COUNTIES, COURTS: Designation of smoking areas in courthouses. Acts of the 72d General Assembly, 1987 Session, House File 79, §§ 3 and 4; Iowa Code § 622.1303 (19878). The Court and not the County Board of Supervisors is the person in custody and control of areas of a courthouse assigned to the Court and its employees, and authorized to designate in which portions of such areas smoking can be permitted. (Hayward to Mullins, 1-21-88). #88-1-11(L)

January 21, 1988

The Honorable Sue B. Mullins
Iowa State Representative
Prairie Flat Farms
Corwith, Iowa 50430

Dear Representative Mullins:

You have asked this office for its opinion concerning the applicability of Iowa's new smoking law, Acts of the 72d General Assembly, 1987 Session, House File 79. (Hereinafter referred to as H.F. 79). Specifically you ask whether a County Board of Supervisors has authority to issue a resolution or ordinance regulating smoking in portions of the county courthouse assigned to the Court, including the office of the clerk of court, the courtroom, chambers, and other offices of judicial employees. It is our opinion that the various boards of supervisors have no authority to regulate smoking in areas of their courthouses assigned to State officials, such as the Court.

Under H.F. 79, §§ 3 and 4, the "person having custody and control" of a public place is responsible for designating smoking areas if smoking is to be permitted anywhere in the public place. This language is to be given its meaning in general usage. Iowa Code § 4.1(2) (1987). Thus, the question is not who owns a particular location, but who is in control and has custody of that location.

The Judicial Department is an agency of the State of Iowa and includes the district court, the clerk of court, juvenile court officers, court reporters, and all other court employees. Iowa Code § 602.1102 (1987). All employees of the Judicial

Department are under the "supervisory and administrative control" of the Iowa Supreme Court. Iowa Code § 622.1201 (1987). While the counties are required to provide suitable facilities for the Courts, Iowa Code § 622.1303 (1987), nothing in the statutes reserves authority over the use of those facilities for the counties. This is consistent with the general proposition that home rule does not give cities and counties authority to regulate state agencies. See, e.g., Molitor v. City of Cedar Rapids, 360 N.W.2d 568 (Iowa 1985) (City of Bloomfield v. Davis Co. Comm. School Dist., 254 Iowa 900, 119 N.W.2d 909 (1963) (Municipal zoning inapplicable to state property).

Therefore, it is our opinion that a county board of supervisors cannot designate smoking or no smoking areas in portions of the courthouse assigned to the Court or its employees. Nothing in this opinion should be construed to permit employees of the State to smoke in other areas of the courthouse contrary to established policy.

Respectfully yours,

GARY L. HAYWARD
Assistant Attorney General
Public Safety Division

GLH:mjs

HIGHWAYS; SCHOOLS: Minors' school licenses. Iowa Code § 321.194 (1987) Iowa Administrative Code 761-600.5(2); 670-6.11(2). A student holding a minor's school license may drive unaccompanied only to those extracurricular activities held on the actual school grounds of the schools in which the minor licensee is enrolled and attends. (Olson to Harbor, State Representative, 1-21-88) #88-1-10(L)

January 21, 1988

The Honorable William H. Harbor
State Representative
State Capitol
LOCAL

Dear Representative Harbor:

You have requested an opinion of the Attorney General concerning whether a valid citation may be issued for violation of Iowa Code § 321.194 when a student holding a minor's school license is driving to an athletic event at a location other than a school facility (grounds). Your opinion request explains that "in some instances, extracurricular activities are held at places other than the school grounds (i.e. city parks are often times used for school sanctioned softball or baseball games, tennis, etc.)."

Iowa Code § 321.194 (1987) in pertinent part provides:

> Upon certification of a special need by the school board or the superintendent of the applicant's school, the department may issue a school license to a person between the ages of fourteen and eighteen years. The license shall entitle the holder, while having the license in immediate possession, to operate a motor vehicle during the hours 6 a.m. to 9 p.m. over the most direct and accessible route between the licensee's residence and schools of enrollment and between schools of enrollment for the purpose of attending duly scheduled courses of instruction and extracurricular activities <u>at the schools</u> . . . (Emphasis added).

The Department of Transportation's implementing rule, 761 Iowa Administrative Code 600.5(2) in pertinent part provides:

> A minor's school license is a restricted license. It allows driving unaccompanied on the most direct route

> between a licensee's residence and schools of enrollment and between schools of enrollment from 6 a.m. to 9 p.m. to attend scheduled courses and extra-curricular activities at the schools. (Emphasis added).

Department of Education rule 670 Iowa Administrative Code 6.11(2) provides:

> The applicant for the minor's school license is enrolled in instructional programs or involved in extra-curricular activities at the applicant's school of attendance that occur at such times that make it impossible to take advantage of the school transportation service, or that the school transportation service is not provided. (Emphasis added).

When a statute is plain and its meaning is clear, we do not search for meaning beyond its express terms. State v. Tuitjer, 385 N.W.2d 246, 247 (Iowa 1986). Words and phrases shall be construed according to the context and the approved usage of the language. Iowa Code § 4.1(2) (1987).

If a statute contains an ambiguity, however, rules of statutory construction must be applied. Since there is some uncertainty regarding what constitutes extracurricular activities "at the schools," we will discuss rules of statutory construction and apply those rules to your question. In construing a statute we must look to the object to be accomplished, the mischief to be remedied, or the purpose to be served, and place on the statute a reasonable or liberal construction which will best effect the legislature's purpose. Beier Glass Co. v. Brundige, 329 N.W.2d 280, 283 (Iowa 1983); Iowa Code § 4.6 (1987). In interpreting statutes, the Supreme Court considers all parts of a statute together without attributing undue importance to any single or isolated portion. Beier Glass Co., 329 N.W.2d 280, 283. We must construe a statute so that no part of it is rendered superfluous. Id. at 285.

The legislative history of § 321.194 illustrates that a minor's school license began as a restrictive license and remains so today. For example, the 1946 Code provided that a restricted license could be issued to a person between the ages of fourteen and sixteen years, valid only in going to and from school. 1947 Iowa Acts, chapter 175, section 9 added the provision that the licensee must drive to school over the most direct and accessible route. The statute was further amended by 1953 Iowa Acts, chapter 132, section 1, and allowed driving only between the hours of 7 a.m. and 6 p.m. between the licensee's residence and

school of enrollment for the purpose of attending duly scheduled courses of instruction at such school. 1980 Iowa Acts, chapter 1094, section 21 included drivers between the ages of fourteen and eighteen years, extended hours of operation to between 6 a.m. and 9 p.m., and allowed a licensee to drive not only to his courses of instruction, but also to extracurricular activities at such school. 1983 Iowa Acts, chapter 49, section 1 amended this section to include dual enrollments and allowed a licensee to drive between his residence and schools of enrollment, as well as between schools of enrollment for the purpose of attending courses of instruction and extracurricular activities at the schools.

Statutes that provide that a driver's license shall not be issued to a person who is below a certain age limit, except for restricted school licenses provided for by § 321.194, are enacted for the safety of the public. Hardwick v. Bublitz, 119 N.W.2d 886, 893 (Iowa 1963); McCann v. Iowa Mutual Liability Insurance Co., 231 Iowa 509, 1 N.W.2d 682, 686 (1942). In providing for restricted school licenses the legislature has recognized that until they reach a certain age, all children are incapable of driving on the highways. Hardwick, 119 N.W.2d at 893. This office has previously opined in 1962 Op.Att'y.Gen. 290, 291, that the central criterion for the exercise of discretion in issuing minors' school licenses is to protect the public interest.

While the legislature has expanded § 321.194 to include longer hours and dual enrollments, as well as extracurricular activities, it has consistently required that both duly scheduled courses of instruction and extracurricular activities must be at the schools of enrollment. We place significance on the fact that the legislature used the phrase "at the schools" rather than words such as "sponsored by the schools" or simply "extracurricular activities." The purpose of the restrictions placed on minors' school licenses is to insure the safety of the public. The apparent legislative objective of § 321.194 is to allow reasonable accommodation of students, in cases of necessity, to allow them to drive a vehicle directly between their homes and schools of enrollment in order to attend courses of instruction and extracurricular activities conducted there. We do not believe that the legislature intended that a student with a minor's school license should be able to drive to every school activity in which he is involved regardless of where it might occur.

CONCLUSION

Section 321.194, while broadened to include extracurricular activities, is still a very restrictive statute. A minor

licensee must be driving to school for the purpose of attending duly scheduled courses of instruction. He may also attend and participate in extracurricular activities at the schools in which he is enrolled. The purpose of imposing restrictions on minors' school licenses is to provide for the safety of the public.

The legislature has recognized the need to include driving to extracurricular activities, within limits, e.g. that they occur between the hours of 6 a.m. and 9 p.m. and that they be held at the schools of enrollment. The phrase "extracurricular activities at the schools" is limited to activities which are held on the actual school grounds of the schools in which the minor licensee is enrolled and attends, as opposed to activities which might be sponsored by the schools but held at a location other than the schools. This would be true whether the distance from the other location is one block or several miles from the school grounds.

Therefore, in answer to your specific question, driving to an athletic activity which is held at a location which is not on the school grounds of the school in which the minor licensee is enrolled and attends would be a violation of § 321.194 for which a valid citation may be issued.

Sincerely,

Carolyn J. Olson

CAROLYN J. OLSON
Assistant Attorney General

CJO/jks

MUNICIPALITIES; Library Board of Trustees; Charge. Iowa Code § 392.5 (1987); Iowa Code § 378.10 (1971); 1972 Iowa Acts, ch. 1088, §§ 196 and 199. A restriction on a library board of trustee's authority to set the compensation of library personnel in an ordinance which previously granted exclusive control over expenditures and compensation to the library board would constitute an alteration of the "charge of a library board," as used in § 392.5, and would be void absent approval by referendum. A county attorney does not have a duty to react to an invalid municipal ordinance. (Walding to Swaim, Davis County Attorney, 1-21-88) #88-1-9(L)

January 21, 1988

The Honorable R. Kurt Swaim
Davis County Attorney
Bloomfield, Iowa 52537

Dear Mr. Swaim:

We are in receipt of your request for an opinion of the Attorney General regarding a proposed ordinance of the Bloomfield, Iowa, city council.[1] Specifically, you have posed the following questions:

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[1]The former Bloomfield city attorney informs us that the ordinance, Bloomfield Ordinance No. 464, with his advice, was adopted on June 15, 1987 by the city council without a referendum, and has been in effect since publication on June 24, 1987. That ordinance amends Bloomfield Municipal Code § 2.37.050(D). Section 2.37.050, in pertinent part, now reads:

> Powers and Duties. The board [of trustees of the Bloomfield Public Library] shall have and exercise the following powers and duties:
>
> * * *
>
> D. To employ a librarian, and authorize the librarian to employ such assistants and employees as may be necessary for the proper management of the library, and fix their compensation; provided, however, that prior to such employment, the compensation of the librarian, assistants and employees shall have been fixed and approved by a majority of the members of the board voting in favor thereof. And further provided that in the fixing of such compensation and/or benefits, said Library Board shall

(Footnote Continued)

1) Whether [Bloomfield Ordinance No. 464] alters the charge of the Library Board in violation of Iowa Code Section 392.5 in the absence of approval by the City voters? and

2) If the answer to the preceding question is in the affirmative, do I, as County Attorney, have any duty or responsibility to take any action in respect thereto?

Iowa Code § 392.5 (1987) provides, in relevant part, that:

> A proposal to alter the composition, manner of selection, or charge of a library board, or to replace it with an alternative form of administrative agency, is subject to the approval of the voters of the city.
>
> * * *
>
> If a majority of those voting approves the proposal, the city may proceed as proposed.
>
> * * *
>
> [Emphasis added.]

The first question we will consider then is whether a referendum issue is posed by Bloomfield Ordinance No. 464 as a proposal to alter the "charge of the library board." There is no dispute about the substance of the amendment; rather, what is in contention is the procedural issue as to how to effectuate the change: whether by simple adoption of an ordinance by the city council, or by approval of a majority of the city voters at an election.

(Footnote Continued)

> comply with the personnel policies and rules and regulations adopted by the City Council for all city employees. For said purpose library employees shall be considered city employees.
>
> * * *
>
> [Amendment in emphasis.]

The narrower issue, however, is whether a restriction on a library board in the fixing of the compensation of the librarian, assistant and employees requiring the board to comply with the personnel policies and rules and regulations adopted by the city council for municipal employees constitutes an alteration in the "charge of the library board". A conclusion that the ordinance does alter the charge of the library board would render the adopted amendment void absent approval by referendum. Conversely, a ruling that the amendment does not alter the charge of the library board makes sufficient the city council's adoption of the ordinance.

It is our opinion that a proposal to alter the "charge of a library board," as used in § 392.5 and subjecting the proposal to a referendum, would include a proposal which significantly changes the relationship between a city council and a library board of trustees. A proposal which realigns and redistributes administrative control of a public library between a city council and a library board clearly falls within the ambit of that statutory language.

Applying that standard to the present case, it is our judgment that a restriction on a library board's authority to set the compensation of library personnel in an ordinance which previously granted exclusive control over expenditures and compensation to the library board would constitute an alteration of the "charge of a library board." As such, the proposal to alter Bloomfield Municipal Code § 2.37.040 (D) was improperly effected by adoption of the ordinance by the city council. The ordinance, absent approval by referendum, would be void.[2]

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[2] According to McQuillin:

> Substantial compliance with requisite procedure in enactment of an ordinance is prerequisite to its validity, and no ordinance is valid unless and until mandatory prerequisites to its enactment and promulgation are substantially observed. [Footnote omitted].

5 McQuillin, Municipal Corporations, § 16.10 (1980). Further, McQuillin states:

> It is a general rule that an ordinance is

(Footnote Continued)

An examination of the Bloomfield Municipal Code governing the library board of trustees, Bloomfield Municipal Code Chapter 2.37, reveals that the contested ordinance, Bloomfield Ordinance No. 464, constitutes a significant realignment and redistribution of administrative control of the municipal library between the city council and the library board.

Initially, it is observed that paragraph D of § 2.37.050 of the municipal code (titled "Powers and Duties"), prior to adoption of the ordinance amending that paragraph, granted the library board the unrestricted authority to establish the compensation of the library personnel. Similarly, paragraphs D and E grant the library board control of the library's employment including the power of removal. Further, the library board is granted in paragraph I of § 2.37.050 "exclusive control of the expenditure of all funds allocated for library purposes by the council," as well as funds from other sources. In addition, paragraph C of § 2.37.050 grants the library board authority "to direct and control all of the affairs of the library."

Together, these provisions evince a clear intent to establish an autonomous board charged with the administration of the public library free of any direct intervention or control by the city council. In fact, the city council's role in the operation of the library is limited to the appropriation process.

The relationship between the city council and the library board is significantly altered by the contested restriction on compensation and employee benefits because the ordinance transfers, in part, control of compensation of library personnel. The restriction, in effect, diminishes the library board's exclusive control over expenditures and compensation to the advantage of the city council.

(Footnote Continued)

> void where it is passed without authority therefor [sic], or without compliance with statutory requirement. . . .
>
> An invalid or illegal ordinance is wholly inoperative. [Footnotes omitted].

6 McQuillin, Municipal Corporations, § 20.01 (1980). Thus, Bloomfield Ordinance No. 464, amending Bloomfield Municipal Code, § 2.37.050 (D), is invalid because it was adopted without subjecting the proposal to a referendum.

The significance of the realignment and redistribution of the administrative authority to set the compensation of the library personnel is further bolstered by a review of the legislative history of § 392.5. Section 392.5, which became effective on July 1, 1972, was one of the sections added with the adoption of the Home Rule amendment. See 1972 Iowa Acts, ch. 1088, § 196. Unnumbered paragraph 2 of § 392.5 provides:

> In order for the [library] board to function in the same manner the council shall retain all applicable ordinances, and shall adopt as ordinances all applicable state statutes repealed by 64GA, chapter 1088.

That paragraph, in an apparent reference to former Iowa Code ch. 378 which governed public libraries before Home Rule and was repealed by Home Rule, 1972 Iowa Acts, ch. 1088, § 199, required cities to preserve the provisions of chapter 378.

The provisions of former Iowa Code § 378.10 (1971), which the City of Bloomfield apparently preserved when it enacted Bloomfield Municipal Code § 2.47.050, granted library boards of trustees exclusive control over the library expenditures and compensation. Thus, library boards were vested exclusive authority to set compensation of library personnel by the legislature and, through § 392.5, unnumbered paragraph 2, that vested power was intended to be preserved. Accordingly, an erosion of that authority would be contrary to legislative intent and, at the least, was perceived by the legislature to be a significant realignment or redistribution of administrative control of public libraries.

Your second question, posed by the determination that the contested ordinance is invalid, concerns the duty of a county attorney to react to a void municipal ordinance. A review of the duties of a county attorney enumerated in Iowa Code § 331.756 (1987) does not include reviewing city legislation. Accordingly, it is our judgment that a county attorney does not have a duty to react to an invalid city ordinance.

In summary, a restriction on a library board of trustee's authority to set the compensation of library personnel in an ordinance which previously granted exclusive control over expenditures and compensation to the library board would constitute an alteration of the "charge of a library board," as used in § 392.5, and would be void absent approval by referendum.

A county attorney does not have a duty to react to an invalid municipal ordinance.

Sincerely,

Lynn M. Walding
Assistant Attorney General

LML/mo

SCHOOLS: Teachers; Wages; Collective Bargaining. Iowa Code Supp. ch. 294A (1987); Iowa Code § 91A.3 (1987); Iowa Code ch. 20 (1987). The terms of Iowa Code Supp. 294A (1987), the Educational Excellence Program, are not in conflict with the Wage Payment Collection law or the Public Employment Relations law. It is our opinion that a school district ordinarily will include Phase I salary payments in a teacher's regular paycheck but under the terms of Iowa Code § 91A.3, by agreement between the school district and the teachers as a group or as individuals, the schedule for distribution may be different. The distribution of Phase II money is to be accomplished by mutual agreement in districts with collective bargaining and by decision of the district board in other districts. We express no opinion concerning the method for payment of Phase III funds because of the variety that is possible under the terms of the law in school district Phase III plans. (Fleming to Murphy, State Senator, 1-21-88) #88-1-8(L)

January 21, 1988

The Honorable Larry Murphy
State Senator
531 Sixth Street, N.W.
Oelwein, Iowa 50662

Dear Senator Murphy:

You have asked for our opinion concerning the operation of the "Educational Excellence Program - Teachers" law adopted by the 1987 session of the General Assembly, codified as Iowa Code Supp. ch. 294A (1987); 1987 Iowa Acts, ch. 224, H.F. 499. The issues you raise require us to examine the relationship among chapter 294A, Iowa Code ch. 20 (1987), the Public Employment Relations Act, and Iowa Code ch. 91A (1987), the Wage Payment Collection Law.

INTRODUCTION

Your request was submitted because many school districts are paying the salary increases to teachers that are provided under the new program on a quarterly basis rather than as a part of a teacher's regular paycheck. A brief description of the relevant provisions of chapter 294A seems appropriate. The stated purpose of the new law is to promote excellence in education in Iowa. The program consists of three major aspects, Phase I, the recruitment of quality teachers, Phase II, the retention of quality teachers, and Phase III, the enhancement of the quality and effectiveness of teachers through the utilization of performance pay. Iowa Code Supp. § 294A.1.

The means chosen to implement Phase I is the allocation of state funds to provide for an annual minimum salary of $18,000.00 for full-time teachers in Iowa's public schools. Iowa Code Supp. § 294A.5. The means chosen to retain quality teachers

is allocation of state funds to provide general salary increases for Iowa teachers. Iowa Code Supp. § 294A.9 (Phase II).

The goals of Phase III as set out in Iowa Code Supp. § 294A.12 are to be accomplished by the development of performance-based pay plans, and supplemental pay plans and other devices. Such plans are to be developed in each school district through a committee composed of representatives of the school administration, teachers, parents and other interested people. Iowa Code Supp. § 294A.15. Plans that are developed by such committees are subject to approval by the department of education. Iowa Code Supp. § 294A.16.

Payments for each phase of the program are to be made on a quarterly basis to school districts by the department of revenue and finance. For the current year, the first payment was made on October 15, 1987, for Phase I and Phase II of the program. An appropriation of $92,100,085.00 was made to fund the program for the current year. Iowa Code Supp. § 294A.25(1). The funds are allocated in an amount to meet the $18,000.00 annual minimum salary of Phase I, $38,500,000.00 to fund Phase II of the program, with the remainder to be for Phase III, Iowa Code Supp. § 294A.25(4).[1] Phase II money is distributed according to each school district's basic enrollment as defined in Iowa Code Supp. § 442.4. For the current year, the governor is required to designate on February 1, 1988, the amount of the appropriation that is available to fund Phase III of the program. Iowa Code Supp. § 294A.18. We understand that almost all of Iowa school districts had submitted Phase III plans to the department of education by January 4, 1988.

THE ISSUES

With that outline of the program in view, we turn to the issues that concern you because you indicate many school districts have decided to distribute Phase I and Phase II funds to teachers on a quarterly basis rather than in a regular paycheck.[2] The answers to your questions are complex and necessarily vary among the phases of the program. The

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[1] Funds were also appropriated for teachers employed by the Department of Human Services and teachers employed by the Board of Regents at Iowa School for the Deaf and Iowa Braille and Sight Saving School. Iowa Code Supp. § 294A.25(2) and (3).

[2] There is no indication in the statute as to the date on which school districts were to begin paying teachers under the program during the current year of July 1, 1987, to June 30, 1988.

contractual relationships in a particular school district also affect the response.

The specific questions you present are as follows:

1. Does Iowa Code § 91A.3 of the Wage Payment Collection law apply to the disbursement of Phase I, Phase II or Phase III (as of January 1, 1988) moneys to eligible certified employees?

2. Is there any language in Iowa Code Supp. ch. 294A that overrides Iowa Code § 91A.3?

We believe that the interaction of chapter 20 and chapter 91A with the new program are important to our response to the first question.[3] The Iowa Wage Collection Law, ch. 91A, was adopted after the Public Employment Relations Act (ch. 20). Chapter 91A applies to all employers and employees and is administered by the Labor Commissioner. In contrast, chapter 20 applies only to Iowa public employees and is administered by the Public Employment Relations Board.

First, it is necessary to focus on the Wage Collection law which provides in pertinent part:

> An employer shall pay all wages due its employees, less any lawful deductions specified in section 91A.5, at least in monthly, semimonthly, or biweekly installments on regular paydays which are at consistent intervals from each other and which are designated in advance by the employer. * * *
>
> A regular payday shall not be more than twelve days, excluding Sundays and legal holidays, after the end of the period in which the wages were earned. An employer and employee may, upon written agreement which shall be maintained as a record, vary the provisions of this subsection.

Iowa Code § 91A.3(1) (1987) (emphasis added).

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[3] Cases construing chapters 91A and 20 are not helpful here. There is no question that the money paid to teachers under Phase I and Phase II of the new program is wage or salary under both chapters. Further, there is no question that teachers are employees.

The money to be paid to teachers under Phase I of the program is to be paid to a teacher as "regular compensation." Iowa Code Supp. § 294A.5 (first sentence). Thus, ordinarily, the money a teacher would receive from the state Phase I allocation would be included in that teacher's "regular" paychecks. Given the last sentence of § 91A.3(1), set out above, however, we are of the opinion that a school district and a teacher (or teachers) could enter into a written agreement to vary from the requirements of the other provisions of § 91A.3(1). The Phase I program does not include a reference to collective bargaining but since § 91A.3(1) permits "agreement" to "vary," we conclude that quarterly payments to teachers of Phase I compensation could be made if an agreement to do so is made between employer and teacher or employer and teachers. This conclusion is based on Iowa Code § 4.1(3) (1987) which provides that in construction of statutes "the singular includes the plural, and the plural includes the singular." If an agreement is allowed between an employer and an employee, it is allowed between an employer and its employees as a group. If, however, an agreement between the employer and teacher or teachers does not exist to vary from the requirements of Iowa Code § 91A.3(1), payment of Phase I money should be included in each of the recipient teacher's regular paycheck.

We believe that Phase II payments are on a somewhat different basis. In districts with collective bargaining, the formula for distributing Phase II money is to be "mutually agree[d] upon," Iowa Code Supp. § 294A.9 (fifth unnumbered paragraph). (Exceptions from normal chapter 20 processes are provided for the current year). In districts without bargaining representatives, the school board decides "the method of distribution." Id. (sixth unnumbered paragraph). Thus, we believe there appears to be more latitude for school districts in the distribution of Phase II funds, whether by collective bargaining or by board decision.

We are reluctant to express any opinion concerning the distribution of Phase III money. That aspect of the program permits each school district to develop its own plan and the ingredients of the plans can be expected to vary a great deal under the terms of Iowa Code Supp. § 294A.14. During the current year, the funds for Phase III will be distributed late in the fiscal year. Unspent Phase III funds will not revert to the state general fund, however. Iowa Code Supp. § 294A.16.

If the General Assembly determines that the method or time for distributing funds from any phase of the Educational Excellence Program to recipient teachers should be designated more precisely, it should do so. We recognize that teachers may desire that such funds be included in each paycheck. School

boards; on the other hand, may desire to keep the distribution of such funds on a very separate basis out of fear that similar state appropriations will not be made in the future.

The response to your second question is quite simple. We do not believe anything in Iowa Code Supp. ch. 294A overrides or conflicts with Iowa Code § 91A.3 (1987). We have taken care in our consideration of your first question to apply the rules of statutory construction. One of the important rules is that we try to harmonize statutes so that effect is given to all. We do not believe that the new program is in conflict with chapter 91A or chapter 20.

In summary, we conclude that the terms of Iowa Code Supp. 294A (1987), the Educational excellence Program, are not in conflict with the Wage Payment Collection law or the Public Employment Relations law. It is our opinion that a school district ordinarily will include Phase I salary payments in a teacher's regular paycheck but under the terms of Iowa Code § 91A.3, by agreement between the school district and the teachers as a group or as individuals, the schedule for distribution may be different. The distribution of Phase II money is to be accomplished by mutual agreement in districts with collective bargaining and by decision of the district board in other districts. We express no opinion concerning the method for payment of Phase III funds because of the variety that is possible under the terms of the law in school district Phase III plans.

Sincerely yours,

Merle Wilna Fleming

Merle Wilna Fleming
Assistant Attorney General

MWF/lm

SCHOOLS: Offsetting Tax, Trusts. Iowa Code § 282.1 (1987); Iowa Code § 282.2 (1987); Iowa Code § 282.2 (1983). Property tax on trust property for which a parent is not liable is not available to offset nonresident tuition changes. (Fleming to Osterberg, State Representative, 1-20-88) #88-1-7(L)

January 20, 1988

The Honorable David Osterberg
State Representative
Mount Vernon, Iowa 52314

Dear Representative Osterberg:

You have asked for our opinion concerning the relationship of a trust agreement and Iowa Code § 282.1 and § 282.2 (1987). The specific question presented is:

> Whether the sole beneficiary under a trust (or the beneficiary's parents or guardian) is entitled to a deduction from nonresident tuition payments to the extent that the trust property, as administrated by a trustee, pays school taxes to the school district in which the beneficiary attends school.

In submitting the request for our opinion you also submitted a copy of the trust agreement and other facts which are helpful to us in responding to your question.

A summary of the facts is appropriate at the outset. A child, who is not a resident of the West Des Moines school district, began attending classes in that school district. The child's parent requested the school district to allow a deduction from the tuition payments in the amount of the school tax paid by the trustee out of trust funds to West Des Moines; the taxes at issue are from trust property; the child is the sole beneficiary of the irrevocable trust. The child's mother created the trust "to meet the requirements of the Internal Revenue Code of the United States (specifically Section 2503(c), Internal Revenue Code of 1954)." Paragraph 10, Educational Trust.

Under Iowa Code § 282.1, a school district must charge tuition for a nonresident child who attends school, subject to certain exceptions not relevant here. The parent, not the child, is required to pay tuition. The text of Iowa Code § 282.2 as it

appears in the codes published in 1985 and 1987, is as follows:

> The parent or guardian whose child or ward attends school in any district of which the child or ward is not a resident shall be allowed to deduct the amount of school tax paid by the parent or guardian in said district from the amount of tuition required to be paid.

That language includes changes in text made by the code editor in response to 1982 Iowa Acts, ch. 1217 and Iowa Code § 14.13(2) (1987). The effect of those editorial changes in the text of Iowa Code § 282.2 (1983) was the subject of an opinion of this office issued on January 7, 1987, Donner to Peeters and Brown, #87-1-5. We have enclosed a copy of that opinion for your information and convenience. Section 282.2, prior to the editorial change, was as follows:

> The parent or guardian whose child or ward attends school in any district of which he is not a resident shall be allowed to deduct the amount of school tax paid by him in said district from the amount of tuition required to be paid.

(emphasis added). That text is the same as the last sentence of Iowa Code § 2804 (1897). In other words, the statute has existed for over 90 years; it has been construed previously by the courts and by this office and we are bound by the earlier construction. The code editor is not authorized in editing to change the substantive meaning of the statute. Iowa Code § 14.13(2). See Donner opinion enclosed herewith which states that all the pronouns of § 282.2 (1983) referred to the parent or guardian and not the child. See also Hume v. Independent Sch. Dist. of Des Moines, 180 Iowa 1233, 1249, 164 N.W. 188, 193-194 (1917). Thus, it is our opinion that the offsetting tax is not applicable to either the child as beneficiary of the trust or the trustee (who is not a parent) who is required to pay the tax on trust property.

In a previous opinion of this office concerning taxes paid by a corporation we said, "the test should be whether or not the parent is personally liable for payment of the real and personal property taxes of the corporate entity of which he is the sole stockholder." 1976 Op.Att'yGen. 858, 859. In the circumstances presented here, the taxes paid on trust property are paid by the trustee and are not paid by the parents or guardians.[1]

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[1] We have not been asked whether the trustee could use income from the educational trust to pay the tuition.

The facts you present are distinguishable from the facts in 1932 Op.Att'yGen. 54. In the situation described in that opinion, the parent was the heir to the property, not the child. The parent as owner of the real estate upon the death of the ancestor was entitled to the offsetting tax to pay tuition for the child. We believe the distinction is clear in the situations you present. In establishing the trust, the parents sought to take advantage of federal tax provisions. The parent did not retain rights the parent would have had, absent the trust, under Iowa law.

In summary, it is our opinion that property tax for which the parents (or a guardian) is not liable, is not available under the "offsetting tax" provision of Iowa law.

Sincerely,

Merle Wilna Fleming

MERLE WILNA FLEMING
Assistant Attorney General

MWF/kz

Enclosure

STATE OFFICERS AND DEPARTMENTS: Architectural examining board. Iowa Code Chapter 118, House File 587, 72nd G.A., 1st Sess. § 8. The definition of "professional architectural services" lists activities all of which are modified by the phrase "related to architecture". In turn, certain defined services are related to architecture only if the safeguarding of life, health or property is concerned or involved. The question of whether a particular activity fits the definition of the "practice of architecture" should be determined in a specific factual context. A request for an advance determination of the boundaries of the "practice of architecture" is most appropriately addressed to the architectural examining board. (Barnes to Hatch, State Representative, 1-20-88) #88-1-6(L)

January 20, 1988

The Honorable Jack Hatch
House of Representatives
State Capitol
L O C A L

Dear Representative Hatch:

You have requested an opinion from this office concerning the scope of Iowa Code Chapter 118 as amended by House File 587, 72nd G.A., 1st Sess. (Iowa 1987) and the impact of this legislation on the practice of interior design.

The changes made to Chapter 118 by House File 587 which are most relevant to your inquiry concern the definitions found in section 8 of H.F. 587. That section provides, in pertinent part, that:

> [The] "practice of architecture" means performing, or offering to perform, professional architectural services in connection with the design, preparation of construction documents, or construction of one or more buildings, structures or related projects, and the space within and surrounding the buildings or structures, or the addition to or alteration of one or more buildings or structures, which buildings or structures have as their principal purpose human occupancy or habitation, <u>if the safeguarding of life, health or property is concerned or involved</u> [unless excepted by Iowa Code § 118.18].
>
> "Professional architectural services" means consultation, investigation, evaluation, programming, planning, preliminary design and feasibility studies, designs, drawings, specifications and other technical submissions, administration of construction contracts, observation of construction site programs, or other services and instruments of service <u>related to architecture</u>....(emphasis added)

We believe that the activities listed in the definition of "professional architectural services" are all modified by the phrase "related to architecture". See Hamilton v. City of Urbandale, 291 N.W. 2d 15, 18 (Iowa 1980) (General words in a statute which are followed by specific words take their meaning from the specific ones.) If, for example, an evaluation of a building is conducted which is not related to architecture, the evaluation would not constitute a professional architectural service.

When the definition of "professional architectural services" is read in combination with the definitions of "practice of architecture" and "construction" it appears that all three are qualified by whether the activity involves or concerns the safeguarding of life, health or property. See 2A A. Sutherland, Statutory Construction § 47.33 (4th ed. C. Sands 1984) (Evidence that a qualifying phrase applies to all antecedents instead of only to the immediately preceding one may be found if the phrase is separated from the antecedents by a comma.)

Your letter does not describe nor does this office have familiarity with the services typically rendered by interior designers. The question of whether a particular activity fits the definition of the "practice of architecture" should be determined in a specific factual context. A request for an advance determination of the boundaries of the "practice of architecture" is most appropriately addressed to the architectural examining board pursuant to its power to decide petitions for declaratory rulings.[1] Iowa Code § 17A.9. Any such ruling would be binding on the board as well as the person who petitions for the ruling and would also be subject to judicial review. The board would likewise be in a superior position to determine the meaning and extent of the exceptions enumerated in Iowa Code § 118.18.

Sincerely,

Susan Barnes

SUSAN BARNES,
Assistant Attorney General

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[1] An interested person may also petition the board to adopt administrative rules which are of general applicability. See Iowa Code § 17A.7.

August 5, 1987, the state vehicle dispatcher issued a directive to all drivers of state vehicles that only ethanol blended fuel should be purchased for state cars when stopping at commercial establishments in Iowa.

We do not have any facts regarding what impact the Governor's directive will have on the agencies' respective budgets for FY 1987-88. However, state agencies who advertised for bids for gasoline after May 26, 1987, were statutorily required to also seek bids for ethanol-blended gasoline.[2] These bids show that ethanol blended fuel costs several cents more per gallon. Based on this factual situation, you have requested opinions on the following two questions:

1. What specific authority does the Governor have to issue this type of directive?

2. Can the Governor require state agencies to purchase a specific type of product which will result in higher costs to those agencies than estimated during the appropriation process, and thereby divert funds that would otherwise have been used for purposes intended by the general assembly?

> sary to convert the state's vehicle fleet to ethanol blended fuels. Please assist in those efforts when called upon. Your cooperation and example will provide a tremendous boost to the Governor's desire to make Iowa a leader in this important effort."

[2]Effective on May 26, 1987, Iowa Code section 18.115(9) (1987) was amended by H.F. 621 which required that:

> The state vehicle dispatcher and other state agencies, when advertising for bids for gasoline, shall also seek bids for ethanol-blended gasoline.

4 Iowa Legislative Service, p. 109.

GOVERNOR: STATE OFFICERS AND DEPARTMENTS; Governor's Authority over State Purchases. Iowa Const., Art. III, § 24, Art. IV, §§ 1, 9; Iowa Code §§ 8.3, 8.31, 8.39, 18.3(1), 18.115(9). The Governor's directive to state agencies to purchase ethanol-blended state fuel as implemented by the state vehicle dispatcher is not inconsistent with statute. Section 18.115(9) authorizes the vehicle dispatcher to issue guidelines for the purchase of gasoline by all state agencies; section 8.3(2) charges the Governor with the efficient and economical administration of state departments. It does not appear that the budgetary impacts of the decision would necessitate the diversion of funds from other appropriated purposes to such an extent that the legislative objectives of the appropriations to the various agencies could not be met. (Brick to Jochum, State Representative, 1-20-88) #88-1-5(L)

January 20, 1988

The Honorable Thomas J. Jochum
State Representative
State Capitol
L O C A L

Dear Representative Jochum:

You have requested an opinion of the Attorney General concerning the Governor's authority to issue a directive requiring state agencies to purchase a certain product that will result in higher costs than those estimated during the appropriation process.

On July 7, 1987, Governor Branstad announced that all state vehicles capable of running on ethanol blended fuel would use the fuel exclusively. This announcement came seven days after the commencement of fiscal year 1987-88. There was no directive regarding timelines for compliance other than the request to state agencies to begin the conversion process immediately.[1] On

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[1]The Governor did not issue an executive order. His announcement came during a press conference held July 7, 1987. Three weeks later, the Director of the Department of Management, issued a memorandum to all Department Heads which stated in part as follows:

> "Governor Branstad strongly believes that Iowa's state government should assume the lead in the use of ethanol blended fuels; accordingly, the Departments of General Services and Transportation and the Board of Regents have begun to take the steps neces-

I.

What specific authority does the Governor have to issue this type of directive?

Article IV, section 1 of the Constitution of the State of Iowa vests the Governor with the "Supreme Executive power of this State." This phrase is generally interpreted to mean that he has such powers as will secure efficient execution of the laws, as distinguished from the power to make or judge laws. 38 Am.Jur.2d Governor § 4 (1968); 16 Am.Jur.2d Constitutional Law § 216 (1967). Section 9 imposes upon the Governor the duty to "take care that the laws are faithfully executed." These two basic provisions are referred to as the "executive power" and the "duty to enforce the laws."[3] Although the Iowa Supreme Court has never been asked to decide whether these provisions are the source of the Governor's power to issue executive orders and administrative directives, other jurisdictions have upheld executive orders grounded upon such broad constitutional authority. See Matheson v. Ferry, 641 P.2d 674 (Utah 1982); People ex rel. Deukmejian v. Brown, 172 Cal.Rptr. 478, 624 P.2d 1206 (1981); Tucker v. State, 218 Ind. 614, 35 N.E.2d 270 (1941); State v. McPhail, 182 Miss. 360, 180 So. 387 (1938); Spear v. Reeves, 148 Cal. 501, 83 Pac. 432 (1906).

In addition, the Governor has legislatively granted authority for "[d]irect and effective financial supervision over all departments and establishments, and every state agency by whatever name . . . ." Iowa Code § 8.3(1) (1987). The Governor is also charged with the "efficient and economical administration of all departments and establishments of the government." § 8.3(2). In the present situation, the Governor's authority to recommend the use of ethanol-blended gasoline in state vehicles is grounded on a statutory grant of executive power to administer state agencies, in particular. §§ 8.3(1)-(2), Code of Iowa (1987).

The Director of General Services has statutory authority to establish and develop "in cooperation with the various state agencies, a system of uniform standards and specifications for purchasing." Iowa Code § 18.3(1). Further, the state vehicle dispatcher has express statutory authority over the purchase of

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[3]A comprehensive discussion of the history and development of gubernatorial power is "Gubernatorial Executive Orders as Devices for Administrative Direction and Control," 50 Iowa L. Rev. 78 (1964).

gasoline for all state-owned vehicles. Iowa Code § 18.115(9). The Governor's recommendation was carried out by directive of the state vehicle dispatcher, using this express statutory authority.

This is an instance where the Governor's recommendation for the purchase of state supplies was implemented by an agency which had been granted specific legislative authority to develop purchasing guidelines for all state agencies. We do not therefore find it necessary to address the Governor's authority to mandate actions by state agencies concerning matters wholly within an individual agency's statutory mandate nor the Governor's authority concerning regulatory rather than proprietary matters. We also do not address whether the Governor could require action by all state agencies in the absence of statutory authority for gubernatorial control or statutory authority for uniform requirements to be imposed on state agencies.

II.

Can the Governor require state agencies to purchase a specific type of product which will result in higher costs to those agencies than estimated during the appropriation process, and thereby divert funds that would otherwise have been used for purposes intended by the general assembly?

Article III, § 1 of the Constitution establishes three separate departments of state government:

> The Legislative, the Executive and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.

As previously discussed, Article IV, § 1 of the Constitution coupled with §§ 8.3(1)-(2) of the Code give the Governor certain authority to administer and supervise state agencies. However, Article IV, § 9, directs the Governor to execute faithfully the laws of the State; this "requires the Governor to execute the law as it emerges from the legislative process," 1980 Op.Att'yGen. 786, 792. Additionally, the power to appropriate funds for the operation of state agencies is given only to the Legislature by Article III, § 24. The Iowa Supreme Court has held that inherent in the legislative power to appropriate money is the authority to specify how the money shall be spent. Welden v. Ray, 229 N.W.2d 706, 709 (Iowa 1975). There appears to be no question that the Governor does not have constitutional authority to impound or

otherwise prevent the expenditure of a legislative appropriation. 1980 Op.Att'yGen. 786.[4] Rush v. Ray, 362 N.W.2d 479 (Iowa 1985); Welden v. Ray, 229 N.W.2d 706 (Iowa 1975); State ex rel. Turner v. Iowa State Highway Commission, 186 N.W.2d 141 (Iowa 1971).

We are not faced with a situation where the Governor is preventing the expenditure of a legislative appropriation. He has not attempted to limit the spending of appropriated funds in a way that is neither uniform nor proportionate among state departments. Although we know that ethanol blended gasoline costs more per gallon than unleaded gasoline, it does not appear that the budgetary impact of this higher expenditure for FY 1987-88 would be sufficient to necessitate the diversion of funds from other appropriated purposes to such an extent that the legislative objectives of the appropriation cannot be met. Indeed H.F. 621, amending Iowa Code § 18.115(9) to require the vehicle dispatcher to take bids for ethanol-blended gasoline suggests that encouraging state use of ethanol-blended gasoline harmonizes with a legislative objective.

We have not found any statute which would be violated by the Governor's directive nor are we aware of facts suggesting that the Governor's directive would thwart the objectives of any appropriation.

Very truly yours,

ANN MARIE BRICK
Assistant Attorney General

AMB:mlr

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[4]This opinion addressed the Governor's use of the item veto power to veto a legislatively-imposed condition upon an appropriation without vetoing the appropriation itself. The opinion concluded that is not a proper exercise of the veto power. The Governor may not exercise any creative legislative power by reducing the amount of an appropriation. However, the Governor has implied constitutional authority under Article IV, § 9, to make a reasonable judgment that a legislative objective can be accomplished by spending less than the sum appropriated for that objective. 1980 Op.Att'yGen. at 797.

