analysis it is unnecessary to determine whether they "prohibit an act permitted by statute or permit an act prohibited by statute."

II. HOUSE FILE 519

House File 519, now 1995 Iowa Acts, chapter 195, became effective May 31, 1995. The legislation provides a comprehensive scheme for the regulation of animal feeding operations, including confinement feeding operations defined as animal feeding operations in which animals are confined to areas which are totally roofed. *Id.* § 15. For example, the legislation amends Division III of Iowa Code chapter 455B by adding a new Part 2 entitled "Animal Feeding Operations Requirements." Sections 16 and 17 create new Iowa Code sections 455B.162 and 163 which establish separation distances for animal feeding operation structures. Section 22 amends Iowa Code section 455B.173 in part by imposing requirements for the issuance of construction permits for animal feeding operations. Section 25 creates a new Iowa Code section 455B.203 providing for a manure management plan. In addition, the Iowa Environmental Protection Commission has published Notice of Intended Action of proposed rules to implement the law. IAB Vol. XVIII, No. 10 (11/8/95) p. 690, ARC 6008A.

Both the statute and the proposed rules cover the same subject matter as the proposed Winneshiek County ordinances. The first proposed ordinance would set forth requirements for land disposal of animal waste from a hog confinement facility constructed after the date of the ordinance and built to hold in excess of 1,000 head of hogs. Section 25 of the new legislation sets forth requirements for a manure management plan. This section provides that in order to receive a permit for the construction of a confinement feeding operation as provided in section 455B.173, a person shall submit a manure management plan to the department together with the application for a construction permit.

The manure management plan must include information regarding the land application of manure from the confinement feeding operation. For example, the plan must detail manure application methods, timing of manure application, and the location of the manure application. The plan must describe the methods, structures or practices to prevent or diminish soil loss and potential surface water pollution and methods or practices to minimize potential odors caused by the application of manure by the use of spray irrigation equipment. The proposed rules also provide detailed requirements for the manure management plan. IAB, Vol. XVIII, at pp. 702-05.

Section 16 of the legislation sets forth separation distances applicable to animal feeding operation structures, the subject matter of the second proposed ordinance described in your letter. Animal feeding operation structures include an anaerobic lagoon or confinement feeding operation structure such as an earthen manure storage basin or confinement building. 1995 Iowa Acts, ch. 195, § 15. The statute governs animal feeding operation structures constructed

on or after the effective date of the Act, the expansion of structures constructed on or after the effective date of the Act, and with certain exceptions, the expansion of structures constructed prior to the effective date of the Act. 1995 Iowa Acts, ch. 195, § 16. The separation distances are based on the size and type of structure and the facility for which the separation distance is required. For example, the separation distance in feet between an uncovered earthen storage basin with an animal weight capacity of less than 625,000 pounds for animals other than bovine, or less than 1,600,000 for bovine, and a residence not owned by the owner of the animal feeding operation, or a commercial enterprise, bona fide religious institution, or an educational institution is 1,250 feet. *Id.* The legislation also provides for minimum separation distances between structures and a public use area or residence not owned by the owner of the animal feeding operation, a commercial enterprise, a bona fide religious institution or an educational institution located within the corporate limits of a city. *Id.*

The subject matter of the third ordinance, concerning construction permits and identification of tile systems, etc. is also covered in great detail in the legislation and the proposed rules to implement the law. Section 22 of the legislation mandates that the department adopt rules setting forth the requirements for obtaining permits for animal feeding operations. The legislation provides that a person shall not obtain a permit for construction of a confinement feeding operation unless the person develops a manure management plan as provided in section 455B.203. The department shall not issue a permit to a person if an enforcement action is pending. 1995 Iowa Acts, ch. 195, § 22. The proposed rules provide specific requirements for investigation of tile systems and their removal or rerouting prior to construction. IAB, Vol. XVIII, at pp. 700-07. The proposed rules also state that a confinement feeding operation shall submit a certification from a registered professional engineer certifying that the structure was constructed according to the design plan, and that the structure was constructed in accordance with the drainage tile removal standards contained elsewhere in the rules. IAB, Vol. XVIII, at p. 705.

III. ANALYSIS

There is no express statement within House File 519 to the effect that the general assembly intended to preempt local ordinances pertaining to animal feeding operations. However, the scope of this legislation and its implementing rules is comprehensive and highly pervasive. As a result, we believe that the general assembly has "reserved" the regulation of animal feeding operations to itself, preempting the enactment of local ordinances on the subject. *See Board of Supervisors v. Valadco*, 504 N.W.2d 267, 269 (Minn. App. 1993) (finding that Minnesota law preempts local regulation of animal feedlots because state law has occupied the field).

Aside from the sheer breadth of the state's legislation in this area, there are other indications that the general assembly did not intend for local regulation to exist. A major provision of the new legislation is the restriction on nuisance suits found in section 36. This section of the law establishes a rebuttable presumption that if a person has obtained all the permits required by chapter 455B for an

animal feeding operation the animal feeding operation is not a public or private nuisance. The purpose of the section is to "protect animal agricultural producers who manage their operations according to state and federal requirements from the cost of defending nuisance suits." (emphasis added). There is no mention in this section of local requirements for agricultural feeding operations, from which we infer that the general assembly did not contemplate such regulation.

The general assembly did provide in section 22 that a copy of the construction permit application should be provided to the county board of supervisors in the county where the confinement feeding operation or confinement feeding operation structure is to be located. The department may then consider "comments" from the board on the application. However, that provision for comment is the only section in which the legislature chose to involve county government. Again, we infer from this very limited involvement that the general assembly considered a role for county government but did not intend for counties to go further in the regulation of these operations.

Finally, counties are given explicit roles in environmental regulation elsewhere in Division III of chapter 455B concerning water quality. For example, section 455B.172(3) states that each county board of health shall adopt standards for private water supplies and private sewage disposal facilities. The county board of health shall regulate the private water supply and private sewage disposal facilities within its jurisdiction including enforcement of standards. *Id.* The general assembly has therefore provided local governments with a role in water quality protection. But in House File 519, which amended statutes within the same Division, the general assembly made no provision for local standards or local enforcement. The mere failure to mention a power does not itself deprive a county of the authority to enact an ordinance. *See* Iowa Code § 331.301(3). However, the enactment of a massive regulatory statute amending Division III and giving counties no role either to set standards or for enforcement, suggests that the general assembly saw no role for local governments in this sphere. Legislative intent may be expressed by omission as well as by inclusion. *State ex rel. Miller v. Santa Rosa Sales and Marketing*, 475 N.W.2d 210, 218 (Iowa 1991).

Nor do we find any intent to leave small animal feeding operations subject to county regulation. A small animal feeding operation, defined in section 15 of the legislation as an "animal feeding operation which has an animal weight capacity of two hundred thousand pounds or less for animals other than bovine, or four hundred thousand pounds or less for bovine" are exempt from the requirement of obtaining a permit prior to operation. 1995 Iowa Acts, ch. 195, § 22. However, small operations are subject to section 24 of the Act which provides for minimum manure control by requiring, for example, that manure from an animal feeding operation shall be disposed of in a manner which "will not cause surface water or groundwater pollution." *Id.* § 24. The proposed rules provide that the owner of a confinement feeding operation with an animal weight capacity of more than 200,000 pounds but less than the threshold weight capacity for a construction permit must submit a manure management plan if a formed manure storage structure is used and other thresholds in the rules are exceeded. IAB, Vol. XVIII, at p. 705. The nuisance protection provisions

of section 36 and the mediation provisions of section 28 of the legislation all apply to smaller operations. Under section 19 a small animal feeding operation with an earthen manure storage basin is not exempt from the statute's separation distance requirements. In our view, the general assembly left no room for local regulation of even smaller facilities.[9]

IV. CONCLUSION

The ordinances proposed in Winneshiek County purport to regulate hog confinement facilities. In enacting 1995 Iowa Acts, chapter 195, the Iowa legislature reserved the regulation of confinement feeding operations to itself. The proposed local ordinances described in your letter are preempted by the operation of this law.

FEBRUARY 1996

February 2, 1996

PUBLIC RECORDS: Fees or charges for copying computerized public records. Iowa Code §§ 22.2, 22.3 (1995). A county has no authority under section 22.3 to impose a charge for a computer system's depreciation, maintenance, electricity, and insurance associated with retrieving the computerized public record of its budget and either printing it out or reproducing it onto a floppy disk. (Kempkes to Angrick, Citizens' Aide/Ombudsman, 2-2-96) #96-2-1

William P. Angrick II, Citizens Aide/Ombudsman: You have requested an opinion regarding the types of charges a governmental entity may include within its fee for producing copies of its computerized public records. This question implicates Iowa Code chapter 22 (1995) — entitled Examination of Public Records (Open Records) — which was enacted at a time when filing cabinets, and not computers, routinely stored public records. *See* Bunker, Splichal, Chamberlin & Perry, "Access to Government-Held Information in the Computer Age," 20 Fla. St. U.L. Rev. 543, 544, 559-60 (1993). *See generally* 1967 Iowa Acts, 62nd G.A., ch. 106. Specifically, it implicates section 22.3, which the General Assembly has left unchanged since the enactment of chapter 22 in 1967.

We have the following background information to consider. A county already has on hand its 270-page budget in printed or "hard copy" form, which the county allows the public to photocopy within its courthouse at a cost of about

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[9] As your letter notes, in 1994 Op. Att'y Gen. 102, 109 we opined that a local board of supervisors did not have authority to adopt ordinances regulating waste storage facilities for livestock feeding operations because these ordinances would be preempted by state law. We suggested that since there were no regulations governing land disposal of animal waste, this area was open to local regulation. Id. This aspect of our prior opinion has been altered by the enactment of House File 519, because the state now regulates land application of manure through the manure management plan.

$40, A citizens group, however, does not want to obtain a copy of the budget by photocopying the printed form at the county courthouse; instead, it wants a copy printed directly from the computer system or reproduced directly from the computer system onto a commonly available "floppy disk."

The county can indeed retrieve the 270-page budget from its computer system and either print it out anew or reproduce it on floppy disk. It appears that the county does not need to create or buy a special or custom program to retrieve the budget from its data base and that the county may thus retrieve and copy the budget by using existing software and making the appropriate keyboard commands. According to the county's fee schedule, a printed budget costs about $130 and a floppy disk containing the budget costs about $35.

Apparently unlike the fee charged for photocopying the printed form of the budget at the courthouse, both these fees of $130 and $35 include two different charges: (1) a charge for such computer supplies as paper, ribbon, and floppy disks and for county employees' time in retrieving the budget from its data base and either printing it out or reproducing it onto a floppy disk and (2) a "computer time" charge for the depreciation, maintenance, electricity, and insurance associated with providing either one printed budget or one floppy disk containing the budget.

You ask whether the county may include within its fee schedule the second (or "computer time") charge for printing the budget or reproducing it onto a floppy disk. We conclude that the county has no authority under section 22.3 to impose a charge for a computer system's depreciation, maintenance, electricity, and insurance associated with retrieving the computerized public record of its budget and either printing it out or reproducing it onto a floppy disk. In making this conclusion, we emphasize that we have neither resolved any factual issues nor determined any statutory violations. *See* 1994 Op. Att'y Gen. 31 (#93-7-7(L)) (explaining narrow role of opinion process). Stated otherwise, our opinion only concerns the legal construction of chapter 22. *See id.*

Your question invites preliminary comment about chapter 22 and public records stored electronically in computer systems. We are faced with the problem of interpreting statutory language that, when written, did not address problems connected with "paperless" governmental entities storing their public records in computerized form. *See* Grodsky, "The Freedom of Information Act in the Electronic Age," 31 Jurimetrics 17, 18 (1990); Sorokin, "The Computerization of Governmental Information," 24 Colum. J.L. & Social Problems 267, 267 n. 3 (1990); *see also* 13 U.L.A. *Uniform Information Practices Code*, Preferatory Note, at 277 (1974). We also are faced with the problem that chapter 22, like certain constitutional provisions, may not always lend itself to sweeping generalities about what is proper and what is improper action on the part of governmental entities. *See* Annot., 86 A.L.R.4th 786, 790, 793 (1991).

Moreover, with regard to public records stored in computer systems, we recognize that some systems may be expensive to install and update. We further recognize that retrieving certain electronic information and providing it in a particular medium or format to interested persons may generate very high costs. As one commentator has observed,

> A fundamental difference between hard copy records and computerized records . . . is that the former may reside within computer systems until they are demanded, sometimes requiring the application of codes or additional programming to be retrieved from host systems in systematic and comprehensible form.
>
> [E]lectronic information always needs some type of transformation to be understood. While written information can be read instantaneously, no one can look at electronic bits of data and understand their meaning. These bits of data often require specialized software for reorganization into readable form.

Grodsky, *supra*, 31 Jurimetrics at 27-28, 30 n. 59.

I. Statutory Background

Section 22.2(1) provides that every person

> shall have the right to examine *and copy* public records and to publish or otherwise disseminate public records or the information contained therein. The right to copy public records *shall include the right to make photographs or photographic copies* while the records are in the possession of the custodian of the records.

(emphasis added). *See generally* Iowa Code § 22.1(2) (defining "lawful custodian"). Section 22.1(3) broadly defines "public records" to include "all records, documents, tape, or other information, stored or preserved in any medium," which undoubtedly encompasses information electronically stored in computer systems.

Section 22.4 provides that the rights to examine and copy may be exercised at any time during the customary office hours of the lawful custodian keeping the public records. Sections 22.5 and 22.6 provide that these rights may be enforced by civil remedy and that their knowing violation or attempted violation may lead to criminal penalties.

Section 22.3 sets forth the authority of lawful custodians to impose various charges relating to examining and copying public records. Of importance to this opinion, section 22.3 provides:

> [Examining or copying public records] shall be done under the supervision of the lawful custodian or the custodian's authorized deputy. The lawful custodian may adopt and enforce reasonable rules regarding such work and the protection of the records against damage or disorganization. The lawful custodian shall provide a suitable place for such work, but if it is impracticable to do such work in the office of the lawful custodian, the person desiring to examine or copy shall pay any necessary expenses of providing a

> place of such work. All expenses of such work shall be paid by the person desiring to examine or copy. The lawful custodian may charge a reasonable fee for the services of the lawful custodian or the custodian's authorized deputy in supervising the records during such work. If copy equipment is available at the office of the lawful custodian of any public records, the lawful custodian shall provide any person a reasonable number of copies of any public record in the custody of the office upon the payment of a fee. The fee for the copying service as determined by the lawful custodian shall not exceed the cost of providing the service.

See generally Iowa Code § 4.1(30) (in statutes, "shall" normally imposes a duty and "may" normally confers a power); 1970 Op. Att'y Gen. 725, 728. We have concluded that the phrase "such work" refers to examining or copying, 1982 Op. Att'y Gen. 207, 210, and that copying fees or charges must be uniform, 1982 Op. Att'y Gen. 76, 77-78.

In 1989, the General Assembly amended section 22.2 by adding a new subsection (3), which also addresses costs incurred by lawful custodians in providing certain public records. *See* 1989 Iowa Acts, 73rd G.A., ch. 189, § 1. Section 22.2(3) now provides that, notwithstanding the right to examine and copy public records under section 22.2(1),

> a government body which maintains a *geographic computer data base* is not required to permit access to or use of the data base by any person except upon terms and conditions acceptable to the governing body. The governing body shall establish reasonable rates and procedures for the retrieval of specified records . . . stored in the data base upon the request of any person.

(emphasis added). *See generally* Iowa Code § 22.1(1) (defining "government body"). Correspondingly, section 331.441 now defines an "essential county purpose" to include the acquisition, development, and improvement of "a geographic computer data base system suitable for automated mapping and facilities management." *See generally* 1989 Iowa Acts, 73rd G.A., ch. 189, § 2.

II. Analysis

The general policy underlying chapter 22 is "that free and open examination of public records is generally in the public interest . . . ." Iowa Code § 22.8(3). Chapter 22, however, attempts to balance this public interest with limitations upon certain disclosures of confidential information: "the sunlight of public access to information about governmental operations kills or retards the growth of mould in government," but "too much sunlight causes sunburn." Bonfield, "Chairman's Message," 40 Ad. L. Rev. iii, iii-iv (1988).

In creating the rights to examine and copy public records, section 22.2(1) represents the sunlight that "kills or retards the growth of mould in government." These separate rights "are intended to remedy unnecessary secrecy in conducting

the public's business." 1982 Op. Att'y Gen. 207, 209. *Accord Northeast Council on Substance Abuse v. Iowa Dep't of Public Health*, 513 N.W.2d 757, 759 (Iowa 1994). They generally receive a liberal interpretation to ensure broad public access to public records. *See Northeast Council on Substance Abuse v. Iowa Dep't of Public Health*, 513 N.W.2d at 759; 1982 Op. Att'y Gen. 207, 209; *see also* 2 J. O'Reilly, *Federal Information Disclosure* 281 (1995). Access involves copying public records as well as examining them. An unreasonably high copying fee, however, may constructively restrict public access to public records and therefore defeat the legislative purpose underlying section 22.2(1). *See* 52 Fed. Reg. 10017 (Mar. 27, 1987); *Dismukes v. Department of Interior*, 603 F. Supp. 760, 762-63 (D.C. 1984); 13 U.L.A., supra, § 2-102, Comment at 288.

A.

Before addressing section 22.3, we note the county has indicated section 22.2(3) permits a charge for a computer system's depreciation, maintenance, electricity, and insurance that arises out of a single printing of electronic information or reproducing the electronic information one time onto a floppy disk. Section 22.2(3) authorizes a county maintaining a "geographic computer data base" to establish "reasonable rates" for the retrieval of information stored within it.

The phrase "geographic computer data base" obviously has a technical meaning; it has neither a legal nor a common definition at this point in time. It would appear that a *geographic* computer data base likely contains, for example, a series of maps and data relating to real property and that, as one of several data bases retrievable by a computer system's user interface, it likely does not contain the data for an entire governmental budget. *See generally* Iowa Code §§ 331.401 *et seq.* (county budget process).

Although the county has provided statistical information to justify the reasonableness of its fee schedule, this information does not indicate that its computer system actually uses a geographic computer data base or that such a data base can and does include the county budget itself. In the absence of information indicating the existence and purpose of a geographic computer data base and explaining its relationship to the computerized public record of the county budget, we decline to determine whether section 22.2(3), which permits the county to set "reasonable rates," authorizes the recovery of costs other than those authorized under section 22.3.

B.

Section 22.3 allows lawful custodians to recover various costs or expenses incurred in examining or copying public records. Three prior opinions from this office have concluded that recovery for these outlays is limited to the "actual costs" incurred in copying. *See* Braverman, "A Practical Review of State Open Record Laws," 49 Geo. Wash. L. Rev. 720, 750 (1981) (noting that fee in most states for copying public records limited to actual cost); Bunker, Splichal, Chamberlin & Perry, 20 Fla. St. U.L. Rev., *supra*, at 597 (recommending that fee for copying computerized public records be limited to actual cost).

In 1968, we noted that the precursor to section 22.3, Iowa Code section 68A.3 (1977),

> is calculated to insure that the lawful custodian of public records is . . . not to be obliged to incur unnecessary expenses or to have the work of his office disrupted without being reimbursed for such expense or compensated for such disruption.
>
> It is doubtful that [section 68A.3] was intended as a revenue measure and presumably the necessary expenses of providing a place [for copying] would be geared to the actual cost of providing such a place. By the same token the reasonable fee in supervising the records while the work of copying is going on should be closely related to the actual cost of such supervision.

1968 Op. Att'y Gen. 656, 657.

In 1978, we noted that section 68A.3 allows a person to obtain copies of public records upon payment of a fee "reasonably related to the actual cost of compiling and copying." 1978 Op. Att'y Gen. 677, 678.

In 1981, we issued an opinion that concerned lawful custodians who were using electronic systems to store public records and charging persons to copy those records onto magnetic tapes. 1982 Op. Att'y Gen. 207, 208-09. We reiterated our belief section 68A.3 did not mean lawful custodians should be obliged to incur expenses or have their offices disrupted for the copying of public records without reimbursement. *Id.* at 211. We also reiterated our belief that the General Assembly did not intend for the copying of public records to provide any revenue for lawful custodians. *Id.; accord* Note, "Iowa's Freedom of Information Act," 57 Iowa L. Rev. 1163, 1171 (1972). Lawful custodians, we thus concluded, could only charge a fee to recover the actual costs incurred in electronic copying. 1982 Op. Att'y Gen. 207, 211.

