

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

April 26, 1995

Mr. Verd R. Bailey
Page County Attorney
109 E. Main
P.O. Box 478
Clarinda, IA 51632

Dear Mr. Bailey:

You have requested an opinion whether Iowa Code section 422B.1 (1995) allows the imposition of a local option tax under a set of unusual circumstances. A city lying within two counties wishes to impose a local sales and services tax. No one, however, resides within the city's incorporated area in one of the counties as that part of the city has only commercial and industrial buildings.

In 1985, the legislature allowed counties and cities to impose a local option tax. See Scott County Property Taxpayers v. Scott County, 473 N.W.2d 28, 29 (Iowa 1991). Under chapter 422B, the Department of Revenue collects such a tax and remits collections to the county board of supervisors on behalf of the unincorporated area and to each city council in the county; the unincorporated area and the cities then divide 75 percent of the collections based upon population and 25 percent of the

collections based upon the sum of tax dollars levied by the county board and by the city councils; the unincorporated area and each city receive a prorated share, based upon its percent of total population and total tax dollars levied. Id.; 1992 Op. Att'y Gen. 50; 1990 Op. Att'y Gen. 93 (#90-10-4(L)); 1988 Op. Att'y Gen. 112; 1986 Op. Att'y Gen. 127 (#86-11-4(L)).

A local option tax requires voter approval. See 1992 Op. Att'y Gen. 50. Its imposition thus depends upon compliance with section 422B.1, which provides:

(2). A local option sales tax shall be imposed ~~only~~ after an election at which a majority of those voting on the question favors imposition and shall then be imposed until repealed If the tax is a local sales and services tax imposed by a county, it shall only apply to those incorporated areas and the unincorporated area of that county in which a majority of those voting in the area on the tax favors its imposition

. . . .
. . . .

(5)(a). If a majority of those voting on the question of imposition of a local option tax favor imposition of a local option tax, the governing body of that county shall impose the tax at the rate specified for an unlimited period. However, in the case of a local sales and services tax, the county shall not impose the tax in any incorporated area or the unincorporated area if the majority of those voting on the tax in that area did not favor its imposition.

Iowa Code § 422B.1(2), (5)(a) (emphasis added). Accord 701 IAC 107.2. See generally Iowa Code § 4.1(30)(a) (legislature's use of "shall" normally imposes a duty).

Our analysis hinges upon two well-established principles designed to ascertain the legislative intent underlying section 422B.1. First, unambiguous statutes normally require no construction. American Home Products Corp. v. Iowa State Bd. of Tax Review, 302 N.W.2d 140, 143 (1981); 1986 Op. Att'y Gen. 127 (#86-11-4(L)). Whether any ambiguity exists requires an examination of the taxing statute's words and phrases, which

normally have their common and ordinary meanings. Iowa Code § 4.1(38); 3A Sutherland's Statutory Construction § 66.03, at 16 (1992). Second, ambiguous taxing statutes must receive a strict construction against the imposition of taxes. Association of General Contractors v. Iowa State Tax Comm'n, 255 Iowa 673, 123 N.W.2d 922, 924 (1963); 16 E. McQuillin, The Law of Municipal Corporations § 44.13, at 53 (1994); 3A Sutherland's, supra, § 66.01, at 1-2, § 66.05, at 30. The taxing power thus can be exercised "only in the manner prescribed by law," and a local government's powers of taxation "are lawful only when exercised in strict conformity to the terms by which they are given." 16 McQuillin, supra, § 44.13, at 15, § 44.17, at 17; see Ludeman v. Cerro Gordo County, 204 Iowa 1100, 216 N.W. 712, 713 (1927).

In view of these principles, we believe that section 422B.1 presupposes the existence of at least one voter in incorporated areas or the unincorporated area who favors the imposition of a local sales and services tax. Thus, if a city lies within two counties, and no one resides in its incorporated area lying within one of the counties, section 422B.1 effectively prohibits the imposition of such a tax in that area of the city. Section 422B.1 is unambiguous in this regard and requires no construction; even if it were not, we would be required to construe it against imposition of the tax.

Section 422B.1 plainly provides that a local sales and services tax "shall only apply to those incorporated areas and the unincorporated area of that county in which a majority of those voting in the area on the tax favors its imposition" and that the county "shall not impose the tax in any incorporated area or the unincorporated area if the majority of those voting on the tax in that area did not favor its imposition." Iowa Code § 422B.1(2), (5)(a) (emphasis added). A "majority" commonly means a number greater than one half of a total. Mills v. Hallgren, 146 Iowa 215, 124 N.W. 1077, 1079 (1910); Webster's Ninth New Collegiate Dictionary 687 (1979). It would thus require the presence of at least one voter in a given area or district. See Delozier v. Village of Magnet, 178 N.W. 619, 620 (Neb. 1920); Dabkowski v. Baumann, 191 N.E.2d 809, 812 (Ohio 1963). Cf. 1992 Op. Att'y Gen. 50, 52 (appropriate to consider whether particular construction of taxing statute "would circumvent the voter approval process"). One cannot have a majority of a group totaling zero: "It is simply a question in arithmetic" Ludeman v. Cerro Gordo County, 216 N.W. at 713.

We therefore conclude that when a city lies within two counties, and no one resides in the city's incorporated area lying within one of the counties, a local sales and services tax

Mr. Verd R. Bailey
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may not be imposed upon that area of the city. We note that the General Assembly is considering an amendment to section 422B.1 that takes into account these unusual circumstances. See Senate File 470, 76th G.A. (1995) (authorizing city whose boundaries span two counties, but whose residents all live in one county, to impose local sales and services tax in parts of city lying in both counties).

Sincerely,

A handwritten signature in cursive script that reads "Bruce Kempkes". The signature is written in dark ink and is positioned above the typed name.

Bruce Kempkes
Assistant Attorney General

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

May 24, 1995

Walter H. Johnson
Deputy Labor Commissioner
Department of Labor Services
1000 E. Grand Ave.
Des Moines, IA 50319-0209

Dear Mr. Johnson:

You have requested an opinion involving the child labor law, Iowa Code chapter 92 (1995). In essence, you ask whether the General Assembly impliedly intended in chapter 92 to create an exception, based upon emancipation, to its age-based provisions prohibiting persons under eighteen years to work in various occupations. We conclude that chapter 92 encompasses all persons under eighteen years regardless of their emancipation. In addition to general principles of statutory interpretation, our analysis takes into account the common law, the statutory framework of chapter 92, other laws involving emancipation, and constitutional concerns.

Under the common law, children generally attained majority age, or adulthood, on their twenty-first birthday. Banco de Sonora v. Bankers' Mutual Casualty Co., 124 Iowa 576, 100 N.W. 532, 535 (1904). This "emancipation" from legal disability, which focused upon particular facts and circumstances, could also be attained by marriage, entry into military service, voluntarily leaving the parental home to seek one's own fortune, and various other means. Vaupel v. Bellach, 261 Iowa 376, 154 N.W. 149, 150-51 (1967); Annot., 32 A.L.R.3d 1055 (1970); Annot., 132 A.L.R. 1010 (1941); Black's Law Dictionary 468 (1979). Loss of legal disability meant that emancipated persons were sui juris, or "of

their own right." Black's, supra, at 1286. Emancipation was an important event: it affected the duties and obligations of both parents and children by, among other things, freeing the children from parental care, custody, control, and service and giving them a right to their own earnings. See, e.g., Porter v. Powell, 79 Iowa 151, 44 N.W. 295, 296-97 (1890); Everett v. Sherfey, 1 Iowa (W. Clarke) 356, 360-62 (1856); Annot., 132 A.L.R. 1010 (1941).

It has been long-recognized that the legal status of children, emancipated or not, "is unique in many respects" and may be the subject of special legislation. Bellotti v. Baird, 443 U.S. 622, 633, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979). In the special role of *parens patriae*, which literally means "parent of the country," Black's, supra, at 1003, states can enact legislation controlling the conduct of children to a greater degree than the conduct of adults, Ginsberg v. New York, 390 U.S. 629, 636-38, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968). Such state control has peculiar applicability to matters of employment. Prince v. Massachusetts, 321 U.S. 158, 168, 64 S. Ct. 438, 88 L. Ed. 645 (1944); see City of Panora v. Simmons, 445 N.W.2d 363, 369 (Iowa 1989) (Lavorato, J., dissenting).

That there should be limits upon the right to employ children in mines and factories in the interest of their own and the public welfare, all will admit. That such employment is generally deemed to require regulation is shown by [documentation indicating] that every state in the Union has a law upon the subject, limiting the right to thus employ children.

Hammer v. Dagenhart, 247 U.S. 251, 275, 38 S. Ct. 529, 62 L. Ed. 1101 (1918). "It is too late now to doubt that legislation appropriately designed to reach [the evils associated with child labor] is within the state's police power" Prince v. Massachusetts, 321 U.S. at 168-69.

Chapter 92 represents this state's response to the evils associated with child labor. In its twenty-three sections, chapter 92 delineates the type of work that may and may not be performed by children. Like the laws of other states, it links specific ages -- ten, twelve, fourteen, sixteen, and eighteen -- with categories of permissible and impermissible work. See Strong, "Cooperative Federalism: Cooperation Through State Consent," 23 Iowa L. Rev. 469, 483-86 (1938). This framework apparently presupposes that different degrees of maturity may be necessary or desirable for different types of activities.

Chapter 92 does not expressly except emancipated persons of any age under eighteen years from its framework of restrictions.

Compare Iowa Code ch. 92 with Alas. Op. Att'y Gen. J-66-221-82 (noting express statutory exception for emancipated minors from Alaska's child labor law). Although earlier opinions have not directly addressed the issue of implied exceptions, they have consistently indicated that the exceptions expressed in chapter 92 (or its precursors) represent the actual parameters of legislative disposition to tinker with that framework. See 1980 Op. Att'y Gen. 356; 1930 Op. Att'y Gen. 169; 1916 Op. Att'y Gen. 143; 1914 Op. Att'y Gen. 114; 1912 Op. Att'y Gen. 801.

In other areas besides child labor, moreover, the General Assembly has expressly mentioned emancipation as a factor defining or qualifying the rights or duties of children. See, e.g., Iowa Code §§ 232.171 (art. IV(a)), 252.16(4), 613.16(1), 645.3(3), 694.1(4). Such a circumstance suggests a legislative intent to include all persons under eighteen years within the scope of chapter 92 regardless of their emancipation. See State v. Azneer, 526 N.W.2d 299, 300 (Iowa 1995); Kohrt v. Yetter, 344 N.W.2d 245, 248 (Iowa 1984); see also Iowa Code § 4.6(4) (in determining legislative intent underlying ambiguous statute, proper to consider laws upon similar subjects); Iowa R. App. P. 14(f)(14) (search for legislative intent focuses upon what legislature wrote, not what it should or might have written).

Application of three rules of statutory interpretation further supports this conclusion. First, a statutory exception may be implied only if it is reasonable and necessary to avoid an absurd or illogical result. State v. Rouse, 290 N.W.2d 911, 915 (Iowa 1980); 2A Sutherland's Statutory Construction § 47.11, at 165 (1992). Second, a presumption exists against implying additional exceptions to ones already expressed in statutory language. 1980 Op. Att'y Gen. 356. Third, a statute intended to protect children must be liberally interpreted to further its objectives even when it contains criminal penalties. 3A Sutherland's Statutory Construction § 71.04, at 256 (1992).

Our conclusion also acknowledges that various constitutional provisions protect children from governmental restrictions affecting their rights. See, e.g., Bellotti v. Baird, 443 U.S. at 633; City of Panora v. Simmons, 445 N.W.2d at 369 (Lavorato, J., dissenting). We take specific note of City of Maquoketa v. Russell, 484 N.W.2d 179 (Iowa 1992), where the Supreme Court of Iowa indicated that emancipation might play a part in determining the constitutionality of laws restricting the rights of children.

At issue was a city curfew that generally prohibited the presence of children under eighteen years in any public place between 11:00 p.m. and 6:00 a.m. The court held that the curfew was unconstitutionally overbroad on the grounds that it substantially impinged the fundamental rights of these children to freedom of religion, speech, assembly, and association. Id.

at 182-86. In its analysis the court observed that the curfew failed to provide for certain exceptions; for example, it did not except children who wished to attend precinct caucuses, church services, or city council meetings. Id. at 185. The court also observed:

Emancipated minors are not exempt from [the curfew.] No provision, for example, is made . . . for such minors returning home from a late labor union meeting lasting past 11:00 p.m. The same can be said for any emancipated minor who might belong to any association for the advancement of economic, religious, or cultural matters. Freedom of association is clearly implicated in these circumstances.

In this new age of protests and demonstrations, emancipated minors would be prohibited from marches, demonstrations, sit-ins, and prayer vigils lasting past 11:00 p.m. So would unemancipated minors. Freedom of assembly is implicated here

Id. at 185 (citation omitted).

We believe that this passage in City of Maquoketa v. Russell must be viewed in its proper constitutional context. It does not suggest a prohibition against the equal treatment of emancipated and unemancipated children as workers. Indeed, the court acknowledged the principle that a law restricting the rights of children does not violate constitutional provisions when it seeks, in properly drawn language, to protect their "peculiar vulnerability" or account for their "lesser ability to make sound judgments." Id. at 185-86. Protecting all child workers from themselves, coworkers, or employers appears to fall within this broad principle. As the court earlier explained in State v. Erle, 210 Iowa 974, 232 N.W. 279, 280 (1930), the state has some leeway in making such a decision:

It must be conceded that the state may, in the exercise of its police power, prohibit the employment of such persons in defined occupations as are deemed dangerous, either to the life or limb, or injurious to the morals, or the future welfare of children of tender years, and by the same token, exceptions to the defined prohibition may be made. . . .

Mr. Walter H. Johnson
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To what extent the supervision and control should be exercised is a question of expediency which is the province of the legislature to determine.

See 1952 Op. Att'y Gen. 124.

Constitutional considerations thus do not support the conclusion that the General Assembly intended to create an exception in chapter 92 based upon emancipation. See generally Iowa Code § 4.4(1) (legislature presumed to enact statutes in compliance with federal and state constitutions). It seems entirely reasonable and proper for the General Assembly to treat uniformly all child workers on the belief, for example, that an emancipated sixteen-year-old likely acts and thinks in the same way as an unemancipated sixteen-year-old. Although emancipated children may have greater responsibilities in various ways than their unemancipated counterparts, this circumstance, if true as a generality, has no relevance to the strong public interest in protecting the health, safety, and welfare of all children in the work force.

In summary, the various employment restrictions set forth in chapter 92 apply to all persons under eighteen years of age regardless of their emancipation.

Sincerely,



Bruce Kempkes
Assistant Attorney General

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

June 7, 1995

The Honorable Chuck Gipp
State Representative
Statehouse
LOCAL

Dear Representative Gipp:

You have requested an opinion whether a county board of supervisors may arrange to construct a radio tower and then enter into a lease with a private party who would compete against owners of existing radio towers. Although a web of constitutional and statutory provisions affect governmental power to engage in certain functions, we believe that Iowa Code chapters 23A and 331 (1995) -- which respectively limit governmental involvement in the private marketplace and define the general scope of county power -- answer the issue. Our review leads us to conclude that a county board may arrange to construct a radio tower only if it serves a public purpose and may lease part of it to a private party competing against owners of existing radio towers only if the lease results from specific authorization in an ordinance.

We must initially determine whether a county board has authority to arrange for the construction of a radio tower. Section 331.301(1) broadly provides that the county 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." See Iowa Const. amend. 39A (1978) (county home rule). See generally 4 Antieau's Local Government Law § 31.06, at 27 (1987).

It is the county board that initially decides which functions are appropriate to preserve or improve the public peace, safety, health, welfare, comfort, or convenience. See Beardsley v. City of Darlington, 111 N.W.2d 184, 188 (Wis. 1961); 1991 Wis. Op. Att'y Gen. 80; 3 M. Libonati & J. Martinez, Local Government Law § 18.01, at 61 (1994). This decision often is an "extraordinarily delicate" one. Cf. Leonard v. State Bd. of Educ., 471 N.W.2d 815, 817 (Iowa 1991) (interpreting constitutional prohibition against using public property for other than a public purpose). There must be a reasonable relationship, however, between the public action and the public interest. 4 Antieau's, supra, § 32.04, at 11.

Discretion rests with the county board in determining the existence of this relationship. Cf. Dickinson v. Porter, 240 Iowa 393, 35 N.W.2d 66, 80 (Iowa 1948) (interpreting constitutional prohibition against using public property for other than a public purpose). A county board should act restrictively rather than expansively in questionable cases. Cf. 1980 Op. Att'y Gen. 160 (when public use of public property merely incidental to primary private use, public entity should make fairly restrictive interpretation of public purpose). At the same time, a county board should have sufficient flexibility to meet the challenges of increasingly complex, social, economic, and technological conditions. Cf. John R. Grubb, Inc. v. Iowa Housing Finance Authority, 255 N.W.2d 89, 93 (Iowa 1977) (interpreting constitutional prohibition against using public property for other than a public purpose; courts defer to legislative findings on what constitutes "public purpose"; absence of public purpose must be "so clear as to be perceptible by every mind at first blush"); Dickinson v. Porter, 35 N.W.2d at 79, 80 (interpreting constitutional prohibition against using public property for other than a public purpose; legislative findings of public purpose, which should not be construed narrowly, controls if "zone of doubt" exists).

Regarding a radio tower in particular, it is conceivable that one could serve the public interest by, for example, aiding communication among law enforcement and emergency personnel or expanding educational opportunities. Cf. Iowa Code §§ 23A.2(2)(f) (exception to general prohibition against competing with private enterprise allows board of regents or school corporation to provide telecommunications), 23A.2(10)(k)(7) (exception to general prohibition against competing with private enterprise allows institutions or schools to operate radio or television stations); Comtec, Inc. v. Municipality of Anchorage, 710 P.2d 1004, 1006-07 (Alas. 1985) (city telephone utility, which provided reliable products and service in leases of telephone equipment to consumers, did not violate public-purpose doctrine); State v. City of Jacksonville, 50 So. 2d 532, 535 (Fla. 1951) (city's maintenance, operation,

and improvement of radio station did not violate public-purpose doctrine); Beardsley v. City of Darlington, 111 N.W.2d at 188 (city's building of TV translator station, which disseminated information to citizens, did not violate public-purpose doctrine). We thus conclude that a county board could arrange to construct a radio tower for such a public purpose.