LAW ENFORCEMENT: Peace Officers; Municipalities; Arrest; Implied Consent: Arrest outside jurisdiction. Iowa Code ch. 80D; §§ 28E.3, 28E.21, 28E.22, 28E.23, 28E.24, 28E.25, 28E.26, 28E.27, 28E.28, 321J.1(1)(b), 321J.1(7), 321J.6, 321J.6(1), 321J.6(1)(b), 321J.6(1)(c), 321J.6(1)(d), 321J.6(1)(e), 331.562(1)(a), 331.562(1)(b), 331.562(1)(c), 331.562(1)(d), 804.9, 804.22 (1987). 1. A municipal police officer does not have the authority to arrest as a peace officer outside of the boundaries of the municipality unless the municipality is part of a joint law enforcement district or the officer is a special or reserve sheriff's deputy. 2. A municipal police officer who is qualified to administer implied consent has the authority to administer implied consent outside of the municipality. (Ryan to Davis, Scott County Attorney, 1-19-88) #88-1-4(L)

January 19, 1988

William E. Davis
Scott County Attorney
Scott County Courthouse
416 East Fourth Street
Davenport, Iowa 52801

Dear Mr. Davis:

You have requested an opinion of the Attorney General concerning the authority of a municipally appointed police officer to act outside of the geographic boundaries of the municipality which appointed the officer. We shall address each of your questions in turn.

Your specific questions are as follows:

1. What is the extent of the authority of a municipally appointed police officer to act outside the geographic boundaries of the city which has appointed the officer?

2. If summoned by the Sheriff to assist in a specific call or investigation, does the County assume the liability for the actions of that peace officer and for the officer's injuries, etc. which the officer might suffer during the course of that investigation?

3. If a municipal police officer, while off duty and outside of the officer's jurisdiction, comes into contact with a crime committed in his presence does the officer have the authority to act as a peace officer or only as a private citizen?

Although the subject of peace officer authority has been the

subject of prior opinions,[1] we are addressing the issue in greater detail in this opinion.

This opinion does not address your second question concerning tort liability. Issues of liability generally would be determined under general principles of tort law and of agency law. This office does not issue opinions predicting potential tort liability. This is instead a matter for advice by the attorney representing the entity in question. By contrast, an Attorney General's Opinion resolves a specific legal question which is ascertainable by principles of statutory construction or legal research. We will therefore decline to render an opinion concerning potential tort liability.

As a general rule, a peace officer may not make arrests in his or her capacity as a peace officer outside of the geographic boundaries of the governmental entity for which he or she is an officer without express statutory authority to do so. State v. O'Kelly, 211 N.W.2d 589, 595 (Iowa 1973); accord People v. Wolf, 635 P.2d 213, 216 (Col. 1981); People v. Gupton, 139 Ill. App. 3d 530, 94 Ill. Dec. 182, 487 N.E.2d 1060, 1063 (1985); People v. Seybold, 77 Ill. App. 3d 614, 33 Ill. Dec. 70, 396 N.E.2d 295, 298 (1979); Stevenson v. State, 287 Mo. 504, 413 A.2d 1340, 1343 (1980); People v. Meyer, 424 Mich. 143, 379 N.W.2d 59, 64 (1985); State v. Filipi, 297 N.W.2d 275, 278 (Minn. 1980); Bounds v. Commissioner of Pub. Safety, 361 N.W.2d 145, 146 (Minn. Ct. App. 1985); State v. McDole, 734 P.2d 683, 685 (Mont. 1987); State v. Williams, 136 N.J. Super. 546, 347 A.2d 33, 35 (1975); State v. Hoffman, 490 Or. App. 523, 621 P.2d 78, 79 (1980); State v. McDonald, 260 N.W.2d 626, 627 (S.D. 1977); 16A E. McQuillin, The Law of Municipal Corporations § 45.18 at 122 (S. Flanagan ed., 3d rev. 1984).

A court retains personal jurisdiction over a criminal defendant regardless of how that defendant's presence was procured. See Frisbie v. Collins, 342 U.S. 519, 72 S. Ct. 509, 96 L. Ed. 541 (1952); Ker v. Illinois, 119 U.S. 436, 7 S. Ct. 225, 30 L. Ed. 421 (1886); State v. Lawless, 265 N.W.2d 733 (Iowa 1978). See also Annot., 25 A.L.R.4th 157 (1983). The question of personal jurisdiction, however, is quite limited and would not control the broader issues dealing with the validity of an arrest such as civil liability or search and seizure.

The officer has only the authority to make arrests as a private person outside of his or her jurisdiction. O'Kelly, 211 N.W.2d at 595. Iowa Code section 804.9 (1987) authorizes a

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[1]1980 Op. Atty. Gen. 882(L); 1980 Op. Atty. Gen. 261; 1972 Op. Atty. Gen. 439; 1950 Op. Atty. Gen. 72.

private person to make an arrest "[f]or a public offense committed or attempted in the person's presence" and "[w]hen a felony has been committed, and the person has reasonable grounds for believing that the person to be arrested has committed it." However, a private person who makes an arrest must immediately take the person arrested before the nearest magistrate. Iowa Code § 804.22 (1987). Therefore, an officer outside of the officer's jurisdiction could make a warrantless arrest as a private person when a public offense is committed or attempted in the officer's presence and when a felony has been committed and the officer has reasonable grounds for believing that the person to be arrested has committed the felony. Iowa Code § 804.9 (1987).

The municipally appointed police officer would have the authority to arrest as a peace officer outside the geographic boundaries of the municipality and within the county if the municipality and the county provided joint law enforcement under Iowa Code chapter 28E. Iowa Code §§ 28E.21-28E.28 (1987) (joint law enforcement districts); Iowa Code § 28E.3 (1987); see 1984 Op. Atty. Gen. 167, 169-70 (governmental units which have entered into a Chapter 28E agreement jointly exercise the powers which they are authorized to exercise separately); 1982 Op. Atty. Gen. 278(L). The municipally appointed officer would also have the authority to arrest as a peace officer within the boundaries of the county if the officer had been appointed by the county sheriff to serve as a special sheriff's deputy under Iowa Code section 331.562(1)(a-d) (1987) or a reserve deputy under Iowa Code chapter 80D (1987). Iowa Code § 4.1(19) (1987); 1984 Op. Atty. Gen. 119 (L); 1982 Op. Atty. Gen. 148, 149; 1978 Op. Atty. Gen. 822, 823; 1972 Op. Atty. Gen. 605, 607-08; see Bowman v. Overturff, 229 Iowa 329, 332-33, 294 N.W.2d 568, 570 (1940) (authority to appoint special deputies).

Additionally, a municipally appointed peace officer who is qualified under Iowa Code section 321J.1(7) (1987) to administer the statutory implied consent procedures retains this authority outside of the geographic boundaries of the municipality which appointed the officer. State v. Wagner, 359 N.W.2d 487, 490 (Iowa 1984). In Wagner, an Iowa state trooper who was investigating an automobile accident which occurred in Iowa administered implied consent to the driver at a Wisconsin hospital. The Iowa Supreme Court held that the trooper retained his authority to administer the Iowa implied consent procedures in Wisconsin since he was acting as an administrative agent of the Iowa Department of Transportation in administering the implied consent procedures to the driver. 359 N.W.2d at 595; accord 1982 Op. Atty. Gen. 392 (L) (Peace officer who is qualified to administer implied consent procedures has authority to do so anywhere in Iowa; accord 1980 Op. Atty. Gen. 882 (L).)

A qualified officer may administer the implied consent procedures after a lawful arrest for operating a motor vehicle while under the influence of alcohol or drugs. Iowa Code § 321J.6(1) (1987). There is no reported Iowa appellate court decisions holding that an arrest by an officer as a private person would be a "lawful arrest" for implied consent purposes. However, since a peace officer may lawfully make an arrest as a private person outside of his or her jurisdiction, O'Kelly, 211 N.W.2d at 595, a valid arrest made by the officer as a private person would be a lawful arrest. Id.,; Iowa Code § 804.9 (1987). Therefore, the officer's valid arrest in the capacity of a private person would be a "lawful arrest" as required by section 321J.6(1) as an alternate prerequisite for the administration of implied consent procedures to the person arrested. Bounds, 361 N.W.2d at 146 (valid private person's arrest by officer outside of his jurisdiction is valid arrest for subsequent implied consent procedures); McDole, 734 P.2d at 685-86 (valid private person's arrest by peace officer outside of his jurisdiction provided valid basis for subsequent administration of implied consent procedures). A qualified officer may also administer implied consent procedures without a prerequisite arrest when the person operates a motor vehicle under circumstances which give reasonable grounds to believe that the person has been operating a motor vehicle under the influence of alcohol or drugs and the person has been involved in an automobile accident involving personal injury or death, Iowa Code section 321J.6(1)(b) (1987), the person has refused to take a preliminary breath screening test, Iowa Code section 321J.6(1)(c) (1987), the results of the preliminary breath screening test administered indicate an alcohol concentration of 0.10 grams of alcohol or more per two hundred ten liters of breath, Iowa Code sections 321J.6(1)(d) and 321J.1(1)(b) (1987), or the results of the preliminary breath screening test indicate an alcohol concentration of less than 0.10 grams of alcohol per two hundred ten liters of breath and the peace officer has reasonable grounds to believe that the person is under the influence of alcohol, drugs, or a combination of alcohol and drugs. Iowa Code §§ 321J.6(1)(e) and 321J.1(1)(b) (1987). When an arrest is not a prerequisite to the administration of implied consent procedures, the officer has the authority to administer implied consent outside of his or her jurisdiction regardless of his or her authority to arrest as a peace officer. Wagner, 359 N.W.2d at 959; see Department of Pub. Safety v. Juncewski, 308 N.W.2d 316, 321 (1981) (qualified officer retained authority to administer preliminary screening test outside of his jurisdiction); Bounds, 361 N.W.2d at 146 (qualified officer retained authority to administer implied consent procedures and preliminary screening test outside of his jurisdiction); McDonald, 260 N.W.2d at 628 (qualified officer

retained his authority to administer implied consent procedures outside of his jurisdiction).

It is therefore our opinion that outside of the geographic boundaries of the appointing city a municipally appointed police officer may make valid arrests in the officer's capacity as a private person for public offenses committed or attempted to be committed in the officer's presence or when a felony has been committed and he or she has reasonable grounds for believing that the person to be arrested has committed it. The officer may also administer the implied consent procedures of Iowa Code section 321J.6 (1987) outside of the geographic boundaries of the city which has appointed the officer if the officer is qualified under Iowa Code section 321J.1(7) to administer the implied consent procedures. When a municipally appointed police officer is off duty or outside of his or her jurisdiction, the officer has only the authority to act as a private person in making arrests, but may administer the implied consent procedures of section 321J.6 if the officer is qualified under section 321J.1(7) to do so.

Sincerely,

Roxann M. Ryan

ROXANN M. RYAN
Assistant Attorney General

RR/sb

COUNTY AND COUNTY OFFICERS; Mentally ill; Cost of Commitment is county obligation. Iowa Code §§ 230.1; 230.10; 230.15; 230.26; 1987 Iowa Acts, ch. 36, § 1. A county may not establish accounts receivable nor keep an index for the cost associated with civil commitments of mentally ill persons. (Robinson to Welsh, State Senator, 1-15-88) #88-1-3(L)

January 15, 1988

The Honorable Joe Welsh
Iowa State Senate
Capitol Building
LOCAL

Dear Senator Welsh:

You recently asked for an opinion of the Attorney General concerning the following:

> Whether a county may establish accounts receivable and keep an index for the cost associated with the civil commitment of a mentally ill person. These costs would include the cost of taking into custody, care, investigation, admission, and commitment of the mentally ill person.

You included with your request an October 12, 1987 letter from Donna L. Smith, chairperson of the Dubuque County Board of Supervisors, and an opinion of the Dubuque County Attorney dated October 7, 1987, which refers to prior opinions of this office.

In our opinion a county may not establish accounts receivable nor keep an index for the cost associated with civil commitments of mentally ill persons.

Iowa Code § 230.1 provides:

> 230.1 Liability of county and state.
>
> The necessary and legal costs and expenses attending the taking into custody, care, investigation, admission, commitment, and support of a mentally ill person admitted or committed to a state hospital shall be paid:
>
> 1. By the county in which such person has a legal settlement, or

> 2. By the state when such person has no legal settlement in this state, or when such settlement is unknown.
>
> The legal settlement of any person found mentally ill who is a patient of any state institution shall be that existing at the time of admission thereto.

§ 230.26 provides:

> 230.26 Auditor to keep record.
>
> The auditor of each county shall keep an accurate account of the cost of the maintenance of any patient kept in any institution as provided for in this chapter and keep an index of the names of the persons admitted or committed from such county. . . .

It is clear that the costs prior to commitment are not the same as the cost of maintenance at an institution or support cost. Only the latter is subject to reimbursement. Section 230.10 now provides:

> Payment of costs.
>
> All legal costs and expenses attending the taking into custody, care, investigation, and admission or commitment of a person to a state hospital for the mentally ill under a finding that such person has a legal settlement in another county of this state, shall be charged against the county of legal settlement.

The last session of the legislature removed the initial payment by the commiting county and placed it directly with the county of legal settlement. 1987 Iowa Acts, ch. 36, §1. This section again shows the distinction between cost prior to commitment and those after.

Thus, we agree with the opinion of the Dubuque County Attorney as expressed in his letter of October 7, 1987 and the several opinions of the Attorney General which have reached the conclusion that costs paid by the county for commitment expenses are the obligation of the county alone and are not reimbursable. See 1984 Op.Att'yGen. 123 (#84-3-1(L)), 1966 Op.Att'yGen. 104, 1948 Op.Att'yGen. 189, 1930 Op.Att'yGen. 75, and 1904

Op.Att'yGen. 267. See also 1986 Op.Att'yGen. 55 (#85-8-11(L)) and Op.Att'yGen. #87-3-4(L).

In Iowa Code § 230.15 we find:

> 230.15 Personal liability.
>
> A mentally ill person and a person legally liable for the person's support remain liable for the support of the mentally ill person as provided in this section. . . . The county auditor, subject to the direction of the board of supervisors, shall enforce the obligation created in this section as to all sums advanced by the county.

The sentence "The county auditor, subject to the direction of the board of supervisors, shall enforce the obligation created in this section as to all sums advanced by the county." is the one which is perhaps the most troublesome for our consideration.

In our opinion, the phrase "all sums advanced by the county" would be limited by the latter part of § 230.15 to the sums paid by the county "for the care of a person at a mental health institute. . . ." Again, these sums would not include the costs prior to civil commitments such as hospitalization and psychiatric expenses. These are similar to "medicine and medical attendance cost" rejected by the Supreme Court in Jones County v. Norton, 91 Iowa 680, 682-683, 60 N.W. 200, 201 (1894).

There being no statutory authority establishing liability, the county cannot collect these particular costs, as there is also no common law liability. Delaware County v. McDonald, 46 Iowa 170 (1877), Jones County v. Norton, supra.

The "appropriate forum for . . . expansion of the present limited right . . . is the legislature and not the courts." Dept. of Human Services v. Brooks, 412 N.W.2d 613, 617 (Iowa 1987).

Sincerely,

Stephen C. Robinson
Assistant Attorney General

SCR/mo

BEER AND LIQUOR: Licensing of Food Establishments. 1987 Iowa Acts, Ch. 22, §§ 4 and 5; 1986 Iowa Acts, Ch. 1245 and Ch. 1246; Iowa Code Ch 123 and 170 (1987); Iowa Code §§ 123.4, 123.30, 123.30(1), 170.1(1), 170.1(2), 170.2, 170.4, 170.5, 170.55 (1987). A class "E" liquor licensee is subject to the liquor licensing requirements of chapter 123, as well as the food establishment licensing provisions in chapter 170. A conflict does not exist between the Iowa Alcoholic Beverages Control Act and the food establishment licensing provisions found in chapter 170. (Walding to Sweeney, Director, Department of Inspection and Appeals, 1-14-88) #88-1-2(L)

January 14, 1988

Mr. Charles Sweeney, Director
Department of Inspections
and Appeals
2nd Floor, Lucas Bldg.
L O C A L

Dear Mr. Sweeney:

We are in receipt of your request for an opinion of the Attorney General regarding the relationship between Iowa Code chapter 123, the Iowa Alcoholic Beverages Control Act, and the food establishment licensing provisions found in Iowa Code ch. 170. Specifically, you have asked whether a class "E" liquor licensee is subject to dual licensing pursuant to the provisions of chapters 123 and 170 or, alternatively, whether a conflict exists between the two licensing statutes.

Initially, I would observe that the Alcoholic Beverages Division of the Department of Commerce administers and enforces the laws concerning beer, wine and alcoholic liquor. Iowa Code § 123.4 (1987). Food establishments are regulated, licensed and inspected by the Director of the Department of Inspections and Appeals. Iowa Code § 170.55 (1987).

The authority establishing the class "E" liquor license is found in Iowa Code § 123.30 (1987), as amended by 1987 Iowa Acts, Ch. 22. A class "E" liquor license authorizes the holder to purchase alcoholic liquor exclusively from the Alcoholic Beverages Division and to wholesale alcoholic liquor to holders of liquor licenses and retail alcoholic liquor to the general public for off premises consumption only. As a condition to receiving a liquor wholesale license, an applicant must consent to inspection of the licensed premises for violations of the provisions of chapter 123. Iowa Code § 123.30(1) (1987), as amended by 1987 Iowa Acts, Ch. 22, §§ 4 and 5. Further, no liquor wholesale license will be issued to an applicant whose premises "do not conform to all applicable laws, ordinances,

resolutions, and health and fire laws." [Emphasis added.] Id. Thus, while § 123.30 recognizes that a class "E" liquor licensee is subject to the various licensing requirements of chapter 123 (e.g. dram shop liability, § 123.92, illegal sales to persons under legal age, §§ 123.49(2)(h), hours of sale, § 123.49(2)(b), etc.), chapter 123 is not intended to be the sole or exclusive licensing requirements. A class "E" liquor licensee is still governed by and subject to other licensing authorities.

Whether a class "E" liquor licensee is subject to food establishment licensing provisions of chapter 170 is dependent on a finding that a chapter 123 licensed premises is a "food establishment" as defined in Iowa Code § 170.1(2) (1987). That section, in relevant part, defines a "food establishment" as a, "place in which food is kept, produced, prepared, or distributed for commercial purposes for off the premises consumption, except those premises covered by a current class "A" beer permit as provided in chapter 123." [Emphasis added.] Relevant for our purposes is the definition of "food" which is defined in Iowa Code § 170.1(1) (1987) as, "any raw, cooked, or processed edible substance, ice, beverage, or ingredient used or intended for use in whole or in part for human consumption." [Emphasis added.] This Office has previously opined that a "food service establishment includes an establishment serving alcoholic beverages or beer." 1980 Op.Att'yGen. 845 (#80-10-13(L)). Thus, the holder of a class "E" liquor license is a food establishment for purposes of chapter 170 because a liquor wholesaler, by license, is authorized to distribute a beverage for off premise consumption.

Because a class "E" liquor licensee is a food establishment, the licensee is required to obtain a food establishment license and submit to an inspection by the Department of Inspection and Appeals prior to opening. Iowa Code §§ 170.2 and 170.4 (1987). The fee for the license is established in Iowa Code § 170.5 (1987). Further, a class "E" liquor licensee is subject to the sanitary construction, sanitation and fire requirements found in chapter 170.

The question then arises whether there is an irreconcilable conflict between the provisions of Iowa Code Ch. 123 governing class "E" liquor license regulation and Iowa Code § 170.55. That section gives the Director of the Department of Inspection and Appeals "sole and exclusive authority to regulate, license, and inspect food establishments."[1] We do not read this section as

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[1] Section 170.55 states:

The director [of the Department of Inspec-

exempting food establishments from all other licensing authorities which may be applicable to certain of their activities. Section 170.55 appears to be concerned with enforcement of the sanitation code and not with other statutory requirements; the section primarily concerns when municipal corporations may obtain authority for local, rather than state, enforcement. This Office construed the interrelationship between Iowa chapter 170A, governing food service establishments, and chapter 123 in 1980 as follows:

> It should be noted that a beer or liquor license is issued for the privilege of selling beer or liquor in this state. No inspections for sanitation result from this license. The Iowa Beer and Liquor Control Department has no duty or power to inspect for sanitation under Ch. 123, The Code 1979. The duty to inspect food service establishments, including bars and food service establishment holders of liquor or beer licenses falls to the Department of Agriculture [now the Department of Inspections and Appeals] under Ch. 170A.

1980 Op.Att'yGen. 845 (#80-10-13(L), p. 3-4).

The amendments establishing the class "E" liquor license and the adoption of Iowa Code § 170.55 were made in the same session

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> tions and Appeals] has sole and exclusive authority to regulate, license, and inspect food establishments and to enforce the retail food sanitation code in Iowa. Municipal corporations shall not regulate, license,inspect, or collect fees from food establishments except as provided for in agreements entered into between the director and the municipal corporation.
>
> If a municipal corporation wants its local board of health to license, inspect, and otherwise enforce the retail food store sanitation code within its jurisdiction, the municipal corporation may enter into an agreement to do so with the director. The director may enter into such an agreement if the director finds that the local board of health had adequate resources to perform the required functions.

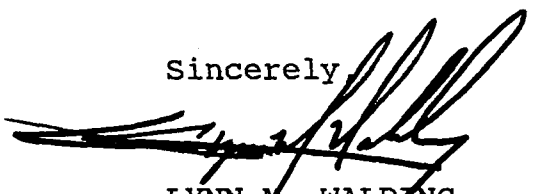
of the General Assembly in 1986 Iowa Acts, Ch. 1246 and Ch. 1245, respectively. We would not read § 170.55 as precluding regulation of class "E" liquor licensees under chapter 123 because such a reading would make many of the provisions of chapter 123 ineffectual as applied to those licenses. Further, the provisions of chapter 123 are more specific concerning the class of entities with which we are concerned, class "E" liquor licensees.

We therefore construe § 170.55 as reserving exclusive authority for regulation of the food sanitation code to the Director of the Inspection and Appeals Department but not as precluding enforcement of the requirements of chapter 123 by the Alcoholic Beverages Division. This reading harmonizes and effectuates all of the relevant statutes. See Egan v. Naylor, 208 N.W.2d 915 (Iowa 1973) (a statute must be harmonized, if possible, with other statutes relating to the same subject).

Accordingly, it is our judgment that a class "E" liquor licensee is subject to the liquor licensing requirements of chapter 123, as well as the food establishment licensing provisions in chapter 170. A conflict does not exist between the Iowa Alcoholic Beverages Control Act and the food establishment licensing provisions found in chapter 170.

Nevertheless, we would strongly urge that the possibility of exempting all wholesalers of alcoholic beverages from the food establishment licensing provisions of chapter 170 be considered by the Iowa General Assembly. The same rationale for exempting class "A" beer permittees (beer wholesalers) from the definition of a "food establishment," see Iowa Code § 170.1(2) (1987), and thus exempting beer wholesalers from the licensing requirements of chapter 170, would seem equally applicable to any wholesaler of an alcoholic beverage.

Sincerely,



LYNN M. WALDING
Assistant Attorney General

PUBLIC RECORDS: Ipers membership. Iowa Code ch. 22; §§ 22.1, 22.2, 22.7. Iowa Code ch. 97B; §§ 97B.11. 5 U.S.C. §§ 551(1), 552(b)(6). Iowa Admin. Code Ch. 581; §§ 21.23(1), 21.23(2). The names of legislators who elect membership in IPERS is not personal information which would be a confidential record under § 22.7(11). Disclosure of such information would be treated similarly under § 552(b)(6) of the federal Freedom of Information Act. (Pottorff to Tyrrell, State Representative, 1-6-88) #88-1-1(L)

January 6, 1988

The Honorable Phil Tyrrell
State Representative
222 North Mill
North English, Iowa 52316

Dear Representative Tyrrell:

You have requested an opinion of the Attorney General concerning application of public records laws to records of members of the Iowa Public Employees Retirement System [hereinafter IPERS]. You point out that legislators must opt to become members of IPERS. You specifically ask whether the names of legislators who elect membership in IPERS is personal information which would be a confidential record under § 22.7(11) of the Iowa Public Records Law or under the federal Freedom of Information Act. In our opinion, the names of legislators who elect membership in IPERS is not personal information which would be a confidential record under § 22.7(11) of the Iowa Public Records Law. Disclosure of such information would be treated similarly under § 552(b)(6) of the federal Freedom of Information Act.

I. STATE LAW

Iowa law provides that every person "shall have the right to examine and copy public records or the information" contained in them. Iowa Code § 22.2(1) (1987). A "public record," in turn, is defined in relevant part to include "all records, documents, tape, or other information, stored or preserved in any medium, of or belonging to this state or any . . . department . . . ." Iowa Code § 22.1 (1987). Records reflecting the names of IPERS members would fall within this definition.

The right to examine and copy public records may be limited in one of two alternative ways. First, records may be made confidential by independent statutes which prohibit the public from access. See, e.g., Iowa Code § 422.20 (1987) (tax return

information); Iowa Code § 901.4 (1987) (presentence investigation reports). Second, records itemized under § 22.7 may be kept confidential in the discretion of the lawful custodian who may restrict the public from access. Iowa Code § 22.7 (1987). We find no independent statutes which prohibit the public from access to membership information. See generally ch. 97B (1987). The relevant inquiry, therefore, is whether membership information may be kept confidential under § 22.7 in the discretion of the lawful custodian.

Section 22.7 by its terms contemplates that records itemized in subsections 1-23 may be released by the lawful custodian under some circumstances. Section 22.7 states that "[t]he following records shall be kept confidential unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information." Iowa Code § 22.7 (1987) (emphasis added). In previous opinions we have construed this language to vest the lawful custodian with discretion to release records which are itemized in the subsequent subsections.[1] 1982 Op.Att'yGen. 512, 515; Op.Att'yGen. 80-9-19(L).

The specific subsection about which you inquire applies to "[p]ersonal information in confidential personnel records of public bodies . . . ." Iowa Code § 22.7(11) (1987). In order to fall within this subsection the records must be personnel records which: 1) are designated and treated as confidential; 2) involve personnel matters; and 3) contain personal information on the personnel matters. 1982 Op.Att'yGen. 3, 5. The first and second prongs of this three-part test involve factual assessments. The third prong, however, is dispositive. In our view, records of the names of legislators who are members of IPERS cannot meet the third prong of this three-part test because this information is not "personal" information.

The Iowa Supreme Court has not delineated what constitutes personal information. The Court, however, has delineated some information that does not constitute personal information. In City of Dubuque v. Telegraph Herald, Inc., 297 N.W.2d 523 (Iowa 1980), the Court refused to apply § 22.7(11) to information contained in applications for employment. Relying on the federal analogue in 5 U.S.C. § 552(b)(6), which concerns personnel files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, the Court ruled that such informa-

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[1]Previous opinions construed § 68A.7 which has been renumbered as § 22.7. The language in issue has remained unchanged.

tion is not "personal" information that a right of privacy would protect. Id. at 526. Based on City of Dubuque, personal information apparently would not include names, addresses, past employers, education, training and experience of an applicant for employment. Id. at 525, 529. See 1982 Op.Att'yGen. at 7.

City of Dubuque makes clear that information is not "personal" merely because it may identify data with a specific individual. A privacy interest in the underlying information must be identified. We can discern no privacy interest in disclosure of the names of persons who opt to belong to a retirement system which is partially publicly funded. See generally, Iowa Code § 97B.11 (1987).

We are aware that the Department of Personnel has promulgated rules which provide some confidentiality to these records. Rule 21.23(1) states that records maintained by the Department contain personal information. 581 Iowa Admin. Code § 21.23(1). Rule 21.23(2) further states that summary information "concerning the demographics of the IPERS membership and general statistical information concerning the system" are public records available under chapter 22. 581 Iowa Admin. Code § 21.23(2). In light of City of Dubuque, however, we do not believe these rules could be applied validly to withhold names of members.

We do not suggest that IPERS records may not contain additional information which may fall within the scope of § 22.7(11). We opine only that names of members, alone, do not fall within the scope of § 22.7(11).

II. FEDERAL LAW

The federal Freedom of Information Act [hereinafter FOIA] is the federal counterpart to the state public records law.[2] The federal statute establishes a general policy of full disclosure

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[2]It is unclear whether FOIA even applies to IPERS records. Generally, the federal statute applies to federal, not state, agencies. See 5 U.S.C. § 551(1) ("'agency' means each authority of the Government of the United States"); St. Michael's Convalescent Hospital v. California, 643 F.2d 1369, 1373-74 (9th Cir. 1981) (federal regulations on expenditure of federal funds insufficient to convert state body into federal agency under FOIA). We recognize, however, that you may have an interest in considering the consistency between state and federal law. Accordingly, we will address the federal statute.

of records unless the information requested is clearly exempted. Department of Air Force v. Rose, 425 U.S. 352, 361, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11, 21 (1976). An exemption is provided for "personnel . . . files . . . or similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). This exemption is to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information. Department of State v. Washington Post Co., 456 U.S. 595, 599, 102 S.Ct. 1957, 1959, 72 L.Ed.2d 358, 362-63 (1982).

Applying the exemptions in FOIA, the federal courts utilize a balancing test which weighs the public interests served by disclosure against the private interests in protecting against invasion of privacy. See, e.g., Department of Air Force v. Rose, 425 U.S. at 372-73, 96 S.Ct. at 1604-05, 48 L.Ed.2d at 27-28. Generally, this balancing test is applied in terms of the specific request and the public interest to be vindicated by that specific request. See, e.g., National Association of Retired Federal Employees v. Horner, 633 F.Supp. 1241, 1244 (D.D.C. 1986). Our ability to assess the applicability of FOIA to a request for such information, therefore, is limited since we can only speculate on the purpose of such a request and the public interest which would be placed in issue. A recent federal district court decision, however, suggests that such information would be disclosed under FOIA as well.

In National Association of Retired Federal Employees v. Horner, 633 F.Supp. at 1242-45, a federal district court assessed application of this exemption to a request for the names and addresses of persons added to the annuity rolls of the federal retirement system during a specific time period. The requestor, a non-profit association concerned with administration of the federal government's civilian retirement system and other issues affecting the aging, sought names and addresses of persons added to annuity rolls between April 1, 1981, and December 31, 1984, in order to solicit membership in the association. Id. at 1242. The Court determined that the public interest in facilitating dissemination of information about the association's services outweighed the relatively minor privacy interests of the federal employees in their names and addresses. Id. at 1244-45. See also Disabled Officer's Association v. Rumsfeld, 428 F.Supp. 454, 458 (D.D.C. 1977), aff'd without opinion sub nom., Disabled Officer's Association v. Brown, 574 F.2d 636 (D.C. Cir. 1978) (names and addresses of retired disabled officers disclosed).

We consider Horner to be a well-reasoned application of § 552(b)(6). Significantly, the Horner Court dismissed as "relatively minor" the privacy interests of the annuitants in

their home addresses but acknowledged authority for that proposition in other circuits. National Association of Retired Federal Employees v. Horner, 633 F.Supp. at 1243-44. Cf. Heights Community Congress v. Veterans Administration, 732 F.2d 526, 529 (6th Cir. 1984) ("important privacy interest" in home address). In the situation which you pose, however, legislators' home addresses are generally public information. See, e.g., 1985-86 Iowa Official Register, pp. 22-23 (abridged ed.) In light of Horner and in the absence of unforeseen factors which may affect the public interest in disclosure, therefore, we believe such information would not be exempt from disclosure under FOIA.

In summary, it is our opinion that the names of legislators who elect membership in IPERS is not personal information which would be a confidential record under § 22.7(11) of the Iowa Public Records Law. Disclosure of such information would be treated similarly under § 552(b)(6) of the federal Freedom of Information Act.

Sincerely,

Julie F. Pottorff

JULIE F. POTTORFF
Assistant Attorney General

JFP:mlr

OPEN MEETINGS; PUBLIC RECORDS; SCHOOLS; Advisory Committees. Iowa Code §§ 20.9, 20.17(3); 21.2(1); 22.1, 22.2(1), 294A.15; Iowa Acts Ch. 224 § 11. A committee appointed by a board of directors of a school district or an area education agency pursuant to Iowa Code § 294A.15 is not a governing body subject to chapter 21 pertaining to open meetings because such a committee possesses no more than advisory authority. A committee appointed by a board of directors of a school district or an area education agency pursuant to Iowa Code § 294A.15 is a committee of a school corporation and the records of such a committee are public records subject to chapter 22 pertaining to public records. (Johnson to Miller, State Representative, 2-18-88) #88-2-6(L)

February 18, 1988

The Honorable Tom H. Miller
State Representative
State Capitol
LOCAL

Dear Representative Miller:

You have requested an opinion of the Attorney General regarding the applicability of Iowa Code chapters 21 and 22, commonly known as the Open Meetings and Public Records Laws, to a committee appointed pursuant to Iowa Code § 294A.15.

Your request asks whether a committee appointed pursuant to section 14 of House File 499 (hereinafter Iowa Code § 294A.15) is subject to the requirements of chapter 21 ("Official Meetings Open to the Public") and chapter 22 ("Examination of Public Records"). We conclude that a section 294A.15 committee is not subject to the requirements of chapter 21 pertaining to open meetings, but the records of such a committee are public records subject to the requirements of chapter 22. The open meeting and public records aspects of your inquiry are dealt with separately below.

CHAPTER 21 -- OPEN MEETINGS

Provisions of chapter 21, pertaining to open meetings, are limited to "governmental bodies." Iowa Code § 21.2(1) defines a "governmental body" for purposes of chapter 21 as follows:

> a. A board, council, commission or other governing body expressly created by the statutes of this state ...
>
> b. A board, council, commission, or other governing body of a political subdivision or tax-supported district in this state.
>
> c. A multimembered body formally and directly created by one or more boards, councils, commissions, or other

> governing bodies subject to paragraphs "a" and "b" of this subsection.

Opinions of the Attorney General have interpreted Iowa Code § 21.2(1) as limiting chapter 21 to a body that possesses decision-making or policy-making authority. 1980 Op.Att'y Gen. 148, 151-153; 1984 Op.Att'y.Gen. 152 Op.Att'yGen. #84-8-1 (L). A committee whose authority is limited to studying a problem and providing recommendations is not a governmental body subject to the open meetings law. Id.; Op.Att'y.Gen. #87-3-7(L).

A committee appointed pursuant to Iowa Code § 294A.15 "to develop a proposal for distribution of phase III moneys" serves in only an advisory capacity. Iowa Code § 294A.15 provides, in pertinent part, that:

> the proposal developed by the committee shall be submitted to the board of directors of the school district or area education agency for consideration by the board in developing a plan.

It is clear that an Iowa Code § 294A.15 committee is limited to making recommendations to the appropriate board for distribution of phase III moneys. The final decision remains with the board of directors of the school district or area education agency. Therefore, a committee appointed pursuant to Iowa Code § 294A.15 is not a "governmental body" subject to the provisions of chapter 21 pertaining to open meetings.

It should be noted that Iowa Code chapter 21 expresses a strong policy preference for openness. Although not subject to the procedural requirements or the sanction of chapter 21, an advisory or study group which will report to a governing body might well consider the public expectation that it will publicly conduct its business. See 1980 Op. Att'y. Gen. 148, 153. We would also note that in enacting Iowa Code § 294A.15 the legislature apparently sought to maximize public input by providing for the appointment of committees consisting of "representatives of school administrators, teachers, parents and other individuals interested in the public schools of the school district." Closing the meetings of a section 294A.15 committee unnecessarily could be seen as inconsistent with the spirit of the statutory scheme for the development of a phase III plan.

CHAPTER 22 -- PUBLIC RECORDS

You have also asked whether a committee appointed pursuant to Iowa Code § 294A.15 is subject to the requirements of Iowa Code chapter 22 pertaining to examination of public records.

Iowa Code § 22.2(1) provides, in pertinent part, 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.
>
> A "public record" is defined in Iowa Code § 22.1 as:
>
> ... all records, documents, tapes, or other information, stored or preserved in any medium, of or belonging to this state or any other county, city, township, school corporation, political subdivision, or tax-supported district in this state, or any branch, department, board, bureau, commission, council, or committee of any of the foregoing.

Iowa Code § 294A.15 provides for the appointment of committees by the board of directors of a school district or area education agency to develop a proposal for distribution of Phase III monies. School Districts (Iowa Code section 274.1) and area education aagencies (Iowa Code § 273.2) are school corporations. A section 294A.15 committee is, therefore, a committee of a school corporation. As such, the records of a section 294A.25 committee are public records as defined in Iowa Code § 22.1.

OTHER EXEMPTIONS

You have further inquired as to whether there are any exemptions to the requirements of chapter 21 (open meetings) or chapter 22 (public records) which would be applicable to a committee appointed pursuant to Iowa Code § 294A.15 other than the exemptions specifically granted in chapter 21 or 22. We have already concluded that an Iowa Code § 294A.15 committee is not subject to chapter 21 pertaining to open meetings. Therefore, it is unnecessary to discuss other exemptions from chapter 21 that might be applicable to such a committee.

Chapter 22 pertaining to public records contains a list of records that are to be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information. See Iowa Code § 22.7. It is difficult to anticipate every possible factual situation relating to records that may be encountered by a section 294A.15 committee, and we would not speculate as to whether there are exceptions other than those found in chapter 22, that would be applicable to such a committee. It should be noted, however, that if confidential personnel records are utilized by such a committee, the records may be exempt pursuant to Iowa Code § 22.7(11).

CHAPTER 20 PROVISIONS

Your final question asks whether there are any provisions of chapter 20 (Collective Bargaining) which relates to open meetings or open records which would restrict public access to meetings or records of committees established pursuant to Iowa Code § 294A.15. Once again, section 294A.15 committees are not subject to the requirements of chapter 21 pertaining to open meetings, and the exceptions to chapter 21 requirements that are found in chapter 20 are inapplicable, to such a committee.[1] There are no applicable exceptions to chapter 22, pertaining to public records, found in chapter 20.

CONCLUSION

In conclusion, it is our opinion that committees appointed pursuant to Iowa Code § 294A.15 are not subject to the requirements of Iowa Code chapter 21 pertaining to open meetings due to the fact that such committees lack decision-making or policy-making authority and are not governing bodies. The records of a section 294A.15 committee are, however, subject to the provisions of Iowa Code chapter 22 pertaining to public records. There do not appear to be any exemptions to chapter 22 that would be applicable to the records of such a committee, nor are the provisions of Iowa Code chapter 20 which relate to

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[1] Iowa Code § 294A.15 provides, in pertinent part, as follows:

> For the school year beginning July 1, 1987, if the school district or area education agency is organized for collective bargaining purposes under Chapter 20, the portions of the proposed plan that are within the scope of negotiations specified in Section 20.9 require the mutual agreement by January 1, 1988 of both the board of directors of the school district or area education agency and the certified bargaining representative for the certificated employees. In succeeding years, if the school district or area education agency is organized for collective bargaining purposes, the portions of the proposed plan that are within the scope of the negotiations specified in Section 20.9 are subject to Chapter 20.

The exceptions to Chapter 21 open meetings requirements found in Iowa Code § 20.17(3) pertaining to negotiating sessions and strategy meetings, while inapplicable to a § 294A.15 committee, would be applicable to the respective boards as to the portions of the proposed plan that are within the scope of negotiations specified in Iowa Code § 20.9.

collective bargaining applicable to a committee appointed pursuant to Iowa Code § 294A.15.

Sincerely,

Ray Johnson

RAY JOHNSON
Assistant Attorney General

REAL PROPERTY/COUNTY RECORDER AND AUDITOR: Recording notice of nonjudicial mortgage foreclosure. Iowa Code §§ 558.57, 558.64 (1987); Iowa Code Supp. §§ 655A.3, 655A.7, 655A.8 (1987). The county recorder and auditor must treat a notice of nonjudicial mortgage foreclosure as an instrument unconditionally conveying real estate by collecting the transfer fee and updating the auditor's transfer books. (Smith to Metcalf, Black Hawk County Attorney, 2-18-88) #88-2-5(L)

February 18, 1988

Mr. James Metcalf
Black Hawk County Attorney
B-1 Courthouse Building
Waterloo, Iowa 50703

Dear Mr. Metcalf:

You have requested an opinion of the Attorney General concerning the recording of instruments evidencing a nonjudicial mortgage foreclosure. We paraphrase your question as follows:

> Whether a notice of nonjudicial mortgage foreclosure including proofs of service filed for recording pursuant to Iowa Code Supp. § 655A.7 (1987) is an "instrument unconditionally conveying real estate" which Iowa Code § 558.57 (1987) requires to be entered on the auditor's transfer books.

In responding to your request, we first consider the consequences of filing the notice of nonjudicial mortgage foreclosure with proofs of service. Nonjudicial foreclosure of nonagricultural mortgages was authorized by 1987 Iowa Acts, ch. 142, §§ 17 - 25, which created a new Iowa Code ch. 655A. The new nonjudicial mortgage foreclosure procedure appears to have been patterned after Iowa Code ch. 656 (1987), which authorizes nonjudicial forfeiture of real estate contracts. The new chapter authorizes the mortgagee to serve a notice of nonjudicial foreclosure on a defaulting mortgagor. The notice must inform the mortgagor of the right to serve a rejection of nonjudicial foreclosure or cure the payment default within thirty days of service of the notice. After expiration of thirty days without rejection of notice or cure of the default, § 655A.7 authorizes the mortgagee to file a copy of the notice and proofs of service with the county recorder.

The effects of filing the notice with proofs of service are specified in Iowa Code Supp. § 655A.8 (1987). Subsection 1 states that "(t)he mortgagee acquires and succeeds to all interest of the mortgagor in the real estate." Thus, one effect of the filing is to unconditionally convey title from the mortgagor to the mortgagee. The recorded notice including proofs of service is the functional equivalent of a sheriff's deed issued pursuant to judicial foreclosure.

Iowa Code §§ 558.57-558.67 (1987) require the county recorder and county auditor to perform various duties related to maintaining records of real estate conveyances. When an instrument unconditionally conveying real estate is filed with the recorder for recording, § 558.57 requires the recorder to forward it to the auditor to update the real estate transfer books that the auditor is required to maintain.

Although § 558.64 requires the auditor to enter title transfer information only for a "deed of unconditional conveyance," § 558.57 requires that the entries in the transfer book be made for "any deed or other instrument unconditionally conveying real estate." (emphasis added). Likewise, §§ 558.58, 558.59 and 558.61, relating back to § 558.57, use the word "instrument." Black's Law Dictionary (5th ed. 1979), defines the word "instrument" broadly, e.g., including the following:

> A written document; a formal or legal document in writing, such as a contract, deed, will, bond or lease.

Sections 558.57-558.64, when considered together, clearly evidence legislative intent that all instruments of unconditional conveyance be entered on the auditor's real estate transfer books when presented for recording. A notice of nonjudicial mortgage foreclosure including proofs of service is such an instrument. We note that Iowa Code Supp. § 655A.3 (1987) requires the notice to accurately describe the real estate covered. Therefore, the required contents of the notice include the information that the auditor would enter on the index and transfer books from a deed.

