

**OPINIONS**  
**OF THE**  
**ATTORNEY GENERAL**

**OF THE**  
**STATE OF WISCONSIN**

**VOLUME 60**

**January 1, 1971 through December 31, 1971**

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**ROBERT W. WARREN**  
**Attorney General**



**MADISON, WISCONSIN**

**1971**

# ATTORNEYS GENERAL OF WISCONSIN

## FROM THE ORGANIZATION OF THE STATE

JAMES S. BROWN, Milwaukee	from June 7, 1848,	to Jan. 7, 1850
S. PARK COON, Milwaukee	from Jan. 7, 1850,	to Jan. 5, 1852
EXPERIENCE ESTABROOK, Geneva	from Jan. 5, 1852,	to Jan. 2, 1854
GEORGE B. SMITH, Madison	from Jan. 2, 1854,	to Jan. 7, 1856
WILLIAM R. SMITH, Mineral Point	from Jan. 7, 1856,	to Jan. 4, 1858
GABRIEL BOUCK, Oshkosh	from Jan. 4, 1858,	to Jan. 2, 1860
JAMES E. HOWE, Green Bay	from Jan. 2, 1860,	to Oct. 7, 1862
WINIFIELD SMITH, Milwau- kee	from Oct. 7, 1862,	to Jan. 1, 1866
CHARLES R. GILL, Water- town	from Jan. 1, 1866,	to Jan. 3, 1870
STEPHEN S. BARLOW, Dellona	from Jan. 3, 1870,	to Jan. 5, 1874
A. SCOTT SLOAN, Beaver Dam	from Jan. 5, 1874,	to Jan. 7, 1878
ALEXANDER WILSON, Min- eral Point	from Jan. 7, 1878,	to Jan. 2, 1882
LEANDER F. FRISBY, West Bend	from Jan. 2, 1882,	to Jan. 3, 1887
CHARLES E. ESTABROOK, Manitowoc	from Jan. 3, 1887,	to Jan. 5, 1891
JAMES L. O'CONNOR, Madi- son	from Jan. 5, 1891,	to Jan. 7, 1895
WILLIAM H. MYLREA, Wausau	from Jan. 7, 1895,	to Jan. 2, 1899
EMMET R. HICKS, Oshkosh	from Jan. 2, 1899,	to Jan. 5, 1903
LAFAYETTE M. STURDE- VANT, Neillsville	from Jan. 5, 1903,	to Jan. 7, 1907
FRANK L. GILBERT, Madison	from Jan. 7, 1907,	to Jan. 2, 1911
LEVI H. BANCROFT, Richland Center	from Jan. 2, 1911,	to Jan. 6, 1913
WALTER C. OWEN, Maiden Rock	from Jan. 6, 1913,	to Jan. 7, 1918
SPENCER HAVEN, Hudson	from Jan. 7, 1918,	to Jan. 6, 1919
JOHN J. BLAINE, Boscobel	from Jan. 6, 1919,	to Jan. 3, 1921
WILLIAM J. MORGAN, Mil- waukee	from Jan. 3, 1921,	to Jan. 1, 1923
HERMAN L. EKERN, Madison	from Jan. 1, 1923,	to Jan. 3, 1927
JOHN W. REYNOLDS, Green Bay	from Jan. 3, 1927,	to Jan. 2, 1933
JAMES E. FINNEGAN, Mil- waukee	from Jan. 2, 1933,	to Jan. 4, 1937
ORLAND S. LOOMIS, Mauston	from Jan. 4, 1937,	to Jan. 2, 1939
JOHN E. MARTIN, Milwaukee	from Jan. 2, 1939,	to June 5, 1948
GROVER L. BROADFOOT, Mondovi	from June 5, 1948,	to Nov. 15, 1948
THOMAS E. FAIRCHILD, Mil- waukee	from Nov. 15, 1948,	to Jan. 1, 1951
VERNON W. THOMSON, Rich- land Center	from Jan. 1, 1951,	to Jan. 7, 1957
STEWART G. HONECK, Madi- son	from Jan. 7, 1957,	to Jan. 5, 1959
JOHN W. REYNOLDS, Green Bay	from Jan. 5, 1959,	to Jan. 7, 1963
GEORGE THOMPSON, La Crosse	from Jan. 7, 1963,	to Jan. 5, 1965
BRONSON C. La FOLLETTE, Madison	from Jan. 5, 1965,	to Jan. 6, 1969
ROBERT W. WARREN, Green Bay	from Jan. 6, 1969,	to

## DEPARTMENT OF JUSTICE LEGAL SERVICES DIVISION

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MICHAEL L. ZALESKI	Assistant Attorney General

## Preface

For the first time in many years, this volume of the *Opinions of the Attorney General* includes selected informal opinions in addition to all of the formal opinions issued by the Attorney General in 1971. The informal opinions selected for printing herewith were chosen because of their important subject matter or because of their possible statewide impact.

Both formal and informal opinions constitute official opinions of the Attorney General. Historically, their difference has related to the manner in which they have been prepared within the Department of Justice and the extent to which they are released to the public when issued by the Attorney General.

Since many informal opinions are of equal importance to the public as are formal opinions, Attorney General Warren has directed that selected informal opinions be made available for future reference in OAG volumes.

OPINIONS  
OF THE  
ATTORNEY GENERAL

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Volume 60

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*Real Estate Broker's License—Security Deposits—(Informal)*—Officer of corporation or partners or a partnership can act for corporation or partnership in rental of real estate owned by such entity without being licensed as a real estate broker under secs. 452.01 (2), 452.03, Stats. Security deposits discussed, sec. 452.09, Stats.

January 15, 1971.

ROY E. HAYS, *Secretary-Counsel,*  
*Wisconsin Real Estate Examining Board*

You have requested my opinion on a number of questions relating to the rental of properties by unlicensed brokers, the drafting of leases, and the status of security deposits in rental situations.

"1. Does an individual who is an officer of a corporation or a partner of a partnership, which corporation or partnership owns apartment complexes, require a real estate broker's license for the rental of said apartments by said individual on behalf of said corporation or partnership in accordance with Section 452.01 (2) (a) and 452.01 (6) (e) of the Wisconsin Statutes?"

It is my opinion that, where the corporation or partnership is the owner of the property and the individual concerned acts for the corporation or for the partnership in the rental of such property, no real estate broker's license is required.

Neither the corporation, nor the partnership could engage in the business of *selling* real estate to the extent that a pattern of real estate *sales* is established, even if the property were owned by such corporation. Nor could unlicensed individuals act for them. This is because sec. 452.01 (2) (b), Stats., defines real estate broker as any person not exempted by sub. (6), who:

"Is engaged wholly or in part in the business of selling real estate to the extent that a pattern of real estate sales is established, whether or not such real estate is owned by such person; or \* \* \*."

Section 452.03, Stats., prohibits any person from engaging in the business of a real estate broker without a license.

See *State ex rel. Real Estate Exam. Bd. v. Gerhardt* (1968), 39 Wis. 2d 701, 159 N.W. 2d 622.

However, it is clear that, while real estate brokers can engage in the rental of real estate for others and for a commission, there is no statutory prohibition against an owner of real estate from renting the property he owns without engaging the services of a licensed broker.

Section 452.01 (2) (a), (6) (e), Stats., provides in part:

"(2) 'Real estate broker' means any person not excluded by sub. (6), who:

"(a) For another, and for commission, money or other thing of value, sells, exchanges, buys or rents, or offers or attempts to negotiate a sale, exchange, purchase or rental of an interest or estate in real estate;

"(6) 'Real estate broker' does not include:

"(e) Any custodian, janitor, employe or agent of the owner or manager of a residential building who exhibits a

residential unit therein to prospective tenants, accepts applications for leases and furnishes such prospective tenants with information relative to the rental of such unit, terms and conditions of leases required by the owner or manager, and similar information.”

Even sec. 452.01 (6) (e), Stats., as created by ch. 56, Laws of 1969, recognizes that there are cases where the owner or manager of the property concerned might not have to be licensed.

Corporations, of course, act through officers or agents.

In *St. Regis Apartment Corp. v. Sweitzer* (1966), 32 Wis. 2d 426, 145 N.W. 2d 711, it was claimed that St. Regis Apartment Corporation, a lessor of the property involved, could not recover fees for expenses incurred in rerenting the premises because the corporation was not a licensed real estate broker. At page 434 the court stated:

“\* \* \* Sec. 136.01 (2) (a), Stats., defines a real-estate broker as one who rents an interest or estate in real estate for another. Appellants argue that respondent was rerenting on behalf of appellants. Respondent owns this property and is renting the premises for its own benefit. Moreover, the respondent lessor is under a duty to rerent in an attempt to minimize damages. Respondent is allowed to charge the collection fee specified in the contract, \$180, on rerenting its own property to minimize damages which would accrue against the appellants. It is not barred because it did not have a real-estate broker’s license.”

I am of the opinion that, since a corporation does not have to be licensed to rent property owned by it, or in which it has an interest as lessor, its officers need not be licensed to complete the act where they are paid or receive salary from the corporation. An officer could not receive a commission from the renter in such case without being licensed.

The same reasoning is applicable to a partner who rents real estate owned by the partnership. It is true, of course, that where a partnership is engaged in the *sale* of real estate as a pattern, or is engaged in the rental of real estate owned

by others, for a commission, both partners must be licensed if they both are to act as real estate brokers. Secs. 452.07 (2), 452.05 (1), Stats.

*Maslowski v. Bitter* (1959), 7 Wis. 2d 167, 96 N.W. 2d 349.

*Frankenthal v. Wisconsin Real Estate Brokers' Board* (1958), 3 Wis. 2d 249, 88 N.W. 2d 352.

"2. Would the fact that said corporation is owned substantially by said individual or the fact that said partnership is a partnership of man and wife or a partnership created by joint tenancy alter this situation?"

I am of the opinion that the additional facts given in this question would not alter the answer to the first question.

"3. May this individual as outlined in Paragraph 1, draft leases on behalf of said partnership or corporation if they are not licensed as a broker and as an exception to Section 256.30 of the Wisconsin Statutes? Said drafting might include the completion of fill-in type forms originally either drafted by an attorney or secured from a printing company."

Section 256.30, Stats., provides a penalty for practicing law without a license.

*State ex rel. Reynolds v. Dinger* (1961), 14 Wis. 2d 193, 109 N.W. 2d 685, and *State ex rel. State Bar v. Keller* (1963), 21 Wis. 2d 100, 123 N.W. 2d 905, recognize that the drafting of leases and contracts by a layman for another, even where there is a filling in of blank forms, constitutes the practice of law.

The problem here, of course, is that the officer of the corporation is acting for the corporation with respect to a lease of corporate property.

I am not aware of any court decision which bars an individual owner from drafting a lease covering property he owns, and am of the opinion that a court would not hold a corporate officer guilty of practicing law without a license where the drafting is for a corporate purpose and involves corporation property. Such a strict interpretation would require every car dealer to have a lawyer draft a contract of sale which is, of course, a legal document, or, in the alternative, be licensed as a lawyer.

"4. If your answer to Paragraph 1 is yes, then may that individual or may any licensed real estate broker place a provision in the rental lease relieving the broker of the obligation of placing security deposits in the broker's real estate trust account as required by section 452.09 of the Wisconsin Statutes and RFB 6.01 of the Administrative Rules of the Board?"

"5. May a broker complete leases, changing said lease to provide that the security deposit is to be paid to the principal or is a broker prohibited from handling a transaction where this is required by the principal?"

While the answer to question one was in the negative, some mention should be made of the problem of security deposits as the phrasing of your question demonstrates an apparent misconception of their nature and a failure to differentiate between a landlord-tenant relationship and a landlord-tenant relationship where a real estate broker is acting as agent for the landlord.

Questions involving security deposits cannot be answered in the abstract. They are usually created by written documents and the language of the document must be referred to in each case.

Deposits involving landlord-tenant are treated in 49 Am. Jur. 2d, *Landlord and Tenant*, §651-657. Such deposits usually create a debtor-creditor relationship rather than a trust situation, with title remaining in the lessee until the deposit is properly applied. The contract can provide that the lessor pay the lessee interest on the deposit; however, in the usual case, it does not and the lessor is held accountable only for correct application of the stated amount and return of any excess. Some states, such as New York, have by statute transformed the usual debtor-creditor relationship into one of trust by application of law.

See Annotations at 27 ALR 2d 656, 659, 15 ALR 2d 1199.

The Wisconsin court has, in two cases, apparently considered a debtor-creditor relationship to exist.

*Beach v. Gehl* (1931), 204 Wis. 367, 235 N.W. 778.

*Elmor Realty Co. v. Community Theatres, Inc.* (1932), 208 Wis. 76, 241 N.W. 632.

Where a mere debtor-creditor relationship exists, there appears to be no requirement to treat the deposit as trust funds, to keep the funds intact or to account for increase if deposited in an interest-bearing account. A trust situation could be created by written document however.

The obligation of a broker is somewhat different, however, resort must be made to the written documents in each case. In any case, where the broker is handling trust funds, there must be compliance with sec. 452.09, Stats., and REB 6.01.

While security deposits can be trust funds, especially where held by a broker, under agreement with landlord, tenant and broker, those parties could contract that security deposits be paid directly to the landlord or that the broker shall pay said deposit to the landlord within a certain number of days. There is no real reason why a broker should be obligated to hold such deposits during the entire period of tenancy. There is usually a dispute as to their proper allocation at the termination of a tenancy and the broker might well avoid being the long term caretaker. Section 452.09, Stats., recognizes that where trust funds are received by a broker, that even where they must be deposited in his trust account, they "may be paid out to one of the parties pursuant to such contract \* \* \*."

"6. If a broker deposits security deposits in an account other than his real estate trust account, who is entitled to interest income that may accrue on said deposits, or is the tenant entitled to interest on said money when used by the landlord principal?"

No answer can be given to this question absent examination of the actual documents involved with respect to the establishment of the security deposit. The only safe rule for the broker to follow is to deposit such moneys in a non-interest-bearing trust account as required by sec. 452.09, Stats., and REB 6.01. He should treat such funds as trust funds absent specific agreement between the landlord, tenant and broker as to incidents of ownership, etc.

Where he is acting solely for the landlord, there is no question that he has a duty to account his principal and to refrain from attempting to make undisclosed profits.

*Pederson v. Johnson* (1919), 169 Wis. 320, 324, 172 N.W. 723, 724.

*Hilboldt v. Wisconsin R. E. Brokers' Bd.* (1965), 28 Wis. 2d 474, 137 N.W. 2d 482.

12 Am. Jur. 2d, *Brokers*, §99, Duty to Account and Keep Accounts.

“7. Would an unlicensed individual renting his own properties or acting as a partner or an officer of a partnership or corporation owning properties, which individual corporation or partnership accepts security damage deposits from tenants, but fails to return same to tenants when no damage has occurred, be subject to prosecution under Section 943.20 (1) (b) of the Wisconsin Statutes.”

As pointed out above, absent a statute impressing a trust on such deposits, or absent a contract between the landlord and tenant that such deposit be held by the landlord or third person in trust, a special deposit usually creates a debtor-creditor relationship. Liabilities growing out of a debtor-creditor relationship ordinarily cannot be made the basis of a charge of embezzlement. *Hanser v. State* (1935), 217 Wis. 587, 259 N.W. 418. There is a possibility that, depending on the circumstances, sec. 943.20 (1) (d), could be violated.

RWW:RJV

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*Mobile Home Park—State University—(Informal)—*  
State University is not subject to local licensing in the operation of a University mobile home park under sec. 66.058, Stats.

January 18, 1971.

ROBERT W. WINTER, JR., *Assistant Director,*  
*Board of Regents of State Universities*

You have requested by opinion as to whether the Wisconsin State University-River Falls mobile home park falls within the provisions of sec. 66.058, Stats., as amended.

In my opinion, the Wisconsin State University at River Falls, which is an arm of the state agency, Board of Regents of State Universities, is not subject to the provisions of sec. 66.058, Stats., and therefore need not be licensed or pay the annual license fee.

It is well settled law that general statutes and ordinances do not bind the state or any of its agencies unless the legislative intent clearly appears to include the state. *State ex rel. Martin v. Reis* (1939), 230 Wis. 683, 284 N.W. 580; *Kenosha v. State* (1966), 35 Wis. 2d 317; 56 OAG 225.

The rationale behind this general rule of law was stated in *Fulton v. State Annuity and Investment Board* (1931), 204 Wis. 355, 361, as being:

“The purpose of the rule relied on by appellant, that general statutes are not to be construed to include to its hurt the state, is to prevent interference with the exercise of authority in the administration of the affairs of state or community. \* \* \*”

Further, sec. 66.058 (2) (a), Stats., reads in part:

“It shall be unlawful for any person to maintain or operate \* \* \* any mobile home park unless such person shall first obtain \* \* \* a license therefor. \* \* \*”

“Person” is defined in sec. 66.058 (1) (d), Stats., as being any natural individual, firm, trust, partnership, association or corporation.

Clearly, under the above-quoted language of the statute, there is no legislative intent either expressed or implied to include the sovereign.

Additionally you have asked “Need the tenants pay the monthly mobile home fee?”

The answer to this question is considerably more difficult. The statute, as amended by ch. 495, Laws of 1969, imposes a

tax on each occupant. Whether an occupant of a mobile home in a state-owned park is liable for this tax is a question that does not directly involve the Board of Regents of State Universities. Under these circumstances, I would be in the position, if I were to answer such request, of advising the private occupants as to their tax liability to the local taxing authority. Under the law, this office cannot assume such responsibility.

Under these circumstances, I must respectfully decline to answer this question.

RWW:CAB

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*Anti-Secrecy—Open Meetings—(Formal)*—Consideration of a resolution is formal action of an administrative or minor governing body and when taken in proper closed session, under sec. 66.77 (2) and (3), Stats., formerly sec. 14.90 (2) and (3), Stats., resolution and result of vote must be made available for public inspection, pursuant to sec. 19.21, Stats., absent specific showing that the public interest would be adversely affected. In general, the public has a right to know the result of any vote taken at a closed session.

January 21, 1971.

GERALD C. NICHOL

*District Attorney of Dane County*

Your predecessor has requested my opinion on several questions relating to the Wisconsin anti-secrecy law, sec. 66.77, Stats., renumbered from sec. 14.90, Stats., by ch. 276, s. 62, Laws of 1969.

The request does not specify which type of governing or administrative body is concerned. Some governing bodies exercise legislative and administrative tasks and some also exercise quasi-judicial powers.

Both sec. 66.77 and sec. 19.21 (2), Stats., renumbered from sec. 18.01 (2), Stats., by ch. 259, s. 6, Laws of 1969,

recognize that each state and local governing and administrative body or officer may be subject to express law with respect to the necessity for holding open meetings and permitting the inspection of documents. Other laws specifically require publication of ordinances before they become effective and the publication of proceedings.

Absent a specific fact situation involving a given body, it is impossible to render an opinion which will be meaningful in every incident which may arise. In any specific case the statutes applicable to the body involved must be examined in addition to the provisions of secs. 66.77 and 19.21, Stats. Special statutes will be construed together with secs. 66.77 and 19.21, Stats. *State ex rel. Cities Service Oil Co. v. Board of Appeals* (1963), 21 Wis. 2d 516, 537, 124 N.W. 2d 809. However, see *State ex rel. Journal Co. v. County Court* (1969), 43 Wis. 2d 297, 168 N.W. 2d 836, as to special considerations applicable to special statutes pertaining to specific officers requiring public inspection, where statute is antecedent to former sec. 18.01, Stats.

This opinion is not concerned with either house of the state legislature. While secs. 66.77 and 19.21, Stats., appear to be generally applicable to those bodies, either house specially acting pursuant to Art. IV, sec. 10, Wis. Const., can exercise reasonable secrecy as to meetings and publication of proceedings when it determines such measures are required in the interests of the public welfare.

The questions relate to executive or closed sessions held under subsec. (3) of sec. 66.77, Stats. For the purposes of this opinion I will assume that all executive sessions discussed herein are legally held under subsec. (3).

Question 1: "If a resolution is considered in executive session, must the resolution be made public?"

Section 66.77 (2), Stats., provides in part:

"\* \* \* No formal action of any kind, except as provided in sub. (3), shall be introduced, deliberated upon or adopted at any closed session or closed meeting of any such body, or at any reconvened open session during the same calendar day

following a closed session. No adjournment of a public meeting into a closed session shall be made without public announcement of the *general nature of the business to be considered at such closed session, and no other business shall be taken up at such closed session.*" (Emphasis added.)

I am of the opinion that consideration of a resolution, including introduction, deliberation on, rejection or adoption, *is formal action* within the meaning of sec. 66.77 (2), Stats.

Resolutions may take many forms. To be entitled to consideration at a closed session, any resolution must be pertinent to a proper purpose for which a closed session may be held under sec. 66.77 (3), Stats., and within the limits of the public announcement of the general nature of the business to be considered at the closed session of the meeting publicly called or adjourned for closed session. Sec. 66.77 (2); 54 OAG iii, vi (1965).

Webster's Third International Dictionary defines "resolution" as "a formal expression of opinion, will, or intent by an official body or assembled group; also: a declaration submitted to an assembly for adoption."

An oral motion passed by a county board, common council, or school board thereupon becomes a "resolution."

*Meade v. Dane County* (1914), 155 Wis. 632, 145 N.W. 239;

*City of Green Bay v. Brauns* (1880), 50 Wis. 204, 6 N.W. 503;

*Lindahl v. Independent School District No. 306* (1965), 270 Minn. 164, 133 N.W. 2d 23, 26.

When passed by a legislative body, a resolution may have the effect of law. Sec. 59.02 (1), (2), Stats.