We must now determine whether a county board has authority to lease part of this radio tower to a private party competing against owners of existing radio towers. Before examining chapter 23A, entitled "Noncompetition By Government," we revisit chapter 331.

Section 331.361(2) generally gives the county board authority to dispose of interests in real property by lease. See 1940 Op. Att'y Gen. 269; see also Annot., "Lease of Municipal Property," 47 A.L.R.3d 19 (1973). Section 331.301(1) generally gives it authority to exercise any power or perform any function it deems appropriate to preserve or improve the public peace, safety, health, welfare, comfort, or convenience. Section 331.301(1), however, also provides a limitation to this broad grant of power: a county board may exercise any power or perform any function "if not inconsistent with" the laws of the General Assembly. Accord Iowa Const. amend. 39A (1857) (county home rule); see City of Des Moines v. Master Builders, 498 N.W.2d 702, 703-04 (Iowa 1993).

The determination of whether the exercise of county power is inconsistent with state law is essentially a question of preemption. In other words, where the state has passed legislation in a given area, the question is whether the legislature has intended to exclusively regulate the subject matter. Where preemption is applicable, any county regulation is inconsistent with the pervasive state legislation.

1984 Op. Att'y Gen. 101, 101-02.

The scope of county power under sections 331.301(1) and 331.361(2) became affected in 1988, when the General Assembly passed chapter 23A. See generally 1990 Iowa Acts, 73rd G.A., ch. 1129, § 1; 1988 Iowa Acts, 72nd G.A., ch. 1230, § 1. Chapter 23A allows public participation in the private marketplace under certain circumstances and applies to state agencies and "political subdivisions," which include counties, cities, and school corporations. See Iowa Code § 23A.1(1). Subject to certain exceptions, section 23A.2(1) provides that every state agency or political subdivision

shall not, unless specifically authorized by statute, rule, ordinance, or regulation:

(a). Engage in the manufacturing, processing, sale, offering for sale, rental, leasing, delivery, dispensing, distributing, or advertising of goods or services to the public which are also offered by private enterprise unless such goods or services are for use or consumption exclusively by the state agency or political subdivision.

(emphasis added). See generally Iowa Code §§ 4.1(30)(a) (legislature's use of "shall" in statute normally imposes a duty), 23A.1(2) (definition of "private enterprise").

Although section 23A.2(1) "does not prohibit [a] county from competing with private enterprise, it does require the adoption of an ordinance to authorize competitive activity." 1990 Op. Att'y Gen. 74 (#90-4-5(L)). See 1990 Op. Att'y Gen. 7, 9 (noting that both statute and regulation specifically authorized state board to offer certain service); see also American Asbestos v. Eastern Iowa Community College, 463 N.W.2d 56, 59 (Iowa 1990) (noting that statute specifically authorized community colleges to offer certain services). There is no statute specifically authorizing a county to lease part of a county-owned radio tower; therefore, a county board may lease part of it to a private party competing against owners of existing radio towers only if the lease results from specific authorization in an ordinance.

In summary, a county board may arrange to construct a radio tower only if it serves a public purpose and may lease part of it to a private party competing against owners of existing radio towers only if the lease results from specific authorization in an ordinance. We emphasize, however, that a county board cannot arrange to construct a radio tower purely for the benefit of private parties. 1986 Op. Att'y Gen. 113; see 2 M. Libonati & J. Martinez, Local Government Law § 13.09, at 56 (1993).

Sincerely,



Bruce Kempkes
Assistant Attorney General

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

June 7, 1995

The Honorable Bill Bernau
State Representative
2340 Knapp Street
Ames, Iowa 50014

Dear Representative Bernau:

The Attorney General has received your request for an opinion concerning Iowa Code sections 425.16 through 425.40 (1995), which govern the division entitled Property Tax Relief for Certain Elderly, Disabled, and Other Persons. First, you ask whether low-income individuals between the ages of 23 and 65 and who are not disabled may file a claim for property tax credits or rent reimbursements. Second, you ask what obligation the State has to fund these claims.

Section 425.17(2) defines which persons are entitled to file claims for property tax credits and rent reimbursements. The 1993 legislative session produced an amendment to section 425.17 that provides:

2. "Claimant" means a either of the following:
 - a. A person filing a claim for credit or reimbursement under this division who has attained the age of ~~eighteen~~ sixty-five years on or before December 31 of the base year, who is a surviving spouse having attained the age of fifty-five years on or before December 31, 1988, or who is totally disabled and was totally disabled on or before December 31 of the base year, and was domiciled

in this state during the entire base year, and is domiciled in this state at the time the claim is filed or at the time of the person's death in the case of a claim filed by the executor or administrator of the claimant's estate and, in the case of a person who is not disabled and has not reached the age of sixty-five, was not claimed as a dependent on any other person's tax return for the base year.

b. A person filing a claim for credit or reimbursement under this division who has attained the age of twenty-three years on or before December 31 of the base year or was a head of household on December 31 of the base year, as defined in the Internal Revenue Code, but has not attained the age or disability status described in paragraph "a", and was domiciled in this state during the entire base year, and is domiciled in this state at the time the claim is filed or at the time of the person's death in the case of a claim filed by the executor or administrator of the claimant's estate, and was not claimed as a dependent on any other person's tax return for the base year.

1993 Iowa Acts, 75th G.A., ch. 180, § 4.

As a result of this amendment, section 425.17(2) (1995) now separates the property tax credits and rent reimbursements available for elderly and disabled persons into section 425.17(2)(a) and for other low-income individuals between the ages of 23 and 65 into section 425.17(2)(b).

The 1993 legislative session also produced an amendment to section 425.40 by creating a fund and appropriating \$13,500,000 for the purpose of paying the low-income claimants described in section 425.17(2)(b):

1. A low-income credit and reimbursement fund is created. **Beginning July 1, 1994, there is appropriated annually from the general fund of the state to the department of revenue and finance to be credited to the low-income tax credit and reimbursement fund the sum of thirteen million five hundred thousand dollars to pay credits and reimbursements for claimants described in section 425.17, subsection 2, paragraph "b".**

2. If the amount appropriated under subsection 1 plus any supplemental appropriation made for purposes of

this section for a fiscal year is insufficient to pay all claims in full, the director shall pay, in full, all claims to be paid during the fiscal year for reimbursement of rent constituting property taxes paid or if moneys are insufficient to pay all such claims on a pro rata basis. If the amount of claims for credit for property taxes due to be paid during the fiscal year exceed the amount remaining after payment to renters, the director of revenue and finance shall prorate the payments to the counties for the property tax credit. In order for the director to carry out the requirements of this subsection, notwithstanding any provision to the contrary in this division, claims for reimbursement for rent constituting property taxes paid filed before May 1 of the fiscal year shall be eligible to be paid in full during the fiscal year and those claims filed on or after May 1 of the fiscal year shall be eligible to be paid during the following fiscal year and the director is not required to make payments to counties for the property tax credit before June 15 of the fiscal year.

1993 Iowa Acts, 75th G.A., ch. 180, § 9. However, this appropriation, as encompassed within the asterisks, was rejected by the Governor under his item-veto authority. See Iowa Const., art. III, § 16 (1857). The veto was not overturned, and the remaining portion of the amendment became law.

The 1993 legislative session further produced an amendment to section 425.39:

1. The extraordinary property tax credit and reimbursement fund is created. There is appropriated annually from the general fund of the state to the department of revenue and finance to be credited to the extraordinary property tax credit and reimbursement fund, from funds not otherwise appropriated, an amount sufficient to implement this division the sum of ten million eight hundred thousand dollars to pay credits and reimbursements for all claimants for which partial funding is not provided from an appropriation made to the fund created in section 425.40.

2. If the amount appropriated under subsection 1, as limited by section 8.59, plus any supplemental appropriation made for purposes of this section for a fiscal year is insufficient to pay all claims in full, the director shall pay, in full, all claims to be paid during the fiscal year for

reimbursement of rent constituting property taxes paid or if moneys are insufficient to pay all such claims on a pro rata basis. If the amount of claims for credit for property taxes due to be paid during the fiscal year exceed the amount remaining after payment to renters, the director of revenue and finance shall prorate the payments to the counties for the property tax credit. In order for the director to carry out the requirements of this subsection, notwithstanding any provision to the contrary in this division, claims for reimbursement for rent constituting property taxes paid filed before May 1 of the fiscal year shall be eligible to be paid in full during the fiscal year and those claims filed on or after May 1 of the fiscal year shall be eligible to be paid during the following fiscal year and the director is not required to make payments to counties for the property tax credit before June 15 of the fiscal year.

1993 Iowa Acts, 75th G.A., ch. 180, § 8.

The Governor again rejected this appropriation by vetoing all of amended section 425.39(1), as indicated by the asterisks. The legislature did not override this veto, and the remaining portion of the amendment became law. See Iowa Code § 425.39(2) (1995). Because the Governor vetoed all of amended section 425.39(1), the original language of section 425.39 (1993) remained in effect and was renumbered by the Code Editor as section 425.39(1) (1995). Also, because section 8.59 froze funding for various appropriations, including section 425.39, at the level of the fiscal year commencing July 1, 1992, the standing appropriation for this section was automatically funded to \$10,794,998.

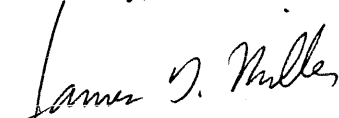
Your first question is whether low income individuals between the ages of 23 and 65 and not disabled may file a claim for a property tax credit or rent reimbursement. The answer is yes. Section 425.18 provides for the right to file a claim for reimbursement or credit by any claimant defined in section 425.17(2)(a) or (b). The right to file such a claim is not dependent upon funds being available to reimburse or credit that claim.

Your second question involves the State's obligation to fund these claims. As discussed above, the entire appropriation designated for the newly created low-income fund under section 425.40 was vetoed by the Governor. When the low-income fund was created, the legislature obviously intended to create two separate funds with the elderly and disability claimants being funded under section 425.39 and the low-income claimants being funded under section 425.40. The mere creation of a

fund does not require that it actually be funded. These are two separate actions and the legislative action which created the fund does not bind future legislatures to appropriate money to properly implement the fund or to prohibit the Governor from exercising his item veto powers in eliminating the funding.

In conclusion, the statute allows claimants under either section 425.17(2)(a) or 425.17(2)(b) to file claims for rent reimbursement or property tax credits. However, if funding for the particular fund has not been provided by the legislature or has been vetoed by the Governor, then the particular claimants will not be reimbursed or credited for their claims.

Sincerely,



JAMES D. MILLER
Assistant Attorney General

JDM:cml

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

June 7, 1995

The Honorable Betty Grundberg
State Representative
234 Foster Drive
Des Moines, Iowa 50312

Dear Representative Grundberg:

You have requested an opinion of the Attorney General concerning a possible conflict between state and federal law in the area of cable television franchises. Specifically, you ask:

Did the Cable Communications Policy Act of 1984 as amended in 1992 and codified as 47 U.S.C. § 541 preempt and supersede Iowa Code § 364.2(4)(a)-(d) (1995), which require an ordinance with approval by an election before a competitive cable television franchise is granted?

For reasons that are explained in more detail in what follows, we believe that the federal statute may, in practice, be inconsistent with the state law provisions, and therefore, to that extent, preempt them.

A.

We begin with some background on the pertinent state and federal legislation. On October 5, 1992, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") over the veto of President George Bush. Among the articulated purposes for the 1992 Cable Act were to "provide increased consumer protection and to promote increased competition in the cable television and related markets." Boudreaux and Ekelund, The Cable Television Consumer Protection and Competition Act of 1992: The Triumph of Private over Public Interest, 44 Ala. L. Rev. 355, 355 (1993). Among other things, the 1992 Cable Act amends the Federal Communications Policy Act of 1984 by amending 47 U.S.C. § 541 so as to provide that "a

franchising authority may not grant an exclusive franchise or may not unreasonably refuse to award an additional competitive franchise." 47 U.S.C. § 541(a)(1).

On the other hand, state law also discusses the granting of a cable television franchise by a city. Since a city is a "governmental entity empowered by Federal, State or local law to grant a franchise", it is a "franchising authority as that term is defined by 47 U.S.C. § 522(a). See e.g. City of Burlington v. Mountain Cable Co., 559 A.2d 153, 155 (Vt. 1988).

A city may grant a cable television franchise only by ordinance. Iowa Code § 364.2(4)(a). No such ordinance shall become effective unless approved at an election. Iowa Code § 364.2(4)(b). Notice of the election must be provided in a newspaper of general circulation in the city. Iowa Code § 364.2(4)(c). Finally, the person asking for the franchise must pay the costs incurred in holding the election, including the costs of the newspaper notice. Iowa Code § 364.2(4)(d).

B.

In 1992 Op. Att'y Gen. 123 we discussed basic principles governing the concept of federal preemption:

In general, Article VI of the United States Constitution, the so-called "Supremacy Clause," establishes the supremacy of federal law over state law. "It is a familiar and well-established principle that the Supremacy Clause invalidates state laws that 'interfere, or are contrary to' federal law." Hillsborough County v. Automated Laboratories, Inc., 471 U.S. 707, 713, 85 L.Ed.2d 714, 721, 105 S.Ct. 2371 (1985). This may occur in several different ways. First, when acting within constitutional limits, Congress may pre-empt state law by so stating in express terms. Id. In the absence of such express language, congressional intent to pre-empt state law may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary regulation. Id. Pre-emption of a whole field will also be inferred where the field is one in which "the federal interest is so dominant that the

federal system will be assumed to preclude enforcement of state laws on the same subject." Id. Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress." Id. Moreover, it is now firmly settled that "state laws can be pre-empted by federal regulations as well as by federal statutes." Id.

Id. at 124-25, quoting 1990 Op. Att'y Gen. 11, 12-13. We have also previously applied these principles in another situation involving the Cable Communications Policy Act of 1984. In 1986 Op. Att'y Gen. 56, we opined that provisions of the 1984 Cable Act allowing renewal of a franchise did, under certain circumstances, conflict with, and therefore preempt, the state law provisions at issue here. We stated:

In conclusion, the Cable Communications Policy Act of 1984 expressly preempts any state regulations concerning cable television to the extent that they are inconsistent with the Cable Act. Under 47 U.S.C. § 546, franchise renewal may be denied by the franchising authority only if one of four specified factors are not met by the cable operator. In addition, it is a stated purpose of the Cable Act to protect cable operators against unfair denials of renewal where the standards of 47 U.S.C. § 546(c)(1) are met. The renewal process established under § 364.2(4)(a) requiring that a franchise renewal be granted only after the passage of an ordinance by the city council is not inconsistent with the Cable Act. However, the § 364.2(4)(b) requirement that allows cable television franchise renewal to be made only by the passage of an ordinance and approval at an election is void as it is preempted and superseded by the Cable Act.

In order to comply with federal law, Iowa's cable franchising renewal process must follow the federal procedure, if timely invoked, which includes limiting the circumstances in which a franchise renewal may be denied and providing an administrative proceeding to be invoked at the initiative of the operator or the franchising authority to consider the denial of a proposal for renewal. The current requirements of § 364.2(4) regarding franchise renewal may be followed if the federal procedure is not timely invoked. We would suggest that consideration be given to legislative amendment of Iowa Code § 364.2(4) to reflect the changes now required by federal law.

Id. at 59-60. We believe that a similar conflict exists in the present case.

C.

Our concern is based on the fact that the federal statute prohibits a franchising authority from unreasonably refusing to award a competitive franchise, whereas the state law not only permits, but requires, a franchising authority to deny a franchise if an ordinance to the effect is defeated at an election. It is the clear intent of the federal statute to require a franchising authority to allow a competitive cable television franchise unless it has a reasonable basis for doing otherwise; this is, of course, consistent with Congressional intent to increase competition in the cable television market. However, once a city voter is lawfully in the ballot box, there are no constraints or standards limiting that voter's discretion. Requiring a cable television company to win approval at an election before being allowed a franchise therefore opens the door to that company's request for a franchise being denied without any reasonable basis, a result which conflicts with the federal law.

It can be argued that a franchising authority does not "unreasonably refuse to award an additional competitive franchise" when it acts in furtherance of the wishes of the electorate. However, for several reasons, we do not believe that argument to be sound. First, it seems contrary to the intent of Congress to allow a franchising authority, which cannot unreasonably refuse to award a franchise, to simply turn the decision-making process over to third parties, who can

unreasonably refuse to award a franchise. Second, we believe that in determining whether a refusal to award an additional competitive franchise is reasonable or not, Congress intended the franchising authority to look to circumstances and factors involving the company itself, rather than merely rely on the results of an election. Legislative history tends to bear this out. According to the Joint Explanatory Statement of the Committee of Conference, the House Amendment to the 1992 Cable Act included five examples of circumstances under which it would be reasonable for a franchising authority to deny a franchise. These were: technical infeasibility; failure of the applicant to assure that it will provide adequate public, educational and governmental access channel capacity, facilities or financial support; failure of the applicant to assure that it will provide universal service throughout the franchise area within a reasonable period of time; interference with the ability of the franchising authority to deny renewal of a franchise; and failure of the applicant to demonstrate financial, technical or legal qualifications. 4 U.S. Code Cong. & Admin. News at 1259 (102nd Cong. Second Sess. 1992). The conferees adopted the Senate provision which did not include these specific circumstances, id., but, we believe that the circumstances listed do reflect some congressional intent to require a franchise award unless factors such as these are present. This intent is also reflected by the provision of the 1992 Cable Act which allows any "cable operator adversely affected by any final determination made by a franchising authority" under 47 U.S.C. § 541 to commence an action for declaratory or injunctive relief in state or federal court. 47 U.S.C. § 555. It is clear from this provision, of course, that any franchising authority's denial of a competitive franchise must be for reasons that can be meaningfully reviewed in court. Because an election outcome cannot feasibly be so reviewed, it seems clear that Congress intended a franchising authority to have reasons for denial other than the outcome of an election.

D.

For the foregoing reasons, we believe that the provisions of state law requiring an election to be held before a competitive franchise can be awarded may in certain circumstances conflict with the mandate of federal law that no such franchise be unreasonably denied. In any situation where a franchise is denied solely because of an election, it is likely that a court

Representative Betty Grundberg
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would determine that state law has led to a conflict with federal law. In such case, of course, federal law would control and preempt the conflicting state law. As we did in our 1992 opinion, we again suggest that the state legislature consider amending the pertinent provisions of state law so as to eliminate the possibility of conflict.