You have also asked the corollary question whether the auditor and assessor must treat a nonjudicial mortgage foreclosure as a transfer of title for tax-levying purposes. Such treatment is required for an instrument that is functionally equivalent to a sheriff's deed. For example, Iowa Code § 443.3 (1987) requires the auditor to correct the tax list to reflect entries in the transfer books.

In conclusion, it is our opinion that a notice of nonjudicial mortgage foreclosure including attached proofs of service filed with the county recorder pursuant to Iowa Code Supp. § 655A.7 (1987) is an "instrument unconditionally conveying real estate" within that term's meaning in Iowa Code § 558.57 (1987). Thus, when the notice and proofs of service are submitted to the recorder, the auditor's transfer fee must be collected by the recorder and the auditor must treat the notice as a deed of unconditional conveyance by entering upon the index and transfer books the information specified in § 558.64 (1987).

Sincerely,

Michael H Smith

MICHAEL H. SMITH
Assistant Attorney General

MHS:rcp

AUDITOR OF STATE: Audits of area schools. Iowa Code § 11.18 (1987). The Auditor's decision to audit an area school constitutes a policy choice within his or her discretion under Iowa Code § 11.18 (1987). No special conditions must exist or findings be made. An area school is permitted to contract for an audit by a certified public accountant if the Auditor has not expressed an intention to audit the area school. (Galenbeck to Boswell, State Senator, 2-16-88) #88-2-4(L)

February 16, 1988

The Honorable Leonard L. Boswell
State Senator
State Capitol
L O C A L

Dear Senator Boswell:

You have requested an opinion of the Attorney General regarding the authority of the Auditor of State to perform audits of area schools (community colleges). More specifically, your questions are:

> 1. Do the audit provisions of Iowa Code § 11.18 (1987) generally pertain to community colleges?
>
> 2. What conditions must exist or findings be made to permit the Auditor to perform an audit as allowed by the third unnumbered paragraph of Iowa Code § 11.18 (1987)?
>
> 3. Are area schools permitted to contract with certified public accountants for performance of their audits so long as the provisions of § 11.18 are followed?

Your questions will be answered in the order stated above.

1. Iowa Code § 11.18 (1987) provides that "[t]he financial condition and transactions of all . . . merged areas . . . shall be examined at least once each year . . . ." (emphasis added). The words "merged area" were added to section 11.18 in 1967 (1967 Iowa Acts ch. 244, § 8) as part of an act relating to area vocational schools and area community colleges. This act, now found at Iowa Code chapter 280A (1987) defines a "merged area" as follows:

> "Merged area" means an area where two or more county school systems or parts thereof merge resources to establish and operate a vocational school or a community college in the manner provided in this chapter.

Iowa Code § 280A.2(4) (1987). An area community college is established and operated by a merged area. Iowa Code § 280A.2(6).

The Iowa Code clearly provides for an annual audit of "merged areas." Because an area community college is both established and operated by the merged area, its financial condition and transactions will be audited as a part of the merged area audit. Thus, by its reference to "merged areas," Iowa Code § 11.18 (1987) covers both the initial entity, "merged area," and its progeny, the community college.

2. The Auditor of State is granted broad authority to audit government units when the Auditor determines an audit would be in the public interest. The third unnumbered paragraph of Iowa Code § 11.18 (1987) provides:

> In addition to the powers and duties under any other provisions of the Code, the auditor of state may at any time, if the auditor of state deems such action to be in the public interest, cause to be made a complete or partial audit of the financial condition and transactions of any city, county, school corporation, governmental subdivision, or any office thereof, even though an audit for the same period has been made by certified or registered public accountants. (emphasis added)

Your inquiry seeks a definition of "conditions" which must exist or "findings" which must be made in order to support exercise of the Auditor's statutory power. However, the statute requires only that the Auditor "deem" an audit to be "in the public interest." The statute makes no mention of findings or any other mechanism for articulating the Auditor's reasons for conducting an audit. This silence indicates the Auditor's authority is discretionary.

Moreover, the statute uses the word "may" in describing when the Auditor is allowed to exercise that authority. Such word usage confirms the discretionary nature of the duties described. See generally, Nordbrock v. State, 395 N.W. 872, 875 (Iowa 1986).

Agencies of state government are encouraged by the administrative procedure act (Iowa Code chapter 17A (1987)) to utilize their expertise in making policy choices. The Iowa courts have repeatedly expressed their willingness to defer to such expertise. Iowa-Illinois Gas & Elec. v. State Com. Com'm, 412 N.W.2d 600, 604 (Iowa 1987). A decision to make a discretionary audit of a government unit is a policy decision within the expertise of the Auditor.

Also worthy of note is the statutory scheme of Iowa Code chapter 11 (1987). Chapter 11 establishes the Auditor as the examiner of the state's financial records and condition. Section 11.2 mandates that the Auditor "shall annually make a complete audit of the books and accounts of every department of the state." Section 11.4 goes further in describing the contents of the Auditor's "written reports of all audits and examinations . . . ." For example, the Auditor is directed to report any "illegal or unbusinesslike practices" (§ 11.4(3)). The Auditor is further required to give an opinion as to the efficiency of state departments, whether they are duplicating the work of other departments, and whether money appropriated by the legislature is being spent for the designated purpose. Iowa Code § 11.2 (1987).

In order to perform the "watchdog" function delineated in chapter 11, the legislature empowered the Auditor to audit any State of Iowa governmental subdivision about which the Auditor has concern. Thus, the third unnumbered paragraph of Iowa Code § 11.18 (1987) contains the above quoted language permitting an audit whenever the Auditor "deems such action to be in the public interest . . . ." The statute does not require that findings be made by the Auditor prior to commencement of an audit; nor does the statute list factors to be used by the Auditor in assessing the public interest. Instead, the evaluation of the public interest is left to the Auditor's discretion.[1] No articulation of how the Auditor measures "public interest" is required.

Consistent with the Auditor's extensive discretion to conduct an audit is the provision of Iowa Code § 11.18 (1987) for payment of the Auditor's expenses. If an audit by certified or registered public accountants has not previously been conducted

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[1]The Auditor is a member of the executive department selected by the general electorate. Iowa Constitution, Art. IV, Sec. 22. The ultimate evaluation of his or her performance of discretionary functions is, of course, made by the voters.

and paid for, the Auditor may assess the governmental unit for the costs of the audit.

3. Your third question is premised upon full compliance with the provisions of Iowa Code § 11.18. Thus, area schools may contract with certified public accountants for performance of audits if section 11.18 is met.[2] However, compliance with section 11.18 requires that governmental units recognize (1) the Auditor's discretionary authority to cause an audit to be made when the Auditor deems an audit to be "in the public interest" and (2) the area school's obligation to bear the cost of the Auditor's activities unless the registered or certified public accountant's audit has been "previously made and paid for . . . ."

Sincerely,

Scott M. Galenbeck

SCOTT M. GALENBECK
Assistant Attorney General

SMG:rcp

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[2]In light of the Auditor's authority to audit, we note that contracts with certified or registered public accountants would appropriately contain a clause allowing cancellation in the event the Auditor expresses an intent to conduct the identical audit.

SCHOOLS: Postsecondary Enrollment Options Act; Shared Time Agreements. Iowa Code Supp. ch. 261C (1987), 1987 Iowa Acts ch. 224; Iowa Code § 256.12 (1987). The Chapter 261C Postsecondary Enrollment Option applies only to public school pupils. Section 256.12 does not allow nonpublic school students to participate in the "Postsecondary Enrollment Options Act," and a school district is therefore not allowed to pay tuition costs to an "eligible postsecondary institution," on behalf of nonpublic school students. Iowa Code § 256.12 gives a school district's board of directors virtually complete control over the terms by which a nonpublic school student will be accepted under a section 256.12 "sharing agreement," subject only to Chapter 290 review. (Donner to Wise, State Representative, 2-8-88) #88-2-1(L)

February 8, 1988

The Honorable Philip Wise
State Representative
State Capitol Building
Des Moines, Iowa 50319

Dear Representative Wise:

You have asked for an Attorney General's opinion regarding the participation by nonpublic school students in the "Postsecondary Enrollment Options Act," which was created by House File 499 during the 1987 regular session of the 72nd General Assembly. That Act is codified at Chapter 261C, Iowa Code Supplement 1987.

You specifically asked:

1. Does section 256.12 allow nonpublic school students to participate in the "Post-secondary Enrollment Options Act"?

2. Is a school district allowed to pay tuition costs to an "eligible postsecondary institution", as defined by Chapter 261C, on behalf of nonpublic school students?

3. Does paragraph 2 of section 256.12 give a school district's board of directors complete control over the terms by which a nonpublic school student will be accepted under a section 256.12 "sharing agreement"?

The answers to your first two questions are "no". The language of chapter 261C clearly provides this option and benefit only to public school pupils. As to question 3, the school district's board of directors does have virtually complete

control over the terms by which a nonpublic school student may enroll in specified classes under Iowa Code section 256.12 (1987).

The "Postsecondary Enrollment Options Act" provides that "[a]n eligible pupil may make application to an eligible institution to allow the eligible pupil to enroll for academic credit in a nonsectarian course offered at the eligible institution. A comparable course must not be offered by the school district in which the pupil is enrolled." Iowa Code Supp. § 261C.4 (1987) (emphasis added). Subsequently, "a school district shall pay a tuition reimbursement amount to an eligible postsecondary institution that has enrolled its resident eligible pupils under this chapter," up to a maximum of two hundred dollars for each separate course. Iowa Code Supp. § 261C.6 (1987) (emphasis added). A further restriction on a pupil's eligibility is found in section 261C.9, which requires that a reimbursement payment shall not be made "if the eligible pupil is enrolled on a full-time basis in the pupil's school district of residence as well as enrolling in a course or program in an eligible postsecondary institution." (Emphasis added.)

"Eligible pupil" is defined at Iowa Code Supp. § 261C.3(2) (1987) as "a pupil classified by the board of directors of a school district as an eleventh or twelfth grade pupil during the period the pupil is participating in the enrollment option provided under this chapter." (Emphasis added.) The board of directors of a school district sets forth the curriculum requirements for each grade (based upon the minimum educational standards in Iowa Code section 256.11 (1987)) exclusively for the public schools in its jurisdiction. Iowa Code §280.3 (1987). The "authorities in charge of each nonpublic school" set out the curriculum requirements for each grade for the nonpublic schools in their jurisdiction. Id. Therefore, the "board of directors of a school district" does not and cannot classify a nonpublic school pupil "as an eleventh or twelfth grade pupil."

Furthermore, section 261C.5 provides for high school credits which may be awarded by the board of directors of the school district, which shall count "toward the graduation requirements and subject area requirements of the school district of residence." Again, the board of directors of the school district has no jurisdiction to award high school credits toward graduation for a pupil in a nonpublic school. The authorities of that nonpublic school have that jurisdiction.

It is our conclusion that the clear language of chapter 261C provides for its application only in relation to public school pupils. As the statute on its face does not contemplate its

application to students who are not subject to classification by a board of directors of a public school district, an examination of section 256.12, relating to the "shared time agreements" with nonpublic schools is not necessary in this context.

In relation to your third question, an examination of Iowa Code section 256.12(1) (1987) reveals that the director of the department of education is permitted to approve the enrollment of nonpublic school students in specified courses in public schools "when necessary to realize the purposes of this chapter". One of the purposes of chapter 256 is to ensure all schools in Iowa meet at least the minimum educational standards. Iowa Code §256.11 (1987). The last sentence of section 256.12(1) underscores this finding of purpose by providing that the courses made available to nonpublic school pupils through 256.12 do count toward meeting the minimum educational standards.

An earlier Attorney General's opinion, 1968 Op.Att'yGen. 69, in interpreting section 257.26, the predecessor to section 256.12, also found that the "purpose" referred to is the establishment of a minimum curriculum and standards guideline. That opinion concluded that the state board of public instruction, the predecessor authority to the current director of education, had the power to "approve the enrollment in public schools for specified courses of students who also are enrolled in private schools" only where necessary to achieve the goal of the minimum curriculum requirements. Beyond the point of mandating enrollment in these situations, the local boards of public school districts retain all power, subject only to the appeal procedure available under Chapter 290.

The clear language of §256.12(2) provides that the director's power to approve the dual enrollment of nonpublic pupils "does not deprive the respective boards of public school districts of any of their legal powers, statutory or otherwise, and in accepting the specially enrolled students, each of the boards shall prescribe the terms of the special enrollment, including but not limited to scheduling of courses and the length of class periods." This places virtually complete control concerning the terms of the agreement within the discretion of the local public school board, subject only to chapter 290 appeal, with the caveat that no restriction could be placed upon the agreement which would defeat the "purpose of the chapter" -- to achieve the minimum curriculum requirements.

In conclusion, section 256.12 does not allow nonpublic school students to participate in the "Postsecondary Enrollment Options Act", and a school district is therefore not allowed to pay tuition costs to an "eligible postsecondary institution,"

as defined by chapter 261C, on behalf of nonpublic school students. Iowa Code section 256.12(2) does give a school district's board of directors virtually complete control over the terms by which a nonpublic school student will be accepted under a section 256.12 "sharing agreement".

Sincerely,

Lynette A. F. Donner
Assistant Attorney General

ENVIRONMENTAL PROTECTION: Hazardous waste generators. Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6925, 6926, 6973(a); Comprehensive Environmental Response Compensation and Liability Act (CERCLA) 42 U.S.C. §§ 9604, 9607; Iowa Code Supp. §§ 455B.301A, 455B.304-455B.306, 455B.310, 455E.3, 455E.5, 455E.6, 455E.11 (1987); 1985 Iowa Acts, ch. 260, § 12 (House File 476); 1987 Iowa Acts, ch. 233, § 204(5) (Senate File 511). Provisions of the groundwater protection act establishing a solid waste account within a groundwater protection fund and provisions relating to closure, postclosure leachate control and treatment do not immunize generators of waste later classified as hazardous from liability for cleanup costs. Generators of hazardous waste must follow federal RCRA requirements. (Sarcone to Scieszinski, Monroe County Attorney, 3-29-88) #88-3-7(L)

March 29, 1988

Ms. Annette Scieszinski
Monroe County Attorney
One Benton Avenue East
P.O. Box 576
Albia, Iowa 52531

Dear Ms. Scieszinski:

You have requested an opinion of the Attorney General regarding hazardous waste generators and the solid waste of the groundwater protection act passed by the legislature in its 1987 session. 1987 Iowa Acts, ch. 225 (House File 631). Your inquiry concerns the liability of hazardous waste generators and those who legally dispose of waste at a sanitary landfill where that waste is subsequently classified as hazardous. As we understand the context of your questions, you want to know if disposal of wastes at a landfill was proper at the time of disposal, would the disposer be liable for clean up of the landfill if the wastes are subsequently classified as hazardous. Also you want to know if federal regulations and Iowa law regarding hazardous waste generators are consistent. Specifically you ask:

> 1. Under House File 631 provisions for closure, postclosure, leachate control and treatment, and any clean-up for sanitary landfill disposal projects does the State-administered Solid Waste Management Fund hold harmless the original sources or generators of waste later found to be hazardous?
>
> 2. Depending upon the answer to the foregoing question, how do the applicable federal regulations on the responsibility of original sources or generators of hazardous waste mesh with current Iowa law?

In answer to your first question, neither the provisions in House File 631 establishing the solid waste account within the groundwater protection fund nor the provisions regarding closure, postclosure, leachate control and treatment related to sanitary landfills holds harmless generators of waste who legally disposed of their wastes but later those wastes were determined to be hazardous. In answer to your second question, at the present time federal law governs the transportation, treatment, storage and disposal of hazardous waste. Hazardous waste generators must follow federal law. In regard to cleanup of abandoned or uncontrolled sites, responsible parties, including generators of hazardous waste, are strictly liable and subject to joint and several liability for clean up costs.

The legislature enacted House File 631 as a comprehensive approach designed to prevent further groundwater contamination from point and non-point sources. Iowa Code Supp. §§ 455E.3 and 455E.5 (1987). The groundwater provisions of new chapter 455E were designed to supplement other legal authority and not "enlarge, restrict, or abrogate any remedy . . . under other statutory or common law and which serves the purpose of groundwater protection." Iowa Code Supp. § 455E.6 (1987). The act provides for a groundwater protection fund with five accounts set up within the fund. The money in each account is to be expended according to specific guidelines. Iowa Code Supp. § 455E.11 (1987). One of these accounts is the solid waste account which deals with sanitary disposal projects.

A major source of funds for the solid waste account comes from tonnage fees collected by landfill operators pursuant to § 455B.310 (1987) as amended by Iowa Code Supp. §§ 455B.310(2), (4) (1987). The Department of Natural Resources (DNR) may use part of these funds each year for the following:

> . . . (ii) Abatement and cleanup of threats to the public health, safety and environment resulting from a sanitary landfill if an owner or operator of the landfill is unable to facilitate the abatement or cleanup. However, not more than ten percent of the total funds allocated under this subparagraph may be used for this purpose without legislative authorization.

Iowa Code Supp. § 455E.11(2)(a)(1)(d)(ii) (1987).

The groundwater protection act also reflects an overall policy designed to substantially reduce landfilling of wastes and insure that those operating landfills will have the economic

ability to properly operate and close such facilities without need of public expenditures. In section 405 of the act the legislature sets forth a waste management hierarchy.

> 1. . . . While recognizing the continuing necessity for the existence of landfills, alternative methods of managing solid waste and a reduction in the reliance upon land disposal of solid waste are encouraged. In the promotion of these goals, the following waste management hierarchy in descending order of preference, is established as the solid waste management policy of the state:
>
> a. Volume reduction at the source.
> b. Recycling and reuse.
> c. Combustion with energy recovery and refuse-derived fuel.
> d. Combustion for volume reduction.
> e. Disposal in sanitary landfills.

Iowa Code Supp. § 455B.301A (1987).

The act also imposes on current operators and those proposing to operate a sanitary disposal project new responsibilities. By July 1, 1990, permitted sanitary landfills must have "a trained, tested and certified operator." Iowa Code Supp. § 455B.304 (1987). After July 1, 1987, no new landfill permits shall be issued except under limited conditions. Iowa Code Supp. § 455B.305(5) (1987). From July 1, 1992, forward, no permits shall be issued, renewed or reissued ". . . unless the sanitary disposal project is equipped with a leachate control system . . ." Iowa Code Supp. § 455B.305(6) (1987).

Current operators and those proposing to operate a sanitary disposal project regularly must file with the director of DNR a comprehensive plan which reflects the waste management hierarchy. Iowa Code Supp. §§ 455B.306(1), (3) (1987). The plan must address plans for closure and postclosure, leachate control, financing the project and emergency response and remedial action. Iowa Code Supp. § 455B.306(3) (1987). The operator also must file a financial statement annually and an operator or one proposing to operate a sanitary disposal project must provide a financial assurance instrument. Iowa Code Supp. §§ 455B.306(3), (4) and (5) (1987).

In reviewing the provisions concerning the solid waste account and those dealing with closure, postclosure and leachate control and treatment, we find nothing within these provisions which mention generators of hazardous waste. Clearly the

legislature has provided a source of funds within the solid waste account that DNR may use to abate and clean up threats to the public health, safety and the environment from the sanitary landfills where the owner or operator is incapable of doing so. Iowa Code Supp. § 455E.11(2)(a) (1987). However, the provisions of new chapter 455E were designed to supplement the legal authority not abrogate remedies a person has under statutory or common law. By placing new restrictions on operators of current facilities and those proposing to operate sanitary disposal projects it is our opinion that the legislature is attempting to minimize the amount of public funds needed to be expended for clean up of sanitary disposal projects by requiring operation of such projects to have sufficient funds to properly close and monitor their sites after closure, and take care of any future problems with such facilities. Iowa Code Supp. §§ 455B.306(1)-(5) (1987). However in our opinion, the legislature did not provide in any of the above cited provisions or other provisions in the groundwater protection act that generators of wastes, determined after disposal to be hazardous, will be held harmless for their actions. If the disposal of the wastes you refer to can be traced to a specific generator, nothing in House File 631 would preclude such a generator from responsibility for cleanup costs associated with problems caused by such waste.

Your second question concerns how applicable federal regulations on the responsibility of original sources or generators of hazardous waste mesh with current Iowa law. The answer to this question requires a brief review of the background of federal and state law dealing with the transportation, treatment, storage and disposal of hazardous waste. In 1976 Congress enacted the Resource Conservation and Recovery Act (RCRA) Pub. L. No. 94-580, 90 Stat. 2826 (1976), 42 U.S.C. § 6901 et seq. RCRA was passed by Congress to amend and completely overhaul the federal Solid Waste Disposal Act. 42 U.S.C. § 6901 et seq. Its purpose was to fill the gap left by the Clean Water Act, 33 U.S.C. § 1251 et seq., and Clean Air Act, 42 U.S.C. § 7401 et seq., concerning regulation of the treatment, storage, and disposal of hazardous wastes. Amendments were made to RCRA in 1978, Pub. L. No. 95-609, 92 Stat. 3083 (1978) and in 1980, Pub. L. No. 96-482, 94 Stat. 2348 (1980). Extensive amendments known as the Hazardous and Solid Waste Amendments of 1984 (HSWA) were made in 1984. Pub. L. No. 98-616, 98 Stat. 3271 (1984).

RCRA provides a multifaceted approach to the problems of solid waste management. As part of this approach a "cradle to grave" system was created for regulating transportation, storage, treatment and disposal of hazardous waste. This system is administered by the federal government but is designed for delegation to individual states provided the states choose to accept the federal plan as their own. 42 U.S.C. §§ 6925, 6926.

In order to administer and enforce a state RCRA program a state must satisfy the administrator of the Environmental Protection Agency that the state program is equivalent to the federal program, that it is consistent with federal or state programs in other states, and that the program provides for adequate enforcement of compliance with RCRA. 42 U.S.C. § 6926. Where a state has an approved RCRA program, jurisdiction over such activities is concurrent with the federal government.

The State of Iowa operated a RCRA program until July 1, 1985, when that program was returned to the federal government for enforcement. 1985 Iowa Acts, ch. 260, § 12 (House File 476); 1987 Iowa Acts, ch. 233, § 204(5) (Senate File 511). The legislature suspended operation of the statutes relative to the Iowa RCRA permit program, and thus, all hazardous waste enforcement in Iowa is handled by the federal government. Generators of hazardous waste therefore must follow federal RCRA requirements.

In 1980, Congress passed the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) to provide authority to respond to releases or threatened releases of hazardous substances, pollutants and contaminants into the environment. 42 U.S.C. § 9604(a). CERCLA was enacted to address hazardous waste problems not covered by existing legislation, particularly problems related to past disposal practices and future hazards that would occur despite existing legislation. Under CERCLA the federal government is authorized to respond directly to releases or threatened releases of hazardous substances and releases or threatened releases of pollutants or contaminants which may endanger public health or the environment. 42 U.S.C. § 9604(a), as amended by Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. No. 99-499, 100 Stat. 1617 (1986).

CERCLA establishes a federal program to monitor hazardous substances and cleanup sites where wastes have been released. Cleanup costs are covered by an $8.5 billion fund (Superfund), and the government is authorized to bring legal action to recover its cleanup costs from parties identified as responsible for the release or conditions leading to the release of hazardous substances, pollutants or contaminants. 42 U.S.C. §§ 9604, 9607. Liability under CERCLA is strict, and responsible parties can be held jointly and severally liable. United States v. Northeastern Pharmaceutical, 810 F.2d 726 (8th Cir. 1986). Generators of hazardous substances who "arranged for disposal or treatment or arranged with a transporter for transport for disposal or treatment" of such substances owned or possessed by them can be liable for cleanup costs and damages. 42 U.S.C. § 9607(a)(3).

Recently, the Eighth Circuit Court of Appeals held that an action commenced by EPA under RCRA § 7003(a), 42 U.S.C. § 6973(a), and CERCLA 107(a), 42 U.S.C. § 9607, to recover response costs from generators who disposed of hazardous wastes prior to enactment of RCRA and CERCLA was proper. United States v. Northeastern Pharmaceutical, 810 F.2d 726, 732-737, 740 (8th Cir. 1986). In answer to your second question, since the State of Iowa has no RCRA enforcement responsibilities, hazardous waste generators in Iowa must follow federal RCRA requirements and are subject to strict, joint and several liability under RCRA and CERCLA for response costs.

Very truly yours,

John P. Sarcone

JOHN P. SARCONE
Assistant Attorney General
Environmental Law Division

JPS:rcp

PUBLIC RECORDS: Abstract of Driver's Operating Record. §§ 22.2, 22.3 and 321A.3(1), Iowa Code (1987). A copy of a computer master tape of the abstract of driver operating records of the Department of Transportation is a public record and can be obtained without paying the fee required for a certified abstract of an operating record by Iowa Code § 321A.3(1) (1987). (Krogmeier to Rensink, 3-22-88) #88-3-6(L)

March 22, 1988

Darrel W. Rensink
Acting Director
Iowa Department of Transportation
800 Lincoln Way
Ames, IA 50010

Dear Mr. Rensink:

You have asked the opinion of this office on the following two questions:

1. Does Iowa Code § 321A.3 prescribe the sole means by which the department is to provide copies of drivers license records?

2. If the answer to the first question above is no, then does Iowa Code chapter 22 require the Department to provide a copy of the Department's computer master file containing the complete driving history of all Iowa drivers upon request and without the payment of the $4.00 statutory fee of § 321A.3, with the only charge to be the cost of duplicating the computer master tape?

Your letter explains that at present the Department of Transportation charges $4.00 for a certified copy of a driver's abstract pursuant to § 321A.3. This generates approximately $3 million a year in revenue for the DOT. The information contained on the abstract is stored on a master computer tape. The DOT has now received a request for a copy of the master computer tape from a private commercial enterprise.

Your first question requires construction of Iowa Code § 321A.3 which states in relevant part:

> 321A.3 Abstract of operating record - fees to be charged and disposition of fees.
>
> 1. The director shall upon request furnish any person a certified abstract of the operating record of a person subject to chapter 321 or this chapter. The abstract shall also fully designate the motor vehicles, if any, registered in the name of the person. If there is no record of a conviction of the person having violated any law relating to the operation of a motor vehicle or of any injury or damage caused by the person, the director shall so certify. A fee of four dollars shall be paid for each abstract except by state, county, city or court officials.

Rules of statutory interpretation are found in Iowa Code § 4.6. The Iowa Supreme Court reviewed general principles of statutory interpretation in Beier Glass Co. v. Brundige, 329 N.W.2d 280 (Iowa 1983):

> Our ultimate goal is to determine and effectuate the intent of the legislature. We look to the object to be accomplished, the mischief to be remedied, or the purpose to be served, and place on the statute a reasonable or liberal construction which will effect, rather than defeat, the legislature's purpose. We avoid strained, impractical or absurd results in favor of a sensible, logical construction. We consider all parts of the statute together, without attributing undue importance to any single or isolated portion. The spirit of the statute must be considered along with its words, and the manifest intent of the legislature will prevail over the literal import of the words used. Although final interpretation and construction of the statute is for this court, we give deference to an interpretation by the responsible administrative agency.

Id., at 283. (citations omitted).

Iowa Code § 22.2 gives every person a right to examine and copy Iowa public records. Clearly the DOT's motor vehicle operator records are public records as defined by § 22.1. "The purpose of chapter 68A [the predecessor statute to chapter 22] is to open the doors of government for public scrutiny - to prevent government from secreting its decision-making activities from the

public on whose behalf it is its duty to act." Iowa Civil Rights Comm. v. City of Des Moines, 313 N.W.2d 491, 495 (Iowa 1981). Iowa Code § 22.3 provides that only the actual cost of copying the public record is to be borne by the requestor.

Section 321A.3 was created by 1947 Iowa Acts ch. 172 § 3 and may have been intended in part to raise revenue as indicated by the sentence, "Such fees shall be used by the department for administering this act." However, this language was struck in a 1977 amendment. (1977 Iowa Acts ch. 60). Although both the 1977 amendment and a 1981 amendment raising the fee (1981 Iowa Acts ch. 14) were included in appropriation bills, it is not clear from the legislative action that the legislature's intent was to exclude copies of drivers operating records from the provisions of chapter 22.

Iowa Code chapter 22 was adopted as the Public Records Law of the state in 1971 and does not contain any exception for copies of drivers' operating records. Presumably, the legislature was aware of § 321A.3 when it passed chapter 22. The Public Records Law is to be interpreted liberally to provide broad public access to public records. City of Dubuque v. Telegraph Herald Inc., 297 N.W.2d 523 (Iowa 1980). Chapter 22 establishes a liberal policy of access to public records from which departures are to be made only in discrete circumstances and specific exemptions from the statute are to be construed narrowly. Head v. Colloton, 331 N.W.2d 870 (Iowa 1983).

We find that § 321A.3(1) is not in conflict with Iowa Code § 22.2. In attempting to reconcile the two statutes, it is apparent that § 321A.3(1) is referring to a certified abstract of an operating record and the fee of $4.00 prescribed by the section applies to certified abstracts only. It does not refer to computer files of those records. A computer file tape is a public record, 1980 Op.Att'yGen. 224, but is not a certified abstract per § 321A.3(1). A review of the legislative history of § 321A.3(1) does not indicate that it was intended to be an exception to § 22.2, that it was intended to preclude obtaining an uncertified copy of a record without the $4.00 fee or that it was intended to cover computer tapes of those records.

From the facts outlined in your letter, the DOT should make available a copy of its master computer tape if that is the form in which the requestor wants to receive the information. 1982 Op.Att'yGen. 207. The fee to be charged for a copy of the information is controlled by Iowa Code § 22.3 and not by § 321A.3(1).

We believe we have answered both of the questions raised in your letter. In summary, it is our conclusion that Iowa Code § 321A.3(1) does not prescribe the sole means by which the department is to provide copies of drivers license records and Iowa Code chapter 22 does require the Department of Transportation to provide a copy of the computer master file containing the complete driving history of all Iowa drivers upon the payment of the fee prescribed by § 22.3.

Sincerely yours,

Charles J. Krogmeier

CJK:rg

STATE OFFICERS AND EMPLOYEES; Professional and Occupational Licensing Boards; Iowa Accountancy Examining Board; Gender Balance. Iowa Code §§ 69.16A, 69.19, 116.3(1), 116.9 (1987). Members of both the Accountancy Examining Board and the Accounting Practitioner Advisory Council are appointed by the governor, confirmed by the senate, and serve terms commencing May 1st. The gender balance of this eight member Board can be either five-three or four-four. (Weeg to Henze, Chairman, Accountancy Examining Board, 3-16-88) #88-3-5(L)

March 16, 1988

Mr. Daryl Henze, Chairman
Accountancy Examining Board
Department of Commerce
1918 S.E. Hulsizer Avenue
Ankeny, Iowa 50021

Dear Mr. Henze:

You have requested an opinion of the Attorney General on the applicability of Iowa Code § 69.16A (1987) to the Iowa Accountancy Examining Board (Board), given the unique role the Accounting Practitioner Advisory Council (Council) has in the composition of the Board.

The Board is created by Chapter 116. The composition of the Board is described in § 116.3(1) as follows:

> The board consists of eight members, five of whom shall be certified public accountants, one of whom shall be from the accounting practitioner advisory council, and two of whom shall not be certified public accountants or licensed accounting practitioners and who shall represent the general public . . . . Members, except the member from the accounting practitioner advisory council, shall be appointed by the governor to staggered terms, subject to confirmation by the senate. The board member from the accounting practitioner advisory council shall serve a one-year term and must be the most senior member of the accounting practitioner advisory council who has not

> served a term on the board in the previous two years.
>
> As used in this chapter, "board" means the accountancy examining board established by this section. Upon the expiration of each of the terms and of each succeeding term, except that of the member from the accounting practitioner advisory council, a successor shall be appointed for a term of three years beginning and ending as provided in section 69.19. Members, except the member from the accounting practitioner advisory council, shall serve a maximum of three terms or nine years, whichever is less. Vacancies occurring in the membership of the board for any cause shall be filled in the same manner as original appointments are made by the governor, for the unexpired term and subject to senate confirmation. . . .

The accounting practitioner advisory council is established in § 116.9, and is comprised of "three members appointed by the governor who shall be licensed accounting practitioners." Members currently serve three year terms, up to a maximum of three terms or nine years, whichever is less. See § 116.9. This council is established to advise the Board on matters relating to accounting practitioners. Id.

The gender balance provisions of § 69.16A were enacted in 1987 and provide as follows:

> All appointive boards, commissions, committees and councils of the state established by the Code if not otherwise provided by law shall be gender balanced. No person shall be appointed or reappointed to any board, commission, committee, or council established by the Code if that appointment or reappointment would cause the number of members of the board, commission, committee, or council of one gender to be greater than one-half the membership of the board, commission, committee, or council plus one. If there are multiple appointing authorities for a board, commission, committee, or council, they shall consult each other to avoid a violation of this section. This section shall not prohibit an individual

> from completing a term being served on June 30, 1987.

Given these statutory provisions, your first question is whether the Board should be considered a separate entity from the Council under § 69.16A. In your request you state that:

> 1. The Council is appointed by the Governor but not confirmed by the Senate (§ 116.3);
>
> 2. The most senior member of the Council serves a one year term on the Board, then that position rotates to the most senior member of the Council who has not served on the Board in the previous two years (§ 116.3); and
>
> 3. The terms for Board members end April 30th, while the terms for Council members end June 30 (§§ 69.19, 116.3).

We first note that Council members are appointed to the Council by the Governor pursuant to § 116.9, and therefore should be subject to confirmation by the Senate in accordance with § 69.19. Section 116.3(1) does state that Board members, "except the member from the accounting practitioner advisory council, shall be appointed by the governor to staggered terms, subject to confirmation by the senate." (emphasis added) However, we do not believe this language was intended to exempt Council appointments from Senate confirmation. Instead, it appears the intent was simply to ensure that the specific provisions regarding appointment of Board members did not apply to the one Council member serving on the Board for an annual term. In other words, appointments of Council members to the Council are subject to Senate confirmation, but Senate confirmation is not required when the senior Council member automatically rotates onto the Board for an annual term in accordance with § 116.3(1). The fact that "member" is used in the singular in § 116.3(1) further supports this conclusion, as does the fact that § 116.9 sets forth separate requirements for appointment of Council members to the Council. In addition, we see no statutory authority for the terms of Council members to commence July 1, rather than May 1, as required by § 69.19. We would suggest that current practice be revised in order to conform to statute.

Turning now to the question of whether the Board is separate from the Council under § 69.16A, it is our opinion that these bodies are separate entities, established by separate Code sections. See §§ 116.3(1) and 116.9. However, the Council

member serving an annual term on the Board is clearly a Board member for that year for, as set forth above, § 116.3(1) specifically states "the board consists of eight members, . . . one of whom shall be from the accounting practitioner advisory council . . . ." The question then becomes how the gender balance provisions of § 69.16A apply to this Board.

Under § 69.16A, no more than half the membership of any board, plus one, can be the same gender. In the present case, because the Board has eight members, half the membership of the Board plus one is five, so the gender balance on the Board needs to be five-three or four-four. The difficulty this presents to the Board is that the annual rotation of the member from the Council could upset an originally proper balance, given that the rotation is automatic and based on seniority and past service on the Board. Because the statute as a practical matter prevents gender from being a consideration in the rotation of Council members on the Board, it is our view that the most practical solution is for the Governor to appoint the seven certified public accountants and public Board members to achieve a 4-3 gender balance. In this way the annual addition of the eighth Board member from the Council, regardless of sex, will not upset this balance.

In conclusion, it is our opinion that members of both the Accountancy Examining Board and the Accounting Practitioner Advisory Council are appointed by the governor, confirmed by the senate, and serve terms commencing May 1st. The gender balance of this eight member Board can be either five-three or four-four.

Sincerely,

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

SCHOOLS; HEALTH: Withholding of life-sustaining procedures. Iowa Code § 144A.2(4); 144A.3, 144A.7, 144A.9(1)(c); Uniform Rights of the Terminally Ill Act, § 1(3). A school is not a health care provider under chapter 144A. Thus a school has no mandatory duty under the statute to either withhold life-sustaining procedures for a terminally ill child or transfer the child to another facility. Given the difficulties of application of the statute to minors and the significance of the decision in question, a school would be well advised under the current Iowa law to require a court order before agreeing to neither summon medical personnel nor administer first aid to a terminally ill child. (Osenbaugh to Lepley, Director, Iowa Department of Education, 3-10-88) #88-3-3(L)

March 10, 1988

Mr. William Lepley, Ed.D.
Director
Iowa Department of Education
L O C A L

Dear Mr. Lepley:

You have requested an opinion of the Attorney General regarding the applicability to public schools of Iowa Code chapter 144A, known as the Life-Sustaining Treatment Act and commonly described as "living will" legislation.

Your opinion request is concerned with the issue of a school's duty to comply with parental requests that a terminally ill child not be subjected to "life-sustaining procedures" as defined in that act. It is our opinion that public schools and school personnel are not subject to any mandatory duty to comply with such requests under the Act. Schools are not "health care providers" as defined in § 144A.2(4). Thus, they have no mandatory duty to either comply with a declaration or attempt to transfer the patient under Iowa Code § 144A.8.

The first question is whether a school is a "health care provider" under Iowa Code ch. 144A. Chapter 144A of the Iowa Code is was enacted in 1985. The bill was entitled "[a]n Act relating to life-sustaining procedures by providing a procedure for declarations by certain competent adults that life-sustaining procedures may be withheld or withdrawn; providing for revocations; providing a procedure in absence of a declaration; providing for patient transfers; providing immunity from liability; prohibiting destruction, concealment or forging of declarations or revocations; providing penalties; and providing other matters properly related thereto." 1985 Iowa Acts, ch. 3.

Health care providers are to comply with the declarations, follow the procedures as specified for persons in the absence of a declaration § 144A.7, or transfer the patient to another facility which will withhold the procedures as provided in the statute.

Section 144A.2(4) states that a "[h]ealth care provider" means a health care facility licensed pursuant to chapter 135C, a hospice program licensed pursuant to chapter 135, or a hospital licensed pursuant to chapter 135B." Unless a public school is licensed under one of the chapters in question, it does not fit the statutory definition of "health care provider" used in chapter 144A. It should be noted that the Uniform Rights of the Terminally Ill Act defines "health care provider" more broadly as any person licensed under State law "to administer health care in the ordinary course of business or practice of a profession." Thus, under the Uniform Act, an individual, such as a nurse, could fit the definition of "health care provider." However, neither an individual school employee nor a public school as such comes within the definition used in Iowa Code § 144A.2(4), which requires that it be a facility licensed as a health care facility, a hospice, or a hospital. Even if a school provides some amount of medical services under a child's individualized education program, this does not qualify the school as a "health care provider" unless it is licensed under one of the statutes in question.[1]

Because a public school is not a "health care provider" within the definition of the Life-Sustaining Treatment Act, it is not subject to those provisions of the Act which apply to health care providers. Section 144A.8 requires that a physician or a health care provider who is unwilling to comply with the provisions for withholding life-sustaining procedures take all

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[1]A health care provider licensed under Iowa Code chapter 135C provides twenty-four hour care to persons unable to care for themselves due to illness, disease or mental or physical infirmity; this specifically includes residential care facilities, intermediate care facilities and skilled nursing facilities. Iowa Code § 135C.1(4). Section 135.90 defines a hospice program as a centrally coordinated program of home and inpatient care providing twenty-four hour per day care and supportive medical and other health services to terminally ill patients and their families. A hospital licensed under Iowa Code § 135B.1 is a place "devoted primarily to the maintenance and operation of facilities for the diagnosis, treatment or care over a period exceeding twenty-four hours of two or more non-related individuals suffering from illness, injury or deformity, or a place which is devoted primarily to the rendering of obstetrical or other medical or nursing care."

reasonable steps to effect the transfer of a patient to another facility or physician. This would not apply to a school.

It is our view that a school has no duty to comply with a decision by parents and the physician to withhold life-sustaining procedures at least in the absence of a court order or Iowa court decision to the contrary.

Chapter 144A may have application outside of a health care facility. Section 144A.9(1)(c) immunizes any person who participates in the withholding of life-sustaining procedures under the direction of or authorization of a physician. It is conceivable that a school nurse or a parent caring for a child at home could be immune from liability under this section if all of the provisions of the chapter were met.

You also ask whether the chapter applies at all to minors. The provision authorizing declarations relating to the use of life-sustaining procedures states that "any competent adult" may execute a declaration. Iowa Code § 144A.3. Many sections of this chapter assume that the patient is a competent adult who has executed a declaration relating to use of life-sustaining procedures. See Iowa Code §§ 144A.2(1), 144A.3. The applicability of the chapter to a minor child is further complicated by the fact that §§ 144A.6 and 144A.9(1)(a) refer to a "qualified patient," which as defined in § 144A.2(7), requires that the patient have executed a declaration. Only competent adults can execute a declaration.

Section 144A.7, concerning procedures in absence of a declaration, arguably applies to a child, yet its provisions do not neatly fit the situation of a child.[2] However, this section

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[2] Section 144A.7(1) states in relevant part:

> Life-sustaining procedures may be withheld or withdrawn from a patient who is in a terminal condition and who is comatose, incompetent, or otherwise physically or mentally incapable of communication and has not made a declaration . . . if there is consultation and written agreement . . . between the attending physician and any of the following individuals, who shall be guided by the express or implied intentions of the patient, in the following order of priority . . .: * * *
> (e) A parent of the patient, or parents if both are reasonably available.

comes into play only where the patient is "comatose, incompetent, or otherwise physically or mentally incapable of communication." Section 144A.7 does not directly address the ability of parents, the attending physician, and a third party (the school) to agree in advance to withhold life-sustaining procedures from a minor.

At least two courts have found a constitutional or common-law right for a minor to decline life-sustaining procedures through determinations by the parents and physician; these cases do not rely on the living will legislation in those states. See In re L.H.R., 253 Ga. 439, 321 S.E.2d 716 (1984) (finding constitutional right in infant to refuse medical treatment where child is terminally ill and in a chronic vegetative state with no reasonable possibility of attaining cognitive function); In re Guardianship of Grant, 747 P. 2d 445, 449-451, 455-457 (Wash. 1987) (holding Washington Natural Death Act not applicable as act requires declaration by competent adult but finding constitutional or common law right to have life sustaining treatment withheld and authorizing parents and physician to make decision under similar criteria to 144A.7). The Grant case stated that no health care provider would be required to participate in withholding of treatment if this was contrary to its conscience or belief. 747 P. 2d at 456.

Certain other states have specifically addressed the subject of minors in comparable legislation. Ark. Stat. Anno. § 82-3803; Tex. Rev. Civ. Stat. Ann. art. 4590h, § 4D (Vernon 1976 & Supp. 1988). The legislature could consider whether to specifically address the issue of minors in this statute .