At page 642 of *Meade v. Dane County* it is stated:

"While there are in some instances and for some purposes fundamental distinctions between an ordinance and a resolution, there is no such broad distinction between a resolution and other acts of an administrative or *quasi*-legislative board. Almost any one of these acts not required to be by ordinance may be in the form of a resolution."

Also see *Wisconsin Gas & E. Co. v. Fort Atkinson* (1927), 193 Wis. 232, 244, 213 N.W. 873, and *State ex rel. Fulton v. Zimmerman* (1926), 191 Wis. 10, 16, 210 N.W. 381.

Ordinarily, bodies not having legislative power take formal action by resolution.

The question of whether a resolution considered at a legally held closed session must be made public is not, however, determined under sec. 66.77, Stats., but rather is more correctly considered under the provisions of sec. 19.21, Stats., or other special statute which regulates the keeping of public records and, particularly, under sec. 19.21 (2), which requires that such records be available for examination and copying and in that sense be made public. The distinctions between secs. 66.77 and 19.21, are more technical than real because the Wisconsin Supreme Court has interpreted the provisions of sec. 19.21 according to the policies expressed in sec. 66.77. See *State ex rel. Youmans v. Owens* (1965), 28 Wis. 2d 672, 137 N.W. 2d 470; *Beckon v. Emery* (1967), 36 Wis. 2d 510, 153 N.W. 2d 501.

In *International Union v. Gooding* (1947), 251 Wis. 362, 369, 29 N.W. 2d 730, the Supreme Court stated that where sec. 19.21, Stats., is applicable, the officer concerned is required to keep and public inspection extends to three specific kinds of papers:

“(1) Such books, papers, records, etc., as are *required by law* to be filed, deposited, or kept in his office; (2) books, papers, etc., *in his possession as such officer*; (3) books, papers, etc., *to the possession of which he is entitled as such officer.*”

In most cases any resolution would have been reduced to writing and would be at least a “paper” in possession of an officer or a paper to the possession of which he is entitled as such officer. Where sec. 19.21, Stats., was the only statute applicable, the officer could only avert examination and copying by giving specifically stated sufficient reasons as to why he believes inspection would be contrary to the public interest as required by the *Youmans* case, *supra*. *Becon v. Emery, supra*. Where a statute, or resolution of a superior

body such as a county board, requires publication of proceedings or requires a report, reduction of resolutions to written form is incumbent upon the minor deliberative body concerned.

Special consideration must, however, be given where any specific statute, antecedent to former sec. 18.01, Stats., provides for the right of inspection as to the records of any specific body. Former sec. 18.01, the predecessor to sec. 19.21, Stats., was created by ch. 178, Laws of 1917.

Section 19.21, Stats., which provides for examination and copying of public documents, was a restatement of the common law and the right of inspection is absolute, subject only to the common-law limitation that inspection need not be permitted if there is a specific showing that the public interest would be adversely affected. In *State ex rel. Youmans v. Owens* (1965), 28 Wis. 2d 672, 137 N.W. 2d 470, 139 N.W. 2d 241, the court set forth a procedure for judicial determination of whether, in cases governed by the common law, specific harmful effect upon the public interest outweighed benefits to be obtained by following the general public policy of permitting inspection. However, common-law limitations are not applicable to other statutes, antecedent to former sec. 18.01, Stats., which impose upon particular officers the duty to keep certain records and which evidence an express or implied legislative intent that such records be open to public inspection. In *State ex rel. Journal Co. v. County Court* (1969), 43 Wis. 297, 168 N.W. 2d 836, the court held that sec. 59.14 (1), Stats., was a legislative declaration independent and in substitution of the common law and posed no requirement that a person have a special interest in the subject matter of the document and that the right of inspection was absolute, and that the county judge had no right to suppress a decision from the public after it had been made available to the parties.

It is my opinion that any resolution considered by a minor governing or administrative body which has a duty to keep a record of its proceedings or has a duty to report its actions to a superior governing body, must, as a general rule, be made public.

I have reached that conclusion, in part, upon examination of the statutes relating to records to be kept involving meetings of local units of government. In the case of cities, sec. 62.11 (4) (a), Stats., provides:

“Proceedings of the council shall be published \* \* \*. The proceedings for the purpose of publication shall include the substance of every official action taken by the governing body. \* \* \*”

Also see sec. 62.09 (11), (b), (c), (d), (f), Stats.

For village boards see secs. 61.32 and 61.25 (4), Stats., and for town board meetings and town meetings, see sec. 60.45 (1), (7), (9), Stats. For county boards see secs. 59.09 (2), 59.17 (1), (2), (14), 59.09, Stats.

Section 59.06 (1), Stats., provides that county boards may establish committees “designating the purposes \* \* \* prescribing the duties \* \* \* and manner of reporting.”

Examination of all statutes relating to all bodies, boards, commissions, committees and agencies that may be covered by sec. 66.77, Stats., would be exceedingly tedious and, by and large, not very fruitful. Specific provisions to the contrary, all meetings are essentially governed by the provisions of sec. 66.77 itself, and statutory provisions, such as discussed above, requiring local units of government to hold open meetings will be construed together with sec. 66.77. *State ex rel. Cities Service Oil Co. v. Board of Appeals, supra*. The previously cited statutory sections provide us, however, with a useful basis for analogy and clearly demonstrate a legislative intent that resolutions, considered by a minor governing or administrative body which has a duty to keep a record of proceedings or report its actions to a superior governing body, be made public.

Question 2: “May a body, board, commission, committee or agency not acting in a quasi-judicial capacity formally vote in executive session or must it, after deliberating in executive session thereafter vote at a reconvened open session?”

In *Cities Service Oil Co. v. Board of Appeals, supra*, the court held that the specific provisions of sec. 66.77, Stats.,

applied to the more general open meeting provision contained in sec. 62.23 (7) (a), Stats. The court concluded that the Board of Zoning Appeals acted properly when, after an open hearing, it held closed sessions to deliberate the decision, stating that:

“When the two statutes are construed together we think it clear that where a municipal board, such as the instant Board of Appeals, is acting in a quasi-judicial capacity, all meetings in the nature of hearings held on a pending appeal must be open to the public, but that closed executive sessions may then be held for the purpose of deliberating to determine what decision should be made. \* \* \*” 21 Wis. 2d at 537.

This court stated that the board could properly take a formal vote at such a closed session because voting was an integral part of the deliberative process. It follows that a body or board acting in a quasi-judicial capacity may take a formal vote after deliberations at a meeting closed pursuant to subsec. (3) (a).

In a recent decision, the Supreme Court determined that a *particular formal action* of a body not acting in a quasi-judicial capacity could not be taken at a closed session under subsec. (3) (d). In *Board of School Directors of Milwaukee v. WERC* (1969), 42 Wis. 2d 637, 168 N.W. 2d 92, the court agreed with, and adopted the conclusion of my predecessor in 54 OAG vi (1965), where it was stated that wage negotiations between a municipality and a labor organization could be held at a closed session under subsec. (3) (d). However, the court went on to quote the language of the attorney general’s opinion with approval and held that:

“\* \* \* the formal introduction, deliberation and adoption by the elected body of the bargaining recommendations must be at open meetings. \* \* \*” 42 Wis. 2d at 653.

From the preceding cases it can be seen that subsec. (3) performs a dual function in providing for specific exceptions to the blanket prohibition of closed meetings contained in subsec. (2). First of all, it defines the situations where the legislature thought that open meetings might be incom-

patible with the conduct of governmental affairs or the transaction of governmental business so that public bodies should have the discretionary authority to close meetings. See 57 OAG 213, 214-215 (1968). Secondly, subsec. (3) also acts to define what formal actions can be taken at a meeting properly closed under subsec. (3). The cases also suggest that a case-by-case and situation-by-situation approach will be necessary in order to determine what formal actions can be taken.

Section 66.77 (2), Stats., uses the language:

“\* \* \* No formal action of any kind, *except as provided in sub. (3)*, shall be introduced, deliberated upon or adopted at any closed session \* \* \*.” (Emphasis added.)

The statute contemplates that certain formal actions, if within the exceptions set forth in subsec. (3), can be adopted at a closed session. Minor governing or administrative bodies adopt proposals by voting, with a majority of the quorum prevailing, absent specific statute to the contrary. See sec. 990.001 (8) and (8m), Stats.

Since only two cases dealing with relatively specific situations have been decided, I cannot formulate an opinion regarding which formal actions can be taken at closed sessions that would apply to all subjects considered by all the various state and local bodies and boards covered by sec. 66.77, Stats. I am of the opinion, however, that the basic guideline for decision in any particular situation has been provided us by the legislature. Thus, just as meetings should be closed under subsec. (3), only where an open meeting would be incompatible with the conduct of governmental affairs or the transaction of governmental business, formal action, by vote, may be taken at a closed meeting only where open formal action would be incompatible with the conduct of governmental affairs or the transaction of governmental business.

Question 3: “If such body, board, commission, committee or agency can lawfully, formally vote in closed session, must the result of the vote and the vote of each of the voting members thereafter be made public?”

I am of the opinion that the "result" of the vote must be made public. Where the formal action was positive in nature, no purpose would be served by secreting the action. The "result" of the vote may, however, be limited in certain cases to a report of "adoption" or "rejection" of a given resolution. Absent statute, or rule of a given minor governing or administrative body, there is no requirement that there be a roll call of votes or that the numerical split of votes be recorded.

I am of the opinion that where such a body does take a vote and records the same, public inspection of such paper is available to any person, subject to the limitations applicable to sec. 19.21, Stats., set forth in *State ex rel. Youmans v. Owens*; *Beckon v. Emery*; and *State ex rel. Journal Co. v. County Court*, and any special statute applicable to such body. I am not aware of any substantial reason why such record should not be immediately available to the public.

While there are a number of statutes which require more than a majority of a quorum, or of those elected, to formally act in a given area, few statutes require recordation of a roll call vote.

Section 59.17 (1), Stats., requires the county clerk to:

"\* \* \* record the vote of each supervisor on any question submitted to the board, if required by any member present \* \* \*"

Section 119.04 (5), Stats., applicable to the Milwaukee School Board, provides:

"(5) All elections or appointments of members and officers, authorized by law to be made by such board of school directors, shall be made by roll call vote. The records of such votes shall be entered by the secretary-business manager in the minutes and the printed proceedings of such board."

It is for the legislature to determine whether the public is entitled to know how each member voted. However, if such records are kept, they should be available for public inspection.

An administrative agency speaks only through its records. It is therefore incumbent that every minor administrative body as well as every legislative and quasi-judicial body keep and maintain adequate records to support actions taken by them. When such records exist, they are available for public inspection subject to the limitations herein set forth.

RWW:RJV

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*ORAP--County Facilities--(Formal)*—Although counties may charge reasonable fees for the use of facilities in their county parks, they may not charge such fees only to out-of-state residents while allowing all Wisconsin residents to utilize such facilities free of charge simply because ORAP or ORAP-200 funds are involved. Such action would create an arbitrary and unreasonable distinction based on residence and unconstitutionally deny residents of other states equal protection of the laws. U. S. Const., Amend XIV, sec. 2; Wis. Const., Art. I, sec. 1; sec. 27.015 (7) (f), Stats.

January 22, 1971.

JOSEPH J. SALITURO

*Corporation Counsel, Kenosha County*

You advise that the number of out-of-state people utilizing your county parks has become so large that Wisconsin residents are being denied the full utilization of these parks. This situation has apparently generated a desire to somehow control the use of your county parks by nonresidents. You further advise that your county is also interested in generating revenue at its parks to assist in paying for the cost of obtaining and maintaining them.

With the foregoing goals in mind, your County Park Commission has requested that you obtain my opinion in reference to three somewhat interrelated questions. You first inquire as follows:

“Can we charge a fee to out-of-state residents who use any of our parks?”

Generally speaking, parks are provided for the benefit of and are held in trust by government for the public. 10 McQuillin, *Municipal Corporations* (3d ed., 1966 Rev. Vol.) §28.52, p. 169; *State ex rel. Hammann v. Levitan* (1929), 200 Wis. 271, 278, 279, 228 N.W. 140. Thus, the dominant aim in their establishment appears to be the common good of mankind, rather than the special gain or private benefit of a particular municipality. 39 Am. Jur., *Parks, Squares, and Playgrounds* §18, p. 815. As stated in 67 C.J.S., *Park*, at pp. 860-861:

The word ‘park’ generally means a public park, and the customary use of the term is to designate a piece of ground maintained for the benefit and use of the public generally, a place open for everyone; and it carries no idea of restriction to any part of the public.”

In modern times, the principal purpose of most parks is public recreation, and included in the word “recreation” is the right of assemblage, aesthetic recreation and mental and cultural entertainment as well as physical recreation. *Committee for Industrial Organization v. Hague* (1938), D.C.N.J., 25 F. Supp. 127, 145, mod. on other grounds in 101 F. 2d 774 and 307 U.S. 496, 83 L.ed. 1423, 59 S.Ct. 954; *Bernstein v. City of Pittsburgh* (1951), 366 Pa. 200, 77 A. 2d 452, 455.

Normally, however, local government may establish reasonable fees relating to the use of the park facilities if such fees are designed to provide funds for the continuing operations of such park facilities. As stated in 64 C.J.S., *Municipal Corporations*, §1818, at p. 303:

“*Fees.* As a general rule, municipal authorities may, in case of expense in maintaining service in a public park, demand a reasonable fee for individual use. So a reasonable fee may be charged for the use of a bathhouse, swimming pool, or pavilion . . . .”

See also 10 McQuillin, *Municipal Corporations* (3d ed., 1966 Rev. Vol.) §28.54, p. 191.

In Wisconsin, counties have specific statutory authority to impose fees for the use of county park facilities. A county park commission established pursuant to sec. 27.02, Stats., possesses and exercises all of the powers and duties of a county rural planning committee under sec. 27.015, Stats. See sec. 27.015 (13). Section 27.015 (7) (f), Stats., in turn, provides that a county rural planning committee:

“. . . may under the direction of the county board, *operate* a county park or parks for tourist camping and general public amusement, and *may establish fees*, concession privileges and grants and employ such help as is needed to operate the park or parks for the best county interests. The county board shall establish rules and regulations governing the conduct and behavior of patrons in and on any such park and shall provide for penalties for infraction of these rules and regulations . . . .” (Emphasis added.)

Even where authority to impose fees exists, however, unless clearly evident from the statute, such charges may not be established for general revenue purposes. Obviously, if our parks be viewed merely as a source of revenue, the broad public purposes they are intended to serve could be frustrated in large measure and those who would most benefit from them might be deprived of their use. 39 Am. Jur., *Parks, Squares, and Playgrounds*, §18, p. 815; 10 McQuillin, *Municipal Corporations* (3d ed., 1966 Rev. Vol.) §28.10, p. 23. Therefore, since the above statute appears to authorize charges for the use of county park facilities only if related to current needs for *operation*, (which term I construe as sufficiently broad to include rehabilitation, repair and other expenditures necessary to maintain service), it cannot be viewed as statutory authorization for the establishment and utilization of public park fees for the purpose of producing revenue for such capital expenditures as the *acquisition* of county parks.

In response to your first question, then, it is clear from the foregoing that your county may charge individuals, including out-of-state residents, reasonable fees for the use of facilities in your county park or park system if such are

imposed for the purpose of providing funds for the continuing operation of such facilities.

Your second and third questions more specifically inquire whether your county may impose fees *only* on nonresidents of Wisconsin. You ask:

"Can we charge a fee to out-of-state residents and not state residents at those parks in which ORAP (one-cent cigarette tax) funds have been used since Wisconsin taxpayers, by paying this tax, help pay for the parks?"

"Can we charge a fee to out-of-state residents and not Wisconsin residents at those parks in which ORAP 200 funds will be used since this will be a tax on all Wisconsin taxpayers?"

Nonresidents and residents can be treated differently where there are valid reasons for doing so. *American Commuters Ass'n v. Levitt* (D.C.N.Y. 1967), 279 F. Supp. 40, affirmed 405 F. 2d 1148. See also 16A C.J.S., *Constitutional Law*, §470, p. 209; 16 Am. Jur. 2d, *Constitutional Law*, §474, pp. 828-829. Thus, the courts will apparently allow a municipality to make different provisions for the use of specific public facilities for people residing outside a municipality from those residing in it, if the classification is based on a reasonable distinction. *McClain v. City of South Pasadena* (1957), 155 Cal. App. 2d 423, 318 P. 2d 199, 207 (municipal plunge); *Schreiber v. City of Rye* (1967), 53 Misc. 2d 259, 278 N.Y.S. 2d 527 (city golf course and swimming pool); *People ex rel. Village of Larchmont v. Gilbert* (1954), Co. Ct. 137 N.Y.S. 2d 389 (parking lot); *People ex rel. Village of Lawrence v. Kraushaar* (1949), 195 Misc. 487, 89 N.Y.S. 2d 685 (parking lot); *Cartwright v. Sharpe* (1968), 40 Wis. 2d 494, 162 N.W. 2d 5 (transportation of students). And it has been held that a classification may reasonably be based upon residence in a county as against nonresidence. *Jones v. Hammer* (1927), 143 Wash. 525, 255 P. 955, 957. The foregoing cases clearly suggest that a county may reasonably distinguish between residents and nonresidents of the county for the purpose of insuring that its county parks remain available for the use of inhabitants of the county.

However, while discrimination between citizens and non-citizens or residents and nonresidents, is not necessarily improper, it often raises constitutional questions requiring judicial consideration. And as a general rule, unless required under the police power of the state for the protection of the local citizens, laws establishing unequal burdens on the basis of residence are held unconstitutional and void as violating some constitutional provision, including the privileges and immunities clause of Art. 4, §2 and the equal protection clause of §1 of the Fourteenth Amendment, U.S. Const. 61 A.L.R. 63. See also *Edgerton v. Slatter* (1935), 219 Wis. 381, 263 N.W. 83; *Whipple v. South Milwaukee* (1935), 218 Wis. 395, 361 N.W. 235; *Toomer v. Witsell* (1948), 334 U.S. 385, 68 S.Ct. 1156, 92 L.ed. 1460, rehearing denied 335 U.S. 837, 69 S.Ct. 12, 93 L.ed. 389.

The provision of the Fourteenth Amendment which insures that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws," not only applies to the state but to all units of government of the state, including counties. 5 McQuillin, *Municipal Corporations* (3d ed., 1969 Rev. Vol.), §19.13, p. 425, 16 Am. Jur. 2d, *Constitutional Law*, §491, p. 856. See also *State v. Dering* (1893), 84 Wis. 585, 54 N.W. 1104. In addition, equal protection of the law as well as due process is also guaranteed to all persons by secs. 1, 13 and 22 of Art. I, Wis. Const. *Chicago & N. W. Ry. v. La Follette* (1969), 43 Wis. 2d 631, 636, 169 N.W. 2d 441. See also *State ex rel. Sonneborn v. Sylvester* (1965), 26 Wis. 2d 43, 132 N.W. 2d 249, *Hause v. Sawicki* (1963), 20 Wis. 2d 308, 121 N.W. 2d 876.

Since the equal protection of the laws guaranteed by both the Federal and our State Constitution forbids only unreasonable classification, the ultimate test is whether the basis for the classification proposed in your letter is reasonable. 5 McQuillin, *Municipal Corporations* (3d ed. 1969 Rev. Vol.), §19.14. See *State ex rel. Schopf v. Schubert* (1969), 45 Wis. 2d 644, 651, 173 N.W. 2d 673; *Johnston v. Sheboygan* (1966), 30 Wis. 2d 179, 184, 140 N.W. 2d 247.

It is elementary that all legislative acts are presumed constitutional and every presumption must be indulged to

sustain the law if at all possible. *Gottlieb v. City of Milwaukee* (1967), 33 Wis. 2d 408, 415, 147 N.W. 2d 633. A legislative body, therefore, has very broad discretion as to matters of classification and its judgment in reference thereto enjoys the presumption of reasonableness. *Cayo v. Milwaukee* (1969), 41 Wis. 2d 643, 649, 165 N.W. 2d 198; *State ex rel. Baer v. Milwaukee* (1967), 33 Wis. 2d 624, 633, 148 N.W. 2d 21; *Associated Hospital Service, Inc. v. Milwaukee* (1961), 13 Wis. 2d 447, 109 N.W. 2d 271; 88 A.L.R. 2d 1395; *Kiley v. Chicago, M. & St. P. Ry.* (1910), 142 Wis. 154, 159, 125 N.W. 464. Such a presumption collapses, however, in light of evidence which tends to establish the contrary. *Schlichting v. Schlichting* (1961), 15 Wis. 2d 147, 112 N.W. 2d 149. See 29 Am. Jur. 2d, *Evidence*, §165, p. 203. The court will then scrutinize the distinction in light of the standards for constitutional classification established by our Supreme Court in *State ex rel. Ford Hopkins Co. v. Mayor* (1937), 226 Wis. 215, 222, 276 N.W. 311, which requires in part that all classifications be based upon substantial distinctions which make one class really different from another, that the classification be germane to the purpose sought to be accomplished and that the law apply equally to each member of a class. See *Cayo v. Milwaukee*, *supra*, at pp. 649-650 and *State ex rel. Baer v. Milwaukee*, *supra*, at p. 633.

Chapter 427, Laws of 1961, referred to as the Outdoor Recreation Act of 1961 or ORAP, provided for the establishment of a long range plan for a comprehensive statewide system of recreational facilities to be developed under the guidance of a state recreation committee and financed by a "penny-per-pack" cigarette tax. The program included a number of specific provisions authorizing state aid to assist eligible counties in the acquisition and development of outdoor recreational facilities. The general outdoor recreation program, including those provisions relating to state aids for county recreational facilities, was significantly altered and greatly expanded by the enactment of ch. 353, Laws of 1969, better known as ORAP-200. Although the cigarette tax instituted under the initial ORAP program continues, it is now paid into the state general fund, and the new program is financed through bonding and an allotment from

the general fund. Normally, costs associated with the operation and maintenance of parks and other outdoor facilities have not been eligible for state aid under either of these laws.