Sincerely yours,



MARK HUNACEK
Assistant Attorney General

MH:plr

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

June 20, 1995

The Honorable Michael Fitzgerald
State Treasurer
State Capitol
L O C A L

Dear Treasurer Fitzgerald:

You have requested an opinion of the Attorney General regarding the legality of engaging in securities lending transactions with securities in the state operating fund portfolio. You have indicated to us that you are considering engaging in securities lending transactions in which the collateral for the securities loan would be either cash or securities which are permitted investments for the treasurer under Iowa Code section 12B.10(4)(a)-(d).

Specifically you have inquired as to whether lending securities in the state operating fund portfolio would violate Iowa Code section 12B.10(4)(e) (1995) or Iowa Code section 12B.5 (1995). Iowa Code section 12B.10(4)(e) authorizes the state treasurer to invest in certain repurchase agreements but indicates that reverse repurchase agreements are not authorized. Iowa Code section 12B.5 provides that the treasurer of state shall not loan out, or otherwise use public funds for a private purpose.

Iowa Code section 12B.10(1) directs the treasurer to invest public money only in the investments provided in that section unless otherwise provided by law.¹ Section 12B.10(4) further

¹ We have previously interpreted this provision to allow public entities to invest in items not listed in section 12B.10 if another section of the Iowa Code authorizes a different investment

provides that the treasurer of state shall only purchase and invest in the investments listed in that subsection.

There is no specific mention of securities lending in Iowa Code section 12B.10(4). Section 12B.10(4)(f) does, however, authorize the treasurer to invest in any investment which is authorized for the Iowa public employee retirement system in Iowa Code section 97B.7(2)(b) (1995), except common stocks. Section 97B.7(2)(b) authorizes the Iowa public employee retirement system to invest in "every kind of property and every kind of investment which persons of prudence, discretion, and intelligence acquire or retain for their own account" provided that the investment is made in compliance with the investment standards and policies in that section. Accordingly, a securities lending transaction meeting the prudent person standard is an authorized investment for the treasurer unless this investment is otherwise prohibited by law.²

Iowa Code section 12B.10(4)(e) specifically authorizes the treasurer to invest in repurchase agreements provided that the collateral for the repurchase agreement is one of the investments listed in section 12B.10(4)(a)-(d).³ Section 12B.10(4)(e) also states that "[r]epurchase agreements do not include reverse repurchase agreements."⁴

for a specific purpose. Op. Att'y Gen. #93-12-4, pp. 3-4. We are not, however, aware of any statutory provision which specifically authorizes the treasurer to lend securities in the state operating fund portfolio.

² For purposes of issuing this opinion we have assumed that the treasurer will engage in securities lending transactions only if the treasurer determines that the transactions meet the standard of section 97B.7(2)(b) and the requirements of section 12B.10(2)-(3). Whether a particular transaction meets these requirements is a factual determination which we do not make in this opinion.

³ Repurchase agreements are sometimes characterized as collateralized loans as opposed to the repurchase and sale of securities. See generally, Comark v. Jones, 971 F.2d 322, 323 (9th Cir. 1992); First Federal Savings & Loan Association v. Fidelity & Deposit Company, 895 F.2d 254, 259-60 (6th Cir. 1990); M. Stigum, The Money Market 396-99 (rev. ed. 1983); Schatz, The Characterization of Repurchase Agreements in the Context of the Federal Securities Laws, 61 St. John's L. Rev. 290, 294-95, 299, 303-06 (1987).

⁴ In a repurchase agreement the treasurer acquires securities by buying securities with a simultaneous commitment to resell the securities on a specified date at a specified price. In a reverse

A reverse repurchase agreement is similar to a securities lending transaction⁵ in which securities are loaned against cash collateral. See generally, P. Lipson, B. Sabel & F. Keane, Securities Lending at 6, 13, 24 (1989). Because of the similarity between reverse repurchase agreements and security lending against cash collateral, the question arises as to whether the limitation on reverse repurchase agreements, which is contained in section 12B.10(4)(e), prohibits the treasurer from engaging in securities lending.

The goal of a court construing an ambiguous statute is to determine the intent of the legislature. E.g., State v. Sullins, 509 N.W.2d 483, 485 (Iowa 1995). The court will examine the language used, the object sought to be accomplished and the intended purpose of the statute. E.g., Havil v. Job Service, 423 N.W.2d 184, 186 (Iowa 1988). When the legislature passes a statute it is presumed that the entire statute was intended to be effective. Iowa Code § 4.4(2) (1995). If exceptions to a statute are delineated it is presumed that there are no other exceptions. Estate of Mills, 374 N.W.2d 675, 677 (Iowa 1988). Doubts in interpretation will be resolved in favor of a general statutory provision as opposed to language of exception. See Menke Hardware,

repurchase agreement the treasurer would sell securities and make a simultaneous commitment to buy the securities at a specified date for a specified price. Because each party to a repurchase agreement/reverse repurchase agreement transaction has the opposite perspective, a single transaction can be referred to as both a reverse repurchase agreement and a repurchase agreement. See Bevill, Bresler & Schulman v. Spencer Savings & Loan, 878 F.2d 742, 743 (3d Cir. 1989). In this opinion, when we refer to a repurchase agreement, we are referring to a transaction in which the treasurer buys securities and agrees to resell them on a specified date at a specified price.

⁵ Securities loans are often arranged by a commercial bank with an extensive custodial operation. The bank typically enters into a contract with the securities lender which specifies the parameters under which the bank will loan the lender's securities and invest the proceeds of the loans. Usually the contract requires the bank to negotiate fees and collateral requirements with borrowers, to monitor the credit worthiness of selected borrowers, to maintain custody of the lendable securities, to mark to market securities pledged as collateral, to collect fees from borrowers, and to indemnify the lender for certain losses which might occur from the loan transactions. The bank is usually compensated by splitting the lender's fee. See generally, P. Lipson, B. Sabel & F. Keane, Securities Lending (1989) (paper prepared by the Federal Reserve Bank of New York).

Inc. v. City of Carroll, 474 N.W.2d 579, 580 (Iowa 1991). No one principle of construction is determinative. Metier v. Cooper Transport Co., 378 N.W.2d 907, 912 (Iowa 1985).

Section 12B.10(4) addresses the investment standards and investment choices of the state treasurer and state agencies. Each of the permitted investments listed in this section, other than the prudent person standard in section 12B.10(4)(f), references a specific investment. Presumably, each of the investments listed in each of these subsections could be made in compliance with the prudent person standard as section 12B.10(2) also specifically requires all investments made by the treasurer to meet the prudent person standard. In order to give effect to the entire statute it is necessary to construe section 12B.10(4)(e) as a limitation on the prudent person investment authority given to the treasurer in section 12B.10(4)(f). Accordingly, section 12B.10(4)(e) does prohibit the treasurer from investing in reverse repurchase agreements.

It is our opinion, however, that section 12B.10(4)(e) does not prevent the treasurer from investing in securities lending transactions which meet the prudent person standard and the other requirements of section 12B.10(2)-(3). Securities lending transactions may or may not be conducted in a manner which makes them substantially similar to a reverse repurchase agreement.⁶ At the time this legislation was passed securities lending was not a new investment that the legislature might not have contemplated. In fact the legislature has specifically authorized the treasurer to engage in securities lending transactions with securities in the Iowa public employee retirement system portfolio. Iowa Code section 12.8 (1995). The legislature obviously knows how to refer to securities lending when it chooses to do so. Accordingly, Iowa Code section 12B.10(4)(e) does not prevent the state treasurer from engaging in securities lending transactions with securities in the state operating fund portfolio.

You have also asked whether securities lending transactions are prohibited by Iowa Code section 12B.5. This section provides that "[t]he treasurer of state shall be guilty of a serious misdemeanor for loaning out, or in any manner using for private

⁶ Securities loans may be collateralized by cash, letters of credit, or securities. See P. Lipson, B. Sabel & F. Keane, Securities Lending (1989) (paper prepared by the Federal Reserve Bank of New York). Our opinion that securities lending is not prohibited by Iowa Code section 12B.10(4)(e) applies to transactions collateralized by cash as well as other authorized investments.

The Honorable Michael Fitzgerald
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purposes, state, county, or other funds in the treasurer's hands."
Iowa Code § 12B.5 (1995).

Section 12B.5 is a criminal statute which imposes a criminal penalty for loaning out or otherwise using public funds for a private purpose. This statute does not appear to be intended to address permissible and impermissible investments provided that the motivation for the investment is not to benefit a private party. Ambiguities in criminal statutes are generally construed against the state and in favor of a criminal defendant. See, e.g., State v. Oldfather, 306 N.W.2d 760, 764 (Iowa 1981). If this statute is given a narrow construction, the statute would be construed as preventing a loan of funds for a private purpose. Moreover, the treasurer is specifically authorized to engage in securities lending with securities in the Iowa public employee retirement system portfolio. Iowa Code § 12.8 (1995). It is doubtful that the legislature would have specifically authorized the treasurer to engage in securities lending if such lending would result in a violation of Iowa Code section 12B.5 (1995). Based on these factors it is our opinion that Iowa Code section 12B.5 does not prevent the treasurer of state from engaging in securities lending transactions which do not further a private purpose.

Sincerely,



Sherie Barnett
Assistant Attorney General

SHERIFF; CIVIL SERVICE; PUBLIC RECORDS: Use of reserve deputy sheriffs; duties of county civil service commission in appointing and promoting regular deputy sheriffs and in allowing access to service records by regular deputy sheriffs. Iowa Code §§ 80D.6, 80D.8, 80D.9, 80D.10, 80D.11, 80D.12, 91B.1, 331.652, 341A.6, 341A.8 (1995). A county may assign to reserve deputies those duties of a regular, full-time deputy for which the reserve deputies are properly trained and supervised to perform, even though such assignment may reduce overtime payments to regular, full-time deputies. Although a county civil service commission may arrange, compile, and administer competitive tests to determine the relative qualifications of persons seeking employment as regular deputies, the Law Enforcement Academy must design and prepare practical tests to determine the ability of persons to perform the duties of a regular deputy. A county civil service commission must allow regular deputies to inspect their respective service records in order to identify inaccurate or misleading information. (Kempkes to Van Fossen, State Representative, 6-20-95) #95-6-6(L)

June 20, 1995

The Honorable James Van Fossen
State Representative
Statehouse
LOCAL

Dear Representative Van Fossen:

You and former Representative Robert L. Rafferty have each requested an opinion about the powers of reserve deputy sheriffs and the duties of county civil service commissions administering the civil service system for regular deputy sheriffs. You indicate that a county has begun using reserve deputies who have not complied with all of the requirements for regular deputies to perform duties previously performed by regular deputies. You also indicate that a county civil service commission has recently included a written examination for evaluating regular deputies that the Iowa Law Enforcement Academy neither designed nor

prepared. Last, you indicate that a county civil service commission has accumulated information on job performance, including records that contain factual statements relating to the character and quality of the work performed by regular deputies.

With regard to these matters you ask three questions:

- 1) whether a county may use reserve deputies to perform duties previously performed by regular, full-time deputies in order to reduce overtime payments to them;
- 2) whether a county commission may use appointment and promotional tests other than those designed and prepared by the Law Enforcement Academy; and
- 3) whether regular deputies may examine records on their own job performance in order to identify inaccurate or misleading information.

Guided by canons of statutory construction or interpretation, we make the following conclusions: First, a county may assign to reserve deputies those duties of a regular, full-time deputy for which the reserve deputies are properly trained and supervised to perform, although such assignment may reduce overtime payments to regular, full-time deputies. Second, although a county commission may arrange, compile, and administer competitive tests to determine the relative qualifications of persons seeking employment as regular deputies, the Law Enforcement Academy must design and prepare practical tests to determine the ability of persons to perform the duties of a regular deputy. Third, a county commission must allow regular deputies to inspect their respective service records in order to identify inaccurate or misleading information.

I.

Iowa Code chapter 80D (1995) governs "reserve peace officers," which include reserve deputy sheriffs. Section 80D.1 permits the establishment of a force of reserve deputies to "assist" the county sheriff and any regular deputy sheriffs in performing official duties. State v. Wright, 441 N.W.2d 364, 368 (Iowa 1989); see Thompson Bros. v. Phillips, 198 Iowa 1064, 200 N.W. 727, 728 (1924); 1982 Op. Att'y Gen. 148; 1972 Op. Att'y Gen. 605. See generally Iowa Code §§ 331.652-.653 (listing general powers and duties of county "sheriff," defined in section 4.1(31) to include any person performing sheriff's duties); 1982 Op. Att'y Gen. 278 (#81-10-19(L)) (force of regular officers a condition precedent to establishing force of reserve officers); 1972 Op. Att'y Gen. 605. Section 80D.1A(3) defines a reserve deputy as a "volunteer, non-regular, sworn member" of the sheriff's office who "serves with or without compensation," has

"regular police powers" while functioning as a deputy sheriff, and "participates on a regular basis" in the activities of the county sheriff's office, "including crime prevention and control, preservation of the peace, and enforcement of law."

Chapter 80D, however, clearly distinguishes between a county's need for employing a primary force of regular deputies (who undergo extensive training and testing) and a county's option of employing an assisting force of non-regular deputies (who undergo substantially less training and testing). See State v. Wright, 441 N.W.2d at 370 (Snell, J., dissenting); 1982 Op. Att'y Gen. 278 (#81-10-19(L)). Compare Iowa Code § 80D.3 (training standards for reserve peace officers) with Iowa Code §§ 80.11 (course requirements for regular peace officers), 80.15 (examination requirements for regular peace officers), 80B.11 (minimum basic training and other requirements for regular peace officers). Chapter 80D does not equate the class of reserve deputies with the class of regular deputies for all purposes: in some respects it treats them the same, in others it treats them differently. Those differences are "crucial and substantial" and lie in the nature of authority each class possesses and the relationship of one class to the other. 1982 Op. Att'y Gen. 278 (#81-10-19(L)).

Sections 80D.11 and 80D.12 generally address the benefits due reserve deputies. Section 80D.11 provides that reserve deputies shall be considered county employees and shall be paid a minimum of one dollar per year; it also permits counties to purchase their uniforms and equipment. Section 80D.12 provides that reserve deputies shall receive hospital and medical assistance and insurance protection against liability and false arrest; however, it prohibits them from becoming eligible to participate in pension funds or retirement systems established by the state for regular deputies and peace officers. See generally 1972 Op. Att'y Gen. 605.

Section 80D.6 sets forth the power of reserve deputies and cloaks them with substantially the same authority as regular peace officers. 1982 Op. Att'y Gen. 278 (#81-10-19(L)). It provides that while in the actual performance of official business reserve deputies "shall be vested with the same rights, privileges, obligations, and duties as any other peace officers." See generally 1974 Op. Att'y Gen. 193. Section 80D.9 mentions some of the official duties that may be performed by reserve deputies in uniform: "assignments involving special investigation, civil process, court duties, jail duties and handling mental patients." Section 331.652(1) indicates other duties that may be performed by reserve deputies. See generally Iowa Code § 4.6(4) (in determining legislative intent underlying ambiguous statute, proper to consider statutory provisions upon similar subjects). It permits a "special deputy" -- "any person"

called upon in very unusual circumstances to assist the county sheriff, 1984 Op. Att'y Gen. 119 (#84-2-6(L)) -- to perform certain duties: to "[k]eep the peace or prevent the commitment of crime," "[a]rrest a person who is liable to arrest," and "[e]xecute a process of law."

Significant limitations exist, however, with regard to the circumstances surrounding the performance of official duties by reserve deputies. See generally Iowa Code §§ 80D.6, 80D.7, 80D.8, 80D.9, 80D.10, 80D.11, 80D.12, 80D.13. They therefore "cannot act with the same independence or discretion" of regular deputies. 1982 Op. Att'y Gen. 278 (#81-10-19(L)); see 1980 Op. Att'y Gen. 882 (#80-12-4(L)). Section 80D.8 contains two of these limitations. First, it prohibits reserve deputies from assuming the "full-time duties of regular peace officers without first complying with all requirements for regular peace officers"; and second, it provides that reserve deputies "shall act only in a supplementary capacity" to the regular force in a sheriff's office. See generally Iowa Code §§ 80B.11 (training standards), 80B.11A (jailer training standards), 80D.3 (minimum training standards), 80D.7 (weapons certification), 331.653 (general duties of sheriff); State v. Wright, 441 N.W.2d at 368 (properly trained reserve may perform implied-consent test); 501 IAC 8.1, 501 IAC 9.1, 501 IAC 11.1.

We note that section 80D.8 uses the adjective "full-time" in its first limitation describing the official duties that properly trained reserve deputies may perform. See generally Webster's Ninth New Collegiate Dictionary 460 (1979) ("full-time" means employed for or involved with an amount of time considered normal or standard amount for working during a given period). Although every word normally counts for something in a statute, see City of Estherville v. Iowa Civil Service Comm'n, 522 N.W.2d 82, 86 (Iowa 1994); State v. Sumpter, 438 N.W.2d 6, 8 (Iowa 1989), this rule remains subject to overriding principles: for example, that the meaning of a statute depends upon legislative intent; that a statute must be read as part of an entire legislative scheme; and that a reasonable construction or interpretation prevails over an unreasonable one, see Iowa Code §§ 4.1, 4.1(38), 4.2, 4.4(3); State v. Sullins, 509 N.W.2d 483, 485 (Iowa 1993); State v. Byers, 456 N.W.2d 917, 919 (Iowa 1990); State v. Sumpter, 438 N.W.2d at 8 (part of statute may be superfluous when no other construction produces reasonable result); Wright v. City of Cedar Falls, 424 N.W.2d 456, 457 (Iowa 1988); In re Clay, 246 N.W.2d 263, 265 (Iowa 1976).

In view of these principles, we do not perceive that "full-time" carries any significance regarding the type of duties that may be performed by properly trained and supervised reserve deputies. The import of the first limitation in section 80D.8 clearly lies with its requirement that reserve deputies undergo

training for specific duties before proceeding to perform them. See 1982 Op. Att'y Gen. 278 (#81-10-19(L)) (unlike regular deputies, who, being fully trained, are expected to function in all areas of law enforcement, reserve deputies are only expected to perform those specific tasks for which they have received training); 1994 Neb. Op. Att'y Gen. 94076 (in statutory scheme similar to Iowa Code chapter 80D, important distinction between regular peace officer and reserve lies with training and duties or requirements for supervision).

Sections 80D.9 and 331.652(1) support this interpretation of section 80D.8. They set forth specific duties that may be performed by reserve or special deputies, and those duties obviously may fall within the "full-time duties" of regular deputies. Moreover, purely as a matter of common sense, the duties of regular deputies cannot be readily compartmentalized into such categories as full-time, overtime, or even part-time. What duties they may be required to perform during their full-time hours in one week they may be required to perform during their overtime hours in the next.