We would also note that school personnel are not specifically trained, as are trained medical personnel, to make the medical decisions required by the Act. The procedures withheld must be "life-sustaining procedures," which are specially defined in § 144A.2(5) as:

> Life-sustaining procedure means any medical procedure, treatment or intervention which meets both of the following requirements:
>
> a. Utilizes mechanical or artificial means to sustain, restore, or supplant a spontaneous vital function.
> b. When applied to a patient in a

[Emphasis added].

> terminal condition, would serve only to prolong the dying process.
>
> Life-sustaining procedure does not include the provision of sustenance or the administration of medication or performance of any medical procedure deemed necessary to provide comfort care or to alleviate pain.

A patient in a "terminal condition" is one having an "incurable or irreversible condition that, without the administration of life-sustaining procedures, will, in the opinion of the attending physician, result in death within a relatively short time." Iowa Code § 144A.2(8). School personnel could reasonably determine that only medical authorities should determine whether in the specific situation the medical treatment in question fits within the specific medical determinations required by the Act.

Any situation such as this should be addressed on an individual basis with appropriate consultation between the school, parents, and medical and legal authorities. We would advise a school district that, absent a court order, it has no mandatory duty to withhold life-sustaining procedures on direction of the parents and physician. Given the difficulties of application of the statute to minors and to schools and given the significance of the decision in question, a school would be well advised to require a court order before agreeing not to summon medical personnel or administer first aid to a child.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Deputy Attorney General

EMO:mlr

COUNTIES: Board of Review. 701 Iowa Admin. Code § 71.20(1)(a). Under 701 Iowa Admin. Code § 71.20(1)(a), a retired farmer does not qualify as a farmer under Iowa Code § 441.31 (1987), and consequently may not serve on the county board of review, unless the retired farmer "remains in reasonable contact" with the prior farming operation. The prior opinion of Benton to Martens, Iowa County Attorney, #86-5-4(L) is overruled. (Benton to Martens, Iowa County Attorney, 3-4-88) #88-3-2(L)

March 4, 1988

Mr. Kenneth R. Martens
Iowa County Attorney
1060 Court Avenue
Marengo, Iowa 52301

Dear Mr. Martens:

On May 20, 1986, our office responded to your request for an Attorney General's opinion concerning whether a retired farmer may qualify to serve under Iowa Code § 441.31 (1987) on the county board of review. As you will recall, that statute in part states that "[i]n the case of the county at least one member of the board shall be a farmer." Our opinion to you decided that since the statute only used term "farmer" and not "active farmer" or "presently engaged in farming" a retired farmer could qualify to serve on the board. However, it has come to our attention that the Iowa Department of Revenue has a rule governing the composition of county boards of review. Specifically, 701 Iowa Admin. Code § 71.20(1)(a) provides:

> One member of the county board of review must be actively engaged in farming as that member's primary occupation. However, it is not necessary for a board of review to have as a member one licensed real estate broker and one registered architect or person experienced in the building and construction field if the person cannot be located after a good faith effort to do so has been made by the conference board (1966 O.A.G. 416). In determining eligibility for membership on a board of review, a retired person is not considered to be employed in the occupation pursued prior to retirement, unless that person remains in reasonable contact with the former occupation, including some participation in matters associated with that occupation.

We owe deference to the agency construction of the statute as stated in this rule. Bishop v. Iowa State Bd. of Public Instruction, 345 N.W.2d 888, 892 (Iowa 1986). Consequently, under this rule the farmer-member of the county board of review must be actively engaged in farming and not retired. Our previous conclusion to the contrary was incorrect.

It should be noted that the last sentence of this rule provides that a retired person is not considered to be employed "unless that person remains in reasonable contact with the former occupation, including some participation in matters associated with that occupation." There may be a factual question as to the extent to which the retired farmer in Iowa County "remains in reasonable contact" with the farm. Because the eligibility of this retired farmer could turn on this factual question, we cannot express an opinion as to this person's continued eligibility to serve on the board. Nor can we express an opinion on the effect this rule may have on any decisions of the board in which the person participated.

We apologize for not noticing this rule earlier. Thank you for your patience and consideration.

Sincerely,

Timothy Benton

TIMOTHY D. BENTON
Assistant Attorney General

TDB:bac

CHIROPRACTORS; BOARD OF CHIROPRACTIC EXAMINERS; Iowa Code §§ 151.1(3); 151.8; 151.10. Iowa Code § 151.10 allows an individual to choose not to be tested in or utilize chiropractic physiotherapy as a condition for licensure. Chapter 151 does not address whether individuals can be required to take courses in the procedures authorized by law if they do not intend to utilize those procedures. (McGuire to Miller, State Senator, 3-1-88) #88-3-1(L)

March 1, 1988

The Honorable Charles P. Miller
State Senator
State Capitol
L O C A L

Dear Senator Miller:

You requested an Attorney General's Opinion on Iowa code ch. 151 which governs the practice of chiropractic. Specifically you asked whether chiropractors must be qualified and examined in physiotherapy if they have no intention to utilize that procedure in their practice.

Iowa Code § 151.1(3) defines the practice of chiropractic by the procedures which may be utilized by a chiropractor, and includes physiotherapy.

> Persons utilizing differential diagnosis and procedures related thereto, withdrawing or ordering withdrawal of the patient's blood for diagnostic purposes, performing or utilizing routine laboratory tests, performing physical examinations, rendering nutritional advice, utilizing chiropractic physiotherapy procedures, all of which are subject to and authorized by section 151.8. However, a person engaged in the practice of chiropractic shall not profit from the sale of nutritional products coinciding with the nutritional advice rendered.

Section 151.1(3).

Iowa Code § 151.10 refers to § 151.1(3) and specifies that an individual who applies "for a license to practice chiropractic

shall only be required to be tested for the adjunctive procedures . . . which the person chooses to utilize . . . [and] shall not be required to utilize any of the adjunctive procedures specified in section 151.1(3) to obtain a license or continue to practice chiropractic, respectively."

To determine whether an individual can be required to be examined in physiotherapy, it must be determined whether physiotherapy is an "adjunctive procedure" as that term is used in § 151.10.

The term "adjunctive procedure" is not defined by statute. The Board of Chiropractic Examiners, per § 151.11, has defined what adjunctive procedures are by rule. Agencies can interpret and define legislation so long as it does not make law or change the meaning of the law. Burlington Community School District v. Public Employment Relations Board, 268 N.W.2d 517, 521 (Iowa 1978).

The Board of Chiropractic Examiners defined adjunctive procedures as "[p]rocedures related to differential diagnosis." 645 Iowa Admin. Code 40.39(1). This definition appears to come from § 151.1(3): "Persons utilizing differential diagnosis and procedures related thereto . . . ." The Board further states that applicants for license may choose to be tested in limited adjunctive procedures so long as they can come to an acceptable differential diagnosis. 645 Iowa Admin. Code 40.39(2).

What procedures are included in the Board's definition are not specified and we cannot determine whether physiotherapy would be included. However, it does appear that the legislation contemplates that the procedures listed in section 151.1(3) are adjunctive procedures for purposes of § 151.10.

Section 151.10 refers to the adjunctive procedures specified in § 151.1(3). Section 151.1(3) lists various procedures that are specifically identified, i.e. withdrawing blood, physical examinations, nutritional advice, etc. There is no exception for some of these specified procedures in § 151.10. It would follow that all the procedures, which are specified in § 151.1(3), are adjunctive procedures as intended by § 151.10.

Further support for this interpretation can be found in the explanation contained in the initial bill which became § 151.10. The explanation in 70th General Assembly, 1983 Regular Session, Senate Bill, S.F. 474 states:

> This bill defines procedures in the practice of chiropractic to include treatment

> of human ailments by the adjustment of the neuromusculoskeletal structure, withdrawing blood from a patient for diagnostic purposes, performing routine laboratory tests and physical examinations, rendering nutritional advice, and utilizing chiropractic physiotherapy procedures and permits doctors of chiropractic to utilize these procedures. The bill specifies that an applicant for a license to practice chiropractic or a person licensed to practice chiropractic are not required to utilize the procedures and shall not be tested for or required to complete continuing education requirements for the procedures the applicant or licensee does not choose to utilize.

It appears from this explanation that the legislature intended that those newly authorized procedures identified in the bill are the procedures which a chiropractor cannot be required to be tested in or to utilize.[1] Legislative history, including the bill's explanation, can be used to determine what the legislature intended. State v. Luppes, 358 N.W.2d 322, 324 (Iowa App. 1984).

Further, the term adjunctive procedures does not appear to be a technical phrase used in chiropractic that would preclude such an interpretation. See Department of Transportation v. Iowa Dept. of Job Service, 341 N.W.2d 752, 754 (Iowa 1983). Absent evidence that this term has an intrinsic meaning in the practice of chiropractic, it would appear that all of the procedures listed in section 151.1(3) were regarded as adjunctive procedures by the legislature.

In answer to your question, § 151.10 allows an individual to choose not to be tested in or utilize physiotherapy as a condition for licensure.

The other part of your question was whether chiropractors must be qualified in physiotherapy if they do not intend to utilize it. Section 151.8, to which you refer, prohibits chiropractors from utilizing procedures authorized by law unless

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[1]Nothing in this opinion should be construed as precluding the testing of all applicants on any subjects which would be appropriate to the practice of chiropractic prior to the enactment of the 1983 bill.

they are trained by an approved college or, if licensed as of July 1, 1974, filed an affidavit of proficiency with the Board. We are assuming your question pertaining to being qualified in physiotherapy means complying with § 151.8.

With regards to the chiropractors licensed as of July 1, 1974, it is not mandatory that they file such an affidavit and utilize the procedures. It is required only if they decide to utilize the procedures authorized by law. It would follow that these chiropractors do not have to be qualified in the procedures they do not utilize.

Section 151.8 also applies to chiropractors licensed after July 1, 1974. It prohibits those individuals from utilizing procedures authorized by law unless they were trained in them by a Board approved college. Section 151.8, by itself, does not address whether these individuals can be required to take the courses even if they choose not to utilize some procedures.[2]

Section 151.10 refers to the procedures authorized by law in terms of testing, continuing education and utilization of procedures for licensure purposes. It does not address whether individuals can be required to take courses in these procedures.

Sincerely,

Maureen McGuire

MAUREEN McGUIRE
Assistant Attorney General

MM:mlr

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[2]The Iowa Supreme Court upheld the Board in requiring individuals to take courses in the modalities listed in § 151.1(3) before they could take the license examination. Dain v. Pawlewski, 253 N.W.2d 582 (Iowa 1977). This decision was prior to the 1983 amendments to §§ 151.1(3) and 151.10.

JUDICIAL DEPARTMENT; PUBLIC EMPLOYEES: Retirement. Iowa Code §§ 602.9115A, 602.9106 (1987). The term "retired" is defined as the time that a judge qualifies for an annuity under § 602.9106, not the time a judge resigns from the bench. A qualifying judge who has resigned from the bench but has not yet met the age requirement to be eligible to receive an annuity may make the annuity election provided by § 602.9115A before the judge reaches retirement age. (Osenbaugh to O'Brien, State Court Administrator, 4-25-88) #88-4-6(L)

April 25, 1988

Mr. William J. O'Brien
State Court Administrator
State Capitol
L O C A L

Dear Mr. O'Brien:

We are in receipt of a request from your office to interpret Iowa Code § 602.9115A regarding the optional annuity election for judges. More specifically, you have asked the following questions:

> 1) When does "retirement" occur for the purposes of § 602.9115A?
>
> 2) Is a former judge eligible to make the annuity election under § 602.9115A if the judge resigned from the bench before the statute was enacted in 1986, but is not yet eligible to receive annuity under § 602.9106?

It is our opinion that the definition of "retirement" is the date when the judge is entitled to receive an annuity under the applicable statute.

A recent Attorney General's opinion concluded that the term "retirement" as applied to public retirement benefits should be defined by the criteria defining eligibility for benefits under the applicable statute. 1984 Op.Att'yGen. 179 (#84-12-3(L)).

Section 602.9106 entitled "Retirement" describes the requirements for eligibility for judicial retirement benefits:

> Any person who shall have become separated from service as a judge of any of

> the courts included in this article and who has had an aggregate of at least six years of service as a judge of one or more of such courts and shall have attained the age of sixty-five years or who has had twenty-five years of consecutive service as a judge of one or more of said courts, and who shall have otherwise qualified as provided in this article, shall be entitled to an annuity as hereinafter provided.

Applying the test stated in full above, a judge is "retired" when that judge has fulfilled the criteria to receive benefits, including attainment of retirement age, and is eligible to receive an annuity.

You also requested an opinion on whether a former judge who has not yet reached retirement age may make an optional annuity election. We assume that the person otherwise qualifies for an annuity as provided in the statute.

Section 602.9115A states, "The judge shall make the election request in writing to the state court administrator prior to retirement." (emphasis added). Because retirement is defined as the time at which an annuity can be received, it is our opinion that the former judge is able to make the election after resigning from the bench but before attaining retirement age.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Deputy Attorney General

EO:kjg

ANTITRUST: Monopolies; Beer and Liquor; Class "A" Beer Permit Authority; 15 U.S.C. §§ 2, 13. Iowa Code §§ 123.122, 123.124, 123.130, and 553.5 (1987). 185 Iowa Admin. Code §§ 4.31 and 4.33. A challenge to "dual pricing" in which distributors sell beverages, candy and cigarettes at lower prices to grocery stores than to bars or restaurants is potentially governed by the Iowa Competition Law, the Sherman Act and the Robinson-Patman Act. An opinion of the Attorney General is not the proper vehicle to determine whether a person has violated those provisions. A class "A" beer permittee is not authorized to sell beer at retail nor, under the present statute and administrative rules, is the holder of a class "C" beer permit authorized to deliver beer at the premises of a beer wholesaler. (Walding to May, State Representative, 4-11-88) #88-4-3(L)

April 11, 1988

The Honorable Dennis May
State Representative
State Capitol
L O C A L

Dear Representative May:

We are in receipt of your request for an opinion of the Attorney General regarding certain practices of beverage, candy and cigarette wholesalers. In your letter, we are told:

> Recently a number of my constituents have contacted me about "dual pricing". Apparently wholesalers of pop, beer, candy and cigarettes in the Mason City-Clear Lake area have a lower selling price for the big supermarkets and convenience stores, and there is another selling price, as much as 33% higher for the little restaurants and taverns.

You further state:

> These same constituents have explained one or more beer wholesalers are selling kegs of beer to the general public, accepting payment and making the ticket out to show that the keg was run through a legitimate class c liquor license account. The wholesalers, as I understand it, have permission to use the account as a clearing house for these keg sales.

Specifically, the questions you have posed can be restated as follows:

1. May a wholesaler provide a dual pricing structure which establishes one price for supermarkets and convenience stores and another (and higher) price for restaurants and taverns for the same product?

2. May a class "A" beer permittee (a beer wholesaler) sell beer to the general public, including accepting payment and pick up of the beer by a non-permittee, if the transaction is recorded on the account of a class "C" beer permit holder (a grocery store or pharmacy retailing beer for off premises consumption).

Your first question is whether distributors may sell at lower prices to grocery stores than to bars or restaurants.

Iowa has no statute which expressly prohibits discriminatory pricing to different purchasers. In certain unique circumstances, discriminatory pricing could be attacked as an attempt to create a monopoly under the Iowa Competition Law, Iowa Code § 553.5, or the federal Sherman Act, 15 U.S.C. § 2. Whether a pricing scheme is monopolistic would be a factual question. This office cannot resolve questions of fact in an Attorney General's opinion. 1984 Op.Att'yGen. 11; 1982 Op.Att'yGen. 353.

The federal Robinson-Patman Act, 15 U.S.C. § 13, does prohibit discrimination in price between competing customers. That act does allow the payment of promotional allowances where they are made available to all competing customers on proportionally equal terms, 15 U.S.C. §§ 13(d), 13(e), or where there is a rational basis to distinguish between purchasers.

Thus the only law directly addressing discriminatory pricing is a federal act. This office opines on issues of state law and on questions of federal law where state officers seek guidance concerning how to conform their actions to the dictates of federal law. An opinion of this office would not bind federal agencies in enforcing federal statutes against private persons. It would therefore be inappropriate for this office to officially opine on the interpretation to be given to the Robinson-Patman

Act. We are therefore simply providing general information on your first question.

Your second question concerning the authority of a class "A" beer permittee to sell to the general public is more readily addressed in an opinion. In responding to your second inquiry we have assumed that the transaction is occurring at the premises of the wholesale establishment because of your reference to the class "C" beer permittee as merely a "clearing house."

It is our judgment that a class "A" beer permittee is not authorized to sell beer at retail. Nor does a class "C" permittee have the authority to authorize a non-permittee to pick up beer at the premises of a beer wholesaler. A review of applicable statutes, rules and prior opinions will confirm that view.

Initially, it is observed that no one is authorized to sell beer at wholesale or retail unless first issued a permit. Iowa Code § 123.122 (1987). The permits to sell beer are statutorily divided into three classes: A class "A" permit authorizes the holder to "manufacture and sell beer at wholesale" [Emphasis added]; A class "B" permit authorizes the holder to sell beer at retail for on and off premises consumption; and a class "C" permit (issued only to grocery stores and pharmacies) allows the holder to sell beer at retail for consumption off the premises only. Iowa Code § 123.124 (1987).

The authority under a class "A" permit is further described in Iowa Code § 123.130 (1987). That section provides:

> Any person holding a class "A" permit issued by the division shall be authorized to manufacture and sell, or sell at wholesale, beer for consumption off the premises, such sales within the state to be made only to persons holding subsisting class "A", "B" or "C" permits, or liquor control licenses issued in accordance with the provisions of this chapter.

[Emphasis added]. Thus, a class "A" permit holder is authorized only to sell at wholesale to beer permittees and liquor licenses.

The authority of a class "A" permittee to sell to a non-permittee has previously been examined in a prior opinion. In 1940 Op.Att'yGen. 123, we recognized the general bar against a class "A" permittee retailing beer to non-permittees. In reviewing language similar to § 123.130, the opinion concluded

that the Fort Des Moines Post Exchange and Civilian Conservation Corps exchange, which did not hold a beer permit, could not legally be sold beer by a class "A" beer permit holder. 1940 Op.Att'yGen. at 123-124. The opinion recognized the ban, while ruling that the fact that the Exchange was a branch of the federal government was irrelevant. Thus, while a beer wholesaler is authorized to sell beer to beer permittees and liquor licensees, a class "A" permit holder is barred from retail sales.

Any effort to thwart the prohibition against class "A" retail sales by a scheme whereby a class "C" permittee would make the sale with delivery at the premises of a beer wholesaler is equally prohibited.

A beer permittee is only authorized to sell beer on the licensed premises. See 1934 Op.Att'yGen. 265. Certain limited exceptions, however, have been established by administrative rule. One exception is found in 185 Iowa Admin. Code § 4.33, which provides:

> Licensees and permittees who hold a license or permit which allows them to sell bottled wine and bottled beer may deliver beer and wine to residences if the customers phoned and requested that the beer and wine be delivered.

Further, 185 Iowa Admin. Code § 4.33, states:

> No retail liquor licensee or retail beer permittee shall store beer except on premises licensed for retail sale and then only to the extent that the beer is intended for sale to consumers from the individually licensed premises where stored. The adoption of this rule shall not preclude a retail liquor licensee or a retail beer permittee from picking up beer from class "A" and "F" beer permittees and directly transporting the beer to the retail establishment where the beer is intended to be sold at retail.

With these exceptions, a class "C" permittee may not sell beer beyond the licensed premises.

It is observed that limiting authority to transport beer to customers is necessary for effective enforcement of other provisions of the Alcoholic Beverages Act. For instance, a

practice permitting open delivery would hamper efforts to control the hours of sale, Iowa Code § 123.49(2)(h) (1987), sales to minors, Iowa Code §§ 123.47, 123.47A and 123.49(2)(h) (1987), and recordkeeping requirements, Iowa Code § 123.138 (1987).

In summary, a challenge to "dual pricing" in which distributors sell beverages, candy and cigarettes at lower prices to grocery stores than to bars or restaurants is potentially governed by the Iowa Competition Law, the federal Sherman Act and the Robinson-Patman Act. An opinion of the Attorney General is not the proper vehicle to determine whether a person has violated those provisions. A class "A" beer permittee is not authorized to sell beer at retail nor, under the present statute and administrative rules, is the holder of a class "C" beer permit authorized to deliver beer at the premises of a beer wholesaler.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW:mlr

SCHOOLS: Offsetting tax. Iowa Code § 282.2 (1987). A tenant, who under terms of a lease must pay property taxes on real estate, is entitled under Iowa Code § 282.2 (1987) to deduct the portion that is school tax from tuition required to be paid for a child who attends school in a district in which the tenant is not a resident. (Willits to Bruner, Carroll County Attorney, 4-1-88) #88-4-1(L)

April 1, 1988

Barry T. Bruner
Carroll County Attorney
225 East Seventh Street
Carroll, Iowa 51401

Dear Mr. Bruner:

You have asked for our opinion concerning the effect of Iowa Code § 282.2 (1987) on farm leases. The specific question is as follows:

> Do non-resident parents, who rent land in a school district and who are required by the terms of their farm lease to pay real estate taxes on the leased land, have the right to request and receive a credit against tuition for their child under § 282.2?

We are of the opinion that the answer is yes.

The Code section at issue is entitled offsetting tax and is as follows:

> The parent or guardian whose child or ward attends school in any district of which the child or ward is not a resident shall be allowed to deduct the amount of school tax paid by the parent or guardian in said district from the amount of tuition required to be paid.

This Code section and its predecessors have been the subject of several opinions of this office. None of those opinions bear directly on this question. The only reported case in which the Court considered the Code section pertained to tuition for a nephew, not the taxpayer's own child. Hume v. Independent School District of Des Moines, 180 Iowa 1233, 164 N.W. 188 (1917). This opinion sheds no light on the question at hand.

In construing statutes, the Attorney General applies the same rules of statutory construction that courts would apply. One primary rule of construction is applicable here. When a statute is plain and its meaning is clear, courts are not permitted to search for meaning beyond its express terms. State v. Sunclades, 305 N.W.2d (Iowa 1981). The statute in question, set forth above, would seem to be clear on its face that a parent or guardian who pays school tax in a district to which his or her child is tuitioned may credit the amount of the school tax paid against the tuition. The statute does not contain any language limiting this credit to those who own land in the district. It would be inappropriate for this office to read any such limitation into the statute. This view is supported by an earlier opinion of the Attorney General:

> [The applicable section] of the Code does nor require that the taxpayer be the owner in fee of the property, but merely provides that in the event he pays school taxes, then the amount may be deducted or offset, and this being true, the purchaser of real estate under contract, where the contract provides that he pay the taxes, would be entitled to the same deduction and offset as he would be if he were the owner in fee.

1936 Op.Att'yGen. 422.

While the legal status of a contract purchaser and a lessee are, of course, significantly different, we believe the primary point of the 1936 opinion remains valid: there is nothing in the statute limiting the school tax offset to fee owners. We are of the opinion that this same statement could be extended to note that there is nothing in the statute limiting the school tax offset to fee owners or contract purchasers. The plain language of the statute does not prevent a lessee, who as a term of the lease, pays property taxes on the leased property directly to the county treasurer, from claiming a credit against tuition. We do believe the lessee must have the obligation of paying the taxes directly. Renters who pay periodic rent payments directly to a landlord would not be eligible to claim that a part of the rent

is going to pay school property taxes and, thus, seek a credit against tuition.

We acknowledge that this opinion may result in increased use of lease arrangements, particularly of farm land, which provide for direct property tax payment by the lessee, to enable the lessee to take advantage of the credit provided by section 282.2. If this occurs, and it is a result not intended by the General Assembly, it can be corrected by legislation.

Sincerely yours,

Earl M. Willits

EARL M. WILLITS
Deputy Attorney General

EMW:sg

HIGHWAYS, CONSTITUTIONAL LAW: Road Use Tax Fund Expenditures for Public Transit. Iowa Const., Art. VII, § 8; Iowa Code chapter 312. The use tax proceeds included in the road use tax fund in § 312.1(3) are not the type of revenue dedicated to highway purposes by Article VII, § 8 of the Constitution. The allocation of use tax proceeds in § 312.2(17), as amended by the 1988 session of the General Assembly, is made before these proceeds are commingled with other revenues in the road use tax fund thereby avoiding any implication of Article VII, § 8. (Krogmeier to Harbor, State Representative, 5-12-88) #88-5-5(L)

May 12, 1988

The Honorable William H. Harbor
State Representative
State Capitol
Des Moines, Iowa
L O C A L

Dear Representative Harbor:

You have requested an opinion of the Attorney General concerning appropriations from the road use tax fund with specific reference to the allocation of funds to the public transit assistance fund pursuant to Iowa Code § 312.2(17) (1987). You question whether Article VII, § 8 of the Iowa Constitution permits the use of the revenue generated for the road use tax fund for purposes other than those provided for in Article VII, § 8 as long as the revenue is used before it is placed in the road use tax fund.

Article VII, § 8, the so-called "antidiversion" amendment to the Iowa Constitution, was adopted by the voters of the state in 1942 and states as follows:

> All motor vehicle registration fees and all licenses and excise taxes on motor vehicle fuel, except the 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.

The road use tax fund is created by Iowa Code ch. 312 and includes funds mentioned in the amendment along with other

funds. Section 312.1 creates the fund and indicates the various types of revenue that it includes, as follows:

> There is hereby created, in the state treasury, a road use tax fund. Said road use tax fund shall embrace and include:
>
> 1. All the net proceeds of the registration of motor vehicles under chapter 321.
> 2. All the net proceeds of the motor vehicle fuel tax or license fees under chapter 324.
> 3. All revenue derived from the use tax, under chapter 423 on motor vehicles, trailers, and motor vehicle accessories and equipment, as same may be collected as provided by section 423.7.
> 4. Any other funds which may by law be credited to the road use tax fund.

The net proceeds from the registration of motor vehicles and the net proceeds from the motor vehicle fuel tax referred to in § 312.1(1) and (2) are motor vehicle fees and fuel taxes as referred to in Article VII, § 8 of the Constitution. As such, the use of these fees and taxes is limited by the Constitution to the "construction, maintenance and supervision of the public highways exclusively within the state." Frost v. State, 172 N.W.2d 575 (Iowa 1969).

Also included within the road use tax fund is the revenue collected pursuant to § 423.7 from the use tax on motor vehicles, trailers, and motor vehicle accessories and equipment. § 312.1(3). These fees and taxes do not appear to be the type of fees and taxes referred to in Article VII, § 8. The use tax is an excise tax "upon the use of vehicles subject to registration or subject only to the issuance of a certificate of title." § 423.7. It is not an excise tax on motor vehicle fuel nor is it a motor vehicle registration fee or license. Therefore, Article VII, § 8 does not apply to the allocation of these revenues. However, once the use tax proceeds are deposited in the road use tax fund, they are commingled with constitutionally dedicated funds and lose their separate identify. Frost, 172 N.W.2d at 583. All allocations directly from the road use tax fund must therefore be consistent with Article VII, § 8.

The question you ask relates to the use of funds within the road use tax fund for purposes other than those allowed by Article VII, § 8. The fees and taxes mentioned under § 312.1(1) and (2) must be used for highway purposes as they are dedicated

funds by virtue of the Constitution. The taxes mentioned in § 312.1(3) are not dedicated to highway purposes under Article VII, § 8 of the Constitution and therefore, if this revenue is used for non-highway purposes, there is no constitutional violation. Any such use of the revenue provided for in § 312.1(3) for non-highway purposes must occur before it is commingled with the constitutionally dedicated tax proceeds and license fees referred to in § 312.1(1) and (2).

We note that the recently adjourned 1988 session of the General Assembly has amended § 312.2(17) to provide for the allocation of use tax proceeds to the public transit assistance fund before commingling in the road use tax fund. The amendment, signed by the Governor April 15, 1988, is as follows:

> 17. The treasurer of state, before making the allotments provided for in this section, shall credit monthly from the road use tax fund to the public transit assistance fund, created under section 601J.6, from revenue credited to the road use tax fund under section 423.24, subsection 1, paragraph "b", an amount equal to one-twentieth of the revenue credited to the road use tax fund under section 423.24, subsection 1, paragraph "b". (amended language emphasized).

Senate File 2314, 72nd G.A., 2d Sess. § 30. Section 423.24(1)(b) apportions funds derived from the use tax on motor vehicles, trailers, and motor vehicle accessories and equipment collected under Iowa Code § 423.7.

The 1988 amendment would appear to require the treasurer to make the allocation to the public transit assistance fund before the use tax proceeds are deposited in the road use tax fund as it is clear that the allocation is to be from the use tax revenue. Since the use tax collected pursuant to § 423.7 is not the type of revenue covered by Article VII, § 8, the allocation made in amended § 312.2(17) does not implicate the constitutional provision. Therefore, it is not necessary to resolve the question of the constitutionality of the allocations of the road use tax fund for the public transit program. We do not resolve hypothetical or abstract questions of law or speculate on the constitutional implications of a statute that no longer exists.

In summary, we are of the opinion that § 312.2(17) as it now exists, with the 1988 amendment, makes an allocation of the use tax proceeds collected pursuant to § 423.7 before those proceeds are commingled with other revenues in the road use tax fund. The use tax proceeds are not the type of fees and taxes within the

limitations of Article VII, § 8 of the Constitution. Therefore, it is not necessary to determine whether the allocation of use tax proceeds is consistent with Article VII, § 8.

Sincerely,

Charles J. Krogmeier
Special Assistant Attorney General

REAL ESTATE; Licensing: Iowa Code §§ 117.1, 117.3, 117.5(1)(2), 496C, and 496A (1987). The real estate statute does not as a matter of law limit the creation of corporations, associations, or partnerships by broker associates but it does, in effect limit the licensing of the separate entity only to those which have one officer or member who is a broker as defined in § 117.3, Iowa Code (1987). Even if a salesperson or broker-associate were to incorporate, the new entity cannot rise above the broker-member limitation to obtain a license nor could the corporation engage in any activity that requires licensing under the real estate statute. (Skinner to Skow, State Representative, 5-10-88) #88-5-4(L)

May 10, 1988

The Honorable Bob Skow
State Representative
Assistant Majority Leader
State Capitol
L O C A L

Dear Representative Skow:

You have requested an opinion of the Attorney General on the issue of whether a real estate broker-associate may incorporate under the Iowa statutes and administrative rules. You state that many broker associates in the state want to incorporate for tax purposes, in the same manner as accountants, physicians and attorneys, but to date, the Iowa Real Estate Examining Board has not thought the statutes and rules allow incorporation.

It is our opinion that the real estate statute does not as a matter of law limit the creation of separate entities by broker associates but it does, in effect, limit the licensing of the separate entity only to brokers.

By way of background, we note that any given real estate office in this state may have three different types of individuals involved: a broker, a broker-associate, and a salesperson. All have real estate training in some form and all function under specified statutes and rules.

A real estate broker is defined as "any person, other than a salesperson . . . who engages for all or part of the person's time in the following:

1. The business of selling, exchanging, purchasing, or renting of real estate for another for a fee, commission or other consideration.

> 2. Listing real estate of others for sale, exchange or rental for a fee, commission, or other consideration or advertises or claims to be a real estate broker. Iowa Code § 117.3 (1987)[1]

A real estate broker-associate is defined as "a person who has a broker's license but is employed by or otherwise associated with another broker as a salesperson." Iowa Code § 117.5(1) (1987).

A real estate salesperson is defined as "a person employed by or otherwise associated with a real estate broker, as a selling, renting or listing agent or representative of the broker." Iowa Code § 117.5(2) (1987).

We first dispose of the concept that any real estate entity can incorporate under the professional corporation statute, Iowa Code ch. 496C. This statute defines those professions included in this statute; real estate brokers, broker associates, and salespersons are not included.[2] We will confine our analysis to the question whether a broker-associate is precluded from incorporating as a business corporation under Iowa Code ch. 496A (1987). For all practical purposes, the broker-associate functions as a salesperson and is treated the same as a salesperson in the statute.

Important to the question in this opinion are the opening two sentences of § 117.1, the real estate brokers and salespersons statute, which states:

> A person shall not act as a real estate broker or real estate salesperson without first obtaining a license as provided in this chapter. The word "person" as used in this chapter means individual, partnership, association, or corporation.

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[1]There has been no question concerning the propriety of brokers incorporating in this state and in fact many of them do incorporate and license the corporation.

[2]Real estate licenses are within the category of "business licenses" as defined by one law review commentator. Hirschburg, Licensing in Iowa, 33 Iowa L. Rev. 347, 345-355 (1948).

In other words, every individual, partnership, association, or corporation acting as a broker or salesperson must obtain a real estate license.

The next subsection in the statute however, limits the actual licensing of a separate structure. Section 117.2 states in part:

> A partnership, association, or corporation shall not be granted a license, unless every member or officer of the partnership, association, or corporation who actively participates in the brokerage business of the partnership, association, or corporation, holds a license as a real estate broker or salesperson and unless every employee who acts as a salesperson for the partnership, association, or corporation holds a license as a real estate broker or salesperson.[3] At least one member or officer of each partnership, association, or corporation shall be a real estate broker.[4]

(Emphasis added).

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[3]In the view of one commentator this statement refers to the license granted to a broker.

> [T]he license may not be granted to the firm unless every employee who acts as a salesperson on its behalf holds a license as a real estate broker, salesperson . . . . This requirement does not mean that every member or officer of the firm must be licensed. For example, a passive shareholder not engaging in the firm's business need not be licensed. Nor must an employee, such as a secretary, who is not engaging in real estate sales be licensed. Gaudio, The Iowa Law of Real Estate Brokerage, 30 Drake L. Rev. 438, 437-501 (1981).

[4]Prior to 1974 Iowa Acts, ch 1086, § 33, this section required every active member or officer of the firm to hold a license as a real estate broker.

At first blush, this section seems to allow salespersons (or broker-associates) to form and license partnerships, associations or corporations, but the limitation that at least one member or officer must be a broker casts this provision in another light.[5] This limitation indicates that the licensing of separate entities can only be accomplished by a broker as defined in § 117.3. This reading is consistent with other parts of the statute which contain separate requirements applicable only to a broker. The broker must maintain a place of business, and hold and control the licenses of real estate salespersons it employs. Iowa Code §§ 117.31, 117.24 (1987). A broker-associate, although holding a broker's license, does not function as a broker. The broker-associate is employed as a salesperson, functions as a salesperson and is associated with one broker. The limitation in § 117.2 that at least one member or officer of each partnership, associate or corporation be a broker cannot be satisfied by one member being a broker-associate.

Should the statute not have the requirement that one member be a broker, these first two subsections of the statute read alone would allow a corporation to be licensed as a salesperson or broker-associate. Given this requirement, however, the board has permitted only a broker corporation (or a partnership or association) to be licensed and has developed administrative rules with further limitations.[6] The overriding purpose of the

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[5]An old Attorney General's opinion which concludes that an individual can do business as an individual and as a broker corporation with only one license was issued prior to a statutory change and is inapplicable to this opinion. 1934 Op.Att'yGen. 743.

[6]A broker functioning as a partnership, association, and corporation must obtain a license. Iowa Admin. Code 700-1.4. Each actively licensed broker-associate and salesperson shall be licensed under a broker. Iowa Admin. Code 700-1.21. A broker-associate or salesperson cannot be licensed under more than one broker during the same period of time. Iowa Admin. Id. Each broker when operating under a franchise or trade name other than the broker's own name may license the franchise or trade name with the board, or shall clearly reveal in all advertising that the broker is the licensed individual who owns the entity using the franchise or trade name. Iowa Admin. Code 700-1.24. A salesperson shall not handle the closing of any real estate transaction except under the direct supervision or with the consent of the employing broker. Iowa Admin. Code 700-1.29. A

statute establishing the Real Estate Examining Board and its delegation of authority to the Board is to protect the public. Milholin v. Vorhies, 320 N.W.2d 552 (Iowa 1982). The board is granted express authority to promulgate rules to carry out and administer the provisions of chapter 117. Iowa Code § 117.9. The rules effectuate the statutory requirement that each partnership, association, or corporation have a broker officer or broker member.

In conclusion, it is our opinion that, while the statute does not limit the formation of corporations by broker associates as a matter of law, it does limit those which may obtain a real estate license to those which have one officer or member who is a broker as defined in the statute. Even if a salesperson or broker-associate were to incorporate, the new entity cannot rise above the broker-member limitation to obtain a license for the partnership, association, or corporation. Nor could the corporation engage in the business of selling or listing real estate or any activity that requires licensing under the statute. As a practical matter, the combination of the licensing requirement and the requirement that any corporation include a broker may preclude a broker-associate from incorporating. However, we would not state per se that there could never be a lawful corporation created by a broker-associate.

Sincerely,

Kathy Skinner

KATHY MACE SKINNER
Assistant Attorney General

KMS:sg

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licensed broker is responsible for providing supervision of any salesperson or broker associate licensed with the broker as a selling, renting, managing or listing agent or representative of the broker. Iowa Admin. Code 700-1.30.

BEVERAGE CONTAINER DEPOSIT LAW: Iowa Code Chapter 455C; Iowa Code §§ 455C.1(5), 455C.2, 455C.3, 455C.6, 455C.7 (1987); 567 Iowa Admin. Code § 107.4(1). If a grocery chain engages in the sale of beverages in beverage containers to its dealers, it is a "distributor" under the bottle law and is required to pay the one-cent handling fee to a redemption center for the dealer served by the distributor. An unapproved redemption center could, in certain circumstances, be a "redemption center for a dealer served by the distributor." (Ovrom to Beres, Hardin County Attorney, 5-10-88) #88-5-3(L)

May 10, 1988

Mr. James L. Beres
Hardin County Attorney
P.O. Box 129
Eldora, Iowa 50627

Dear Mr. Beres:

You asked for an Attorney General's opinion on the beverage container deposit law, Iowa Code ch. 455C. You state that a local retail grocery chain sells its own private label soft drinks in redeemable containers. The chain refuses to pay redemption centers the one-cent handling charge provided by § 455C.2(2) for these beverage containers.

You ask whether the retail grocer is required to pay a redemption center the one-cent handling charge provided by Iowa Code § 455C.2(2) (1987) when the grocer redeems its own private label containers from a redemption center. The answer depends on whether the grocer fits the definition of "distributor," and whether the redemption center is a "redemption center for a dealer served by the distributor."

Redemption centers are authorized by Iowa Code § 455C.6 (1987). They are places consumers can return empty beverage containers and receive a five-cent refund. Their purpose is to facilitate the return of empty containers and to service retail dealers. Iowa Code § 455C.6(1) (1987).

There are two types of redemption centers authorized by Code chapter 455C: "approved" redemption centers and "unapproved" redemption centers. Approved redemption centers are authorized by the Department of Natural Resources, to serve specific retail dealers such as grocery stores or convenience shops, and they relieve the specified dealers of their duty to refund five cents

to consumers (i.e. the consumer returns empty cans and bottles to the redemption center rather than to the grocery store). See Iowa Code §§ 455C.6, 455C.7 (1987). Anyone can also operate an unapproved redemption center where consumers return empty containers; however this does not relieve a dealer of the responsibility to redeem empty containers. Iowa Code § 455C.7 (1987). DNR rules state that the difference between an approved and an unapproved redemption center "is in the effect on the obligation of dealers to redeem certain empty beverage containers rather than in the activity performed by the redemption center." 567 Iowa Admin. Code § 107.4(1).

A distributor is defined as "any person who engages in the sale of beverages in beverage containers to a dealer in this state, including any manufacturer who engages in such sales." Iowa Code § 455C.1(5) (1987). Distributors are required to accept and pick up "from a dealer served by the distributor or a redemption center for a dealer served by the distributor" empty beverage containers of the kind, size and brand sold by the distributor, and to pay to the dealer or redemption center the five-cent refund value plus an additional one cent per container. Iowa Code §§ 455C.2, 455C.3(2) (1987).

You describe a situation in which a local retail grocery chain sells its own private label soft drinks in redeemable containers, and refuses to pay the one-cent handling charge to redemption centers. If the grocery chain fits the definition of a "distributor," then it is required to pay the one-cent handling charge to a redemption center for a dealer served by the distributor under § 455C.3(2).

From the facts of your letter it is unclear if the grocery chain would be a distributor. If it sells the soft drinks in beverage containers to its retail dealers (stores), then it would be a distributor under the definition of 455C.1(5). If it manufactures soft drinks and delivers them to its own retail grocery stores without selling them, it would not appear to fit within the definition of distributor and would not be required to pay the one-cent handling fee.

This latter scenario illustrates an unfortunate loophole in the law. Such retail chains would in effect have no distributor as defined in chapter 455C because there is no "sale" to a dealer. The chain would be allowed a windfall in receiving five-cent deposits on its private label soft drinks, and would not have to accept and pay the refund and handling fees on these containers which are returned to redemption centers.

Distributors are required to accept and pick up empty containers "from a dealer served by the distributor or a

redemption center for a dealer served by the distributor" under § 455C.3(2). Another issue which arises under the question you ask is whether an unapproved redemption center is a "redemption center for a dealer served by the distributor" under 455C.3(2). It could be argued that only approved redemption centers, which relieve specified dealers from the obligation to redeem empty containers, are redemption centers "for a dealer." However we decline to espouse this categorical rule without knowing the facts involved. We are aware of situations where unapproved redemption centers have contracts or relationships with dealers. In some cases unapproved redemption centers act as pick-up services for dealers. That is, they go out to dealers and pick up all their empty beverage containers. Distributors then deal with one unapproved redemption center rather than multiple dealers. Under those facts an unapproved redemption center could arguably be a "redemption center for a dealer" under 455C.3(2). Thus we think there could be situations in which distributors would be required to accept and pick up empty containers from unapproved redemption centers and pay the refund value plus the one-cent handling fee.[1]

In conclusion, if a grocery chain engages in the sale of beverages in beverage containers to a dealer, it is a distributor, and is required to pay the one-cent handling fee to a redemption center for the dealer served by the distributor. An

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[1]This conclusion is strengthened by recent legislation. The 1988 Iowa legislature passed an amendment to Chapter 455C which creates a new category of container redeemer: the "dealer agent." 1988 Iowa Acts, S.F. 443, § 1 [amending Iowa Code § 455C.1]. A dealer agent is one who solicits or picks up empty beverage containers from a dealer for the purpose of returning them to a distributor or manufacturer. Id. The new legislation requires distributors to accept empty containers from dealer agents and to pay them the five-cent refund value plus the additional one cent per container. It also allows distributors to refuse to accept empty containers picked up from dealers outside the geographic territory served by the distributor. 1988 Iowa Acts, S.F. 443, § 4 [to be codified at Iowa Code § 455C.4]. If signed by the Governor, this bill will become law July 1, 1988. It does not change our opinion concerning the question you ask.

unapproved redemption center could, in certain circumstances, be a "redemption center for a dealer served by the distributor."