The phrase "actual cost" normally does not encompass the "incidental," "fixed," or "proportional" charges linked with depreciation, maintenance, electricity, and insurance. *Cf. Bangor Fruit Exchange v. Bangor Canning Co.*, 201 N.W. 215, 216 (Mich. 1924) (phrase "actual expense" in contract clearly excludes depreciation, insurance, taxes, and advertising). Rather, "actual cost" normally "imports the exact sum expended or loss sustained rather than the average or proportional part of the cost." *Black's Law Dictionary* 33 (1979). *Accord State v. Northwest Poultry & Egg Co.*, 281 N.W. 753, 756 (Minn. 1938); 1988 S.D. Op. Att'y Gen. 305. We have recently interpreted "actual expense" consistent with this definition of "actual cost." See 1994 Op. Att'y Gen. 51, 51.

Section 22.3 says nothing about the recovery in any amount for "fixed charges" or "operating expenses," which, in the absence of any copying requests, must be borne in full by the offices of lawful custodians. *See generally* Iowa R. App. P. 14(f)(13) (statutory interpretation focuses upon what legislature actually wrote, not what it should or might have written). These phrases signify outlays for

such matters as depreciation, maintenance, rent, and insurance. 1994 Op. Att'y Gen. 98 (#94-5-6(L)) (construing "fixed charges"); 35 C.J.S. Expense 237 n. 41 (1960) (construing "operating expenses").

In addition to text, a practical reason tends to indicate that section 22.3 does not allow recovery for depreciation, maintenance, electricity, and insurance. *See generally* Iowa Code § 4.4(5) (statutory interpretation presumes that legislature enacts statute with a result feasible of execution), § 4.6(5) (statutory interpretation may involve consideration of consequences of particular interpretation). We have, since 1968, consistently interpreted the precursor to section 22.3 as precluding the receipt of revenue by lawful custodians; but a lawful custodian seeking, for example, to impose an up-front charge to recover the amount of a computer system's depreciation based upon complying with a single request for copying computerized information has a problem in avoiding the receipt of any copying revenue. This problem arises because the number of requests for computerized public records in any given time period cannot be known in advance and therefore must be estimated, perhaps too low, by the lawful custodian.

The foregoing therefore suggests that section 22.3 does not, under the circumstances, permit the recovery of costs for a computer system's depreciation, maintenance, electricity, and insurance incurred by a lawful custodian in copying a computerized public record. *Cf. In re Schulz*, ——— N.Y.S.2d ———, ——— & n. 10 (Sup. Ct. 1995) (copying public record does not include cost of producing it in the first place; copying fee for computerized record limited to cost of diskette itself and employee time in downloading record onto it); *Szikszay v. Buelow*, 436 N.Y.S.2d 558, 561 (Sup. Ct. 1981) (actual cost incurred in producing public record from electronic storage system does not include maintenance expense); 1992 Fla. Op. Att'y Gen. 77 (actual cost of copying public record does not include incidental costs such as utilities); 1987 Fla. Op. Att'y Gen. 1 (actual cost for copying computerized public record does not include in-house costs associated with writing computer program); 42 Or. Op. Att'y Gen. 382 (actual cost of copying public record includes "only those costs that would not otherwise be incurred but for the public records request" and excludes amounts "calculated in part to subsidize the cost of any activity that would otherwise be performed").

We note that this interpretation of section 22.3 aligns with the federal law governing fees for copying public records, 552 U.S.C. section 552(a)(4)(A)(iv). *See* 52 Fed. Reg. 10017 (Mar. 27, 1987) ("direct costs" for copying public record do not include overhead expenses such as space, heating, and lighting of facility in which public record stored); 1 K. Davis & R. Pierce, Jr., *Administrative Law Treatise* § 5.5, at 195 (1994) ("direct costs" incurred in copying public record do not include overhead expenses). *See generally* Iowa Code § 4.6(4) (statutory interpretation may involve consideration of laws upon the same subject).

Moreover, we believe that this interpretation of section 22.3 fairly balances the costs associated with copying a public record:

> The public as a whole benefits from the policy of access to governmental information. For that reason, . . . each [lawful

> custodian should] absorb all costs of compliance [with a record request] except for the cost of copying. But when a person receives a copy of a government record, the character of the benefit conferred on the person is direct and immediate. This justifies shifting the cost of duplication to the record requester.

13 U.L.A., *supra*, § 2-102, Comment at 288.

III. Conclusion

A county has no authority under section 22.3 to impose a charge for a computer system's depreciation, maintenance, electricity, and insurance associated with retrieving the computerized public record of its budget and either printing it out or reproducing it onto a floppy disk.

February 6, 1996

TAXATION: PROPERTY TAX: Tax Sale Redemption Rights of Heirs. Iowa Code §§ 447.1, 447.5, 447.8, 447.9, and 447.12 (1995). The county treasurer is authorized by statute to refuse to accept an ex parte offer to redeem from tax sale presented by an alleged heir of a deceased person in whose name the parcel is taxed where the alleged heir has not taken any of the actions authorized by law which would clearly place that individual within the class of those who have a right to redeem the parcel directly from the treasurer pursuant to section 447.9. The treasurer may accept an affidavit of completion of service of notice of expiration of right of redemption, filed under section 447.12, in such cases even where the affidavit clearly shows on its face that the alleged heir has not been personally served with such notice. (Hardy to Lytle, Van Buren County Attorney, 2-6-96) #96-2-2

Richard H. Lytle, Van Buren County Attorney: You have requested an opinion of the Attorney General with respect to an offer to redeem presented to the treasurer by an alleged heir of a deceased person in whose name a parcel is taxed after a tax sale to collect delinquent taxes on the parcel has occurred under Iowa Code chapter 446 (1995). Specifically, you have asked the following three questions:

1. In cases where no estate proceedings have occurred and where the person in whose name the parcel is taxed is deceased, must the treasurer allow redemption of the parcel by an individual who, nonetheless, claims to have some interest in the parcel in question solely by virtue of being an alleged heir of the deceased? The additional facts you have provided indicate that the alleged heir in question has not taken possession of the parcel, has failed to take the steps necessary for the parcel to be listed and taxed in their name as an heir or in the name of the estate of the deceased, and has failed to bring any action to have their claim of heirship in the parcel properly determined of record.

2. If the alleged heirs in the above described situation must be allowed to redeem, what proof should the county treasurer require be furnished to establish that

the person claiming a redemption right is in fact a lawful heir of the deceased person in whose name the parcel is taxed and does, thereby, have some interest in the parcel in question which would entitle them to redeem?

3. Can a treasurer accept for filing an affidavit of completion of service under section 447.12 when it is clear from the face of the affidavit that the alleged heir, in the circumstances presented, was not personally served with the notice of expiration of right of redemption under section 447.9?

We will answer your questions in the order posed. As explained below, it is our opinion that the answer to the first question is no. The second question needs no answer given our negative response to question one. Finally, the answer to the third question is yes. Our conclusions were reached based upon the following legal authority and analysis.

A.

There is no general constitutional or independent equitable right for anyone to redeem a parcel from a tax sale. *Keely v. Sanders*, 99 U.S. 441, 25 L. Ed. 327, 328 (1878). Such redemption rights are exclusively statutory. *Id.*[10] In this regard, the general rule is that redemption is allowed and can be claimed only by those entitled by statute to such right to redeem and only under the circumstances provided by statute. *Id.* Thus, the answers to your questions lie in the specific language found in chapter 447 of the Code, which is the chapter where such redemption rights are codified.

At the outset, we note that, as to the rules of statutory construction which may be employed in interpreting the provisions in question, it is axiomatic that there is no need to resort to such rules where no ambiguity exists in the statutes. *Hartman v. Merged VI Community College*, 270 N.W.2d 822, 825 (Iowa 1978). Conversely, in cases where an ambiguity does exist as to the meaning of redemption statutes, the rules of construction provide that statutory redemption rights are generally favorably regarded, will be construed according to general equitable principles, and will generally be construed broadly in favor of redemption. *Penn v. Clemans*, 19 Iowa 372, 380 (1865). However, in interpreting these provisions, it is also important to consider the additional rules of construction which provide that: statutes should be construed to avoid strained, impractical or absurd results and the interpretation should always be sensible, workable, practical and logical; the purposes of the statute should always be considered; all parts of the enactment should be considered together, and; all parts of the statute should be given effect if at all possible. *American Home Products v. Iowa State Board of Tax Review*, 302 N.W.2d 140, 142-143 (Iowa 1981). Finally, none of the rules of statutory construction are to be employed to the exclusion of the others. Rather, all must be considered in light of the facts and circumstances of each case and with the understanding that all such rules have one purpose, which is to ascertain the intent of the legislature which enacted the provisions in question. *Id.*

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[10] In some jurisdictions, the state constitution provides explicitly for a right of redemption from tax sales. 85 C.J.S. Taxation 841 (1954). We are aware of no such specific provision in Iowa's constitution.

As to the tax sale redemption provisions in Iowa, two separate avenues were created by the legislature by which those with a statutory right to redeem a parcel may seek to exercise this right. First, a parcel may be redeemed from a tax sale by payment to the tax sale certificate holder, ex parte and through the county treasurer, of the amount for which the parcel was sold at tax sale, plus the certificate fee and applicable interest to the date of redemption. Iowa Code § 447.1. This procedure for redemption is applicable only prior to issuance of a tax deed by the treasurer to the tax sale certificate holder. *Id.* A second redemption procedure is provided which applies after delivery of a tax deed to the tax sale certificate holder. Iowa Code § 447.8. In the second situation, however, redemption must be sought through the courts with notice to all parties with an interest of record so that the court can conduct a trial in order to determine the rights, claims and interests of the several parties claiming an interest in the parcel. *Id.*

As regards the first procedure for redemption via direct ex parte payment to the treasurer prior to issuance of the tax deed, section 447.5 states in relevant part that:

> The county treasurer, upon application of a party to redeem a parcel sold at a tax sale, *and being satisfied that the party has a right to redeem the parcel upon the payment of the proper amount,* shall issue to the party a certificate of redemption, the amount paid, and by whom redeemed, and shall make the proper entries in the county system in the treasurer's office.

(Emphasis added.) Thus, under the plain language of section 447.5, a treasurer is authorized to accept the ex parte application to redeem only when the treasurer has been satisfied that the party who seeks to redeem the parcel in question in fact has a right to do so. Consequently, if it is not clear to the treasurer that the party seeking to exercise a statutory pre-deed ex parte redemption right is in fact a person entitled to so redeem, the treasurer is not required to honor an application to redeem submitted by that person. Rather, the application may be denied by the treasurer. Of course, the person may subsequently bring an action for redemption, in an appropriate case, before a court of competent jurisdiction pursuant to section 447.8 once the deed is issued.[11]

Thus, the general question which must be decided by the treasurer is whether or not an alleged heir, under the facts presented, is clearly legally entitled to redeem a particular parcel of property under section 447.9. As to tax sale redemptions in Iowa, section 447.9 (1995) specifically states in pertinent part as follows:

> After one year and nine months from the date of sale, or after nine months from the date of a sale made under section 446.18,

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[11] It should be noted that the tax deed holder can act to quiet his title to the parcel and to cut off redemption rights by filing the affidavit authorized by section 448.15.

> 446.38 or 446.39, the holder of the certificate of purchase may cause to be served *upon the person in possession of the parcel*, and also *upon the person in whose name the parcel is taxed*, in the manner provided for the service of original notices in R.C.P. 56.1, if the person resides in Iowa, or otherwise as provided in section 446.9, subsection 1, a notice signed by the certificate holder or the certificate holder's agent or attorney, stating the date of sale, the description of the parcel sold, the name of the purchaser, and that the right of redemption will expire and a deed for the parcel be made unless redemption is made within ninety days from the completed service of the notice. The ninety-day redemption period begins as provided in section 447.12. . . .
>
> Service of the notice shall also be made by mail on *any mortgagee having a lien upon the parcel, a vendor of the parcel under a recorded contract of sale, a lessor who has a recorded lease or memorandum of a recorded lease, and any other person who has an interest of record, at the person's last known address*, and on the state of Iowa in case of an old-age assistance lien by service upon the state department of human services. The notice shall also be served on any city where the parcel is situated. *Only those persons who are required to be sent the notice of expiration as provided in this section are eligible to redeem a parcel from tax sale.*

(Emphasis added.)[12] Thus, pursuant to the plain language of section 447.9, the class of persons entitled to redeem a parcel from a tax sale which occurred during the relevant time period was specifically limited to: persons in possession of the parcel; persons in whose name the parcel is taxed; mortgagees having a lien on the parcel; vendors of the parcel under recorded contracts of sale; lessors with recorded leases or memoranda of recorded leases; other persons with interests of record, and; certain cities and state agencies.

As to the question at hand, an "heir" is defined as "any person, except the surviving spouse, who is entitled to property of a decedent under the statutes of intestate succession." Iowa Code § 633.3(21). Given that definition, it is

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[12] It should be noted that prior to April 1, 1992, the class of those persons entitled to redeem a parcel from a tax sale was not limited by statute. 1991 Iowa Acts, ch. 191, § 96. However, the law in his regard has changed and the class of those entitled to redeem has now been specifically limited by statute as explained in the main body of this opinion. *Id.* However, it is our understanding that the tax sale in question occurred in 1993. Therefore, the law prior to the change taking effect on April 1, 1992 does not apply since the law in effect at the time of the tax sale governs redemption. Iowa Code § 447.14.

Additionally, persons who acquire an interest in or who take possession of a parcel subsequent to completion of the service required under section 447.9 are now statutorily entitled to redeem as well, although they are not entitled to the section 447.9 notice of expiration of that right. Iowa Code § 447.9 (1997). However, since the new provision in this regard was not in effect at the time of the tax sale in question, the language of that provision is, likewise, not presently implicated.

apparent that there are only three possible categories of statutorily authorized redemptioners into which an alleged heir claiming a right to redeem solely by virtue of heirship through the person in whose name a parcel is taxed could fall. The first is as a person "in possession" of the parcel. This term has fairly recently been construed to include, in relation to tax sales, those persons in actual physical possession of the parcel or some portion thereof such that others are placed on inquiry notice of that possession, as opposed to those with record ownership only. *Pendergast v. Davenport*, 375 N.W.2d 684, 690 (Iowa 1985). We note that heirs do have avenues available to them which would enable them to establish their right to heirship in a parcel and to take possession of the parcel. Iowa Code §§ 633.11, 633.227, 633.350, 633.351, 633.353 and 633.354. The facts you have provided indicate that the alleged heir in question claimed to have obtained no such physical possession. The general rule is that complaints by those who do have means available to them to protect their rights but choose not to take advantage of those means will not be heard in equity. *Teget v. Lambach*, 226 Iowa 1346, 1352, 286 N.W. 522 (1939).

The second possible category of authorized redemptioners under section 447.9 into which an heir may fall is that of persons "in whose name the parcel is taxed." This language has been interpreted to mean those in whose name the parcel is taxed at the time the notice of expiration of right of redemption required under section 447.9 is actually given. *Smith v. Callanan*, 103 Iowa 218, 221, 72 N.W. 513 (1897). Normally in Iowa, real property is listed and taxed in the name of the record owner. Iowa Code § 428.1. However, when such persons are deceased, parcels may be listed and taxed in the name of the deceased's estate or his heirs, without enumerating them. Iowa Code § 428.6. Thus, the heir in question could have taken the appropriate actions to have an estate opened and to have the parcel in question listed in the name of the estate and/or the heirs of the deceased.

If a parcel is in fact listed and taxed in the name of the estate at the time notice of expiration of right of redemption is given, the personal representative would thereby be identified of record and would, therefore, clearly be entitled to receive notice of expiration of right of redemption on behalf of the estate for purposes of effecting and exercising redemption rights on behalf of the estate. A district court sitting in probate would then be in a position to determine the rights of any and all claimants to the parcel through the appropriate judicial proceedings. If the property is actually listed and taxed to the unenumerated heirs by the personal representative, the certificate holder is on notice that such persons exist and can look to the probate records to identify the heirs and to give them notice. These procedures provide an orderly means by which the issue of heirship can be established in the proper forum while also providing the estate and the heirs with the means of receiving notice that the tax sale purchaser intends to take the tax sale certificate to a deed. They also provide the certificate holder with the ability to identify those to whom the notice of expiration of right of redemption must be served. However, under the facts presented, the necessary steps to have the parcel taxed either to the estate or to the heirs, either enumerated or unenumerated, were never taken. Again, equity will not assist those who fail to take the steps available to them to protect their rights. *Teget v. Lambach*, 226 Iowa 1346, 1352, 286 N.W. 522 (1939).

In support of our conclusion in this regard, we note a prior Iowa Supreme Court's ruling wherein the Court held that when the statute merely provides that notice is to be personally served upon those "in whose name the parcel is taxed", no statutory provision is made for personal service upon any other person or persons if, when an attempt is made to serve personal notice, the person in whose name the property is taxed is deceased. *Gray v. Morin*, 218 Iowa 540, 542, 255 N.W. 631 (1934). In such cases, the statutory requirement for notice thereon simply ceases to be effective. *Id.* This proposition is apparently still good law. *Burks v. Hedinger*, 167 N.W.2d 650, 654 (Iowa 1969). Thus, unless the appropriate steps have in fact been taken to have the property taxed in the name of the estate or the heirs of the decedent under section 428.6, apparently no notice to the possible heirs or devisees is necessary under the statute. It is presumed that the legislature was aware of the Iowa Supreme Court's prior determination, that no notice to the person in whose name the parcel is taxed is necessary in cases where the person in whose name the property is taxed is deceased, when it enacted the present provision limiting the right to redeem. *John Hancock Mutual Life Insurance Co. v. Lookingbill*, 253 N.W. 604, 611 (Iowa 1934). Thus, it appears clear that the legislature intended to place the responsibility on potential heirs and devisees to take the appropriate actions to have the parcel listed and taxed to them in order to bring themselves within the class of those statutorily entitled to redeem. Under the present statutory scheme allowing redemptions, if those individuals choose not to comply with that requirement, they make that choice at their own peril.

The third possible category of authorized redemptioners into which heirs may fall includes all others with an interest "of record". In this context, "of record" denotes some authorized entry available to the public through an examination of the public records related to real property interests which would give notice to all interested persons that the person identified has a recordable interest in the property. *Van Gorder v. Hanna*, 72 Iowa 572, 576, 34 N.W. 332 (1887). In the case of heirs, the authorized way by which they can place a record of such heirship in the public records related to real property interests is for the heir to have their claim judicially established under the provisions of chapter 633, as explained above. It has already been determined that, in redemption cases, it is not an unreasonable requirement to compel someone with a purported interest in property to make that interest one "of record" in order for that person to preserve their rights in and to that property. *Id.* Again, since the alleged heir under the facts presented took no steps to establish "of record" that the person in fact had some interest in the parcel in question which would authorize that person to redeem the parcel from tax sale, the treasurer could reasonably refuse to allow the alleged heir to redeem the parcel in question ex parte under section 447.9. Thus, it is our opinion that, under the circumstances presented, the treasurer is not required to allow an alleged heir to redeem.

B.

As to your second question, it requires no further direct answer given our negative answer to your first question. Further, it appears clear by the facts given that the treasurer did inquire as to whether or not the alleged heir had

taken any of the steps necessary to bring the person within the class of those entitled to redeem under section 447.9. It appears clear under the facts that the alleged heir did not do so. Therefore, under the circumstances presented, it is our opinion that no additional inquiry by the treasurer is necessary.

It should be noted that, procedurally, requiring a claimant to resort to a court action under section 447.8 in order to determine whether or not the claimant has a right to redeem in cases where a question exists regarding whether the individual actually does have such alleged right is both reasonable and workable under the circumstances. The simple fact is that treasurers are not clothed with the authority to conduct the type of inquiry necessary to determine, in the first instance, the legal rights of individuals in a particular parcel of property who claim to be heirs of the deceased person in whose name a parcel is taxed. No mechanism has been provided for the treasurer to make findings of fact or to provide all interested parties with an appropriate opportunity to be heard in this regard. Rather, both the authority and the means to conduct the relevant factual and legal inquiry necessary to make this determination have appropriately been vested exclusively in the courts of the state under Iowa Code chapter 633. See 1994 Op. Att'y Gen. 64, 65.

C.