Since the occupational and use tax which supported the original ORAP program was ultimately passed on to the people who purchased and used cigarettes in Wisconsin, regardless of their residence, it does not appear to form any reasonable justification for discriminating against non-residents of Wisconsin in the manner contemplated. Under the ORAP-200 program this tax and all manner of other general state revenues which make up the general fund are utilized to support the program. However, these revenues are also obtained from nonresidents of Wisconsin as well as residents of this state. Therefore, it appears that the ORAP-200 legislation also fails to provide any reasonable basis for the proposed distinction. Further, a primary purpose and intent of both ORAP programs has been "to facilitate and encourage the fullest public use" of our outdoor recreation resources rather than limit utilization of such facilities.

Your letter suggests that the capacity of the public park facilities of your county are limited and insufficient to meet the needs of both county residents and the nonresidents of your county who seek to use them. It is therefore understandable that your county would and should take some appropriate action designed to avoid excessive breakdown and deterioration of your park facilities which might result from overcrowding. While parks normally provide recreational opportunities for the public at large, it is well recognized that parks of local governmental units are intended for the comfort and enjoyment of the local inhabitants. *Baird v. Board of Recreation Com'rs. of Village of South Orange*, 108 N.J. Eq. 91, 154 A. 204, 208, 209; *Archer v. Salinas City*, 93 Cal. 43, 28 P. 839; *Ramstad v. Carr*, 31 N.D. 504, 154 N.W. 195, 200; *Bushard v. Washoe County*, 68 Nev. 217, 236 P. 2d 793, 796; *Borough of Fenwick v. Town of Old Saybrook*, 133 Conn. 22, 47 A. 2d 849, 853. Indeed, this concept appears to be recognized in sec. 27.015 (7) (d), Stats., which provides that county park authorities shall:

“(d) Consider and provide for the establishment of community parks and woodlands, proportioned and situated so as to provide *ample and equal facilities for the establishment of community parks and residents of the county.*” (Emphasis added.)

However, the congestion at your parks may be caused or aggravated by nonresidents of your county who reside in other Wisconsin counties just as well as by nonresidents of Wisconsin. Under such circumstances, the act of singling out nonresidents of Wisconsin as the only individuals to pay the subject fees would appear to be based merely on the fact that these people are citizens of other states. In this regard, the discrimination which would result from requiring a fee from some, but not all, nonresidents of the county, is similar to that considered in *People ex rel. Village of Lawrence, supra*. In that case the court held that where a village ordinance fixed a municipal parking lot fee for residents of two communities outside the village limits at the same rate as for village residents while charging all other nonresidents a substantially higher fee, it unconstitutionally discriminated as to persons within a class of nonresidents of the village in violation of the equal protection clauses of both the state and federal constitutions.

As pointed out above, the fees authorized by sec. 27.015 (7) (f), Stats., were presumably intended to relate mainly to expenses of operating county park facilities rather than for the prevention of congestion in your parks. This is not to say that a legislative body may not limit the number of people who will engage in a particular activity, which if carried on without restraint as to numbers will be injurious to the public welfare, by the imposition of a charge or fee upon those engaging in the activity. *Milwaukee v. Hoffmann* (1965), 29 Wis. 2d 193, 138 N.W. 2d 223. But even if such fees were effective in dissuading nonresidents of Wisconsin from using your park facilities, the question remains as to whether their numbers would simply be replaced with an equal number of residents from other Wisconsin counties. Under such circumstances, of course, the congested park conditions would obviously continue.

For the foregoing reasons, I am of the opinion that a county may not charge fees for the use of facilities in their county parks only to out-of-state residents while allowing all Wisconsin residents to utilize such facilities free of charge simply because ORAP or ORAP-200 funds are involved. Such action would create an arbitrary and unreasonable distinction based on residence and unconstitutionally deny residents of other states equal protection of the laws. In so concluding, however, I do not mean to intimate that situations may not arise which could form a reasonable basis for such distinction or that a county may not determine that circumstances justify the establishment of fees for the use of such park facilities which would apply to all but residents of the county in which the park or park system is located.

RWW:JCM

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*Advertising, Abortions—Student Newspaper—(Informal)*—Legality of advertising an abortion referral service in student (campus) newspaper discussed.

January 22, 1971.

EUGENE R. MCPHEE, *Executive Director*  
*Board of Regents of State Universities*

You have requested my opinion as to whether the Board of Regents of State Universities may prohibit certain advertisements in campus newspapers. The advertisements in question are in the nature of offering a physician and hospital referral service for abortions.

In my opinion, the Board may not prohibit these advertisements.

In *Lee vs. The Board of Regents of State Universities* (1969), 306 F.Supp. 1097, the District Court, in a declaratory judgment, held that when a state-owned newspaper allowed commercial advertising, the state could not restrict or prohibit editorial advertising.

The advertisements concerning abortions are not only commercial in nature but may also be considered as editorial in nature. This point is made for the federal courts have given some indication that commercial advertisers are not afforded as much protection under the constitution as are those who wish to advance their political, philosophical or social views.

Consequently, it may be constitutionally permissible to prohibit a purely commercial advertisement but under the *Lee* case, an advertisement which is both commercial and editorial in nature, may not be prohibited.

The fact that the advertisements concern abortions is immaterial, unless the ads clearly assist in obtaining illegal abortions in Wisconsin in such a manner as to aid and abet the commission in Wisconsin of a crime. Substantial confusion exists at present as to what kinds of abortions are criminal in Wisconsin, since a three-judge federal court held a part of the state abortion statute invalid [see *Babbitz v. McCann* (1970), 310 F.Supp. 293] and enjoined the Milwaukee district attorney from all future prosecutions under that portion of the statute. Pending decision of the appeal from *Babbitz*, both doctors and prosecutors are uncertain of their rights and liabilities under the abortion statute.

Advertisements for abortion referral services do not appear to violate sec. 151.15, Stats., which bans the advertising of "indecent articles."

One of the advertisements that you have inquired about, while loosely speaking may be considered editorial in nature, does advertise the availability of condoms. In my opinion, this ad violates the provisions of sec. 151.15, Stats., which reads in part as follows:

"(1) As used in this chapter, the term 'indecent articles' means any drug, medicine, mixture, preparation, instrument, article or device of whatsoever nature used or intended or represented to be used to procure a miscarriage or prevent pregnancy.

“(2) No person, firm or corporation shall publish, distribute or circulate any circular, card, advertisement or notice of any kind offering or advertising any indecent article for sale, nor shall exhibit or display any indecent article to the public.”

The law does not, however, favor censorship. When questionable ads of this character are presented to the paper for publication, it is my suggestion that the opinion of the local district attorney be obtained as to whether prosecution would result if published. If an affirmative answer is given, the editors may decline publication on the ground that they would be subject to possible criminal liability.

It should be called to your attention that both the *Lee* case and the *Babbitz* case have been appealed to higher courts. This opinion may possibly be subject to change depending on the results of these appeals. You will be notified if there is any change in the law resulting from the appeals.

RWW:CAB

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*Motor Vehicles—Weight Limitations—(Informal)*—Section 348.20 (3), Stats., in effect, increases the maximum weight of a motor vehicle from 73,000 pounds to 74,500 pounds.

January 22, 1971.

JAMES L. KARNS, *Administrator*  
*Division of Motor Vehicles*

You have asked for my opinion regarding certain motor vehicle weight limitation statutes. Section 348.15 (2), Stats., establishes the maximum weight which may be imposed on the highway by one wheel, one axle, a group of axles, and all axles of a vehicle. Section 348.15 (3), Stats., specifies certain increased weights that may be tolerated above these maximums. Prior to a recent amendment, sec. 348.20 (3), Stats., read in part:

“When a vehicle or combination of vehicles is transporting livestock and a violation of a single axle or a group of axles over the limits set forth in ss. 348.15 (3) (b) or (c) and 348.16 is detected, there shall be no prosecution provided that the axles under consideration can be made legal by shifting the load but no shifting of load shall be required unless the overload is more than 1,500 pounds per axle or group of axles. \* \* \*”

This statute provides that where a load of livestock is too heavy on one axle or a group of axles, there shall be no prosecution if the load can be shifted in such a way as to redistribute the weight so that all axle weights will be within legal tolerances. This means that it must be physically possible and practicable to shift the load upon the vehicle to accomplish this result. It is not enough that there be a mere theoretical or mathematical possibility of shifting the weight to an underloaded front axle for example. This law requires that such actual shifting take place unless the overload is no more than 1,500 pounds, in which case the shifting need not be made. However, the violation is excused only where it would be possible to make the correction by shifting the load. This requirement is not dispensed with by the additional provision that the shifting will not be required to be performed where the overload is only 1,500 pounds. This statute applied only to single axle and group axle overloads. It did not apply to an overload on all axles. Its meaning was reasonably clear.

However, this statute was amended by ch. 340, Laws of 1969, to read, in part:

“When a vehicle or combination of vehicles is transporting livestock, bulk products or peeled or unpeeled forest products cut crosswise and a violation of a single axle or a group of axles over the limits set forth in ss. 348.15 (3) (b), (c) or (d) and 348.16 is detected, there shall be no prosecution provided that the axles under consideration can be made legal by shifting the load but no shifting of load shall be required unless the overload is more than 1,500 pounds per axle or group of axles. \* \* \*”

This amendment adds to sec. 348.20 (3), Stats., a reference to sec. 348.15 (3) (d), Stats., which relates to an overload on all axles. The maximum load permitted on all axles is 73,000 pounds, but 77,000 pounds for certain forest products. As amended, this statute now applies to an overload on all axles as well as to overloads on single and group axles. This now creates some confusion as to the meaning of the words "can be made legal by shifting." Under the prior law shifting obviously meant shifting the load upon the vehicle from one axle or group of axles to another. However, no amount of such shifting would change the total weight of the vehicle. Thus under the law as amended, it must have been the legislative intention to change the conception of what constitutes shifting, at least as far as total vehicle weight overload is concerned. Obviously, only partial unloading of the vehicle will correct such an overload problem.

Whatever the intention of the legislature as to how the shifting is to be accomplished, it seems clear that, since an overload of no more than 1,500 pounds does not have to be moved, the practical effect of this statutory amendment is to allow vehicles exceeding the 73,000 pound maximum (77,000 pounds in some cases) an additional 1,500 pounds without penalty. Thus the new maximum total weights are 74,500 and 78,500 pounds respectively.

It should also be pointed out that sec. 348.20 (3), Stats., is not a criminal statute which must be construed strictly in favor of an accused. It is, in fact, an exception to a criminal statute. A person claiming the benefit of such an exception must establish that he comes within it. 82 C.J.S. *Statutes*, §382, at page 893. This rule is applicable in a criminal proceeding. In 22A C.J.S. *Criminal Law*, §572, at pages 316, 317, it is said:

"In general, accused has the burden of proving, as a matter of defense, that he is within an exception in the statute creating the offense, at least, where such exception is not part of the enacting clause, but is a proviso thereto, or is in fact not part of the description of the offense, as where the exception is not part of the crime but operates to prevent the act otherwise included in the statute from being a

crime. Accordingly, the prosecution owes no duty to prove that accused is not within the exception. \* \* \*

RWW:AOH

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*Coordinating Council for Higher Education—Duties—(Formal)*—Under ch. 39, Stats., duties of Coordinating Council for Higher Education are of planning and budgetary nature rather than managerial or administrative. Numerous questions regarding Council functions discussed.

January 25, 1971.

ARTHUR D. BROWNE

*Executive Director, Coordinating Council for Higher Education*

You have requested my opinion on numerous questions relative to the powers and duties of the Coordinating Council.

The legislative intent in creating the Coordinating Council is declared in sec. 39.01, Stats. (1967), as amended by ch. 276, Laws of 1969. This section states the purposes of the Council to be:

“39.01 The purpose of this subchapter is to provide for the direction and coordination of the activities of the university of Wisconsin, the state universities, schools of vocational, technical and adult education and county teachers colleges by providing a permanent coordinating council for higher education to make a continuing study of the state-supported institutions of higher education under their jurisdiction and the relation thereto of the needs of the people of Wisconsin, to recommend necessary changes in programs and facilities, to provide for a single, consolidated, biennial budget request for the university of Wisconsin and the state universities, and that portion of the budget request of the board of vocational, technical and adult education described in s. 39.03 (3) and to report the results of its studies and recommendations to the governor and the legislature.”

To accomplish these purposes, the agency was given certain powers and duties which are set forth in sec. 39.03, Stats. (1967), as amended by the 1969 session of the legislature. In considering the powers and duties of the Council, it is essential to consider the provisions of sec. 39.03 (7), Stats. (1967), which read in part as follows:

“Except as expressly provided in this subchapter nothing herein shall be construed to deprive the regents of the university, the board of regents of state colleges, the state board of vocational, technical and adult education and boards of county teachers colleges of any of the duties and powers conferred upon them by law in the government of the institutions under their control.”

Specifically you have asked:

(1) Does CCHE have the power to set statewide guidelines or policies which would determine for all state-supported post-high school institutions:

(a) The definition of and classification of a “teaching assistant,”

(b) The number or proportion of teaching assistants allowable in the instructional staff of an institution,

(c) The maximum number of hours per week, pay per hour and working conditions for teaching assistants.

The Council is primarily charged with the duty and responsibility of coordinating curriculum between the various institutions of higher education and in determining and presenting the biennial budget request to the Governor.

Under sec. 37.11 (2), Stats. (1967), the Board of Regents of State Universities has the power to employ assistants and teachers and to prescribe their duties. Under sec. 36.06 (1), Stats. (1967), the Regents of the University of Wisconsin have similar powers including the specific authority to fix salaries. Similarly, under ch. 41 and specifically sec. 41.155 (9), Stats. (1967), the District Board has express authority to employ and fix the compensation of teachers and technical advisors subject to the approval and require-

ments of the State Board of Vocational, Technical and Adult Education. Sections 41.37 and 41.41, Stats. (1967), empower county teacher college boards with the same powers and fixes the qualifications of teachers.

In my opinion, the answer to question (1) (a) through (c) must be no. The Coordinating Council does not have the authority or power to determine what are essentially personnel matters. These functions are expressly reserved to the governing boards of the particular institutions. However, the Coordinating Council in exercising its statutory fiscal control may, as a very practical matter, effect the employment of teaching assistants.

The Coordinating Council does not have the authority or power to directly promulgate personnel or management policies for these institutions other than those that are necessary for proper budgetary presentation.

Additionally, you have asked:

(2) Does CCHE have the power to establish statewide policies relative to procedures for institutional reaction to campus disturbances such as the following:

(a) Obligation of campus officers to call for law enforcement personnel under certain conditions of riot,

(b) Penalties to be levied in conjunction with certain acts of campus disturbances that would be applicable in all state public higher education institutions,

(c) Procedures for due process in campus disciplinary systems accorded to students undergoing disciplinary procedures,

(d) Procedures for establishing community campus responsibilities and financial obligations for police and fire protection.

The answer to this question is clearly no. There is nothing in ch. 39, Stats. (1967), or in the Laws of 1969 that empower the Council to supervise or prescribe student disciplinary procedure or procedure for establishing community campus responsibilities and financial obligations for police and fire

protection. These functions are clearly, specifically and expressly reserved to the institutions.\*

Further, you have asked:

(3) Does CCHE have the power to prescribe statewide policies to be followed by public higher institutions relative to the following faculty management problems:

(a) Minimum student faculty ratios to be achieved by each institution,

(b) Average teaching load to be achieved by an institution,

(c) Salaries to be paid by any institution for specified instructional duties,

(d) Uniform procedures in negotiating with faculty associations.

The functions involved in questions (a) and (b) are primarily related to the day-to-day operations of the institutions and do not directly involve curriculum or budgetary matters. As such, these matters are under the direct supervision of the governing boards of the particular institutions and are not the responsibility of the Coordinating Council.

However, as the Council is the "final authority in determining the biennial budget request," criteria could be established as a matter of budgetary control. In this respect the Council would be exercising its fiscal responsibilities rather than usurping the direct administration of the institutions.

It is my opinion that the matters referred to in questions (c) and (d) are clearly administrative and within the purview of the institutions' powers and responsibilities. For example, the Regents of the University of Wisconsin are given express power to "fix the salaries" (sec. 36.06 (1), Stats. (1967)), and the Board of Regents of State Universities are given the power of appointment, which, in my opinion, necessarily includes the determination of salaries.

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\*For example, see secs. 36.12 and 37.11 (10), Stats. (1967)

(sec. 37.11 (2), Stats. (1967)). This, of course, does not mean the salary requests of the institutions must be accepted by the Coordinating Council. It does mean, however, that the Council does not have the authority to say that Professor A shall receive so much and Professor B so much. Further, in my opinion, the Coordinating Council may not say English professors are to be paid more than Sociology professors. Nor does the Council have the authority to say that teachers with doctors' degrees are to be paid so much and teachers with lesser degrees are to be paid something less. The matter of fixing individual compensation is so directly related to the management and operation of the institution, that it must be left with those who have such responsibility under the law.

Similarly, the matter of negotiation with employe associations is one of management or administration, and is not a matter for the Coordinating Council.

In question 4 you have asked:

(4) Does CCHE have the power to require that any request for appropriation of GPR funds by a public system of higher education to the state be reviewed by CCHE prior to, or simultaneously with, that request? For example, do institutional requests to the Bureau of Government Operations for supplemental funds to meet enrollment increases require CCHE approval?

The answer to the example given in question (4) is no. The statutes are clear in this matter. Under sec. 14.72 (2), Stats. (1967), the Board on Government Operations is:

“\* \* \* authorized to supplement the appropriation of any department, board, commission or agency, which is insufficient because of unforeseen emergencies or insufficient to accomplish the purpose for which made \* \* \*”

The Council, under sec. 39.03 (7), Stats. (1967), only has final authority on the budget presented to the Governor. Once the budget has been adopted by the legislature, institutions of higher education may seek additional appropriations to meet emergencies without the approval of the Council.

In question (5) you have asked:

(5) Does CCHE have the right to obtain any available or required information relative to policy formation in harmony with its statutory empowerments from systems and/or institutions. For example, can it require detailed data on:

- (a) Costs of instruction,
- (b) Faculty workloads,
- (c) Salaries.

The answer to this question is yes.

Finally, you have asked:

(6) In its responsibility to determine overall educational programs, approve new programs, and to direct discontinuance of existing educational programs when deemed necessary, does the CCHE have the power to stop the use of state funds for programs not approved by CCHE.

Section 39.03 (1) as amended by ch. 438, Laws of 1969, reads:

"39.03 (1) The coordinating council shall determine what overall educational programs shall be offered in the several units of the university of Wisconsin, the state universities, the collegiate transfer and technical education programs of the schools of vocational, technical and adult education and the county teachers colleges to avoid unnecessary duplication and to utilize to the best advantage the facilities and personnel available for instruction in the fields of higher education. No new educational program may be developed or instituted at any institution of higher education except with the coordinating council's approval. The coordinating council may direct the discontinuance of existing educational programs as it deems necessary to conform to state planning efforts and to assure the best utilization of facilities and personnel."

The Council does not have any express statutory authority over institutions of higher education which it could exercise to force compliance with its determinations. In answering this question, which I assume to be hypothetical, it must

be presumed that government agencies will act lawfully and properly. *White House Milk Co. v. Thomson* (1957), 275 Wis. 243, 81 N.W. 2d 725. Also see 52 Am. Jur. §26, *Taxpayers' Actions*.

If a dispute should arise between the Council and an institution of higher education, the matter should be referred to this office for appropriate action.

RWW:CAB

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*Plumbing—Examining Board Discretion—(Informal)—* Although designer of plumbing systems permits must be issued to applicants who are licensed master plumbers, sec. 443.01 (16), Stats., grants the Examining Board wide discretion to establish design of engineering systems classifications in fields and subfields of technology recognized in engineering design practice and to determine the competence of applicants.

January 25, 1971.

C. F. HURC

*Administrator and Secretary, Examining Board of Architects, Professional Engineers, Designers & Land Surveyors*

You ask for my interpretation of the authority of the Examining Board of Architects, Professional Engineers, Designers & Land Surveyors to classify and to issue permits to master plumbers as designers of plumbing systems, as provided in sec. 443.01 (16), Stats. This section was created by ch. 446, Laws of 1969.

The statute gives to the Examining Board wide discretion to establish classifications in which permits may issue for design of engineering systems:

“(b) Permits shall be granted, designated, and limited to the fields and subfields of technology as are determined by the examining board and recognized in engineering design

practice. Any person holding a permit may prepare plans and specifications and perform consultation, investigation and evaluation in connection with the making of plans and specifications, within the scope of the permit, notwithstanding that such activity constitutes the practice of architecture or professional engineering under this section.

“(c) A master plumber’s license under Ch. 145 shall be considered equivalent to the work experience and satisfactory completion of a written examination in the field of plumbing systems, and the holder of a master plumber’s license shall be issued a permit as a designer of plumbing systems upon the making of an application and the payment of the permit fee.

“(d) The permit shall, on its face, restrict the holder thereof to the specific field and subfields of designing in which such permittee acquired his experience in designing. If qualified in more than one type of designing, persons may receive permits for more than one field or subfield of designing as may be determined by the examining board.”

Your questions all concern whether the Examining Board may further restrict to subfields the permits issued to master plumbers for design of plumbing systems. The drafting record discloses that the special provision for master plumbers, sec. 443.01 (16) (c), Stats., was not part of the early drafts of the statute. Its addition created an exception to the general terms of the statute and evinced legislative action (1) establishing the designer of plumbing systems classification, and (2) exempting the master plumber, who qualified and had been licensed under the requirements of ch. 145, Stats., from the additional burden of satisfying the disparate requirement of sec. 443.01 (16) (a), Stats., relating to experience and examination in order to qualify for a permit as a designer of plumbing systems.