Regarding the use of reserve deputies to reduce overtime payments to regular deputies, we note that nothing in chapter 80D limits the number of hours that reserve deputies can devote to performing official duties. See 1994 Neb. Op. Att'y Gen. 94076 (in statutory scheme similar to Iowa Code chapter 80D, no limitation exists "on the number of hours that reserve officers can work"); see also 1984 Op. Att'y Gen. 119 (#84-2-6(L)) (sheriff may use reserve deputies "for those unusual situations where the force of regular deputies is not adequate or available"); 1972 Op. Att'y Gen. 605 (no statutory limitations upon the aides available for use by county sheriffs, who "have on occasions throughout history commanded veritable armies"). See generally Iowa R. App. P. 14(f)(13) (statutory construction normally requires examination of what legislature actually said, not what it should or might have said); State v. Byers, 456 N.W.2d at 919 (impermissible to extend terms of statute under guise of statutory construction). Similarly, we note that nothing in chapter 80D guarantees regular deputies a right to work overtime or prohibits a county from using reserve deputies to reduce its overtime payments to regular deputies. Section 331.904(2), in fact, provides that regular deputies shall receive an "annual base salary," which it specifically defines as basic compensation "excluding overtime pay." See generally 1980 Op. Att'y Gen. 187 (#79-5-30(L)) (interpreting section 331.904); Adams v. City of McMinville, 890 F.2d 836, 840 (6th Cir. 1989) (addressing loss of overtime pay); 1976 Op. Att'y Gen. 786 (noting definition of "overtime" and federal legislation and cases addressing payment for overtime work); 16A E. McQuillin, The Law of Municipal Corporations § 45.13, at 87-90 (1992).

Although chapter 80D does not expressly limit the hours that reserve deputies may work, section 80D.10 does provide that a county "shall not reduce the authorized size of a regular [sheriff's office] because of the establishment or utilization of" reserve deputies. Accordingly, a county may not reduce the total number of authorized, regular deputies by reassigning their duties to reserve deputies.

II.

The question whether a county civil service commission may evaluate regular deputies by using a written test that is neither designed nor prepared by the Law Enforcement Academy requires an examination of chapter 341A, which charges county commissions with the duty to administer the civil service system for regular deputies. See generally 1984 Op. Att'y Gen. 119 (#84-2-6(L)); 1978 Op. Att'y Gen. 60; 1974 Op. Att'y Gen. 193.

Before examining those provisions, we note that commissions or boards generally have wide discretion in administering civil service systems. Patch v. City of Des Moines Civil Service Comm'n, 295 N.W.2d 460, 465 (Iowa 1980); 1982 Op. Att'y Gen. 283. See generally Iowa Code § 341A.8 (appointments of regular deputies "shall be made solely on merit, efficiency, and fitness"), § 341A.18 (political or religious opinion or affiliation, race, national origin, sex, or age may not affect appointments or promotions); 1977 Op. Att'y Gen. 130; 1974 Op. Att'y Gen. 193; 1972 Op. Att'y Gen. 605. We also note that the Law Enforcement Academy plays a crucial role in establishing uniform, minimum physical, educational, mental, moral, and training standards for all deputy sheriffs in all ninety-nine counties. See, e.g., Iowa Code §§ 80B.11, 80B.11A, 80B.13, 341A.6(2), 341A.10; 501 IAC 7.14; see also 1974 Op. Att'y Gen. 193.

Chapter 341A sets forth the responsibilities of county commissions and the Law Enforcement Academy regarding tests for regular deputies. Specifically, section 341A.6 provides that a county commission shall:

2. . . . administer practical tests designed to determine the ability of persons examined to perform the duties of the position for which they are seeking appointment. Such tests shall be designed and prepared by the . . . law enforcement academy, shall be administered by each commission in a uniform manner, and shall be consistent with standards established pursuant to chapter 80B governing standards

for employment of . . . law enforcement
officers. . . .

. . . .
6. . . . arrange, compile, and
administer competitive tests to determine the
relative qualifications of persons seeking
employment in any class of position and as a
result establish [eligibility] lists

Iowa Code § 341A.6(2, 6) (emphasis added). See generally Iowa
Code §§ 341A.6(1) (county commission has duty to adopt rules
specifying manner in which examinations will be held); 3 E.
McQuillin, The Law of Municipal Corporations § 12.78.15, at 403
(1990) (civil service commission may exercise discretion
regarding nature and scope of examinations).

Section 341A.6 distinguishes between "practical" and
"competitive" tests, and this distinction governs which public
entity bears responsibility for designing and preparing or
compiling and administering them. Unlike section 341A.6(6),
which broadly permits a county commission to arrange and compile
competitive tests, section 341A.6(2) specifically identifies the
entity responsible for creating practical tests. It provides
that the Law Enforcement Academy "shall" design and prepare
practical tests, which a county commission "shall" then
administer. See Iowa Code § 4.1(30)(a) (legislature's use of
"shall" normally imposes a duty); Schmidt v. Abbot, 261 Iowa 886,
156 N.W.2d 649, 651 (1968); 1978 Op. Att'y Gen. 130.

Regarding the use of practical tests, section 341A.6 is
plain and its meaning is clear. See State v. Hopkins, 465 N.W.2d
at 896 (generally improper to search for statutory meaning when
language plain and meaning clear). Although it permits a county
commission to arrange, compile, and administer competitive tests,
it does not permit a county commission to administer practical
tests other than ones designed and prepared by the Law
Enforcement Academy. See generally Iowa R. App. P. 14(f)(13)
(statutory construction normally requires examination of what
legislature actually wrote, not what it should or might have
written); State v. Byers, 456 N.W.2d at 919 (impermissible to
extend terms of statute under guise of statutory construction).

We cannot decide in this opinion whether any particular test
is a "practical" test to be designed and prepared by the Law
Enforcement Academy or a "competitive" test to be arranged,
compiled, and administered by a county commission. This decision
ultimately involves a determination of fact that must be resolved
between the Law Enforcement Academy and the county commission.
See 61 IAC 1.5(13)(c).

III.

The question whether a county commission may release a service record to a regular deputy requires further examination of chapter 341A. Section 341A.6(11) specifically provides that a county commission has the duty to

keep records of the service of each [deputy sheriff]. These records shall contain facts and statements on all matters relating to the character and quality of the work done and the attitude of the individual to the work. All such service records . . . shall be subject only to the inspection of the commission.

(emphasis added). See generally Iowa Code § 341A.5 (personnel director of county commission shall keep and preserve commission records), § 341A.6(8) (county commission may keep administrative records), § 341A.19 (any administrative rules shall afford county commission, its members, and employees reasonable assistance in inspecting books, documents, and accounts pertaining to civil service). The importance of service records lies in the application of section 341A.8, which requires that a county commission take them into consideration in certifying a promotional list to a sheriff. See generally Iowa Code § 341A.6(7).

Service records would be public records subject to examination under chapter 22, entitled "Examination of Public Records," absent the last sentence of section 341A.6. See generally Iowa Code § 22.7(11) ("[p]ersonal information in confidential personnel records of public bodies" generally shall be kept confidential). The specification of a right of access by the county commission would ordinarily imply no right of access by others under chapter 22. This office has recognized that an express requirement of disclosure to a limited class of persons implies confidentiality regarding others. 1982 Op. Att'y. Gen. 51 (#81-3-5(L)) (child-support-record book open to parties and their attorneys, expressly mentioned by statute, but not to public). The law providing for the examination of public records, however, is generally directed toward providing a right of access to the general public rather than limiting the right to an individual to examine his or her own records. See Head v. Colloton, 331 N.W.2d 870, 874 (Iowa 1983) (open records law defines right of general public to public records; exemptions from this general rule only delineate exceptions to this same right and do not, for example, preclude access by agency vested with investigative authority and subpoena power); Iowa Civil Rights Comm'n v. City of Des Moines, 313 N.W.2d 491, 495 (Iowa 1981).

Indeed, in the context of the federal counterpart to the public records law, 5 U.S.C. § 552, the Supreme Court has observed that "courts have been very reluctant to give third parties" access to certain confidential reports that Congress exempted from the rule of public disclosure. U.S. Dep't of Justice v. Julian, 486 U.S. 1, 12 (1988). The Court reasoned that "it seems clear that there is good reason to differentiate between a governmental claim of privilege for [these confidential reports] when a third party is making the request and such a claim when the request is made by the subject of the report." Id. at 14.

Section 341A.6(11) thus can be interpreted to allow the inspection of service records by regular deputies, who, unlike the general public, have a direct interest in the accuracy of the information contained in their respective records. Cf. 501 IAC 7.13 (examinations and their results may be withheld "from public inspection"). See generally Iowa Code § 4.1 (statutory context a proper consideration in statutory interpretation). This interpretation of section 341A.6(11) comports with common sense and constitutional precepts protecting the rights of public officers and employees. See generally Iowa Code § 4.4(1) (legislature presumably intends its enactments to comply with constitutional commands), § 4.4(3) (legislature presumably intends its enactments to have reasonable result). Due process, for example, requires that a public officer or employee have access to a personnel file used as a basis for discipline. 4 E. McQuillin, The Law of Municipal Corporations § 12.260, at 629 (1992).

Interpreting section 341A.6(11) to allow access by regular deputies to their respective service records also comports with the underlying theme of chapter 91B, entitled "Employee Access to Personnel Files." See generally Iowa Code § 4.6(4) (proper to consider statutes on similar subjects in determining legislative intent). Specifically, section 91B.1 provides that any employee "shall have access to and shall be permitted to obtain a copy of the employee's personnel file maintained by the employee's employer, . . . including but not limited to performance evaluations, disciplinary records, and other information concerning employer-employee relations."

Although we need not decide the issue, section 91B.1 could be construed as requiring a county commission to allow inspection by regular deputies of their respective service records. Cf. Spirt v. Teachers Ins. and Annuity Ass'n, 691 F.2d 1054, 1063 (2d Cir. 1982) ("employer" in Civil Rights Act sufficiently broad to encompass any party who significantly affects access of any person to employment opportunities), vacated, 463 U.S. 1223; Owens v. Rush, 636 F.2d 283, 297 (10th Cir. 1980) (sheriff, as agent of county, an "employer" of deputy sheriffs for purposes of

Civil Rights Act); Curran v. Portland Superintending School Comm'n, 435 F. Supp. 1063, 1073 (S.D. Me. 1977) (even though it had no direct connection with actual employment of teachers, city considered their "employer" for purposes of Civil Rights Act); Schaefer v. Tannian, 394 F. Supp. 1128, 1132 (E.D. Mich. 1974) (persons charged with responsibility for hiring police officers deemed agents of city or police department and thus were "employers" for purposes of Civil Rights Act). See generally Iowa Code § 91B.1 ("employee" means any natural person employed for wages); Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255, 1260 (4th Cir. 1974) (scope of "employer" depends upon statutory purpose); State v. Lee, 37 Iowa 404, 407 (1873) ("employer" must be construed according to context); 1978 Op. Att'y Gen. 60.

Similarly, interpreting section 341A.6(11) to allow access by regular deputies to their respective service records in order to identify or correct inaccurate or misleading information comports with the underlying theme of section 22.11, entitled the "Fair Information Practices Act." See generally Iowa Code § 4.6(4) (proper to consider statutes on similar subjects in determining legislative intent). Section 22.11(1) requires every "state agency" to adopt rules "allowing a person to review a government record about that person and have additions, dissents or objections entered in that record unless the review is prohibited by statute."

In view of the foregoing, we conclude that section 341A.6(11) allows regular deputies to inspect their respective service records in order to identify or correct inaccurate or misleading information. See generally 501 IAC 7.11 ("[t]o the extent permitted by law, the subject may consent in writing to agency disclosure of confidential records").

IV.

To summarize our conclusions: First, a county may assign to reserve deputies those duties of a regular, full-time deputy for which the reserve deputies are properly trained and supervised to perform, although such assignment may reduce overtime payments to regular, full-time deputies. Second, although a county commission may arrange, compile, and administer competitive tests to determine the relative qualifications of persons seeking employment as regular deputies, the Law Enforcement Academy must design and prepare practical tests to determine the ability of persons to perform the duties of a regular deputy. Third, a county commission must allow regular deputies to inspect their

The Honorable James Van Fossen
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respective service records in order to identify inaccurate or misleading information.

Sincerely,

A handwritten signature in black ink, appearing to read "Bruce Kempkes". The signature is written in a cursive style with a large initial "B" and a long, sweeping underline.

Bruce Kempkes
Assistant Attorney General

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

August 15, 1995

Dr. James D. Collins, Jr., Chair
Iowa State Board of Medical Examiners
1209 E. Court Ave.
Executive Hills West
L-O-C-A-L

Dear Dr. Collins:

For many years the Board of Medical Examiners has licensed physicians and regulated the practice of medicine and surgery. E.g., Iowa Code § 2576 (1897). In 1971, the General Assembly passed legislation allowing a "physician's assistant" to perform medical services under a physician's supervision. 1971 Iowa Acts, 64th G.A., ch. 137. It provided the Board of Medical Examiners with authority to approve applications for supervision and to adopt rules delineating the specific medical services that a physician's assistant could perform. Id. §§ 3, 8.

The General Assembly also created an advisory committee to assist the Board of Medical Examiners regarding educational programs for physicians' assistants and approval of physicians seeking to supervise them. This advisory committee did not include a physician's assistant in its membership, and all regulatory power over physicians' assistants remained with the Board of Medical Examiners. Id. § 5.

In the last ten years, however, physicians' assistants have acquired an increasing role in governing their profession. In 1986, the General Assembly passed legislation requiring that a physician's assistant sit on the Board of Medical Examiners. 1986 Iowa Acts, 71st G.A., ch. 1003, § 1. Then, in 1988, the General Assembly created a separate Board of Physician Assistant Examiners and extinguished the physician's assistant seat on the Board of Medical Examiners. 1988 Iowa Acts, 72nd G.A., ch. 1225.¹

With the creation of the Board of Physician Assistant Examiners, the General Assembly divided the regulatory authority over the medical team of physician and physician assistant. Significant rule-making power shifted from the Board of Medical Examiners to the Board of Physician Assistant Examiners, subject to approval by a "Physician Assistant Rules Review Group" composed of members from both boards. Id. § 21.

Against the backdrop of this legislative history, you have requested an opinion about the powers and duties of the Board of Medical Examiners Board, the Board of Physician Assistant Examiners, and the Physician Assistant Rules Review Group. You ask three questions:

(1). Whether the Physician Assistant Rules Review Group must review and approve proposed rules before the filing of a "Notice of Intended Agency Action" by the Board of Physician Assistant Examiners and whether each member of the Physician Assistant Rules Review Group must have an opportunity to review the proposed rules before voting to approve them.

(2). Whether the Board of Physician Assistant Examiners has statutory authority to enact rules regulating the "conduct" of supervising physicians and, if so, whether it has statutory authority to enforce those rules against supervising physicians.

(3). Whether the Board of Physician Assistant Examiners has statutory authority for determining the procedures for evaluating the eligibility of supervising physicians.

We make the following conclusions. First, the Physician Assistant Rules Review Group must review and approve drafted rules before the filing of a Notice of Intended Agency Action by the Board of Physician Assistant Examiners; each member of the Physician Assistant Rules Review Group should have a meaningful opportunity to review drafted rules before voting to approve them.

¹ In 1988, the General Assembly substituted "physician assistant" for "physician's assistant" in the statutory language. See 1988 Iowa Acts, 72nd G.A., ch. 1225.

Second, the Board of Physician Assistant Examiners has limited powers that may affect the "conduct" of supervising physicians; however, the Board of Medical Examiners has the power to discipline them. Third, the Board of Physician Assistant Examiners has no authority over the eligibility of supervising physicians; however, it has rule-making authority over the licensing of physician assistants (subject to approval by the Physician Assistant Rules Review Group).

Our conclusions stem from the legislative intent underlying the applicable statutes governing these entities in particular and administrative agencies in general. Those statutes are contained in Iowa Code chapters 17A, 148, and 148C (1995).

Chapter 148C governs physician assistants. It provides that licensed physician assistants may perform medical services under the supervision of specified physicians. Iowa Code §§ 148C.1(4), 148C.4; see 645 IAC 325.1, 325.6(1). It also provides the Board of Physician Assistant Examiners with powers over the registering, licensing, and disciplining of physician assistants (although disciplinary decisions may be appealed to the Board of Medical Examiners). Iowa Code §§ 148C.3, 148C.5A, 148.13(4). Regarding the licensing of a physician assistant by the Board of Physician Assistant Examiners, section 148C.3 provides that the

supervising physician or physicians shall submit evidence of eligibility, as determined by the board of medical examiners, to serve as a supervising physician, information with respect to the supervising physician's professional background and specialty, scope of practice, and a plan for supervision of the physician assistant. In addition the physician assistant applicant and the supervising physician or physicians shall submit a description of how the physician assistant is to function within the scope of practice.

Iowa Code § 148C.3(4) (emphasis added). See generally Iowa Code § 4.1(30)(a) (legislature's use of "shall" normally imposes a duty).

Chapter 148 governs physicians. It defines the practice of medicine and surgery, details licensing requirements, and sets forth the grounds for license revocation by the Board of Medical Examiners. Iowa Code §§ 148.1, 148.3, 148.6. It also provides the Board of Medical Examiners with power over physicians seeking to supervise physician assistants: section 148.13(1) provides that the Board of Medical Examiners "shall adopt rules setting forth in detail its criteria and procedures for determining the

Dr. James D. Collins, Jr.

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ineligibility of a physician to serve as a supervising physician under chapter 148C." (emphasis added). See generally 653 IAC 10.2, 21.4 (rules determining ineligibility of supervising physicians).

Chapters 148 and 148C thus involve both boards in the licensing of physician assistants. The Board of Physician Assistant Examiners has rule-making and decision-making authority over the licensing of physician assistants, the application for which must include evidence of a supervising physician's eligibility. The Board of Medical Examiners has rule-making authority over the eligibility of supervising physicians.

I.

You have asked whether the Physician Assistant Rules Review Group must review and approve drafted rules before the filing of a Notice of Intended Agency Action by the Board of Physician Assistant Examiners and whether each member of the Physician Assistant Rules Review Group must have an opportunity to review drafted rules before voting to approve them. Section 148C.7 provides the starting point for resolving the first part of your question.