As to your third question, the treasurer is likewise neither authorized nor required by statute to enter into an extensive investigation as to whether or not all those entitled to notice of expiration of right of redemption have in fact been served. However, the county treasurer who does have actual knowledge that proper service of notice of expiration of right of redemption has not in fact been made on all those entitled to redeem as indicated in the affidavit has no legal obligation or right to issue a tax deed. *White v. Hammerstrom*, 224 Iowa 1041, 277 N.W. 483 (1938). Thus, when a treasurer is presented with no more than a bare allegation that a particular individual has a right to redeem but has not been served with the section 447.12 notice of expiration of right of redemption, the treasurer should accept the affidavit of completion of service as filed pursuant to section 447.12. It is our opinion that an alleged heir, in the circumstances provided, has presented to the treasurer no more than a bare allegation that they were entitled to such notice and that the treasurer could, therefore, accept the affidavit of completion of service under section 447.12 as filed.

In summary, it is our opinion that the treasurer is authorized to refuse to accept an offer of redemption from tax sale made by an individual who merely claims to be an heir of a deceased person in whose name the parcel was taxed in situations where the person in whose name the parcel is taxed is deceased and the alleged heir has failed to take any of the actions available which would clearly establish that the individual is in fact within the class of persons entitled to redeem. Further, given our conclusion to the first question, your second question regarding proof requires no further answer. Finally, it is our opinion that the treasurer may accept for filing an affidavit of completion of service of notice of expiration of right of redemption under the circumstances presented

even where it is clear from the face of the affidavit that the alleged heir was not served with personal notice.

REAL PROPERTY; WATERS & WATER COURSES; RECREATIONAL NAVIGATION; FENCES: Scope of public right to navigate nonmeandered streams. Iowa Code §§ 462A.2(16), 462A.69, 716.7(2)(a) (1995). Members of the public may float on any stream that is navigable as defined in Iowa Code section 462A.2(16) and engage in activities incident to navigation, including fishing, swimming, and wading. To the extent that waterfowl hunting in Iowa stream beds is customary, some particular types of waterfowl hunting might be considered as incidental to public recreational navigation. The owner of a navigable stream bed has a right to erect a fence across the stream as necessary to confine livestock on the owner's land while affording boaters safe passage. (Smith to Kremer, State Representative, 2-6-96) #96-2-3

Joseph M. Kremer, State Representative: You have requested an opinion of the Attorney General concerning the scope of public rights to wade, fish and hunt in nonmeandered streams, and the right of a landowner to erect a fence across a nonmeandered stream that is navigable. We paraphrase your questions as follows:

1. Do members of the public have a right to wade and to fish or hunt while floating or wading in a nonmeandered navigable stream whose bed is privately owned?

2. Can the owner of the bed of a nonmeandered navigable stream erect a fence across the stream without creating a nuisance as defined in Iowa Code section 657.2(3)?

In response to these questions, it is our opinion that members of the public may float on any navigable stream and engage in activities that are incident to navigation, including fishing, swimming, and wading. To the extent that hunting waterfowl in Iowa stream beds is customary, some particular types of waterfowl hunting might be considered as incidental to public recreational navigation. The owner of the bed of a nonmeandered navigable stream has a right to erect a fence across the stream as necessary to confine livestock on the owner's land in a manner that affords boaters safe passage.

Our analysis begins with the observation that the phrase "navigable waters" has two distinctly different meanings depending on the context in which it is used. Its meaning in the context of streambed ownership is different from its meaning in the context of the public right to navigate streams flowing over private property.

I. "NAVIGABLE" AND "MEANDERED" IN RELATION TO OWNERSHIP OF IOWA STREAM BEDS

When entering the Union, the original thirteen states retained title to the beds of navigable waters within their borders. Consequently, the federal government later held the beds of navigable territorial waters in trust for future states. *Shively v. Bowlby*, 152 U.S. 1, 26-27 (1894). On admission to the Union each state was given title to all navigable lakes and streams within its boundaries. The act for the admission of Iowa into the Union in 1845 put it on an equal footing with other states and gave it title to all navigable waters within its boundaries. *See State v. Jones*, 143 Iowa 398, 404-5, 122 N.W. 241, 243 (1909) *aff'd sub nom. Marshall Dental Mfg. Co. v. Iowa*, 226 U.S. 460, 462 (1913); 5 Stat. L. 742-3, § 3 (1845).

The State of Iowa owns the beds of its navigable streams up to the ordinary highwater mark and holds them in trust for its citizens. *McManus v. Carmichael*, 3 Iowa (Clarke) 1 (1856). Thus, a riparian owner whose land abuts a navigable water body takes only to the highwater mark. *McCauley v. Salmon*, 234 Iowa 1020, 1022, 14 N.W.2d 715, 716 (1944).

For the purpose of determining streambed ownership in Iowa, streams are only navigable to the extent that they were meandered in the original government survey. *Shortell v. Des Moines Elec. Co.*, 286 Iowa 469, 481-82, 172 N.W. 649, 653 (1919); *Board of Park Comm'rs v. Taylor*, 133 Iowa 453, 458, 108 N.W. 927, 928 (1906); Note: "Fishing and Recreational Rights, in Iowa Lakes and Streams," 53 Iowa L. Rev. 1322, 1328 (1968).

A meandered river is one that was set apart from adjoining public lands by "meander lines" run in public land surveys made for the United States Department of the Interior. Meander lines were run for the purpose of ascertaining the quantity of land in a tract bordering a lake or river. *St. Paul & P. R. Co. v. Schurmeier*, 74 U.S. (7 Wall) 272, 286-7 (1868); *Berry v. Hoogendoorn*, 133 Iowa 437, 108 N.W. 923 (1906); *Kraut v. Crawford*, 18 Iowa 549, 553 (1865). Instructions for the original township surveys included a directive to meander all navigable rivers. However, the original township surveys were begun during the rush of settlement during the late 1830's while Iowa was still part of the Wisconsin Territory. Criteria for determining navigability were not specified in the instructions to surveyors, time was of the essence, land was cheap, and wages for surveyors were low. *See*, generally, Dodds, *Original Instructions Governing Public Land Surveys of Iowa*, Iowa Engineering Society (Powers Press, Ames, IA) (1943).

Thus, despite the directive to meander all navigable rivers, some large rivers were not meandered in the original township surveys. The variability in applying the meandering directive is illustrated by comparing the Little Sioux River with the East Fork Des Moines River. The latter was meandered upstream to a point near Algona, Iowa, where it drains approximately 880 square miles. However, no segment of the Little Sioux River was meandered even though it drains approximately 4500 square miles at its mouth in Harrison County. *Drainage Areas of Iowa Streams*, Iowa Highway Research Board (1974).

Iowa's border rivers and lengthy segments of the Iowa, Des Moines, and Cedar rivers were meandered in the public land surveys. Much shorter segments of the Raccoon, Wapsipinicon, Maquoketa, Skunk, Turkey, Nishnabotna, Upper Iowa and Little Maquoketa rivers were meandered. The upstream ends of the meandered segments are listed in the administrative rules of the Environmental Protection Commission. 567 IAC 74.1.

A riparian owner whose land abuts a nonnavigable stream takes to a line midway between the banks. *Holmes v. Haines*, 231 Iowa 634, 640, 1 N.W.2d 746, 749 (1942). Consequently, the beds and banks of many of Iowa's most popular canoeing and fishing streams are privately owned except to the extent that they have been included in public purchases of adjoining lands.

II. THE STATUTORY DEFINITION OF "NAVIGABLE" IN RELATION TO THE PUBLIC RIGHT TO USE STREAMS FLOWING OVER PRIVATE PROPERTY

Although the term "navigable" may simply mean "meandered" for the purpose of determining streambed ownership in Iowa, the legislature has enacted a substantially different definition of "navigable" in relation to the right of the public to use streams flowing in privately owned beds. The following definition of the term "navigable waters" was included in a 1961 revision of Iowa water safety regulations:

> "Navigable waters" means all lakes, rivers and streams, which can support a vessel capable of carrying one or more persons during a total of six months period in one out of every ten years.

1961 Iowa Acts, 59th G. A., ch. 87, § 2 (codified at Iowa Code § 462A.2(16)(1995)). Shortly after its enactment, this office opined in 1965 that notwithstanding the statutory definition of "navigable waters," the public had a right to canoe rivers in Iowa only to the extent that they were meandered. 1966 Op. Att'y Gen. 578. The 1965 opinion further concluded that owners of the beds of nonmeandered streams had the right to erect fences obstructing passage of boats. *Id.* The validity of those conclusions was doubtful in 1965. They clearly are not valid in light of subsequent legislative and judicial recognition of the importance of recreational navigation to the public.

In 1982, the General Assembly enacted legislation entitled "An Act relating to revision of laws governing recreational boating in Iowa, including penalties and scheduled fines for violations of boating laws." 1982 Iowa Acts, 69th G. A., ch. 1028. Section 34 added a new section to the Iowa Code:

> Water occurring in any river, stream, or creek having definite banks and bed with visible evidence of the flow of water is flowing

> surface water and is declared to be public waters of the state of Iowa and subject to use by the public for navigation purposes in accordance with law. Land underlying flowing surface water is held subject to a trust for the public use of the water flowing over it. Such use is subject to the same rights, duties, limitations, and regulations as presently apply to meandered streams, or other streams deemed navigable for commercial purposes and to any reasonable use by the owner of the land lying under and next to the flowing surface water.

This statute, codified at Iowa Code section 462A.69 (1995), has not been construed in any reported opinion of a court or any prior opinion of this office. Coupled with the statutory definition of "navigable waters", section 462A.69 clarifies the public right to navigate for recreational purposes on nonmeandered streams that have enough flow to float a small recreational vessel.

Iowa's statutory recognition of the public right to use streams navigable in fact for recreational purposes is in accord with the modern majority rule. Cases are collected in 6 A.L.R.4th 1030. Colorado is an exception to the modern majority rule. *Compare People v. Emmert*, 597 P.2d 1025, 6 A.L.R.4th 1016 (Colo. 1979) (affirming rafters' conviction on charge of criminal trespass for floating over privately-owned streambed) *with Adirondack League Club v. Sierra Club*, 201 App. Div. 2d 225 (N.Y. App. Div. 1994) (despite posting for a century by private club, stream bed navigable in fact by canoes and kayaks was subject to public right of navigation for recreational purposes).

III. WADING, FISHING AND HUNTING AS INCIDENTS OF PUBLIC RECREATIONAL NAVIGATION

Section 462A.69 clarifies the right of the public to use streams flowing through private property for navigation purposes. But it is ambiguous concerning the scope of the term "public use for navigation purposes." If a statute is ambiguous, principles of statutory construction should be applied. Iowa Code § 4.6 (1995). In interpreting statutes the ultimate goal is to ascertain and give effect to the intention of the legislature. *Farmers Coop Co. v. DeCoster*, 528 N.W.2d 536, 537 (Iowa 1995). In discovering such intent courts consider the language used, the purpose to be served and the evil sought to be remedied. *Id.* When statutes relate to the same subject matter or to closely allied subjects they are said to be in pari materia and must be construed, considered and examined in light of their common purpose and intent so as to produce a harmonious system or body of legislation. *Id.* at 538.

The definition of "navigable waters" in Iowa Code section 462A.2(16) is relevant in determining whether the legislature intended to include wading within the scope of public use for navigation purposes. By including all streams capable of floating a vessel with one person aboard during six months in one out of ten years, the legislature defined as navigable the numerous streams which are floatable by small watercraft.

Water levels in Iowa streams fluctuate considerably with changes in season and from wet weather to drought. As a practical matter, floating on streams in small boats necessitates some wading. Fallen trees and log jams temporarily obstruct channels that are otherwise floatable. Canoeists sometimes must wade around such obstructions and pull their vessels over shoals even on the larger meandered rivers when water levels are low.

Neither the statutory definition of the term "navigable waters" nor section 462A.69 limits navigation to periods when water levels are high. If public use for navigation were not intended to include wading through shallows, legislative declaration of the public right to navigate streams flowing through private land would be futile. Courts seek a reasonable interpretation that will best effect the purpose of the statute and avoid an absurd result. *First Iowa State Bank v. Iowa Dept. of Natural Resources*, 502 N.W.2d 164, 168 (Iowa 1993). We conclude that the legislature intended the phrase "public use for navigation" to include wading because floating often necessitates some wading.

Courts in several other jurisdictions have concluded that activities such as recreational boating and activities "incident to navigation" such as fishing, wading, swimming, and hunting waterfowl are within the scope of the public right of recreational navigation on streams flowing over privately owned stream beds. *State v. McIlroy*, 595 S.W.2d 659, 664-65 (Ark. 1980); *People v. Sweetser*, 72 Cal. App. 3d 278, 140 Cal.Rptr.82 (1977); *Southern Idaho Fish & Game Ass'n v. Picabo Livestock, Inc.*, 96 Idaho 360, 528 P.2d 1295 (1974); *Kelley ex rel. MacMullan v. Hallden*, 51 Mich. App. 176, 214 N.W.2d 856,862-64 (1974) (citing cases from other jurisdictions employing recreational use test to determine navigability); *Elder v. Delcour*, 364 Mo. 835, 269 S.W.2d 17, 47 A.L.R. 2d 370 (1954); *Montana Coalition for Stream Access, Inc. v. Hildreth*, 211 Mont. 29, 684 P.2d 1088, 1091 (1984); *Montana Coalition for Stream Access, Inc. v. Curran*, 210 Mont. 38, 682 P.2d 163, 170-1 (1984); *Day v. Armstrong*, 362 P.2d 137 (Wyo. 1961) (floating and fishing but wading only as necessary for floating).

Courts have articulated several rationales for the public right to navigate and engage in activities "incident to navigation" on streams flowing in privately owned beds. An early and frequently cited case is *Diana Shooting Club v. Husting*, 156 Wis. 261, 145 N.W. 816, 820 (1914) (public right to boat and hunt waterfowl for pleasure on stream navigable in fact by small boats based on implied trust reservation in conveyance of stream bed). Other courts have cited constitutional or statutory declarations of navigability or public ownership of the water flowing in privately-owned stream beds. *Muench v. Public Service Comm'n.*, 261 Wis. 492,53 N.W.2d 514,519 (1952); *Montana Coalition for Stream Access, Inc., v. Hildreth*, 684 P.2d at 1091; *see* Note: *supra*, 53 Iowa L. Rev. at 1332-42.

The Iowa Supreme Court has noted the relationship between recreational fishing and navigation, taking judicial notice of the "expanding involvement of Iowans in recreational activities on or near navigable streams such as the Missouri River." *State v. Sorensen*, 436 N.W.2d 348, 363 (Iowa 1989). Public recreational use of Iowa's streams clearly is not limited to meandered stream segments. Prominent examples of nonmeandered rivers popular for floating

and fishing are the Boone and Little Sioux, all of the Upper Iowa except a straightened portion near its confluence with the Mississippi River, all of the Raccoon upstream from Polk County, the Maquoketa upstream from the City of Maquoketa, and the Iowa upstream from the City of Ladora. In the mid 1960's the Iowa Conservation Commission began printing guides for canoeing and fishing Iowa rivers without distinguishing between meandered and nonmeandered segments. *See*, e.g., Iowa Department of Natural Resources (DNR), "Canoeing the Middle and South Raccoon River". The DNR's fish stocking programs include periodic stocking of walleye in non-meandered floatable streams. *See* DNR, Fisheries Bureau, "1995 Stocking List"; *see also* "Interior River Walleyes! A Well-Kept Secret," *Iowa Conservationist* 8, 10 (March/April 1995).

Public recreational use of Iowa's many non-meandered streams from public points of access and egress is of substantial importance. The spiritual value of experiencing such streams has been eloquently expressed:

> Most of all, these rivers invite awareness. Land forms, sky patterns, and the community of plant, animal, and bird life are on display in river corridors as nowhere else in the forest. Wild rivers are the museums of the natural world. And beneath, there is no wearisome tile floor but a cushion of running water, brown or clear, floating one in sensuous ease down river.

Jamieson, *Adirondack Canoe Waters*, Preface (North Flow Press 1986), *quoted* in "Paddling Through: New York's Canoeable Rivers Can No Longer Be Posted by Landowners," (September 1995) *National Environmental Enforcement Journal* 2, 7 fn. 12.

IV. RELEVANCE OF IOWA'S CRIMINAL TRESPASS STATUTE

In 1981 Iowa's criminal trespass statute was amended to specify a prohibition against entering property to hunt, fish or trap without express permission from the landowner or agent. 1981 Iowa Acts, 69th G.A., ch. 205, § 1 (codified at Iowa Code § 716.7(2)(a) (1995)). We thus need to consider whether this statute conflicts with section 462A.69 and, if so, how the conflict should be resolved.

If two statutes are irreconcilable, the statute latest enacted prevails. Iowa Code § 4.8; *Doe v. Ray*, 251 N.W.2d 496, 503 (Iowa 1977). Ambiguities in penal statutes are strictly construed against the State. *First Iowa State Bank v. Iowa Dept. of Natural Resources*, 502 N.W.2d 164, 166 (Iowa 1993). If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. Iowa Code § 4.7.

Applying these rules of construction, we conclude that section 462A.69 would bar prosecution of a person for criminal trespass arising from boating, fishing, or wading in the bed of a stream that is navigable as defined in Iowa Code section 462A.2(16). Section 462A.69 was enacted one year later than section 716.7(2)(a). Additionally, section 716.7 is a penal statute while section 462A.69 is not penal. Although section 716.7(2)(a) is more specific than section 462A.69

with respect to hunting, fishing, or trapping, it is less specific with respect to the property to which it applies.

Courts in other jurisdictions have recognized a public right to hunt waterfowl from a boat on a stream flowing in a privately owned bed. *Diana Shooting Club v. Husting, supra.* However, generally, hunting is less likely than wading and fishing to be viewed as an incident of recreational navigation. To the extent that waterfowl hunting is customary in Iowa stream beds, some particular types of waterfowl hunting might be considered as incidental to public recreational navigation. It would not be appropriate for us to speculate on particular facts and circumstances which might make section 462A.69 relevant in a criminal trespass prosecution for hunting waterfowl in a privately-owned stream bed.

V. FENCING ACROSS A NAVIGABLE STREAM

Owners have a duty of reasonable and ordinary care in confining their livestock. *Leaders v. Dreher,* 169 N.W.2d 570, 573 (Iowa 1969). In some circumstances an owner may be required to erect a fence across a stream to confine livestock. *See Myers v. Tallman,* 169 Iowa 104, 149 N.W. 259 (1914) (dispute arising from complications of attempting to maintain hog-tight fence across stream). It is unlikely that any landowner would attempt to maintain a hog-tight fence across a navigable stream due to the considerable practical difficulties and the modern practice of confining hogs in buildings or lots. However, it is still a common practice to pasture cattle along streams and to confine them by extending one or more electric or barbed wires across the stream.

You have asked whether such a fence across a nonmeandered navigable stream would violate Iowa Code section 657.2(3) which states that a nuisance includes: "[t]he obstructing or impeding without legal authority the passage of any navigable river, harbor, or collection of water." The identical text has been codified since the early years of statehood. *See* Code of 1851, § 2759. Arguably, the meaning of the word "navigable" is ambiguous as used in this ancient statute enumerating nuisances. However, whether or not section 657.2(3) is applicable to a fence across a nonmeandered stream, such a fence could constitute a common law nuisance by interfering with public navigation. Statutory provisions enumerating nuisances have not superseded the common law of nuisance. *Guzman v. Des Moines Hotel Partners,* 489 N.W.2d 7, 10 (Iowa 1992). Moreover, irrespective of liability in nuisance, one who negligently fences a stream in a manner that causes injury to the navigating public may be liable in tort. *See Guzman,* 489 N.W.2d at 11 (analyzing the relationship between nuisance and tort).[13]

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[13] Conflict between fence wires and canoeists is easily avoided. Cattle and canoeists tend to seek different areas of rivers and streams. Canoeists generally navigate in the "thalweg," the deepest navigable area of the channel, while cattle instinctively prefer wading the shallows to swimming in current. Fence wires can be insulated to afford boaters safe passage. With simple modifications, livestock "watergap" fences can be maintained across navigable streams without obstructing navigation.

VI. CONCLUSION

It is our opinion that members of the public may float on any stream that is navigable as defined in Iowa Code section 462A.2(16) and engage in activities incident to navigation, including fishing, swimming, and wading. To the extent that waterfowl hunting is customary in Iowa stream beds, some particular types of waterfowl hunting might be considered as incidental to public recreational navigation. The owner of a navigable stream bed has a right to erect a fence across the stream as necessary to confine livestock on the owner's land in a manner that affords boaters safe passage.