In treating specifically with the master plumber and designer of plumbing systems classification, but only generally with designers of other engineering systems, the legislature has defined the specific class and the standard for membership in that class. By definition “A master

plumber is any person skilled in the planning, superintending and the practical installation of plumbing and familiar with the laws, rules and regulations governing the same." Sec. 145.01 (2), Stats.

By virtue of licensing by the State Board of Health, the master plumber is deemed competent in the entire field of practice allowed by ch. 145, Stats. In my opinion, the legislature did not intend your Examining Board to limit licensed master plumbers to subfields in the design of plumbing systems.

The designer permit statute, however, does not deal expressly with the separate statutory categories of master plumber (restricted) or temporary master plumber. It cannot reasonably be concluded that sec. 443.01 (16) (c), Stats., would entitle such licensees to permits for the entire field of design of plumbing systems. It is left for the discretion of the Examining Board, as it deems advisable, to establish appropriate subfields and to determine competence of applicants for any such limited permits.

RWW:GS

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*Passport Application Fees—Clerk of Courts—(Informal)*  
—Clerk of courts compensated on salary basis in lieu of fees must remit \$2 U. S. passport fee to county treasury.

January 25, 1971.

WILLIAM LEITSCH

*Corporation Counsel, Columbia County*

You have inquired whether the clerk of court for Columbia County can retain for his personal use the \$2 application for United States passport fee, where the county board has provided that he be compensated by annual salary in lieu of all fees and has by resolution provided that all fees collected by him shall be remitted to the county and become the property of the county.

I am of the opinion that, unless the resolution referred to the passport fees and specifically permitted the official to retain them for his personal use, such fees are "fees authorized by law *appertaining to his office*" and must be remitted to the county.

Section 59.15 (1) (a) and (b), Stats., provides in part:

"(a) \* \* \* The annual compensation may be established by resolution or ordinance, on a basis of straight salary, fees, or part salary and part fees, and if the compensation established is a salary, or part salary and part fees, it shall be in lieu of all fees, including per diem and other forms of compensation for services rendered, except those specifically reserved to the officer in such resolution or ordinance. The compensation established shall not be increased nor diminished during the officer's term and shall remain for ensuing terms unless changed by the board.

"(b) Any officer authorized or required to collect fees appertaining to his office shall keep a complete record of all fees received in the form prescribed by the board and shall file a record of the total annual receipts in the clerk's office within 20 days of the close of the calendar year or at such other times as the board requires. Any officer on a salary basis or part fees and part salary shall collect all fees authorized by law appertaining to his office and shall remit all fees not specifically reserved to him by enumeration in the compensation established by the board pursuant to par. (a) to the treasurer at the end of each month unless a shorter period for remittance is otherwise provided."

The Wisconsin Statutes do not specifically provide in secs. 59.39 or 59.395 or other statute that the clerk of circuit court shall process passport application papers, nor is a specific fee set forth in sec. 59.42, Stats. However, sec. 59.395 (7), Stats., provides that the clerk of circuit court shall:

"(7) Perform such other duties as required by law."

If the officer has authority or a duty to process applications for passports, it is at least in part based on federal law.

22 U.S.C.A., §214, as amended July 26, 1968, by Public Law 90-428, §2, 82 Stat. 446, provides in part:

“There shall be collected and paid into the Treasury of the United States quarterly a fee of \$2 for executing each application for a passport and \$10 for each passport issued: *Provided*, that nothing herein contained shall be construed to limit the right of the Secretary of State by regulation to authorize State officials to collect and retain the execution fee of \$2. \* \* \*”

The Secretary of State of the United States has promulgated regulations which include the following:

22 CFR, §51.21 (b), provides:

“(b) *Persons authorized and empowered by the Secretary to administer oaths.* The following persons are hereby authorized and empowered by the Secretary to administer oaths for passport purposes:

“(1) A Passport Agent.

“(2) A clerk of a Federal or State court authorized to naturalize aliens.

“(3) A diplomatic or consular officer of the United States abroad.

“(4) Any other persons specifically designated by the Secretary.”

22 CFR, §51.61 provides:

“Except as provided in §51.63, (a) the fee for a U.S. passport is \$10; (b) the execution fee for a U.S. passport is \$2, which shall be remitted to the U.S. Treasury where an application is executed before a Federal official but which may be collected and retained by any State official before whom an application is executed; (c) the passport fee of \$10 shall be paid by all applicants for a passport. The execution fee of \$2 shall be paid only when an application is executed under oath or affirmation before an official designated by the Secretary for such purpose.”

8 U.S.C.A., §1421 (a) provides:

“Exclusive jurisdiction to naturalize persons as citizens of the United States is conferred upon the following specified courts: District courts of the United States now existing, or which may hereafter be established by Congress in any State, District Court of the United States for the District of Columbia and for Puerto Rico, the District Court of the Virgin Islands of the United States, and the District Court of Guam; also all courts of record in any State or Territory now existing, or which may hereafter be created, having a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited. The jurisdiction of all the courts herein specified to naturalize persons shall extend only to such persons resident within the respective jurisdiction of such courts, except as otherwise specifically provided in this subchapter.”

While jurisdiction to naturalize has been granted state circuit courts by federal statute, sec. 252.065, Stats., provides that the counties of Wisconsin shall comprise one district and that for purposes of venue the legislature has divided the counties into 16 groups and has provided that “the office of clerk of circuit court located in the cities designated thereunder shall be the place for filing the petitions for naturalization for residents of that district.”

For the purposes of this opinion, it is assumed that the clerk of circuit court of Columbia County is the clerk of a court authorized to naturalize citizens.

In *Barron County v. Beckwith* (1910), 142 Wis. 519, 124 N.W. 1030, it was stated that circuit courts of this state have jurisdictions to naturalize aliens and that the services of the clerk of court therein are performed in his official capacity. The case held that the act of Congress, providing that clerks of state courts may retain one-half of the fees collected in naturalization proceedings, does not permit the clerk to retain such fees as against the county where the county board has provided that he serve on a salary basis and required him to remit all fees received in his official capacity to the county.

For the purposes of this opinion, we need not determine whether the clerk of circuit court is required by law to

process passport applications. The federal law grants such clerk authority to act, and authority is granted in his official capacity. 22 CFR, §51.21 (b) (2).

22 CFR, §51.61, provides that the \$2 execution fee "may be collected and retained by any state official before whom an application is executed."

It is a fee which he can collect only because of his official capacity. It is a fee "authorized by law appertaining to his office" within the meaning of sec. 59.15 (1) (b), Stats., and under the facts stated must be remitted to the county treasury.

RWW:RJV

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*Fair Employment Practices Act—Open Meeting Statute—(Formal)*—Proposed rule which would prohibit departmental employes from making any information obtained under sec. 111.36, Stats., of the Fair Employment Practices Act prior to the time an adjudicatory hearing takes place, if used as a blanket to prohibit persons from inspecting or copying public papers and records, would be in violation of sec. 19.21, Stats. Open meeting statute, sec. 66.77, Stats., discussed.

Under sec. 111.36, Stats., the stage at which publicity is to be given to complaint or proceedings is for the department, but subject to secs. 19.21 and 66.77, Stats.

Under sec. 101.60 (3), Stats., Fair Housing Law, the department is precluded from actively publicizing complaints only at those stages before the department finds that conference, conciliation and persuasion have not eliminated the alleged discrimination.

January 26, 1971.

EDWARD E. ESTKOWSKI, *Chairman*

*Department of Industry, Labor and Human Relations*

You have requested my opinion whether a proposed rule which would prohibit the Department or any of its agents or employees from making public, prior to the time an adjudicatory hearing actually takes place, any of the information obtained by the Department acting pursuant to its authority under sec. 111.36, Stats., would be in violation of the anti-secrecy law, sec. 66.77, Stats. (renumbered from sec. 14.90, Stats., by ch. 276, s. 62, Laws of 1969), or sec. 19.21, Stats., (renumbered from sec. 18.01, Stats., by ch. 259, s. 6, Laws of 1969) relating to the right of the public to examine and copy records and documents in possession of a public officer.

Your department is charged with the administration of the Wisconsin Fair Employment Practice Act, secs. 111.31-111.37, Stats.

Section 111.325, Stats., makes it unlawful for any employer, labor organization, licensing agency or person to discriminate against any employe or any applicant for employment or licensing. Discrimination is defined in sec. 111.32 (5), Stats., to include discrimination based on age, race, color, handicap, sex, creed, national origin or ancestry.

Section 111.33, Stats., provides that the Department may adopt rules and regulations to carry out the subchapter and may conduct proceedings, hearings, investigations or inquiries.

Section 111.35, Stats., provides that the Department shall investigate the existence, causes and character of discrimination; study ways of elimination and plan therefor; publish and disseminate reports embodying its findings and results of investigations and findings; confer and educate; make specific and detailed recommendations to the interested parties and report its recommendations to the legislature.

Section 111.36, Stats., is concerned with the powers of the Department to "receive and investigate complaints charging discrimination or discriminatory practices *in particular cases*, and *give publicity to its findings with respect thereto.*"

Subsections (2) and (3) of sec. 111.36, Stats., as amended by ch. 276, s. 584, Laws of 1969, provide:

“(2) In carrying out the provisions of this subchapter the department and its duly authorized agents are empowered to hold hearings, subpoena witnesses, take testimony and make investigations in the manner provided in chapter 101. The department or its duly authorized agents may privilege witnesses testifying before them under the provisions of this subchapter against self-incrimination.

“(3) If the department finds probable cause to believe that any discrimination as defined in this subchapter has been or is being committed, it shall immediately endeavor to eliminate the practice by conference, conciliation or persuasion. In case of failure so to eliminate the discrimination, the department shall issue and serve a written notice of hearing, specifying the nature of the discrimination which appears to have been committed, and requiring the person named, hereinafter called the ‘respondent’ to answer the complaint at a hearing before the department. The notice shall specify a time of hearing not less than 10 days after service of the complaint, and a place of hearing within either the county of the respondent’s residence or the county in which the discrimination appears to have occurred. The testimony at the hearing shall be taken down by a reporter appointed by the department. If, after hearing, the department finds that the respondent has engaged in discrimination, the department shall make written findings and recommend such action by the respondent as will effectuate the purpose of this subchapter and shall serve a certified copy of the findings and recommendations on the respondent together with an order requiring the respondent to comply with the recommendations, the order to have the same force as other orders of the department and be enforced as provided in ch. 101. Any person aggrieved by noncompliance with the order shall be entitled to have the same enforced specifically by suit in equity. If the department finds that the respondent has not engaged in discrimination as alleged in the complaint, it shall serve a certified copy of its findings on the complainant together with an order dismissing the complaint.”

It is clear from a reading of the statute that even where formal complaint is made the Department is not confined to conducting investigations by formal hearing. The statute

provides that the Department may rely on the provisions of ch. 101 relating to hearings, subpoena, testimony and investigations. Subsection (3) provides that the Department shall "find" probable cause that discrimination has or is being committed before the adjudicatory hearing on notice referred to in (3) is held. Prior to scheduling such hearing on notice, the Department has a duty to endeavor to eliminate the practice by conference, conciliation or persuasion.

To implement this statute the Department has adopted administrative rules, IND. 88.01-88.50.

Rule IND. 88.02 provides that the complaint be in writing, signed and sworn to before a notary public and filed. IND. 88.02 (7) provides that, at the time of filing, the Department shall promptly, and prior to the commencement of the investigation, serve a copy on the party charged.

Rule IND. 88.03 provides for an investigation by a departmental agent and a determination of whether or not there is probable cause. If no probable cause is found, the complaint is to be dismissed with notice to both parties.

Rule IND. 88.04 provides that, if the departmental agent does find probable cause, he shall give notice to both parties and proceed to eliminate the alleged unlawful practice through conference, conciliation or persuasion.

It is only after these procedures fail that a formal adjudicatory hearing on notice is scheduled. See IND. 88.06-88.13.

Your first question is whether the proposed Rule IND. 88.05, quoted below, would violate either sec. 66.77 or sec. 19.21, Stats.

#### "IND. 88.05 PROHIBITED DISCLOSURES

"The commission or any of its agents or employes shall not make public in any manner whatever any of the information obtained by the commission, or its agent, pursuant to its authority under Section 111.36, Stats. prior to the time a hearing actually takes place."

I am of the opinion that the proposed rule would violate sec. 19.21 (2) and (4), Stats., if it were used as a blanket applicable to all proceedings under sec. 111.36, Stats., to prohibit all persons from inspecting and copying papers and records required by law to be filed, deposited or kept, papers in possession of such officer, or papers to the possession of which he is entitled as such officer.

Section 19.21 (1) and (2), Stats., provides:

“(1) Each and every officer of the state, or of any county, town, city, village, school district, or other municipality or district, is the legal custodian of and shall safely keep and preserve all property and things received from his predecessor or other persons and required by law to be filed, deposited, or kept in his office, or which are in the lawful possession or control of himself or his deputies, or to the possession or control of which he or they may be lawfully entitled, as such officers.

“(2) Except as expressly provided otherwise, any person may with proper care, during office hours and subject to such orders or regulations as the custodian thereof prescribes, examine or copy any of the property or things mentioned in sub. (1). Any person may, at his own expense and under such reasonable regulations as the custodian prescribes, copy or duplicate any materials, including but not limited to blueprints, slides, photographs and drawings. Duplication of university expansion materials may be performed away from the office of the custodian if necessary.” (As amended by ch. 219, Laws 1969.)

Administrative agencies have only such powers as are expressly granted or necessarily implied. *American Brass Co. v. State Board of Health* (1944), 245 Wis. 440, 15 N.W. 2d 27. Rules of administrative agencies must be in accord with statutory policy. *Josam Mfg. Co. v. State Board of Health* (1965), 26 Wis. 2d 587, 133 N.W. 2d 301.

While the Department has rule-making authority under ch. 227, sec. 101.10 (7), Stats., and, with respect to this area, sec. 111.33, Stats., its rules cannot be contrary to the provisions of secs. 19.21 and 66.77, Stats., absent specific

statutory authority to the contrary. Nowhere in secs. 111.31-111.37, or in that part of ch. 101 made applicable to sec. 111.36, is there authority to adopt the rule referred to.

There may be good reason to preclude public inspection of records and papers prior to the time notice of formal hearing under sec. 111.36, Stats., is given; however, in view of the general policy established by secs. 19.21 and 66.77, Stats., any blanket limitation on the right of public inspection or open meeting is for the legislature.

The legislature has provided special legislation with respect to the Fair Housing Law. The procedures followed by the Department under sec. 101.60 (4), Stats., are essentially similar to those provided in sec. 111.36, Stats. Section 101.60 (3) is far more limited than proposed rule IND. 88.05, but does provide in part:

“(3) \* \* \* No publicity shall be given a complaint in those cases where the department obtains compliance \* \* \* or \* \* \* finds that the complaint is without foundation.”

With respect to the Federal Equal Opportunity Commission, federal law provides that whenever it is claimed in writing by a person claimed to be aggrieved or where a member of the Commission has made written charge that an employer, employment agency or labor organization has engaged in unlawful employment practice, the Commission shall furnish the person charged:

“\* \* \* with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of

this subsection shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$1,000 or imprisoned not more than one year." 42 U.S.C.A. §2000e-5 (a).

It will be noted that the proscription runs only against officers and employes of the Commission and does not apply to state officers or employes, even where the federal agency notifies the state and gives the state time to act pursuant to state law.

If your department is of the opinion that similar provisions would be in the public interest in eliminating discrimination in housing and employment and licensing practices, the matter should be brought to the attention of the legislature.

The provisions of sec. 19.21, Stats., would not require an officer having custody of papers in a specific matter to allow examination and copying if he determined that inspection would be detrimental to the public interest. In such case he must specifically state the reasons for refusal and the person seeking inspection could institute court action to compel inspection.

*State ex rel. Youmans v. Owens* (1965), 28 Wis. 2d 672, 137 N.W. 2d 470;

*Beckon v. Emery* (1967), 36 Wis. 2d 510, 153 N.W. 2d 501;

*State ex rel. Journal Co. v. County Court* (1969), 43 Wis. 2d 297, 168 N.W. 2d 836.

Section 66.77, Stats. (formerly 14.90, Stats.), the anti-secrecy statute, would apply to the Department (Commissioners), but as pointed out in 52 OAG 363 (1963) and 54 OAG i, vii (1965), it is only applicable to *meetings* of administrative *bodies*, whether or not formal action is taken.

The proposed Rule IND. 88.05 could conceivably be used in violation of sec. 66.77, Stats. However, present procedures of the Department would not offer great opportunity for breach.

In 57 OAG 213, 216 (1968), it is stated:

“A basic but sometimes overlooked fact is that sec. 14.90 applies only to *meetings* of *bodies*. Thus meetings between the one-man head of a department and a member of his staff, or even a meeting of the entire staff of a department, may not be covered by the anti-secrecy law because the staff does not constitute a body. On the other hand, meetings of statutorily defined public bodies, such as the state university board of regents, clearly are covered by sec. 14.90.”

There is no doubt but that commissioners comprise an administrative body. It is questionable, however, whether one commissioner, or an agent acting alone for the Department, does in every case constitute a body.

I am of the opinion that an examiner who was conducting an investigation by hearing, prior to an adjudicatory hearing on notice after conciliation and conference failed, could exclude the public in a case where it was his duty to investigate and report his recommendations to the Commission for their determination of probable cause.

I am of the further opinion that a commissioner or examiner could privately conduct conferences with the complaining party and party complained against for the purposes of conciliation or persuasion. In the usual case there would be no formal action on the part of the commissioner or examiner. The Commissioners cannot order an agreement between the parties at this stage.

It might be better procedure, however, where such conferences are conducted by the Commissioners, to publicly announce a reason why the conference is being restricted to the parties. While it is questionable whether such conferences constitute *meetings* of a public body at which formal action may be taken, subsec. (3) (d) of sec. 66.77, Stats., permits closed meetings for conducting public business which for competitive or bargaining purposes requires closed meetings. Subsection (3) (b) might be involved in certain cases under secs. 111.31-111.37, Stats., where the charge is against a person licensed by the state, and subsec.

(3) (e) relating to "financial, medical, social or personal histories and disciplinary data which may unduly damage reputations" could be involved. Each case involving alleged discrimination is different. However, where a matter has gone to the conference, conciliation and persuasion stage, there will generally be sufficient specific reasons available to justify closing by the Commissioners.

Where sec. 66.77, Stats., is applicable, assuming presence of an administrative body, and a meeting, the general rule is that in order to close any meeting or portion, specific reasons must be stated as to why the meeting is to be closed.

54 OAG i, vi, xi (1965);

*Board of School Directors of Milwaukee v. WERC* (1969), 42 Wis. 2d 637, 653, 168 N.W. 2d 92;

*State ex rel. Cities Service Oil Co. v. Board of Appeals* (1963), 21 Wis. 2d 516, 537, 124 N.W. 2d 809;

*State ex rel. Youmans v. Owens, supra.*, pp. 672, 684, 685.

Notice of the closing can be given at the time of closing; however, notice of the conference is given in the usual case by letter to the parties and could contain a statement that the conciliation conference would be closed to the general public. Notice of such conference and reasons for closing the same could be given to the public by means of prior posting in the building or other public area.

Your second question is at what point the Department can give publicity to its findings under sec. 111.36, Stats. You further inquire whether the Department can give publicity to a finding of probable cause.

Section 111.36 (1), Stats., provides that the Department may receive and investigate complaints and "give publicity to its findings with respect thereto."

Under the statute, the Department is not precluded from giving publicity at any stage subsequent to the filing of the complaint, which must be in writing by reason of departmental rule.

The point at which publicity should be given under present statutes is a matter of departmental policy. The Department might wish to follow the federal policy referred to above or the policy set forth in sec. 101.60 (3), Stats., applicable to the Fair Housing Law.

Where access to records or documents in the possession of departmental officers is sought, it cannot prevent the parties concerned or third parties from publicizing such materials absent foreclosing inspection in the public interests, on the basis of specific reasons stated, in compliance with the mandate of the *Youmans* case, *supra*.

Your third question is at what point the Department can give publicity to its findings under sec. 101.60 (3), Stats., of the Fair Housing Law.

Section 101.60 (3), Stats., as amended by s. 381 of ch. 276, Laws of 1969, provides:

“(3) DEPARTMENT TO ADMINISTER. This section shall be administered by the department of industry, labor and human relations through its division of equal rights. The department may promulgate such rules as are necessary to carry out this section. *No publicity shall be given a complaint in those cases where the department obtains compliance with this section or the department finds that the complaint is without foundation.*” (Emphasis added.)

I am of the opinion that this provision cannot be used by department officers to deny all persons the right to inspect and copy public records and documents which is guaranteed under sec. 19.21, Stats. Refusal can only be denied on a case-by-case basis where the officer having custody initially determines that inspection would be detrimental to the public interest and gives specific reasons for such denial.

*State ex rel. Youmans v. Owens, Beckon v. Emery, State ex rel. Journal Co. v. County Court, supra.*

The provision in sec. 101.60 (3), Stats., could be a supporting reason in such refusal, as it shows a legislative intent that at certain stages of the process to eliminate discrimination the Department shall not actively publicize.

It is commonly recognized that publicizing efforts to eliminate discrimination with respect to specific instances can be a beneficial tool in deterring its general spread or in eliminating it. The legislature, however, has apparently recognized that harm can be caused to individuals or corporations unfairly charged, or who may be unaware of a violation and promptly comply when state action is taken.