Section 148C.7(1) provides that "[t]he review group shall review and approve or disapprove rules proposed for adoption by the board of physician assistant examiners" and that "[a] rule shall not become effective without approval of the review group." See generally Iowa Code § 4.1(30)(a) ("shall" defined). Section 148C.7(2) provides that "[p]roposed rules must be submitted to the review group for prior review and approval." (emphasis added).

The timing of this "prior review" appears ambiguous: we must ascertain whether it must take place before the Board of Physician Assistant Examiners proposes a rule or whether it must take place before the Board of Physician Assistant Examiners adopts a proposed rule. Before examining the language of section 148C.7(2), we will briefly review chapter 17A to provide some background to the rule-making process of administrative agencies.

Chapter 17A, the "Iowa Administrative Procedure Act," sets forth the mechanics of rulemaking for state administrative agencies. See generally Iowa Code § 17A.2 (defining "agency," "agency action," "rule," and "rule-making"); Bonfield, "The Iowa Administrative Procedure Act," 60 Iowa L. Rev. 731, 760-62, 824-32 (1975). Chapter 17A seeks to ensure the passage of rules in an open, fair, efficient, and uniform manner. Bonfield, supra, 60 Iowa L. Rev. at 736. Rulemaking "is to be essentially an informed legislative activity," id. at 853, which in turn is premised upon "a broad range of participation" in the informational process, 1 C. Koch, Administrative Law and Practice § 2.6, at 67 (1985).

A "Notice of Intended Agency Action," published in the Iowa Administrative Bulletin, triggers the opportunity for public participation in rulemaking. Iowa Code § 17A.4(1)(a). This notice effectively elevates drafted rules -- the "intended agency action" -- to formally "proposed rules" and requires "a statement of either the terms or the substance of the intended action or a description of the subjects and issues involved." Iowa Code § 17A.4(1)(b). These requirements apparently presume that an opportunity for the general public to present relevant information regarding the merits of proposed rules will result in fair, worthy, and responsive rules. Bonfield, supra, 60 Iowa L. Rev. at 845-60.

Setting section 148C.7(2) against the framework of chapter 17A, we see no reason to construe "prior review" to mean "review subsequent to" other steps in the rule-making process. See Funk & Wagnalls Standard Handbook of Synonyms, Antonyms, and Prepositions 333-34 (1947) ("subsequent" an antonym of "prior"); Webster's Ninth New Collegiate Dictionary 908 (1979) ("prior" means before, in advance of, or earlier in time or order). See generally Iowa Code § 4.1(38) (statutory terms shall be construed according to approved English usage). Although section 148C.7(2) does not link "prior review" to any specific time period in the rule-making process, it does indicate through use of the phrase "[p]roposed rules" that such review means at a time before the Board of Physician Assistant Examiners proposes a rule. Indeed, the phrase "[p]roposed rules" is the only reference section 148C.7(2) provides with regard to the "prior review" the Physician Assistant Rules Review Group must perform before a rule becomes effective.

Given the grammatical linkage between "[p]roposed rules" and "prior review," we believe that the General Assembly intended for this review to take place before drafted rules become formally proposed through the filing of a Notice of Intended Agency Action. Cf. State ex rel. Dep't of Transp. v. General Elec. Credit Corp., 448 N.W.2d 335, 345 (Iowa 1989) (generally, qualifying words and phrases in statute only refer to immediately preceding antecedent); 1994 Op. Att'y Gen. ___ (#93-7-6) (same). See generally Llewellyn, "Remarks on the Theory of Appellate Decision," 3 Vand. L. Rev. 395, 404 (1950) (words and phrases should be interpreted according to the proper grammatical effect of their arrangement within statute). This construction squares with the result reached by another attorney general considering analogous statutes. Cf. 1979-80 Mich. Op. Att'y Gen. 987 (administrative agency may adopt rule only after all preliminary requirements, including approval by joint committee, have been met).

Moreover, a construction of section 148C.7(2) that requires review by the Physician Assistant Rules Review Group before the Board of Physician Assistant Examiners files a Notice of Intended Agency Action has support on a common-sense level. See generally Iowa Code § 4.4(3) (presumption established by legislature that it

intends reasonable results in enacting statutes), § 4.6(5) (in determining legislative intent underlying ambiguous statutes, proper to consider consequences of particular constructions). Such a review would tend to serve the public interest in effective, expeditious, and efficient government: resulting discussions might justifiably lead to the early death of drafted rules inside the Physician Assistant Rules Review Group itself and thereby foreclose the time, money, and effort accompanying any public input on their merits as formally proposed rules.

With regard to the second part of your question, we believe that "review" in section 148C.7 presupposes a meaningful opportunity for review. Cf. Community Action Research Group v. Iowa St. Commerce Comm'n, 275 N.W.2d 217, 219-20 (Iowa 1979) (interested party filing petition for proposed rule seeks to induce agency "to engage in reasoned consideration of" or "give fair consideration to" proposed rule). See generally Johnston v. Iowa St. Realty Comm'n, 344 N.W.2d 236, 239 (Iowa 1984); 1990 Op. Att'y Gen. 37 (#89-8-1(L)).

Although we cannot quantify the scope of this opportunity for review as a matter of law, experience, fairness, ethics, and common sense suggest that each member of the Physician Assistant Rules Review Group should have adequate time to review drafted rules before voting to approve them. See generally Bonfield, State Administrative Rule Making § 5.3, at 150 (1986); 1 Koch, supra, § 1.11, at 25. Groups or committees composed of equal members necessarily take action on a collective basis and not on a factional one, and informed action requires prior notice of the purpose of meetings and an opportunity to debate the issues before voting on them. Mason's Manual on Legislative Procedure 4-5, 75, 78, 91 (1979); Robert's Rules of Order 249-50 (1981); see 645 IAC 325.9(3)(e) (Board of Physician Assistant Examiners "governs its proceedings by Robert's Rules of Order"); 653 IAC 10.3(4) (Board of Medical Examiners "[g]overns its proceedings by Robert's Rules of Order").

II.

In asking whether the Board of Physician Assistant Examiners has statutory authority to regulate the conduct of supervising physicians, you have not specified the particulars of that "conduct." Accordingly, we will only discuss the statutory authority generally relating to supervising physicians. This authority lies in chapters 148 and 148C and involves both the Board of Medical Examiners and the Board of Physician Assistant Examiners.

In giving the Board of Physician Assistant Examiners rule-making power in 1988, the General Assembly provided that the existing rules of the Board of Medical Examiners governing

physician assistants "shall continue in effect as rules of the board of physician assistant examiners until modified by rules of the board of physician assistant examiners" 1988 Iowa Acts, 71st G.A., ch. 1003, § 28(2). Thus, since 1988, the Board of Physician Assistant Examiners has had rule-making power over physician assistants (subject to approval by the Physician Assistant Rules Review Group). Iowa Code § 148C.7. This power may affect the conduct of supervising physicians to some degree. E.g., 645 IAC 325.6(5)(a)(4) (rule allowing requirement that assistant and physician work together for up to three months before utilization of assistant in remote clinic), 325.6(6)(a) (rule requiring that physician shall review patient care given by assistant on weekly basis and shall cosign all notes on patient care rendered without documented direct consultation with physician).

In addition, the Board of Physician Assistant Examiners has specific powers that may have an impact upon supervising physicians. It may enact rules defining "supervision" to require the personal presence of physicians for certain medical services performed by their physician assistants. Compare Iowa Code § 148C.1(4) with Iowa Code §§ 147.13(1), 147.76, 148.6. It also may adopt rules "which will permit qualified practicing physicians to supervise licensed physician assistants at a free medical clinic on a temporary basis." Iowa Code § 148C.3(9).

Last, the Board of Physician Assistant Examiners has some power, in issuing a license, over the type of medical services that physician assistants may perform for supervising physicians. It may issue licenses to physician assistants only if physicians submit plans for their supervision and descriptions of their functions within the physicians' medical practices. Iowa Code § 148C.3(4). In addition, it may modify these plans before granting approval. Iowa Code § 148C.3(6).

The Board of Physician Assistant Examiners thus has limited powers that may affect the "conduct" of supervising physicians. The Board of Medical Examiners, however, has exclusive power to license and discipline all physicians; whether they supervise physician assistants has no effect upon this power. Iowa Code §§ 148.3, 148.6, 272C.1(6)(1), 272C.3(1)(e), (j). Disciplinary rules promulgated by the Board of Medical Examiners specifically prohibit "[n]egligence in failing to exercise due care in the delegation of medical services to or supervision of" physician assistants. 653 IAC 12.4(27). The Board of Medical Examiners also has the corollary power to review contested cases involving the discipline of physician assistants by the Board of Physician Assistant Examiners. Iowa Code § 148C.6A ("a decision of the board in a contested case involving discipline of a person licensed as a physician assistant may be appealed to the board of medical

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examiners"). See generally Iowa Code § 4.1(30)(c) ("may" normally confers a statutory power).

III.

Your question about the authority of the Board of Physician Assistant Examiners over the eligibility of supervising physicians finds an answer in chapter 148 as well as chapter 148C. Section 148.13(1) requires the Board of Medical Examiners to determine "the ineligibility of a physician to serve as a supervising physician," and section 148C.3(4) similarly requires a physician to "submit evidence of eligibility, as determined by the board of medical examiners," to serve as a supervising physician.

Sections 148.13(1) and 148C.3(4) plainly leave the Board of Medical Examiners with the power to determine the eligibility of supervising physicians. They contain no ambiguous language, and such a circumstance precludes the application of principles relating to statutory construction or interpretation. See Stroup v. Reno, 530 N.W.2d 441, 443 (Iowa 1995); 3A Sutherland's Statutory Construction § 66.01, at 2 (1992); see also Rubin v. United States, 449 U.S. 424, 430, 101 S. Ct. 698, 66 L. Ed. 2d 633 (1981) (only "rare and exceptional" circumstances allow for construction or interpretation of unambiguous statute). We therefore conclude that the Board of Physician Assistant Examiners has no authority over the eligibility of supervising physicians. Cf. 1988 Neb. Op. Att'y Gen. 88016 (under Nebraska law, medical examiners board approves supervising physicians seeking to use physician assistants).

This conclusion receives support when viewed on a common-sense level. See generally Iowa Code § 4.4(3), (4) (presumptions established by legislature that it intends reasonable results as well as results feasible of execution in enacting statutes). Placing the power to determine the eligibility of supervising physicians with the Board of Medical Examiners fits appropriately within the statutory framework, because that board holds the corollary power to discipline them. See Iowa Code §§ 147.103A, 148.6; see also 645 IAC 325, 653 IAC 10.3(5).

We note parenthetically that chapter 148 requires both boards to act in harmony to promote the public health. Section 148.13(2) provides that the Board of Medical Examiners shall establish specific procedures "for consulting with and considering the advice of" the Board of Physician Assistant Examiners in determining whether to initiate a disciplinary proceeding against a physician in a matter involving the supervision of a physician assistant. Section 148.13(3) also provides that in exercising their respective powers the boards "shall cooperate with the goal of encouraging the utilization of physician assistants in a manner that is consistent with the provision of quality health care and medical services for the citizens of Iowa."

Dr. James D. Collins, Jr.

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We also note that chapter 148C requires cooperation on the part of both boards. Section 148C.5A provides that rules shall be adopted by the Board of Physician Assistant Examiners "to establish specific procedures for consulting with and considering the advice of" the Board of Medical Examiners regarding the discipline of physician assistants.

IV.

In summary: The Physician Assistant Rules Review Group must review and approve drafted rules before the filing of a Notice of Intended Agency Action by the Board of Physician Assistant Examiners; each member of the Physician Assistant Rules Review Group should have a meaningful opportunity to review drafted rules before voting to approve them. The Board of Physician Assistant Examiners has limited powers that may affect the "conduct" of supervising physicians; however, the Board of Medical Examiners has the power to discipline them. The Board of Physician Assistant Examiners has no authority over the eligibility of supervising physicians; however, it has rule-making authority over the licensing of physician assistants (subject to approval by the Physician Assistant Rules Review Group).

Sincerely,



Bruce Kempkes
Assistant Attorney General

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

August 23, 1995

The Honorable Maggie Tinsman
3055 Redwing Ct.
Bettendorf, IA 52722

Dear Senator Tinsman:

You have requested an opinion regarding the duties of a city toward its employees on military leave. You ask about (1) the amount of civilian pay a city must provide to its employees on military leave; (2) the type of duties occurring on military leave that trigger civilian pay; (3) the number of days in a year a city must provide civilian pay to its employees on military leave; (4) the amount of civilian pay a city must provide to city firefighters and police officers, who do not work a regular forty-hour week, while on military leave; and (5) the obligation of a city to reimburse its employees for travel time occasioned by military leave.

These five questions primarily involve Iowa Code section 29A.28 (1995), which provides:

All officers or employees of the state, or a subdivision thereof, or a municipality other than employees employed temporarily for six months or less, who are members of the national guard, organized reserves or any component part of the military, naval, or air forces or nurse corps of this state or nation, or who are or may be otherwise inducted into the military service of this

state or of the United States, shall, when ordered by proper authority to active state or federal service, be entitled to a leave of absence from such civil employment for the period of such active state or federal service, without loss of status or efficiency rating, and without loss of pay during the first thirty days of such leave of absence. The proper appointing authority may make a temporary appointment to fill any vacancy created by such leave of absence.

(emphasis added). See generally Iowa Code § 4.1(30)(a) (General Assembly's use of "shall" normally imposes a duty); Annot., "Employee Compensation for Military Service," 8 A.L.R.4th 704 (1981).

Preliminarily, we note that section 29A.28 seeks to encourage military service by providing a period of leave without loss of status, efficiency rating, or pay to public employees. 1936 Op. Att'y Gen. 619, 620; accord 1980 Op. Att'y Gen. 851 (#80-11-5(L)). Accordingly, section 29A.28 "should be liberally construed" in their favor in cases of ambiguity. Gibbons v. City of Sioux City, 242 Iowa 160, 45 N.W.2d 842, 844 (1951); see Iowa Code § 4.2. Although section 29A.28 "may lead to situations where a public employee is compensated twice, by his or her employer, and by military authorities, for one day's service, it must be assumed that this [circumstance] was within the contemplation of the [General Assembly in enacting section 29A.28]." 1980 Op. Att'y Gen. 851 (#80-11-5(L)).

We conclude that a city must pay its employees on military leave their full, normal civilian pay when they have been properly ordered to active state or federal service, but only for a maximum of thirty days per year; that, within this thirty-day limitation, a city must pay its firefighters and police officers on military leave the amount they would receive if present on the job for the city; and that a city need not reimburse its employees for time or expense incurred in traveling to their duty assignments.

I.

Your first question asks, "Is a city required to reimburse its employees on military leave for anything more than the difference between what they would regularly receive from the city and the amount they receive from the military for performing military duty?" This office has already issued opinions answering that question.

Nearly forty years ago, for example, we concluded that "without loss of pay" in section 29A.28 meant without loss of civilian pay. 1956 Op. Att'y Gen. 166, 167; accord 1980 Op. Att'y Gen. 851 (#80-11-5(L)); 1936 Op. Att'y Gen. 619, 620. In other words, "There is no authority in the section for deduction of military pay" from regular civilian salaries or wages. 1956 Op. Att'y Gen. 166, 167. Opinions from other states have since reached this conclusion in interpreting similar statutes. See, e.g., 219 Ala. Op. Att'y Gen. 51 (1990); 74 Cal. Op. Att'y Gen. 190 (1991); 1978-79 Ky. Op. Att'y Gen. (#2-569); 1980 S.C. Op. Att'y Gen. 100; 1981 Utah Op. Att'y Gen. (#81-23); 1985-86 Va. Op. Att'y Gen. 198. A recent decision by the Supreme Court of Iowa, moreover, indicates agreement with our prior opinions. See Painters and Allied Trades Union v. City of Des Moines, 451 N.W.2d 825, 827 (Iowa 1990) (General Assembly intended in section 29A.28 to ensure that public employees on military leave will suffer no penalty in their civilian employment for thirty days, rather than "obtain a bonus beyond their normal civilian compensation").

We have no reason to withdraw our longstanding opinions. See 1994 Op. Att'y Gen. ____ (#94-6-5(L)). Thus, a city must pay its employees their full, normal civilian pay for the first thirty days of military leave.

II.

Your second question, phrased in two parts, asks:

What type of military duty requires a leave of absence without loss of pay during the first thirty days of such leave? What are the requirements for inactive, active, and training duty for all branches of the military, national guard, or organized reserves of either federal or state governments?

This question may rest in part upon chapter 581 of the Iowa Administrative Code, which, in rule 14.9, provides that a state employee

shall, when ordered by proper authority to active or inactive state or federal military service, be granted leave . . . for the period of active or inactive state or federal military service without loss of pay for the first 30 workdays of such leave. . . .

581 IAC 14.9. In Painters and Allied Trades Union v. City of Des Moines, however, the Supreme Court of Iowa rejected the argument

that administrative rule 14.9 interprets section 29A.28. "It is clear to the court [that administrative rule 14.9] was not undertaken pursuant to . . . section 29A.28" and, accordingly, has no weight in determining the meaning of section 29A.28. 451 N.W.2d at 826.

In the past, we have concluded that section 29A.28 encompasses "annual training encampment" and certain "field training." 1978 Op. Att'y Gen. 618, 620; 1936 Op. Att'y Gen. 619, 620-21. In view of your broadly worded question about what military duties possibly fall within the phrase "active state or federal service," we cannot provide you with any specific answer. See generally 61 IAC 1.5(2) (opinion request must contain sufficient information to answer precise legal question), 1.5(3)(d) (opinion request should involve a concise question of law); 1984 Op. Att'y Gen. 116, 117; 1982 Op. Att'y Gen. 308, 310.

We can, however, direct your attention to section 29A.1, which provides two key definitions:

1. "Active state service" means service on behalf of the state when public disaster, riot, tumult, breach of the peace or resistance of process occurs or threatens to occur, or when under martial law or at encampments ordered by state authority. Active state service also includes serving as adjutant general, deputy adjutant general, state quartermaster and administrative orders officer, but does not include training or duty required or authorized under 32 U.S.C. § 502-505, or any other training or duty required or authorized by federal law and regulations.

. . .

3. "Federal service" means duty authorized and performed under the provisions of 10 U.S.C. or 32 U.S.C., § 502-505 which includes unit training assemblies commonly known as "drills," annual training, rifle marksmanship, full-time training for school purposes and recruiting.