February 8, 1996

COUNTIES: Zoning. Home Rule. Iowa Const. art. III, § 39A; Iowa Code ch. 335; Iowa Code §§ 172D.1(6), 172D.4(1), 331.301(1), 331.301(3), 331.301(4), 331.302, 331.304(6), 335.2, 335.3, 335.4, 335.5, 335.6, 335.8, 335.27, and 358A.2 (1995); 1947 Iowa Acts, ch. 184, § 2; 1981 Iowa Acts, ch. 117. Iowa Code section 335.2 (1995), exempting "land, farm houses, farm barns, farm outbuildings or other buildings or structures which are primarily adapted, by reason of nature and area, for use for agricultural purposes" from county zoning, does not prohibit a county from adopting non-zoning ordinances regulating agricultural activities. (Benton to Arnold, State Representative, 2-8-96) #96-2-4

Richard Arnold, State Representative: You have requested our opinion on the question of whether Iowa Code section 335.2 prohibits counties from regulating agricultural activities through ordinances that do not involve zoning. Iowa Code section 335.2 (1995) states:

> Except to the extent required to implement section 335.27, no ordinance adopted under this chapter applies to land, farm houses, farm barns, farm outbuildings or other buildings or structures which are primarily adapted, by reason of nature and area, for use for agricultural purposes, while so used. However, the ordinances may apply to any structure, building, dam, obstruction, deposit or excavation in or on the flood plains of any river or stream.

You ask whether this zoning exemption also prohibits a county from regulating agricultural activities through the exercise of its general home rule authority.

Iowa Code chapter 335 governs county zoning. Iowa Code section 331.304(6) states that the power to enact zoning ordinances must be exercised through chapter 335. Zoning involves the division of land into zones and within these zones the regulation of both the nature of land usage and the physical dimensions of these uses including height setbacks and minimum area. *Cheyenne Airport Bd. v. Rogers*, 707 P.2d 717, 726 (Wyo. 1985). The objectives of county zoning include the protection of soil from wind and water erosion, the protection of health and the general welfare, and the preservation of the availability of agricultural land. Iowa Code § 335.5 (1995).

Through zoning, counties may by ordinance regulate and restrict "the location and use of buildings, structures, and land for trade, industry, residence, or other purposes." Iowa Code § 335.3 (1995). To accomplish these purposes a board of supervisors may divide the county into districts, and within each district regulate the use of buildings, structures or land. Iowa Code § 335.4. All regulations must be uniform throughout each district, but the regulations in one district may differ from those in other districts. *Id.*

To avail itself of these zoning powers, the board of supervisors shall appoint a zoning commission to recommend boundaries of the various districts and the appropriate regulations and restrictions to be enforced in those districts. Iowa Code § 335.8. After the commission submits its final proposed regulations, the board provides notice and a public hearing is conducted to consider the proposed regulations. Iowa Code § 335.6. The regulation, restriction, or boundary shall be adopted in accordance with section 331.302. *Id.*

Counties in Iowa have also been granted home rule power and authority not "inconsistent with the laws of the general assembly." Iowa Const. art. III, § 39A. The statutes implementing home rule, to which your letter alludes, grant counties broad authority over their local affairs.

Iowa Code section 331.301(1) states that except as expressly limited by the Constitution, and if not inconsistent with the laws of the general assembly, a county may "exercise any power and perform any function it deems appropriate to protect the rights, privileges, and property of the county or of its residents." A county may exercise its general powers subject only to limitations expressly imposed by state law. Iowa Code § 331.301(3). An exercise of a county power is not inconsistent with a state law unless it is irreconcilable with a state law. Iowa Code § 331.301(4).

In considering whether section 335.2 extends to any county ordinance we must determine the intent of the general assembly. The place to begin that effort is with the language of the exemption itself. *Krull v. Thermogas Co. of Northwood, Iowa*, 522 N.W.2d 607, 612 (Iowa 1994). Section 335.2 states in part that "no ordinance adopted under this chapter" applies to land, farm houses, etc. The phrase "adopted under this chapter" indicates that the exemption is limited to a zoning ordinance enacted pursuant to chapter 335.

This conclusion is buttressed by an examination of the legislative history of the zoning power and home rule. County zoning has existed since 1947. The statute then contained the farm exemption in substantially the same form as it exists today.[14] The constitutional amendment granting counties home rule

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[14] The original language of the exemption read:

> No regulation or ordinance adopted under the provisions of this Act, shall be construed to apply to land, farm houses, farm barns, farm outbuildings or other buildings, structures or erections which are adapted by reason of nature and area for use for agricultural purposes as a primary means of livelihood, while so used. 1947 Iowa Acts, ch. 1.84, § 2.

power was enacted in 1978, and the statutes implementing home rule were adopted in 1981 Iowa Acts, chapter 117,

Section 1070 of the home rule implementing legislation amended the farm exemption slightly, but left the limiting phrase "adopted under this chapter" intact. Significantly, the general assembly left this phrase in the farm exemption while granting counties the broad power to enact general ordinances. We infer therefore that the general assembly did not intend to broaden the exemption to other county ordinances. The legislature could, for example, have said that "no ordinance" shall apply to farm buildings etc., but did not do so. We can be guided on occasion by what the legislature did not say as well as what it did say. *State ex rel. Miller v. Santa Rosa Sales and Marketing, Inc.*, 475 N.W.2d 210, 218 (Iowa 1981).

In light of the foregoing, we conclude that section 335.2 does not prevent a county from adopting other ordinances which may bear on agricultural activities. However, limitations remain on a county's authority to enact ordinances applicable to agricultural activities. First, a county may not enact ordinances which amount to zoning without going through the provisions of chapter 335. *See* Iowa Code § 331.304(6). Courts in other jurisdictions have discussed the distinction between a zoning ordinance and a general regulatory ordinance in discussing whether the procedures applicable to zoning should have been followed. *See, e.g., Land Acquisition Services, Inc. v. Clarion County*, 605 A.2d 465, 470 (Pa. Cmwlth. 1992) (holding that a county ordinance with the primary objective of regulating hazardous waste activity was not a zoning regulation). A county ordinance which bears the earmark of zoning, regulating the use of agricultural land or buildings, may be subject to challenge on the grounds that it is in reality a zoning ordinance not enacted in compliance with chapter 335, and subject to the farm exemption.

Second, local ordinances may be preempted in two ways. A local ordinance is "inconsistent" with the laws of the general assembly and therefore preempted when the ordinance prohibits an act permitted by statute, or permits an act prohibited by statute. *City of Des Moines v. Gruen*, 452 N.W.2d 340, 342 (Iowa 1990). An ordinance is also preempted when it invades an area of the law reserved by the legislature to itself. *Id.* at 342. In a separate opinion recently issued, we advised the Winneshiek County Attorney that three ordinances proposed in Winneshiek County were likely preempted by 1995 Iowa Acts, chapter 195 (House File 519). 1996 Op. Att'y Gen. ___ (#96-1-2). A general county ordinance attempting to regulate confinement feeding operations would likely invade an area of law which the legislature has reserved to itself in House File 519.

It should be noted that the farm exemption itself does not leave counties totally powerless to regulate at least some aspects of agriculture through zoning. In *Thompson v. Hancock County*, 539 N.W.2d 181, 183 (Iowa 1995), the Iowa Supreme Court held that five hog confinement buildings, constructed as an expansion of an existing farrow-to-finish hog operation, were exempt from county zoning under section 335.2. However, the Court found that a feedlot may not qualify for the exemption.

Hancock County argued in *Thompson* that Iowa Code section 172D.4(1) granted it authority to zone Thompson's operation. *Thompson*, 539 N.W.2d at 184. Section 172D.4(1) states:

> A person who operates a feedlot shall comply with applicable zoning requirements. The applicability of a zoning requirement shall be as provided in subsection 2 of this section. A person complies with this section as a matter of law where no zoning requirement exists.

This provision was enacted in 1976, after the zoning exemption. According to Hancock County's argument, because this section is specific as to feedlots and was enacted after section 335.2, it superseded the general exemption statute. *Id.* The Court found the argument to be "persuasive", but of no avail to the county because the hog confinement operation did not meet the definition of a "feedlot." *Id.* at 183-84. As a result, county zoning may apply to operations which do meet the definition of a feedlot, defined in section 172D.1(6) as a "lot, yard, corral or other area in which livestock are confined, primarily for purposes of feeding and growth prior to slaughter." A feedlot "only extends to open land areas and does not include enclosed structures." *Id.* at 184.

In addition, the Court in *Thompson* did not overrule *Farmegg Products, Inc. v. Humboldt County*, 190 N.W.2d 454 (Iowa 1971), the seminal Iowa case applying the farm exemption to livestock confinement operations. The Court in *Farmegg* considered whether a four acre tract with two 40 x 400 foot steel buildings containing 40,000 chicks in each building was subject to a Humboldt County zoning ordinance. The Court found that the chicks would be confined in wire cages hung from rafters in the buildings which would be equipped with ventilation fans, and automatic feeders and watering equipment. *Id.* Stating that, "[i]t is clear the activity proposed by plaintiff in the present case will be organized and carried on as an independent productive authority and not as part of an agricultural function" the Court held that the proposed use of the land was not exempt from the county zoning ordinance under the predecessor to section 335.2 (section 358A.2). *Id.* at 459-60. The *Farmegg* decision may leave some types of comparable confinement feeding operations subject to zoning.

MARCH 1996

March 6, 1996

COUNTIES: Allocation of library services tax revenues. Iowa Code §§ 256.69, ch. 336 (1995). A county is not required, outside of a contract, to allocate unincorporated county property tax revenues for library services to a municipal library located outside the county which provides library services to individuals living in unincorporated areas. (Crawford to Dinkla, State Representative, 3-6-96) #96-3-1(L)

CRIMINAL LAW; COUNTY ATTORNEYS: Authority to seek injunctions to protect victims and witnesses. Iowa Code §§ 236.8, 331.756, 665.5, 719.3,

801.4, 910A.11 (1995). A county attorney may seek a restraining order to prohibit the harassment or intimidation of a victim or witness in a criminal case and may, but is not required to, represent the county in a contempt proceeding to prosecute a violation of such an order. (Tabor to Dunn, Hardin County Attorney, 3-6-96) #96-3-2(L)

March 7, 1996

CONSTITUTIONAL LAW; REAL PROPERTY: Limitation upon establishment of real estate improvement districts. Iowa Const. art. I, § 6; art. III, § 30 (1857); Iowa Code § 358C.2 (Supp. 1995). Iowa Code section 358C.2 (Supp. 1995), which ultimately limits the establishment of real estate improvement districts in a pilot program to communities within a maximum of six counties, does not offend state constitutional clauses generally requiring the passage of general laws having a uniform operation. (Kempkes to Black, State Senator, 3-7-96) #96-3-3(L)

APRIL 1996

April 3, 1996

COUNTY OFFICERS: Leave of absence for deputy sheriffs running for partisan elective office paying remuneration. Iowa Code § 341A.18 (1995). Section 341A.18 does not preclude deputy sheriffs on leave from responding to subpoenas to testify as material witnesses in a criminal case in which they have performed official duties relating to investigation or law enforcement. Section 341A.18 does not require deputy sheriffs to take a leave of absence before a primary election if they will have no opponents in the primary election, but will have opponents in the general election. (Kempkes to Anstey, Mills County Attorney, 4-3-96) #96-4-1(L)

April 10, 1996

HUMAN SERVICES, DEPT. OF; CHILD SUPPORT LAW: Establishment of current and accrued support. Iowa Code § 234.39(1) (1995). A dispositional order of the juvenile court or an administrative order entered pursuant to chapter 252C shall establish, after legal notice and a reasonable opportunity to be heard is provided to a parent or guardian, the amount of the support obligation which may be retroactive to the date the child first entered foster care. (Hansen to Wise, State Representative, 4-10-96) #96-4-2

Phillip Wise, State Representative: You have requested an opinion of the Attorney General with respect to Iowa Code section 234.39(1) (1995). Section 234.39 concerns parental responsibility for support of a child receiving foster care services from the state. You have asked whether the notice and reasonable opportunity to be heard language in section 234.39(1) prohibits the entry of a child support order for arrearages arising prior to the actual notice to the payor.

Section 234.39(1) provides authority to the state to pursue and establish any current and/or accrued child support obligation for parents who have or have had children receiving foster care services.

> For an individual to whom section 234.35, subsection 1, is applicable, a dispositional order of the juvenile court requiring the provision of foster care, or an administrative order entered pursuant to chapter 252C, or any order establishing paternity and support for a child in foster care, shall establish, after notice and a reasonable opportunity to be heard is provided to a parent or guardian, the amount of the parent's or guardian's support obligation for the cost of foster care provided by the department. The amount of the parent's or guardian's support obligation and the amount of support debt accrued and accruing shall be established in accordance with the child support guidelines prescribed under section 598.21, subsection 4.

You view this provision as establishing a support obligation for arrearages prior to notice and reasonable opportunity to be heard being provided to the parent. The statute, read together with pertinent federal and state legislation, regulations and rules and common law, does not permit the entry of an enforceable order for current or past support until due process requirements of notice and opportunity for a hearing are provided to a parent. However, as noted in chapter 252C:

> The payment of public assistance to or for the benefit of a dependent child... creates a support debt due and owing to the department by the responsible person in an amount equal to the public assistance payment, except that the support debt is limited to the amount of a support obligation established by court order or by the administrator.

Iowa Code § 252C.2(2) (1995). This statute, and a previous Iowa Supreme Court ruling, provides that the state is entitled to recover child support from the date a child begins receiving public assistance. *State ex rel. Hammons v. Burge*, 503 N.W.2d 413, 416 (Iowa 1993).

Under state law, each and every parent has a duty to provide support for the needs of a minor child. Iowa Code §§ 252C.1(8) and .2(2) (1995); *In Re B.G.*, 508 N.W.2d 687, 688 (Iowa 1993); *Iowa Dept. of Human Serv. ex rel. Gonzales v. Gable*, 474 N.W.2d 581,583 (Iowa App. 1991). The duty of support is heightened when the minor receives public assistance. *State ex rel. Cacek v. Cacek*, 484 N.W.2d 592, 594 (Iowa 1994); *State ex rel. Lara v. Lara*, 495 N.W.2d 719, 722 (Iowa 1993). Foster care placement is, by statutory definition, public assistance. Iowa Code § 252C.1(7) (1995). Parents have a duty to repay the state for public assistance expended on minor children pursuant to a foster care placement. Iowa Code § 234.39(1) (1995); In *Re B. G.*, 508 N.W.2d at 688; *State rel. Shoemaker v. Fink*, 432 N.W.2d 700, 701 (Iowa App. 1988).

Congress has also been concerned with public assistance and child support issues. *See, e.g.*, Social Services Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337 (1975). Congress in 1975 enacted the Social Security Act. Social Services Amendments of 1974, Pub. L. No. 936-47, 88 Stat. 2387 (1975) (pertinent sections codified at 42 U.S.C. §§ 661-65 (1988)).

In the matter of child support, federal law expressly regulates procedures to be utilized by states as a condition of participation in federally funded public assistance programs. 42 U.S.C. § 666; 45 C.F.R. § 302.31 (1993). Public assistance in Iowa includes foster care costs paid by the department pursuant to chapter 234. Iowa Code § 252C.1(7) (1995); 42 U.S.C.A. § 672(h).

Participation by a state in a federal program pursuant to the Social Security Act is optional. 42 U.S.C. § 607(a); *Oberschachtsiek v. Iowa Dept. of Social Services*, 298 N.W.2d 302, 305 (Iowa 1980); However, once a state elects to participate in the program, as Iowa has, it must abide by federal statutes and regulations. *Oberschachtsiek*, 298 N.W.2d at 305. Pursuant to the supremacy clause, a state participating in a federally funded public assistance program may not contravene the federal regulatory scheme. U.S. Const. art. VI, § 2; *LaBeaux v. Iowa Dept. of Human Services*, 465 N.W.2d 541, 542-43 (Iowa 1991); *Oberschachtsiek*, 298 N.W.2d at 304. Thus, if a state chooses to administer a public assistance program, such as foster care, then the state must, among other things, establish and implement a IV-D agency to establish, enforce, and collect child support orders for the dependent child receiving foster care services.[15] Iowa Code chapter 252B. Iowa, as a participant in IV-D programs, is subject to the federal requirement to enact and implement procedures for the administrative establishment of a support obligation and is required to use expedited administrative process to establish child support obligations. *Oberschachtsiek*, 298 N.W.2d at 305; 45 C.F.R. §§ 302.70(a)(2) and 303.101.

Chapter 252C is Iowa's answer to federal legislative and regulatory requirements for expedited process. Implementing an administrative procedure for establishing child support obligations in compliance with federal requirements, chapter 252C reflects a plan based on a mutual goal of effecting the most efficient, yet just, method of dealing with the [issue of child support.] *State of Iowa ex rel. Keasling v. Keasling*, 442 N.W.2d 118, 122 (Iowa 1989). The statute, effectuating the strong governmental interest in the support of children, permits the use of administrative child support proceedings to establish and enforce current and accrued support obligations. *Duranceau v. Wallace*, 743 F.2d 709, 711 (9th Cir. 1984).

Section 234.39(1) requires the administrative agency or the court to establish, through the procedures outlined in chapter 252C, child support obligations to recover the cost of foster care provided by the department. In Be *B.G.*, 508 N.W.2d 687, 688 (Iowa 1993).

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[15] The IV-D agency in Iowa is known as the Department of Human Services, Child Support Recovery Unit. Iowa Code 252B.2 (1995); 45 C.F.R. 301.1. The Foster Care Recovery Unit is a part of the Iowa IV-D agency. 441 IAC 156.2 & 3.

Statutory provisions and proceedings thereunder are construed liberally with a view to promote the statutory objects and assist the parties in obtaining justice. Iowa Code § 4.2 (1995). Further, the entire statute is intended to be effective. Iowa Code § 4.4(2) (1995).

Pursuant to chapter 252C, a responsible parent from whom support is sought receives legal notice of the pending administrative action to establish a support obligation in compliance with statutory provisions and requirements of the Iowa Rules of Civil Procedure. Iowa Code § 252C.3(1) (1995). The parent from whom the support obligation is sought then has the opportunity to challenge the administrative proceeding. Iowa Code §§ 252C.3(2) and (3); 252C.4 (1995). The obligor parent has the right to seek a negotiation conference with the unit to review the potential obligation or the right to a judicial hearing for determination of the support obligation. Iowa Code § 252C.3(1)(d), (e) and (f) (1995); *Krause v. State ex rel, Dept. of Human Services*, 426 N.W.2d 161, 165-66 (Iowa 1988). The parent is informed in the notice initiating the administrative proceeding of the right to seek a judicial determination of the support obligation. Iowa Code §§ 252C.3(1)(d), (e) and (f) (1995). Specifically, the administrative notice which is served on a parent in compliance with the requirements of the Iowa Rules of Civil Procedure informs the parent that the state intends to pursue a support obligation which may include any of the following: current support, accrued support dating back to the initial placement into foster care, and medical support. Iowa Code § 252C.3(1) (1995). The notice also informs the parent of the right to a negotiation conference to be held with the agency or of the right to a judicial determination of the support obligation following a hearing in the district court. Iowa Code §§ 252C.3(1)(d) and (f) (1995).

Additionally, upon the agency's determination of the potential support obligation pursuant to the Iowa guidelines, a cover letter and worksheet are issued, reminding the obligor of the right to seek a judicial hearing. 441 IAC 99.41(5). A parent wishing to challenge the potential support obligation thus has at least two opportunities to be heard either administratively or judicially: when the notice is served, and when the agency's guidelines worksheet is issued upon the parent.

The uniform support statutes "clearly [recognize] liability for past support paid by the state." *Hammons*, 503 N.W.2d at 416. The focus is on the right of the department on behalf of the children receiving public assistance to obtain future support and reimbursement for amounts previously expended. *State ex rel. Shoemaker v. Fink*, 432 N.W.2d 700, 701 (Iowa Ct. App. 1988). The rights of the department for reimbursement and future support are identical with those of the children. *State ex rel. Brecht v. Brecht*, 255 N.W.2d 342, 345 (Iowa 1977). The date of birth or the date when public assistance to the child is initiated is the logical starting point for reimbursement. *Hammons*, 503 N.W.2d at 416.