The provision in sec. 101.60 (3), Stats., is somewhat vague as to the point in the proceedings where active publicity by the Department is proscribed. I construe the restraint as running only against the Department or its employes. In my opinion it is not restrictive on the complainant, the party charged, or such persons who may lawfully be apprised of the proceedings through inspection of public records or otherwise.

It should be noted that sec. 101.60 (3), Stats., provides in part: “\* \* \* No publicity shall be given a *complaint* \* \* \*” Other language in subsection (3), however, extends the prohibition to some proceedings beyond the complaint stage.

Section 101.60 (4) (a), Stats., provides that the Department may receive and investigate complaints which must be written and verified. Subsection (b) provides that the Department is empowered to investigate, hold hearings and take testimony.

Section 101.60 (4) (c), Stats., as amended by ch. 276, s. 584, Laws of 1969, provides:

“If the department finds probable cause to believe that any discrimination has been or is being committed in violation of this section, it shall immediately endeavor to eliminate such discrimination by conference, conciliation and persuasion. If the department determines that such conference, conciliation and persuasion has not eliminated the alleged discrimination, the department shall issue and serve a written notice of hearing, specifying the nature and acts of discrimination which appear to have been committed, and requiring the person named, hereinafter called the ‘respondent’ to answer the complaint at a hearing before the department. The notice shall specify a time of hearing, not less than 10

days after service of the complaint, and a place of hearing within the county in which the act of discrimination is alleged to have occurred. The testimony at the hearing shall be recorded by the department. In all hearings, except those for determining probable cause, before the department the burden of proof shall be on the party alleging discrimination. If, after the hearing, the department finds by a fair preponderance of the evidence that the respondent has engaged in discrimination in violation of this section, the department shall make written findings and recommend such action by the respondent as will effectuate the purpose of this section and shall serve a certified copy of its findings and recommendations on the respondent and complainant together with an order requiring the respondent to comply with the recommendations, the order to have the same force as other orders of the department and be enforced as provided in this section except that the enforcement of such order shall automatically be stayed upon the filing of a petition for review with the circuit court for the county in which the alleged discrimination took place. If the department finds that the respondent has not engaged in discrimination as alleged in the complaint, it shall serve a certified copy of its findings on the complainant and the respondent together with an order dismissing the complaint. Where the complaint is dismissed, costs in an amount not to exceed \$100 plus actual disbursements for the attendance of witnesses may be assessed against the department in the discretion of the department."

I am of the opinion that the provision of restraint as to publicity contained in sec. 101.60 (3), Stats., is applicable against the Department or its agents only at those stages before the Department finds that the conference, conciliation and persuasion have not eliminated the alleged discrimination.

It is my opinion that the legislature did not intend that the Department refrain from giving publicity where it finds that there is probable cause for discrimination that has been or is being committed, and where efforts to eliminate it without the necessity of the adjudicatory hearing have failed.

The adjudicatory hearing is on notice, testimony must be recorded, formal findings and an order must be entered and served. I am of the opinion that the Department could not exclude the public from such quasi-judicial hearing except in circumstances specified in sec. 66.77 (3), Stats.

54 OAG vii, viii (1965).

*State ex rel. Cities Service Oil Co. v. Board of Appeals, supra*, p. 537.

*Board of School Directors of Milwaukee v. WERC, supra*, p. 653.

I do not believe that the legislature could have intended that the Department should be precluded from actively publicizing the final outcome of an adjudicatory hearing, where the order is subject to judicial review by either party. Section 101.60 (5), Stats., provides that such judicial review shall be a trial *de novo* with right to a jury. Final compliance could conceivably be delayed until after appeal to the supreme court.

RWW:RJV

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*County Supervisor—Supervisory District—(Informal)—*  
County board supervisor does not vacate office by moving from district if he continues to reside in county.

January 26, 1971.

A. HENRY HEMPE

*Corporation Counsel, Rock County*

You have requested my opinion whether a vacancy is created under sec. 17.03 (4), Stats., where a county board supervisor, following his election and qualification and during the term for which he was elected, moves to a different supervisory district within the same county.

I am of the opinion that there is no vacancy, and that the supervisor continues in office until his successor is

elected and qualifies, barring other subsequent event such as resignation, death, or removal for cause.

Section 17.03, Stats., provides in part:

“17.03 *Vacancies, how caused.* Any public office, including offices of counties, cities, villages, towns and school districts, however organized, shall become or be deemed vacant upon the happening of any of the following events:

“(1) The death of the incumbent.

“(2) His resignation.

“(3) His removal.

“(4) His ceasing to be an inhabitant of this state; or if the office is local, his ceasing to be an inhabitant of the district, county, city, village, town ward or school district *for which he was elected or within which the duties of his office are required to be discharged*; and in the case of a school district officer, and in addition to the foregoing, his being and remaining absent from the district for a period exceeding 60 days.

“\* \* \*.” [Emphasis added.]

Note that sec. 17.03 (4), Stats., uses the phrase “for which he was elected” rather than “from which he was elected.”

Prior to 1965, there was a question whether supervisors were county officers. They were elected from each ward in a city and from each village. The town chairman from each town served as supervisor by virtue of his town office. Sec. 59.03 (2) (a), (b), (c), (d), Stats., 1963. They were primarily regarded as officers and representatives of the respective municipal unit from which elected. In 27 OAG 704 (1938), it was stated that removal of a supervisor from the ward from which he was elected vacates his office but, unless the vacancy was filled, he could continue to act on the county board as a *de facto* supervisor from such ward.

In response to the “one man, one vote” rulings of the United States and Wisconsin Supreme Courts, the legisla-

ture changed the entire method of selecting supervisors and expressly made them county officers. Ch. 20, Laws of 1965. While they are elected from supervisory districts, to give representation to the people residing therein, their duties are not confined to the boundaries of the district. Sec. 59.03 (b), Stats. Section 59.03 (2) (d), Stats., provides that they are county officers, elected for a two-year term, and serve until their successors are duly elected and qualified.

Section 59.03 (2) (d), Stats., provides that a candidate must be a qualified elector and resident of his supervisory district, and sec. 59.03 (2) (e), Stats., provides that in case of vacancy the person to be appointed must be a qualified elector and resident of the supervisory district. In *Cross v. Hebl* (1970), 46 Wis. 2d 356, 174 N.W. 2d 737, the Supreme Court held that a resident who would be 21 years of age on election day would be qualified to seek the office.

The legislature intended that at least at the time of election or appointment the supervisor be a resident of the supervisory district. The legislature did not expressly or impliedly provide, however, that ceasing to be a resident of the supervisory district after election or appointment would vacate the office so that an appointment could be made. In creating the office, the legislature provided that vacancies caused by "death, resignation or removal from office" could be filled by appointment by the county board chairman with the approval of the county board. See sec. 59.03 (2) (e), Stats.

This is a local office and in the usual case a supervisor who ceased to be a resident of the district from which he was elected would resign so that the county board chairman could appoint a person who resided in the district, on the theory that such person would be more representative of the residents of such district and hence more responsive to their needs.

As a supervisor, while elected "from" a district, he is elected as an officer of and "for" the county, and his duties are countywide and not limited to the boundaries of his district.

Since he has not ceased to be an inhabitant of the county "for which he was elected or within which the duties of his office are required to be discharged," he can continue to serve until his successor is elected and qualified. See sec. 17.03 (4), Stats.

In *State ex rel. Witkowski v. Gora* (1928), 195 Wis. 515, 218 N.W. 837, the court applied the above reasoning to sec. 17.03 (4), Stats., in holding that the office of a member of a school board, elected from a ward, did not vacate his office when he moved to another ward in the same district, as he still resided in the district "for" which he was elected and within which the duties of his office were required to be discharged. At page 519 the court stated:

"\* \* \* The legislature when it uses the language in sec. 40.46, 'the members of the district board shall be chosen one from each ward,' and when it uses the language in paragraph (4) of sec. 17.03, 'or if the office is local, his ceasing to be an inhabitant of the district, county, city, village, town, ward or school district for which he was elected,' makes a clear differentiation between the words 'from' and 'for.' This indicates that the legislature was fully aware of the ordinary and customary meaning of these words as used in common parlance. In any event, if the law-making body had intended a different meaning, its intention could readily and easily have been expressed. It thus becomes clear to our mind that the office of member of the district board becomes vacant if the member ceases to be an inhabitant of the *district*, and not of the *ward*."

The legislature did not change sec. 17.03 (4), Stats., subsequent to the *Gora* decision, and did not especially provide for special treatment of the office of county supervisor where the incumbent moves from the district from which he was elected during his term.

The rationale of the *Gora* decision is therefore controlling.

I am aware that the Milwaukee Sentinel of December 15, 1970, reports that the supervisor in question intends to resign effective February 1, 1971. The board can take assurance, however, that he can continue to serve until that time.

RWW:RJV

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*Marriage & Divorce—Retirement Fund Death Benefits—(Informal)*— Discussion of validity of marriage performed before divorce decree was final in relation to death benefit under sec. 41.14 (2), Stats.

February 1, 1971.

C. M. SULLIVAN, *Secretary*

*Department of Employee Trust Funds*

You request my opinion by letter dated December 31, 1970, as to whether, upon the facts therein stated, Margaret H. Harma, the named beneficiary of Elmer J. Harma, is his spouse and entitled to payment under sec. 41.14 (2) (a), Stats. You inform me that Mr. Harma was divorced from one Betty Harma in October, 1968, in Wisconsin, and married to one Margaret Hilma Haakana on June 27, 1969, in the State of Michigan. Section 41.14 (2) (a), Stats. (1969), provides a specific level of benefits for a beneficiary, who is a spouse or other named relative of the deceased. A lesser benefit is provided under sec. 41.14 (2) (b), Stats. (1969), if the beneficiary is not a spouse or other named relative.

Mr. Harma was married during the one-year required waiting period before his divorce became final. Section 245.03 (2), Stats., declares such second marriage void as follows:

“(2) It is unlawful for any person, who is or has been a party to an action for divorce in any court in this state, or elsewhere, to marry again until one year after judgment of divorce is granted, and the marriage of any such person solemnized before the expiration of one year from the date of the granting of judgment of divorce shall be void.”

The fact that the second marriage took place in the State of Michigan does not cure the defect caused by marrying within the one-year waiting period due to the specific language of sec. 245.04, Stats. Such section reads in part:

“(1) If any person residing and intending to continue to reside in this state who is disabled or prohibited from contracting marriage under the laws of this state goes into an-

other state or country and there contracts a marriage prohibited or declared void under the laws of this state, such marriage shall be void for all purposes in this state with the same effect as though it had been entered into in this state.

“(2) Proof that a person contracting a marriage in another jurisdiction was (a) domiciled in this state within 12 months prior to the marriage, and resumed residence in this state within 18 months after the date of his departure therefrom, or (b) at all times after his departure from this state, and until his return maintained a place of residence within this state, shall be prima facie evidence that at the time such marriage was contracted the person resided and intended to continue to reside in this state.”

The term “void” is specifically defined in sec. 245.002, Stats., as “In this title ‘void’ means null and void and not voidable.”

The Wisconsin Supreme Court in *Davidson v. Davidson* (1966), 35 Wis. 2d 401, discussed the subject of void and voidable marriages upon the similar fact situation of a marriage during the period before a divorce was final. The court held on the basis of sec. 245.24, Stats., providing for the validation of void marriages, that a marriage declared void by the statutes when originally contracted ripens into an absolute marriage when the impediment is removed. The court stated at page 407-8 of *Davidson*:

“The terms ‘void’ and ‘voidable’ are distinguished in 35 Am. Jur., Marriage, p. 212, sec. 46, as follows:

“ ‘A definition of voidable and void marriage which will closely fit modern conditions is that a marriage may be considered voidable although prohibited by law when it is possible, under any circumstances, for the parties to contract the marriage, or subsequently to ratify it, while it should be considered void if it is impossible for them under the law to contract it, and if it is impossible for them subsequently by any conduct to ratify it, and if the statute expressly declares that the marriage is void.’

“The marriage entered into between Leona and Robert at its inception was at least voidable under sec. 245.03 (1),

Stats., because Robert had a wife living at the time of the marriage; and it continued to be unlawful under sec. 245.03 (2) because the ceremony was performed within one year from the granting of the divorce to Mildred.

“Sec. 245.21, Stats., provides, in part:

“ ‘All marriages hereafter contracted in violation of ss. 245.02, 245.03, 245.04 and 245.16 shall be void (except as provided in ss. 245.22 and 245.23).’

“Sec. 245.002 (3), Stats., provides:

“ ‘In this title “void” means null and void and not voidable.’

“If we considered no other statutes we would be led to conclude that the marriage between Leona and Robert was absolutely void.

“However, sec. 245.24, Stats., provides for the removal of impediments and the validation of otherwise void marriages:

“ *Removal of impediments to subsequent marriage.* If a person during the lifetime of a husband or wife with whom the marriage is in force, enters into a subsequent marriage contract in accordance with s. 245.16, and the parties thereto live together thereafter as husband and wife, and such subsequent marriage contract was entered into by one of the parties in good faith, in the full belief that the former husband or wife was dead, or that the former marriage had been annulled, or dissolved by a divorce, or without knowledge of such former marriage, they shall, after the impediment to their marriage has been removed by the death or divorce of the other party to such former marriage, if they continue to live together as husband and wife in good faith on the part of one of them, be held to have been legally married from and after the removal of such impediment and the issue of such subsequent marriage shall be considered as the legitimate issue of both parents.’ ”

It, therefore, appears that the Harma-Haakana marriage was not void ab initio. If Margaret H. Haakana entered into the marriage “in good faith, in the full belief that the form-

er \* \* \* marriage had been dissolved by a divorce, or without knowledge of such former marriage," then within the specific language and requirements of sec. 245.24, Stats., the marriage would be valid upon the end of the year waiting period in October of 1969.

The determination of whether the Harma-Haakana marriage became a valid marriage upon removal of the impediment by passage of time requires the determination of facts sufficient to satisfy the "good faith" requirements of sec. 245.24, Stats. Where a marriage is shown to have been solemnized, it is presumed to have been legally and properly performed, and it is presumed that the parties had the legal capacity, and that the marriage was valid. *Estate of Campbell* (1952), 260 Wis. 625, 630.

If your agency is satisfied, through communications with the named beneficiary, that the "good faith" requirements of sec. 245.24, Stats., have been met, you may make payment under sec. 41.14 (2) (a), Stats., on the basis that Margaret H. Haakana, the named beneficiary, is a spouse. However, should you determine that the named beneficiary is not a spouse under such "good faith" requirements, this would be tantamount to declaring the marriage void. Section 247.02, Stats., specifically provides that "no marriage shall be annulled or held void except pursuant to judicial proceedings." Should you decide, therefore, that the "good faith" requirements of sec. 245.24 have not been shown, the only available alternative is to refuse payment under sec. 41.14 (2) (a) until a court determination is made.

RWW:WMS

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*Sheriff—Jurisdiction, Lake Michigan—(Informal)—*Sheriff has authority to aid in rescue on ice offshore in Lake Michigan.

February 4, 1971.

JOSEPH F. HORAK

*Sheriff, Kewaunee County*

I am in receipt of a copy of your letter to the National Transportation Safety Board and your note to me with respect thereto.

You request that I write to the county board chairman of your county advising him of laws pertaining to the jurisdiction of Kewaunee County over the waters of Lake Michigan.

It appears that your office furnished rescue and security personnel in connection with a plane crash on the ice of Lake Michigan on or about January 16, 1971. The crash site was about one-half mile offshore. The county board has hesitated in authorizing county payment for hours performed by your deputies. It appears that you are the sole full-time, compensated law enforcement officer in your department, that your wife serves as undersheriff, and that you do not have any full-time deputies.

Both you and the county board should seek legal advice on county matters from your district attorney in the first instance. In cases where he needs assistance, he can then request aid from this office. It appears from the news clipping that he has given some consideration to the problem, and I am sending a copy of this letter to him.

Your basic inquiry is how far out into Lake Michigan does the jurisdiction of Kewaunee County extend.

I will direct you to the constitutional provision and statutes involved.

Article II, sec. 1, Wis. Const., establishes the state boundary as fixed by the United States Congress, and, for purposes here, it is the center of Lake Michigan.

Section 2.01 (31), Stats., fixes the boundaries of Kewaunee County. Basically it extends only to the shore of Lake Michigan.

However, sec. 2.04, Stats., grants counties on the Lake Michigan shore "jurisdiction in common of all offenses committed on said lake." The statute also authorizes execution of civil process upon such waters as are within the jurisdiction of such county granted by said section.

Section 59.07 (42), Stats., provides that the county board has authority to:

“Appropriate money for the purchase of boats and other equipment necessary for the rescue of human beings and the recovery of human bodies from waters of which the county has jurisdiction under s. 2.04.”

Section 59.23 (11), Stats., provides that it is the duty of the sheriff to:

“Conduct operations within his county and, when the county board so provides, in waters of which his county has jurisdiction under s. 2.04 for the rescue of human beings and for the recovery of human bodies.”

Also see sec. 59.24 (1), Stats., as to the sheriff’s duty to keep and preserve the peace.

It is state policy to cooperate with federal officials in the enforcement of both state and federal laws relating to the use of aircraft. The state has regulations regarding the use of aircraft and there, of course, is always a possibility that certain state laws, such as secs. 114.16 and 114.18, Stats., may have been violated. Where such question is present, preservation of evidence at the crash scene would be in order.

RWW:RJV

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*Collective Bargaining—Contracts—(Informal)*—Collective bargaining contract between Board of Regents and union representing unclassified employes is valid and may not be impaired, during its term, by current or future Board of Regents or legislature.

February 5, 1971.

WALTER G. HOLLANDER

*Chairman, Joint Committee on Finance*

You have asked for an elaboration on my recent formal opinion to the Joint Committee on Finance, dated November

17, 1970, concerning the collective bargaining agreement between the Regents of the University of Wisconsin and the Teaching Assistants Association. I will state and answer your current specific questions separately.

1. May a contract between the present administration and the Teaching Assistants bind the future Board of Regents?

As I indicated in my formal opinion to you, the present contract is a legally valid and binding contract, and, during its duration, it is legally enforceable by both parties. To this extent, the collective bargaining agreement is binding on the present or future Board of Regents until the end of the term of the contract, September 1 of this year.

However, the present contract does not bind the Board of Regents to again formally recognize the Teaching Assistants Association as a collective bargaining agent beyond the term of the present agreement or to enter into a subsequent collective bargaining agreement.

2. May it bind future legislators?

The contract, as I have already indicated, is a binding contract and is legally enforceable. Therefore, the legislature could not enact valid legislation that would impair the existing contract to the extent that it is valid.

However, the contract does not bind the legislature concerning what it may wish to direct, by legislation or otherwise, what the Board of Regents may do concerning similar recognition, collective bargaining or collective bargaining contracts in the future.

3. Does the contract negotiated extend beyond the fiscal year of this biennium?

Yes. The current contract extends to September 1, 1971.

RWW:WHW

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*Industrial Development Corporation—Wisconsin Retirement Fund—(Informal)*—Industrial Development Corporation is a separate municipality or public agency for purposes of the Wisconsin Retirement Fund and Public Employes Social Security Fund.

February 5, 1971.

C. M. SULLIVAN, *Secretary*

*Department of Employe Trust Funds*

You ask two questions as to the status of the Fond du Lac Industrial Development Corporation under secs. 40.40 (1), Stats., and 41.02 (4), Stats. You first question:

“Is the corporation a ‘public agency,’ or is it a private, non-profit organization?”

Section 40.40 (1), Stats., defines “public agency” for social security coverage purposes as:

“(1) ‘Public agency’ means the state and any county, city, village, town, school district or other unit of government, or agency or instrumentality of 2 or more thereof which is eligible for inclusion under the federal OASDHI system.”

Section 41.02 (4), Stats., defined “municipality” for inclusion of employes in the Wisconsin Retirement Fund as:

“(4) ‘Municipality’ means the state and any city, village, town, county, common school district, high school district, unified school district, county-city hospital established under s. 66.47, sewerage commission organized under s. 144.07 (4) or a metropolitan sewerage district organized under ss. 66.20 to 66.209, or any other unit of government, or any agency or instrumentality of 2 or more units of government now existing or hereafter created within the state.”

The Fond du Lac Industrial Development Corporation was organized under the authority of sec. 59.071, Stats. It is clear that the legislature intended industrial development corporations to be public agencies as is shown from the following statements and definitions in such section:

“59.071 (2) \* \* \* It is therefore declared to be the policy of this state to promote the right to gainful employment, business opportunities and general welfare of the inhabitants thereof \* \* \* by the creation of *bodies, corporate and politic*, which shall exist and operate for the purpose of fulfilling the aims of this section \* \* \*.

“(3) (a) ‘Industrial development agency’ or ‘agency’ is a *public body corporate and politic* created under this section, which agency shall have the characteristics and powers described in this section.

“(4) (d) The agency shall be a separate and distinct *public instrumentality and body corporate and politic exercising public powers* determined to be necessary by the state for the purposes set forth in sub. (2). The agency shall have no power at any time to pledge the credit or taxing power of the state, any county, or any municipality or political subdivision, but all of its obligations shall be deemed to be obligations solely of the agency.

“(5) (c) The provisions of ch. 181, except such as are inconsistent with this section and except as otherwise specifically provided in this section, shall be applicable to such agency. *The articles of incorporation shall specifically state that the agency is a public instrumentality* created under the industrial development law and organized in accordance with the requirements of ch. 181 and that the agency shall be subject to ch. 181 to the extent that said chapter is not inconsistent with this section.”

Industrial development corporations are, in my opinion, units of government as that term is used in secs. 40.40 (1) and 41.02 (4), Stats.

You then question:

“If the corporation is a ‘public agency’ is it simply a branch or unit of the county, or is it a separate ‘municipality’ or ‘public agency’ for purposes of the Wisconsin Retirement Fund and the Public Employes Social Security Fund?”