Iowa Code § 29A.1 (1), (3) (emphasis deleted). See generally 1980 Op. Att'y Gen. 851 (#80-11-5(L)).

Because federal statutes may serve as bases for defining "active state or federal service," we also direct your attention to them: 10 U.S.C.A. § 101 ("active service" means service on

full-time National Guard duty or on "active duty," which is full-time duty in active military service; full-time training duty; annual training duty; and attendance while in active military service at a school designated as a service school); 32 U.S.C.A. § 101(12) ("active duty" means full-time duty in the active military service, including full-time training duty; annual training duty; and attendance while in active military service at a school designated as a service school, but excluding full-time National Guard duty), § 502 (National Guard members shall assemble for drill and instruction, including indoor target practice; and participate in training at encampments, maneuvers, outdoor target practice, or other exercises), § 503 (National Guard members may attend schools conducted by commissioned officers of Regular Army or Regular Air Force or participate in small-arms competition), § 504 (National Guard members may attend schools conducted by Army or Air Force, conduct or attend schools conducted by the National Guard, or participate in small-arms competition), § 505 (National Guard members may attend any service school, except the United States Military Academy, to pursue a regular course of study or may receive routine practical instruction at or near Army post or Air Force base during field training or other outdoor exercise) (Supp. 1995).

III.

Your third question asks, "How often must a city provide a military leave of absence without loss of pay?" Section 29A.28 does not contain any time limitation; it simply provides that public employees shall be entitled to "a leave" of absence "when ordered" to active state or federal service and that they shall receive their civilian pay during the "first thirty days" of such leave of absence. Again, this office has already issued opinions answering your question.

First, we concluded in 1940 that although section 29A.28

is not explicit upon the matter, the [General Assembly] evidently intended that such leave should be annual. We can discover no other reasonable interpretation of the statute. This being true, [public] employees who are members of the national guard are entitled to the privileges granted by the statute if their leave does not exceed thirty (30) days per year.

1940 Op. Att'y Gen. 245, 245-46. Accord 1980 Op. Att'y Gen. 851 (#80-11-5(L)); 1978 Op. Atty. Gen. 618; 1978 Atty. Gen. 68; 1974 Op. Atty. Gen. 31; 1974 Op. Atty. Gen. 234; 1974 Op. Atty. Gen. 404; 1968 Op. Atty. Gen. 895; 1956 Op. Atty. Gen. 179; 1956 Op.

Atty. Gen. 166; 1944 Op. Atty. Gen. 134; 1942 Op. Atty. Gen. 130;
1942 Op. Atty. Gen. 41; 1940 Op. Atty. Gen. 587.

Second, we concluded in 1974 that the phrase "first thirty days" in section 29A.28 means the first thirty days "of the total of all leaves taken annually." 1974 Op. Att'y Gen. 404, 404-05. In other words, it does not mean the first thirty days "per incident of military leave" in a year. Id.

We have no reason now to withdraw our prior opinions. See 1994 Op. Att'y Gen. ____ (#94-6-5(L)). Section 29A.28 thus applies to a maximum of thirty days' military leave per year.

IV.

Noting that city firefighters work ten shifts of twenty-four hours in a thirty-day period (with one shift encompassing parts of two calendar days) and that city police officers effectively work around the clock every day of the year, your fourth question asks, "What does 'workdays' mean in computing civilian pay for military leave?" This question again may be premised in part upon administrative rule 14.9, which provides that military leave without loss of pay applies to the first thirty "workdays" and similarly that military leave "may be utilized for up to 30 workdays in any calendar year." 581 IAC 14.9. Section 29A.28, in contrast, merely provides for civilian pay for the "first thirty days" of military leave.

In addition to its conclusion that administrative rule 14.9 has no weight in interpreting section 29A.28, the Supreme Court of Iowa in Painters and Allied Trades Union v. City of Des Moines held that "days" in section 29A.28 means calendar days and not workdays. 451 N.W.2d at 826; see 1953 Op. Att'y Gen. 28. As a general rule, this holding effectively prohibits receipt of civilian pay for active state or federal service occurring on weekends. As the court explained, section 29A.28 ties the amount of civilian pay for being on leave with the military to the amount of civilian pay for being "on the job" with the public employer:

The phrase ["without loss of pay"] assures that the [public employee] will be treated the same by the employer during a period of absence in military service as he or she would be if present on the job. For example, an employee absent for military service, who normally worked a forty-hour week, eight hours a day, Monday through Friday, would receive the same pay for those days as though present on the job. The employee would serve "without loss of pay." This same employee

normally would not work Saturday and Sunday, days off, and consequently would not normally be paid for those days off. If absent on Saturday and Sunday due to military leave, this employee would also not be paid for those days since he or she would not suffer a loss of pay for those days. The employee has not had a "loss of pay" when none was due. One cannot lose that to which one is not entitled.

Id. at 827. Accordingly, we must withdraw those portions of our opinions preceding this case that required civilian pay for public employees' active state or federal service occurring on weekends and other non-working days. See, e.g., 1980 Op. Att'y Gen. 581 (#80-11-5(L)); 1978 Op. Att'y Gen. 608, 609.

Painters and Allied Trades Union v. City of Des Moines only addressed section 29A.28 as it applied to public employees working a regular forty-hour week; it did not address decidedly more complex situations that involve public employees working unusual schedules. Without any detailed information, however, we cannot provide a specific answer governing a city's duty to its firefighters and police officers on military leave who may work such unusual schedules. See generally 61 IAC 1.5(2), 1.5(3)(d); 1984 Op. Att'y Gen. 116, 117; 1982 Op. Att'y Gen. 308, 310. Applying section 29A.28 requires knowledge of specific facts and circumstances.

We can, however, direct your attention to the statement in Painters and Allied Trades Union v. City of Des Moines that public employees should be treated the same during their military leave as they would be treated "if present on the job" for their public employers. 451 N.W.2d at 827. It is this principle that must guide a city in computing the civilian pay, pursuant to section 29A.28, for its firefighters and police officers on military leave. In the past, we have suggested that a city take a practical approach in performing this task:

In the case of regular employees paid on an hourly basis, but whose number of hours might vary from week to week on account of weather conditions, the situation should be dealt with by paying such employees during such absence the average of his weekly earnings during the preceding year. In cases where such employee was engaged in work which would normally be discontinued during a portion of the year, the average of the weekly earnings should be determined by the weekly earnings during the normal working season. In the

cases of employees in presumed regular employment who have not worked long enough to establish an average of weekly earnings, the payments during leave of absence should be the average paid to others in similar employment.

1936 Op. Att'y Gen. 619, 622. See generally Bewley v. Villisca Community Sch. Dist., 299 N.W.2d 904, 905-07 (Iowa 1980) (requiring public employees to combine vacation with military leave violates section 29A.43, which prohibits discrimination against their "rights to vacation"); 1980 Op. Att'y Gen. 851 (#80-11-5(L)) (under certain circumstances, public employer may be able to "schedule around" employees' military leave after requesting dates of anticipated military service); 1974 Op. Att'y Gen. 31, 32 (same).

V.

Your fifth question asks, "Is travel time reimbursable when it is requested to accommodate an eligible duty assignment?" Section 29A.28 does not say anything about travel time; it simply provides that public employees shall not lose "status," "efficiency rating," or "pay" for the first thirty days of military leave for active state or federal service. No matter how broadly construed or interpreted, this language does not require a city to reimburse its employees for time or expense incurred in traveling to military duty assignments. See Black's Law Dictionary 1016 (1979) ("pay" means compensation, wages, salaries, commissions, and fees). See generally Iowa Code § 4.1(38) (words and phrases shall be construed according to context and approved usage of language, and technical words and phrases shall be construed according to their peculiar and appropriate meaning), § 29A.1(12) (undefined words and phrases in chapter 29A shall have the meaning commonly ascribed to them in the military profession); Painters and Allied Trades Union v. City of Des Moines, 451 N.W.2d at 827 (impermissible to extend, enlarge, or otherwise change statutory terms under guise of construction).

We have no power to rewrite section 29A.28 or ignore the plain meaning of its words and phrases to reach a particular result. See Painters and Allied Trades Union v. City of Des Moines, 451 N.W.2d at 827 (impermissible to supply words for or read them into statutes); see also Farmers Coop. Co. v. DeCoster, 528 N.W.2d 536, 539 (Iowa 1995). Had the General Assembly intended to impose upon public employers the substantial responsibility of reimbursing its employees for time or expense incurred in traveling to military duty assignments, it presumably would have provided for this reimbursement in express language. See Iowa R. App. P. 14(f)(13) (permissible only to consider what

The Honorable Maggie Tinsman
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was written in statute, not what might or should have been written); Painters and Allied Trades Union v. City of Des Moines, 451 N.W.2d at 827; see also Kohrt v. Yetter, 344 N.W.2d 245, 248 (Iowa 1984); 1936 Op. Att'y Gen. 619, 621.

Such reimbursement, we believe, could be considered a windfall to public employees on military leave who also receive reimbursement from the federal government for travel to duty assignments. See generally 37 U.S.C.A. §§ 404 et seq. (Supp. 1994). If so, it tends to conflict with the legislative intent underlying section 29A.28, which simply ensures that public employees on military leave "will suffer no penalty in their civilian employment [for thirty days] rather than . . . obtain a bonus beyond . . . normal civilian compensation." Painters and Allied Trades Union v. City of Des Moines, 451 N.W.2d at 827. See generally Office of Consumer Advocate v. Iowa State Commerce Comm'n, 376 N.W.2d 878, 880 (Iowa 1987) (goal is to determine and best promote intent of General Assembly in resolving statutory issue).

VI.

In summary: A city must pay its employees on military leave their full, normal civilian pay when they have been properly ordered to active state or federal service, but only for a maximum of thirty days per year; a city must pay its firefighters and police officers on military leave the amount they would receive if present on the job for the city; and a city need not reimburse its employees for time or expense incurred in traveling to military duty assignments.

Sincerely,



Bruce Kempkes
Assistant Attorney General

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

September 13, 1995

Mark Kruse
Appanoose County Attorney
Courthouse
Centerville, IA 52544

Dear Mr. Kruse:

You have requested an opinion involving the powers of a county board of supervisors over a county sheriff's office. You mention that a county sheriff who recently lost two deputy sheriffs as the result of budget cuts applied to have a federal grant pay 75 percent of wages and benefits for an additional deputy; that he planned to use forfeited property acquired by his office to pay the remaining 25 percent of those wages and benefits; and that, as a result, the county board would not need to appropriate any county funds for wages and benefits paid to the additional deputy. You also mention that after the federal government initially approved this application, the county board refused to participate in the grant process.

You ask whether the county sheriff may proceed with his application to receive federal funds and, upon their receipt, to hire the additional deputy without approval from the county board. We conclude that Iowa Code chapter 331 (1995) prohibits him from doing so.

Chapter 331 governs county boards. It generally provides that "[a] power of a county is vested in [its county] board, and a duty of a county shall be performed by or under the direction of [its] board except as otherwise provided by law." Iowa Code § 331.301(2). See generally Iowa Code § 4.1(3)(a) ("shall"

normally imposes a statutory duty). Chapter 331 grants the county board the power to appropriate "the amounts deemed necessary for each of the different county officers and departments" for each fiscal year. Iowa Code § 331.434(6); see Iowa Code § 331.437 (unlawful for county officer to authorize expenditure of sum for his or her department larger than the amount appropriated by county board).

Chapter 331 specifically grants county boards certain powers over the hiring of deputy sheriffs. First, section 331.323(2)(g) provides county boards with the power to "[e]stablish the number of deputies, assistants, and clerks for the offices of auditor, treasurer, recorder, sheriff, and county attorney." Second, section 331.903(1) provides:

The auditor, treasurer, recorder, sheriff, and county attorney may each appoint, with approval of the [county board], one or more deputies, assistants, or clerks The number of deputies, assistants, and clerks for each office shall be determined by the [county board] and the number and approval of each appointment shall be adopted by a resolution recorded in the minutes of the [county board].

(emphasis added).

Chapter 331 also governs county sheriffs. Sections 331.652 and 331.653 grant various powers and impose various duties upon county sheriffs. Section 331.652(7) specifically provides that [s]ubject to the requirements of . . . section 331.903, [county sheriffs] may appoint and remove deputies, assistants and clerks." (emphasis added).

We have previously determined that section 331.903(1) "clearly vests the [county board] with the authority to decide the total number of deputy sheriffs the sheriff may employ" 1986 Op. Att'y Gen. 92 (#86-4-2(L)). We have no reason now to depart from this conclusion. The clear import of the plain language in section 331.903(1), as well as sections 331.323(2)(g) and 331.652(7), provides county boards with discretionary power to determine the number of deputy sheriffs who shall serve their respective counties. See 1934 Op. Att'y Gen. 65 (under precursor to section 331.903(1), county boards may order county officer not to employ deputy officer). Nothing indicates any power on the part of county sheriffs to override the power of county boards in this area.

Our analysis need not proceed any further. "When a statute is plain and its meaning is clear, [there is no need to] search

Mr. Mark Kruse
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for its meaning beyond its expressed language. [R]esort to rules of statutory construction [or interpretation may take place] only when the terms of the statute are ambiguous." Stroup v. Reno, 530 N.W.2d 441, 443 (Iowa 1995). That the hiring of deputies results in no fiscal outlay by counties for their wages and benefits is a circumstance having no relevance under sections 331.323(2)(g), 331.652(7), and 331.903(1). See, e.g., State v. Rouse, 290 N.W.2d 911, 915 (Iowa 1980) (generally improper to imply exception or exemption into statute that restricts its applicability); 1996 Op. Att'y Gen. __ (#95-5-2(L)).

To summarize: county boards of supervisors have discretionary power to determine the number of deputy sheriffs who shall serve their respective counties, and, accordingly, county sheriffs have no power to hire deputy sheriffs without approval from their county boards of supervisors.

Sincerely,



Bruce Kempkes
Assistant Attorney General

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

September 13, 1995

The Honorable Dwight Dinkla
State Representative
P.O. Box 37
207 N. 5th Street
Guthrie Center, Iowa 50115

Dear Representative Dinkla:

You have requested an Attorney General's opinion as to whether Iowa's franchise tax, as amended in 1995 by Senate File 478, violates 31 U.S.C. § 3124(a) by discriminating against federal obligations held by Iowa financial institutions.

31 U.S.C. § 3124(a) provides:

(a) Stocks and obligations of the United States Government are exempt from taxation by a State or political subdivision of a State. The exemption applies to each form of taxation that would require the obligation, the interest on the obligation, or both, to be considered in computing a tax, except--

- (1) a nondiscriminatory franchise tax or another nonproperty tax instead of a franchise tax, imposed on a corporation; and
- (2) an estate or inheritance tax.

This federal statute is a codification of the constitutional prohibition of discrimination against federal securities, grounded upon concepts of federalism, article I, § 8, cl. 2 (congressional authority to borrow money) and article VI, cl. 2 (Supremacy Clause) of the United States Constitution. 1980 Op. Att'y Gen. 42, 44.

The Iowa franchise tax is imposed on financial institutions by Iowa Code section 422.60(1) (1995) for the privilege of doing business in Iowa as financial institutions. The tax is "according to and measured by net income" as "net income" is defined in Iowa Code section 422.61(2). The net income base by which the franchise tax is measured includes interest and dividends from federal securities. Iowa Code section 422.61(2)(c). It also, however, includes income from obligations of the state and its political subdivisions. Iowa Code section 422.61(2)(b). Therefore, the Iowa franchise tax does not discriminate against federal securities with respect to the initial inclusion of income in the net income base. Your question, however, concerns the effect of the denial of a deduction provided for in the amendments to section 422.61 in Senate File 478.

Senate File 478 added the following provision to Iowa Code section 422.61(2) regarding the "net income" measure for the franchise tax:

f. A deduction shall not be allowed for that portion of the taxpayer's expenses computed under this paragraph which is allocable to an investment in an investment subsidiary. The portion of the taxpayer's expenses which is allocable to an investment in an investment subsidiary is an amount which bears the same ratio to the taxpayer's expenses as the taxpayer's average adjusted basis, as computed pursuant to section 1016 of the Internal Revenue Code, of investment in that investment subsidiary bears to the average adjusted basis for all assets of the taxpayer. The portion of the taxpayer's expenses that is computed and disallowed under this paragraph shall be added.

Senate File 478 also added the following provision to section 422.61 to define "investment subsidiary":

1A. "Investment subsidiary" means an affiliate that is owned, capitalized, or utilized by a financial institution with one of its purposes being to make, hold, or manage, for and on behalf of the financial institution, investments in securities which the financial institution would be permitted by applicable law to make for its own account.

Deductions to be subtracted from what would otherwise be the "net income" measure for a tax are a matter of legislative grace which the legislature can disallow as it chooses. Regan v. Taxation With Representation, 461 U.S. 540, 544, 549, 103 S. Ct. 1997, 76 L. Ed. 2d 129, 136, 139 (1983); Shell Oil Co. v. Bair, 417 N.W.2d 425, 430 (Iowa 1987). Allowance for deductions does not turn on general equitable

considerations. Brown Group, Inc. v. Administrative Hearing Com'n, 649 S.W.2d 874, 877 (Mo. 1983). "For taxation purposes, 'income' is to be determined in accordance with rules laid down by the statute, and it may well happen that the application of such rules will not establish the real net income in many instances; neither is it necessary that they should." State v. Wisconsin Tax Commission, 175 N.W. 931, 932 (Wis. 1920). The legislature is not required to allow a deduction for expenses of doing business as long as it does not unconstitutionally discriminate in deciding which deductions to allow. The fairness of the tax is within the prerogative of the legislature. Yaeger v. Dubno, 449 A.2d 144, 147 (Conn. 1982).

The legislature has wide discretion in determining the measure of the Iowa franchise tax. See Mobil Oil Corp. v. Ley, 416 N.W.2d 680, 682 (Wis. App. 1987) (concluding that legislature was within its discretion to measure the corporate franchise tax by the corporation's net income without deducting the windfall profit tax). For example, the validity of the franchise tax does not depend upon whether the measuring base relies upon gross income or net income. Shell Oil Co. v. Bair, 417 N.W.2d 425, 430 (Iowa 1987); Com'r of Revenue v. Mass. Mut. Life Ins. Co., 428 N.E.2d 297, 303 (Mass. 1981). Also, the legislative purpose in amending the franchise tax is irrelevant as long as the tax operates in a constitutional way. Sav. League of Wis. v. Dept. of Revenue, 416 N.W.2d 650, 654 (Wis. App. 1987), review denied, 428 N.W.2d 554 (Wis. 1988), appeal dismissed, 488 U.S. 806, 109 S. Ct. 37, 102 L. Ed. 2d 16 (1988).