Sincerely,

ELIZA OVROM
Assistant Attorney General

EO:rcp

LAW ENFORCEMENT, PUBLIC SAFETY; Missing Persons; Iowa Code §§ 694.1, 694.2, 694.3 and 694.10 (1987). The phrase "a law enforcement agency having jurisdiction" in Iowa Code § 694.2 (1987) refers to any such agency which is in a position to conduct an investigation of the case within its territorial jurisdiction whether because it is the place of residence of the missing person, where the person was last seen, where witnesses or pertinent evidence may be located, where the person is likely to be coming or intended to go, or where there are any other factors providing the base for an investigation. There may be several agencies having jurisdiction in a given case. Reports in the Missing Person Information Clearinghouse cannot be withdrawn so long as the subject of the reports continues to be a missing person as defined in Iowa Code § 694.1 (1987). (Hayward to Shepard, Commissioner, Department of Public Safety, 5-4-88) #88-5-2(L)

May 4, 1988

Mr. Gene W. Shepard
Commissioner of the Iowa
Department of Public Safety
Third Floor, Wallace Building
L O C A L

Dear Commissioner Shepard:

You have asked this office for its opinion concerning the application of the reference in Iowa code § 694.2 (1987) to "a law enforcement agency having jurisdiction" to various situations in which the missing person disappeared in some locality other than his or her regular place of residence. Specifically you have asked the following questions:

1. When a person is reported missing from a location other than his or her regular place of residence, what factors are to be used in determining the agency of jurisdiction for purposes of this statute?

2. When a juvenile's original place of residence is one county and the juvenile is temporarily residing in another county due to a court order placement, what factors are to be used in determining which agency is the agency of jurisdiction for the purpose of this statute.

3. If an individual from Iowa who has been placed in a foster home or shelter facility in another state is missing, and the other state is handling the case within the guidelines of chapter 694, does that relieve any Iowa agency from responsibility for the case? If the other state refuses to handle the case as a missing person case, what would be the factors used in determining the Iowa agency with jurisdiction and responsibility to handle the missing person entry?

4. Under what circumstances can an Iowa agency cancel a missing person entry if an individual has not be located?

The pertinent statutory provisions to this opinion are Iowa Code §§ 694.1, 694.2, 694.3 and 694.10(5) and (6) (1984). Section 694.1 states:

> As used in this chapter, unless the context otherwise indicates, "missing person" means a person who is missing and meets one of the following characteristics:
>
> 1. Is physically or mentally disabled.
>
> 2. Was, or is, in the company of another person under circumstances indicting that the missing person's safety may be in danger.
>
> 3. Is missing under circumstances indicating that the disappearance was not voluntary.
>
> 4. Is an unemancipated minor.
>
> For purposes of this chapter an "unemancipated minor" means a minor who has not married and who resides with a parent or other legal guardian.

Section 694.2 states:

> 1. A person may file a complaint of a missing person with a law enforcement agency having jurisdiction. The complaint shall include, but is not limited to, the following information:
>
> a. The name of the complaint.
>
> b. The relationship of the complainant to the missing person.
>
> c. The name, age, address, and all identifying characteristics of the missing person.
>
> d. The length of time the person has been missing.
>
> e. All other information deemed relevant by either the complainant or the law enforcement agency.
>
> 2. A report of the complaint of missing person shall be given to all law enforcement personnel currently on active duty for that agency through internal means and over the law enforcement administration network immediately upon its being filed.

Section 694.3 states:

> 1. A law enforcement agency in which a complaint of a missing person has been filed shall prepare, as soon as practicable, a report on a missing person. That report shall include, but is not limited to, the following:
>
> a. All information contained in the complaint on a missing person.

b. All information or evidence gathered by a preliminary investigation, if one was made.

c. A statement, by the law enforcement officer in charge, setting forth that officer's assessment of the case based upon all evidence and information received.

d. An explanation of the next steps to be taken by the law enforcement agency filing the report.

Iowa Code § 694.10(5) and (6) (1987) states:

5. A person who has filed a missing person complaint with a law enforcement agency shall immediately notify that law enforcement agency when the location of the missing person has been determined.

6. After the location of a person reported missing to the clearinghouse has been determined and confirmed, the clearinghouse shall only release information described in subsection 2, paragraphs "g" and "h" concerning the located person. After the location of a missing person has been determined and confirmed, other information concerning the history of the missing person case shall be disclosed only to law enforcement officers of this state and other jurisdictions when necessary for the discharge of their official duties and to the juvenile court in the county of a formerly missing child's residence. All information relating to a missing person in the clearinghouse shall be purged when the person's location has been determined and confirmed, except that information relating to a missing child shall be purged when the child reaches eighteen years of age and the child's location has been determined and confirmed.

The purpose of any exercise in statutory construction is to ascertain and, to the extent possible, give effect to the intent of the legislature behind the enactment in question. In doing so, we should look to the object to be accomplished, the mischief to be remedied, or the purpose to be served, and place on the statute that construction which will best effect rather than defeat the intent. Beier Glass Co. v. Brundige, 329 N.W.2d 280 (Iowa 1983). Words are to be given their meaning in common usage, unless they have particular technical or legal meaning in the context of the statute. Iowa Code § 4.1(2) (1987); Welp v. Iowa Dep't of Revenue, 333 N.W.2d 481 (Iowa 1983).

The intent behind the enactment of chapter 694 is obvious. the legislature was concerned that persons seeking official assistance from law enforcement agencies to locate relatives, friends or associates who had disappeared were being frustrated by rules or policies and indifferences, real or perceived, of these agencies. The purpose of the statute is to provide some uniformity to the process so that concerned persons know to whom to turn, and law enforcement agencies know what their obligations are.

It is with this intent and purpose in mind that we turn to the language of the statute. Your first three questions all share a common misconstruction of Iowa Code § 694.2 (1987). That is that there is one agency with jurisdiction, one agency with an obligation to receive the missing person report. You asked what factors would be considered in determining "the" agency with jurisdiction. The statute refers to "a" law enforcement agency. The word "a" is an indefinite article.

> The article "a" is not necessarily a singular term; it is often used in the sense of "any" and is then applied to more than one individual object.

Black's Law Dictionary, p. 3 (4th Rev. Ed. 1973). Thus, it is clear that while the obligations of chapter 694 can be imposed only on a law enforcement agency that has jurisdiction, there is by no means necessarily only one such agency in a given case. Such a construction of the statute would complicate rather than simplify the task of persons seeking law enforcement assistance.

There are many ways in which an agency could become "a law enforcement agency having jurisdiction." It could have jurisdiction over the missing person's place of residence, where the person was last seen, where witnesses or other pertinent evidence may be located, where the person is likely to be coming or intended to go, or any other factors providing a basis to conduct an investigation within its territorial authority. The scope of the phrase is broad, and was intended to be so. Thus, any number of agencies could be obligated to receive a missing person report and follow through with the requirements of chapter 694, even though other agencies may have already done so, or may be asked to do so in the future.

The only references in chapter 694 to the cancellation of a missing person report are in Iowa Code § 694.10(5) and (6) (1987), referring to the Missing Person Information Clearinghouse in the Iowa Department of Public Safety. These provisions only permit the cancellation of reports on persons who have been located. It would be unreasonable to cancel a missing person report because the person's place in an institution or facility had been filled, for administrative reasons, or because for any other reason the person reporting their disappearance was no longer interested in their return. So long as they meet the criteria of Iowa Code § 694.1 (1987) as a missing person, they are to remain on the registry of missing persons in the Clearinghouse.

Respectfully yours,

GARY L. HAYWARD
Assistant Attorney General
Public Safety Division

GLH:mjs

HIGHWAYS, CONSTITUTIONAL LAW, APPROPRIATIONS: Limitations on Highway or Bridge Construction in Appropriation Bills. Iowa Const., Article III § 29 and § 30; Iowa Code § 307A.2(11); 1987 Iowa Acts, ch. 233, § 218. The prohibition of the authorizing of the construction of a bridge in 1987 Iowa Acts, ch. 233, § 218, is to be construed to apply only to the appropriations contained in the same legislative act, for to give a broader, more indefinite application would result in a conflict with Article III, § 29 and § 30 of the Iowa Constitution. (Krogmeier to Wilson, 6-30-88) #88-6-5(L)

Larry J. Wilson, Director
Department of Natural Resources
Wallace State Office Building
Des Moines, IA 50319

Dear Mr. Wilson:

You have requested an opinion of the Attorney General concerning Senate File 511, 1987 Iowa Acts, chapter 233, section 218. You question whether section 218 is a permanent prohibition against reconstruction of the bridge over the canal at Black Hawk State Park, or whether the prohibition expires at the end of the fiscal year, June 30, 1988. We conclude that the latter interpretation is the correct one.

1987 Iowa Acts, ch. 233 (hereafter referred to as ch. 233) is a rather lengthy bill containing the following title:

> An act relating to the financing of public agencies and programs and making appropriations to agencies, boards, commissions, departments, and programs of state government relating to elected officials, the executive council, management, revenue and finance, personnel, general services, economic development, agriculture, natural resources, and education, providing a property tax exemption for certain educational facilities, establishing an office of state-federal relations, providing for the education of American Indian children, establishing an occupational therapist loan program, providing for the sale of certain property and the purchase of certain property, providing tax exemption for certain property of a public television station, establishing a targeted small business linked deposit

> program and Iowa satisfaction and performance bond program, establishing a state fair authority, establishing an obstetrical and newborn indigent patient care program, accretion to bargaining units of certain teachers, providing for a loan of moneys in the permanent school fund, providing a tax deduction and a tax credit for certain purposes, making provisions retroactive, and providing effective dates.

Ch. 233, § 218 provides as follows:

> The Natural Resources Commission shall not authorize the reconstruction of the bridge over the canal at Black Hawk State Park.

Neither § 218 nor any other provision of ch. 233 specifically appropriates funds for the bridge mentioned. Likewise, no provision specifies the time period during which the prohibition of § 218 applies even though the other provisions of the bill deal with effective dates for other sections. Ch. 233, § 498. Consequently, § 218 is ambiguous as to the duration of its existence, requiring that rules of statutory construction be applied. Janson v. Fulton, 162 N.W.2d 438 (Iowa 1968).

In construing a statute we must look to the object to be accomplished, the mischief to be remedied, or the purpose to be served, and place on the statute a reasonable construction which will best effect the legislature's purpose. State v. Kirklan, 357 N.W.2d 310, 313 (Iowa 1984); Iowa Code § 4.6 (1987). In interpreting statutes, the Supreme Court considers all parts together without attributing undue importance to any single or isolated portion. Beier Glass Co. v. Brundage, 329 N.W.2d 280, 283 (Iowa 1983). A strained, impractical or absurd result should be avoided in favor of a sensible, logical construction. Id. The manifest intent of the legislature will prevail over the literal import of the words used. Iowa National Industrial Loan Company v. Iowa Department of Revenue, 224 N.W.2d 437 (Iowa 1974). Revisions will not be construed as altering a particular statute absent clear and unmistakable legislative intent. LeMars Mutual Ins. Co. v. Bonnecroy, 304 N.W.2d 422 (Iowa 1981); State v. LeFlore, 308 N.W.2d 39 (Iowa 1981).

On its face, § 218 does not appear to have any relationship to appropriations granted to the Department of Natural Resources in ch. 233, and could be reasonably interpreted to have indefinite duration. However, to apply § 218 as though it had no termination date does raise certain Iowa constitutional questions regarding its validity. First, such an interpretation needs to

be reconciled with the provisions of Article III, § 30 of the Constitution relating to the enactment of local or special laws. Second, such an interpretation needs to be reconciled with the provisions of Article III, § 29 of the Constitution concerning the subject matter and title of the bill. And finally, such an interpretation of § 218 may require reconciling the section with the inherent constitutional question of separation of powers between the executive and legislative branches. Because of the discussion that follows concerning the first and second constitutional issues, and the conclusions we reach, we do not address the other potential issue.

The pertinent part of Article III, § 30 of the Constitution is as follows:

> The General Assembly shall not pass local or special laws in the following cases:
>
> For the assessment and collection of taxes for State, County, or road purposes;
> For laying out, opening, and working roads or highways; . . .
>
> In all the cases above enumerated, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State; . . .

(emphasis added)

The Iowa Code allocates to the Natural Resources Commission the authority to exercise its discretion in determining what roads or bridges should be improved within the state parks and institutional roads system. Iowa Code § 307A.2(11). If § 218 of ch. 233 were given an interpretation that would give it permanent effect and not limit its duration to the 1988 appropriations, the legislature then would have removed the bridge in question from the discretionary authority of the Natural Resources Commission under § 307A.2(11). This would amount to a statutory change without a specific statement by the legislature indicating an intent to amend the Code. We presume that the legislature was aware of § 307A.2(11) and could have amended it if the legislature so chose. We do not believe that the legislature clearly stated an intent to deviate from prior policy or to amend § 307A.2(11).

If we were to interpret § 218 to be of indefinite duration and therefore apply permanently to any reconstruction or rebuilding of the bridge in question, a serious question would arise as to whether the section would then be a local or special

law. The provision would definitely concern the working of a road. It would also apply to a local or special area and not be of general application. We do not believe this was the legislative intent.

We make reference at the beginning of this opinion to the title of ch. 233. In carefully reviewing the title, we find that the only reference in the title that could conceiveably include § 218 is that portion relating to funding for the Department of Natural Resources. The major focus of ch. 233 is the appropriation of funds for various state agencies, including the Department of Natural Resources. No reference to changing state policy in designating bridges for reconstruction is contained in the title of ch. 233. If § 218 is interpreted to be of indefinite duration, and in effect amount to an amendment to § 307A.2(11), it may then be in conflict with Article III, § 29 of the Constitution.

Article III, § 29 of the Iowa Constitution is as follows:

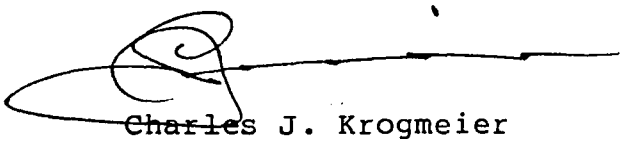
> Every act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title. But, if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title.

We believe the legislature intended § 218 to apply only to the appropriations contained within ch. 233. To give § 218 a broader, more indefinite application would not be consistent with the title of ch. 233. The title of ch. 233 deals primarily with funding of the Department of Natural Resources, other agencies and with statutory change in certain programs. The only relationship that § 218 has to the title concerns the funding of the Department of Natural Resources. We believe this connection to appropriations would be sufficient to withstand challenge under Article III, § 29.

Therefore we are of the opinion that the legislature intended that § 218 of ch. 233 of the 1987 Iowa Acts was intended to be limited only to the appropriations contained within the same legislation. To give the section a more indefinite or unlimited duration beyond the effective date of the appropriations would result in a serious constitutional question being raised under Article III, § 30 and possibly under Article III, § 29. We presume that legislative acts are constitutional and we seek to give legislative acts an interpretation that will

be consistent with the constitution. Therefore, we conclude that the restriction placed in ch. 233, § 218 applies only to the Natural Resource Commission's expenditure of the funds appropriated in the same legislation and within the same fiscal year and does not act as a permanent or indefinite limitation on the exercise of discretion by the Natural Resources Commission concerning the bridge in question.

Sincerely,



Charles J. Krogmeier
Special Assistant Attorney General

ELECTIONS: Voter Registration. Change of Name, Address or Telephone Number. Iowa Code ch. 39: § 39.3. Ch. 43: §§ 43.41, 43.42. Ch. 48: §§ 48.6, 48.7. Submission of an alternate registration form, with no party affiliation marked, as a notice of change to the name, address or telephone number of an existing registration pursuant to § 48.7 is insufficient to terminate a previously declared affiliation with a political party. (Pottorff to Nelson, State Registrar of Voters, 6-28-88) #88-6-3(L)

June 28, 1988

Mr. Dale L. Nelson
State Registrar of Voters
Department of General Services
Hoover State Office Building
L O C A L

Dear Mr. Nelson:

You have requested an opinion of the Attorney General concerning the consequences of failing to designate a party affiliation when a registered voter reports a change of name, address or telephone number to the county commissioner. You point out that a change of name, address or telephone number is not required to be recorded by the voter on any particular form. You state that a letter or postcard, a "special purpose change form," or "an alternate registration form" may be used to notify the county commissioner.

Apparently the mechanism by which the voter chooses to notify the county commissioner of these changes affects how some county commissioners have construed a contemporaneous failure to designate a party affiliation. You state that when the voter utilizes a letter or postcard or completes a "special purpose change form" and makes no affirmative indication of a change in party affiliation, party affiliation is left unchanged on the official registration rolls. If, however, the voter utilizes an alternate registration form to record these changes and makes no affirmative indication of a party affiliation, some county commissioners have changed the registration rolls to reflect no party affiliation for the voter even though the voter may have been registered previously as a Democrat or a Republican. A

recent amendment to the voter registration laws has failed to resolve this ambiguity.

In light of the confusion concerning a failure to designate any party affiliation when an alternate registration form is used, you ask whether a voter who submits an alternate registration form, with no party affiliation marked, as a notice of change to the name, address or telephone number of an existing registration has indicated a desire to terminate a previously declared affiliation with a political party. It is our opinion that the failure to designate a party affiliation under these circumstances is insufficient to terminate a previously declared affiliation with a political party.

A voter registration form collects a variety of information for the registration records. Under chapter 48 the form requires the following:

> 1. The name of the applicant in full.
>
> 2. Residence, giving name and number of the street, avenue, or other location of the dwelling, and such additional clear and definite description as may be necessary to give the exact location of the residence of the applicant. Post-office box numbers shall not be used unless no other method of identifying the residence exists for the community.
>
> 3. Date of birth.
>
> 4. Sex.
>
> 5. Date of registration.
>
> 6. Ward, precinct, school district, and such other districts in which the registrant resides which are empowered to call special elections. To assist in making this determination the commissioner may also request other information including but not limited to fire district number or township, range and section number of the location of the applicant's residence. The commissioner may if necessary obtain the needed information from other sources, but shall in on case decline to register an applicant because the applicant is unable to provide any of the information referred to in this subsection.

> 7. Name, if different than current name, and address given on applicant's last previous registration.
>
> 8. Party affiliation. No party affiliation need be stated if the applicant declines to make such statement.
>
> 9. A certification in substantially the following form:
>
> "I certify that I am a citizen of the United States, that I am or will be an eligible elector at any election at which I attempt to vote and that all of the information I have given upon this voter registration form is true. I authorize cancellation of any prior registration to vote in this or any other jurisdiction and my eligibility to vote in any jurisdiction where voter registration is not required. I am aware that fraudulently registering, or attempting to do so, is an aggravated misdemeanor under Iowa law."
>
> 10. The social security number of the applicant, if available.
>
> 11. The signature of the applicant.
>
> 12. Residential telephone number if available.

Iowa Code § 48.6 (1987) (emphasis added). Among the information collected, therefore, is the voter's name, address, telephone number and party affiliation.

Separate statutory provisions authorize a qualified elector[1] to make changes in the registration information without executing a completely new registration form. A qualified elector may submit a "written notice" bearing the elector's signature of a

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[1]A qualified elector is a person who is registered to vote pursuant to chapter 48. Iowa Code § 39.3(2). An eligible elector possesses all of the qualifications necessary to entitle the person to be registered to vote whether or not the person is in fact registered. Iowa Code § 39.3(1).

change of name, address or telephone number to the county commissioner. The commissioner, in turn, shall change the registration records accordingly and the change shall be reflected in the election registers prepared for the next election held ten or more days after receipt of the notice. Iowa Code § 48.7(1)(a). Alternatively, the qualified elector may record a change of name, address or telephone number at the polling place on election day under certain circumstances. Iowa Code § 48.7(1)(b).

The confusion which you describe arises when a qualified elector utilizes "an alternate registration form" to record a change in name, address or telephone number pursuant to § 48.7. See 845 Iowa Admin. Code § 2.1 et seq. This same form may be used to register to vote. 845 Iowa Admin. Code § 2.1(5). The form contains boxes marked "Republican" and "Democratic" and the instruction: "Check one or you may decline to state party." Id. An eligible elector, therefore, "registers" with no party and attains "independent" status by failing to check either party option. Consequently, both an eligible elector who intends to register as an "independent" and a qualified elector who intends to change his or her phone number but leave the party affiliation unchanged would use this form and would not check either box. Confusion on this issue is not only unsurprising but, perhaps, inevitable.

In 1987 the legislature enacted the following new paragraph to § 48.7:

> If a change of name, address or telephone number is submitted under this subsection, the commissioner shall not change the party affiliation in the elector's prior registration other than that indicated by the elector.

Iowa Code § 48.7(1)(b) (Supp. 1987). Under this language the commissioner is precluded from changing the party affiliation "other than that indicated by the elector."

In construing this new paragraph, we are guided by principles of statutory construction. In interpreting statutes all relevant statutes should be read together and harmonized. Office of Consumer Advocate v. Iowa State Commerce Commission, 376 N.W.2d 878, 881 (Iowa 1985). See Messina v. Iowa Department of Job Service, 341 N.W.2d 52, 56 (Iowa 1983). A statutory amendment, moreover, can be for the purpose of clarification. See Knight v. Iowa District Court of Story County, 269 N.W.2d 430, 434 (Iowa 1978). Applying these principles, we point out that separate statutory provisions govern notice of a change in

the voter registration information and declaration or change in political party affiliation. There is no provision under § 48.7 to change party affiliation at all. The prefatory language to this section provides that a "qualified elector may record a legal change of name or a change of telephone number or address, for voter registration purposes . . . ." Iowa Code § 48.7(1). Section 43.41 provides a separate procedure for a qualified elector to change or declare a political party affiliation. This statute states:

> Any qualified elector who desires to change or declare a political party affiliation, may, before the close of registration for the primary election, file a written declaration stating the change of party affiliation with the county commissioner of registration who shall enter a notation of such change on the registration records.

Iowa Code § 43.41. Under this statute a qualified elector may file a written declaration to change or declare a political party affiliation with the county commissioner. This change may also be made at the polls on election day. Iowa Code § 43.42.

Juxtaposing these statutory provisions, it is clear that a change of political party affiliation is not authorized under § 48.7. The language added to § 48.7 in 1987 clarifies the limited scope of this section. Any form changing the name, address or telephone number tendered under § 48.7, therefore, should not be deemed effective to change political party affiliation.

In our view this confusion is generated by use of the same forms for different statutory purposes. We believe much of the confusion on this matter could be eliminated by clear delineation of the purposes for which forms to register to vote pursuant to § 48.6, to record a legal change of name, or change of telephone number or address pursuant to § 48.7 or to declare or change a political party affiliation pursuant to § 43.41 are used. We encourage the Secretary of State and the Voter Registration Commission in whom rulemaking powers are vested to develop forms which clearly reflect the statute under which it is filed. If it is most efficient to use one form for both new registration pursuant to § 48.6 and for notice of changes pursuant to § 48.7,

color coding of the forms or inclusion of boxes which indicate the purpose for which the form is filed may resolve these problems.

Sincerely,

JULIE F. POTTORFF
Assistant Attorney General

JFP:mlr

TAXATION: Collection And Compromise Of Tax On Buildings On Leased Land. Iowa Code §§ 428.4, 445.8, 445.32 (1987). Delinquent property taxes on buildings on leased land are collected by enforcing the § 445.32 tax lien on the building by selling the building at a distress sale. The County has no authority to compromise the delinquent tax. (Mason to Riepe, Henry County Attorney, 6-7-88) #88-6-2(L)

June 7, 1988

Michael A. Riepe
Henry County Attorney
Courthouse, P. O. Box 69
Mt. Pleasant, Iowa 52641

Dear Mr. Riepe:

You have requested an Attorney General's Opinion regarding real estate taxes on buildings on leased lands. Specifically, you have raised the following issues:

1. Who may compromise delinquent taxes levied on a building erected by a person other than the owner of land on which the building is located, as provided for in §428.4, the Code, which are required to be collected in the manner prescribed in §445.32, the Code? When can such a compromise be effected? What procedures must be followed in such a compromise?

2. What procedures are to be followed and what property is subject to distraint and sale in collection of delinquent real estate taxes levied against buildings pursuant to §445.32, the Code?

The context in which you wish to have these issues addressed is the following problem:

A restaurant building was constructed by lessee on undeveloped real estate. In settlement of suit over forfeiture of leasehold, in which County was <u>not</u> a party, all interest in the building of the lessee, lessee's assignees and some of lessee's creditors were quit-claimed to lessor. Property taxes, assessed in the name of the building owner-lessee, and levied as real estate taxes against the building were, at the time of settlement, delinquent and are still not paid and are now more than one year delinquent. The County Treasurer desires to collect the delinquent taxes, as required by §445.32, through issuance of a distress warrant and by distraint and sale of the restaurant

building only commencing in June, 1988. The lessor-owner believes that §§445.32 and 445.8, when read together, limit the method of collection of the taxes to issuance of a distress warrant for the distraint and sale of personal property, not the building. Lessor-owner also wishes to enter into negotiations for the compromise of the delinquent taxes.

The issues you have raised will be addressed in reverse order.

Iowa Code § 428.4 (1987) provides that a building erected by a person other than the owner of the land on which the building is located shall be listed and assessed to the owner of the building "as real estate." Therefore, the tax on the building is treated as a real estate tax rather than a personal property tax. Iowa Code § 445.32 (1987) provides the following:

> If a building is erected by a person other than the owner of the land on which the building is located, as provided for in section 428.4, the taxes on the building shall be and remain a lien on the building from the date of levy until paid. If the property taxes on the building become delinquent for a tax year the county treasurer shall collect the tax in the same manner as delinquent personal property taxes are collected under section 445.8.

Iowa Code § 445.8 (1987) provides for the issuance of a distress warrant for the collection of delinquent personal property taxes.[1] Therefore, although the tax on the building is considered to be a real estate tax, the legislature has decided to allow the delinquent tax to be collected by selling the building pursuant to a distress warrant rather than requiring the county to follow the tax sale procedures set forth in Iowa Code chapter 446 (1987).

The assessment of the building in a particular name "is only a matter of administrative convenience." See Oberstein v. Adair

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[1]The 1988 General Assembly of the State of Iowa enacted Senate File 452, which added a new subsection to Iowa Code § 445.8 to cancel all personal property taxes not collected by July 1, 1988, and rescind all personal property tax liens. Since the tax on the building is a real estate tax, Senate File 452 is not relevant to its collection.

County Board of Review, 318 N.W.2d 817, 819 (Iowa App. 1982).[2] The real estate tax on the building is a charge upon the building, and is not a personal obligation of any person. See Merv E. Hilpipre Auction Co. v. Solon State Bank, 343 N.W.2d 452, 455 (Iowa 1984). Also, the lien on the building does not attach to the underlying land. 1984 Op.Att'yGen. 125.

"Where a specific remedy is provided for tax collection, such remedy must be followed; the statutory remedy is exclusive." Hilpipre, 343 N.W.2d at 456. The specific statutory remedy for collection of the real estate tax on a building on leased land is to enforce the lien on the building by distraint and sale of the building under Iowa Code § 445.8. The procedures to be followed are the same as those followed for any other warrant for the distraint and sale of personal property. See Iowa Code § 445.8(4) (1987). Notice of the tax delinquency must be published in an official newspaper in the county, in compliance with Iowa Code §§ 445.8(2) and (3). Within ten days following publication of the notice, the county treasurer issues a distress warrant "in the form prescribed in section 445.7." Iowa Code § 445.8(3). The form prescribed in § 445.7 can be easily modified to refer to real estate taxes and to command the sheriff or tax collector to "distrain, seize, levy upon, and sell" the building on which the delinquent tax is a lien.

The above procedures are not affected by the fact that the building has changed ownership since the tax was assessed and became delinquent. The lien stays with the building, and the in rem claim for the delinquent tax is satisfied by sale of the building. The levy was against the building and the fact that the titleholder's name subsequently was changed is irrelevant. See Hilpipre, 343 N.W.2d at 455.

The remaining questions to be addressed are who may compromise delinquent taxes on buildings on leased lands, when can the compromise be effected, and what procedures must be followed.

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[2]In fact, Iowa Code § 428.4 and Iowa Code § 428.1(6), which states that property under lease is to be listed by and taxed to the lessor, unless listed by the lessee, have been construed by the Iowa Supreme Court to allow for the assessment of taxes for improvements, such as new buildings, to be made against the lessor or the lessee. Duda v. Hastings, 389 N.W.2d 404, 407 (Iowa App. 1986); Ruan Center Corp. v. Board of Review, 297 N.W.2d 538, 554 (Iowa 1980). The burden is on the lessor and lessee to decide who is going to pay the tax, and the assessor does not have to investigate whether a tenant or a lessor improved the property. Ruan Center, 297 N.W.2d at 554.

"The general rule is that the power to tax does not include the power to remit or compromise taxes. Where taxes are legally assessed, the taxing authority is without power to compromise, release or abate them except as specifically authorized by statute." 1972 Op.Att'yGen. 398, 399. There is no statute which grants compromise authority for a real estate tax on a building on leased land. Iowa Code §§ 445.19 and 633.475 apply to personal property taxes only. They make no provision for compromise of a real estate tax. Iowa Code § 445.16 provides for the compromise of real estate taxes under certain conditions. Among those conditions is the requirement that the property be sold at a "scavenger" sale before boards of supervisors may compromise the tax. 1972 Op.Att'yGen. 29; 1938 Op.Att'yGen. 699; 1936 Op.Att'yGen. 319. By following the required distraint and sale procedure set forth in § 445.8, however, there will never be a "scavenger" sale of the building. The scavenger sale, provided for by Iowa Code § 446.18, takes place only after the property has been previously advertised and offered for sale for two years or more and remains unsold for want of an adequate bid. 1980 Op.Att'yGen. 378. It appears, therefore, that the legislature has not provided for the compromise of the tax on buildings on leased lands.[3]

Sincerely,

Marcia Mason

Marcia Mason
Assistant Attorney General

MM:cmh

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[3]The delinquent taxes could be suspended or cancelled under Iowa Code §§ 427.9 and 427.10, if the owner is a recipient of federal supplementary security income or state supplementary assistance or is a resident of a health care facility which is receiving payment from the department of human services for the person's care. See 1940 Op.Att'yGen. 257. Iowa Code § 427.8 allows suspension of taxes "for the current year" if a person, by reason of age or infirmity, is unable to contribute to the public revenue. It does not, however, allow suspension or cancellation of taxes for past years. See 1942 Op.Att'yGen. 34.

CONSTITUTIONAL LAW: Constitutional amendments. Iowa Const. Art. X, § 2; 1986 Iowa Acts, ch. 1251, and 1988 Iowa Acts, ch. ____ (S.J.R. 1), proposing amendments to Iowa Const., Art. IV, §§ 2, 3, 4, 5, 15, 18, 19. The general assembly has proposed two separate constitutional amendments, one concerning the selection of the Lieutenant Governor and one concerning the duties of that office. These two amendments should be separately submitted to the voters. (Osenbaugh to Halvorson, State Representative, 6-7-88) #88-6-1(L)

June 7, 1988

The Honorable Rod Halvorson
State Representative
1030 North 7th Street
Fort Dodge, Iowa 50501

Dear Representative Halvorson:

You have requested an opinion of the Attorney General concerning whether Senate Joint Resolution 1 contains two separate constitutional amendments to be submitted separately to the voters.

We conclude that the resolution proposes two separate amendments. Under Article X, section 2, of the Iowa Constitution, these amendments must be submitted so that electors may vote for or against each amendment separately.

Article X, section 2, of the Iowa Constitution states:

> If two or more amendments shall be submitted at the same time, they shall be submitted in such manner that the electors shall vote for or against each of such amendments separately.

The test for determining whether there is one or more amendments to submit separately to the voters is not how many sections of the Constitution would be amended but is instead whether the propositions have distinct and separate purposes. 1970 Op.Att'yGen. 419-20. In Lobaugh v. Cook, 127 Iowa 181, 186, 102 N.W. 1121, 1123 (1905), the Iowa Supreme Court stated:

> * * * We think amendments to the Constitution, which (Article X, Section 2) requires shall be submitted separately, must be

> construed to mean amendments which have different objects and purposes in view. In order to constitute more than one amendment, the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes, not dependent upon or connected with each other.

The purpose of Article X, section 2, is to submit each amendment on its own merits. As stated in Jones v. McClaughry, 169 Iowa 281, 297, 151 N.W. 210, 216 (1915):

> The elector in approving or rejecting cannot be put in a position where he may be compelled, in order to aid in carrying a proposition, also to vote for another which, if separately submitted, he would reject. But this does not mean that every proposed change shall necessarily be analyzed into its minutest component parts, and these separately submitted. All intended is that but one subject be dealt with in a single amendment.

The proposed constitutional amendments would change several sections of the Constitution concerning the office of the Lieutenant Governor. These amendments were approved by the seventy-first General Assembly, 1986 Iowa Acts, ch. 1251, and by the seventy-second General Assembly in S.J.R. 1. In each of those resolutions, section one approved changes to the Constitution which concern the selection of the Lieutenant Governor. Section two approved changes which concern the duties of the Lieutenant Governor and ancillary provisions.[1] Thus the two sections of the bill could be seen as having different purposes. A voter might agree with one proposition and not agree with the other.

The legislature has been granted the power to propose constitutional amendments, and it thus has inherent power to exercise its discretion to determine what constitutes separate

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[1]Under the amendment proposed in section two of the resolutions, the Lieutenant Governor's duties would be established by statute. The amendment would change constitutional references to the president pro tem of the senate to reflect the fact that the Lieutenant Governor would no longer be the president of the senate.

constitutional amendments. Jones v. McClaughry, 169 Iowa at 300, 151 N.W. at 217.

> . . . some latitude necessarily must be indulged in ascertaining the real subject touched and the purpose to be accomplished, and, within proper limitations, the Legislature may exercise its discretion in defining the subject-matter to be included in a proposed amendment.

Jones v. McClaughry, 169 Iowa at 300, 151 N.W. at 217.

We conclude that the seventy-first and the seventy-second General Assembly intended to approve two separate constitutional amendments. These two amendments were separately delineated in the resolutions approved in 1986 and in 1988. The resolutions in question each contained three sections. The first two sections, each proposing changes to several different sections of the Constitution, begin with the sentence, "The following amendment to the Constitution of the State of Iowa is proposed." Thus, it is clear that each session of the General Assembly had determined that there were two separate amendments.[2]

In 1986, this Office was asked whether amendments contained in a similar resolution approved in 1985 were severable so that the legislature could approve only one section of the resolution and have that section meet the requirement of approval of the same amendment by two sessions of the General Assembly. This Office concluded that the resolution in question proposed two separate amendments, one concerning the selection of the Lieutenant Governor and one concerning the duties of that office. 1986 Op.Att'yGen. 80. The reasoning of that opinion applies equally to the resolutions in question here. The legislature was aware of our opinion in February 1986, prior to the passage of the resolutions in question. Had the legislature intended the

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[2]This result is not changed because section 3 of S.J.R. 1 as approved by the seventy-second general assembly states, "The foregoing proposed amendment...shall be submitted to the people..." Although the singular is used in this section, the title refers to proposed amendments. The third section of the resolution passed by the seventy-first general assembly referred the "foregoing proposed amendments" to the next session of the general assembly. Given the other indicia of legislative intent to propose two amendments, the use of the singular in section 3 of S.J.R. 1 as approved in 1988 appears to be a typographical error.

these resolutions to contain only one amendment, the resolution would not have separately designated two amendments as it did.

Because we have concluded that the General Assembly has proposed two separate amendments, we conclude that these proposed amendments must be submitted separately to the voters.

Sincerely,

ELIZABETH M. OSENBAUGH
Deputy Attorney General

EMO:mlr

COUNTY HOME RULE; HIGHWAYS; CONSERVATION: Roadside trapping. Iowa Const. art. III, § 39A; Iowa Code §§ 331.301, 331.302 (1987); Iowa Code § 109.92 as amended by 1988 Iowa Acts, H.F. 395, § 33; Iowa Code § 716.7 as amended by 1988 Iowa Acts, H.F. 2258. Statewide restrictions on roadside trapping enacted by the General Assembly preempt county boards of supervisors from enacting local regulations of roadside trapping for public safety purposes. (Smith to Richards, Story County Attorney, 7-28-88) #88-7-8(L)

July 28, 1988

Ms. Mary E. Richards
Story County Attorney
Story County Courthouse
Nevada, Iowa 50201

Dear Ms. Richards:

You have requested an opinion of the Attorney General on the question whether county home rule authorizes a county board of supervisors to enact an ordinance prohibiting trapping in the roadside ditches of county rights of way.

We assume the purpose of a county ordinance prohibiting roadside trapping would be to protect pets (and possibly humans) from injury. A recent Iowa Supreme Court opinion summarized the constitutional and statutory provisions that would be relevant to the authority of the board of supervisors to enact such an ordinance.

> Each county has home rule power to determine its local affairs. Iowa Const. art. III, § 39A. Further, the power of each county is vested in its board of supervisors. Iowa Code § 331.301(2) (1985). Consequently, if not limited by the constitution or inconsistent with state law, a board may exercise any power and perform any function it deems appropriate to ... preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents.

Id. § 331.301(1) (emphasis added). The

> board can exercise this broad power by passing an ordinance. Id. §§ 331.302(1).

Kent v. Polk County Bd. of Sup'rs, 391 N.W.2d 220, 222 (Iowa 1986).

An ordinance prohibiting roadside trapping would be inconsistent with state law if the legislature has expressly limited local regulatory power or impliedly preserved the subject matter to itself. Preservation of subject matter is shown by statutes covering the subject matter in such a manner as to demonstrate a legislative intention that the field is preempted by state law. City of Council Bluffs v. Cain, 342 N.W.2d 810, 812 (Iowa 1983); Op.Att'yGen. #87-1-7(L).

The laws enacted in the 1988 Session of the 72nd General Assembly include several statutes relating to roadside trapping. None of the 1988 enactments expressly prohibit local regulation of roadside trapping. The second step in preemption analysis is to ascertain whether state statutes, including the 1988 amendments, demonstrate an implied intent by the legislature to preserve the subject matter to itself.

We first consider 1988 Iowa Acts, H.F. 2258, entitled "An Act Relating to Trespass upon the Right-of-Way of a Public Road or Highway." House File 2258 amended Iowa Code § 716.7 (definition of criminal trespass) by adding a new subsection stating: "The term 'trespass' does not mean the entering upon the right-of-way of a public road or highway." House File 2258 can reasonably be interpreted as a response to Op.Att'yGen. #87-5-3(L), in which we opined that the person in possession of land that is subject to a public road easement may prohibit trapping of animals within the road right of way. House File 2258 does not preempt enactment of a local ordinance prohibiting roadside trapping, because it only declares that acts done within a public road right of way do not constitute criminal trespass.

However, we must also consider 1988 Iowa Acts, H.F. 395, § 33, which amended Iowa Code § 109.92, relating to regulation of trapping. The amendments included the addition of the following paragraphs:

> Conibear type traps and snares shall not be set on the right-of-way of a public road within two hundred yards of the entry to a private drive serving a residence without the permission of the occupant.

> A snare when set shall not have a loop larger than eight inches in horizontal measurement except for a snare set with at least one-half of the loop underwater. A snare set on private land other than roadsides within thirty yards of a pond, lake, creek, drainage ditch, stream, or river shall not have a loop larger than eleven inches in horizontal measurement.

The new restriction on use of conibear and snare traps within two hundred yards of the entry to a private drive serving an occupied residence clearly appears intended to protect the occupants or their pets. The new restriction on snare loop size differentiates between private land and public land and treats roadsides as public land. Protection of non-target animals such as pets is the apparent intent of the more stringent regulation of snare loop size on public land. One can infer from the two paragraphs legislative intent to authorize trapping in roadside ditches of public highways subject to statewide restrictions for public safety. The inference is strengthened by the amendment making criminal trespass inapplicable to activities in public road rights of way. The legislature has made judgments concerning which types of traps may be safely used on which parts of public road rights of way. These legislative judgments impliedly preclude county boards of supervisors from adopting ordinances that would impose different restrictions on roadside trapping for public safety purposes.

In conclusion, we opine that statewide restrictions on roadside trapping enacted by the General Assembly preempt county boards of supervisors from enacting local regulations restricting roadside trapping for public safety purposes.

Sincerely,

Michael H Smith

MICHAEL H. SMITH
Assistant Attorney General

MHS:rcp

AGRICULTURE, DEPARTMENT OF; RACING COMMISSION; STATUTORY CONSTRUCTION: Iowa Code §§ 99D.12 (1987) and 99D.22 (1987) as amended. Legislative history indicates that it was the legislature's intent to provide for supplemental purses to both the owners of Iowa-foaled horses who win races restricted to Iowa-foaled horses and to the owners of Iowa-foaled horses who place first, second, third or fourth in any race not restricted to Iowa-foaled horses, and this intent is to be given effect. Legislative history indicates that it was the legislature's intent to provide for breeders' awards to the breeders of Iowa-foaled horses who win any race, including races not restricted to Iowa-foaled horses. (Donner to Cochran, Secretary of Agriculture, 7-28-88) #88-7-7(L)

July 28, 1988

The Honorable Dale M. Cochran
Iowa Secretary of Agriculture
Wallace State Office Building
Des Moines, Iowa 50319

Dear Secretary Cochran:

You have requested an Attorney General's opinion regarding the interpretation of two Iowa Code sections of the Iowa Parimutuel Wagering Law, sections 99D.12 and 99D.22. Specifically, you ask whether the supplemental purses for Iowa-foaled horses (§99D.12) and the breeders' awards for Iowa-foaled horses (§99D.22) are to be paid only in regard to the Iowa restricted race which a licensee is required to hold daily, or whether they are to be paid in regard to any race won by an Iowa-foaled horse.

You indicate that the statutes are ambiguous, being given opposing interpretations by your department and the Racing Commission, which have overlapping jurisdiction in regard to the two sections. Therefore, a construction must be given to the statutes by determining the intent of the legislature, considering the object sought to be attained, circumstances under which the statute was enacted, common law or former statutory provisions, and consequences of a particular construction. Smith v. Linn Co., 342 N.W.2d 861 (Iowa 1984). The goal of statutory construction is to effectuate the intent of the legislature, Iowa Southern Utilities Co. v. Iowa State Commerce Com'n., 372 N.W.2d 274 (Iowa 1985); Kohrt v. Yetter, 344 N.W. 245 (Iowa 1984); and the spirit of the statute must be considered as well as the words so that a sensible, workable, practicable and logical construction is given, and inconvenience or absurdity avoided. Emmetsburg Ready Mix Co. v. Norris, 362 N.W.2d 498 (Iowa 1985). We conclude that this statutory construction requires a finding that both the supplemental purse and the breeder's award are to be paid in regard to any race won by an Iowa-foaled horse.