Section 59.071 (4) (d), Stats., specifically declares that an industrial development agency “shall be a separate and distinct public instrumentality and body corporate and poli-

tic exercising public powers \* \* \*." The industrial development agency is required to be organized under the provisions of ch. 181, Stats., relating to nonstock corporations. While the county may appropriate money to the agency for operating expenses, the agency has no power to pledge the taxing of any political subdivision "but all of its obligations shall be deemed to be obligations solely of the agency." Sec. 59.071 (4) (c) (d), Stats.

I conclude, therefore, on the basis of the above cited statutes, that the Fond du Lac Industrial Development Corporation is a separate "municipality" under the definition of sec. 41.02 (4), Stats., and a separate "public agency" as defined in sec. 40.40 (1), Stats.

RWW:WMS

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*Airport Planning—Transportation—(Informal)*—Since the Department of Transportation has general planning authority over all modes of transportation pursuant to sec. 79.01, Stats., and the Secretary of Transportation is authorized pursuant to sec. 114.32, Stats., to enter into contracts with the Federal Government and to accept and receive federal money for and in behalf of the state for the construction, improvement and maintenance of airports; it necessarily follows that the Secretary of Transportation possesses the requisite implied authority to enter into contracts with the Federal Government to secure federal funds to enable the Department to undertake airport system planning.

February 18, 1971.

NORMAN M. CLAPP, *Secretary*  
*Department of Transportation*

Mr. Fritz E. Wolf, Administrator of the Division of Aeronautics, has requested my opinion as to whether the Department of Transportation can enter into contracts with the Federal Government for the receipt of federal aid to be used for airport system planning purposes.

Section 13, of the Airport and Airway Development Act of 1970, authorizes the Secretary of the United States Department of Transportation to make planning grants in an amount not to exceed \$15,000,000 in any fiscal year to planning agencies for airport system planning and to public agencies for airport master planning.

Paragraph 204 of ch. 3, sec. 1, of the interim Planning Grant Program Handbook, adopted by the Federal Aviation Administration of the United States Department of Transportation, sets forth the following requirements for eligibility:

“(1) That the sponsor is a legal entity and qualifies as a ‘planning agency.’

“(2) That the sponsor is legally empowered to provide the type of planning assistance or perform the type of planning work proposed in the application.

“(3) That the sponsor is empowered to receive and expend Federal funds and to provide or obtain and expend other funds for the purposes stated in paragraph 204a(2).

“(4) That the sponsor is empowered to contract with the United States for the purpose of receiving and expending Federal funds.”

Section 114.01, Stats., directs the Division of Aeronautics to cooperate with the Federal Government “in the preparation and annual revision of the national airport plan, . . . and to lay out a comprehensive state system of airports adequate to provide for the aeronautical needs of the people of all parts of the state.” The section further provides that, “In selecting specific sites, due regard shall be given to general suitability for service and economy of development as evidenced by convenience of access, adequacy of available area, character of topography and soils, freedom from hazards and obstructions to flight and other pertinent consideration.”

Section 114.32, Stats., reads, in part, as follows:

“Federal aid for airports. (1) SECRETARY MAY ACCEPT. The secretary of transportation may cooperate with

the government of the United States, and any agency or department thereof in the acquisition, construction, improvement, maintenance and operation of airports and other air navigation facilities in this state, and comply with the laws of the United States and any regulations made thereunder for the expenditure of federal moneys upon such airports and other air navigation facilities, and may enter into any contracts necessary to accomplish such purpose. He may accept, receive and receipt for federal moneys and other moneys, either public or private, for and in behalf of this state or any municipality thereof, for training and education programs, for the acquisition, construction, improvement, maintenance and operation of airports and other aeronautical facilities, whether such work is to be done by the state or by such municipalities, or jointly, aided by grants of aid from the United States, upon such terms and conditions as are or may be prescribed by laws of the United States and any rules or regulations made thereunder, . . . .”

Section 114.33, Stats., provides that any state agency may initiate and sponsor an airport project. Section 15.46, Stats., creates the Wisconsin Department of Transportation under the direction and supervision of the Secretary of Transportation. Pursuant to sec. 79.01, Stats., the Department of Transportation may direct and undertake all planning for all modes of transportation including aeronautics.

It is quite clear that the Wisconsin Department of Transportation satisfies the requirements set forth in (1), (2) and (4) above. The only question is whether the Department has the authority to receive and expend federal funds for planning purposes. Although sec. 114.32, Stats., authorizes the Secretary to accept federal money for the acquisition, construction, improvement, maintenance and operation of airports, it is silent with respect to planning. Thus, the question arises whether the doctrine “*expressio unius est exclusio alterius*” is applicable under the circumstances. The Wisconsin Supreme Court considered the application of the doctrine in two recent cases. *Columbia Hospital Asso. v. Milwaukee* (1967), 35 Wis. 2d 660, 252 N.W. 2d 750; *Hoefl*

*v. Milwaukee & Suburban Transport Corporation* (1969), 42 Wis. 2d 699, 168 N.W. 2d 134. In the latter case, the court, in applying the doctrine, made reference to other appropriate sections in the statutes in support of its determination. The court, at p. 669, of the *Columbia* case, stated:

“ . . . However, while the exemptions are extensive and grouped together and require the application of the *pari materia* rule, we think the rule *expressio unius est exclusio alterius* is not necessarily to be used in construing this statute. Although based upon logic and the working of the human mind, it is not a ‘Procrustean standard to which all statutory language must be made to conform.’ *State ex rel. West Allis v. Milwaukee Light, Heat & Tractor Co.* (1917), 166 Wis. 178, 182, 164 N.W. 837, 839, quoting Black on the Interpretation of Laws (2d ed.), 219. Factually, there should be some evidence the legislature intended its application lest it prevail as a rule of construction despite the reason for and the spirit of the enactment. Section 70.11 (4m) was created in 1957 solely to apply to hospitals and its language is much broader than that used in the older exemption statutes applicable to charitable and benevolent institutions.”

The doctrine “*expressio unius est exclusio alterius*” is resorted to for the purpose of arriving at the real intention of the lawmakers, where such intention is not manifest, and only for such purpose. It should not be used to defeat or override clear and contrary evidences of legislative intent, and must yield whenever a contrary intention on the part of the lawmaker is present. 50 Am. Jur., §246, p. 241.

As previously stated, sec. 114.32(1), Stats., authorizes the Secretary to accept and receive federal money for and in behalf of the state for the acquisition, construction, improvement maintenance and operation of airports. It is inconceivable that the legislature intended to exclude therefrom the authority to accept federal moneys for planning inherent and required by such activities. It is, therefore, my opinion that the doctrine does not apply and the Department of Transportation can enter into contracts with the Federal

Government for the receipt of federal aid to be used for airport system planning purposes.

RWW:GBS

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*Inheritance Tax—Public Administrator—(Informal)—*  
County may not charge to state's share of inheritance tax revenues the cost of fringe benefits for public administrator, under sec. 72.19, Stats.

February 25, 1971.

DANIEL G. SMITH

*Acting Secretary, Department of Revenue*

Your predecessor in office requested my opinion whether certain expenses connected with the office of the public administrator were deductible by the county from the State's revenues. The answer is "No."

Since at least 1927, sec. 72.17 (3), Stats., has described the duties of the public administrator and then provided that "for such services the public administrator shall be entitled to" certain specified fees to be paid from inheritance tax funds. There is no other provision in the statutes for payment of any further sums—by way of fringe benefits or otherwise—as compensation to the public administrator from the State's share of inheritance tax revenues.

Section 72.19, Stats., requires the county treasurer to make monthly reports to the Department of Revenue showing the inheritance tax collections, by estates, and then provides: "The county treasurer shall also set forth in his report the fees of the public administrator paid in each such estate, the expense of collection, the portion of each tax collection payable to the state and the aggregate amount of the payment to the state of its portion of said tax collections." Prior to 1929, sec. 72.19 required the county treasurer to report the taxes received by him, by estates, but

was silent as to the expense of collection and the fees of the public administrator. Chapter 462, Laws of 1929, added to sec. 72.19 the following sentence:

“The county treasurer shall also set forth in such report the fees of the public administrator paid in each such estate, as well as expenses of collection.”

Needless to say, at the time of that amendment there was no thought of fringe benefits such as social security, Wisconsin retirement or life or health insurance premiums for the public administrator. Then, as now, the expenses of collection which the county treasurer might pay from inheritance tax revenues in his hands included witness fees and compensation for appraisers under sec. 72.14, Stats.

All of the items called for in the county treasurer's reports are items which can be submitted on a case-by-case basis, whereas the insurance premiums, retirement contribution and social security contribution could not be broken down by individual estates. It is my conclusion that the expense of collection referred to in sec. 72.19, Stats., is the particular expense attributable to a given estate and cannot be stretched to include the county's payments of fringe benefits, which normally are considered part of compensation for services.

There is only one item of county expense involved in the office of the public administrator, which cannot be accounted for on a case-by-case basis, and which the county is authorized to pay from inheritance tax revenues. That is the cost of bonding the public administrator. Section 253.25, Stats., expressly provides that the county may charge that to the state's share of inheritance tax revenues. In the absence of any similar provision applicable to the fringe benefit costs which you mentioned, I conclude that the county is not entitled to pay those costs from the state's share of inheritance tax revenues.

RWW:EWW

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*Plumbing—Sprinkler Systems—(Formal)*—The installation of condensate drainpipes from air-conditioning units and like equipment where the condensate waste is discharged into a proper drainage system through an air-gap connection is not plumbing within the meaning of sec. 145.01 (1), Stats., and Rule H. 62.18 (3), Wis. Adm. Code.

The installation of automatic fire protection systems inside a building from a valve installed by a licensed plumber is not plumbing within the meaning of sec. 145.01 (1), Stats., and Rule H 62.18 (3), Wis. Adm. Code.

March 2, 1971.

DR. GEORGE HANDY

*State Health Officer, Department of Health and Social Services*

Your predecessor has requested my formal opinion concerning two questions: First, whether plumbing, as defined in sec. 145.01(1), Stats., includes the installation of piping attached to air-conditioning units which conveys condensate wastes to open sight drains with an air-gap connection. Secondly, whether the above section of the statutes includes, within the definition of plumbing, fire protection sprinkler systems and other similar units or appliances where a valve has been installed by a licensed plumber at the initial point of such system.

#### CONDENSATE DRAINS

In September of 1968 the chief of your Section of Plumbing and Related Services advised this office of the jurisdictional dispute which arose between the plumbers and steam fitters organizations with regard to whether or not condensate and other equipment drains are plumbing. Apparently your office has been interpreting the plumbing laws to apply to this type of installation over a period of more than ten years.

In the summer of 1969 an action was started by the Steam Fitters Local Union 394 of Madison against the De-

partment of Health and Social Services and the Plumbers Local Union 167 of Madison seeking declaratory judgment on the question of whether the installation of drain lines from various pieces of equipment and machinery through open sight or air-gap connections to a floor drain was considered to be plumbing. On October 13, 1969, a demurrer filed by this office in behalf of the Department of Health and Social Services was sustained by the Honorable A. W. Parnell, acting Circuit Judge of Dane County. The court at that time felt that the more appropriate forum for the taking of testimony to determine the fact questions involved was the Department of Health and Social Services. However, no request was made for such a proceeding for a declaratory ruling under sec. 227.06, Stats.

Nothing more of a formal nature took place in this controversy until August 18, 1970, when the Joint Committee for the Review of Administrative Rules held a hearing at the request of Steam Fitters Local Union 394. As a result of that hearing, the Joint Committee for the Review of Administrative Rules directed the Department of Health and Social Services to hold a public hearing within 60 days on the question of whether to adopt a rule interpreting sec. 145.01 (1), Stats., as that statute relates to "air-gap" installation of drain lines from boilers, air conditioners and similar installations.

On October 12, 1970, a hearing was held by the Department on the question presented. I understand that the answer which I give to you in this opinion will guide you in making recommendations to the Board of Health and Social Services concerning possible rules.

We have been advised that there are various types of equipment from which piping carries condensate liquid waste to open sight drains with an air gap separating such piping from the drain. However, the specific issue in this case arises in connection with the dispute between the steam fitters and plumbers as to the installation of condensate drain lines from air-conditioning equipment being installed in multistory buildings. From the knowledge that I have from our office's participation in the Circuit Court action, the Leg-

islative Committee hearing, and the hearing before the Department, I must conclude that the issue involved herein is whether the installation of condensate drain piping from air-conditioning units and like equipment where the condensate is eventually discharged into an open sight drain with an air gap between the drain and the discharge pipe, as defined in H 62.02 (3), is plumbing within the meaning of sec. 145.01 (1), Stats. The reasoning in this opinion may or may not apply to other types of equipment which drain wastes into open sight drains.

If the installation of these condensate drain lines is plumbing, it must fall within the definition of plumbing found in sec. 145.01(1) (a), Stats., which, insofar as it is applicable to this question, reads as follows:

“All piping \* \* \* in connection with the \* \* \* drainage systems \* \* \*.”

Subsection (e) of that definition also defines plumbing as follows:

“A \* \* \* drainage system so designed \* \* \* to prevent \* \* \* sewer air to escape into the building \* \* \*.”

The above-quoted statutory provisions remain unchanged since their enactment by ch. 431, Laws of 1931. In considering the interpretation of the statute in question we can take into consideration similar statutes and laws in other states where such language has been construed. We must also consider two conflicting rules of law. First, that the law regulating plumbing and requiring a licensed person to perform acts of plumbing is a proper exercise of the police power in the interests of public health. *Josam Mfg. Co. v. State Board of Health* (1965), 26 Wis. 2d 587, 133 N.W. 2d 301; *State ex rel. Winkler v. Benzenberg* (1898), 101 Wis. 172, 76 N.W. 345; 22 A.L.R. 2d 816. Secondly, that the violation of the plumbing regulations constitutes a criminal violation of the law and the law must be construed in such a way as to give the benefit of any doubt to a prospective defendant. *State v. Wrobel* (1964), 24 Wis. 2d 270, 128 N.W. 2d 629.

It should be pointed out that if sec. 145.01 (1) (a), Stats., were strictly interpreted to require a plumber to install “all

pipings, fixtures, appliances, equipment, devices and appurtenances in connection with the water supply, water distribution and drainage systems," no one but a plumber could install any kind of equipment which was directly or indirectly connected to the water supply, water distribution or drainage systems in a building. Of course, this is not the case, since Rule H 62.18 (3) (b) specifically provides that nonplumbers may make installations of steam power, heating temperature regulation, automatic fire protection, hydraulic power, and other special water usage equipment, providing the plumber has installed the piping supplying the water for such systems "\* \* \* to the appliance forming the unit or initial point of such system and shall terminate with a valve, located at the unit or appliance to be connected." Subsection (c) of that rule further provides that the person installing said systems may connect the unit to the water supply pipe installed by the plumber in a manner "\* \* \* to prevent the possibility of contamination of the water supply by the backflow of water from such systems by siphonage, drainage, or force." Therefore, by the Department's own interpretation of the statutes as shown by their enactment of administrative rules dealing with the very subject, there can be certain installations of equipment or appurtenances to the plumbing system and, more specifically, to the water supply by trades other than plumbers.

We are not dealing here, however, with the water supply but rather with the "drainage system." We are dealing with a condensate drainpipe designed to carry away condensed moisture which is collected from the humid air in the course of the operation of an air-conditioning system where this condensate gathers in a receptacle or receptacles and eventually finds its ways into an open drain with an air break as defined in Rule H 62.02 (2), or air gap as defined in Rule H 62.02 (3), Wis. Adm. Code, such open drain having been properly installed by a plumber with the necessary vents and traps.

A case in point was decided by the Supreme Court of Pennsylvania in 1940. In that case, *City of Pittsburg v. Kane*, 141 Pa. Super. 44, 14 A. 2d 887, the complaint was

that, although they were not plumbers, the defendants had installed waste pipes to air-conditioning units at a hospital in Pittsburgh. The court said, at page 889:

“The dispute is really one between plumbers and steam fitters as to the right of the latter, who are lawfully engaged in the work of installing air conditioning units in buildings, to equip them with waste-pipes to carry away the condensed moisture collecting therein.”

The regulation in question in the *Kane* case, insofar as it is applicable to this question, was very similar to Rule H 62.14 (3) which provides that refrigerator waste pipes must not connect directly with any drain, soil or waste pipes. The Pittsburgh regulation read as follows:

“Safe waste pipes must not connect directly with any part of the plumbing system. Safe waste pipes must discharge over an open, water-supplied, publicly-placed, ordinarily-used sink, placed not more than three and one-half feet above the cellar floor.”

The court went on to conclude that the use of the word “safe” in the law did not refer to safety but rather to an appliance, which was a term in use when the law was enacted in 1901. In concluding that the installation did not constitute plumbing, the court commented as follows, at page 891:

“The real point involved was whether these defendants who installed the air conditioning unit could connect it with a pipe which would carry away the condensed moisture that was collected from the humid air in the course of its conditioning and conduct it so that it would drip or empty over and into an open sink or drain which had been properly installed by a plumber. Admittedly they could have made no connection with any drainage system, nor did they do so. Their work was no more plumbing than the man who takes the ‘portable pan’ into which water drips from an ice refrigerator and pours it into a sink is engaged in plumbing.”

A similar case was decided by the Supreme Court of Nebraska in *John McNeil et al. v. City of Omaha et al.* (1955), 160 Neb. 301, 70 N.W. 2d 83. In that case the plaintiffs,

steam fitters, sought declaratory judgment that in performing certain work in the installation of heating and air-conditioning units in a building in Omaha they were not engaged in plumbing within the meaning of the ordinances of the City of Omaha.

Again, as in the Pennsylvania case, a combination air-conditioning and heating system was being installed in a hospital and the system consisted of two large units installed in the basement. One was for heating and one for cooling water. Pipes ran from these large units to individual units placed variously about the building and returned to the basement unit.

When the equipment was used for cooling purposes, moisture from the air collected and fell from the cooling unit, and a drip pan to catch the moisture was a part of the unit. To the drip pan of each unit was fitted a pipe leading from the unit downward, and it was joined with other like-purpose pipes from other units and ultimately ended immediately over, but not physically attached to, a sewer drain in the basement. These pipes were called condensation lines. The equipment and condensate pipes were being installed by steam fitters, and under a threat of arrest the contractor took out plumbing permits when the city insisted that the installation of the condensation lines was plumbing work. The contractors then brought the action to have the law construed. The Omaha Municipal Code provided in part as follows:

“A plumbing fixture is any receptacle, appurtenance, or device or appliance connected to either a water supply or drainage system, or both, intended to receive, to discharge, or to receive and discharge water, liquid or water carried waste into an approved drainage system.”

In commenting upon the above section of the Municipal Code, the court said, at page 85:

“This definition of a plumbing fixture is broad enough and indefinite enough to include these condensation pipes. It is likewise broad enough and indefinite enough to include the heating and cooling units, for they also are connected to

a water supply system and are intended to receive water. It does not appear that the city has ever construed, and does not now construe, Rule 63 to cover these units of which, by undisputed evidence, the condensation lines are a necessary part."

The court then cites from the *Kane* case cited previously, and quotes from page 891 of the Pennsylvania court's decision which we have quoted, *supra*.

The court concluded, at page 85:

"In accord with the above reasoning and decision, we hold that the installation of the condensation lines as a necessary part of the heating and cooling units was not the installation of plumbing and did not require a plumbing permit."

Extensive research has disclosed no other cases in the United States dealing with the specific point concerning the installation of condensate drain lines by persons not licensed as plumbers.

In discussing these questions with members of your staff, we have been able to discover only one remote health hazard possibility in connection with the installation of these condensate drainpipes, assuming that a qualified plumber properly installs the floor drain, and that is the possibility that deleterious odors or fumes might be drawn into the condensate drain lines if proper wet traps are not provided for the condensate lines. It is speculated that carbon monoxide from engines or poisons from other sources might be drawn up these pipes in apartment buildings or hospitals and affect the occupants by such noxious or deleterious odors or fumes. However, such possibility appears so remote and is so far removed from plumbing definitions in sec. 145.01, Stats., as not to be seriously considered. It is to be remembered that a plumbing or drainage system is to be designed so as not to permit "sewer air to escape into the building" and no mention is made of other foreign deleterious odors or fumes. It is not without the realm of possibility that noxious fumes could pass through buildings by such means as ventilating, heating and air-conditioning systems, but this appears to be a problem for the Department of Industry, Labor and Hu-

man Relations in enforcing its ch. Ind 59 relating to heating, ventilating and air conditioning, and is not the responsibility of your Plumbing Section.

I must advise you accordingly, therefore, that if this matter was ever brought to court test, it is my considered opinion that the Wisconsin Supreme Court would be bound to some extent by the interpretations placed on these regulations by the highest courts of two other states in this country. Further, I must advise that the Pennsylvania and Nebraska decisions seem to be the most logical answer to the question presented, since there is a paucity of acceptable evidence that the public health would be adversely affected by the installation of these drain lines by nonplumbers. Thus, acceptable justification for the construction of the statutes and rules to include condensate waste pipes from air-conditioning units within the definition of plumbing is plainly absent.

In answer to the first question, therefore, I must conclude that the installation of condensate drainpipes to such devices as air-conditioning units, where the drainpipe empties the waste into an open sight drain with an air gap between the drain and the pipe, is not plumbing within the meaning of sec. 145.01 (1), Stats., and that the Department has no authority to adopt a rule construing the statute in question to include condensate drains within the definition of plumbing.

#### FIRE PROTECTION SPRINKLER SYSTEMS

The second question deals with the installation of water-related systems such as automatic sprinkler systems used for fire prevention. At the request of the State Health Officer, this office has appeared as *amicus curiae* in a case involving this same issue in the County Court of Wood County.