It is clear that the legislature intended that, following the provision of proper notice and opportunity to be heard to an obligor, a judgment for child support may be established retroactively. *Gremillion ex rel. Gremillion v. Erenberg* 402 N.W.2d 410, 413 (Iowa 1987); *Brown v. Brown*, 269 N.W.2d 819, 822 (Iowa 1978).

Due process is fundamental, particularly when, as here, state action is involved. *State ex rel. Hamilton v. Snodgrass*, 325 N.W.2d 740, 741 (Iowa 1982). "What process is due depends on the nature of the government function and individual interests involved." *Duranceau v. Wallace*, 743 F.2d at 711-12. It is necessary, at the commencement of a legal proceeding, that the parent be given reasonable notice and opportunity to be heard. *Sharkey v. Iowa Dist. Court for Dubuque*, 461 N.W.2d 320, 323 (Iowa 1990). "Fundamental fairness" is a part of the requirement. . . ." *Snodgrass*, 325 N.W.2d at 742. "Due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377, 91 S. Ct. 780, 785, 28 L. Ed. 2d 113, 118 (1971).

A support obligation for a child placed in foster care is not established either by administrative or judicial order until or unless a parent has first received proper legal notice of the pending support action and has been provided a meaningful opportunity to be heard by the agency or by the court. Upon a showing that the administrative action has complied fully and completely with all statutory notice and procedural requirements, an administrative order establishing a judgment for any current and/or retroactive support is valid and enforceable upon approval by the district court. *Danner v. Klosterbuer*, 434 N.W.2d 921, 923 (Iowa App. 1988).

The administrative action to establish a child support obligation complies with basic due process requirements, the statutory requirements found in chapter 252C and the agency's administrative rules found at 441 IAC 156. The administrative order approved by the district court, after notice and opportunity to be heard, in conformance with federal and state statutory and common law, may provide for support due and owing retroactive to the date the child was first placed into foster care.

April 16,1996

COURTS: Judicial nominating commission vacancy. Iowa Code §§ 46.4, 46.5, 69.2(2) (1995). A vacancy on a district judicial nominating commission caused by a commissioner elect's rejection of a seat on the commission should be filled by appointment by a majority of the authorized number of elective members of the district commission, as provided for in the third unnumbered paragraph of section 46.5. (Scase to Richardson, Clerk of the Supreme Court, 4-16-96) #96-4-3

R. K. Richardson, Clerk of the Supreme Court: You have requested an opinion of the Attorney General interpreting the provisions of Iowa Code chapter 46 (1995) which govern the filling of a vacancy in the office of an elective district judicial nominating commissioner. Specifically, you ask what procedure should be utilized to select a district nominating commissioner if the individual receiving the highest number of votes at the regular election conducted pursuant to section 46.4 declines the position. We conclude that the commissioner-elect's rejection of this position results in a vacancy in the commissioner seat which should be filled pursuant to section 46.5.

District judicial nominating commissions are established, pursuant to Article V, section 16 of the Iowa Constitution and Iowa Code chapter 46, to screen applicants and make recommendations to the Governor for filling vacancies in the district court. District commissions include five members appointed by the governor and five elected members. Iowa Code §§ 46.3, 46.4 (1995). "The resident members of the bar of each judicial election district shall elect five eligible electors of the district to the district judicial nominating commission." Iowa Code § 46.4 (1995). The elected commissioners serve staggered six-year terms, with elections being conducted in January of each even-numbered year. *Id.* Procedures for the conduct of judicial nominating commissioner elections are set forth in section 46.9. "The elector receiving the most votes shall be elected. When more than one commissioner is to be elected, the electors receiving the most votes shall be elected, in the same number as the offices to be filled." Iowa Code § 46.9 (1995) (third unnumbered paragraph).

You ask us to determine how a district commissioner seat should be filled if the person who receives the most votes at the regular election held pursuant to section 46.4 declines the position. We find that rejection of a district judicial nomination commission seat by the person receiving the highest number of votes will, as a matter of course, result in a vacancy in that seat. We begin our analysis by noting that the commissioner-elect's rejection of the position does not constitute a "resignation" from the position because a person who refuses to assume the office does not hold the office.

> To constitute the holding of an office, there must be the concurrence of two wills, that of the appointive power, whether that power is vested in the electors of the state or in an executive or board, and that of the person who is appointed to the office. In no case will an office be considered as filled until there is an acceptance by the person chosen to fill the same.

Section 5 of article XI of the constitution of the state provides:

> Every person elected or appointed to any office shall, before entering upon the duties thereof, take an oath or affirmation to support the constitution of the United States and of this state, and also an oath of office.

1906 Op. Att'y Gen. 315, 317-18; *see also* Iowa Code § 63.10 (oath of office for civil offices). An officer-elect's failure to qualify by taking the oath of office in a timely manner creates a vacancy in the office. Iowa Code § 69.2(2) (1995); *see also* 1974 Op. Att'y Gen. 396 (failure of newly elected municipal officer to qualify within statutory time limit resulted in vacancy in the office); 1906 Op. Att'y Gen. 315, 318.

Chapter 46 provides a mechanism for filling vacancies in district judicial nominating commissions.

> Vacancies in the office of elective judicial nominating commissioner of district judicial nominating commissions shall be filled consistent with the eligibility requirements and by majority vote of the authorized number of elective members of the particular commission, at a meeting of such members called in the manner provided in section 46.13. The term of judicial nominating commissioners so chosen shall commence upon their selection.

Iowa Code § 46.5 (1995) (third unnumbered paragraph). We believe that this method should be used to fill a vacancy caused by a commissioner-elect's rejection of a seat on the district judicial nominating commission.

Pointing to a prior opinion of this office and an Iowa Supreme Court case, you ask us to consider two alternative methods for filling the seat. The first alternative is to certify the person receiving the next highest number of votes as elected to the seat. While this office in 1982 Op. Att'y Gen. 126, recommended using this method to select a person to fill a seat on the state judicial nominating commission in the event the person receiving the most votes was not qualified for the position, our recommendation was subsequently rejected by the Iowa Supreme Court in *Welty v. McMahon*, 316 N.W.2d 836 (Iowa 1982). In light of the Supreme Court's decision, our prior opinion is withdrawn as to this point.

The second alternative, identified by the *Welty* court as the proper method for filling a vacancy created by the failure to elect a qualified person to fill a seat on the state judicial nominating commission, is to hold a new election for the seat. *See Welty v. McMahon*, 316 N.W.2d at 840. Examination of chapter 49 reveals that a special election is the appropriate method for filling a vacancy on the state judicial nominating commission. Iowa Code § 49.5 (1995). Although the Court did not discuss the basis for its conclusion that a new election was appropriate, this provision was included in section 49.5 at the time *Welty* was decided. We believe that the new election ordered by the Court was the special election required by section 49.5. As noted above, special elections are not statutorily required to fill vacancies on *district* judicial nomination commissions. We do not, therefore, believe that a new election must be held to fill a vacancy on the district judicial nominating commission which results from failure to elect a qualified person or the rejection of a seat by a commissioner-elect.

In summary, a vacancy on a district judicial nominating commission caused by a commissioner-elect's rejection of a seat on the commission should be filled by appointment by a majority of the authorized number of elective members of the district commission, as provided for in the third unnumbered paragraph of section 46.5.

AREA EDUCATION AGENCIES; SCHOOLS; GIFTS; Iowa Code §§ 68B.2, 68B.21, 68B.22, 256.9, 273.7A, 273.9, 279.32 (1995). Area Education Agency (AEA) probably could not pay the costs for food and beverages of school district employees and school board members attending an AEA business meeting or the costs for lodging, food, and beverages of such persons attending an AEA sponsored educational conference, seminar, or workshop

to the extent these costs exceed three dollars per person per day. An AEA could not waive the registration fees of school district employees or school board members attending an AEA sponsored educational conference, seminar, or workshop absent an exception to the prohibition against gifts from restricted donors. The agenda of the conference, seminar, or workshop and the existence of contractual relations between the AEA and a school district are factors that may affect these conclusions. (Kempkes to Tinsman, State Senator, 4-16-96) #96-4-4

Maggie Tinsman, State Senator: You have requested an opinion concerning Iowa Code chapter 68B (1995), the Iowa Public Officials Act, which sets forth a general prohibition against making gifts to public officials or employees. An Area Education Agency (AEA) is the proposed donor, and employees of school districts and members of school boards located within the AEA are the proposed donees. You ask whether the AEA may pay their costs for food or beverages when they attend AEA business meetings or their costs for lodging, food, and beverages when they attend an AEA sponsored educational conference, seminar, or workshop. You also ask whether the AEA may pay their registration fees when they attend an AEA sponsored educational conference, seminar, or workshop.

Your request raises factual questions concerning the agenda of the conference, seminar, or workshop and the existence and terms of any contractual relations between the AEA and the school districts. *See generally* 1978 Op. Att'y Gen. 199, 200. We cannot apply chapter 68B in an opinion to particular situations when the resolution of the underlying legal issues turns on the resolution of factual issues. *See* 61 IAC 1.5(3). We can, however, interpret the applicable statutes to guide AEAs, school board members, and school district employees with regard to making and receiving gifts. *See* 1990 Op. Att'y Gen. 52 (#89-11-3(L)).

In doing so, we emphasize that this opinion does not attempt to resolve whether any past actions may have violated chapter 68B, which provides for a criminal penalty upon its violation. *See generally* Iowa Code § 68B.25; 1978 Op. Att'y Gen. 199, 200. We also emphasize that, depending upon additional facts and circumstances, exceptions to the general prohibition might apply to the situations described in your opinion request.

I. Statutes governing education

Subtitle 6 of Title VII to the Iowa Code governs AEAs, school districts, and school boards, which control and manage school districts. It includes chapters 273 through 301A.

Chapter 256 governs the Department of Education, which exercises general supervisory power over the state's elementary and secondary schools as well as AEAs. Iowa Code § 256.1(1). The Director of the Department of Education has specific powers that involve the provision of programs and services by AEAs. The director shall direct AEAs to arrange for professional teacher's

meetings, demonstration teaching, or other field work for the improvement of instruction. Iowa Code § 256.9(25). The director has the power to direct AEAs to develop a statewide technical assistance support network in order to provide school districts with assistance in creating child day care programs. Iowa Code § 256.9(36). The director shall develop in-service and pre-service training programs through AEAs. Iowa Code § 256.9(45). Last, the director has the power to direct AEAs to provide technical assistance to school districts with regard to family resource centers. Iowa Code § 256.9(46).

Chapter 273 sets forth the powers and duties of the fifteen AEAs, which may encompass a number of school districts. See generally 1994 Op. Att'y Gen. 152 (#94-12-3(L)). AEAs are school corporations created to provide special education, media services, and various other services and programs to school districts pursuant to contract. Iowa Code §§ 273.1, 273.2, 273.4, 273.5, 273.6. *See generally* 1982 Op. Att'y Gen. 527 (#82-10-1(L)).

Section 273.2 provides that whenever practicable, an AEA must contract with other school corporations for use of personnel, buildings, facilities, supplies, equipment, programs, and services. *See* 1988 Op. Att'y Gen. 21 (#87-11-5(L)); *see also* Iowa Code § 256B.4. Section 273.3 provides in part that an AEA shall be authorized to receive and expend money for providing programs and services and to contract with public or private agencies to provide them in its stead. Iowa Code § 273.3(2), (5).

Section 273.7A provides that an AEA "may provide services to school districts located in the [AEA] under contract with the school districts" and that an AEA "may provide for furnishing expensive and specialized equipment for school districts." Section 273.7A also provides that school districts "shall pay to an [AEA] the cost of providing the services." *See generally* Iowa Code § 4.1(3)(a) (statute's use of "shall" normally imposes a duty); 1978 Op. Att'y Gen. 52, 53 (use of "shall" in statute addressing public officials ordinarily will be imperative); 1970 Op. Att'y Gen. 725, 728.

Section 273.9(1) similarly provides that school districts "shall pay for the programs and services provided through [an AEA] and shall include expenditures for the programs and services in their budgets." Section 273.9(2) provides that school districts "shall pay the cost of special education instructional programs . . . ."

Chapter 279 sets forth the powers and duties of boards of directors for school corporations. Section 279.12 provides that school boards shall make all necessary or proper contracts for exercising their powers or performing their duties.

II. Statutes governing gifts

In recent years the General Assembly has substantially amended chapter 68B, which also governs public bidding, sales of goods and services, appearances before state agencies, and compensation for services. *See* 1993 Iowa Acts, 75th G.A., ch. 163; 1992 Iowa Acts, 74th G.A., ch. 1228; *see also* 1990 Op. Att'y

Gen. 27, 27; 1980 Op. Att'y Gen. 705 (80-5-17(L)) (noting earlier legislative history). It now sets forth a general prohibition against gifts in complimentary sections. Section 68B.22(1) prohibits a public official or employee from directly or indirectly accepting or receiving any gift from a restricted donor; section 68B.22(2) prohibits a restricted donor from directly or indirectly offering or making a gift to a public officer or employee.

Section 68B.2(22) defines a "public official" to include officials and local employees, and section 68B.2(20) similarly defines "public employee" to include local employees. *See generally* Iowa Code § 68B.22(17) (defining "official"). Section 68B.2(24) defines a "restricted donor" to include any "person" who "[i]s or is seeking to be a party to any one or any combination of sales, purchases, leases, or contracts to, from, or with the agency in which the donee holds office or is employed."

Section 68B.2(18) defines a "person" to include any legal entity. Section 68B.2(9) defines a "gift" as a rendering of anything of value in return for which legal consideration of equal or greater value is not given or received. *See* 1974 Op. Att'y Gen. 437, 440 (payment of expenses for lodging or travel by public official or employee amounts to gift); 1968 Op. Att'y Gen. 752, 753; *see also* 1994 Op. Att'y Gen. 31 (#93-7-7(L)). Section 68B.22(4) sets forth several exceptions to the general prohibition against accepting or receiving gifts.

III. Analysis

Chapter 68B, which the General Assembly originally enacted in 1967, is one of several laws pertaining to gifts in the context of public employment. *See, e.g,* Iowa Const. art. III, § 31 (1857); Iowa Code § 721.2(3); Iowa Sup. Ct. R. 204; *see also State v. Books*, 225 N.W.2d 322, 323 (Iowa 1975); *State v. Prybil*, 211 N.W.2d 308, 311 (Iowa 1973); 1974 Op. Att'y Gen. 437, 439. *Cf.* 5 U.S.C.A. § 7353, at 98-99 (1995) (corresponding federal statutes); 5 C.F.R. § 2635, at 468-79 (1995). In general, such laws should be broadly construed in order to accomplish the legislative purposes they manifest. 1968 Op. Att'y Gen. 752, 753; *see United States v. Evans*, 572 F.2d 455, 480 (5th Cir. 1978); *see also* Iowa Code § 4.2 (all statutes shall be liberally construed with a view to promote their objects), § 4.6(1) (statutory construction may involve consideration of legislative object).

With regard to gift restrictions, section 68B.21 sets forth the legislative purpose: to limit situations in which "the acceptance of personal benefits from those who could gain advantage by influencing official actions raises suspicions that tend to undermine the public trust" and thereby avoid "appearances of impropriety." As one court has stated in a related context, gift restrictions seek to limit those situations in which

> the judgment of a government [official or employee] might be clouded because of payments or gifts made to him by reason of his position 'otherwise than as provided by law for the proper discharge of official duty.' Even if corruption is not intended by

> either the donor or donee, there is still a tendency in such a situation to provide conscious or unconscious preferential treatment of the donor by the donee, or the inefficient management of public affairs.

United States v. Evans, 572 F.2d at 480. *Accord State v. Prybil*, 211 N.W.2d at 311-12; 1990 Op. Att'y Gen. 27, 29; 1968 Op. Att'y Gen. 752, 753; *see* Comment, "Ethics in Government," 30 Am. Cr. L. Rev. 617, 631-32 (1993); *see also United States v. Booth*, 148 F. 112, 116 (D. Or. 1906); Nolan, "Regulating Government Ethics," 58 Geo. Wash. L. Rev. 405, 408 n.3 (1990).

With these policies in mind, we focus upon chapters 68B, 256, and 273. Our goal in this analysis is to further the legislative intent underlying chapter 68B, which governs gifts to public officials and employees, as well as the legislative intent underlying chapters 256 and 273, which govern AEAs and school districts. *See generally Farmers Coop. Co. v. DeCoster*, 528 N.W.2d 536, 537 (Iowa 1995).

First, we need to examine whether the AEA may pay the costs for food and beverages of school district employees and school board members attending an AEA business meeting or the costs for lodging, food, and beverages of such persons attending an AEA sponsored educational conference, seminar, or workshop. This question, we believe, rests upon whether the AEA is a "restricted donor" with respect to school district employees and school board members. Section 68B.2(24) defines a restricted donor to include any legal entity who "[i]s or is seeking to be a party to any one or any combination of sales, purchases, leases, or contracts to, from, or with the agency in which the donee holds office or is employed."

We note that chapters 256 and 273 effectively encourage school boards, on behalf of their respective school districts, to contract with AEAS, *See generally* 1978 Op. Att'y Gen. 285, 286. We thus recognize the probability that the AEA is or is seeking to be a party to any one or any combination of sales, purchases, leases, or contracts to, from, or with each school district. Without any information about the actual or potential existence of contractual relations, however, we cannot determine that the AEA is a restricted donor as a matter of law.

If the AEA is a restricted donor with respect to school district employees and school board members, the AEA could not pay their costs for food and beverages at an AEA business meeting or their costs for lodging, food, and beverages at an AEA sponsored educational conference, seminar, or workshop to the extent the costs exceeded three dollars per person per day. Similarly, the AEA could not waive the registration fee for an AEA sponsored educational conference, seminar, or workshop absent an exception to the prohibition against gifts from restricted donors. *See* Iowa Code § 68B.22(4)(i).

Second, we need to consider the impact of other statutes in examining whether the AEA may waive the registration fees on behalf of school district employees and school board members attending an AEA sponsored educational conference, seminar, or workshop. *See State v.* Prybil, 211 N.W.2d at 311 (statutes restricting gifts should be considered in light of other pertinent statutes). In particular, we consider the impact of chapter 273.

If school boards, on behalf of their respective school districts, enter into a contractual relationship with an AEA for a program or service, chapter 273 requires the school districts to pay the AEA for that program or service. *See* Iowa Code §§ 273.7A, 273.9. There is no ambiguity about the meaning of that requirement. *See Stroup v. Reno*, 530 N.W.2d 441, 443 (Iowa 1995) (unambiguous statutes normally require no construction or interpretation). We have, in fact, already emphasized that school districts must make these payments to an AEA and include expenditures for them in their budgets. 1978 Op. Att'y Gen. 285, 286.

We may consider the consequences of a particular interpretation of a statute or statutes. *See* Iowa Code §§ 4.6(5); 1980 Op. Att'y Gen. 896 (#80-12-16(L)). In applying this principle, we note that allowing an AEA to waive the registration fees for school district employees or school board members attending a program or using a service would appear to circumvent the clear language in chapter 273 that requires school districts to pay the AEA for that program or service.

We point out, however, that payment for the costs of lodging, food, and beverages or waiver of registration fees for an AEA sponsored educational conference, seminar, or workshop may be included in the terms of a contract between an AEA and a school district under chapter 273. To the extent these items are included in a contract for which the school district pays fair consideration, the items would be paid by the school district in compliance with chapter 273 and would not be considered "gifts" under chapter 68B. *See* Iowa Code §§ 68B.2(9), 273.7A; *see also* 1978 Op. Att'y Gen. 199, 201 (noteworthy that contract between legislature and group provided for payment of legislators' travel expenses for attending seminar presented by group).

IV. Summary

We offer qualified conclusions for guiding AEAs, school district employees, and school board members with regard to chapters 68B and 273. An AEA probably could not pay the costs for food and beverages of school district employees and school board members attending an AEA business meeting or the costs for lodging, food, and beverages of such persons attending an AEA sponsored educational conference, seminar, or workshop to the extent these costs exceed three dollars per person per day. Similarly, an AEA could not waive the registration fees of school district employees or school board members attending for an AEA sponsored educational conference, seminar, or workshop absent an exception to the prohibition against gifts from restricted donors. The agenda of the conference, seminar, or workshop and the existence of any actual or potential contractual relations between the AEA and the school boards and school districts are factors that may affect these conclusions.