I. SUPPLEMENTAL PURSES.

Both sections 99D.12 and 99D.22 deal with the distribution of the "breakage", which is defined as "the odd cents by which the amount payable on each dollar wagered in a pari-mutuel pool exceeds a multiple of ten cents." Iowa Code section 99D.2(2) (1987). The source of Iowa Code section 99D.12, dealing with supplemental purses, is the original Iowa Pari-mutuel Wagering Act, 1983 Iowa Acts, Chapter 187, section 12. As enacted, the introductory paragraph and subsection 1 provided that:

> A licensee shall deduct the breakage from the pari-mutuel pool which shall be distributed in the following manner:
> 1. In horse races the breakage shall be retained by the licensee to supplement purses for the race restricted to Iowa-foaled horses as provided in section 99D.19.

This provision was codified at Iowa Code section 99D.12 (1983 Supplement). The following year, that section was amended by 1984 Iowa Acts, Chapter 1266, section 14, as follows:

> A licensee shall deduct the breakage from the pari-mutuel pool which shall be distributed ~~in the following manner~~ to the breeders of Iowa-foaled horses and Iowa-whelped dogs in the manner described in section 99D.22. The remainder of the breakage shall be distributed as follows:
> 1. In horse races the breakage shall be retained by the licensee to supplement purses for ~~the race restricted to~~ races won by Iowa-foaled horses as provided in section 99D.22.

This amendment was codified at Iowa Code section 99D.12 (1985) and remained in that form in Iowa Code section 99D.12 (1987). However, this language was recently amended by the Iowa Legislature in 1988 Iowa Acts, Senate File 2263, section 2. That amendment left the introductory paragraph intact, but amended paragraph 1 as follow:

> 1. In horse races the breakage shall be retained by the licensee to supplement purses for races ~~won by~~ restricted to Iowa-foaled horses ~~as provided in section 99D.22~~ or to supplement purses won by Iowa-foaled horses by finishing first, second, third, or fourth in any other race. The purse supplements will be paid in proportion to the purse structure of the race.

Neither section 99D.12 nor 99D.22 define "Iowa-foaled horse", but rather, section 99D.22 provides that the Department of Agriculture and Land Stewardship is to define the term consistent with the standards of the section. Section 99D.22(2) provides criteria for determining whether a horse is an Iowa-foaled thoroughbred horse, and Department of Agriculture and Land Stewardship rules provide three divisions in which a horse may achieve the status of an "Iowa-foaled horse": thoroughbred (I.A.C. 30-14.16(99D)); standardbred (I.A.C. 30-14.25(99D)); and quarterhorse (I.A.C. 30-14.36(99D)). For the purposes of this opinion, we find that "Iowa-foaled horse" is any horse which satisfies the criteria of the Department under any of the three divisions.

The legislative history exhibits a definite inclination toward expanding the number of persons entitled to receive supplemental purses. The original language did restrict the supplemental purses to the Iowa-restricted race. The 1984 amendment diverted a portion of the breakage to fund section 99D.22 (discussed in more detail below). The remainder of the breakage in horse races was to be paid to races won by Iowa-foaled horses. The language concerning payment in regard to races restricted to Iowa-foaled horses was explicitly stricken. The 1988 language appears to take this one step further, by providing for a supplemental purse for Iowa-foaled horses whether they win an Iowa-restricted race or place first, second, third, or fourth in any other race. You note concern over the ambiguous use of the term "or." However, in seeking to give sensible, practical, and workable construction to a statute, the manifest intent of the legislature will prevail over the literal meaning or words, and the usual disjunctive use of a term such as "or" will be overcome if contrary legislative intent appears. Koethe v. Johnson, 328 N.W.2d 293 (Iowa 1982); Kearney v. Ahmann, 262 N.W. 2d 768 (Iowa 1978).

A closer examination of the legislative history behind the 1988 amendment confirms that the intent was to further expand the class of eligible awardees. The language as adopted was the product of two amendments to Senate File 2263: the first, H-6234, provided that there were to be supplemental purses "for races ~~won by~~ restricted to Iowa-foaled horses ~~as provided in section 99D.22~~ or to supplement purses won by Iowa-foaled horses in any other race." The second amendment, H-6335, amended H-6234 to add that the supplemental purse was to be paid to any Iowa-foaled horse who finished first, second, third, or fourth in any other race. This does not evidence an intent to provide an option which would restrict the number of persons entitled to a supplemental purse; rather, the intent evidenced is to reward owners of Iowa-foaled horses even if they won a purse secondary to a first place purse.

While there is no general statement in the Code as to the legislature's intent in providing for supplemental purses, it can be inferred that from the first, the intent has been to provide special awards to owners of Iowa-foaled horses in an attempt to provide incentive for persons to own and race Iowa-foaled horses, thus promoting Iowa's horse breeding industry. The amendments to 99D.12 have consistently increased this incentive. There is no evidence that by the new language added in 1988 the legislature intended to return to the more restricted provision of 1983. Effect should be given to the legislature's intent to provide supplemental purses to the Iowa-foaled winners of all races, including the second, third, and fourth placing horses in races which are not Iowa-restricted.

II. BREEDER'S AWARDS

Like section 99D.12, the source of Iowa Code section 99D.22, dealing with breeders' awards, is the original Iowa Pari-mutuel Wagering Act, 1983 Iowa Acts, Chapter 187, section 22. As enacted, the section provided that:

> A licensee shall hold at least one race on each racing day limited to horses foaled or dogs whelped in Iowa. However, if sufficient competition cannot be had among that class of horses or dogs on any day, another race for the day may be substituted. Three percent of the purse won by a horse or dog in the race limited to Iowa-foaled horses or Iowa-whelped dogs shall be used to promote the horse and dog breeding industries. The three percent shall be withheld by the licensee from the purse and shall be paid at the end of the race meeting to the state department of agriculture which in turn shall deposit it in a special fund to be known as the Iowa horse and dog breeders fund and pay it by December 31 of each calendar year to the breeder of the winning Iowa-foaled horse or Iowa-whelped dog.

This provision was codified at Iowa Code section 99D.22 (1983 Supplement). The following year, that section also was amended by 1984 Iowa Acts, Chapter 1266, section 20, by numbering the paragraph as subsection 1, reading as follows:

> 1. A licensee shall hold at least one race on each racing day limited to ~~horses foaled or dogs whelped in Iowa~~ Iowa-foaled horses or Iowa-whelped dogs as defined by the department of agriculture using standards

> consistent with this section. However, if sufficient competition cannot be had among that class of horses or dogs on any day, another race for the day may be substituted. ~~Three~~ A sum equal to twelve percent of the purse won by ~~a horse or dog in the race limited to~~ an Iowa-foaled ~~horses~~ horse or Iowa-whelped ~~dogs~~ dog shall be used to promote the horse and dog breeding industries. The ~~three~~ twelve percent shall be withheld by the licensee from the ~~purse~~ breakage and shall be paid at the end of the race meeting to the state department of agriculture which in turn shall deposit it in a special fund to be known as the Iowa horse and dog breeders fund and pay it by December 31 of each calendar year to the breeder of the winning Iowa-foaled horse or Iowa-whelped dog. For the purposes of this section, the breeder of a thoroughbred horse shall be considered to be the owner of the brood mare at the time the foal is dropped.

The 1984 amendment also added a subsection 2 to 99D.22, which set out standards for determining whether a horse was "Iowa-foaled". This amended language was codified at Iowa Code section 99D.22 (1985), and currently remains without further amendment at Iowa Code section 99D.22 (1987).

It appears that as originally enacted, the legislature did, in fact, intend that the breeder's award be paid only in regard to the Iowa-restricted race. The language provided that the award come from "[t]hree percent of the purse won by a horse or dog in the race limited to Iowa-foaled horses or Iowa-whelped dogs" (emphasis added). However, in 1984, two significant revisions were made. First, the funding mechanism for the breeder's award was raised from three percent to twelve percent, and the source of the award changed from being deducted from the purse to being deducted from the breakage. Second, the language underscored above which specifically limited the award to the Iowa-restricted race was stricken. Where there is a material change in the language of the original statute, a change in the law is presumed. State ex rel. Palmer v. Board of Sup'rs of Polk Co., 365 N.W.2d 35 (Iowa 1985); Iowa Valley Community School Dist., 359 N.W.2d 446 (Iowa 1984). This presumption is strengthened when an amendment to a statute deletes certain words. Nelson v. Restaurants of Iowa, Inc., 338 N.W.2d 881 (Iowa 1983). In this case, the deletion of the limitation of the award to Iowa-restricted races manifests an intent to open the award to breeders of Iowa-foaled horses in races which are not Iowa-restricted.

Further, unlike section 99D.12, section 99D.22 does contain a statement of the legislature's intent in providing for breeders' awards. It states that the award "shall be used to promote the horse and dog breeding industries." The intent has been to provide special awards to breeders (as contrasted with owners) of Iowa-foaled horses in an attempt to provide incentive for persons to breed and raise Iowa-foaled horses, thus also promoting Iowa's horse breeding industry. The 1984 amendment to 99D.22 expanded upon this intent and broadened the incentive to provide larger awards to a larger class of eligible awardees. Again, effect should be given to the intent to provide breeders' awards to the breeder of an Iowa-foaled horse which wins any race, including those races which are not Iowa-restricted.

In conclusion, we opine that the supplemental purses under section 99D.12 are to be paid both to owners of Iowa-foaled horses who win Iowa-restricted races and to owners of Iowa-foaled horses who place first, second, third or fourth in any race not restricted to Iowa-foaled horses. Further, the breeders' awards under section 99D.22 are to be paid to the breeders of Iowa-foaled horses who win any race, including races not restricted to Iowa-foaled horses.

Sincerely,

Lynette A F Donner

LYNETTE A. F. DONNER
Assistant Attorney General

LAFD:bac

STATE OFFICERS AND DEPARTMENTS: Iowa Peace Institute. Iowa Code sections 8.2(1), 8.39, 11.1, 11.2, 11.5, 11.18 (1987); Iowa Code Supp. sections 38.1, 38.2, 38.4(6), 38.5, 99E.10, 99E.20(2), 99E.32(4)(d) (1987); 1987 Iowa Acts, chapter 231, sections 15 through 19. The Iowa Peace Institute is a "department" as defined in § 11.1, but is not a "governmental subdivision" as defined in § 11.18. Our office cannot in this opinion make the factual determinations necessary to decide whether contributions to the Peace Institute from other state departments from their appropriated funds constitute interdepartmental transfers under § 8.39(2). (Benton to Johnson, 7-28-88) #88-7-6(L)

July 28, 1988

Mr. Richard D. Johnson, CPA
Auditor of State
LOCAL

Dear Mr. Johnson:

In 1987 Iowa Acts, chapter 231, sections 15 through 19, the General Assembly established the Iowa Peace Institute with several stated purposes, including the development of programs that, "promote peace among nations." The legislature stated specifically that:

> A corporate body called the "Iowa Peace Institute" is created. The institute is an independent nonprofit public instrumentality and the exercise of the powers granted to the institute as a corporation in this chapter is an essential governmental function.

This language, codified at Iowa Code Supp. § 38.1 (1987), has lead to your request for our opinion on three questions concerning the Institute. You have asked:

> 1. Does the creation by the Legislature of such a corporation violate Article VIII, section 1 of the Constitution of the State of Iowa?
>
> 2. Is this entity considered a department under section 11.1 of the Code of Iowa or a governmental subdivision under section 11.18?
>
> 3. Do payments (contributions) out of appropriated funds by state institutions or departments to the Iowa Peace Institute in support of its operations represent transfers under section 8.39 of the Code of Iowa?

In response to your first question, we forwarded copies of two previously issued opinions, 1986 Op.Att'yGen. 19 and Op.Att'yGen. #88-2-3(L), which seemed on point with this issue. You agreed that these opinions addressed your question concerning the constitutionality of Iowa Code Supp. Chapter 38 (1987) and therefore withdrew that inquiry. This opinion will address questions 2 and 3.

As a "corporate body" and "independent nonprofit public instrumentality" exercising an "essential governmental function," the Peace Institute has been given the attributes of both a public and private body. The Institute shall be administered by a governing board consisting in part of members appointed by the Governor and members of the General Assembly. Iowa Code Supp. § 38.2 (1987). If the corporation is terminated, the rights and properties of the corporation shall pass to the State. Iowa Code Supp. § 38.3 (1987). The governing board must provide an annual report to the Governor and General Assembly. Iowa Code Supp. § 38.4(6) (1987). Under Iowa Code Supp. § 38.5 (1987) the Institute may accept ". . . grants, gifts, and bequests, including but not limited to appropriations, federal funds, and other funding . . .". Your second question raises the issue of whether such a body is either a "department" under Iowa Code § 11.1 (1987), or a "governmental subdivision" under Iowa Code § 11.18 (1987).

Section 11.1 states:

> The term department shall be construed to mean any authority charged by law with official responsibility for the expenditure of public money of the state and any agency receiving money from the general revenues of the state.

The auditor is required under Iowa Code § 11.2 (1987) to make a complete audit of the books and accounts of every "department" of the state. Each department is required to keep its records and accounts in current condition and in such form as the auditor may require. Iowa Code § 11.5 (1987). If the Peace Institute is a department under § 11.1, it is subject to these requirements.

The definition of department in § 11.1 has two parts. First, a department is "any authority charged by law with official responsibility for the expenditure of public money of the state." The second part of the definition refers to "any agency receiving money from the general revenues of the state."

The definition requires first that we determine whether the Peace Institute is an "authority." Although the terms "authority" and "agency" may in certain situations have distinct meanings, we believe that the use of the two terms in the same statute in this context indicates that the legislature intended the words to be synonymous. The intent of the General Assembly prevails over the literal import of the words used. In Interest of N.H., 383 N.W.2d 570, 572 (Iowa 1986). The use of the word "and" between the two terms underscores that the legislature intended the words to mean the same.

As we noted in 1976 Op.Att'yGen. 823, 827, the question of whether an entity is an agency of a government must be determined on its own facts. Because it is common for states to create corporations to carry out public functions, the question of whether a corporation is a part of state government under different circumstances has arisen in several jurisdictions. In Iowa, for example, in Stanley v. Southwestern Com. Col. Merged Area, Etc., 184 N.W.2d 29, 33-34 (Iowa 1971), the Iowa Supreme Court decided that the legislature did not intend a merged area to be an agency of the State for purposes of Iowa Const. Art VII, § 1, prohibiting the pledge of the State's credit. In determining whether the General Assembly intended the Institute to be an authority for purposes of § 11.1, we can be guided by several principles which have emerged from cases which have decided similar questions in other jurisdictions. The mere fact that a corporation receives and administers grants of state funds does not mean that it is a state agency. Kentucky Region Eight v. Commonwealth, 506 S.W.2d 489, 490 (Ky. 1974). A state-authorized entity may be a state agency for some purposes but not for others. Alaska Commercial Fishing v. O/S Alaska Coast, 715 P.2d 707, 709 (Alaska 1986). The creation of an entity by the State and the retention of some oversight by the State over that entity does not automatically render the entity a state agency or instrumentality. Alaska Commercial Fishing, 715 P.2d at 711.

We can be guided as well by the tests which courts in other states have applied in determining whether a corporation is a state agency or authority. In Seghers v. Community Advancement, Inc., 357 So.2d 626 (La. 1978) the Louisiana Court looked at three factors in deciding whether a private, non-profit corporation administering an anti-poverty program was a state agency for purposes of the State's Open Meetings statute. The Court noted that the corporation was organized to perform a governmental function, the administration of anti-poverty programs, that it was supported almost exclusively by tax-derived funds, and that it was able to set policy in the distribution of those funds. Seghers, 357 So.2d at 627. The Court concluded that, based on these factors, the corporation was an authority within the meaning of the statute. Seghers, 357 So.2d at 627.

The Alaska Supreme Court has evolved a balancing test to determine whether a corporate entity is a state agency, measuring an entity's autonomy against the state's retained control. Alaska Commercial Fishing v. O/S Alaska Coast, 715 P.2d 707, 711 (Alaska 1986). Where the factors evidencing autonomy outweigh the State's control, the Court will find that the legislature intended to create an independent entity. Alaska Commercial Fishing, 715 P.2d at 713-14. Factors which the Court examined included whether the corporation performs a governmental function such as education, whether it exercises general corporate powers, whether the State appoints board members, and the source of funding. Alaska Commercial Fishing, 715 P.2d at 709-711. The test which the Louisiana Court used, focusing on the corporation's function and use of appropriated funds, seems subsumed within the more detailed Alaska test. In any case, in our opinion the Peace Institute is an authority/agency within § 11.1.

In § 38.1 the General Assembly characterized the Institute as a "public instrumentality" the exercise of whose powers is an "essential governmental function." The purposes of the Institute are clearly public in nature, and are thus analogous to governmental functions such as administering anti-poverty programs or furnishing education which lead the Louisiana and Alaska Courts to find corporations were state authorities. The Institute may receive state appropriations under § 38.5 and presumably has the discretion to administer those funds to accomplish its public purposes. By contrast, in Ex Parte Auditor of Public Accounts, 609 S.W.2d 682, 686 (Ky. 1980), the Kentucky Supreme Court found that its State Bar Association was not a State agency subject to audit by the State Auditor in part because it did not receive appropriated funds from the legislature. See also, Matter of Washington State Bar Association, 548 P.2d 310, 311 (Wash. 1976). The Board must report to the Governor and General Assembly. § 38.4(6). If the corporation is terminated its rights and properties pass to the State. § 38.3. Several members of the Board are appointed by the Governor and the General Assembly. § 38.2. There is an established nexus between the corporation and the State through which the corporation is to perform its "governmental function."

The Institute has some attributes of autonomy. It is required to employ an executive director and support personnel to administer its activities. § 38.4(1). A majority of the governing board are not appointed by State officials. § 38.2. It may accept, under § 38.5, grants, gifts and bequests from sources other than the State. § 38.5. However, on balance, the public purposes of the Institute, and its receipt of appropriated

funds, leads to the conclusion that it is an authority/agency for purposes of § 11.1. It would be anomalous in our view to find that the Institute performs an essential governmental function with State funds, which it has the discretion to use to accomplish its public purposes, and yet to conclude that it was not subject to audit under the statute. The Institute falls within the definition of an authority and an agency under § 11.1.

However, it should be emphasized that our conclusion is confined to this statute. We agree with the Alaska Court that an entity may be an agency for some purposes and not others, and therefore a determination of the exact status of the corporation turns on specific factual circumstances. We do not express an opinion as to whether the Institute is an agency for other purposes of Iowa law.

The definition of "department" in § 11.1 also requires that we determine whether the Institute has been "charged by law with official responsibility for expenditure of public money of the state" and whether the Institute is "receiving money from the general revenues of the state." The Peace Institute is clearly charged with the official responsibility for the expenditure of public funds since under § 38.5 it may accept state appropriations. In fact, the General Assembly in Iowa Code Supp. § 99E.32(4)(d) (1987) appropriated $250,000.00 to the Peace Institute for the fiscal years beginning July 1, 1987, and July 1, 1988, for salaries, support and maintenance. The Peace Institute is also "officially" responsible for the expenditures of State funds because under § 38.4(6) it must provide an annual report to the Governor and General Assembly which presumably includes in part a report on its expenditures. The Peace Institute clearly is "charged by law with official responsibility for expenditure of public money."

Section 11.1 also refers to an agency receiving money from the "general revenues of the state." This part of the definition requires an examination of the source of the Institute's funding. The $250,000.00 appropriation which the Institute received in § 99E.32(4)(d) originated from funds generated by the Iowa Lottery. Upon receipt of any revenue, the Commissioner of the Lottery is required under Iowa Code Supp. § 99E.10 (1987), to deposit the moneys in the lottery fund established in Iowa Code Supp. § 99E.20(2) (1987). After the payment of expenses, these revenues are transferred to the Iowa Plan Fund to be used for economic development initiatives. § 99E.10(2). The Iowa Plan Fund in turn has different accounts. Section 99E.32(4), the introductory paragraph to the section with the specific appropriation to the Institute, states:

> There are appropriated moneys in the education and agricultural research and development account for each of the fiscal years beginning July 1, 1986, July 1, 1987, July 1, 1988, and July 1, 1989, to the following funds, agencies, boards or commissions . . .

The term "general revenues of the state" seems to refer to all income of government from any source. For example, in reference to the general revenue of a city, the Missouri Supreme Court in State ex rel. Spink v. Kemp, 293 S.W.2d 502, 513 (Mo. 1955), wrote:

> It would seem clear therefore that the term "general revenue" would mean all current income of the city, however derived, which is subject to appropriation for general public uses, as distinguished from special use.

Given the expansive nature of this term, we conclude that lottery revenue constitutes general revenue of the state under § 11.1. Since the Peace Institute meets all of the components of the definition, we conclude that it is a "department" as defined in that statute.

You also ask whether the Peace Institute is a "governmental subdivision" under § 11.18. This statute provides in pertinent part:

> In addition to the powers and duties under other provisions of the Code, the auditor of state may at any time, if the auditor of state deems such action to be in the public interest, cause to be made a complete or partial audit of the financial condition and transactions of any city, county, school corporation, governmental subdivision, or any office thereof, even though an audit for the same period has been made by certified or registered public accountants.

Governmental subdivision is not defined. The term is used in connection with the words, "city, county and school corporation," all of which are essentially local governmental bodies. The opening paragraph of § 11.18 provides that the Auditor may examine the financial condition and transactions of, "cities, city offices, merged areas, area education agencies and all

school offices in school districts," indicating that the thrust of the provision is directed to local government. See, Op. Att'yGen. #88-2-4(L), on the Auditor's authority concerning community colleges under § 11.18. In 1974 Op. Att'yGen. 768 we referred to the entities within § 11.18 as political subdivisions.

We reviewed the characteristics of a political subdivision in 1976 Op. Att'yGen. 823, 824-27, in deciding that a community action agency was not such an entity. In reaching this conclusion, we specifically referred to definitions of political subdivision in which the term was defined generally as a geographic area of a State which has been delegated the functions of local government over that area. 1976 Op. Att'yGen. 823, 825. This definition is consistent with the terms used in § 11.18, which as we have noted, basically refer to units of local government. The Peace Institute is not a political subdivision like a city or county. Consequently, we do not believe the General Assembly intended the Peace Institute to fall within the definition of "governmental subdivision" as the term is used in § 11.18.

Your third question asks whether contributions out of appropriated funds by state institutions or departments to the Peace Institute represent transfers under Iowa Code § 8.39. We understand that your question refers to contributions to the Institute from the University of Iowa, Iowa State University and the University of Northern Iowa.

Section 8.39 provides in part that:

> 1. Except as otherwise provided by law, an appropriation or any part of it shall not be used for any other purpose than that for which it was made. However, with the prior written consent and approval of the department of management, the governing board or head of any state department, institution or agency may, at any time during the fiscal year, make a whole or partial intra-departmental transfer of its unexpended appropriations for purposes within the scope of such department, institution or agency.
>
> 2. If the appropriation of any department, institution or agency is insufficient to properly meet the legitimate expenses of such department, institution, or agency of the

> state, the director, with the approval of the governor, is authorized to make an interdepartmental transfer from any other department, institution, or agency of the state having an appropriation in excess of its necessity, sufficient funds to meet that deficiency.

Under § 8.39(3) the chairpersons of the legislative budget committees must be notified prior to the transfer. Transfers must also be reported to the legislative fiscal committee under § 8.39(4). The purpose of § 8.39 is to both permit appropriated funds to be moved from a department having an excess of such funds to a department whose own appropriations are inadequate, and to enable the legislature to monitor these transfers.

In Iowa Code § 8.2(1) (1987), "department" is defined in part as:

> . . . any executive department, commission, board, institution, bureau, office or other agency of the state government, including the state department of transportation. . .

This definition is very broad, encompassing "any" department, commission etc., or "other agency of the state government." We have already defined the Institute as a department under § 11.1. The same analysis which we applied in that context leads to the conclusion that the Institute is a department for purposes of § 8.2(1); there is certainly no evidence that the General Assembly intended to exempt the Institute from the statute.

A "transfer" is an act of the parties, or of the law, by which the title to property is conveyed from one person to another. Black's Law Dictionary, 1669 (4th rev. ed. 1969). The movement of these funds from the universities to the Institute falls within this definition. Moreover, since your letter indicates that the payments involved the transfer of appropriated funds, these seem the type of transfers which the legislature intended to monitor through § 8.39. If the payments were simply donations from appropriated funds, it would seem on its face that this situation meets all of the components of § 8.39(2). However, if the payments were compensation for a service, the statute would not seem to apply.

As we understand the situation, in 1987 the University of Iowa and Iowa State University contributed $10,000 each to the Institute, and the University of Northern Iowa contributed

$5,000.00. Your letter indicates that these payments originated from funds appropriated by the legislature to the universities. We cannot determine, as a factual matter, whether the payments were intended as donations, or compensation for some specific joint undertaking between the universities and the Institute. Consequently, we cannot decide in this opinion the extent to which these specific payments were interdepartmental transfers. The Institute is both authorized to accept such payments, in § 38.5, and to cooperate with the universities in providing courses in the "history, culture, religion and language of world communities." § 38.1(3).

In answer to your third question, we cannot factually determine whether these payments were interdepartmental transfers. However, if the payments from appropriated funds were in the nature of donations, rather than compensation for a service or for a specific joint undertaking, the payments would seem to represent interdepartmental transfers under § 8.39.

Sincerely,

Timothy Benton

TIMOTHY D. BENTON
Assistant Attorney General

TDB:bac

STATE OFFICERS AND DEPARTMENTS; ADMINISTRATIVE RULES: Rulemaking authority within Personnel Department. Iowa Code §§ 19A.1, 19A.8, 19A.9, 19B.3(j); 79.1(2), 79.1(8) (1987); 1986 Iowa Acts, ch. 1245, §§ 2(5), 4(6). Rulemaking authority granted to the Department of Personnel is vested in the Personnel Commission except where expressly conferred on the director or other entity, or where the intent to confer rulemaking authority on the director or other entity can be necessarily implied. Thus the Commission would have authority to adopt rules where a statute provides for rules by the Department if the subject matter of the rules is within the scope of chapter 19A. (Osenbaugh to Donahue, 7-27-88) #88-7-5(L)

July 27, 1988

Mr. Thomas E. Donahue
Personnel Department
Grimes Building
L O C A L

Dear Mr. Donahue:

You have requested an opinion of the Attorney General concerning the relationship between the Personnel Commission, the Department of Personnel, and its director with regard to rulemaking authority over personnel-related areas. Your specific questions are as follows:

1. Does the rulemaking authority of the Iowa Personnel Commission extend only to those items listed in Iowa Code section 19A.9(1) through (24) and other places where the Commission is specifically referenced?

2. If the foregoing is correct, is rulemaking authority for all other matters, specific and general, pertaining to the personnel system in state government and the administration of the department of personnel, therefore, vested in the director of the department of personnel?

A question concerning adoption of Fair Information Practices rules was answered by Theresa Weeg in a letter of informal advice to you on April 27, 1988.

In your opinion request you note that the recent reorganization of state government has affected the relationship between the entities in question, and has redefined the statutory duties of these entities. For instance, the director of the department was formerly appointed by the commission; now the director is appointed by the governor. See Iowa Code § 19A.1A(1). In addition, the department has assumed numerous new statutory duties, while the commission has surrendered its former jurisdiction over just cause hearings to the PERB board.

In your opinion request you set forth a number of statutory provisions governing rulemaking authority over specific personnel-related subjects. A review of these provisions makes clear that a number of different entities are specifically vested with rulemaking authority over different subject matters. Of particular relevance to this opinion are those sections which state the "director," the "personnel commission," or the "department" has rulemaking authority in a particular area.

We conclude that the director has that rulemaking authority specifically delegated to the director by statute. If rulemaking authority is not specifically or by necessary implication vested in the director or another entity, the commission is vested with rulemaking authority for the department for matters within the scope of chapter 19A.

We reach this conclusion for two reasons. First, the primary enabling act for the department, chapter 19A, places the general authority to adopt rules to administer and implement that chapter in the commission. Iowa Code § 19A.9. Second, we construe chapter 19A as generally placing executive or management authority in the director and the law-making authority in the commission. This division of authority is expressly reflected in Iowa Code § 19A.8(1): ("[I]t shall be the director's duty . . . [t]o apply and carry out this law and the rules adopted thereunder."

Other provisions of chapter 19A are consistent with this division of authority. The legislative delegation of rulemaking authority to the commission is broad. Iowa Code section 19A.9 states, "The personnel commission shall adopt and may amend rules for the administration and implementation of this chapter in accordance with chapter 17A."[1] The legislature has used similarly broad language as that in § 19A.9 to grant general

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[1]Other sections grant rulemaking authority to the commission for specific topics. See, e.g., Iowa Code §§ 79.1(7) (sick leave conversion); 79.16(2) (reimbursement for moving expenses).

rulemaking authority to carry out other statutes. See, e.g., Iowa Code §§ 455B.105(3) (Environmental Protection Commission); 601A.5(10) (Civil Rights Commission). We find no similar grant of broad rulemaking authority to the director. The two provisions in chapter 19A which provide for the director to adopt or prescribe rules, §§ 19A.1A(3) and 19A.15, are of limited scope. Section 19A.1A(3) authorizes the director to establish intra-agency divisions or other subunits by rule; this grants management authority but not authority to establish regulatory policy. Section 19A.15 concerns access to certain records. One other provision, § 79.37, refers to rules adopted by the director, but that section does not itself delegate rulemaking authority.[2]

The grant of general rulemaking authority to the commission, rather than the director, is consistent with the general distribution of rulemaking power in state agencies. The state reorganization bill, 1986 Iowa Acts, ch. 1245, § 4(6), defines a "commission" as "a policymaking body that has rulemaking powers." The terms "council" or "committee" were used to describe advisory or recommending bodies. § 4(9), (10). Section 2(5) of that act describes the basic structure of departments with commissions or boards as follows:

> Any commission, board, or other unit attached under this section to a department or independent agency, or a specified division of one, shall be a distinct unit of that department, independent agency or specified division. Any commission, board, or other unit so attached shall exercise its powers, duties, and functions as may be prescribed by law, including rulemaking, licensing and regulation, and operational planning within the area of program responsibility of the commission, board, or other unit independently of the head of the department or independent agency, but budgeting, program coordination, and related management functions shall be performed under the direction and

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[2]Section 79.37 states:

> Administrative rules adopted by the director of the department of personnel pursuant to this chapter shall not supersede provisions of collective bargaining agreements negotiated under chapter 20.

> supervision of the head of the department or independent agency, unless otherwise provided by law.

Thus it is our view that rulemaking authority granted to the Department of Personnel is vested in the Personnel Commission except where expressly conferred on the director or other entity,[3] or where the intent to confer rulemaking authority on the director or other entity can be necessarily implied. Thus the Commission would have authority to adopt rules where a statute provides for rules by the Department if the subject matter of the rules is within the scope of chapter 19A.

The scope of chapter 19A is broad and encompasses state personnel management generally. We would therefore conclude that the Commission would exercise the authority to adopt rules for the department concerning vacation allowances, Iowa Code §79.1(2), educational leave, §79.1(8), and equal employment opportunity, §19B.3(j). We would conclude, however, that the Commission would not have rulemaking authority over IPERS issues. Section 19A.1(1)(c) and 19A.1(3) contemplate that Iowa peace officers retirement and IPERS retirement systems are "distinct and independent systems within the department." There are separate boards with functions relating to these retirement systems.[4]

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Deputy Attorney General

EMO:mlr

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[3]See, e.g., Iowa Code § 97A.5(4), granting rulemaking authority to the board of trustees for the peace officer's retirement system.

[4]This opinion does not address which entity, other than the Personnel Commission, adopts the IPERS rules.

TRANSPORTATION, MOTOR VEHICLES: Commercial vehicle driver qualifications. Iowa Code § 321.449; 1988 Iowa Acts, Senate File 2314, § 50. Rules adopted under § 321.449 for a driver of commercial vehicle do not apply to a driver of a commercial vehicle for a private carrier, not for hire, when the vehicle is operated exclusively intrastate and not more than one hundred miles from the driver's work location. This new exemption in S.F. 2314 does not exempt drivers from the statutory minimum age requirement in § 321.449 or from rules regulating the transportation of hazardous materials adopted under other laws. The Deptartment of Transportation may choose to develop policy under § 321.449 by rule, contested case, or both. (Krogmeier to Priebe, 7-14-88) #88-7-3(L)

July 14, 1988

The Honorable Berl E. Priebe
State Senator
Iowa General Assembly
Des Moines, IA

Dear Senator Priebe:

In a letter dated May 25, 1988, you requested an opinion from this office concerning the proper interpretation of Iowa Code § 321.449 as recently amended. In your letter, you ask the following two questions:

> 1) Does the clause "notwithstanding other provisions of this section", contained in S.F. 2070, section seven mean that the exemption in that section takes precedence over the more limited exemption of section 321.449, third unnumbered paragraph?
>
> 2) In interpreting the meaning of section 321.449, as amended by S.F. 2070, must the Iowa Department of Transportation promulgate those interpretations as administrative rules, pursuant to Iowa Code Chapter 17A, prior to their implementation?

Prior to the 1988 session of the General Assembly, Iowa Code Supp. § 321.449 (1987) provided the following:

> 321.449 Motor carrier safety regulations. A person shall not operate a commercial vehicle on the highways of this state except in compliance with rules adopted by the

> department under chapter 17A. The rules shall be consistent with the federal motor carrier safety regulations promulgated under United States Code, Title 49, and found in 49 C.F.R. §§ 390-399 and adopted under chapter 17A which rules shall be to a date certain.
>
> Rules adopted under this section concerning driver qualifications, hours of service, and recordkeeping requirements do not apply to the operators of public utility trucks, construction trucks and equipment, trucks moving implements of husbandry, and special trucks, other than a truck tractor, operating intrastate. However, construction trucks shall not be construed to include gravel hauling trucks. Gravel hauling trucks and trucks for hire on construction projects are not exempt from this section.
>
> Rules adopted under this section concerning driver age qualifications do not apply to drivers for private and for-hire motor carriers which operate solely intrastate except when the vehicle being driven is transporting a hazardous material in a quantity which requires placarding. The minimum age for the exempted intrastate operations is eighteen years of age.

The 1988 session of the 72nd General Assembly both passed and repealed S.F. 2070, § 7. This repeal and amendment was in 1988 Iowa Acts, S.F. 2314, § 50. The amendment reads as follows:

> Sec. 50. 1988 Iowa Acts, Senate File 2070, section 7 is amended by striking the section and inserting in lieu thereof the following:
>
> SEC. 7. Section 321.449, Code Supplement 1987, is amended by adding the following new unnumbered paragraph:
>
> NEW UNNUMBERED PARAGRAPH. Notwithstanding other provisions of this section, rules adopted under this section for a driver of a

> commercial vehicle shall not apply to a driver for a private carrier, who is not for hire and who is engaged exclusively in intrastate commerce, when the driver's commercial vehicle is not operated more than one hundred miles from the driver's work reporting location.

As the particular statute that you ask about, S.F. 2070, § 7, no longer exists, it is not appropriate for our office to comment about an interpretation of it at this time. We do not resolve hypothetical or abstract questions of law or speculate on the interpretation of a statute that no longer exists. Op.Att'yGen. #88-5-5(L) (Krogmeier to Harbor, 5-12-88). However, since the provisions in S.F. 2314, § 50, are very similar to the provisions in the section you inquire about, we will answer the questions you raise with regard to the most recent amendment to § 321.449.

In order to discuss S.F. 2314, § 50, it is necessary to apply the usual rules of statutory construction. In the construction of statutes, words and phrases which are non-technical or have not acquired a peculiar and appropriate meaning in law are to be construed according to the context and the approved usage of the language. Iowa Code § 4.1(2). It is presumed that words and phrases appearing in statutes are used in their ordinary and usual sense with the meaning commonly attributed to them. Sorg v. Iowa Department of Revenue, 269 N.W.2d 129, 132 (Iowa 1978).

The word "notwithstanding" is defined to mean "without prevention or obstruction from; in spite of." Webster's New International Dictionary, Second Edition.

The word "provision" is defined to mean "that which is stipulated in advance; a condition; a previous agreement; a proviso; as, the provisions of a contract; the statute has many provisions." Webster's New International Dictionary, Second Edition.

As part of a paragraph amendment to a section of the Iowa Code, the phrase "of this section" would commonly mean the entire Code section being amended.

Thus, we conclude the phrase "notwithstanding other provisions of this section" means that the legislature intended the new unnumbered paragraph enacted by S.F. 2314, § 50, to be fully effective despite any other condition or requirement of § 321.449. This does not necessarily imply or mean that the new unnumbered paragraph is in conflict with or takes precedence over the third unnumbered paragraph of § 321.449. Careful review of all of the section must be made.

In enacting a statute, it is presumed the entire statute is intended to be effective and have a just and reasonable result. Iowa Code §§ 4.4(2) & (3). It is assumed that amendments to existing statutes are intended to accomplish a purpose and are not simply a futile exercise of legislative power. Western Outdoor Advertising Co. v. Board of Review of Mills County, 364 N.W.2d 256, 258 (Iowa 1985). Effect is to be given to every part of a statute unless sections thereof are irreconcilably repugnant. Iowa Department of Transportation v. Nebraska-Iowa Supply Co., 272 N.W.2d 6, 11 (Iowa 1978). If possible, a statute is to be accorded a logical and sensible construction which gives harmonious meaning to related sections and accomplishes the legislative purpose. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 188 (Iowa 1980).

The third unnumbered paragraph of § 321.449 applies to "drivers for private and for-hire motor carriers which operate solely intrastate except when the vehicle being driven is transporting a hazardous material in a quantity which requires placarding", whereas the new unnumbered paragraph in S.F. 2314 applies to "a driver for a private carrier, who is not for-hire and who is engaged exclusively in intrastate commerce, when the driver's commercial vehicle is not operated more than 100 miles from the driver's work reporting location."

In effect, the third unnumbered paragraph of § 321.449 grants an exemption to "rules adopted under this section concerning driver age qualifications", whereas the new unnumbered paragraph in S.F. 2314 grants an exemption to "rules adopted under this section for a driver of a commercial vehicle."

We are of the opinion that the provisions of the new unnumbered paragraph in S.F. 2314 take precedence over the other provisions in § 321.449. Therefore, rules adopted under § 321.449 for a driver of a commercial vehicle would not apply if

the driver meets all of the requirements of the new unnumbered paragraph. However, S.F. 2314 does not exempt a driver from the statutory minimum age requirement in § 321.449.

You should be aware that this interpretation of S.F. 2314 does not mean that the qualifications of drivers of vehicles transporting hazardous material is totally unregulated. Iowa Code Supplement § 321.450 (1987) requires the Department of Transportation to adopt rules regulating the transportation or shipment of hazardous material. Drivers of vehicles transporting hazardous materials must continue to comply with these rules and other requirements for transporting hazardous waste regardless of any exemption to rules adopted to implement § 321.449.

To answer your second question, the Iowa Department of Transportation is not required to promulgate all of its interpretations of § 321.449 as administrative rules.

The Iowa Supreme Court has stated that absent statutory guidance, an agency may choose to develop policy by rule, contested case, or both. A rule will be of general applicability and have the binding effect of law. A determination, decision, or order in a contested case will apply only to a particular fact situation although it may have precedential value. An agency cannot avoid using required rulemaking procedures by issuing statements of general applicability in contested proceedings. Young Plumbing and Heating Company v. Iowa Natural Resources Council, 276 N.W.2d 377, 382 (Iowa 1979). Thus, we conclude the Iowa Department of Transportation may interpret § 321.449, as amended by S.F. 2314, § 50 without promulgating administrative rules stating those interpretations.

Sincerely,

CHARLES J. KROGMEIER
Special Assistant Attorney General

COUNTIES; County Hospitals: Iowa Code § 347.13(15). A notice published pursuant to Iowa Code § 347.13(15) that lists each job classification and category and the range of salaries paid for that job classification complies with the requirements of § 347.13(15). (McGuire to Fulton, Decatur County Attorney, 7-14-88) #88-7-2(L)

July 14, 1988

Robert L. Fulton
Decatur County Attorney
203 N.E. Idaho
Leon, Iowa 50144

Dear Mr. Fulton:

You requested an opinion from the Attorney General's Office regarding the sufficiency of the notice published by Decatur County Hospital pursuant to Iowa Code § 347.13(15). Section 347.13(15) requires county hospitals to publish annually "the schedule of salaries paid by job classification and category, but not by listing names of individual employees."

To comply with this, Decatur County Hospital published two notices. The first listed the hospital departments and the salaries and wages paid in the department. As was recognized by the county, this matter was not sufficient because it did not list salaries by job classification and category and a second notice was published.

The second notice listed each job classification and category and the salaries paid for that job. The salaries listed appear to be a range of salaries paid for the job. It is this second notice to which your question refers.

The language of § 347.13(15) appears plain and not ambiguous. The question is whether the second notice complied with the requirements of § 347.13(15). The second notice clearly lists job categories and classifications and a schedule of salaries paid for those jobs. Therefore, it does comply with § 347.13(15).

This does not mean that there are no other ways of publishing this information in compliance with § 347.13(15). Additionally, it should be emphasized that while the employees' names are not to be published in this notice, the names, salaries and job

classifications of all employees paid in whole or part by taxes, are public record open to inspection. Section 347.13(15). See also 1980 Op.Att'yGen. 343.

Sincerely,

Maureen McGuire

MAUREEN McGUIRE
Assistant Attorney General

MM:mlr

SCHOOLS; Financing: Iowa Code §§ 442.4, 442.4(6), 281.9. The amendment to § 442.4 allowing eleventh and twelfth grade students to move from a district but to continue attending the district until graduation without the payment of tuition does not include those students who require special education and are counted in the "weighted enrollment" for the generation of funds. (Skinner to De Groot, State Representative, 8-26-88) #88-8-3(L)

August 26, 1988

The Honorable Kenneth De Groot
State Representative
502 Main Street
Doon, Iowa 51235

Dear Representative De Groot:

You have requested an opinion of the Attorney General concerning an amendment to Iowa Code § 442.4 (1988 Iowa Acts 153) which states in part:

> An eleventh or twelfth grade pupil who is no longer a resident of a school district, but who was a resident of the district during the preceding school year may enroll in the district and shall be included in the basic enrollment of the district until the pupil graduates. Tuition for that pupil shall not be charged by the district in which the pupil is enrolled.

Specifically, you asked whether the above paragraph applies to all students, including special education students. We conclude that this section does not apply to the special education students in a school district who utilize the weighted enrollment procedures.

The section of the Code to which this amendment applies includes the procedures for a school district to determine its "basic enrollment," "adjusted enrollment," "weighted enrollment," "budget enrollment" and "additional enrollment."

In the context of the section, the term "basic enrollment" is used to refer to the counting of those pupils who are enrolled resident pupils, those who are shared and part-time with another district, and those for which the district pays tuition to attend an Iowa area school.[1] The special education pupils, however, are included in the term "weighted enrollment" with a specific reference to Iowa Code § 281.9 (1987).[2] A separate subsection, § 442.4(6) applies to the weighted enrollment for both special education students and for non-English-speaking students.