In Memphis Bank & Trust Co. v. Garner, 459 U.S. 392, 397-98, 103 S. Ct. 692, 74 L. Ed. 2d 562, 568 (1983), the Court stated that its cases establish that if the tax remains the same whatever the character of the property may be, no claim can be sustained that the taxing statute discriminates against federal obligations. Under the provisions of new Iowa Code subsection 422.61(2)(f), the expense allocable to an investment in an investment subsidiary is not allowed as a deduction in computing the "net income" for use as the measure of the Iowa franchise tax regardless of the character of the investment subsidiary. In other words, the disallowance of an expense deduction is the same whether the subsidiary invests in federal securities or makes other investments such as investments in state or local securities. Because the tax remains the same whatever the character of the investments made by the subsidiary, there is no discrimination against federal obligations.

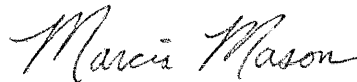
Your opinion request states that the potential constitutional infirmity of amended Iowa Code section 422.61 is due to the type of transactions which do not fall within its scope. As an example, you refer to investments in the Iowa Business Development Finance Corporation pursuant to Iowa Code sections 15E.137, 15E.138 and 15E.139 (1995). Such an investment would not be an investment in an "investment subsidiary" as defined in the new Iowa Code section 422.61(1A) because the Iowa Business Development Finance Corporation would not be an "affiliate" of the financial institution.

The Honorable Dwight Dinkla
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The Attorney General expresses no opinion as to whether under some hypothetical set of facts Iowa Code section 422.61(2)(f) might violate some constitutional provision as applied. The distinction between investments in affiliated corporations and investments in non-affiliated corporations is not, however, based on the differences in the investments made by the corporations. Therefore, there is no violation of 31 U.S.C. § 3124(a) or the doctrine of intergovernmental immunity.

Finally, your opinion request raises an issue of double taxation. Disallowing an expense deduction for a financial institution related to its investment in a subsidiary while taxing the subsidiary on the subsidiary's income does not, however, constitute double taxation. "Double taxation occurs only where there is the imposition of the same tax by the same taxing power upon the same subject matter." Cedar Valley Leasing v. Iowa Dept. of Revenue, 274 N.W.2d 357, 361 (Iowa 1979). Furthermore, even if there were double taxation, it would not be based on ownership of federal securities and, therefore, would not discriminate in violation of 31 U.S.C. § 3124(a).

Sincerely,



MARCIA MASON
Assistant Attorney General

MM:cml

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

September 26, 1995

The Honorable Bill Bernau
State Representative
2340 Knapp Street
Ames, Iowa 50014

Dear Representative Bernau:

The Attorney General has received your request for an opinion on the following question:

Does the member/occupant of an apartment in a housing cooperative formed pursuant to Chapter 499A remain qualified for a homestead tax credit on the apartment unit if the building, which belongs to the cooperative, is constructed on a long-term leasehold interest created pursuant to the authority granted by section 499A.2(4)?

Iowa Code chapter 499A (1995) authorizes the establishment of multiple housing cooperatives whereby "any two or more persons of full age, a majority of whom shall be citizens of the state, may organize themselves for the following or similar purpose: ownership of residential, business property on a cooperative basis." Iowa Code section 499A.1. The Iowa Supreme Court in City of Newton v. Jasper Co. Bd. of Review, 532 N.W.2d 771, 774 (Iowa 1995), defined a cooperative

as a multi-unit dwelling in which each resident has (1) an interest in the entity owning the building, and (2) a lease entitling the member to occupy a particular apartment within the building. 15A Am.Jur.2d *Condominiums and Co-Operative Apartments* § 59 (1976); *Sanders v. Tropicana*, 31 N.C.App. 276, 280-281, 229 S.E.2d 304, 307-08 (1976). It is a vehicle for the common ownership of property, a means of enabling the occupants--as members of the

cooperative--to own, manage, and operate the apartment without anyone profiting therefrom. 15A Am.Jur.2d *Condominiums and Co-Operative Apartments* § 62.

Chapter 499A sets forth numerous statutory requirements dictating the powers and obligations of a cooperative, including the treatment of its real estate taxation and the available homestead tax credits found in section 499A.14. Section 499A.14 states the following:

The real estate shall be taxed in the name of the cooperative, and each member of the cooperative shall pay that member's proportionate share of the tax in accordance with the proration formula set forth in the bylaws, and each member occupying an apartment as a residence shall receive that member's proportionate homestead tax credit and each veteran of the military services of the United States identified as such under the laws of the state of Iowa or the United States shall receive as a credit that member's veterans tax benefit as prescribed by the laws of the state of Iowa.

(emphasis added). This statute clearly requires that all of the cooperative's real estate be taxed in the name of the cooperative and that each member of the cooperative is liable for their proportionate share of the tax. It is equally clear under section 499A.14 that each cooperative member who is "occupying an apartment as a residence" is entitled to receive their proportionate homestead tax credit. (emphasis added). The fact that cooperative members are eligible for a homestead tax credit is also provided for in Department of Revenue and Finance rule 701 IAC 80.1(2)(d) which states that any "person occupying homestead property pursuant to Iowa Code chapter 499A or 499B is eligible for a homestead tax credit."

Section 499A.14, as it currently reads, was amended by the legislature in 1991. See 1991 Iowa Acts, 74th G.A., ch. 30, § 6. Prior to that amendment, section 499A.14 read as follows:

The real estate shall be taxed in the name of the co-operation, and each person owning an apartment or room shall pay that person's proportionate share of such tax, and each person owning an apartment as a residence and under the qualifications of the laws of the state of Iowa as such shall receive that person's proportionate homestead tax credit and each veteran of the military services of the

United States identified as such under the laws of the state of Iowa or the United States shall receive as a credit that person's veterans tax benefit as prescribed by the laws of the state of Iowa.

Iowa Code § 499A.14 (1989). (emphasis added). This Code section was interpreted by the Court in City of Newton, 532 N.W.2d at 774, to require actual ownership by the cooperative before it was entitled to any tax benefits contained in section 499A.14. In City of Newton, the retirement home cooperative was leasing the building and land while the day-to-day management and operation of the cooperative was being handled by the fee simple owner of the property. The Court determined that under this factual situation, the residents had "no more ownership interest in the cooperative than an ordinary tenant." Id. Therefore, since an ownership interest in the property was required before the cooperative received any tax benefits flowing from section 499A.14, the cooperative was denied residential status and was classified for assessment purposes as a commercial enterprise. Id.

The effect of the 1991 amendment was to remove the requirement of ownership as a prerequisite for the cooperative and its members to obtain the tax benefits contained in section 499A.14, including the right to receive the homestead tax credit. However, the amendment only "applies to any cooperative organized pursuant to chapter 499A on or after December 1, 1990." 1991 Iowa Acts, 74th G.A. ch. 30, § 18. (emphasis added). Therefore, the ownership requirements contained in section 499A.14 and discussed in City of Newton, supra, are still applicable for cooperatives formed before December 1, 1990.

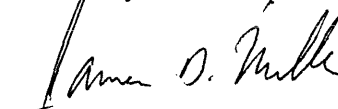
Your specific concern in this opinion request is whether a member of a cooperative who otherwise qualifies for a homestead tax credit is still eligible for such credit if the apartment building belonging to the cooperative is constructed on land not owned by the cooperative.

Generally, in order to be eligible for a homestead tax credit, Iowa Code section 425.11(2) requires that a person hold title to the property in fee simple. That is, the person must own the building in which they are claiming residency, as well as the underlying land. However, with respect to multiple housing cooperatives formed under chapter 499A, section 499A.14 specifically dictates the cooperative's real estate tax obligations and benefits, including the availability of the homestead tax credit to the cooperative's members. See City of Newton, 532 N.W.2d at 774. Therefore, with respect to multiple housing cooperatives, section 499A.14 and not section 425.11(2) controls the eligibility requirements for the homestead tax credit.

For cooperatives formed on or after December 1, 1990, section 499A.14 does not require that the cooperative own the property in fee simple before its members are eligible to receive a homestead tax credit. All that section 499A.14 requires before members are eligible for a homestead tax credit is that the real estate belonging to the cooperative be taxed in the cooperative's name; that the members be responsible for paying their proportionate share of the real estate tax; and that they occupy their apartment as a residence. If these criteria are met, the members of the cooperative are entitled to their proportionate share of the homestead tax credit, regardless of whether the apartment is constructed on leased land.

If, however, the cooperative was formed before December 1, 1990, the ownership requirements discussed in City of Newton, 532 N.W.2d 771, must be shown before the member can apply for the homestead tax credit. As seen in City of Newton, at 774, this determination is factual and is based upon a case by case determination. However, the mere fact that the cooperative's building sits on leased land would not automatically deny a homestead tax credit to the cooperative's members. A cooperative can control and manage its daily affairs and the members can exercise rights of ownership over the cooperative and their apartments, even if the apartment building sits on leased land. If that is the situation, the homestead tax credit would be available to the cooperative's members even if the cooperative was formed prior to December 1, 1990.

Sincerely,



JAMES D. MILLER
Assistant Attorney General

JDM:cml

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

September 26, 1995

Rick L. Lynch
Davis County Attorney
207 S. Washington
P.O. Box 129
Bloomfield, IA 52537

Dear Mr. Lynch:

You have requested an opinion involving an election for the position of county sheriff. See generally Iowa Code § 331.651 (1995). You ask whether the present county sheriff must either become a certified peace officer or complete basic training at the Law Enforcement Academy in order to serve in the position of county sheriff after winning the next election. This question has arisen because the county sheriff -- who apparently has not undergone certification or basic training -- took office before the General Assembly passed "[a]n Act relating to qualifications for sheriffs" and thereby amended Iowa Code section 331.651 (1993). 1994 Iowa Acts, 75th G.A., ch. 1010, § 1, at 20.

The 1994 amendment imposes requirements upon those persons wishing to serve as county sheriffs:

A person elected or appointed sheriff
shall meet all the following qualifications:

- (a). Have no felony conviction.
- (b). Be age twenty-one or over . . .
- (c). Be a certified peace officer recognized by the Iowa law enforcement academy council under chapter 80B or complete the basic training course provided at the Iowa law

enforcement academy's central training facility or a location other than the central training facility within one year of taking office. A person shall be deemed to have completed the basic training course if the person meets all course requirements except the physical training requirements.

Id. § 1, at 20 (codified at Iowa Code § 331.651 (1995)) (emphasis added). See generally Iowa Code § 4.1(30)(a) ("shall" normally imposes a statutory duty). This amendment became effective on July 1, 1994. See generally Iowa Code § 3.7.

At the outset, we note that your question does not implicate any issue regarding the constitutionality or reasonableness of the new requirements. See 3 E. McQuillin, Municipal Corporations § 12.58, at 295-96, § 12.64, at 330, § 12.96, at 478 (1990); see also 1986 Op. Att'y Gen. 70. We also note that it does not implicate any issue regarding a right to continue in elective public office for the completion of its term. See, e.g., Iowa Code § 4.13(2) (amendment of statute does not affect any right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder). Rather, it focuses upon the applicability of the new requirements to all persons, including incumbents, wishing to serve in the position of county sheriff after winning an election. See generally 1992 Op. Att'y Gen. 53, 54 (person appointed to fill vacant county office becomes eligible to assume office by satisfying all qualifications before taking oath and assuming official duties).

Our task thus lies in ascertaining the legislative intent underlying the 1994 amendment. See generally 1994 Op. Att'y Gen. 83 (#94-1-3(L)). We conclude the General Assembly intended for the new requirements to apply to all persons, including incumbents, who are elected or appointed to the position of county sheriff after June 30, 1994.

We discern nothing in the language of the 1994 amendment suggesting a legislative intent to exempt those persons presently serving as county sheriffs from its reach. See generally 1A Sutherland's Statutory Construction § 20.22, at 110-11 (1993); 2A Sutherland's Statutory Construction § 47.12, at 170 (1992). "When a statute is plain and its meaning is clear, [there is no need to] search for its meaning beyond its expressed language. [R]esort to rules of statutory construction [or interpretation may take place] only when the terms of the statute are ambiguous." Stroup v. Reno, 530 N.W.2d 441, 443 (Iowa 1995).

Three rules of statutory interpretation, moreover, reinforce the conclusion that the 1994 amendment encompasses all persons wishing to serve as county sheriffs. The first rule requires

Mr. Rick L. Lynch
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consideration of the words actually written by the General Assembly, not what it should or might have written. Iowa R. App. P. 14(f)(13). The second rule precludes adding any language to statutes. State v. Byers, 456 N.W.2d 917, 919 (Iowa 1990) (generally impermissible to extend or enlarge statutory terms). The third rule precludes restricting the applicability of a statute by implying an exception or exemption into it. State v. Rouse, 290 N.W.2d 911, 915 (Iowa 1980); 1996 Op. Att'y Gen. ___ (#95-5-2(L)); 2A Sutherland's, supra, at § 47.11, at 165. Application of these rules precludes the grafting of a savings or "grandfather" clause onto the 1994 amendment for those incumbents who, for example, have not undergone certification as a peace officer.

We note that the General Assembly has expressly exempted incumbents from qualifying anew in at least one other statutory provision. Iowa Code § 63.12 ("[w]hen the incumbent of an office is re-elected, the incumbent shall qualify [by taking an oath and posting a bond], but a judge retained at a judicial election need not requalify"). See generally Iowa Code § 4.6(4) (statutory construction may involve reference to laws upon similar subjects).

We also note that the 1994 amendment provides one exception to those persons wishing to serve as county sheriffs: if they elect to become qualified by completing the basic training course provided by the Law Enforcement Academy, they need not pass its physical training requirements. The 1994 amendment provides no other exception to the qualifications for service as county sheriff. See generally In re Estate of Mills, 374 N.W.2d 675, 677 (Iowa 1985) (when statutes enumerates certain exceptions, legislature presumably intended no others). Accordingly, all persons wishing to serve as county sheriffs must either become certified peace officers or complete the basic training course provided by the Law Enforcement Academy (except for physical training requirements).

In summary, the 1994 amendment's requirements for qualification apply to all persons, including incumbents, who are elected or appointed to serve the position of county sheriff after June 30, 1994.

Sincerely,



Bruce Kempkes
Assistant Attorney General

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

November 29, 1995

The Honorable Don Gries
State Representative
412 Oak Ave.
Charter Oak, IA 51439

Dear Representative Gries:

In Iowa Code chapter 384 (1995), the General Assembly expressly gave cities the power to construct and maintain utility systems. State v. City of Iowa City, 490 N.W.2d 825, 830 (Iowa 1992). You have requested an opinion whether a city may pass an ordinance allowing for the extension of sewer or water lines and imposing fees upon property owners for connections between their properties and those extended lines or whether the city, under such circumstances, must give notice and conduct a public hearing before passing the ordinance.

Without additional information about the exact nature of the contemplated work and the purpose of the fees or charges, we cannot provide a specific answer to your question. We can, however, identify two different powers and corresponding duties of cities with regard to ordinances setting fees or charges for "connections" between property and city utilities. First: cities need to give notice and conduct a public hearing before passing an ordinance for the imposition and collection of a fee to offset the costs of extending sewer or water lines to the near vicinity of properties located within a proposed sewer or water district. Second: cities

need not give notice and conduct a public hearing before passing an ordinance for the imposition and collection of charges to offset the costs of joining a building located upon a particular piece of property to existing utility lines, including those lines extended by the creation of a new sewage or water district to the near vicinity of the property.

I. Background

Your question primarily concerns chapter 384, which is entitled City Finance, and sections 384.38(3) and 384.84(6) in particular. Interwoven with this statutory law, however, is a small but important body of case law that casts a strong light on its legislative history and purposes. These considerations, in turn, provide significant assistance in determining the meaning of sections 384.38(3) and 384.84(6). See generally Iowa Code §§ 4.4, 4.6; Farmers Coop. Co. v. DeCoster, 528 N.W.2d 536, 537 (Iowa 1995); 2 Sutherland's Statutory Construction § 48.02, at 308, § 48.03, at 315 (1992); 2B Sutherland's Statutory Construction § 53.01, at 229 (1992).

We therefore begin with Lloyd E. Clarke, Inc. v. City of Bettendorf, 261 Iowa 1217, 158 N.W.2d 125 (1968), which considered the power of cities under a 1966 statute to impose various fees for connecting property with sanitary sewer systems. This statute, since repealed, specifically provided that cities could require connections from water pipes and sewers to the curb line of adjacent property, regulate the making of such connections, and fix the charges therefor. Iowa Code § 391.8 (1966); Hayes, "Special Assessments for Public Improvements in Iowa -- Part II," 13 Drake L. Rev. 25, 50-51 (1963).

Pursuant to the 1966 statute, a city passed an ordinance imposing an "inspection fee" of five dollars, a "digging fee" of one dollar, and a "basic connection fee" of more than one hundred dollars. The city passed this ordinance on the day it decided to extend sewer lines to a developer's property, and it anticipated using the connection fee to finance in part that extension. The developer later refused to pay any connection fees, arguing the city had no authority under the 1966 statute to pass an ordinance imposing them.

The Supreme Court of Iowa held that the statute

deals only with costs and regulations incident to a line running from the middle of the street to the curb line so that a newly laid street will not be unnecessarily disturbed, and if it is disturbed, so that it will be properly repaired. It has nothing to do with and cannot be used as a basis for financing

the overall project [which the city here hoped to use it for].

. . .

[T]he obvious purpose . . . [of the statute is] to control the physical and limited act of street sewer connections for regulatory, not cost retirement, purposes.

Id. at 127 (emphasis added).

The court also held that self-determination powers of cities did not impliedly allow the city to pass the ordinance, because these powers did not include the levying of a "tax, assessment, excise, fee, charge or other exaction" except as expressly authorized by statute. Id. at 127-28. Compare Iowa Code § 368.2 (1966) with 1972 Iowa Acts, 64th G.A., ch. 1088, § 199 (effective July 1, 1975 and codified at Iowa Code § 364.3(4) (1995)) (prohibiting cities only from levying "a tax" unless specifically authorized by law); 1986 Op. Att'y Gen. 96 (#86-6-7(L)). Although the court invalidated the city's ordinance, it noted that the General Assembly had recently provided such express statutory authority to cities:

We are aware of [legislation] passed in 1967, which, with certain restrictions, allows sewer connection charges very much as contemplated in the instant ordinance. However, this amendment was passed after the ordinance and [the city] does not argue it is applicable here.