MAY 1996

May 3, 1996

COUNTIES; HOSPITALS: Sales or leases of property; voter approval. Iowa Code §§ 347.7, 347.13, 347.14, 347.24, 347.28, 347A.1 (1995). County hospitals governed either by chapter 347 or by chapter 347A may, under certain circumstances, sell or lease buildings and operations to a privately operated nonprofit corporation for use in providing health-care services to the public. County hospitals governed by chapter 347 have such authority to sell or lease regardless of outstanding bonded indebtedness; however, county hospitals governed by chapter 347A have no authority to transfer their legal responsibility for payment of outstanding revenue bonds to a buyer, lessee, or other party. Voters need to approve those sales or leases of property acquired by condemnation or purchase, but not property acquired by gift, devise, or bequest. (Kempkes to Drake, State Representative, 5-3-96) #96-5-1(L)

May 22,1996

STATE OFFICERS AND DEPARTMENTS; PROFESSIONAL LICENSING BOARDS: Discipline of physicians and surgeons. Iowa Code §§ 7E.2,135.11, 147.87, 147.88, 272C.1, 272C.3, 272C.4, 272C.5 (Iowa 1995). The Department of Public Health has no authority under Iowa Code section 147.87 (1995) either to review the process used by the Board of Medical Examiners and its staff to investigate and prosecute a licensee disciplinary case or to review compliance with that process in particular cases. (Kempkes to Atchison, Director, Department of Public Health, 5-22-96) #96-5-2(L)

May 23,1996

COUNTIES; PROPERTY TAX FREEZE: Aviation Authority. Iowa Code §§ 330A.15, 330A.16, 331.422, 331.424, 444.25A (1995). A county may not increase its aviation authority levy absent an unusual need for the additional funds. (Kempkes to Andersen, Audubon County Attorney, 5-23-96) #96-5-3(L)

AUGUST 1996

August 2, 1996

MOTOR VEHICLES: Renewal of motor vehicle registrations. Iowa Code § 321.40 (1995). Under Iowa Code section 321.40 unnumbered paragraph 4 a county treasurer may refuse to renew a motor vehicle registration only when the applicant owes delinquent restitution to the county in which the renewal is sought. (Olson to Ollie, State Representative, 8-2-96) #96-8-1(L)

August 9, 1996

SCHOOL BOARDS: Publication of Expenditures. Iowa Code § 279.35 (1995); 1987 Iowa Acts, ch. 224, § 49. A school board, in its publication of proceedings,

is required to include, as part of the list of claims allowed, the "purpose of the claim". A school district which, as an issue of fact, fails to identify "the purpose of the claim" is not in compliance with the publication of proceedings requirement set forth in Iowa Code section 279.35. (Walding to Drake, State Representative, 8-9-96) #96-8-2(L)

August 19, 1996

COUNTIES; PROPERTY TAX FREEZE: Constitutionality. Iowa Code §§ 331.301, 444.25A, 444.25B (1995). The county property tax freeze imposed by Iowa Code sections 444.25A and 444.25B (1995) does not appear to violate equal protection principles or conflict with county home rule authority. (Scase to Bailey, Page County Attorney, 8-19-96) #96-8-3(L)

LANDLORD-TENANT: Uniform Residential Landlord and Tenant Act. Iowa Code § 562A.5 (1995). Iowa Code chapter 562A (1995) the Uniform Residential Landlord and Tenant Act provides several exclusions to its coverage, including two that relate to transient housing. Whether an arrangement between a Young Men's Christian Association and a man in its "transitional living facility" comes within one of the exclusions is a fact question that the Attorney General cannot resolve in an opinion. (Kempkes to Holvek, State Representative, 8-19-96) #96-8-4(L)

OCTOBER 1996

October 1, 1996

COUNTIES: Official Bonds. Iowa Code chapter 64 (1995). A county board of supervisors may cancel an official bond and obtain a new bond from a different carrier prior to expiration of an official's term, provided that the provisions of chapter 64 are followed in procuring the new bond, and provided that no language in the original bond instrument prohibits such cancellation. (Adams to Zenor, 10-1-96) #96-10-1(L)

INCOMPATIBILITY OF OFFICES; CONFLICT OF INTEREST: City employees and members of city councils serving as reserve police officers. Iowa Code §§ 80D.4, 80D.6, 80D.9, 80D.11, 372.5 (1995). For the purpose of the incompatibility doctrine, members of a city council hold a "public office" and city employees and reserve police officers do not; accordingly, city employees and council members may serve simultaneously as reserve police officers for the city. City employees and council members may face statutory and common-law conflicts of interest while serving as reserve police officers for the city; however, it is impossible to identify in an opinion every possible scenario in which a conflict might arise. Although council members should not vote on measures that increase the pay or provide additional monetary assistance to reserve police officers during the time they serve as reserve police officers, a city's decision to pay hourly compensation to its reserve police officers does not affect the ability of city employees and council members to serve simultaneously as reserve police officers. (Kempkes to Dillard, Linn County Attorney, 10-1-96) #96-10-2(L)

October 7, 1996

ELECTIONS: Effective date of amendment to special charter; city central committees. Iowa Code §§ 43.112, 56.6, 372.13, 376.3, 420.41, 420.126, 420.287 (1995). After a city approves an amendment to its special charter to substitute nonpartisan elections for partisan ones, the mayor's proclamation on the passage of the amendment required all future elections — including ones to fill vacancies in city offices held by persons previously elected on a partisan basis — to take place on a nonpartisan basis. Although passage of the amendment effectively terminated the election duties of the various political parties' city central committees, it did not immediately change their reporting status for purposes of campaign finance and disclosure. (Kempkes to Williams, Executive Director, Iowa Ethics and Campaign Disclosure Board, 10-7-96) #96-10-3(L)

October 10, 1996

HEALTH; INSURANCE: Preemption. Iowa Code § 514B.14 (1995). The federal Employment Relations Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, which requires employee welfare benefit plans to establish a "claims procedure" providing for the review of denied claims for health care benefits, may preempt Iowa Code section 514B.14 (1995), which requires health maintenance organizations to establish a "complaint system" for the resolution of complaints concerning health care services. If applicable, ERISA provides employees with the opportunity to seek a full and fair review of their denied claims for health care benefits. (Kempkes to Jochum, State Representative, 10-10-96) #96-10-4(L)

October 16, 1996

COUNTIES AND COUNTY OFFICERS: Jails; prison labor. Iowa Code §§ 356.16, 356.17, 356.18, 356.19 (1995); Iowa Code Supp. 904.701 (1995). Iowa Code section 356.17, governing hard labor by county prisoners, does not restrict that labor to publicly owned property if the labor is in furtherance of a duty or power of a county and not for private purposes. Prison labor could be authorized by the Board of Supervisors and the Sheriff for services for which county employees or equipment could be utilized, such as weed control, abatement of nuisances, or care of abandoned cemeteries. (Osenbaugh to Ferguson, Black Hawk Co. Att'y, 10-16-96) #96-10-5(L)

October 17, 1996

TAXATION: Repeal of Local Option Sales and Services Tax. Iowa Code § 422B.1(9) (Supp. 1995). The governing body of a city which is contiguous to other cities may repeal the local option sales and services tax in that city without concurrent action by the other cities. (Scase to Pate, Secretary of State, 10-17-96) #96-10-6

Paul Pate, Secretary of State: You have requested an opinion from this office interpreting Iowa Code subsection 422B.1(9) (Supp. 1995), which allows for the partial repeal of a local option sales and services tax. Specifically, you ask whether this subsection allows the governing body of a city which is contiguous to other cities to repeal the tax only in its own city, so that the tax would remain imposed in the other cities. If we determine that this subsection

does not allow a single city repeal, you ask what action is necessary for the city to repeal the sales and services tax under 422B.1(9).

As you note in your request letter, contiguous cities are generally treated throughout section 422B.1 as one entity. This is true for imposition of the local option sales and services tax.

> A local option tax shall be imposed only after an election at which a majority of those voting on the question favors imposition and shall then be imposed until repealed as provided in subsection 6, paragraph "a".... If the tax is a local sales and services tax imposed by a county, it shall only apply to those incorporated areas and the unincorporated area of that county in which a majority of those voting in the area on the tax favors its imposition. *For purposes of the local sales and services tax, all cities contiguous to each other shall be treated as part of one incorporated area* and the tax would be imposed in each of those contiguous cities only if the majority of those voting in the total area covered by the contiguous cities favors its imposition.

Iowa Code § 422B.1(3) (Supp. 1995) (emphasis added); *see also* Iowa Code § 422B.1(6)(a) (Supp. 1995) (reiterating provision that contiguous cities are treated as one incorporated city area for purposes of imposition of local option sales and services tax); Iowa Code § 422B.8 (Supp. 1995) (contiguous cities treated as one incorporated area for purposes of collection of local option sales and services tax). Contiguous cities are also treated as a single incorporated city area for purposes of conducting an election for repeal, rate change, or change in the use of local option sales and services tax proceeds. *See* Iowa Code § 422B.1(6)(a) (Supp. 1995) (election at which these questions are presented is to be "called and held in the same manner and under the same conditions as . . . for the election on the imposition of the local option tax").[17]

Prior to 1989, a city could only repeal a local option sales and services tax if a majority of the voters in an election favored repeal. See Iowa Code ch. 422B (1989); 1986 Op. Att'y Gen. 127 (#86-11-4(L) at 2). In 1989, the legislature enacted a provision allowing the county board of supervisors and governing bodies of incorporated city areas to repeal the local sales and services tax without conducting an election. 1989 Iowa Acts, ch. 276, § 1. This provision, which now appears as subsection 9 of section 422B.1, is the subject of your inquiry. Subsection 422B.1(9) provides as follows:

> In a county that has imposed a local option sales and services tax, the board of supervisors shall, notwithstanding any contrary

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[17] This office concluded in a 1991 opinion that the statutory provisions "whereby contiguous cities are combined into one incorporated area for purposes of determining voter approval and territorial application of the county local option sales and services tax [are] rationally related to a legitimate state purpose and [do] not violate the equal protection clause of the Fourteenth Amendment. . . ." 1992 Op. Att'y Gen. 22 (# 91-4-8(L))

> provision of this chapter, repeal the local option sales and services tax in the unincorporated areas or in an incorporated city area in which the tax has been imposed upon receipt of a motion adopted by the governing body of that incorporated city area requesting repeal.... *For purposes of this subsection, incorporated city area includes an incorporated city which is contiguous to another incorporated city.*

Iowa Code § 422B.1(9) (Supp. 1995) (emphasis added).

You have asked whether subsection 9 of 422B.1 allows a city which is contiguous to other cities to adopt a motion to repeal the local sales and services tax only in its own city, thereby allowing the tax to continue in force in the other cities. We believe that it does.

Mindful of the principle that "[r]ules of statutory construction are not resorted to unless there is ambiguity present," *State v. Gilmour*, 522 N.W.2d 595, 597 (Iowa 1994), we begin by examining subsection 422B. 1(9). "Ambiguity is present if reasonable minds may differ or be uncertain as to the meaning of the statute." *Id.* We conclude that at least two interpretations could be given to subsection 422B.1(9); the first requiring treatment of contiguous cities as one incorporated city area; and the second allowing contiguous cities to act independently. Because we believe that the subsection is ambiguous, we turn to familiar principles of statutory construction.

The primary goal of statutory construction is the determination of legislative intent. *American Asbestos v. Eastern Iowa Community College*, 463 N.W.2d 56, 58 (Iowa 1990). "We consider all portions of the statute together, without attributing undue importance to any single or isolated portion." *Id.* We must also recognize that the legislature may act as its own lexicographer and that we are bound by its definitions. *See Hartman v. Clarke County Homemakers*, 520 N.W.2d 323, 328 (Iowa App. 1994).

As we have noted, contiguous cities are generally treated as a single incorporated area for purposes of imposing, setting the rate of, and collecting the local sales and services tax. The language of sections 422B.1(3), 422B.1(6)(a), and 422B.8 specifically provides that "all cities contiguous to each other shall be treated as part of one incorporated area." Subsection 422B.1(9) does not, however, adopt the definition of "incorporated area" utilized elsewhere in chapter 422B. Rather, subsection 422B.1(9) indicates that, "for purposes of this subsection, incorporated city area includes an incorporated city which is contiguous to another incorporated city." If this definition of "incorporated city area" is inserted into the operational provision of subsection 422B.1(9), that provision reads as follows:

> [T]he board of supervisors shall, notwithstanding any contrary provision of this chapter, repeal the local option sales and services tax in . . . [an incorporated city which is contiguous to another incorporated city] in which the tax has been imposed upon receipt

> of a motion adopted by the governing body of [the incorporated city which is contiguous to another incorporated city] requesting repeal.

This reading of the statute allows the governing body of a city to act independently to repeal the local sales and services tax within its city without regard to the action of contiguous cities.[18]

We recognize that our interpretation of subsection 422B.1(9) results in contiguous cities being treated differently for purposes of repealing the local option sales and services tax than they are treated throughout the remainder of chapter 422B. Nevertheless, we are not free to legislate. "To the contrary, we must search for legislative intent as expressed by what the legislature has said, not by what it should or might have said." *Hartman v. Clarke County Homemakers*, 520 N.W.2d at 328.

"Where identical language is used in several places in a statute, the phrase is usually given the same meaning throughout." Carson *v. Roediger*, 513 N.W.2d 713, 716 (Iowa 1994). The inverse is also true: "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." 2A N. Singer, *Sutherland Statutory Construction* § 46.06, at 67 (Supp. 1996). Because the legislature chose not to utilize its previous definition of incorporated area and adopted different terminology in subsection 422B.1(9), we must assume that the legislature intended to treat contiguous cities differently under this subsection than they are treated elsewhere within chapter 422B.

Review of 422B.1(9) in its statutory context compels our conclusion that the governing body of a city which is contiguous to other cities may repeal the local option sales and services tax in that city without concurrent action by the other cities.

SCHOOL DISTRICTS: Voluntary early retirement programs; federal law. Iowa Code § 279.46 (1995). The federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, likely precludes a school district from establishing an early retirement program for its employees that diminishes benefits with advancing age. The ADEA likely permits a school district to take into account years of service in providing early retirement benefits to its employees. The ADEA does not necessarily preclude a school district from limiting participation in an early retirement program to employees younger than age sixty-five. (Kempkes to Stilwill, Director, Department of Education, 10-17-96) #96-10-7

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[18] We note, however, that a city's ability to repeal a local option sales and services tax is not without limitation. A city or county is statutorily precluded from repealing or reducing the rate of the local option sales and services tax "if obligations are outstanding which are payable as provided in section 422B.12, unless funds sufficient to pay the principal, interest, and premium, if any, on the outstanding obligations at and prior to maturity have been properly set aside and pledged for that purpose." Iowa Code 422B.1(10) (Supp. 1995).

Ted Stilwill, Director, Department of Education: You have requested an opinion about the impact of federal law upon school districts. Iowa Code section 279.46 (1979) authorizes school districts to "adopt a program for payment of a monetary bonus, continuation of health or medical insurance coverage, or other incentives for encouraging . . . employees [between the ages of fifty-nine and sixty-five] to retire before the normal retirement date as defined in chapter 97B." *See generally* Iowa Code §§ 97B.45(2), 97B.47, 97B.49(15)(a) (defining "normal retirement date" as the time when an employee with thirty years of service reaches age sixty-two, when an employee reaches age sixty-five, or when an employee's age plus years of service equals ninety-two).

You ask whether the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 622 *et seq.*, precludes a school district from establishing an early retirement program that diminishes benefits with either years of service or advancing age or that limits participation to employees younger than age sixty-five. When state officers seek guidance on compliance with federal law, this office will provide advice to them in an opinion. 1988 Op. Att'y Gen. 84 (#88-4-3(L)). Accordingly, we will examine the ADEA and its impact upon early retirement programs established by school districts.

We conclude that the ADEA likely precludes a school district from establishing an early retirement program for its employees that diminishes benefits with advancing age; that the ADEA likely permits a school district to establish an early retirement program for its employees that diminishes benefits with years of service; and that the ADEA does not necessarily preclude a school district from establishing an early retirement program that limits participation to employees younger than age sixty-five.

I.

In 1967, Congress enacted the ADEA as "part of a wider statutory scheme to protect employees [between the ages of forty and sixty-five] in the workplace nationwide." *McKennon v. Nashville Pub. Co.*, 513 U.S. 352, 115 S. Ct. 879, 130 L. Ed. 2d 852, 860 (1995). The ADEA now protects all employees over the age of forty. *See* 29 C.F.R. § 1625.9(c)(1) (1988); *AARP v. Farmers Group, Inc.*, 943 F.2d 996, 1002 n. 10 (9th Cir. 1991), *cert. denied*, 502 U.S. 1059; *EEOC v. Massachusetts*, 858 F.2d 52, 53 (1st Cir. 1988). It applies to public employers such as school districts and, among other things, provides for civil damages and criminal penalties upon its violation. 29 U.S.C. §§ 626, 629, 630; *McKennon v. Nashville Pub. Co.*, 130 L. Ed. 2d at 860-61.

The ADEA primarily purports to remedy the premature forced retirement of older employees and their long-term unemployment. *See* Vol. 2, 1967 U.S. Code Cong. & Ad. News 2213, 2214; Harper, "Age-Based Exit Incentives," 79 Va. L. Rev. 1271, 1275 (1993). Although Congress sought to promote employment based upon ability rather than age and to eliminate arbitrary practices adversely affecting older employees, *see* 29 U.S.C. §§ 621, 631, the United States Supreme Court has pointed out "that not all age discrimination in employment is 'arbitrary' " under the ADEA, *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 176, 109 S. Ct. 2854, 106 L. Ed. 2d 134 (1989). According

to one federal court, Congress did not intend for the ADEA to inhibit an employer from making necessary adjustments to its workforce in the face of changing economic conditions. *See Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 513 (4th Cir. 1994). Such necessary adjustments might include the establishment of voluntary programs for early retirement, which "can be a humane and beneficial way for many older workers to leave the workplace." *Smith v. World Ins. Co.*, 38 F.3d 1456, 1461 (8th Cir. 1994). *Accord Semper v. Johnson and Higgins*, 45 F.3d 724, 732 (3rd Cir. 1995), cert. denied, 132 L. Ed. 2d 854; *Coburn v. Pan American Airways, Inc.*, 711 F.2d 339, 344 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 994.

In 1986, Congress amended the ADEA to prohibit age discrimination in employee pension benefit plans. *See* P.L. No. 99-509, 100 Stat. 1874, 1973-80 (1986). Then, in 1990, Congress enacted the Older Worker's Benefit Protection Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 978 (1990), which also amended the ADEA. *See* H. Perritt, Jr., *Wiley Employment Law Update* § 1.7, at 12 (1994). Among other things, "Congress amended the ADEA via the OWBPA to permit early retirement incentive plans that are voluntary and consistent with the purposes of the ADEA." *Lyon v. Ohio Educ. Ass'n*, 53 F.3d 135, 136 n.2 (6th Cir. 1995). *Accord* Vol. 5, 1990 U.S. Code Cong. & Ad. News 1532-33; *Williams v. Cigna Financial Advisors*, Inc., 56 F.3d 656, 660 (5th Cir. 1995).

The ADEA sets forth a general prohibition that makes it unlawful for an employer

> to fail or to refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of the individuals age.*

29 U.S.C. § 623(4)(a)(1) (emphasis added). *Compare* 29 U.S.C. § 623(4)(a)(1) *with* Iowa Code § 216.6 (any person may not refuse to hire or to discharge any employee, or to otherwise discriminate in employment against any employee because of age, unless based upon the nature of the occupation).

The ADEA, however, exempts certain practices from the general prohibition against age discrimination. Regarding those exempt practices, the ADEA makes it lawful for an employer

> to observe the terms of a *bonafide employee benefit plan*
>
> (i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker . . . ; or
>
> (ii) *that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this Act.*

> Notwithstanding [this particular exemption,] no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual [over the age of forty] because of the age of such individual. An employer . . . shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this Act . . . .

29 U.S.C. § 623(f)(2)(B) (emphasis added). *See* 29 U.S.C. § 621(b) (noting purposes of ADEA); 29 C.F.R. § 1625.9(d) (1988) (ADEA permits employees "to elect early retirement at a specified age at their own option"). *Compare* 29 U.S.C. § 623(f)(2)(B) *with* Iowa Code § 216.13(1) (general prohibition against age discrimination does not apply to employer's retirement plan or benefit system unless the plan or system is mere subterfuge adopted for the purpose of evading general prohibition, and retirement plan or benefit system shall not require involuntary retirement of employee under age of seventy because of age). These provisions became effective in October, 1992. *See* Pub. L. No. 101-433, Title I, § 105(c).