If the language of a statute is plain, unambiguous and consistent with related statutory provision, no duty of interpretation arises and there is no occasion to probe for legislative intent. State v. Baker, 293 N.W.2d 568 (Iowa 1980). Statutes should be given a sensible, practical, workable and logical construction. Northern Natural Gas Co. v. Forst, 205 N.W.2d (Iowa 1973).

The plain meaning of the language in the amended section indicates that it applies to the "basic enrollment," not to the "weighted enrollment." Had the intention been to include the special education students, a reference to both the basic enrollment and the weighted enrollment should have been included.

The new statute provides a method for older students to actually move from a district but still finish their last year or two years in the district without paying tuition. It would be illogical to conclude that the district of a handicapped student as defined in Iowa Code chapter 281 (1987) who has had the benefit of the weighted enrollment to provide an appropriate program for the student would be obligated to provide a program with only the receipt of the "basic enrollment" funds after the student moves out of the district.

In further support of this conclusion, we note the reference to "eleventh and twelfth grade students." Those handicapped

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[1]We note that the term "basic enrollment" may also include the 1.0 portion of the special education student's education, but as used in the amended subsection, § 442.4(1), the special education count is referred to as "additional enrollment because of special education."

[2] This section defines the weighing plan to provide funds for the excess costs of instruction of children requiring special education, above the costs of instruction of pupils in a regular curriculum.

students who are appropriately served in the regular classroom with minimal special education support and instruction will have a grade designation, such as eleventh or twelfth grade. But those handicapped students with intensive instructional needs who are not served in the regular classroom will not have the common grade designation. In fact, they may attend school to an age far beyond the age of most eleventh and twelfth grade students. Iowa Code § 281.2(1). If it was intended to avoid separate treatment and include these students in the provision at issue here, "students requiring special education" or students utilizing the "weighted enrollment" should have been made.

In summary, we conclude that the amendment allowing eleventh and twelfth grade students to move from a district but to continue attending the district until graduation without the payment of tuition does not include those students who require special education and are counted in the "weighted enrollment" for the generation of funds.

Sincerely,

Kathy Skinner

KATHY MACE SKINNER
Assistant Attorney General

KMS:sg

LAW ENFORCEMENT, PUBLIC SAFETY, SHERIFFS, disposition of prisoners: Iowa Code §§ 356.1, 356.2, 356.5, 804.21, 804.22, 804.28 (1987). Generally under Iowa Code §§ 356.1, 356.2, 804.21 and 804.22 (1987) the arresting agency and not the county sheriff is responsible for the safekeeping and custody of prisoners who have not been committed to the county jail. This includes the responsibility of making emergency medical care available. Iowa Code § 804.28 (1987) creates an exception to this rule. Under § 804.28, the Sheriff is responsible to take charge of prisoners of the Iowa Department of Public Safety. The Sheriff is responsible for such prisoners as though the Sheriff made the initial arrest. The arresting agency is not responsible for the cost of medical care made available to arrestees. (Hayward to Shepard, Commissioner of Public Safety, 8-2-88) #88-8-1

August 2, 1988

Honorable Gene W. Shepard
Commissioner
Iowa Department of Public Safety
Third Floor, Wallace State
Office Building
L O C A L

Dear Commissioner Shepard:

You have asked this office for its opinion on several aspects of the initial handling of persons arrested by officers of the Iowa Department of Public Safety, and other agencies. Specifically you have asked:

1. Does Section 804.28, the Code, 1987, require the sheriff to accept custody of prisoners from the Department of Public Safety whose mental state or physical condition appears to render incarceration in the county jail inappropriate?

2. If the answer to the foregoing is in the negative, at what point and under what circumstances is the sheriff obligated to accept custody from the Department?

3. If it is inappropriate to initially place the prisoner in a jail, is it the responsibility of the arresting agency or of the sheriff to safeguard the prisoner while the prisoner is receiving medical care?

4. Do the same answers to Question 1, 2 and 3 apply to arresting agencies other than the Department of Public Safety; e.g., city police departments or other state agencies?

5. Does the fact that a person is under arrest create any responsibility on the part of a law enforcement agency to pay the costs for treatment provided to that person or should the cost be borne by prisoner or the Social Services system?

The applicable statutes are Iowa Code § 356.1 (1987), which states:

> The jails in the several counties in the state shall be in charge of the respective sheriffs and used as prisons:
>
> 1. For the detention of persons charged with an offense and committed for trial or examination.
> 2. For the detention of persons who may be committed to secure their attendance as witnesses on the trial of a criminal cause.
> 3. For the confinement of persons under sentence, upon conviction for any offense, and of all other persons committed for any cause authorized by law.
> 4. For the confinement of persons subject to imprisonment under the ordinances of a city.
>
> The provisions of this section extend to persons detained or committed by authority of the courts of the United States as well as of this state.

Iowa Code § 356.2 (1987), which states:

> The sheriff shall have charge and custody of the prisoners in the jail or other prisons of the sheriff's county, and shall receive those lawfully committed, and keep them until discharged by law.

Iowa Code § 356.5 (1987), which states in pertinent part:

> The keeper of each jail shall:
>
> * * * *
>
> 2. Furnish each prisoner with necessary . . . medical aid.
>
> * * * *

and Iowa Code § 804.28 (1987), which states:

> The sheriff of any county shall accept for custody in the county jail of the sheriff's respective county any person handed over to the sheriff for safe-keeping and lodging by any member of the department of public safety.

Statutes are to be construed by the language used by the legislature. Where that language is clear and unambiguous, there is no need to turn to the rules of statutory construction. State v. Rich, 305 N.W.2d 739 (Iowa 1981).

> 1. The Sheriff is obligated to accept any person for custody from a member of the Department of Public Safety regardless of the person's condition.

The language in Iowa Code § 804.28 (1987) is clear and unambiguous. When a member of the Department of Public Safety requests the Sheriff to take custody of a person, the Sheriff must do so. At that point the person becomes the Sheriff's prisoner. If the person is injured, ill, or otherwise in such a state or condition that immediate incarceration is not appropriate, it is the responsibility of the Sheriff to furnish

the medical assistance required by Iowa Code § 356.5(2) (1987) just as if the Sheriff had made the initial arrest. Similarly, the Sheriff is responsible for safeguarding the prisoner while such attention is provided.

In enacting this provision the legislature obviously was making accommodation to the fact that Department of Public Safety does not have any offices or facilities in each county, nor the requisite number of officers in each county to handle its own prisoners.

2. The Sheriff is not obligated to accept prisoners from other agencies until they have been formally committed to the Sheriff's custody by the court.

On the other hand, the Sheriff is under no obligation to accept for safekeeping, or otherwise to provide care, to prisoners referred to him by law enforcement agencies other than the Iowa Department of Public Safety until they have been committed to the Sheriff's custody by a court. Iowa Code § 356.1 (1987) only requires the Sheriff to accept prisoners who have been "committed" or "upon conviction" or "subject to confinement under the ordinances of a city." Iowa Code § 356.2 (1987) requires the Sheriff to receive prisoners "lawfully committed." The word "committed" in the statute means that an appropriate order, usually an order that the arrestee be "held to answer" pursuant to Rule 4, I.R.Crim.P., be made by the court. 15A C.J.S. "Commit" and "Commitment", pp. 11-13 (1967). See also, State v. Houston, 209 N.W.2d 42, 47 (Iowa 1973).

This is consistent with Iowa's arrest laws, Iowa Code §§ 804.21-804.22 (1987) which require that a prisoner be taken before a magistrate; not that the prisoner be taken to the Sheriff. While the practicalities of the criminal justice system are such that there will be delays in getting prisoners before a magistrate, see e.g. State v. Miller, 259 Iowa 188, 142 N.W.2d 394 (1966), except for Iowa Code § 804.28 (1987) requiring the Sheriff to take custody of Public Safety prisoners, there is no provision relieving the arresting agency of responsibility for prisoners who have not been judicially committed to the county jail.

Therefore, if a prisoner who has not been "committed" to the custody of the Sheriff has immediate medical needs, it is the responsibility of the arresting agency to make medical attention

available and to safekeep the prisoner while such attention is provided. That is, of course, except prisoners of the Iowa Department of Public Safety turned over to the Sheriff pursuant to Iowa Code § 804.28 (1987).

3. The arresting agency does not have the primary obligation to pay for medical care.

Neither the Sheriff nor the arresting agency has any obligation to assume the cost of medical attention provided an arrestee unless payment is unavailable from any other source. In City of Revere v. Massachusetts General Hosp., 463 U.S. 239, 245, 103 S.Ct. 2979, 2983, 77 L.Ed.2d 605 (1983), in regard to the obligations arising when an arrestee needs medical attention, the court stated:

> [A]s long as the governmental entity ensures that the medical care needed is in fact provided, the Constitution does not dictate how the cost of that care should be allocated as between the entity and the provider of the care. That is a matter of state law. (Emphasis added).

In Smith v. Linn County, 342 N.W.2d 861 (Iowa 1984), the Iowa Supreme Court ruled that the statutory requirement in Iowa Code § 356.5(2) (1987) that a Sheriff's office furnish medical care for its prisoners creates no obligation on the part of the county to assume such costs.

However, in City of Revere v. Massachusetts General Hosp., 463 U.S. at 245, 103 S.Ct. at 2983, the court added:

> If, of course, the governmental entity can obtain the medical care needed for a detainee only by paying for it, then it must pay.

Thus, the agency is a payer of last resort, when all other options fail including insurance, indigent assistance programs, and the detainee's own resources.

4. Summary.

Generally under Iowa Code §§ 356.1, 356.2, 804.21 and 804.22 (1987) the arresting agency and not the county sheriff is responsible for the safekeeping and custody of prisoners who have not been committed to the county jail. This includes the responsibility of making emergency medical care available. Iowa Code § 804.28 (1987) creates an exception to this rule. Under § 804.28, the Sheriff is responsible to take charge of prisoners of the Iowa Department of Public Safety. The Sheriff is responsible for such prisoners as though the Sheriff made the initial arrest. The arresting agency is not responsible for the cost of medical care made available to arrestees.

Respectfully yours,

GARY L. HAYWARD
Assistant Attorney General
Public Safety Division

GLH:mjs

COUNTIES: County Care Facilities. Iowa Code §§ 135C.24(1); 135C.24(5) (1987). A health care facility that is not administered by or under the control of the county is not a county care facility for purposes of § 135C.24. (McGuire to Vander Hart, Buchanan County Attorney, 9-6-88) #88-9-1(L)

September 6, 1988

Mr. Allan W. Vander Hart
Buchanan County Attorney
Buchanan County Courthouse
Independence, Iowa 50644

Dear Mr. Buchanan:

You requested an opinion from the Attorney General regarding Iowa Code § 135C.24(5). Specifically you ask whether "a county care facility administrator appointed as a guardian of a facility resident pursuant to Section 135C.24(5) and Chapter 633 continue to serve in that capacity following a change in the administrator's status from that of county employee to that of employee of a private non-profit corporation which operates the facility under contract with the county, or is such service contrary to Section 135C.24(1)?"

Iowa Code § 135C.24(1) prohibits a health care facility, owner, administrator or employee thereof from acting as a guardian for a resident of the facility unless they are related. This prohibition does not apply to county care facilities. § 135C.24(5).

The question, then, is whether Buchanan County Care Facility is still a county care facility. The facility "went private" by the county's contracting with a private non-profit corporation to operate the facility. The county retains ownership of the facility's physical plant.

The Department of Inspections and Appeals, the agency responsible for licensing health care facilities reports that the corporation, and not the county, is the licensee of the facility. Pursuant to 481 Iowa Admin. Code 57.10(1), the licensee must

"assume the responsibility for the overall operation of the residential care facility." The county, then, does not retain control or administration of the facility.

Since the county does not have responsibility for operating the facility, it would not appear to be considered a county care facility for § 135C.24. Therefore, unless they were related, the administrator's acting as a guardian to facility residents would violate § 135C.24(1).

Sincerely,

Maureen McGuire

MAUREEN McGUIRE
Assistant Attorney General

MM:mlr

COUNTIES AND COUNTY OFFICERS; County Conservation Board. Iowa Code §§ 111A.1, 111A.4 (1987); Iowa Code Supp. § 111.85 (1987). A county conservation board may not authorize a private group to control entry into a county park or charge a park admission fee. A county conservation board may charge an admission fee for use of a developed facility such as a golf course, and may sub-delegate management of such a facility by concession contract. (Smith to Stoebe, Humboldt County Attorney, 10-14-88) #88-10-2(L)

October 14, 1988

Mr. Kurt John Stoebe
Humboldt County Attorney
P.O. Box 365
429 Sumner Ave.
Humboldt, Iowa 50548

Dear Mr. Stoebe:

You have requested an opinion of the Attorney General concerning whether a county conservation board may temporarily delegate control of a county park to a private group and authorize the private group to charge members of the public an admission fee. It is our understanding that your request arose from circumstances in which a private organization was allowed to control public entry into a county park during the July 4th holiday weekend. We also understand that the private organization charged a substantial admission fee, a relatively small portion of which was paid to the county conservation board.

It is our opinion that both charging an admission fee and delegating to a private group the authority to limit entry into a county park under the circumstances you have described would clearly be contrary to the enabling legislation for county conservation boards in Iowa Code chapter 111A.

The powers and duties of county conservation boards are set forth in Iowa Code § 111A.4 (1987). The first sentence of § 111A.4 vests in the county conservation board the "custody, control and management" of parks owned by the county. Specific authority to charge user fees and to subdelegate control is set forth in §§ 111A.4(7) and (8) which authorize county conservation boards to do the following:

> 7. To charge and collect reasonable fees for the use of such (conservation)

> facilities, privileges and conveniences as may be provided and for admission to amateur athletic contests, demonstrations and exhibits and other noncommercial events.
>
> 8. To operate concessions or to lease concessions and to let out and rent privileges in or upon any property under its control upon such terms and conditions as are deemed by it to be in the public interest.

Legislative authorization for the board to charge user fees and to subdelegate control of conservation areas must be interpreted in harmony with § 111A.1 which states the purposes of county conservation boards as follows:

> The purposes of this chapter are to create a county conservation board and to authorize counties to acquire, develop, maintain, and make available to the inhabitants of the county . . . parks . . . and to promote and preserve the health and general welfare of the people, to encourage the orderly development and conservation of natural resources, and to cultivate good citizenship by providing adequate programs of public recreation.

(Emphasis added).

An example of a reasonable subdelegation of authorization to charge reasonable fees for use of a county park facility would be a contract with a concessionaire to operate a developed public swimming facility and charge reasonable fees to defray the cost of operating and maintaining the facility. However, it is questionable whether subsection 111A.4(7) authorizes a county board to charge a park admission fee that is not related to use of specific facilities or events. The statute refers to "facilities" and related privileges and conveniences furnished to the public. Ballantine's Law Dictionary 448 (3rd ed. 1969) defines facilities as "[u]tilities; conveniences; restrooms." Webster's New Collegiate Dictionary 406 (1979) defines facility as something "built, installed, or established to serve a particular purpose." Most parks include various facilities which make the park more convenient or enjoyable to use. However the statute neither states nor implies that the terms "parks" and "facilities" necessarily are synonymous. Some parks may be facilities, e.g., a "park" that consists only of a golf course "facility." Sections 111A.4(7) and (8) authorize a county conservation board to charge reasonable fees for the use of a

facility such as a golf course, and to subdelegate management of such a facility by concession contract. See 1970 Op.Att'yGen. 104. However, most parks would include both developed facilities and relatively undeveloped natural areas.

Additionally, doubt that subsection 111A.4(7) authorizes a park admission fee is reinforced by its contrast with Iowa Code Supp. § 111.85 (1987) which expressly mandates a State park user fee in the form of a motor vehicle parking fee and specifies the amount of the alternative daily and annual fees. Iowa Code § 111A.10 makes specified sections of Iowa Code Chapter 111 applicable to lands and waters under the control of a county conservation board. That incorporation of state park statutes by reference does not include § 111.85, providing for a park user fee.

The fees authorized by § 111A.4 appear to be limited to use of facilities and admission to "events." The board must determine that fees charged are reasonable, in the public interest, and compatible with making county conservation areas available to inhabitants of the county. What a board cannot itself do cannot be subdelegated to a private group.

When subdelegating its limited authorization to charge fees for use of county conservation facilities, a board should be especially cautious that fees are reasonable in relation to the services provided and compatible with the statutory purpose of making county conservation areas available to the public. Similarly, although a facility such as a lodge or shelter in a county conservation area may be rented to a private group, a board should adopt fair rental procedures which assure that rental opportunities are offered without favoritism and that rental of facilities does not result in excluding members of the public from a county conservation area.

In conclusion, a county conservation board may not authorize a private group to control entry into a county park or charge a park admission fee. A county conservation board may charge an admission fee for use of a developed facility such as a golf course, and may subdelegate management of such a facility by concession contract.

Sincerely,

Michael H Smith

MICHAEL H. SMITH
Assistant Attorney General

MHS:rcp

COUNTY ATTORNEY: Mental Health Commitment Hearings. Iowa Code §§ 28E, 331.752(4), 331.755(1), 331.756, 331.757, 331.907 (1987). A county attorney, full or part-time, may not be remunerated for handling mental health commitment hearings of outside counties which is an obligation of the county under a 28E agreement. However, a part-time county attorney in his private capacity could be appointed as an assistant county attorney to the committing counties and compensated in that capacity for handling the mental health commitments. (McCown to Wibe, Cherokee County Attorney, 11-28-88) #88-11-3(L)

November 28, 1988

Mr. John A. Wibe
Cherokee County Attorney
P.O. Box 100
Cherokee, Iowa 51012

Dear Mr. Wibe:

You requested an Attorney General's Opinion concerning whether a part-time county attorney may be paid by another county for handling their mental health commitments. In your letter you state the following:

> Our Office has been handling Mental Health Commitment Hearings for other counties in our surrounding district. Our Hospital Referee has an agreement with the surrounding counties wherein Mental Health Commitments at Cherokee, Iowa, are handled by the Hospital Referee in Cherokee, with the appointment of a local attorney, and representation on behalf of the County Attorney from the committing county being done by the County Attorney's Office in Cherokee County, as the County Attorney Designate for said county. The county of legal settlement for the Respondent being committed to the Mental Health Institute in Cherokee, has paid for the services of the Hospital Referee; the Court appointed attorney for the Respondent; and the County Attorney Designate.

> Our Office is requesting a legal opinion as to whether or not the County Attorney in Cherokee County, Iowa, acting as County Attorney Designate for the county of legal settlement, can accept the $35.00 fee from the county of legal settlement.

A county attorney receives a set salary established by the County Board of Supervisors. Iowa Code §§ 331.752(4) and 331.907 (1987). The county attorney has many statutory duties prescribed by the Code. His main duties are outlined in Iowa Code section 331.756 (1987). Additional duties may be created pursuant to 28E agreements entered into between the county and another political subdivision of the state. See, Iowa Code chapter 28E (1987). The Iowa Supreme Court has held that political subdivisions of the state may join together to perform public services and by agreement create a separate legal or administrative entity to render such services. Goreham v. Des Moines Metropolitan Area Solid Waste Agency, 179 N.W.2d 449 (Iowa 1970). See also Op.Att'yGen. #80-4-1(L). Because the services rendered by the county attorney would be on behalf of the county to fulfill its obligation under the agreement, the county attorney cannot receive additional remuneration. See Iowa Code § 331.755(1) (1987). In this particular instance, the handling of mental health commitments would be but another duty of the county attorney position.

A public policy problem may be created if the additional duties created under an agreement would prevent the county attorney from fulfilling his mandatory duties. See Op.Att'yGen. #80-4-1(L). Also, if the county attorney position is part-time, the additional responsibility of handling mental health commitments of surrounding counties could either detract from the responsibilities of the county attorney or detract from his/her other employment.

In an instance such as where the county attorney position is part-time, you could be appointed as an assistant county attorney to the other committing counties and be compensated as such in your private capacity. Furthermore, such an arrangement would save substantial time and money for the committing counties.

In summary, a part-time county attorney for Cherokee County may not be remunerated for handling mental health commitment hearings of outside counties which are an obligation of Cherokee County under a 28E agreement. The county attorney cannot commit time to handling the hearings if it would prevent him/her from fulfilling the mandatory duties of the office. However, if Cherokee County has not assumed this responsibility by 28E agreement, a part-time county attorney in his private capacity

could be appointed and compensated as an assistant county attorney to the committing counties for handling the mental health commitments of those counties.

Sincerely,

Valencia Voyd McCown

VALENCIA VOYD McCOWN
Assistant Attorney General

VVM:mlr

MUNICIPALITIES: Zoning; Historical Significant Areas. Iowa Code Ch. 176B, 414 (1987); Iowa Code §§ 303.20 through 303.33, 303.34, 303.34(4), 380.4, 414.1, 414.2, 414.3, 414.5, 414.21 (1987); 1988 Iowa Acts, ch. 2348, § 8; 1980 Iowa Acts, ch. 1091, §§ 1, 2, and 3. A city, in designating an area of historical significance pursuant to Iowa Code § 303.34 (1987), must comply with the substantive and procedural requirements for exercise of the general zoning power found in Iowa Code ch. 414. Accordingly, passage of an ordinance designating an area as an historically significant area would, upon written protest filed in compliance with the requirements of § 414.5, as amended, require the favorable vote of at least three-fourths of all council members pursuant to § 414.5, as opposed to an affirmative vote of not less than a majority of the council pursuant to § 380.4. (Walding to Bruner, State Senator, 11-18-88) #88-11-2(L)

November 18, 1988

The Honorable Charles Bruner
State Senator
922 Arizona
Ames, Iowa 50010

Dear Senator Bruner:

We are in receipt of your request for an opinion of the Attorney General regarding the designation of an area of historical significance within the limits of a city.[1] The City of Ames, we are told, is exploring the possibility of designating an historically significant area.

A procedural issue has been posed as to whether an ordinance designating an area of historical significance is enacted in the manner as other ordinances, or whether the specific procedure for land use zoning ordinances must be followed. Specifically, the issue is whether, upon written protest filed in compliance with Iowa Code § 414.5 (1987),[2] passage of an ordinance designating an

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[1]As observed in a prior opinion of this office, 1982 Op.Att'yGen. 509 (#82-8-8(L)), fn. 1: "Note that a city merely designates an area of historical significance; a separate historical preservation district is not established [as provided for in Iowa Code §§ 303.20 through 303.33]."

[2]Iowa Code § 414.5 (1987), as amended by 1988 Iowa Acts, Ch. 2438, § 8, provides for a greater number of votes for passage of an ordinance if a written protest is filed with the city clerk and signed by "the owners of twenty percent or more of the area of the lots included in the proposed change or repeal, or by the owners of twenty percent or more of the property which is located

(continued...)

area as an area of historical significance requires simply a majority pursuant to Iowa Code § 380.4, or whether the ordinance requires the favorable vote of at least three-fourths of all the members of the council pursuant to Iowa Code § 414.5, as amended.

It is our opinion that, in designating an area of historical significance pursuant to § 303.34, a city must comply with the substantive and procedural requirements for exercise of the general zoning power found in Iowa Code ch. 414. Accordingly, passage of an ordinance designating an area as an historically significant area would, upon receipt of a § 414.5 protest, require a super-majority of the council members. Thus, a favorable vote of five council members would be required to obtain the necessary three-fourths vote of Ames' six-member council, as opposed to a simple majority of four.

A review of the applicable statutes, legislative history and prior opinions will support that conclusion. Our analysis begins with Iowa Code § 303.34 (1987).[3] The provisions of Iowa Code

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[2](...continued)
within two hundred feet of the exterior boundaries of the property for which the change or repeal is proposed."

[3]The procedure by which a city designates an area of historical significance was described in the 1982 opinion. In 1982 Op.Att'yGen. 509, we observed:

> A separate procedure, however, is to be followed for a city to designate an area it deems to merit preservation as an area of historical significance. The process is initiated either by the governing body of the city or by a petition of the residents therein. See § 303.34(1), The Code 1981. A description of the proposed area of historical significance is submitted to the [historical division of the Department of Cultural Affairs]. Id. Following the division's review, enactment of an ordinance of the city is required before an area may be designated as an area of historical significance. See § 303.34(4), The Code 1981.
>
> * * *

(continued...)

§§ 303.20 through 303.33, which provide for the establishment of historical preservation districts, expressly do not apply within city limits. Iowa Code § 303.34(1) (1988). Section 303.34 was enacted in 1980 to permit cities to provide for historical preservation. See 1980 Iowa Acts, ch. 1091, § 1. Subsection 4, in part, states:

> An area shall be designated an area of historical significance upon enactment of an ordinance of the city. Before the ordinance or an amendment to it is enacted, the governing body of the city shall submit the ordinance or amendment to the historical division for its review and recommendations.

[Emphasis added]. Iowa Code § 303.34(4).

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[3](...continued)
The division, however, is limited to recommendations concerning the proposed area of historical significance within the limits of a city. See § 303.34(1), The Code 1981.

* * *

Once . . . an area within the limits of a city is designated an area of historical significance, it should be observed that the division has no authority.

* * *

Suffice it to say, a city has greater discretion [than does a historical preservation district] in the establishment of a commission to deal with matters involving areas of historical significance. See § 303.34(3), The Code 1981.

* * *

A city, upon establishment of a commission, must provide by ordinance for the powers and duties of the commission. See § 303.34(3), The Code 1981.

(Footnote omitted).

Section 303.34 apparently was added, see 1980 Iowa Acts, ch. 1091, § 1, in response to this office's opinion that the zoning power granted to municipalities authority to zone for historic purposes. The opinion, 1980 Op.Att'yGen. 591, reversed a prior opinion, 1976 Op.Att'yGen. 844, and concluded:

> 1. The existence of Ch. 303.20-.33 may not preempt cities from passing local ordinances of a similar nature under Ch. 364 home rule powers because the two acts are not necessarily irreconcilable. Section 303.20-.33 does not show a clear intention to preempt the field.
>
> 2. However, even if the answer to the first question were yes, that cities are preempted under Ch. 364, the zoning power of Ch. 414 includes the power to zone to preserve historic districts. The zoning power, delegated to the cities by the Home Rule amendment, and as limited by Ch. 414 is not removed merely by the enactment of § 302.20-.33.

1980 Op.Att'yGen. at 592. Thus, the 1980 opinion rejected the earlier view pronounced that, because municipal zoning power was irreconcilable with §§ 303.20 through 303.33, a municipality could not enact a zoning regulation merely for aesthetic purposes and thus a city was preempted from enacting such an ordinance.

It is important to note that the 1980 legislation which added § 303.34 also contained language amending Iowa Code Ch. 414 to specifically grant cities the power to zone for historic purposes.

Iowa Code § 414.1, as amended by 1980 Iowa Acts, ch. 1091, § 2, provides:

> For the purpose of promoting the health, safety, morals, or the general welfare of the community or for the purpose of preserving historically significant areas of the community, any city is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings,

> structures, and land for trade, industry, residence, or other purposes.

[1980 amendment in emphasis]. For any of the purposes set forth in § 414.1, section 414.2, as amended by 1980 Iowa Acts, ch. 1091, § 3, provides:

> For any or all of said purposes the local legislative body, hereinafter referred to as the council, may divide the city into districts, <u>including historical preservation districts but only as provided in section 303.34</u>, of such number, shape, and area as may be deemed best suited to carry out the purposes of this chapter; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land. All such regulations and restrictions shall be uniform for each class or kind of buildings throughout each district, but the regulations in the district may differ from those in other districts.

[1980 amendment in emphasis]. The purposes for the regulations that may be established under § 414.2 are set forth in § 414.3. These purposes include a reasonable consideration "as to the character of the area for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such city."

The narrower issue, therefore, is whether the language in § 303.34 is reconcilable with the relevant provisions in Ch. 414. Clearly, in enacting 1980 Iowa Acts, ch. 1091, the Iowa General Assembly intended that § 303.34 be reconcilable with Ch. 414. Referring to relevant principles of statutory construction, we note that the polestar is to ascertain and give effect to legislative intent. <u>American Home Products Corp. v. Iowa State Board of Tax Review</u>, 302 N.W.2d 140 (Iowa 1981); <u>Doe v. Ray</u>, 251 N.W.2d 496, 501 (Iowa 1977). Further, in construing a particular statute, all provisions of that act and other pertinent statutes must be considered. <u>Maguire v. Fulton</u>, 179 N.W.2d 508 (Iowa 1970); <u>Goergen v. State Tax Commission</u>, 165 N.W.2d 782 (Iowa 1969). Finally with reference to Iowa Code Ch. 4 (1987), which governs construction of statutes, § 4.7 states: "If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both." The Iowa Supreme Court has consistently reiterated that in construing a statute it must be harmonized, if possible, with other statutes

relating to the same subject. Doe v. Ray, 251 N.W.2d at 501; France v. Bentes, 256 Iowa 534, 128 N.W.2d 268 (1964).

Further, it is observed that in the 1980 opinion we declared:

> The exercise of the zoning power by a city would not conflict with the existence of a historical district created under Ch. 303. If a local historic district has been created and a city also wished to zone for historic purposes, any conflict in the standards created by the two forms of regulations would be resolved by § 414.21. This section essentially provides that whenever "any other statute or local ordinance or regulation" requires standards higher than those set by Ch. 414, that the higher standards apply and vice versa. Therefore § 414.21 would prevent historic district regulations under § 303.20-.33, and historic zoning regulations under Ch. 414 from ever being "inconsistent" or "irreconcilable".

1980 Op.Att'yGen. 591, 593. Thus, Iowa Code § 414.21 (1987), as amended by 1982 Iowa Acts, ch. 1199, § 68, would resolve any conflict or inconsistency in the law in favor of the higher standard.

Finally, in a 1982 opinion, 1982 Op.Att'yGen. 510, we examined the relationship between historical preservation districts, §§ 303.20 through 303.33, and land preservation and use provisions, Iowa Code Ch. 176B. At issue in that opinion was whether the enforcement mechanisms in the land preservation and use provisions could be extended to historical preservation districts. We opined that the land use enforcement provisions found in Ch. 176B were not irreconcilable with, and were indeed complementary to, Chapter 303's historical preservation district provisions, and therefore we concluded that the two statutes could be read together. In concluding the 1982 opinion, we declared: "[O]nce an historical preservation district is independently established, it may be recognized, subject to the discretion of the county, as a part of a [Ch. 176B] land preservation and use plan and enforced accordingly." Thus, this office has previously determined Ch. 303 is to be reconciled, if possible, with other related statutes governing land use planning.

Accordingly, we conclude that § 303.34 and ch. 414 are reconcilable. In our view the statutes, when read together,

require the stricter standard of a three-fourths favorable vote for designation of an area as an historical significant area.

In summary, a city, in designating an area of historical significance pursuant to Iowa Code § 303.34 (1987), must comply with the substantive and procedural requirements for exercise of the general zoning power found in Iowa Code ch. 414. Accordingly, passage of an ordinance designating an area as an historically significant area would, upon written protest filed in compliance with the requirements of § 414.5, as amended, require the favorable vote of at least three-fourths of all council members pursuant to § 414.5, as opposed to an affirmative vote of not less than a majority of the council pursuant to § 380.4. Thus, a favorable vote of five, rather than four, council members would be required for the Ames City Council to designate an historically significant area.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW:rcp

SCHOOLS; SCHOOL DISTRICTS; DISSOLUTION; SCHOOLHOUSE TAX: Iowa Code §§ 275.12(5)(1987); 275.20 (1987); 275.51-.56 (1987) as amended; 278.1(7)(1987). The area of a dissolved school district is liable for the schoolhouse tax levied in the school district to which the dissolved district was attached at the time of the levy. (Barnett to Stromer, State Representative, 11-10-88) #88-11-1(L)

November 10, 1988

The Honorable Delwyn Stromer
State Representative
Rural Route Number 2, Box 108
Garner, Iowa 50438

Dear Representative Stromer:

You have requested an opinion of the Attorney General concerning the applicability of a schoolhouse tax voted pursuant to Iowa Code § 278.1(7) (1987) to a school district which has been dissolved pursuant to Iowa Code §§ 275.51-.56, as amended by House File 2419, 72nd General Assembly, 2d Sess. §§ 1-3. You have specifically inquired as to whether the schoolhouse tax levy in the school district to which a dissolved district is attached is applicable to the area of the dissolved district if the dissolved district did not levy the tax prior to dissolution.

As you pointed out in your request, Iowa Code § 275.12(5) (1987) allows a reorganization petition to include a provision for voting the schoolhouse tax, and Iowa Code § 275.20 (1987) provides a method of voting the schoolhouse tax when a school district is reorganized. The dissolution procedures contained in §§ 275.51-.56 do not address the applicability of the schoolhouse tax levy to a dissolved district.

Section 278.1(7) does provide that the power to levy a schoolhouse tax is not affected by a change in the boundaries of a school district which has voted the tax except in designated circumstances when the boundary change is the result of reorganization under chapter 275. The exception in § 278.1(7) was enacted by the legislature at the same time § 275.12(5) and § 275.20 were amended to provide for voting the schoolhouse tax at the time of reorganization. 1980 Iowa Acts, chapter 1080, sections 1-3. The references to voting the schoolhouse tax in § 275.12(5) and § 275.20 clearly describe the vote discussed in

§ 278.1(7). The exception provided in § 278.1(7) is inapplicable to the situation which you have described as it appears that the reference to a chapter 275 reorganization was not intended to be applicable to a dissolution pursuant to §§ 275.51-.56. In addition, the facts you have presented are not within the terms of the exception.

Section 278.1(7) indicates that boundary changes do not affect the power to levy the schoolhouse tax when the change results from something other than reorganization under chapter 275. Therefore, the boundary change of the district to which the dissolved district was attached does not affect the power to levy the tax in that district. The area of a dissolved school district which is within a school district levying the schoolhouse tax at the time of the levy is liable for the tax. See Grout v. Illingworth, 131 Iowa 281, 283-284, 108 N.W. 528, 529 (1906). The power to levy the tax is not affected by the fact that the voters of the dissolved district did not vote the tax. See id.; Cf. Peterson v. Swan, 231 Iowa 745, 750-754, 2 N.W.2d 70, 73-75 (1942) (a municipal corporation which is annexed to another municipal corporation is liable for the debts of the corporation to which it is annexed in the absence of statutory authority to the contrary). For these reasons we conclude that the area of a school district dissolved pursuant to §§ 275.51-.56 is liable for the schoolhouse tax levied in the school district to which it is attached at the time of the levy.

Sincerely,

SHERIE BARNETT
Assistant Attorney General

SB:mlr

COUNTIES; SHERIFF; DEPUTY SHERIFF; CIVIL SERVICE: Reversion of sheriff to position as deputy sheriff. Iowa Code Ch. 341A (1987); §§ 341A.7; 341A.8; 341A.9; 341A.11. A county sheriff who leaves office cannot automatically revert to the rank of deputy sheriff under civil service. (Weeg to Hart, 12-28-88) #88-12-8(L)

December 28, 1988

Mr. Peter C. Hart
Palo Alto County Attorney
Post Office Box 71
Emmetsburg, Iowa 50536

Dear Mr. Hart:

You have requested an opinion of the Attorney General on several questions regarding whether a civil service deputy sheriff who subsequently becomes sheriff and is defeated for re-election may revert back to the rank of deputy sheriff. In particular, you ask whether such reversion is possible under the language of Iowa Code §§ 341A.7 and 341A.9 (1987). Your questions arise because of Palo Alto Sheriff Neary's situation. Sheriff Neary was inducted into the civil service as a deputy sheriff in 1972, and was elected sheriff in 1980. He was defeated in his re-election bid this past fall. Your specific questions are as follows:

1. Does the permanent rank designation and induction which J. Albert Neary received on August 15, 1973, into the Civil Service survive his tenure and later termination as sheriff? Can the Palo Alto Civil Service Commission permit him to revert to the permanent rank of deputy under Iowa Code Chapter 341A.9?

2. Does the opening in ranks created by a deputy's elevation to the position as newly elected Palo Alto County Sheriff, then permit the vacancy to be filled by the unseated Sheriff J. Albert Neary, given his permanent rank in the Civil Service as of August 15, 1973?

3. If the Civil Service Commission for Palo Alto County were convened for the purposes of filling a "vacancy" created by the election of a sheriff's

deputy to the position of sheriff, would the Civil Service Commission be prohibited from recognizing the permanent rank and prior induction of J. Albert Neary into the Civil Service effective August 15, 1973?

4. Given the legislative use of the words "permanent rank" and "inducted permanently" into Civil Service, does the Civil Service Commission have other choice but to recognize J. Albert Neary as a deputy sheriff covered by the Civil Service provisions of Chapter 341A?

It is our opinion that upon leaving office January 12, 1989, Sheriff Neary cannot automatically revert to his previous rank of deputy sheriff. First, we note that Iowa Code Chapter 341A (1987) establishes civil service protections for deputy sheriffs: certain procedures must be followed in order for a deputy sheriff to be appointed, and once the probationary period for that appointment has expired, that deputy is permanently inducted into the civil service and may be removed or disciplined only if certain statutory provisions are violated. See §§ 341A.8 and 341A.11.

An alternative procedure for induction into civil service is contained in § 341A.9, which provides that persons serving as deputy sheriffs prior to August 15, 1973, "shall be inducted permanently into civil service" in that position if they qualify for appointment under § 341A.8. This section is clearly a grandfather provision granting deputies permanent civil service rank at the time civil service for deputies was enacted, even if those deputies were not selected through the new civil service selection process. This section does not grant deputies so grandfathered into civil service any greater protections than deputy sheriffs inducted according to the civil service process in place after that date.

Thus, the fact a deputy is permanently inducted into civil service does not automatically guarantee that person a permanent, lifetime position as deputy sheriff. In the event a deputy voluntarily or involuntarily leaves employment, that person no longer holds permanent rank as a deputy sheriff, and if that person seeks re-employment as a deputy, that person must begin the appointment process anew. In sum, it is our opinion that "permanent" induction into civil service provides protections only so long as the person holding the rank of deputy sheriff retains that position.

There is only one statutory provision for automatic reversion to the permanent rank of deputy sheriff once a person has left that position. Section 341A.7 provides that the classified civil service does not include a certain number of chief or second deputy sheriffs, depending on the size of a county's population. This section then provides:

> A deputy sheriff serving with permanent rank under this chapter may be designated chief deputy sheriff or second deputy sheriff and retain such rank during the period of service as chief deputy sheriff or second deputy sheriff and shall, upon termination of the duties as chief deputy sheriff or second deputy sheriff, revert to the permanent rank.

This section clearly authorizes a chief deputy or second deputy to revert to the permanent rank upon termination as chief or second deputy, so long as that person previously served with permanent rank under civil service. This statute clearly does not require that a sheriff who previously served as a civil service deputy be allowed to revert to that rank after leaving the sheriff's office.

There is a principle of statutory construction that provides the express mention in a statute of one thing implies the exclusion of others. See, e.g., In re Estate of Wilson, 202 N.W.2d 41, 44 (Iowa 1972). Applying this principle in the present case, we believe that had the legislature intended to allow sheriffs to revert to the rank of civil service deputy upon leaving office, it would have expressly so provided, as it did for chief and second deputies. Absent express language authorizing an outgoing sheriff to revert to the rank of deputy, we must conclude that the legislature implicitly intended to exclude sheriffs from the reversion provisions for chief and second deputies contained in § 341A.7.

This conclusion is not only appropriate under existing law, but is also a sensible one given policy considerations. As the county's chief law enforcement officer, the sheriff is the primary policy maker with regard to law enforcement issues in the county. The sheriff's ability to execute his or her statutory obligations would easily be impaired were a new sheriff required by law to appoint the outgoing sheriff as a deputy. If such difficulties arose, they would be particularly severe in Iowa's many rural counties in which the staff of the sheriff's department is quite small and the working environment quite intimate.

Accordingly, the answers to your specific questions are:

1. The civil service commission may not allow Sheriff Neary to automatically revert to his former position as deputy sheriff.

2. The vacancy which exists cannot automatically be filled by Sheriff Neary. However, Sheriff Neary could be appointed to that position in the event he qualified for and was appointed to that position under the provisions of Ch. 341A.

3. See Number 1, supra.

4. See Number 1, supra.

In conclusion, it is our opinion that an outgoing sheriff does not automatically revert to the rank of civil service deputy upon leaving office. However, there is nothing that would prohibit such a sheriff from being re-hired as a deputy if he qualified for and was appointed to that position by the incumbent sheriff pursuant to the procedures contained in Chapter 341A.

Sincerely,

THERESA O'CONNELL WEEG
Assistant Attorney General

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COUNTIES AND COUNTY OFFICERS; NOTICE: Computation of Time; Notice for Public Hearing. Iowa Code §§ 4.1(22), 331.305 (1987). County board of supervisors may hold a public hearing for disposition of county property on the Monday following publication of notice the previous Wednesday under Code § 331.305, which requires that notice be published not less than four days before hearing. (Osenbaugh to Folkers, Mitchell County Attorney, 12-23-88) #88-12-6(L)

December 23, 1988

Mr. Jerry Folkers
Mitchell County Attorney
515 State Street
Osage, Iowa 50461

Dear Mr. Folkers:

You have asked whether the county board of supervisors may properly hold a public hearing for the disposition of county property on Monday after the hearing notice is published the previous Wednesday. You state that the board of supervisors usually meets on Mondays and the newspaper most often used by the board for notices comes out weekly on Wednesdays. In this situation the fourth day after the Wednesday publication falls on Sunday.

We conclude that the board may hold the public hearing on the Monday following the publication on Wednesday.

Notice of a public hearing for disposition of county property must be published not less than four days nor more than twenty days before the hearing. Iowa Code § 331.305 (1987) (emphasis added).

When time is computed for statutory purposes, "the first day shall be excluded and the last included . . . ." Iowa Code § 4.1(22) (1987). Applying this method to the notice provision, the day of publication is not counted. The day after publication is day number one and the election may be held on day number four.[1] McLeland v. Marshall County, 199 Iowa 1232, 1252, 203

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[1]This rule for computation of time has been applied in Iowa even where the statute requires "not less than" so many day's notice. Phelps v. Thornburg, 206 Iowa 1150, 1152, 221 N.W. 835, 836 (1928). Courts are split in other jurisdictions. See Anno., Time Computations -- First and Last Days, 98 A.L.R.2d 1331, § 8.

N.W. 1, 2 (1925) (holding valid special county election occurring on fifth day after notice where statute required publication for at least five days before election); Bonney v. Cocke, 61 Iowa 303, 304, 16 N.W. 139 (1883) (finding deposition proper which occurred fifth day after notice where statute required five days notice). Thus, a limitation statute does not require the days to be "clear" days before the action; rather, the act may take place on the last day of the counting period. McLeland, 203 N.W. at 2; Bonny, 16 N.W. at 139.