In the Wood County case, the City of Marshfield was enforcing its ordinances dealing with the installation of plumbing against the Viking Automatic Sprinkler Company, Inc., which was accused of using workmen who were not licensed as plumbers to install an underground eight-inch

water main and connect it to a sprinkler system which Viking had installed in a warehouse in the City of Marshfield. A yard hydrant was also installed and connected to the eight-inch water main which was tapped into an existing eight-inch water main which had been installed under the supervision of a licensed plumber who had taken out permits with the City of Marshfield. Viking had not applied for a permit.

The court in that case made a finding that the laying of the eight-inch water main from the existing eight-inch water main to the building constituted plumbing and that the defendants violated the law by not having a plumber install said main and the necessary valve and not having secured a permit to make such installation. The court made no determination as to whether the piping installed by the Viking workmen inside of the building beyond a valve at the floor level constituted plumbing within the meaning of the local ordinance or the state statute. Testimony at the hearing was in conflict on this point and, obviously, the court felt that this was not a pertinent question to be determined in that case.

The issue presented is actually one of interpretation of sec. 145.01(1)(a), Stats., and Rule H 62.18 (3) (b), Wis. Adm. Code, and I cite the *Viking* case only as background for this question.

The evidence in the Viking trial established that the Viking Company considered that the initial point of their sprinkler system began at the valve pit which was located between the building foundation wall and the existing eight-inch water main which had previously been installed under the supervision of a licensed plumber. The court determined, however, that all underground piping to the foundation walls was water service piping and should have been installed by a plumber. Therefore, in accordance with the court's determination, the "initial point of such system" within the meaning of Rule H 62.18 (3) (b) would most logically be at a valve just inside the building. The testimony in the *Viking* case indicated that there was a valve located at floor level just inside the building wall. There was also

testimony that the system installed in that particular building was known as a "dry system." Under that particular type of system the water is kept out of the dry pipes by air pressure, and when the fire melts the sprinkler heads the air escapes and the water enters the system.

A representative of your Plumbing Section testified at the trial that your departmental interpretation of Rule H 62.18 (3) (b) would require that all piping on the sprinkler system, including the dry system just described, would have to be installed by a plumber to the sprinkler head itself. I have been advised that the departmental interpretation since the *Viking* case has been that all piping to the sprinkler head itself is plumbing and must be installed by a plumber. The second question obviously is intended to clarify whether such interpretation is correct.

As I have indicated in answer to the first question, there are two conflicting rules of law in considering the construction of statutes and rules dealing with the exercise of the police power. First is the consideration of protecting public health and second is that criminal statutes must be construed most favorably toward a defendant. Violation of the plumbing laws is a criminal violation and may be punished by fine or imprisonment.

Some jurisdictions have construed their plumbing laws to prohibit a person not licensed as a plumber to make connections to the water supply or distribution system even for the installation of appliances and other devices and systems. In *Commonwealth v. Leswing* (1939), 135 Pa. Super. 485, 5 A. 2d 809, it was held unlawful for an electrical contractor selling and installing electric hot-water heaters, but who was not licensed as a plumber, to install a unit by making a connection with a cold-water pipe on one side of the heater and, on the other, with a pipe for distributing warm water throughout the house. To the same effect, see *Greene v. Loveland* (1911), 51 Colo. 593, 119 P. 622. However, it appears that the majority of jurisdictions permit the installation of equipment and devices by nonplumbers where a valve has been installed by a licensed plumber. *Bregman v. Winkler* (1923), 120 Misc. 483, 198 N.Y. Supp. 758; *Garr-*

*son v. District of Columbia* (1908), 30 App. D.C. 515; *Leve v. Putting* (1917), Mo. App., 196 S.W. 1060; *State v. Harrington* (1941), 229 Iowa 1092, 296 N.W. 221.

In the *Harrington* case the Supreme Court of Iowa, in holding that the defendant who was not a licensed plumber did not violate the plumbing code by installing and connecting a water softener to the water supply distribution pipe, had the following to say in regard to regulations enacted under the police power of the state:

“The regulation of an occupation in the interest of the public health, safety, and welfare is valid as a proper exercise of the police power of the state but the restraint must be reasonable and bear such a relation to the public welfare as will sustain it as a police measure. We are unable to perceive that installation by defendant would be detrimental to the public welfare or that a requirement that the softener must be installed by a licensed plumber rather than a person whose business it is to install it would bear the least resemblance to a health regulation or tend to promote the public health. Such a regulation would be an improper exercise of the police power, an unreasonable restraint on the right to follow one of the common occupations of life. The police power should be exercised to prevent injury to the public welfare.”

The Supreme Court of Pennsylvania was even stronger in its warning in the *Kane* case, *supra*, at page 891:

“It is time that people who enjoy special privileges at the hands of the General Assembly, whether they practice professions, such as lawyers, physicians, dentists, nurses, engineers, etc., or are engaged in a business regulated to some extent by statute, such as plumbers, bakers, barbers, etc., should understand and recognize that these privileges are not granted primarily for the benefit of the persons licensed or authorized to pursue said business or profession, etc., but for the benefit and well-being of the public, in order that it may be competently and properly served. That is the only constitutional ground for their enactment. Courts should not be astute to assist persons who mistake the pur-

pose of these statutes and use them to the injury of the public rather than for its advantage.”

As the County Court of Wood County pointed out in the *Viking* case in its decision, Rule H 62.18 (3) (b) seems to hold the key to the issue:

“All such piping for supplying water for any system for \* \* \* automatic fire protection \* \* \* shall be installed by the licensed plumber to the appliance forming the unit or initial point of such system and shall terminate with a valve, located at the unit or appliance to be connected.”

The quoted rule which was adopted by the Board of Health seems to be a clear indication of a construction of ch. 145 of the statutes relating to plumbing in such a way as to permit the installation of a system for automatic fire protection by a person not licensed as a plumber if the licensed plumber has installed a valve at the unit to be connected.

I must also conclude that Rule 62.18 (3) (b) permits the installation of other like systems by persons not licensed as plumbers, providing a valve is installed at the unit or appliance to be connected.

Of course such installation by a nonplumber must be in compliance with Rule 62.18 (3) (c), “\* \* \* in a manner to prevent the possibility of contamination of the water supply by the backflow of water from such systems by siphonage, drainage, or force.”

RWW:LLD

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*Police Enforcement—Joint Exercise of Powers—(Informal)*—No legal authority for the creation of a City-County Metropolitan Police Agency exists at present.

March 2, 1971.

HOMER C. MITTELSTADT

*Corporation Counsel, Eau Claire County*

You advise that the Eau Claire County Board of Supervisors is considering a resolution to create a City-County Metropolitan Police Agency to serve Eau Claire County. You further indicate that "The intent of the resolution is to reorganize the existing Eau Claire City and Eau Claire County law enforcement departments into one agency to serve the needs of the County at large to include all cities, villages and towns therein." As a result of the foregoing, you request my informal opinion on whether there presently exists any legal authority for the creation of such a City-County Metropolitan Police Agency.

Your letter contains no detail as to the nature of the organization presently being considered. Presumably no firm concept has yet evolved. However, the lack of such specifics requires that I likewise respond in general terms. Viewed in such a context, I find little difficulty in concluding that the present Wisconsin Statutes present little possibility for such an intermarriage of police functions.

As previously indicated in 58 OAG 72 (1969), there is some latitude under the joint exercise of powers statute, sec. 66.30, Stats., for counties to contract with municipalities within the county to furnish or supplement certain law enforcement services in the municipality. It was also there pointed out, however, that cooperation does not displace duties imposed by statute. Thus, while such cooperative arrangements may be possible on a contractual basis, secs. 66.305 and 66.315, Stats., quite clearly provide that joint operation of the various local law enforcement agencies as a single law enforcement body is only authorized on a temporary emergency basis.

While most law enforcement agencies are authorized and required to enforce state law, or some portion thereof, most of them also have separate responsibility to enforce other more specialized and local laws relating solely to their separate governmental and territorial jurisdictions. In most instances, this latter law enforcement jurisdiction is exclusive and not subject to joint exercise with others except under the limited circumstances already described.

The varied nature of local law enforcement structure, which has evolved over the years, contributes in large measure to the present fragmentization which makes unified law enforcement activity more difficult. For instance, it has long been assumed that effective law enforcement requires a chain of command and authority and discipline characteristic of military organization. Such is no doubt true. However, in the course of the formalization of this concept by the legislature, varied and dissimilar organizational structures have evolved.

Article VI, sec. 4, Wis. Const., creates the office of sheriff at the county level of government. His powers and duties are not there enumerated, but sec. 59.23, Stats., does delineate the duties of the sheriff. Section 59.24, Stats., also grants necessary powers and duties to the sheriff in reference to his primary duty of preserving law and order throughout the county. See *Andreski v. Industrial Comm.* (1951), 261 Wis. 234, 252 N.W. 2d 135. Therefore, while the alteration of the duties of the sheriff may be permissible, the legislature is the body which, in the absence of constitutional restrictions, may vary, abridge or increase the duties of the sheriff. 47 Am. Jur., *Sheriff, Police, Constables*, §27, at p. 842; 80 C.J.S., *Sheriffs and Constables*, §35, at p. 204. As pointed out by this office previously, even the county board cannot enlarge the duties of the sheriff which are purely statutory. 26 OAG 425 (1937).

Even conceptually, a City-County Metropolitan Police Agency could not exist without a head. Presumably, the present thought is that the sheriff would be called upon to perform this role. If so, his present responsibilities would be significantly expanded. For instance, the sheriff presently performs few functions relating to the enforcement of city, village or town ordinances, all of which constitute a considerable body of law within any county. The more obvious point I wish to make, however, is that nowhere in sec. 59.23, Stats., is there any mention of the type of responsibility which the metropolitan police agency concept proposes. Subsection (7) of that statute does provide that the sheriff is to "Perform all other duties required of him by

law." This provision has been interpreted as authorizing the imposition of certain duties upon the sheriff by ordinance, at least where such ordinance is *clearly authorized by statute*. 52 OAG 222, 226 (1963). I find no such clear authority for the organizational concept you describe. And, as more specifically stated in 29 OAG 428 (1940), at p. 484:

" . . . In the performance of his statutory functions the sheriff is not subject to regulation of a legislative nature by the county board in the absence of a state statute conferring such power upon the county board. . . ."

I further direct your attention to the mandate of Art. VI, sec. 4, Wis. Const., which provides, in part, that ". . . Sheriffs shall hold no other office; . . ." The imposition of additional duties upon an existing office does not necessarily create a new office in violation of a prohibition against the holding by one person of two offices at the same time. 42 Am. Jur., *Public Officers*, §61, at p. 929. However, the appointment of the sheriff to head such a public agency as your letter contemplates, at least in the absence of statutory authorization, does suggest the possible application of the constitutional restriction on holding dual offices.

In addition to the foregoing, it appears that the basic differences in the present statutory command structure of local law enforcement agencies would have to be largely ignored in order to create a police organization such as contemplated. Thus, in addition to the fact that the salaries of deputy sheriffs are established by the county board and the deputies perform their services under the immediate direction of the sheriff, such a deputy may operate under any one of a number of civil service systems of selection, tenure and status or without any such protection. Secs. 59.21 (4) and (8), 59.07 (20) and 63.01 to 63.17, Stats. Peace officers in cities and villages, on the other hand, are subject to the authority of the chiefs of their respective police departments, who in turn are subject to the control of a municipal chief executive and governing body, except in those instances where a board of police and fire commissioners has been authorized to control and manage such departments pursuant to sec. 62.13 (6), Stats. And in cities in excess of 4,000 inhabitants

and in villages in excess of 5,000 inhabitants, appointments to positions in the police departments and disciplinary actions are solely in the hands of boards of police and fire commissions. Secs. 61.65 and 62.13, Stats. In fact, although salaries are fixed by the governing body, they may not be reduced without prior recommendation of such commission. Sec 62.13 (7), Stats. In contrast, towns do not have authority to have a police and fire commission. 58 OAG 115 (1969). I judge it inconceivable that any organization, such as presently considered by your county, could be formulated which would reconcile these various statutory treatments of just one aspect which must be considered and overcome in order to implement any metropolitan police agency such as you describe.

Much more could be said in reference to the various differences in statutory treatment of local law enforcement officers' retirement systems and benefits and governmental liability for the acts of such officers. Such a discussion would only serve to demonstrate that the proposal presently being considered by the Eau Claire County Board of Supervisors is, as you point out in your letter, "frought with problems concerning administrative detail and implementation."

Two basic legal concepts make consideration of a City-County Metropolitan Police Agency largely unrealistic under our present statutes. One is the oft repeated judicial reminder that counties and towns have only such powers as are expressly granted by statute or which are necessarily implied. *Maier v. Racine County* (1957), 1 Wis. 2d 384, 84 N.W. 2d 76; *Pugnier v. Ramharter* (1957), 275 Wis. 70, 81 N.W. 2d 38. In addition, although Wisconsin villages and cities exercise home-rule under the basic constitutional grant ". . . to determine their local affairs and government. . ." under Art. XI, sec. 3, Wis. Const., the exercise of such home-rule power is subject to enactments of the legislature of state-wide concern. The following statement of the Wisconsin Supreme Court in *VanGilder v. Madison* (1936), 222 Wis. 58, 267 N.W. 25, 268 N.W. 108, could hardly have been more dispositive of what rights and powers cities and villages possess, outside of those granted by the legislature in direct-

ing the organization of their police function. At page 76 of that opinion, the court states as follows:

“The determination of other courts and a consideration of the fundamental reasons which underlie those determinations require us to hold that the preservation of order, the enforcement of law, the protection of life and property, and the suppression of crime are matters of state-wide concern. It is true that municipalities deal with many of these subjects and have done so for many decades. However, their power to deal with these matters is not derived from the home-rule amendment but from the legislature through legislative enactment. These powers so vested by the legislature in the municipalities may be withdrawn, modified, or dealt with as the public interest requires in the opinion of the legislature. . . .”

Our court has followed this general position to the present time. See *Logan v. Two Rivers* (1936), 222 Wis. 89, 267 N.W. 36; *Barth v. Shorewood* (1938), 229 Wis. 151, 159, 282 N.W. 89; *West Allis v. Milwaukee County* (1968), 39 Wis. 2d 356, 365, 259 N.W. 2d 36. Both of the foregoing basic legal principles clearly indicate that your county, and the various cities, villages and towns therein, must first seek and obtain proper legislative authority before attempting to organize a City-County Metropolitan Police Agency such as presently contemplated.

RWW:JCM

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*Interception of Communications—Bomb and Harrassing Calls—(Informal)*—The use of the “called party control device” by the communications common carrier to trace bomb scares and other harrassing telephone calls would not violate any Federal or State law if used with the consent of the receiving party.

March 3, 1971.

BURLEIGH A. RANDOLPH

*District Attorney, LaCrosse County*

I am in receipt of your recent letter regarding bomb scares and other harrassing phone calls. You indicate the following:

"Harrassing and obscene phone calls have long been a difficult problem to solve. . . . Recently, the fad is to make phony bomb scare phone calls. . . . The telephone company does have a device which they refer to as the 'called party control device' by which the person receiving the call can lock in the telephone circuits. When this is accomplished the phone company can very quickly trace back to the source of the call. It should be understood that this device does not involve the interception or recording of any communication whatsoever. In addition, not only is the device installed with the consent of the party, but it is not operable unless the party receiving the call activates it."

You ask whether the use of the "called party control device" by the communications common carrier, and with the consent of the receiving party to the call, would be in violation of any state or federal law. The answer is in the negative.

Chapter 427, Laws of 1969, states the relevant Wisconsin law. Chapter 427 is nearly identical to Title III of the Federal Crime Control and Safe Streets act of 1968. Section 968.27 (3), Stats., defines the term intercept as it is used in ch. 427, Laws of 1969:

"(3) 'Intercept' means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical or other device."

Since the "called party control" device does not "intercept" the contents of the wire communication, the use of such a device is not prohibited by sec. 968.31 (1), Stats., which provides:

"INTERCEPTION AND DISCLOSURE OF WIRE OR ORAL COMMUNICATIONS PROHIBITED. (1) Except as otherwise specifically provided in ss. 968.28 to 968.30, whoever commits any of the acts enumerated in this section may be fined not more than \$10,000 or imprisoned not more than five years or both:"

There is a second reason why the use of the called party control device is not prohibited by Wisconsin or federal law. Section 968.31 (2) (c), Stats., provides:

“(2) It is not unlawful under this chapter:

“(c) For a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or of any state or for the purpose of committing any other injurious act.”

Since one of the parties to the telephone call must give his permission to have the device installed, and must in fact activate the “called party control device,” the provisions of sec. 968.31 (2) (c), Stats. apply.

In short, the use of the “called party control device” is both a reasonable and legal tool in order to attempt to put an end to bomb scare and other harrassing telephone calls.

RWW:PAP

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*Minister's Credentials—Marriage Solemnization—(Informal)*—Resident clergyman must have a church under his ministry in this state for authority to solemnize marriages.

March 11, 1971.

WILLIAM A. BABLITCH

*District Attorney, Portage County*

You ask whether “credentials of a minister” which are available for a fee of \$1.00 from organizations located in other states qualify a person to solemnize marriages under Wisconsin Statutes.

I am of the opinion that your question must be answered negatively.

Section 245.17, Stats., provides:

“Credentials to be filed with clerk of circuit court. Before any clergyman, licentiate or appointee named in s. 245.16 is authorized to solemnize a marriage, he shall file credentials of ordination, license or appointment, or other proof of such official character, with the clerk of the circuit court of some county in this state *in which is located a church under his ministry*, who shall record the same and give a certificate thereof, but any such clergyman, licentiate or appointee who is not a resident of this state is likewise authorized to solemnize marriages in this state upon filing such credentials or proof, together with a letter of sponsorship from a clergyman of the same religious denomination or society *who has a church in this state under his ministry*, with the clerk of circuit court of the county in which any such marriage is to be performed, and said clerk shall record the same and give a certificate thereof. The place where such credentials are recorded shall be indorsed upon each certificate of marriage by the officiating clergyman, licentiate or appointee and recorded with the same.” (Emphasis supplied)

The language underlined indicates that any person who is a resident of this state and represents himself as a clergyman must have a church in this state in order to perform marriage ceremonies. Further, a person who is a nonresident of this state, and who represents himself to be a clergyman authorized to perform marriage ceremonies, must be sponsored by a clergyman who has a church in this state.

The definition of a “church under his ministry” as set forth in sec. 245.002(2), Stats., is very broad. The subsection reads as follows:

“In this chapter ‘church under his ministry’ includes any congregation, parish or place of worship at which any clergyman is located or assigned and also any administrative, missionary, welfare or educational agency, institution or organization affiliated with any religious denomination or society in this state.”

In spite of the sweeping broadness of the foregoing definition, there is a location requirement to be satisfied under sec. 245.17, Stats. For instance, the word "place" may be construed as an indefinite area in common usage, but it may also mean "a building or locality used for a special purpose." *Webster's Seventh New Collegiate Dictionary*. In the phrase "place of worship" it is apparent that a specific building or locality was contemplated by the legislature. This construction is further buttressed by the requirements that credentials of a clergyman be filed with the clerk in the county "in which is located a church under his ministry." Sec. 247.17, Stats.

Other than the requirement of a specific location, the definition of the word "church" as used by the statute appears to conform to a standard concept as commonly understood that a church is any religious society or body. A religious society, in turn, is "an assembly met, or a body of persons who usually meet, in some stated place for the worship of God and religious instructions. It is made up of individuals who have associated together for religious as opposed to secular purposes, having no regard to the particular mode or manner of constituting or forming the society or its being incorporated, although the term as used in particular statutes may have reference to incorporated, or quasi-incorporated religious societies. A religious society can exist without having either a church building or a parsonage." 76 C.J.S. *Religious Societies*, §1.

Based on the foregoing, it should be clear that credentials of a minister alone do not fulfill statutory requirements to officiate at marriage ceremonies.

It should be noted that the penalty for false solemnization of marriage is provided under sec. 245.30 (2), Stats., as follows:

"The following shall be fined not less than \$100 nor more than \$1,000, or imprisoned not more than one year, or both:

"\* \* \*

"(c) Penalty for false solemnization of marriage. Any person, not being duly authorized by the laws of this state,

who intentionally undertakes to solemnize a marriage in this state, or any person who intentionally participates in or in any way aids or abets any false or fictitious marriage.”

Although it is well established that a statute which provides criminal penalties must be strictly construed, Justice Holmes suggested that one who comes near a line of demarcation drawn by a criminal statute takes the risk that his conduct is in violation of the law. *U. S. v. Wurzbach* (1930), 50 S.Ct. 167, 280 U.S. 396, 74 L.ed. 508.

RWW:WLJ

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*Legal Notices—Official Newspapers—(Informal)—*A county board may not designate more than one newspaper having a general circulation in the county as its official newspaper. However, the county board may direct that a particular legal notice also appear in one or more other county newspapers.

March 23, 1971.

JAMES R. ERICKSON

*District Attorney, Polk County*

You advise that the Polk County Board of Supervisors has designated three of the seven weekly newspapers located in Polk County, Wisconsin, as official newspapers for the publication of legal notices of the county. Consequently, such notices are published in all three newspapers when a notice is required by law. You, therefore, request my opinion on the following question:

“May a County Board designate more than one newspaper having a general circulation in the county as its official newspaper?”

Chapter 985, Stats., which relates to the publication of legal notices, does not appear to authorize a county board to designate more than one newspaper having general circulation in the county as its official newspaper.