"Bona fide" has been interpreted to mean that a plan "exists and pays benefits." *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. at 166 & n. 6; *Zoppi v. Chrysler Corp.*, 520 N.W.2d 378, 380 (Mich. App. 1994); *see* 29 C.F.R. § 1625.10(a)(2)(b); *United Airlines, Inc. v. McMann*, 434 U.S. 192, 206-07, 98 S. Ct. 444, 54 L. Ed. 2d 402 (1977) (White, J., concurring); Note, 30 Drake L. Rev. 617, 627 (1980-81), "[E]mployee benefit plan" has been interpreted to mean "plan, such as a retirement, pension, or insurance plan, which provides employees with what are frequently referred to as 'fringe benefits,' and "does not refer to wages or salary in cash." 29 C.F.R. § 1625.10(a)(2)(b) (1988).

II.

You have asked whether the ADEA prohibits a school district from establishing an early retirement program that diminishes benefits with either years of service or advancing age or that limits participation in such a program to employees younger than age sixty-five. *See generally* 1980 Op. Att'y Gen. 333, 334 (noting principles for determining preemption of state law by federal law); 1 H. Eglit, *Age Discrimination* § 2.05, at 24 (1995). We assume that the diminishing benefits have no correlation with actual costs, *see* 29 U.S.C. § 623(f)(2)(B)(i), and that your questions thus focus upon the exemption in the ADEA for a "voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this Act," *see* 29 U.S.C. § 623(f)(2)(B)(ii).

In offering our opinion, however, we caution that the proper treatment of early retirement programs "is the most difficult question" under the ADEA. *Karlen v. City Colleges of Chicago*, 837 F.2d 314, 317 (7th Cir. 1988), *cert. denied sub nom.*, 486 U.S. 1044. Questions about such programs "do not fit well within the analysis of benefit plans . . . in a continuing employment relationship." D. O'Meara, *Protecting the Growing Number of Older Workers* 192-93 (1989). Whether a particular program complies with the ADEA will, of course, depend

upon the underlying facts and circumstances. *Henn v. Nat'l Geographic Society*, 819 F.2d 824, 828-29 (7th Cir. 1987), cert. denied, 484 U.S. 964; *see* Vol. 5, U.S. Code Cong. & Ad. News 1533; Annot., 24 A.L.R. Fed. 808 (1975). *See generally Vaughan v. Must, Inc.*, 542 N.W.2d 533, 537-40 (Iowa 1996); Annot., 93 A.L.R. Fed. 10 (1989); Annot., 58 A.L.R. Fed. 94 (1982).

Preliminarily, we note that plaintiffs can generally prove discrimination claims by one of two theories: "disparate treatment" or "disparate impact." According to the United States Supreme Court in *Hazen Paper Company v. Biggins*, disparate impact involves employment practices "that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338,.346 (1993). We need not further discuss the theory of disparate impact as "considerable doubt" exists that it applies to the ADEA, *id.* at 351-52 (Kennedy, J., concurring), and several federal courts have expressly held that it does not apply to the ADEA, *e.g.*, *Ellis V. United Airlines, Inc.*, 73 F.3d 999, 1006-1010 (3d Cir. 1996); *Lyon v. Ohio Educ. Ass'n*, 53 F.3d at 138-39; *DiBase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732-34 (3d Cir. 1995); *EEOC v. Francis W. Parker School*, 41 F.3d 1073, 1076-77 (7th Cir. 1994), *cert. denied*, 132 L. Ed. 2d 828 (1995). Disparate treatment, a theory clearly applicable to alleged ADEA violations, means that an employer "simply treats some people less favorably than others" because of factors such as race, color, religion, sex, national origin, or age, and "[p]roof of discriminatory motive is crucial." International *Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n. 15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977).

We now address, in order, the ability of a school district in its early retirement program to diminish benefits based upon years of service, to link benefits with advancing age, and to limit participation to employees under a maximum age.

A.

In 1993, the United States Supreme Court decided *Hazen Paper Company v. Biggins*, which involved an employer's denial of pension benefits to older employees. Although the Court observed that the theory of disparate treatment applies to alleged ADEA violations, it emphasized that "there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age." 123 L. Ed. 2d at 346. It held that the ADEA protects employees only from an employer who intended to discriminate *because of* age:

> It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with age. Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.

Id. at 347 (citation omitted). See *O'Connor v. Consolidated Coin Caterers*, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996).

No ADEA violation thus occurs when an employer is motivated by a factor other than age:

> When the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is. . . . On average, an older employee has had more years in the work force than a younger employee, and thus may well have accumulated more years of service with a particular employer. Yet an employee's age is analytically distinct from his years of service. . . . *Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily "age-based."*

Id. at 347-48 (emphasis added).

Hazen Paper Company v. Biggins suggests that the ADEA likely does not preclude a school district in its early retirement program from diminishing benefits based upon years of service. *See Lyon v. Ohio Educ. Ass'n*, 53 F.3d at 139-40 (early retirement plan for employees of a state educational association d id not violate ADEA even though younger employees who took early retirement received a higher pension than older employees who took retirement with the same length of service; "the very purpose of offering an early retirement *incentive* plan is to 'buy out' expensive workers"); *Allen v. Diebold, Inc.*, 33 F.3d 674, 676-77 (6th Cir. 1994) (the ADEA "does not constrain an employer who acts on the basis of other factors pension status, seniority, wage rate that are empirically correlated with age"); *Atkins v. Northwest Airlines, Inc.*, 967 F.2d 1197, 1201 (8th Cir. 1992) (early retirement plan did not violate ADEA even though it capped accrual of benefits at twenty-five years of service); *Patterson v. Independent School Dist.*, 742 F.2d 465, 468 (8th Cir, 1984) (early retirement plan for teachers that provided an amount of cash at age fifty-five and decreased that amount each year up until age sixty, at which time their eligibility for benefits ended, did not violate ADEA: a "sliding scale of diminishing benefits is manifestly appropriate" under the ADEA); *see also Karlen V. City Colleges of Chicago*, 837 F.2d at 319-20.

B.

In contrast, *Hazen Paper Company v. Biggins* also suggests that the ADEA likely precludes a school district from establishing an early retirement program for its employees that diminishes benefits solely on account of their advancing age. A school district clearly may not discriminate against its employees simply "because they [are] old." *Lyon v. Ohio Educ. Ass'n*, 53 F.3d at 138-39. *See Allen v. Diebold, Inc.*, 33 F.3d at 676-77 (because the ADEA only prohibits actions "actually motivated by age," age itself "must be the motivating factor behind the employment action in order to constitute an ADEA violation"); *Karlen v. City Colleges of Chicago*, 837 F.2d at 319-20 (when an employer uses age — not cost, years of service, or salary — as — basis for varying retirement benefits, it must show close correlation between age and cost).

C.

No violation arises under the ADEA "solely because . . . an employee pension benefit plan . . . provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits." 29 U.S.C. § 623(l)(1)(A). *See Hamilton v. Caterpillar Inc.*, 966 F.2d 1226, 1227-28 (7th Cir. 1992); *Rock v. Massachusetts Comm'n Against Discrimination*, 424 N.E.2d 244, 246 (Mass. Sup. Ct. 1981). We must, however, determine whether the ADEA prohibits a school district from establishing an early retirement program with a maximum age as a condition of eligibility for benefits, *e.g.*, by limiting participation in the program to those employees younger than age sixty-five.

It appears the ADEA does not necessarily preclude a school district from limiting participation in an early retirement program to employees under a maximum age. We note that in *Patterson v. Independent School District*, 742 F.2d at 468, the Eighth Circuit Court of Appeals upheld an early retirement plan for teachers that limited participation to employees between the ages of fifty-five and sixty. *Accord* Abrahamson, "Early Retirement Incentives Under the ADEA," 11 Indus. Rel. L. J. 323, 329, 350-72 (1989) (ADEA does not provide any cause of action for employees too old to qualify for early retirement plan).

Common sense suggests that an early retirement program must, as a practical matter, contain a ceiling of some sort. *See Trenton v. Scott Paper Co.*, 832 F.2d 806, 811 (3d Cir. 1987), cert. denied, 485 U.S. 1022 ("any early retirement incentive program gives more benefits to younger workers than to older ones"); *see also United Airlines, Inc. v. McMann*, 434 U.S. 192, 207, 98 S. Ct. 444, 54 L. Ed. 2d 402 (1977) (White, J. concurring) ("all retirement plans necessarily make distinctions based on age"). Without any ceiling for participation, employees have no incentive to take early retirement and an employer certainly has no incentive to offer them the opportunity to do so. In upholding under state law an early retirement program that limited participation to school district employees over age forty having ten years of service, one court has pointed out that

> there is a presumption that the legislature does not intend a result that is unreasonable. A statutory scheme which does not allow a school district to develop an early retirement program limited to persons of a certain age would, we believe, be unreasonable.

State v. School Dist. No. 624, 533 N.W.2d 393, 396 (Minn. 1995) (footnote omitted).

Nevertheless, a school district's early retirement program limited to employees under a maximum age that, for example, also incorporates years of service into the benefit equation would appear to provide a stronger basis for defending against any alleged ADEA violation. *See, e.g., Dorsch v. L.B. Foster Co.*, 782 F.2d 1421, 1427-29 (7th Cir. 1986) (upholding early retirement plan that limited monthly cash payment, until age sixty-two, to employees whose age and years of service totaled seventy-five); *Britt v. E.L DuPont de Nemours*,

Inc., 768 F.2d 593, 594-95 (4th Cir. 1985) (upholding early retirement plan limited to employees between the ages of fifty-five and sixty having twenty years of service); *Cipriano v. Board of Educ.*, 772 F. Supp. 1346,1349 (W.D.N.Y. 1991), *affirmed*, 968 F.2d 1502 (1st Cir.) (upholding award of severance pay as incentive to early retirement to employees over age fifty having fifteen years of service even though their acceptance deferred payment of certain pension benefits); *see also Hazen Paper Co. v. Biggins*, 123 L. Ed. 2d at 346-47. *See generally* 1 Eglit, *Age Discrimination*, *supra*, § 5.55, at 243-44. A conservative approach to establishing an early retirement program would provide benefits of a flat dollar amount or benefits based upon years of service or percent of salary. *See* Vol. 5, U.S. Code Cong. & Ad. News 1533. *See generally Hazen Paper Co. v. Biggins*, 123 L. Ed. 2d at 346-47 (under the ADEA, employers may not use pension status, seniority, wage rate, or other such factor "as a proxy for age"); *Allen v. Diebold, Inc.*, 33 F.3d at 676-77.

III. Conclusion

The federal Age Discrimination in Employment Act (ADEA) likely precludes a school district from establishing an early retirement program for its employees that diminishes benefits with advancing age. The ADEA likely permits a school district to take into account years of service in providing early retirement benefits to its employees. The ADEA does not necessarily preclude a school district from limiting participation in an early retirement program to employees younger than age sixty-five.

COUNTIES: Secondary road assessment districts; special secondary road assessment districts; procedures. Iowa Code §§ 311.3, 311.6, 311.7, 311.32, 331.362, 331.429 (1995). Section 311.6, which permits establishment of a secondary road assessment district, differs in a few ways from section 311.7, which permits establishment of a special secondary road assessment district. County supervisors may not assess affected property owners an amount less than fifty percent of the total estimated cost of a project proposed under section 311.6. Section 311.7 provides county supervisors with discretionary authority to accept or reject a proposed project funded in part by deposit. Section 311.7 does not require all property owners to contribute fifty percent of a proposed project's total estimated cost when they elect to pay this percent by deposit; the county pays the remaining fifty percent from its secondary road fund. County supervisors, under section 311.7, must, upon acceptance, establish a priority for projects funded in part by deposit as well as those funded in part by special assessment and should proceed to implement them within a reasonable time. A county may oil and maintain an unpaved secondary road as part of an agreement with property owners willing to pay its cost by making annual installments over a fixed number of years; the county may pursue all available legal remedies if the property owners fail to abide by the agreement. A county generally may not establish a secondary road assessment district, improve a gravel road by paving it, and allow the road at some point in the future to revert back to gravel absent some change in circumstances. (Kempkes to Martens, Iowa County Attorney, 10-17-96) #96-10-8

Kenneth B. Martens, Iowa County Attorney: You have requested an opinion about secondary roads, secondary road assessment districts, and special secondary road assessment districts. You ask four sets of questions about Iowa Code chapter 311 (1995):

> I. (*A*). What distinguishes a secondary road assessment district created via section 311.6 from a special secondary road assessment district created via section 311.7? (*B*). May county supervisors, under section 311.6, assess affected property owners an amount less than fifty percent of a proposed project's total estimated cost?
>
> II. (*A*). May county supervisors reject a petition brought under section 311.7 and refuse to implement the project it proposes? (*B*). Must all property owners, under section 311.7, contribute to fifty percent of a proposed project's total estimated cost when they elect to pay this percent by deposit? (*C*). Must the county pay the remaining fifty percent from county funds? (*D*). When must county supervisors proceed with implementing a proposed project funded in part by deposit?
>
> III. Without establishing a secondary road assessment district pursuant to chapter 311, may a county oil and maintain an unpaved secondary road as part of an agreement with property owners willing to pay its cost by making annual installments over a fixed number of years? If so, must the county assume this cost if the property owners fail to abide by the agreement?
>
> IV. May a county establish a secondary road assessment district, improve a gravel road by paving it, and allow the road at some point in the future to revert back to gravel?

Your questions implicate chapters 309 and 331 as well as chapter 311. We set forth a synopsis of these two chapters before turning to chapter 311.

Chapter 331 governs counties in general. Section 331.362 provides that a county has jurisdiction over its secondary roads. *Accord* Iowa Code § 306.4(2). See Iowa Code § 306.3(11) (defining "secondary roads"); *see also* Iowa Code § 368.7A(2). *See generally* Iowa Code chs. 306, 309, 310, 314, 321, 321G. Section 331.429 creates the "secondary road fund." Section 331.429(2)(i) provides that a county may make appropriations from the secondary road fund for the services provided under sections 311.7 and other state laws relating to secondary roads. *See* Iowa Code § 331.341(3); *see also* Iowa Code §§ 312.2(2), 312.3(1), 315.6(2).

Chapter 309 governs secondary roads. Section 309.67 provides that county supervisors have the responsibility to provide adequate funds "to properly maintain" secondary roads and that the county engineer shall adopt such methods and recommend such personnel and equipment "to maintain

continuously, in the best condition practicable, the entire mileage" of secondary roads. See Iowa Code § 592.8. Section 309.16 provides that county supervisors may seek advice from the Iowa Department of Transportation "as to the manner of constructing and maintaining" their secondary roads. Under section 309.21, "[a]ll construction and maintenance work" shall be performed under the direct and immediate supervision of the county engineer. *See generally* Iowa Code § 309.40 (letting of contracts).

Section 309.93 provides that county supervisors shall, before April 15 of each year, adopt a secondary road budget for the next fiscal year. *See generally* Iowa Code § 309.46 *et seq.* (county may issue anticipatory certificates). Section 309.22 provides that county supervisors at that time shall also adopt a "secondary road construction program" — which shall include a "project priority list" for the succeeding four fiscal years and a "project accomplishment list" for the upcoming year — based upon the secondary road fund.

Under section 309.26, county supervisors shall consult with the county engineer, select in a provisional way the roads they then consider advisable to embrace in the secondary road construction program, and direct the county engineer to make a reconnaissance survey and estimate of all such roads or parts thereof "as, in view of the public necessity and convenience, present the most urgent need and necessity for early construction." Section 309.27 provides that the county engineer shall designate the roads considered "most urgently in need of construction," and section 309.28 provides that the county engineer may recommend that the county omit or add certain roads or parts thereof to a particular project.

Chapter 311 governs secondary road assessment districts and special secondary road assessment districts, It provides an additional means for making improvements to public thoroughfares. *See generally* Iowa Code §§ 331.485-331.491.

Section 311.1 provides that county supervisors "may, on petition," establish a "secondary road assessment district" in order to provide for improvements "such as grading, draining, bridging, aggregate surfacing, paving, or resurfacing of secondary roads." *Accord* Iowa Code § 331.362(3). Section 311.6 provides that a petition "shall be signed by fifty percent of the owners of the lands within the proposed district . . . ." Section 311.3 provides that special assessments "in the aggregate amount of not less than fifty percent of the total estimated cost of improvement of a road included in a secondary road assessment improvement project shall be apportioned and levied on the lands within a district," which, under section 311.2, "shall be not more than one-half mile wide on each side of the road or roads to be improved . . . ."

In its first paragraph, section 311.7 provides for the creation of a "special secondary road assessment district":

> The owner or group of owners of not less than seventy-five percent of the lands adjacent to, or abutting upon any secondary road may,

> on or before October 1 of any year, petition . . . for the improvement of the road, and for the assessment of not less than fifty percent, or a greater portion as provided in the petition, of the cost of the improvement, to the lands adjacent to, or abutting upon the road. [T]he board of supervisors shall review the project proposed by the petition and may accept or reject the proposed project. If the board of supervisors accepts the petition, the board shall include the project in the secondary road construction program . . . and establish a priority for the completion of the project.

In its third paragraph, section 311.7 provides for the deposit of funds in lieu of an assessment:

> However, if the owners of all the lands included in any special secondary road assessment district under this section, subscribe and deposit with the county treasurer an amount not less than fifty percent, or a greater portion as provided in the petition, of the . . . estimated cost of the improvement of the road . . . , the board of supervisors shall not establish the special assessment district, but shall accept the donations in lieu of an assessment, and shall otherwise proceed to the improvement of the road.

The General Assembly added this paragraph in 1949. *See* 1949 Iowa Acts, 53rd G.A., ch. 129, § 9; *see also* 1947 Iowa Acts, 52nd G.A., ch. 163, § 5.

I.

You have asked what distinguishes a secondary road assessment district created via section 311.6 from a special secondary road assessment district created via section 311.7. Section 311.6 differs from section 311.7 in a few ways. *See* 1988 Op. Att'y Gen. 50 (#87-10-1(L)). First, section 311.6 requires signatures from fifty percent of property owners; section 311.7 requires signatures from seventy-five percent. Second, unlike section 311.6, section 311.7 requires the county to establish a priority for the completion of proposed projects upon their acceptance. *See* 1952 Op. Att'y Gen. 48, 48-49. Third, unlike section 311.6, section 311.7 allows property owners to subscribe and deposit funds to help fund a proposed project in lieu of establishing a special secondary road assessment district. Fourth, unlike section 311.6, section 311.7 provides for a refund of unused funds obtained by deposit. *See id.* at 49-50; 1934 Op. Att'y Gen. 106, 106.

You have asked whether county supervisors may, under section 311.6, assess affected property owners an amount less than fifty percent of a proposed project's total estimated cost. Chapter 311 is clear and unambiguous on this matter. *See generally Stroup v. Reno*, 530 N.W.2d 441, 443 (Iowa 1995) (no need for construction or interpretation when statute clear and unambiguous); 1996 Op. Att'y Gen. ——— (#95-11-1). Section 311.6 (in conjunction with section 311.3) clearly requires the county to levy a special assessment of "not less than fifty percent" of a proposed project's total estimated cost. A county thus has no authority to levy a special assessment of less than fifty percent.

II.

A.

You have asked whether county supervisors may, upon receiving a petition brought under section 311.7, refuse to implement the proposed project. Prior opinions have addressed similar issues, *see* 1956 Op. Att'y Gen. 8, 8-9; 1950 Op. Att'y Gen. 8, 10-11; 1950 Op. Att'y Gen. 145, 147, but they antedated an amendment to section 311.7, 1976 Iowa Acts, 66th G.A., ch. 1166, § 1; *see* 1988 Op. Att'y Gen. 50 (#87-10-1(L)); 1976 Op. Att'y Gen. 810, 810-11. We must therefore examine anew the first and third paragraphs of section 311.7.