Id. at 128 n. 1.

The 1967 legislation, "relating to the establishment of sewer connection charges or fees," provided:

Cities and towns may by ordinance establish a schedule of reasonable and equitable sewer connection charges or fees to be paid to such city or town by every person, firm, or corporation whose premises will be served by connecting to the municipal sanitary utilities. Such ordinance shall be . . . filed of record in the office of the county recorder of the county wherein the city or town is situated. The charges or fees shall be due and payable when a sewer connection application is filed. No sewer connection charge or fee established by said ordinance

shall exceed the equitable portion of the total original cost of extending the sanitary utilities to the near vicinity of the property less any part of said cost which has been previously assessed or paid to the city or town under [chapters 391, 391A, or 417, which concern improvements to sewage and water systems.] All moneys shall be kept in a separate and distinct part of the sanitation fund and shall only be used [in accordance with section 393.7 to meet interest and principal payments on bonds legally authorized for the financing of sanitary facilities in any manner and to pay any costs of the construction maintenance, or repair of sanitation utilities or applied toward bonds used for financing sanitary facilities or utilities.]

1967 Iowa Acts, 62nd G.A., ch. 332, § 1 (codified at Iowa Code § 393.14 (1971)) (emphasis added).

In 1975, the court relied upon Lloyd E. Clarke, Inc. v. City of Bettendorf in again noting the difference in purpose between various fees or charges arising out of connections between property and city utilities. In Newman v. City of Indianola, 232 N.W.2d 568 (Iowa 1975), a property owner had requested a city to extend an existing electrical line to the edge of his property in order to provide him with a hookup for electrical service, but refused to pay it any fees incurred in making this extension. The court held that a 1971 statute (later repealed in the 1972 home rule act) permitted the city to impose these fees: they sought only to offset the cost of extending the electrical line to the edge of the owner's property and did not seek to offset the costs of financing the electrical transmission system as a whole. Id. at 572-74. See generally Iowa Code § 397.27 (1971).

In 1981, the court in North Liberty Land Co. v. City of North Liberty, 311 N.W.2d 101 (Iowa 1981), addressed the issue whether a city had complied with an ordinance enacted pursuant to the 1967 legislation that imposed fees for sewer connections. See generally Iowa Code § 393.14 (1973). In agreeing with a developer that the city had not complied with the ordinance, the court neither mentioned nor addressed the question whether the city had any authority to impose such connection fees. Id. at 103.

Meanwhile, the General Assembly repealed the 1967 legislation in the 1972 home rule act, which generally sought to enlarge the powers of cities. — Scheidler, "Implementation of Constitutional Home Rule in Iowa," 22 Drake L. Rev. 294, 304 (1973); see 1972 Iowa Acts, 64th G.A., ch. 1088, § 199; see also Iowa Const. art. III, § 40. In that act, the General Assembly also created section

384.84(2), the precursor to section 384.84(6). See 1972 Iowa Acts, 64th G.A., ch. 1088, § 165 (then codified at Iowa Code § 384.84(2) (1973)). The General Assembly placed this section within Division V of chapter 384, which it entitled Revenue Financing. See id.

The new section provided:

(1). The governing body of a city utility, combined utility system, city enterprise, or combined city enterprise may establish, impose, adjust, and provide for the collection of rates to produce gross revenues at least sufficient to pay the expenses of operation and maintenance of the city utility, combined utility system, city enterprise, or combined city enterprise Rates must be established by ordinance of the council or by resolution of the trustees, published in the same manner as an ordinance.

(2). The governing body of a city utility, combined utility system, city enterprise, or combined city enterprise [may by] ordinance of the council or by resolution of the trustees published in the same manner as an ordinance, establish, impose, adjust, and provide for the collection of charges for connection to a city utility or combined utility system.

(emphasis added). Unlike the repealed 1967 legislation, the new section did not specify the purpose or purposes for which cities could apply these "charges for connection."

Finally, in 1994, the General Assembly enacted section 384.38(3), which concerns two interrelated utilities. See 1994 Iowa Acts, 75th G.A., ch. 1073, § 1 ("[a]n act authorizing cities to assess and collect fees for connection to sewer or water utility"); see also State v. City of Iowa City, 490 N.W.2d at 830. Included within Division IV of chapter 384, entitled Special Assessments, section 384.38(3) provides:

A city may establish, by ordinance after notice and a public hearing consistent with the requirements of section 384.50, one or more districts and schedule of fees for the connection of property to the city sewer or water utility. Each person whose property will be served by connecting to the city sewer or water utility shall pay a connection fee to the city. The ordinance shall be certified by

the city and recorded in the office of the county recorder of the county in which a district is located. The connection fees are payable when a utility connection application is filed with the city. A connection fee shall not exceed the equitable part of the total original cost to the city of extending the utility to the properties within the district, less any part of the cost which has been previously assessed or paid to the city under this division IV [which, among other things, permits assessments for the cost of construction and repair of public improvements within the city, and main sewers, sewage pumping stations, disposal and treatment plants, waterworks, water mains, extensions, and drainage conduits extending outside the city]. All fees collected under this subsection shall be paid to the city treasurer. The moneys collected as fees shall only be used for the purposes of operating the utility, or to pay debt service on obligations issued to finance improvements or extensions to the utility.

(emphasis added). See Iowa Code § 384.38(1) (quoted within above brackets). Section 384.50, which section 384.38(3) mentions, and section 384.51 effectively require a city to give notice to affected property owners and conduct a public hearing on a proposed sewer or water district. See generally City of Clive v. Iowa Concrete Block & Material Co., 298 N.W.2d 585, 591-92 (Iowa 1980) (rejecting constitutional attack upon section 384.51).

II. Analysis

This legislative history forms the background for your question, which effectively stands section 384.38(3) up against section 384.84(6) for comparison. You indicate that section 384.38(3) -- which requires notice and a public hearing before a city may pass an ordinance imposing a "connection fee" -- and section 384.84(6) -- which does not require notice and a public hearing before a city may pass an ordinance imposing "charges for connection" -- appear to conflict. You suggest, however, that no conflict exists if section 384.38(3) is interpreted as "granting another option to cities in addition to [the power granted by] section 384.84(6)." See, e.g., Purdy v. City of York, 500 N.W.2d 841, 843 (Neb. 1993) (noting that legislature expressly provided alternatives for creating water districts and that one alternative does not require prior notice). We agree the two sections do not conflict, but disagree they provide cities with alternative powers.

Instead, we believe that the "connection fee" permitted by section 384.38(3) and the "charges for connection" permitted by the significantly different language in section 384.84(6)) actually address separate issues of city finance. The connection fee in section 384.38(3) specifically offsets the costs associated with extending the lines of a city sewer or water utility into and for the benefit of property owners within a limited area, such as a new development; and the charges for connection in section 384.84(6) specifically offset the costs associated with joining a building located on a particular piece of property to the existing lines of city utilities, including those lines extended by the creation of a new sewer or water district to the near vicinity of the property. The first situation requires a city to give notice and conduct a public hearing before passing an ordinance; the second does not.

A.

Initially, we should identify the type of liability imposed upon participating property owners by section 384.38(3). Although placed within the division of chapter 384 governing special assessments, section 384.38(3) technically does not provide for a special assessment upon property.

A special assessment has been defined as imposing a liability that arises out of a benefit conferred upon real property within a defined geographical area. Newman v. City of Indianola, 232 N.W.2d 568, 573-74 (Iowa 1975); City of Fairfield v. Ratcliff, 20 Iowa 396, 398 (1866); Morrison v. City of Washington, 332 N.W.2d 125, 129 (Iowa App. 1983); 14 E. McQuillin, The Law of Municipal Corporations § 38.47, at 185 (1987). Special assessments have a long history in financing city projects. 14 McQuillin, supra, § 38.01, at 13, § 38.24, at 108-10, § 38.46, at 183, § 38.47, at 185, § 38.50, at 196; Hayes, "Special Assessments for Public Improvements in Iowa -- Part I," 12 Drake L. Rev. 3, 6 (1962); see Tombergs v. City of Eldridge, 433 N.W.2d 731, 732 (Iowa 1988).

Although not considered taxes, special assessments bear some resemblance to them, and, in fact, the power to impose special assessments falls within the parameters of the power to tax. Fitchpatrick v. Botheras, 150 Iowa 376, 130 N.W. 163, 164 (1911). Accordingly, the provision of notice and a public hearing regarding a special assessment serves to provide a sound legal basis for protecting the interests of property owners. Id.; 70A Am. Jur. 2d Special or Local Assessments § 11, at 1134-36, § 145, at 1248-49 (1987).

An individual owner need not actually connect to a utility before the liability for a special assessment arises. See 70 Cal. Op. Att'y Gen. 195 (1987); 44 Or. Att'y Gen. 85 (1985); see also 14 McQuillin, supra, § 38.24, at 110. Section 384.38(3) links payment of the connection fee with an individual property owner's

application; until that time, the liability for payment does not arise. See generally 1980 Op. Att'y Gen. 904 (#80-12-4(L)). This linkage places the liability in section 384.38(3) outside the category labeled "special assessments." Cf. Montgomery Bros. Const. v. City of Corvallis, 580 P.2d 190, 192-93 (Or. App. 1978) (interpreting similar Oregon statute).

If anything, the connection fee in section 384.38(3) appears to come within the category labeled "impact fees." See Juergensmeyer & Blake, "Impact Fees: An Answer to Local Governments' Capital Funding Dilemma," 9 Fla. St. U.L. Rev. 415, 417 (1981). This liability represents a proportionate share of the cost of public facilities needed to serve an area, including new developments, and typically finances the provision of expanded capital facilities, including those for sewer and water. See 15 E. McQuillin, The Law of Municipal Corporations § 39.03.10, at 10-11 (1995). As opposed to funding the new infrastructure through general revenues, impact fees effectively pass on its costs to property owners within that area who actually connect or link to the new or expanded system.

In permitting cities to pass along the costs of sewer and water extensions to property owners within a geographical area, however, section 384.38(3) bears some resemblance to statutes providing for special assessments. That resemblance likely forms the basis for its notice-and-hearing requirement. See generally Slater v. Town of Adel, 324 N.W.2d 482, 485-86 (Iowa 1982) (noting that sections 384.50 and 384.51, as part of the act granting home rule to cities, replaced various provisions governing procedures for making municipal improvements).

B.

Next, we should examine the specific language of section 384.38(3) and its placement within chapter 384 vis-a-vis section 384.84(6). See generally Iowa R. App. P. 14(f)(13) (statutory interpretation focuses upon what legislature actually wrote, not what it should or might have written); 1A Sutherland's Statutory Construction § 20.01, at 81 (1993) (how statute is constructed may have much to do with how it is construed). This examination may provide insight into the purpose of each statute. See generally Iowa Code § 4.6(1) (statutory interpretation may involve consideration of legislative objects); City of Pontiac v. Mason, 365 N.E.2d 145, 148 (Ill. App. 1977) (noting that "connection charge" in statute governing sewer systems must be interpreted to promote general statutory purpose).

Section 384.38(3) imposes a liability for connecting a sewer or water utility, and no other such service, to property that will be served by the creation of a new sewer or water district; in contrast, section 384.84(6) reverses the subjects and imposes a

liability for connecting property to a city utility. The General Assembly placed section 384.84(6) within the division entitled Revenue Financing, and, instead of pairing or cross-referencing the two statutes, the General Assembly placed section 384.38(3) within the division entitled Special Assessments. See 1A Sutherland's, supra, § 21.04, at 121 (statutory heading may be relevant to interpretation if legislature included it in the underlying bill); 2B Sutherland's, supra, § 53.01, at 229.

Admittedly, sections 384.38(3) and 384.84(6) appear to conflict at first blush as each provides a different procedure for the imposition and collection of fees or charges for a utility connection. The words "connection" or "connecting," however, may not necessarily have the same meaning for "fee" in section 384.38(3) and for "charges" in section 384.84(6): a word "is merely a symbol which can be used to refer to different things." 2A Sutherland's, supra, § 45.02, at 6. Indeed, at least one court has noted the ambiguity of the phrase "connection charge" in a statute governing sewer systems. See City of Pontiac v. Mason, 365 N.E.2d at 148-49.

The Supreme Court of Iowa has effectively acknowledged the ambiguity of fees or charges for a utility "connection" in explaining that these liabilities actually arise out of the different types of work necessary, for example, to link a tap, drain, or toilet on a particular piece of property with all the various pipes, mains, meters, pumps, tanks, filters, wells, and other structures located off the property that comprise the entire system of a city sewer or water utility. See, e.g., Newman v. City of Indianola, 232 N.W.2d at 572-74; Lloyd E. Clarke, Inc. v. City of Bettendorf, 158 N.W.2d at 127. In light of this distinction and the legislative history surrounding the two statutes, we believe that their differences in language and location indicate differences in purpose. See generally Iowa Code § 4.6(2) (statutory interpretation may involve consideration of circumstances under which statutes enacted), § 4.6(3) (statutory interpretation may involve consideration of legislative history of statutes).

What is the purpose of section 384.38(3)? Like the repealed 1967 legislation, it clearly attempts to offset the costs of extending utility lines to the near vicinity of properties located within a new sewage or water district. Section 384.38(3) specifically limits use of the collected monies to pay operating expenses or debt service on obligations issued for financing improvements or extensions. Thus, unlike the 1966 statute considered in Lloyd E. Clarke, Inc. v. City of Bettendorf, section 384.38(3) provides a means for financing the overall project of extending the existing lines of a sewer or water utility into a new sewer or water district.

Although the 1972 home rule act removed the general restriction against the self-determination power of cities to levy a special assessment, which governed the court's holding in Lloyd E. Clarke, Inc. v. City of Bettendorf, passage of section 384.38(3) in 1994 removed any lingering doubts about the similar power of cities to impose a connection fee upon participating property owners within a newly created sewer or water district. We note that the court in North Liberty Land Co. v. City of North Liberty did not specifically address the power of cities to impose such a connection fee.

We also note that imposing connection fees within a new sewer or water district is akin to imposing a special assessment, which, in turn, is akin to imposing a tax. Notice and a public hearing thus appear appropriate, because the city has the power to pass along to participating property owners the potentially high cost of creating the new sewer or water district through such fees. See Thielen v. Metropolitan Sewerage Comm'n, 189 N.W. 484, 490 (Minn. 1922) (noting that extensions of sewer lines may naturally require other changes in sewer system to handle increased capacity); see also Hayes v. City of Albany, 490 P.2d 1018, 1020-21 (Or. App. 1971) (noting increased usage from connections made to utility). See generally Iowa Code § 4.4(1) (legislature presumed to have enacted statute that complied with constitutional provisions), § 4.4(3) (legislature presumed to have enacted just and reasonable statutes). This procedure provides property owners with an opportunity to appear before the city to address, for example, the exact boundaries of the proposed district, the various costs associated with its creation, or the amount of the resulting connection fees. See North Liberty Land v. City of North Liberty, 311 N.W.2d at 103 (public hearing on fee schedule for sewer connection informs interested parties what the fees will be). Cf. Slater v. Town of Adel, 324 N.W.2d 482, 485 & n.1 (Iowa 1982) (notice of special assessment affords property owners an opportunity to be heard on the propriety of making proposed improvement and effectively brings them in as parties to it).

What, then, is the purpose of section 384.84(6)? In contrast to section 384.38(3), it does not clearly attempt to offset the costs of extending utility lines to the near vicinity of properties located within a new sewage or water district or specifically limit use of the collected monies to pay operating expenses or debt service on obligations issued for financing improvements or extensions. It is, in fact, silent on these important matters.

The statutory precursor to section 384.84(6), however, was the 1966 statute interpreted in Lloyd E. Clarke, Inc. v. City of Bettendorf, 158 N.W.2d at 126-27. The court classified that since-repealed statute -- which provided cities with the power to require connections from water pipes and sewers to the curb line of adjacent properties -- as "regulatory" in nature. Id. At the time

of its enactment in 1972, moreover, section 384.84(6) followed directly on the heels of the power granted in section 384.84(1) that permits a city to impose and collect rates for offsetting a city utility's operating expenses. See 2B Sutherland's, supra, § 53.01, at 229 (legislative enactments usually arranged according to logical classification schemes). This rate-making power also appears regulatory in nature.

We therefore believe that the General Assembly intended section 384.84(6) to operate in a manner similar to its statutory precursor, the 1966 statute. See generally Iowa Code § 391.8 (1966); Lloyd E. Clarke, Inc. v. City of Bettendorf, 158 N.W.2d at 126-27. Viewed in this light, section 384.84(6) attempts to offset only the regulatory, ministerial, or administrative costs incurred by a city in joining a building located on a particular piece of property with the existing lines of a city utility, including those lines extended by the creation of a new sewer or water district to the near vicinity of the property. Cf. Hayes v. City of Albany, 490 P.2d at 1020-21 (interpreting similar Oregon statute). These costs might, for example, include charges for digging a trench from those lines across the property to the building, laying pipe along this route and joining it with the building's own pipes, refilling the trench, and inspecting the property. See, e.g., Lloyd E. Clarke, Inc. v. City of Bettendorf, 158 N.W.2d at 126-27 (noting "digging fee" and "inspection fee" in connecting property and utility).

C.

In short, chapter 384 sets forth a legislative scheme that addresses two separate and distinct costs associated with "connections" between property and city utilities. The extension of lines to the near vicinity of properties located within a proposed sewer or water district implicates section 384.38(3), and the joinder of a building on a particular piece of property to the existing lines of a city utility, including those lines extended by the creation of a new sewer or water district, implicates section 384.84(6). No conflict thus exists between the different procedures provided in sections 384.38(3) and 384.84(6), because each statute governs a different type of connection fee or charge.

III. Conclusion

Cities have two different powers and corresponding duties with regard to ordinances setting fees or charges for "connections" between property and city utilities. First: cities need to give notice and conduct a public hearing before passing an ordinance for the imposition and collection of a fee to offset the costs of extending sewer or water lines to the near vicinity of properties located within a proposed sewer or water district. Second: cities need not give notice and conduct a public hearing before passing an

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ordinance for the imposition and collection of charges to offset the costs of joining a building located upon a particular piece of property to existing utility lines, including those lines extended by the creation of a new sewage or water district to the near vicinity of the property.

Sincerely,

A handwritten signature in cursive script that reads "Bruce Kempkes". The signature is written in dark ink and is positioned above the typed name.

Bruce Kempkes
Assistant Attorney General