When the last day of the counting period falls on Sunday "the time prescribed shall be extended so as to include the whole of the following Monday . . . ." Iowa Code § 4.1(22) (1987). As in the situation posed by you, Sunday is not counted in the counting period. The hearing then, can occur on Monday because Sunday is excluded making Monday the last day of the counting period.

Minnesota has similar statutes for computation of time. Minnesota, like Iowa, computes time by excluding the first day and including the last day. Minn. Stat. § 645.15. "When the last day of such period falls on Sunday . . . such day shall be omitted from the computation." Minn. Stat. § 645.15. To establish a town road, those requesting the road must serve notice on the affected landowners "at least ten days before" the town board acts on the petition. Minn. Stat. section 164.07(2). The Minnesota Supreme Court found that where the tenth day of the notice period for establishing a road fell on Sunday and the board hearing occurred on Monday, the statutory notice requirements were satisfied. Township Board of Lake Valley Township, Traverse County v. Lewis, 305 Minn. 488, 492, 234 N.W.2d 815, 818 (1975). This holding supports allowing the hearing for disposition of county property on Monday when the fourth day falls on Sunday.

In conclusion, the county board of supervisors may hold a public hearing for disposition of county property on the Monday following publication of notice the previous Wednesday. Of course, the county can entirely avoid this issue by simply providing longer notice.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Deputy Attorney General

EMO:mlr

LABOR; TRANSPORTATION; Railroads. Iowa Code § 88A.1(4), 88A.1(5), 327C.4. Scenic railroads do not fall under either the jurisdiction of the Division of Labor, as an amusement ride, or the Department of Transportation as a railroad. (McGrane to Royce, Rules Review Committee, 12-21-88) #88-12-5(L)

December 21, 1988

Mr. Joseph Royce
Iowa General Assembly
Administrative Rules Review Committee
Statehouse, Room 116
Des Moines, Iowa 50319

Dear Mr. Royce:

You have requested an opinion of this office concerning the responsibility for inspecting certain reconditioned antique railroad cars that provide scenic excursions into the countryside or travel around a large oval track for the amusement and pleasure of the riders. Specifically, you ask:

1. Can a railroad operated solely for entertainment purposes be properly defined as an "amusement ride" as that term is defined in Iowa Code section 88A.1?

2. Does the Iowa Department of Transportation have an affirmative duty to inspect and regulate railroad operations, pursuant to Iowa Code section 327C.4, even if the railroad is not a common carrier?

Your letter indicates that these questions arise from some concern as to what state agency has the responsibility for regulating and inspecting such "scenic railroads," of which there are two in this state. Characterizing such "railroads" as "amusement rides" would take them out of the purview of the Iowa Department of Transportation and make their regulation and inspection the responsibility of the Division of Labor. The Division of Labor has proposed an administrative rule to this effect. The Department of Transportation has asserted they do not have jurisdiction of these railroads, and has indicated a belief regulation is appropriate under the Division of Labor.

Communication with the Division of Labor indicates they do not believe they have jurisdiction, nor do they believe they are properly equipped to regulate such a railroad, but filed the rules exercising an abundance of caution.

Our review of the pertinent statutes convinces us that the legislature did not intend the scenic railroads to be under the jurisdiction of either agency.

In the Division of Labor's enabling act, the amusement ride definition, Iowa Code section 88A.1(4) (1987), provides:

> "Amusement ride" means any mechanized device or combination of devices which carries along, around, or over a fixed or restricted course for the purpose of giving its passengers amusement, pleasure, thrills, or excitement.

The carnival definition in section 88A.1.(5) (1987) provides:

> "Carnival" means an enterprise offering amusement or entertainment to the public in, upon, or by means of amusement devices or rides or concession booths.

Either of these definitions conceivably could be stretched to cover a scenic railroad.

Also a scenic railroad has terminal facilities, trackage, bridges and rolling stock characteristic of a railroad. Iowa Code § 327D.2(1), provides a definition of a railroad:

> Railroad means the terminal facilities necessary in the transportation of persons and property and includes bridges railroad right of way, trackage, switches and other appurtenances necessary for the operation of a railroad; whether owned, leased or operated under some other contractual agreement.

The Department of Transportation is obliged to inspect regulated railroads. See § 327C.2,.1. Thus a bare reading of this statute could bring the scenic railroad under the jurisdiction of the Department of Transportation.

All parts of a law relating to one topic must be read together. Rush v. Sioux City, 240 N.W.2d 431 (Iowa 1976). When all sections of Chapter 88A are read together, it is clear the legislature did not intend that a scenic railroad would be an

amusement ride or a carnival. The terms amusement device or ride are used in the statute with terms like "concession booth" § 88A.1(7) and with provisions which exempt seesaws, swings, etc., § 88A.11(1). The statute also talks about assembly time for rides in terms of hours, Iowa Code § 88A.4(2)(b), (c), and in terms of weight of riders of more and less than seventy-five pounds. Iowa Code § 88A.4(2)(a), (b). The insurance required of $100,000/$300,000 for bodily injury and $5000 for property damage, § 88A.9, must also be looked at when determining what the legislature intended. These amounts would be too low, especially the property damage amount, to realistically apply to a railroad.

While the general language defining amusement ride and device is broad enough to encompass a scenic railroad, it is clear that a railroad is sui generis as an "amusement" device.[1] When the legislature passed the statute at issue, it was attempting to ensure the safety of the many people who attend fairs, carnivals and amusement parks. The worry was the safe operation of ferris wheels, merry-go-rounds, roller coasters, etc. We glean this from reading the statute as a whole and believe the statute must be construed with this in mind.

We believe a general application of the rules of statutory construction indicate scenic railroads were not intended to be covered by Chapter 88A. "Under . . . [these] guide[s] to interpretation the meaning of a word is ascertained in the light of the meaning of words with which it is associated." Wright v. State Board of Engineering Examiners, 250 N.W.2d 412, 413 (Iowa 1977). On the question here we look to the words in the statute to determine if we can fit in the term scenic railroad without causing gross incongruity. We believe we cannot. A railroad and a merry-go-round are simply insufficiently related in this context. In Hewitt v. Whatoff, 251 Iowa 171, 100 N.W.2d 24, 26 (1959), the Iowa court applied the rule of ejusdem generis to determine whether the ability to enter and exit over a parking lot was a means of ingress and egress similar to a "street or streets or otherwise . . . ." The court held it was not, that a parking lot was not "of the same genus, of the same kind" as a "street or streets or otherwise." We cannot directly apply the rule here since we have no "enumeration of specific things . . . followed by some . . . general word or phrase . . . ." Id. However, we do have sufficient references to a number of things of a similar nature, notably definitions of a carnival, a fair, an amusement device and an amusement ride, Iowa Code § 88A.1, to analogize to that rule. Clearly the same reasoning the court

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[1] It must be made clear that we are not here talking about the miniature railroads which provide rides on park grounds, but refer to full scale locomotives and cars on full tracks.

used requires the exclusion of railroads from the "amusement rides" chapter.

Notably the amusement ride statute does address the question of boats and passes the inspection of these to the Department of Natural Resources which licenses boats and provides for inspection of boats for hire. See Iowa Code § 88A.11(5). Boat rentals on lakes might otherwise be regulated as amusement rides. Even if boats were included in the statute but for the exemption, the lack of an exemption for scenic railroads does not bring them within the statute; a canoe cannot be equated with a locomotive to make the analogy work. We take the boat exemption as an indication that the legislature not only did not intend to duplicate efforts but intended to acknowledge expertise in areas other than "amusement" rides and leave safety guarantees with experts in those areas.

This reasoning excluding scenic railroads from the amusement rides statute should lead to the conclusion that the scenic railroads are under the jurisdiction of the Department of Transportation. We, however, do not believe it does. The Iowa statutes dealing with railroads make it clear they are for the governance of common carriers. Iowa Code § 327D.2(1) (1987) states:

> Railroad means the terminal facilities necessary in the transportation of persons and property and includes bridges, railroad right-of-way, trackage, switches and other appurtenances necessary for the operation of a railroad, whether owned, leased, or operated under some other contractual agreement.

As with the amusement ride section, this definition is clearly broad enough to cover the scenic railroad. But this definition is in the chapter on "Regulation of Carriers" and the definition must be read in that context. Girdler, 357 N.W.2d at 597. And in that context "carrier" does not include a scenic railroad carrying only sightseers. See Iowa Code § 327C.7 (notice for withdrawing rail service); Iowa Code § 327C.22 (interstate freight rates). Iowa Code Chapter 327F, "Construction and Operation of Railways," directly governs operating a railroad, but again is intended to cover "common carrier" railroads. See e.g., Iowa Code § 327F.19 (refers to common carrier); § 327F.20 (refers to common carrier); § 327F.26 (requires freight offices). Notably, enforcement of Chapter 327F is related to Chapter 327C, Supervision of Carriers, by the scheduling of violations in accord with section 327C.5. See §§ 327F.14., .20, .28.

Thus the legislative intent on the regulation of railroads by the Department of Transportation must be seen as limited to railroad transportation companies, not railroad entertainment or sightseeing companies. See generally, Hewitt v. Whatoff, 251 Iowa at 175, 100 N.W.2d at 26 (rule of ejusdem generis); Wright v. State Board of Engineering Examiners, 250 N.W.2d at 413 (rule of noscitur a sociis).

Statutes designed to protect the public safety should be read broadly to accomplish that purpose. State ex rel. Turner v. Koscot Interplanetary, Inc., 191 N.W.2d 624, 629 (Iowa 1971). But that does not free an agency to regulate an industry or business which the legislature has given no indication comes within that agency's jurisdiction. See Jansen v. Harmon, 164 N.W.2d 323, 328 (Iowa 1969); Howell School Board v. Hubbartt, 246 Iowa 1265, 1273-74, 70 N.W.2d 531, 535 (1955). Legislative enactments must be harmonized, and harmonizing all parts of the chapter on safety inspection of amusement rides or of the various chapters regulating railroads, forces the conclusion that a discordant note would be raised in either legislative scheme by inclusion of the scenic railroads. Statutes must be reasonably read to accomplish the goal of the legislature. Clearly the goal of the legislature in enacting Chapter 88A was to help ensure the safety of persons in their pursuits at leisure for entertainment; the goal in the railroad statutes was to ensure not only safety for the public in regard to railroads, but also a reasonably operated system of railroad services. Although it is not unlikely that the exercise of jurisdiction by either agency would be upheld by the courts, the scenic railroads cannot be read reasonably into either scheme of regulation.

To adopt the position that either the Division of Labor, enforcing Chapter 88A, or the Department of Transportation enforcing the railroad chapters had regulatory authority over the scenic railroads would be "unduly extending the meaning and intent of . . ." those chapters. See Mississippi Valley Savings & Loan Assoc. v. L.A.D., Inc., 316 N.W.2d 673, 675 (Iowa 1985); see also Iowa Dept. of Social Services v. Blair, 294 N.W.2d 567, 570 (Iowa 1980).

It is our opinion the scenic railroads at this stage do not come within the jurisdiction of the Division of Labor or the Department of Transportation. We believe the legislature needs to address the regulation of scenic railroads specifically. To attempt to fit the regulation into existing regulatory schemes,

distorts those schemes and usurps legislative authority. See Iowa Dept. of Social Services v. Blair, 294 N.W.2d 567, 570 (Iowa 1980).

Sincerely,

THOMAS D. McGRANE
Assistant Attorney General

TDM:sz

CITIES: COUNTIES: 28E Agreement; Open Meeting; Competitive Bidding; Public Improvement; Sanitary Landfill. Iowa Code §§ 21.2, 28E.7, 384.53, 384.76, 384.95, and 384.96 (1987). The governing body of an entity created by a 28E agreement must comply with the open meeting requirements contained in Iowa Code ch. 21 (1987). The governing body of an entity created in part by a city pursuant to a 28E agreement must comply with the competitive bidding requirements of Iowa Code § 384.96 (1987). Operation of a sanitary landfill does not constitute a public improvement as defined in Iowa Code § 384.95(1) (1987) unless the operation includes construction work to be paid for in whole or in part by city or county funds. (Sheridan to Ollie, State Representative, 12-14-88) #88-12-4(L)

December 14, 1988

The Honorable C. Arthur Ollie
State Representative
413 Ruth Place
Clinton, IA 52732

Dear Representative Ollie:

You have requested an opinion of the Attorney General concerning the following questions:

1. Is an agency created by a 28E agreement considered a public body that must comply with the statutes affecting cities and counties such as open meeting laws, bidding requirements, etc.?

2. Is an agency created by a 28E agreement required to comply with Iowa Code § 384.96 (1987) requiring the advertisement for sealed bids?

3. Is the operation of a sanitary landfill requiring the excavation of dirt and the covering of solid waste, including the construction of dikes and ditches, a public improvement as defined in Iowa Code § 384.95 (1987)?

You have provided us with a copy of a letter addressed to you from Clinton City Attorney Bruce D. Johansen, dated July 20, 1988, which outlines the facts giving rise to this request. In addition, we have obtained a copy of the referred to 28E agreement filed with the Secretary of State. See Iowa Code § 28E.8 (1987).

According to this information, the Clinton County Area Solid Waste Agency was created as a separate entity in 1972 by Clinton County, the City of Clinton, and thirteen other cities in Clinton County pursuant to Iowa Code ch. 28E (1971). In 1984, the agency advertised for bids for the operation of sanitary landfills at two sites in Clinton County. The contract required the operator to provide labor and equipment and operate the landfills pursuant to operational plans and existing state laws. A three year contract was awarded at a base annual sum of $450,000.00 and then extended for one year periods in 1987 and 1988. In 1988, the City of Clinton objected to extending the operation contract without advertising for bids.

Your first question concerns whether an entity created by a 28E agreement must comply with other statutes affecting cities and counties. The purpose of Iowa Code ch. 28E (1987) is to permit state and local governments to make efficient use of their powers by enabling them to cooperate and provide joint services and facilities with other agencies. Iowa Code § 28E.1 (1987). To achieve this purpose, the statute provides that any power, privilege or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed jointly with any other public agency having such power, privilege or authority. Iowa Code § 28E.3 (1987). "Public agency" is defined to include any political subdivision of this state, any agency of the State of Iowa or of the United States, and any political subdivision of another state. Iowa Code § 28E.2 (1987).

We have previously stated our opinion that public agencies may not use a 28E agreement to circumvent their legal obligations and responsibilities. 1981 Op.Att'yGen. 190, 194; Op.Att'yGen. #79-4-2(L); 1974 Op.Att'yGen. 743, 744. Each opinion cited Iowa Code § 28E.7 which provides:

> No agreement made pursuant to this chapter shall relieve any public agency of any obligation or responsibility imposed upon it by law except that to the extent of actual and timely performance thereof by a joint board or other legal or administrative entity created by an agreement made hereunder, said performance may be offered in satisfaction of the obligation or responsibility.

Iowa Code § 28E.7 (1987). Applied here, this provision would, for example, prevent Clinton County or one of the participating cities from failing to fulfill their responsibility to establish and operate a sanitary disposal project either directly or through the 28E entity. See Iowa Code §§ 331.381(16) and 455B.302 (1987).

Nevertheless, we have also observed that Iowa Code § 28E.7 relates only to a public agency as defined in Iowa Code § 28E.2 and, therefore, has no application to a separate 28E entity. Op.Att'yGen. #79-4-2(L). In our view, the establishment of a 28E entity does not necessarily mean that this newly created entity must comply with every statutory requirement that would have been applicable to each participating public agency if acting alone. Iowa Code ch. 28E (1987) does not specify what statutes are applicable to a 28E entity. Accordingly, whether a separate 28E entity has the same responsibilities as a city or county will depend on the particular public agencies involved and the statute sought to be applied.

You are concerned specifically with whether a 28E entity must comply with open meeting and competitive bidding requirements. We have previously expressed our opinion that 28E entities must comply with the open meetings law. 1978 Op.Att'yGen. 807. The definition of a "governmental body," subject to open meeting requirements, includes inter alia "a board, council, commission, or other governing body of a political subdivision" or "a multimembered body formally and directly created" by one or more governing bodies who are subject to chapter 21. Iowa Code § 21.2(1)(b) and (c) (1987). We believe that execution of a 28E agreement by one or more cities or counties constitutes "formal and direct" creation of a "multimembered body" subject to open meeting requirements. To the extent there is any ambiguity on this point, Iowa Code § 21.1 (1987) expressly requires that any ambiguities be resolved in favor of openness.

The legislature has subsequently amended Iowa Code ch. 28F, which authorizes joint financing for certain public works and facilities, by expressly making an electric power entity, created to carry out an agreement authorizing the joint exercise of such financing powers, subject to several statutes including the open meeting statute, Iowa Code ch. 21. Iowa Code § 28F.13 (1987). No mention is made in this provision as to whether open meeting requirements are also applicable to other entities covered by Iowa Code ch. 28F, most notably a 28E solid waste disposal entity.

Although the argument can be made that this express application of open meeting requirements to a 28E electric power entity implies a legislative decision that these requirements do not apply to other 28E entities, c.f., e.g., Barnes v. Iowa Dep't of Transp., Motor Vehicle Div., 385 N.W.2d 260, 263 (Iowa 1986), we are not convinced. Iowa Code § 28F.13 was adopted along with numerous other provisions primarily relating to 28E

electric power entities. 1981 Iowa Acts, ch. 31. The legislature may not have considered the implications of Iowa Code § 28F.13 on other 28E entities covered by Iowa Code ch. 28F.

Moreover, the open meeting statute should control on this question. No change has been made in the provisions of Iowa Code ch. 21 relied upon in our prior opinion. Accordingly, we do not believe that the adoption of Iowa Code § 28F.13 should alter our prior opinion that 28E entities must comply with the open meeting requirements contained in Iowa Code ch. 21 (1987).

Your second question concerns whether a 28E entity must comply with the competitive bidding requirements contained in Iowa Code § 384.96 (1987). Iowa Code § 384.96 (1987) requires a city governing body to advertise for sealed bids when the estimated total cost of a proposed public improvement exceeds twenty-five thousand dollars. County boards of supervisors must also comply with the contract letting requirements contained in Iowa Code §§ 384.95-103 (1987) when the estimated cost of a public improvement, other than those paid for from the secondary road fund, exceeds twenty-five thousand dollars. Iowa Code § 331.341(1) (1987).

The definition of a "governing body," subject to competitive bidding requirements, does not include the governing body of a 28E entity. Iowa Code § 384.95(2) (1987). However, the definition of a "public improvement," for which competitive bidding is required, expressly includes "a building or improvement constructed or operated jointly with any other public or private agency." Iowa Code § 384.95(1) (1987). Moreover, in division IV of Iowa Code ch. 384, there is the following provision:

> The provisions of this division apply to any public improvement undertaken jointly by the city and another city or by the city and the state or any other political subdivision of the state, and a city may enter into an agreement for such purpose under the provisions of chapter 28E . . . but any requirement of this part in respect to approval of detailed plans and specifications, calling for construction bids, awarding construction contracts and acceptance of the completed improvement may be carried out by each city with other cities, the state or any other political subdivision of this state, as provided in an agreement entered into as permitted by chapter 28E.

Iowa Code § 384.76 (1987). One of the provisions in division IV, made applicable to 28E public improvements, expressly provides that contract letting be conducted pursuant to Iowa Code §§ 384.95-103. Iowa Code § 384.53 (1987).

For purposes of division IV, a "public improvement" is defined, "unless the context otherwise requires," as "the principal structures, works, component parts and accessories" of twelve enumerated categories of projects. Iowa Code § 384.37(1) (1987). In contrast, Iowa Code § 384.95(1) (1987) defines a "public improvement" as "building or construction work" paid for by public funds. We believe that the context here requires that the reference to "public improvement" in Iowa Code § 384.76 (1987) be construed so as to also include any project that would constitute a "public improvement" under Iowa Code § 384.95(1) (1987). In our view this construction is appropriate since Iowa Code § 384.76 applies to "any public improvement undertaken jointly" and because such joint undertakings are not limited to the projects enumerated in Iowa Code § 384.37(1) (1987). See Iowa Code § 28E.3 (1987).

We must also consider the purposes behind the competitive bidding requirements and the evils sought to be remedied. E.g., Iowa State Bd. of Engineering Examiners v. Olson, 421 N.W.2d 523, 524 (Iowa 1988). Competitive bidding requirements are employed for the protection of the public by securing through competition the "best results at the lowest price, and to forestall fraud, favoritism, and corruption in the making of contracts." Istari Constr., Inc. v. City of Muscatine, 330 N.W.2d 798, 800 (Iowa 1983) (quoting C. Rhyne, The Law of Government Operations § 27.6, at 942 (1980). In our opinion, this purpose is served as much, if not more, by applying competitive bidding requirements to a 28E governing body. Moreover, since these requirements are designed to protect the public from fraud, they should be liberally construed to achieve that purpose. See, e.g., State ex rel. Turner v. Koscot Interplanetary, Inc., 191 N.W.2d 624, 629 (Iowa 1971). See also Iowa Code § 362.8 (1987) ("The city code, being necessary for the public safety and welfare, shall be liberally construed to effectuate its purposes.")

We conclude that the competitive bidding requirements of Iowa Code § 384.96 (1986) are applicable to the governing body of a 28E entity, created in part by a city, pursuant to Iowa Code §§ 384.53, 384.76, and 384.95(1) (1987).

Your final question concerns whether a contract to operate a sanitary landfill requiring the excavation of earth, covering of solid waste, and construction of dikes and ditches, constitutes a "public improvement" within the meaning of Iowa Code § 384.95(1) (1987) which provides:

> "Public improvement" means any building or construction work, either within or outside the corporate limits of a city, to be paid for in whole or in part by the use of funds of the city, regardless of sources, including a building or improvement constructed or operated jointly with any other public or private agency, but excluding urban renewal and low-rent housing projects, industrial aid projects authorized under Chapter 419, emergency work or work performed by employees of a city or city utility.

Thus, the two prerequisites for a project to constitute a "public improvement" under Iowa Code § 384.95(1) (1987) are, first, that the project involve "building or construction work" and, second, that the building or construction work be paid for in whole or in part by public funds.

We must first consider whether the activities you describe as being covered by the contract, although not involving erection of a building, would constitute "construction work" within the meaning of Iowa Code § 384.95(1) (1987). The phrase "construction work" is not defined by the contract letting provisions contained in Iowa Code §§ 384.95-103 (1987). Nor has the Iowa Supreme Court had occasion to construe this phrase.[1]

Statutes relating to the same subject matter, or to closely allied subjects, may properly be construed, considered and examined in light of their common purpose and intent. E.g., State v. Le Master, 391 N.W.2d 705, 706 (Iowa 1986). The competitive bidding statute applicable to townships, school corporations, the state fair board, and the state board of regents similarly defines a "public improvement," subject to competitive bidding requirements, as "a building or other construction work" paid for by municipal funds. Iowa Code

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[1]Decisions applying the contract letting requirements contained in Iowa Code §§ 384.95-103 (1987) have involved, for example, repair of a city water system, Kunkle Water & Elec., Inc. v. City of Prescott, 347 N.W.2d 648 (Iowa 1984); installation of a traffic signal system, Dickinson Co., Inc. v. City of Des Moines, Iowa, 347 N.W.2d 436 (Iowa App. 1984); construction of a public housing project, Istari Constr., Inc. v. City of Muscatine, 330 N.W.2d 798 (Iowa 1983); and remodeling and restoration of a railroad depot for use as a city hall, Dunphy v. City Council of City of Creston, 256 N.W.2d 913 (Iowa 1977).

§ 23.1(1) (1987). Nevertheless, the phrase "construction work" is, once again, not defined by the statute. Nor has the phrase been construed by the Iowa Supreme Court except to state in dicta that there is a distinction between "construction work" and "repairs." Johnson County Sav. Bank v. City of Creston, 212 Iowa 929, 931, 231 N.W. 705, 706 (1930); cf. Iowa Code § 573.1(3) (1987) ("construction," "in addition to its ordinary meaning, includes repair, alteration, and demolition"); Iowa Code §§ 384.37(2) and (3) (separate definitions for "construction" and "repair").

For purposes of division IV of Iowa Code ch. 384 (1987) relating to special assessments, "construction" is defined as "materials, labor, acts, operations and services necessary to complete a public improvement." Iowa Code § 384.37(2) (1987). Although this definition refers to "operations and services", in our view this does not mean that an operation contract, standing alone, constitutes "construction" since the statute limits the phrase to those operations and services "necessary to complete an improvement." Id. In any event, we do not consider this definition controlling since it relates to public improvements enumerated in Iowa Code § 384.37(1) (1987) which, in our view, do not include a sanitary landfill.

In the absence of a legislative definition or a particular and appropriate meaning in law, the words used in a statute are given their ordinary meaning. E.g., State v. Bessenecker, 404 N.W.2d 134, 136 (Iowa 1987). The Iowa Supreme Court has previously defined the word "construct" using the ordinary dictionary definition: "to put together the constituent parts in their proper place and order; to build; form; make." Olney v. Hutt, 251 Iowa 1379, 1386-1387, 105 N.W.2d 515, 520 (1960) (quoting Webster's New International Dictionary (page and year omitted)). For our purposes here, we see no difference between the meaning of the word "construct" and the phrase "construction work." Cf. Ogilvie v. Steele by Steele, 452 N.E.2d 167, 170 (Ind. App. 3 Dist. 1983) ("Construction work means to build, erect, or create.").

Since the definition of a public improvement in Iowa Code § 384.95(1) (1987) refers to both "building" and "construction work," we believe the latter phrase does not require work on a building in order for the project to constitute a public improvement. To hold otherwise would render the phrase "construction work" superfluous. E.g., Casteel v. Iowa Dep't of Transp., Motor Vehicle Div., 395 N.W.2d 896, 898-899 (Iowa 1986). Nevertheless, we conclude that "construction work" does contemplate work involving, if not a building, some other fixed structure.

In our opinion the operation of a sanitary landfill, in and of itself, does not constitute "construction work" within the meaning of Iowa Code § 384.95(1) (1987). Sanitary landfills must comply with applicable requirements contained in Iowa Code Chapter 455B (1987) and 567 Iowa Admin. Code Chapters 100-109. The rules adopted expressly recognize the distinction between construction of a sanitary disposal project, such as a sanitary landfill, and operation of the facility. See, e.g., 567 Iowa Admin. Code §§ 102.1, 102.5, 102.6(1) and (2), and 102.9. The operator of a sanitary landfill must perform numerous tasks which, in our view, do not constitute "construction work" since they do not involve either the creation, installation, alteration or repair of some fixed structure. See generally 567 Iowa Admin. Code §§ 102.13, 103.2(2), and 103.3(2).

The primary operating requirement of a sanitary landfill is, of course, that solid waste be covered with earth. A "sanitary landfill" is defined as a sanitary disposal project where "solid waste is buried between layers of earth." Iowa Code Supp. § 455B.301(14) (1987). Solid waste must be uniformly spread and compacted as densely as practicable. 567 Iowa Admin. Code § 103.3(2)a. An operator must then cover the solid waste with designated depths of earth, depending on the length of time the waste will be exposed. 567 Iowa Admin. Code § 103.3(2)b-d.

We do not believe that covering solid waste with earth constitutes "construction work" within the meaning of Iowa Code § 384.95(1) (1987). No fixed structure is created, installed, altered, or repaired by periodically burying solid waste between varying layers of earth. The final result contemplated by such activity is, in fact, a field seeded with native grasses or other suitable vegetation. See 567 Iowa Admin. Code § 103.2(2)i. Contra McKay Constr. Co. v. ADA County Bd. of Comm'rs, 99 Idaho 235, 240, 580 P.2d 412, 417 (1978) ("permanent internment of refuse beneath earth and rocks amounts to the creation of a fixed structure" where applicable statute defined "fixed works or structures" as projects for inter alia sanitation, reclamation, and excavation and disposal of earth and rocks).

In addition to requiring operation of the landfill and the covering of solid waste, your request concerns a contract that would require excavation and the construction of dikes and ditches. Even in the absence of contract specifications for the construction of a dike or ditch, an operator may be required to construct them in order to provide adequate drainage, 567 Iowa Admin. Code § 103.2(2)h, or to prevent leaching or water pollution, 567 Iowa Admin. Code § 103.2(2)e.

We believe that efforts to erect dikes or ditches at a sanitary landfill, and associated excavation, would constitute

"construction work" within the meaning of Iowa Code § 384.95(1) (1987). Dikes and ditches are fixed structures that can be erected according to precise specifications. The legislature has expressly recognized in other contexts that such structures are "constructed" and that their construction is susceptible to competitive bidding. See, e.g., Iowa Code §§ 384.37(1)(b) and (2) (1987) ("drainage conduits, channels, and levees"); Iowa Code § 455.1 (1987) ("levee, ditch, drain, or watercourse or settling basins"). In our view, the erection of a dike or ditch for a sanitary landfill per specifications is no less "construction work" susceptible to competitive bidding.

The remaining question is whether the contract you describe requires the use of public funds to pay for the construction of these dikes and ditches. We have previously issued an opinion that competitive bidding is not required for a contract between an area solid waste disposal unit organized pursuant to Iowa Code § 455B.76 (1977) (current version at Iowa Code § 455B.302 (1987)) and a private contractor to operate a sanitary landfill where the contract does not require the expenditure of public funds. 1978 Op.Att'yGen. 719. More recently, the Iowa Supreme Court has held that even indirect recoupment through county rental payments of costs for pre-lease office remodeling, conducted per county specifications, did not constitute public payment for construction work within the meaning of "public improvement" as defined in Iowa Code § 384.95(1) since the landlord had no enforceable right to recover these costs. Fischer and Co., Inc. v. Hayes, 364 N.W.2d 237, 238-239 (Iowa 1985).[2]

Although we do not believe that a sanitary landfill operation contract is, in and of itself, a contract for a public improvement, a public agency should not be allowed to circumvent competitive bidding requirements by including within an "operation" contract specifications for construction work at public

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[2]The Court also noted that leases are not normally subject to competitive bidding requirements due to a variety of factors not present in a construction contract citing Wright v. Wagner, 405 Pa. 546, 550, 175 A.2d 875, 877 (1961), cert. denied 369 U.S. 849, 82 S.Ct. 933, 8 L.Ed.2d 9 (1962), which held that a landfill operation contract was not subject to competitive bidding. Fischer, 364 N.W.2d at 239. The Wright decision is distinguishable from the present matter since it involved the selection of the landfill site as well as the operator. Wright, 405 Pa. at 550, 175 A.2d at 877. Moreover, the decision turned on whether the contract constituted "rendering a service" rather than "construction," under the applicable competitive bidding provision. Wright, 405 Pa. at 548-549, 175 A.2d at 876-877.

expense. Cf. Kunkle Water & Elec. v. City of Prescott, 347 N.W.2d 648, 655-656 (Iowa 1984) (unlawful to evade competitive bidding by dividing contract into several contracts below the threshold amount for competitive bidding); Horrabin Paving Co. v. City of Creston, 221 Iowa 1237, 1246-1249, 262 N.W. 480, 486-487 (1935) (unlawful to evade competitive bidding by characterizing work as oiling rather than road repairs or by dividing the contract into several contracts below the threshold amount for competitive bidding).

We conclude that if the contract you describe includes specifications for the construction of particular dikes or ditches to be paid for by the 28E entity, then the contract is, to that extent, a contract for a public improvement within the meaning of Iowa Code § 384.95(1) (1987). If, on the other hand, the contract does not include specifications for construction of a particular dike or ditch but leaves these projects to the discretion of the private operator to be completed at the operator's expense, then in our view any resulting construction would not be paid for by public funds. In the latter case, the operator would have no enforceable right to recover the costs of this construction and, therefore, the contract would not involve a "public improvement" as defined in Iowa Code § 384.95(1) (1987).

Finally, we again recommend that, even in the absence of a statutory mandate, governing bodies should obtain bids as a matter of public policy to avoid situations which might be questionable, tainted or fraudulent. See 1978 Op.Att'yGen. 719, 721, 1973 Op.Att'yGen. 171.

Sincerely,

David R. Sheridan

DAVID R. SHERIDAN
Assistant Attorney General

DRS:rcp

NEWSPAPERS; SCHOOLS: Official Newspapers. Iowa Code sections 279.36; 618.3(1); 618.8; 618.11 (1985). A newspaper is published at the post office of entry, and not where the newspaper is printed. A "newspaper of general circulation" is determined by the diversity of its subscribers within the political subdivision and is one that contains news of a general character and interest to the community. If every newspaper of general circulation published within the political subdivision refuses to publish a notice at the rate set by statute, the district can publish notices in a newspaper published outside the district but which has general circulation within the district. (Osenbaugh to Holveck, State Representative, 12-9-88) #88-12-3(L)

December 9, 1989

The Honorable Jack Holveck
State Representative
2203 - 34th Street
Des Moines, Iowa 50310

Dear Representative Holveck:

We have received your request for an opinion concerning the selection of an official newspaper by the Des Moines Independent Community School District.

We note at the outset that this Office does not determine whether a particular newspaper meets statutory requirements for designation as an official newspaper. Op.Att'yGen. #84-4-5(L). That issue is ultimately a question of fact which cannot be resolved by this Office in an opinion. 1982 Op.Att'yGen. 353. The factual determination is to be made by the governing body in question, subject to review by a court. Our response to your letter is therefore limited to questions of law. As we have previously advised the district, the district's attorney should provide necessary advice to the board as that attorney would advise the board concerning any legal consequences which might result from the advice.

You first ask for the meaning of the phrase "newspaper published in the district" as used in Iowa Code § 279.36. This Office held in 1974 Op.Att'yGen. 102, that a newspaper is published where it is mailed, not where it is printed. The post office of entry should be ascertainable. See Iowa Code § 618.3(1).

You also ask what is a "newspaper of general circulation"? This is an open-ended question, and we would decline to attempt to establish its contours in the abstract. The Iowa Supreme Court set forth the basic criteria to define this phrase in Burak

v. Ditson, 209 Iowa 926, 930, 229 N.W. 227, 228 (1930), as follows:

> First, that a newspaper of general circulation is not determined by the number of its subscribers, but by the diversity of its subscribers. Second, that, even though a newspaper is of particular interest to a particular class of persons, yet, if it contains news of a general character and interest to the community, although the news may be limited in amount, it qualifies as a newspaper of "general circulation."

In determining whether a newspaper has sufficiently broad circulation within the district to constitute a "newspaper of general circulation," the board should consider that the purpose of these provisions is to give notice to the general public. There are cases holding that the number of subscribers served by a paper was too small relative to the city population to be a "newspaper of general circulation." See, e.g., Times Printing Co. v. Star Pub. Co., 51 Wash. 667, 99 P. 1040, 1042 (1909) (1,000 of 274,000); Doster v. City of Cleveland, 20 Ohio Dec. 548, 553 (Cuyahoga Com. Pleas, 1910) aff'd, Cir. Ct., no opin., May 9, 1910 (1,000 of 500,000). On the other hand, in People v. South Dearborn Street Building Corp., 372 Ill. 459, 461-62, 24 N.E.2d 373, 374-75 (1939), the Court held that a paper circulated to 6000 people mainly in southwest Chicago but with a few subscribers in the remaining area of the city was a newspaper of general circulation for Cook County. The board should evaluate all of the facts regarding the newspaper's circulation in determining whether the statutory requirement is met.

You also ask what a district must do when the only newspapers published in the district will not publish notices for the fees provided by law. You ask whether the district can then go to newspapers published outside the district but which have a general circulation within the district. Iowa Code section 618.8 states:

> If publication be refused when copy therefor, with the cost or security for payment of the cost, is tendered, such publication may be made in some other newspaper of general circulation at or nearest to the county seat, with the same effect as if made in the newspaper so refusing.

Sections 279.36 and 618.11 each state that the compensation for publication "shall not exceed" a certain amount or rate. The maximum rate for photographically reproduced matter will vary as this rate is "not to exceed the lowest available earned rate for any similar advertising matter." Construing these statutes in pari materia, it is our view that the district could publish notices in a newspaper published outside the district but which has a general circulation within the district if no newspaper of general circulation published within the district will accept publications at the rate set by statute.

In conclusion, a newspaper is published at the post office of entry, and not where the newspaper is printed. A "newspaper of general circulation" is determined by the diversity of its subscribers within the political subdivision and is one that contains news of a general character and interest to the community. If every newspaper of general circulation published within the political subdivision refuses to publish a notice at the rate established by statute, the district can publish notices in a newspaper published outside the district but which has general circulation within the district.

Sincerely,

ELIZABETH M. OSENBAUGH
Deputy Attorney General

EMO:mlr

SCHOOLS; COUNTIES: County Compensation Board Membership. Iowa Code Supp. §§ 274.1; 331.905(2). A school district is a political subdivision of the state for purposes of Iowa Code Supp. § 331.905(2), and a school board member is therefore prohibited from serving as a member of the county compensation board. (Osenbaugh to Martens, Iowa County Attorney, 12-7-88) #88-12-2(L)

December 7, 1988

Mr. Kenneth R. Martens
Iowa County Attorney
1017 Court Avenue
Marengo, Iowa 52301

Dear Mr. Martens:

We have received your request for an opinion concerning whether a school board member can serve on the county compensation board. We conclude that Iowa Code Supp. § 331.905 (1987) prohibits a school board member from serving on the compensation board.

Iowa Code Supp. § 331.905(2) states that "[a] member of the county compensation board . . . shall not be an employee or officer of the state government or a political subdivision of the state . . . ." Our Office construed this section in Op.Att'yGen. 87-11-10(L) and concluded that the plain language of the statute prohibited ". . . any person serving as an unpaid commissioner, board member, or other elected or appointed official in a political subdivision of the state such as a county, city, or township government . . . from serving on the county compensation board." That opinion did not directly address whether a school district is a "political subdivision of the State," the question raised by your inquiry.

We conclude that a school district is a political subdivision of the state for purposes of section 331.905(2). Iowa Code § 274.1 states that each school district is "a body politic as a school corporation . . . ." As noted in Op.Att'yGen. #87-11-10(L), several Code sections such as Iowa Code § 25B.3(1) define "political subdivision" to include a school district. See also § 8.51. The Iowa Supreme Court has cited, apparently with approval, a New Jersey case defining a school district "as a political or civil subdivision of the state

for the purpose of aiding in the exercise of that governmental function which relates to the education of children." Silver Lake Consolidated School Dist. v. Parker, 238 Iowa 984, 990, 29 N.W.2d 214, 217 (Iowa 1947), citing Landis v. Ashworth, 57 N.J.L. 509, 31 A. 1017. See also, Graham v. Worthington, 259 Iowa 845, 853, 146 N.W.2d 626, 632 (Iowa 1966).

Prior to the 1987 amendment, section 331.905 required that one member be a mayor or city council member, that one member be a member of a school board, and that three members be selected to represent the general public. The statute then provided that the three representatives of the general public could not be an employee or officer of the state or a political subdivision of the state. We believe this suggests that the legislature did not intend to permit a school board member to serve as a representative of the general public. When the statute was amended to abolish the requirement that there be a mayor and a school board member on the compensation board, section 331.905(2) was amended to make its prohibitions applicable to all members of the compensation board. The effect, we believe, was to prohibit either a mayor or a school board member from serving on the county compensation board.

In conclusion, a school district is a political subdivision of the state for purposes of Iowa Code Supp. § 331.905(2), and a school board member is therefore prohibited from serving as a member of the county compensation board.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Deputy Attorney General

EMO:mlr

TAXATION: Sales Tax Exemption -- Machinery Or Equipment Used In "Livestock Or Dairy Production." Iowa Code § 422.47C; House File 2477, 72nd G.A., 2d Sess. § 8 (Iowa 1988); 1988 Iowa Acts, ch.___ (H.F. 2477). The Iowa Department of Revenue and Finance would be correct in including poultry in the definition of "livestock" for purposes of the sales tax exemption for machinery or equipment used in "livestock or dairy production" set forth in Iowa Code § 422.47C. (Willits to Branstad, Governor, 12-7-88) #88-12-1(L)

December 7, 1988

The Honorable Terry E. Branstad
Governor of Iowa
State Capitol
L O C A L

Dear Governor Branstad:

You have requested an Attorney General's opinion as to whether the Iowa Department of Revenue and Finance has sufficient statutory discretion to include poultry in the definition of livestock for the purpose of Iowa Code Supp. § 422.47C (1987), which allows a sales tax refund for machinery and equipment "directly and primarily used in livestock or dairy production." It is the Attorney General's opinion that an agency decision to include poultry in the definition of livestock in § 422.47C would be upheld as reasonable.

An agency decision to include poultry in the definition of livestock would be consistent with the dictionary definition of the term "livestock."

Absent legislative definition or a particular and appropriate meaning in law, words used in a statute should be given their ordinary meaning. State v. Bessenecker, 404 N.W.2d 134, 136 (Iowa 1987). Resort to dictionary definitions is appropriate to construe statutory language according to the common and approved usage of language. Majurin v. Department of Social Services, 417 N.W.2d 578, 580 (Mich. App. 1987); State ex rel. Smith v. City of Oak Creek, 139 Wis.2d 788, 407 N.W.2d 901, 904 (1987). The Iowa Supreme Court has, in some cases, looked at dictionary definitions in interpreting sales tax exemption provisions. See, e.g., S & M Finance Co. Fort Dodge v. Iowa State Tax Comm'n, 162 N.W.2d 505, 508 (Iowa 1968); Benner Tea Company v. Iowa State Tax Commission, 252 Iowa 843, 109 N.W.2d 39, 40 (1961); Community Drama Ass'n v. Iowa State Tax Com'n, 252 Iowa 854, 109 N.W.2d 23 (1961).

According to the dictionary, "livestock" means "animals of any kind kept or raised for use or pleasure; ***esp***: meat and dairy cattle and draft animals -- opposed to ***dead stock*** ." Webster's Third New International Dictionary 1324 (1966).

Webster's New World Dictionary (Second Collegiate Edition 1978), a desk dictionary, at page 828, defines "livestock" as "domestic animals kept for use on a farm or raised for sale and profit." "Poultry," in turn, is defined as "domestic fowls raised for meat or eggs; chickens, turkeys, ducks, geese, etc., collectively." See id. at 1116. To complete the logic, it should be noted that "fowls" are animals. Therefore, the dictionary definition of "livestock" includes poultry.

Thus, a Department of Revenue rule including poultry as livestock for purposes of Iowa Code § 422.47C would likely be upheld.[1]

Sincerely,

Earl M. Willits

Earl M. Willits
Deputy Attorney General

EMW:cml

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[1]I note in passing that the Iowa Department of Revenue and Finance has included domesticated fowl in the definition of "livestock" for the sales tax exemptions regarding the health promotion of livestock and the heating or cooling of livestock buildings. See 701 Iowa Admin. Code §§ 17.9(3)(e) and 17.9(4).