The first paragraph of section 311.7 provides that county supervisors "may accept or reject" a proposed project funded in part by assessment. This language clearly imparts discretionary authority. *See* Iowa Code § 4.1(30)(c) (in statutes, "may" normally confers a power). *Cf.* 1950 Op. Att'y Gen. 145, 146 (interpreting Iowa Code § 311.15, which provides that at final hearing on proposed project, county supervisors "may reject, approve, or modify and approve said proposal"). The third paragraph of section 311.7 provides that county supervisors shall, upon receipt of a petition from affected property owners, accept their deposit in lieu of an assessment for the improvement and "shall otherwise proceed to the improvement of the road." We must determine whether this language incorporates or refers to the first paragraph, which provides that county supervisors have discretion to accept or reject a proposed project.

We note that chapters 306, 309, and 331 confer broad authority upon county supervisors over secondary roads. *See generally* Iowa Code § 4.6(4) (statutory interpretation may take into account laws upon same or similar subjects). Section 306.4 provides that "[j]urisdiction and control over secondary roads shall be vested in the county board of supervisors." Section 309.67 provides that county supervisors have the responsibility to provide adequate funds "to properly maintain" secondary roads; section 309.16 provides that county supervisors may seek advice from the Iowa Department of Transportation "as to the manner of constructing and maintaining" their secondary roads; section 309.22 provides that county supervisors shall adopt a secondary road construction program and a project accomplishment list; and section 309.26 provides that county supervisors shall select "the roads which they then consider advisable to embrace" in the secondary road construction program. Section 331.362 provides that "[a] county has jurisdiction over secondary roads" and that county supervisors "shall exercise the county's jurisdiction over secondary roads."

In view of this body of law, we believe that "shall otherwise proceed" in the third paragraph incorporates or refers to the first paragraph, which governs proposed projects funded in part by assessment and provides county supervisors with discretion to accept or reject them. *See generally* 14 E. McQuillin, *The Law of Municipal Corporations* § 38.55, at 207 (1987) (local authorities usually have discretion in establishing assessment districts). Had the General Assembly intended to create in the third paragraph an exception to the authority of county supervisors over secondary roads, it presumably would have used clear and unmistakable language in doing so. *Cf.* 1996 Op. Att'y Gen. ——— (#95-3-1)

(legislature presumably uses express language if it intends to create exception to body of law that sets forth general rule). We therefore conclude that county supervisors have discretion to accept or reject a proposed project funded in part by deposit, just as they would have if it were funded in part by assessment.

B.

You have asked whether, under the alternative funding mechanism of section 31 1.7, every property owner must make a deposit. The third paragraph of section 311.7 provides that if the owners "of all the lands included in any special secondary road assessment district" subscribe and deposit with the county fifty percent of a proposed project's cost, the county shall accept the deposit in lieu of an assessment and proceed to improve the road.

A prior opinion from this office, which interpreted similar language in the precursor to section 311.7, observed that it

> sets up no machinery for determining the proportions in which contributions shall be made to the 50 per cent required to be subscribed, deposited, or donated. Of necessity, therefore, these propositions would have to be determined by mutual agreement between the landowners concerned. Since . . . no means is set up by which the board of supervisors may review the agreement (whether written or oral) a requirement that "all" must subscribe and deposit or donate is an empty gesture. If the owners of 75 percent of adjacent or abutting lands sign the petition . . . the board of supervisors may not inquire as to the source of or the proportions in which the contribution may have been made, but shall accept the said donation in lieu of an assessment.

1950 Op. Att'y Gen. 131, 132. We see no reason now to withdraw this longstanding opinion. *See generally* 1992 Op. Att'y Gen. 199 (#91-12-4(L)); 1974 Op. Att'y Gen. 459, 469.

C.

You have asked whether, under section 311.7, the county pays the remaining fifty percent of a project's cost from county funds when property owners pay fifty percent of it by deposit. (This question, we assume, involves a petition that did not provide for a deposit greater than fifty percent.) Section 331.429(2)(i) provides that a county may make appropriations from its secondary road fund for the "services provided under [section 311.71 . . . or other state laws relating to secondary roads," and section 311.7 provides that the total expenditure

> of secondary road funds of the county in any year for or on account of special secondary road assessment projects . . . under this section shall not exceed the total secondary road funds legally expendable for construction on [secondary roads] in the county in the year.

Both sections 331.429(2)(i) and 311.7 clearly indicate that the county pays the remaining amount of a project's cost from the secondary road fund when property owners pay part of its cost by deposit. *See generally Nolan v. Reed*, 139 Iowa 68, 117 N.W. 25, 26 (1908); 14 McQuillin, *The Law of Municipal Corporations, supra*, § 38.47, at 185.

D.

You have asked when county supervisors must proceed with implementing a proposed project funded in part by deposit. Section 311.7 provides in its first paragraph that county supervisors, upon accepting a petition to establish a special assessment district, "shall include the project in the secondary road construction program . . . and establish a priority for the completion of the project." Section 311.7 does not reiterate this language in its third paragraph, which provides for projects funded in part by deposit.

In 1951, we concluded that section 311.7 requires county supervisors to establish priorities for projects funded in part by deposit as well as those funded in part by special assessment: section 311.7 "establishes two methods by which priority may be acquired." 1952 Op. Att'y Gen. 48, 48-49 (property owners must deposit cash with county treasurer and not a promissory note to establish priority by subscription). *See generally* Iowa Code §§ 309.22, 309.26, 309.27. We see no reason now to withdraw this longstanding opinion; however, we note that later legislation —1976 Iowa Acts, 66th G.A., ch. 1166, § 1 — provided county supervisors with authority in section 311.7 to accept or reject a proposed project. In light of this later legislation, property owners have no absolute right of priority for proposed projects.

Section 311.7 provides that, upon accepting the deposit, county supervisors "shall otherwise proceed to the improvement of the road." Read in context, *see* Iowa Code § 4.1(38), this language essentially, means "as herein otherwise provided" and thus requires county supervisors to include the proposed project, if accepted, within the secondary road construction program and to establish a priority for its completion. *See generally* Iowa Code §§ 309.22, 309.26, 309.27. In doing so, county supervisors should proceed to implement it within a reasonable period of time. See 13 E. McQuillin, *The Law of Municipal Corporations* § 37.16, at 65, § 37.99, at 285 (1987). *See generally Clarinda Sales Co. v. Radio Sales Pavilion*, 227 Iowa 671, 288 N.W. 923, 926 (1939) (what period of time is "reasonable" depends upon specific facts and circumstances).

III.

You have asked whether a county may, without establishing a secondary road assessment district pursuant to chapter 311, enter into an agreement with property owners to oil and maintain unpaved secondary roads adjacent to their properties. The property owners would pay the cost for oiling and maintenance by making annual installment payments over a fixed number of years. You have also asked whether the county must assume this cost if the property owners fail to abide by the agreement.

"[A] grant of power authorizing payment for public improvements by special assessments is usually construed as not affecting the power . . . to make improvements and pay out of the general revenue" (and presumably out of the revenues in other funds). 13 McQuillin, *The Law of Municipal Corporations, supra*, § 37.57, at 178. "Agreements of citizens and property owners to pay the expense or a part of [a public improvement], when they were under no legal obligation to do so, [are] sanctioned by the courts and not opposed to public policy." *Id.* § 37.58, at 186. *Cf.* 1990 Op. Att'y Gen. 74 (#90-4-5(L)) (county might be able to maintain privately owned farm home lanes for a fee). *See generally* Iowa Code § 331.301(1) (county may, if not inconsistent with the laws of the general assembly, exercise any power or perform any function it deems appropriate to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents).

We do not believe that a county entering into such an agreement needs to assume the cost of oiling and maintenance if the property owners fail to abide by the agreement. It certainly could, for example, seek whatever remedies the law permits for breach of contract. *See generally* Iowa Code § 331.756(5)(6). Moreover, the terms of the agreement could expressly provide that if the property owners defaulted in their payments, the county could allow the secondary road to revert to its previous condition.

IV.

Finally, you have asked whether a county may establish a secondary road assessment district, improve a gravel road by paving it, and allow the road at some point in the future to revert back to gravel. According to section 311.32, "Any road established by petition and *any road improved by petition under [chapter 311] shall be* administered and *maintained by the county* under chapters 306, 309, 314, 317, and 319." (emphasis added).

In interpreting similar language in an earlier version of chapter 311, a prior opinion concluded that county supervisors "[a]re compelled to keep the road surfaced after the original surfacing was paid [in part by subscription]" and that "there is no discretion [on their part] to determine the length, character, or continuity of such a project." 1950 Op. Att'y Gen. 8, 11. We do not, however, believe that section 311.32 means a county must administer and maintain an improved secondary road in its particular improved condition in perpetuity. *See generally* 13 McQuillin, *The Law of Municipal Corporations, supra*, § 37.20, at 74, § 37.25, at 84. Changing demographics, for example, may over the course of many years necessitate either fine-tuning or overhauling a county's secondary road system. Cf. 1996 Op. Att'y Gen. ——— (#95-2-1) (county generally has obligation to construct particular building for purpose specifically authorized in bond referendum, but changing facts and circumstances may allow the county some time in the future to put building to another purpose absent fraud, arbitrary action, or abuse of discretion); 1992 Op. Att'y Gen. 147, 148 (that school building constructed with proceeds from bonds issued for a particular purpose should not permanently restrict building's use).

We conclude that section 311.6 differs from section 311.7 in a few ways; that county supervisors may not assess affected property owners an amount less than fifty percent of the total estimated cost of a project proposed under section 311.6; that section 311.7 provides county supervisors with discretionary authority to accept or reject a proposed project funded in part by deposit; that section 311.7 does not require all property owners to contribute to fifty percent of a proposed project's total estimated cost when they elect to pay this percent by deposit; that the county pays the remaining fifty percent from its secondary road fund; that county supervisors, under section 311.7, must, upon acceptance, establish a priority for the completion of projects funded in part by deposit as well as those funded in part by special assessment and should proceed to implement them within a reasonable period of time; that a county may oil and maintain an unpaved secondary road as part of an agreement with property owners willing to pay its cost by making annual installments over a fixed number of years; that the county may pursue all available legal remedies if the property owners fail to abide by the agreement; and that a county generally may not establish a secondary road assessment district, improve a gravel road by paving it, and allow the road at some point in the future to revert back to gravel absent some change in circumstances.

October 22, 1996

TAXATION; Local Option Tax. Iowa Code section 422B.10(3); 701 IAC 107.10. In determining the allocation of local sales and services tax revenue based on population, any increase in population attributable to a single jurisdiction as a result of a subsequent certified census must be considered in the total population base consisting of the jurisdictions within the county opting for the local sales and services tax. There is no authority to reduce the population of any particular jurisdiction without support of certified federal census data. (Miller to Richards, Story County Attorney, 10-22-96) #96-10-9(L)

October 30, 1996

COUNTIES, WEEDS: Responsibility for control of weeds on county right-of-ways. Iowa Code § 317.10, .11, .13, .14, .18, .19. Under Iowa Code chapter 317, the responsibility for controlling noxious weeds on county right-of-ways is with the county, which does not have the authority to order adjacent landowners to remove these weeds at landowner expense. (Hunacek to Goettsch, 10-30-96) #96-10-10

Kirk E. Goettsch, Ida County Attorney: You have requested an opinion of the Attorney General concerning the following question:

> Does a county board of supervisors have authority under Iowa Code chapter 317 (1995) to order landowners to control noxious weeds growing in the right-of-ways of public highways at landowners' expense?

After reviewing the relevant statutory provisions, and what scant authority exists interpreting these statutes, we conclude that the answer to your question is no, and that the responsibility for eliminating noxious weeds on public right-of-way lies with the governmental entity maintaining that right-of-way.

As you indicate in your letter, the answer to your question entails analysis of Iowa Code chapter 317, entitled "Weeds." This chapter contains a number of separate provisions concerning the control of noxious weeds, a review of which might be helpful. Iowa Code section 317.10 states that each "owner and each person in the possession or control of any lands" shall cut, burn or destroy, as prescribed by the board of supervisors, "all noxious weeds thereon." Iowa Code section 317.11, entitled "Weeds on Roads Harvesting of Grass," states that the "county boards of supervisors and the state department of transportation shall control noxious weeds growing on the roads under their jurisdiction," Iowa Code section 317.13 provides that a county board of supervisors may, upon recommendation of the county weed commissioner, "prescribe and order a program of weed control for purposes of complying with all sections of this chapter." Notice of any order made pursuant to this section is discussed in section 317.14. Iowa Code section 317.18 states that the "board of supervisors may order all noxious weeds within the right-of-way of all county trunk and local county roads to be cut, burned or otherwise controlled" and makes certain provisions for the content of any such order. Finally, Iowa Code section 317.19 gives a county board of supervisors authority to appropriate moneys "to be used for the purposes of cutting, burning or otherwise controlling weeds or brush within the right-of-way of county trunk roads and local county roads," and also provides that the board "may purchase or hire necessary equipment or contract with the adjoining landowner to carry out this section."

In interpreting these statutes, we must attempt to determine and give effect to legislative intent. *Holiday Inns Franchising, Inc. v. Branstad*, 537 N.W.2d 724, 728 (Iowa 1995). Resort to principles of statutory construction is made only if the statute is ambiguous, meaning that reasonable minds could differ or be uncertain as to its meaning. *Id.* at 728; *State v. Green*, 470 N.W.2d 15, 18 (Iowa 1991). In the present case, we believe that chapter 317 is ambiguous, at least with regard to the question you pose. This is because a county road, while under the jurisdiction of a governmental entity, may nevertheless not be "owned" by that entity. The county may maintain only an easement, with the actual fee ownership belonging to someone else. Therefore, section 317.10, interpreted literally, could require the underlying fee owner to be responsible for the cost of weed removal, whereas section 317.11 would seem to place this responsibility on the county. A conflict between two statutes satisfies the "threshold requirement" of showing ambiguity sufficient to justify consideration of principles of statutory construction. *Citizens' Aide/Ombudsman v. Miller*, 543 N.W.2d 899, 902 (Iowa 1996). Several such principles, we believe, clearly indicate that the responsibility for clearing weeds on county right-of-way rests with the county, rather than with adjacent landowners.

First, there is the familiar principle of statutory construction that, in the event of a conflict between a general provision of a statute and a specific provision, the specific or special provision prevails over the general one. *Id.* at 903 (referring to the "specific prevails as an exception to the general" rule of Iowa Code section 4.7). Section 317.10 is clearly more general than section 317.11. It provides a general rule of liability for landowners but does not address the specific situation of weeds on public right-of-way. Section 317.11 does address this special situation, and places the responsibility for such weed control on the governmental entity having jurisdiction over the public road. As it is the

more specific provision, we believe that section 317.11 prevails over any conflicting interpretation of section 317.10.

Second, in cases of statutory construction it is appropriate to consider the legislative history of the statute. *Holiday Inns*, 537 N.W.2d at 728; Iowa Code § 4.6(3). We believe that consideration of the legislative history of chapter 317, and its statutory forerunners, makes abundantly clear the legislative intent to place the responsibility for weed control on the governmental entity rather than any private adjacent landowner. For decades, the Iowa Code has contained a chapter addressing the control of weeds. At one time the statute specifically required adjacent landowners to be responsible for the elimination of weeds in public right-of-way. Iowa Code § 4819(2)(1927) landowner shall "cause all weeds on the streets or highways adjoining said lands to be cut or destroyed . . . [as] . . . prescribed by the board of supervisors."). This Code section was subsequently deleted and replaced with a provision requiring the appropriate governmental entity to be responsible for destruction of "Canada thistle, sow thistle, and quack grass." Iowa Code § 4819(2) (1931). This latter provision appears to have evolved into what is now Iowa Code section 317.11, which now uses the broader term "noxious weeds." This legislative history convinces us that the legislature intended responsibility for control of noxious weeds on the right-of-way to lie with the government. The language of the 1927 Code makes clear that when the legislature wants to impose liability on the adjoining landowners, it knows how to do so. The fact that the legislature at one time did do so, and then repealed the statute and replaced it with one providing for government responsibility, is a clear and unambiguous expression of legislative intent to not make adjoining landowners who derive no special benefit from the highway not shared by the public generally — responsible for weed control on it.

A third principle of statutory construction provides that statutes relating to the same subject matter should be considered together and reconciled if possible. *State v. Peters*, 525 N.W.2d 854, 857 (Iowa 1994). Application of this principle indicates that section 317.11 must be read in conjunction with section 317.19, which, as previously noted, authorizes the appropriation of funds for controlling weeds on right-of-way of county roads, and which also provides that the board of supervisors may "contract with the adjoining land owner to carry out this section." The fact that the legislature would arrange for the appropriation of funds for weed destruction is a clear indication that the legislature believed the county is to be responsible. Moreover, it would not make sense for the county to be "contracting" with the landowner if the county simply had the authority to order the landowner to remove the weeds at the landowner's expense.

Finally, in attempting to ascertain the meaning of section 317.10, it is appropriate to consider the title of that section. *State v. McEwen*, 96 N.W.2d 189, 191 (Iowa 1959). Since the title of section 317.10 is "Duty of Owner or Tenant" we believe that the intent of that section is, in all likelihood, to establish that in cases where property is rented, both the landowner and the tenant are responsible for weed control. This explains the use of the terms "owner" and "person in ... possession or control." While the title of 317.10 is not dispositive in itself and could not, by itself, limit the plain meaning of the text, *Searls*

v. Iowa Dept. of Transp., 405 N.W.2d 808, 810 (Iowa 1987), we think that, taken in conjunction with the other principles of statutory construction that we have discussed, the title provides some indication that section 317.10 is not intended to govern the situation where a county highway is owned, in fee simple, by an adjacent landowner.

Prior opinions of this office support this conclusion. In 1930 Op. Att'y Gen. 179, this office opined that the 1927 code provision previously referenced required the landowner whose land adjoined a primary road to cut and destroy the weeds growing in the primary road. After this provision was deleted from the Code, this office was asked to consider the question of whether that amendment relieved landowners of the responsibility of destroying weeds on the highways. In 1932 Op. Att'y Gen. 56, this office concluded that the statutory scheme, which at the time drew a distinction between Canada thistles, sow thistles, and quack grass and "other weeds," required the county to be responsible for the former and the landowner to be responsible for the latter. Because the current statutory scheme does not distinguish between weeds, it appears that the statutory language which led this office to conclude that the county bore the responsibility for elimination of Canada thistles, sow thistles, and quack grass, now requires the county to be responsible for all noxious weeds on county right-of-way. This conclusion is consistent with a later opinion of this office, 1948 Op. Att'y Gen. 242, where, interpreting what was then called section 317. 11 of the 1946 code (a statute substantially similar to the current section 317.11), this office concluded that the statute "imposes a legal duty upon the board of supervisors which it may not omit." *Id.* at 244. Finally, in 1980 Op. Att'y Gen. 666, an unpublished opinion, this office noted the historical development of chapter 317 and pointed out that under the revised statute "landowners are responsible only for the destruction of nonnoxious weeds and then only on certain roadways."

In summary, it is our conclusion that chapter 317 imposes on the county a responsibility to remove all noxious weeds on county right-of-ways, and that the expenses incurred should be born by the county rather than by adjacent landowners.

October 31, 1996

CONSTITUTIONAL LAW: Legislative transfer of functions of deputy agriculture secretary. Iowa Const., art. I, sec. 21; art. III, sec. 1; 1996 Iowa Acts, ch. ———, sec. 2425; Senate File 2446. Senate File 2446, which eliminated the position of Deputy Secretary of Agriculture, required the office from which the deputy performed duties to be vacated, transferred the powers and duties of the deputy to an interim assistant secretary of agriculture, and created the position of administrative assistant VI, does not facially violate the requirement for separation of powers under the Iowa Constitution and does not constitute a bill of attainder under either the Iowa Constitution or the United States Constitution. (Pottorff to Schrader, State Representative, 10-31-96) #96-10-11(L)

DECEMBER 1996

December 18, 1996

COURTS: Judicial nominating commission eligibility. Iowa Const., art. V, § 16; Iowa Code §§ 46.4, 46.5 (1995). In order to be appointed to fill a vacancy on a district judicial nominating commission a person must satisfy two eligibility criteria; 1) the person must be a United States citizen and Iowa resident at least eighteen years of age, and 2) the person must not have served a previous six-year term on the commission. Neither the Iowa Constitution nor Code chapter 46 require a person to be a member of the bar in order to serve as a member of a judicial nominating commission. (Scase to Richardson, Clerk of the Supreme Court, 12-18-96) #96-12-1(L)

STATUTES CONSTRUED

January 1995 through December 1996

INDEX

INDEX OF OPINIONS

January 1995 through December, 1996