It should first be pointed out that ch. 985, Stats., does not require that your county designate *any* newspaper as its official newspaper. Section 985.05, Stats., however, does authorize the governing body of a county to designate a newspaper published or having general circulation in the county (and otherwise eligible under sec. 985.03, Stats., as "its official newspaper." As far as can be ascertained from the language used in this section, as well as the other sections in ch. 985, it does not appear that the statutes contemplate the designation of more than one official municipal newspaper. Even the State of Wisconsin, for instance, designates only one official State newspaper for the publication of laws. In addition, assuming, as your question does, that all three newspapers designated as official newspapers of your county have a general circulation in the county, there is at least a suggestion of unnecessary duplication and expenditure of tax monies.

The foregoing notwithstanding, it will be noted that sec. 985.02 (1), Stats., does provide in part that, "Except as otherwise provided by law, a legal notice shall be published in a newspaper likely to give notice in the area or to the person affected. \* \* \*" It is possible that the county board at some time in the past has determined that no one weekly newspaper published in the county would provide adequate notice to persons throughout the county. Under such circumstances, it would normally be permissible to publish a legal notice in those papers determined to most likely "give notice in the area or to the person affected." Such publication could be directed by the county board even though the county had not designated an official newspaper. If an official newspaper had been designated, however, the legal notice would be required to appear at least in that newspaper.

In conclusion, then, nothing in ch. 985, Stats., would prevent your county board from designating a newspaper or combination of newspapers in which a legal notice or certain legal notices should be published, so as to insure that persons throughout the county receive proper notice. If, on the other hand, the county desires to designate an official newspaper for the publication of its notices, it would designate only one newspaper as such, even though it might consider

it necessary to publish a particular legal notice in other qualified county newspapers as well.

RWW:JCM

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*Newspaper Identification—Sex Crimes—(Informal)—*  
Newspaper identification of female as stabbing victim without direct or indirect reference to sexual crimes does not violate sec. 942.02 (1) (a), Stats.

March 23, 1971.

JAMES H. OLSON

*District Attorney, Dodge County*

You have requested my opinion whether there would be a violation of sec. 942.02, Stats., which prohibits the communication of the identity of victims of offensive crimes, where the newspaper printed the names and ages of the victims and stated that they were victims of knifing attacks, but made no reference to sexual crimes.

I am of the opinion that there would not be a violation unless it could be proven that the publisher either directly referred to a sexual crime listed in the statute or at the time of publication knew that the persons identified were victims of a sexual crime and used indirect language to convey that impression to his readers.

At the time of *State v. Evjue* (1948), 253 Wis. 146, 33 N.W. 2d 305, the statute, then sec. 348.412, read:

“\* \* \* The identity of a female who may have been raped or subjected to any similar criminal assault \* \* \*”

At page 155 the court noted the object of the statute:

“It was no doubt intended to save from embarrassment and offensive publicity women who have been the subject of the kind of assault delineated in the statute, and to aid law-enforcement officers to more readily obtain evidence for the prosecution of such criminal offenses. It is consid-

ered that it is a matter of common knowledge that such victims suffer far beyond anything suffered by men or women in connection with other classes of crimes. It was to prevent this and aid prosecuting officers that the legislature of this and nineteen other states have enacted laws of this general character."

Present sec. 942.02 (1) (a), Stats., provides:

"(a) Intentionally publishes in any radio or television broadcast, newspaper, magazine, or other similar method of disseminating news to the public, the identity of any living person *as a victim* or the identity of any living person *who is the victim* of the crime of rape, sexual intercourse without consent, sexual intercourse with a child, sexual perversion, or indecent behavior with a child, which crime is alleged to have occurred in this state; or"

It is the connection of a given person with one of the offensive crimes listed which is prohibited.

In my opinion mere identification of the girls as victims of a stabbing would be insufficient. A different conclusion might be reached if it could be established that the publisher knew that the persons were victims of an unlawful sexual crime and used indirect language to convey that impression to his readers.

RWW:RJV

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*County Supervisor—Conflict of Interest—(Informal)—*  
County board member employed by engineering and survey firm may be possible conflict of interest in public contracts.

March 23, 1971.

CHARLES H. PEHLIVANIAN

*Acting Corporation Counsel, Racine County*

You have requested my opinion whether a county board supervisor, who is employed as business manager of an en-

gineering and survey company, which in the past has done, and in the future expects to do considerable surveying and engineering work for the county, can legally serve on the highway committee, on the planning committee or on the county board when matters in which he or his employer have a pecuniary interest are considered by the board or the respective committee.

We are concerned with a possible conflict of interest problem as distinguished from a compatibility of offices problem.

In general, it can be said that all supervisors in our representative form of government have a potential conflict of interest problem.

I am not aware of any statute which would prohibit the supervisor above referred to from legally serving on the county board, or on either of the committees mentioned. It is good governmental practice, however, for the electorate or appointing authority, be it the board itself or board chairman, to select supervisors and committee members who have the least potential for conflict of interest.

Two statutes are primarily in point, sec. 946.12, dealing with misconduct in public office and especially subsec. (3) thereof, and sec. 946.13, which prohibits or strictly limits private interest of public officers in public contracts.

The county has a definite interest, even though the onus and primary risk are on the officer. Violation of the statute can result in fine or imprisonment on the part of the officer. However, the county has an interest in seeing that the statute is not violated by any officer, since sec. 946.13 (3), Stats., provides:

“(3) A contract entered into in violation of this section is void and the state or the political subdivision in whose behalf the contract was made incurs no liability thereon.”

Under sec. 946.13(1) (a), Stats., it would be necessary to determine whether there was a contract involved, and whether or not the public officer, in his private capacity, negotiated or bid for or entered into a contract in which he had a private pecuniary interest, direct or indirect and whether

he was authorized or required by law to participate in the making of that contract. Under sec. 946.13 (1) (b), Stats., it would be necessary to establish that he participated in the making of the contract or that *he performs in regard to that contract some function requiring the exercise of discretion on his part.*

In *Heffernen v. Green Bay* (1954), 266 Wis. 534, 542, 64 N.W. 2d 216, the court said:

“Such contract would have been void because of Rachals’ indirect interest in it as proscribed by the statute. Under such circumstances it would have been immaterial that Rachals in his capacity as alderman did not vote upon the awarding of the contract.”

This holding was based on then sec. 62.09 (7) (d), Stats., which was repealed by ch. 603, Laws of 1959, when the Criminal Code was revised. In 52 OAG 367, 370 (1963), it is stated that a public officer may avoid a violation by refraining to vote or participate in the negotiations. The *Heffernen* case was not discussed in that opinion. It would appear that under sec. 946.13(1) (b), Stats., it is a close question as to whether an officer can avoid a violation by abstaining. Abstention from voting would not avoid a violation under sec. 946.13 (1) (a), Stats., if the other elements could be proven. The exceptions included in sec. 946.13 (2), Stats., must always be considered. Note that the exception in sec. 946.13 (5), Stats., runs only to sec. 946.13 (1) (b).

Your letter does not set forth specific contracts, amounts involved, degree of ownership or participation of the supervisor in the company concerned, or degree in which he might actually participate, bid or negotiate. While we are in part concerned with yearly aggregate of contracts, each contract situation must be studied before a determination could be made as to whether sec. 946.13, Stats., was violated.

One of the burdens of public office can be the foreclosure of participation in certain public contracts which might otherwise be available. On the one hand, the supervisor may avoid possible violation of sec. 946.13, Stats., by abstention from voting or other participation in making a contract in

which he is directly or indirectly interested. On the other hand, he may avoid making proposals in areas in which he is financially interested. And, lastly, the board or its committee may reasonably in certain cases choose to do business with individuals or firms which are known to be free from potential conflict.

RWW:RJV

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*Reapportionment—Legislature—(Formal)* — Reapportionment of the Wisconsin Legislature discussed in reference to Art. IV, secs. 1 through 5, Wis. Const., and the Fourteenth Amendment of the U. S. Const.

March 24, 1971.

MEMBERS OF JOINT COMMITTEE ON LEGISLATIVE ORGANIZATION

You request my opinion on a number of questions relating to the apportionment of the Wisconsin Legislature under the various provisions of our State Constitution, principally secs. 1 through 5 of Art. IV thereof, and as required under the Federal Constitution.

Sections 1 through 5, Wis. Const., provides in part, as follows:

“Legislative power. SECTION 1. The legislative power shall be vested in a senate and assembly.

“Legislative power. SECTION 1. The legislative power of the members of the assembly shall never be less than fifty-four nor more than one hundred. The senate shall consist of a number not more than one-third nor less than one-fourth of the number of the members of the assembly

...

“Apportionment. SECTION 3. \* \* \* At their first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew

the members of the senate and assembly, *according to the number of inhabitants*, \* \* \*. (Emphasis added)

“Assemblymen, how chosen. SECTION 4. \* \* \* The members of the assembly shall be chosen biennially, by single districts, on the Tuesday succeeding the first Monday of November after the adoption of this amendment, by the qualified electors of the several districts, such *districts to be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable*. \* \* \* (Emphasis added)

“Senators, how chosen. SECTION 5. \* \* \* The senators shall be elected by *single districts of convenient contiguous territory*, at the same time and in the same manner as members of the assembly are required to be chosen; and *no assembly district shall be divided in the formation of a senate district*. \* \* \*” (Emphasis added)

You indicate that the Joint Committee on Legislative Organization feels that several recent Federal reapportionment decisions, rendered since the last definitive pronouncement on the subject by the Wisconsin Supreme Court (*State ex rel. Reynolds v. Zimmerman* (May 14, 1964), 23 Wis. 2d 606, 128 N.W. 2d 16, 128 N.W. 2d 349), suggest the need for more current judicial guidance by way of a declaratory judgment action on certain constitutional questions affecting the forthcoming legislative reapportionment. Your committee therefore inquires:

- (a) whether such relief should be sought in Federal District Court or in the Wisconsin Supreme Court;
- (b) what “controversy” should be established;
- (c) who should constitute the “parties” under statutes relating to submission of an agreed case (sec. 269.01, Wis. Stats., or similar U. S. Code provisions) ?

As you point out, a significant number of relevant Federal decisions have been rendered since *Reynolds v. Zimmerman*, *supra*, and the landmark Federal decision which was before the court at that time, i.e., *Baker v. Carr* (1961), 269 U.S. 186, 82 S.Ct. 691, 7 L.ed 2d 663. These more recent decisions

include *Reynolds v. Sims* (1964), 377 U.S. 533, 84 S.Ct. 1362, 12 L.ed. 2d 506; *Swann v. Adams* (1967), 385 U.S. 440, 87 S.Ct. 569, 17 L.ed. 2d 501; *Kilgarlin v. Hill* (1967), 386 U.S. 120, 87 S.Ct. 820, 17 L.ed. 2d 771; *Kirkpatrick v. Preisler* (1969), 394 U.S. 526, 89 S.Ct. 1225, 22 L.ed. 2d 519, *reh. den.*, 395 U.S. 917, 89 S.Ct. 1737, 23 L.ed. 2d 231; *Wells v. Rockefeller* (1969), 394 U.S. 542, 89 S.Ct. 1234, 22 L.ed. 2d 535; *Hadley v. Junior College District of Metropolitan Kansas City, Missouri, et al.* (1970), 397 U.S. 50, 90 S.Ct. 791, 25 L.ed. 2d 45.

Through these decisions of the United States Supreme Court, a case-by-case refinement of the equal protection clause of the Fourteenth Amendment to the United States Constitution has developed which has resulted in a doctrine of constitutional law, which commands that whenever a state or local government decides to select persons by popular election to perform governmental functions, each qualified voter must be given a vote which is equally weighted, insofar as is practicable, with votes cast by all other electors. See *Hadley* case, *supra*.

Your inquiry is no doubt further generated in part by statements appearing in the prior opinion of our office, reported in 56 OAG 105 (1967), which indicated that Senate Bill No. 1, 1967, would result in an apportionment plan for legislative districts which would be unconstitutional. In the course of discussing the various reapportionment authorities reported at that time, particularly *Reynolds v. Sims*, *supra*, we there advised, at p. 108:

“These constitutional requirements [Art. IV, secs. 4 and 5, Wis. Const.], as previously interpreted by the Wisconsin court, make the task of achieving equality between assembly and senatorial districts a difficult one.

“It is possible that the Wisconsin court might now hold that, in light of *Reynolds v. Sims*, these provisions must give way to the United States constitutional requirements of one man-one vote if a plan embodying them does not result in substantial equality among assembly and senatorial districts.”

And at page 111 :

"In *Swann v. Adams*, it was stated that what is marginally permissible in one state may be unsatisfactory in another depending on the particular circumstances of the case. The rule against splitting counties for attachment established in 1892 in *Cunningham* [*The State ex rel. Attorney General v. Cunningham* (1892), 81 Wis. 440, 522, 528, 51 N.W. 724], and followed in 1964 by *Reynolds v. Zimmerman*, before *Reynolds v. Sims*, was based on constitutional interpretation rather than express constitutional provision. This might make the rule even more difficult to sustain if substantial deviations result therefrom.

"It is, therefore, questionable whether the reapportionment plan adopted by the Wisconsin supreme court in *Reynolds v. Zimmerman* would be constitutional under the rules later established by the United States supreme court in *Reynolds v. Sims*. Bill No. 1, S., would establish districts with significantly greater deviations than those in the plan adopted by the Wisconsin supreme court. I am of the opinion, therefore, that an apportionment act resulting from enactment of Bill No. 1, S., 1967, would be unconstitutional."

Your first questions appear to proceed from an assumption that a declaratory judgment action would be appropriate at this time and would provide the legislature with additional guidance as to the manner in which it is to proceed to reapportion our state. In my judgment, however such a supposition is clearly without foundation. Consideration of any such action at this time is, at best, most premature.

As you suggest, in order to properly approach a court in the very first instance, some "controversy" between proper parties must exist. Courts will not normally indulge in the rendition of purely advisory opinions. However, no controversy can be said to exist and a court cannot properly deal with the more specific questions of constitutionality unless or until a law has been duly enacted and some person has been deprived of his constitutional rights by its operation. *Goodland v. Zimmerman* (1943), 243 Wis. 459, 10 N.W. 2d 180. Therefore, before any court is in a position to deter-

mine whether a reapportionment plan is valid, the plan must be enacted as a law through the joint action of the legislature and the Governor. Since the 1971 Legislature has convened, no reapportionment law has been enacted for use in electing state senators and representatives at the forthcoming general election. Under such circumstances, the legal action you suggest would simply delay the timely legislative action demanded by our Wisconsin constitution and would create an aura of procrastination reminiscent of the abortive reapportionment efforts of the 1960's.

While more recent state reapportionment experiences suggest that an eleventh hour crisis could again arise which would generate and justify legal action to preclude a denial of state and federal constitutional rights brought about by a failure of the legislature and Governor to provide for a valid reapportionment, such drastic action could only be justified where it appeared the legislature and Governor would be unable to enact a timely apportionment. Barring such a catastrophe, however, court action such as you presently suggest would have to abide the enactment of a reapportionment law representative of the best efforts of the two coordinate branches of state government which the constitution holds initially responsible. Then, and only then, could any person judge intelligently whether any legal action appeared necessary to preserve constitutional rights, who would constitute proper parties or what forum should be chosen.

You next inquire whether a legislative apportionment should observe county lines as far as possible, consistent with the primary requirement of achieving population equality among districts.

This question was previously answered in the affirmative by this office in 58 OAG 88 (1969). In that opinion, at page 91, the following is stated:

“ . . . In my opinion the Wisconsin Constitution no longer may be considered as prohibiting assembly districts from crossing county lines, in view of the emphasis the United States Supreme Court has placed upon population equality among electoral districts. Nevertheless, apportionment of

assembly seats should be done in accordance with both federal and Wisconsin constitutions, if possible. In other words, the county line requirement of *Cunningham* [*State ex rel. Atty. Gen. v. Cunningham* (1892), 81 Wis. 440, 51 N.W. 724] should be followed insofar as it does not compel disregard for the requirements of the federal equal protection clause."

Your third question asks whether a legislature apportionment should observe precinct lines as far as possible, consistent with the primary requirement of achieving population equality among districts, and, if so, whether the population of precincts may be estimated.

In the *Cunningham* case, *supra*, our Supreme Court indicated that the term "precinct" as used in Art. IV, sec. 4, Wis. Const., requiring assembly districts to be "bounded by county, precinct, town or ward lines," had ceased to have significance since precincts as *political divisions* had ceased to exist. 81 Wis. 440, 514, 520. In so concluding, it was pointed out that the precincts in existence in some counties at the time the constitution was adopted in 1848, "corresponded in some respects to the town or ward of other counties" but that when the uniform system of town and county government (Art. IV, sec. 23) became fully operative no *civil subdivisions* which were the equivalent of the precinct of territorial times remained other than towns and wards.

It is my opinion that a court would hold that insofar as may be consistent with population equality, town and ward lines should be followed and that municipal precinct lines may be disregarded.

In response to your question as to whether the population of precincts may be estimated, it is my opinion that the quality and detail of the current census appears to have eliminated any need for estimates of populations.

You next request my opinion whether a legislative apportionment should observe village lines as far as possible in districting since, as you point out, the word "village" is absent from the list of boundaries which Art. IV, sec. 4, Wis.

Const., indicates should be followed in the formation of assembly districts.

In my opinion, village lines may be utilized in the formation of assembly districts. Such a conclusion is justified for a number of reasons.

At the time of the adoption of the Wisconsin Constitution in 1848, a firm concept of the nature of an incorporated village was yet to be realized. Because of a lack of sophistication and consistency, the incorporated village of this period was sometimes structured more like a city than the village we now know and at times was still considered a part of the town for certain governmental purposes.

A number of early villages incorporated by special act, both before and after the adoption of the constitution, were divided into wards or districts for general governmental purposes such as collecting and expending taxes and the conduct of elections. These wards also formed basic political or civil subdivisions, which sometimes had their own governmental framework, and from which representatives to the village government would be chosen. Prior to the adoption of the constitution, the term "village" could also apparently be used more loosely to identify at least some of the communities which had organized under more general laws, such as No. 17 of the 1836 Laws of the Legislative Assembly of the Wisconsin territory, designated "AN ACT to incorporate the inhabitants of such towns as wish to be incorporated." This act authorized "residents of any town or village of any number of dwellings situated contiguous and convenient for such purpose" and containing 300 persons to become incorporated "for the better regulation of their internal police." These incorporations were to be known "by the name and style of the president and trustees of the town of \_\_\_\_\_." Later on in territorial days, other villages were incorporated, by special act, with much the same governmental structure, i.e., a president and trustees elected at large. Finally, to add to the confusion, some communities appear to have been referred to as villages when they had not been incorporated as such.

The early importance of town government as a basic governmental unit is demonstrated by the fact that when the village of Milwaukee incorporated as a city in 1846 each of its wards were designated as "a separate township or town under the laws regulating town and county government" and the three aldermen of each ward were ex-officio supervisors of such towns. Also, some of the early Wisconsin villages incorporated by special acts were joined to towns for state or county elections by virtue of such acts. *Jones v. Kolb* (1882), 56 Wis. 263, 267, 14 N.W. 177. Likewise, villages organized under such general laws as ch. 70, R. S. 1858, retained the right to vote at town elections.

There were numerous other examples of organizational interrelationships between villages and towns. For example, in the earlier days of statehood towns retained varying degrees of authority to levy taxes upon village property and from time to time certain town officers, such as the town treasurer, assessor or marshal, performed functions which would ordinarily be performed today by village officers. In the *Jones* case, *supra*, however, the court found that villages organized under ch. 40, R. S. 1878, were "separate and distinct municipal corporations, as much so as the town from whose territory the village is formed. . . ." 56 Wis. 268. Interestingly, in support of this conclusion the court pointed to an earlier act governing the incorporation of villages, ch. 183, Laws of 1872, as being a law ". . . intended to separate the village from the town for the purpose of elections." 56 Wis. 269.

This decision was followed by *Cole v. The President and Trustees of the Village of Black River Falls* (1883), 57 Wis. 110, 14 N.W. 906, which held that the legislature had no power to give a voice in the election of village officers to electors outside of the village. While these conclusions hardly come as much of a revelation today, these cases demonstrate the evolution which was necessary before the village finally came to be fully recognized as a separate and independent civil and political subdivision clearly distinguishable from the town in which it was located.

The variety of different village powers and forms of government eventually suggested the need for uniformity. This was largely accomplished by implementation of subdiv. 9 of sec. 31 and sec. 32, Art. IV (added to the Wisconsin Constitution in 1871), which prohibited the enactment of any special or private law for incorporating any village or to amend the charter thereof and provided for future legislative modification by general law, and by implementation of the home rule amendment, Art. X, sec. 3, of 1921.

Today, when a new village is created by incorporation or an existing village is enlarged through annexation of town lands, the town's corporate authority ceases with respect to such lands falling within the new boundaries. As a consequence of this new or altered corporate relationship, some or all of the boundaries of the village become new town boundaries. Likewise, the village of today possesses many more of the same basic characteristics of the first "wards" than do present day city wards. And, of course, but for the voluntary choice of past legislatures to constitute village government as they have, villages could establish wards in the same manner as cities. See *Cole case, supra*, and also *State ex rel. Witkowski v. Gora* (1928), 195 Wis. 515, 218 N.W. 837.

In addition, it is of some significance that the current court made apportionment includes an example of the use of village lines in the creation of districts, i.e., the Village of Fox Point in Assembly District Milwaukee 25 shares a common boundary with the Villages of Bayside and River Hills in Assembly District Milwaukee 18.

On the basis of the foregoing, I am convinced that if any question previously existed as to the propriety of using village lines in legislative reapportionment, such a prohibition probably no longer exists. In my opinion, an incorporated village is a "political," "civil" and "municipal" division of our state in the same sense as the terms "town" and "ward" are used in Art. IV, sec. 4, Wis. Const.

You last inquire whether the present composition of the legislature, with a 100-member assembly and a 33-member senate, can be retained in view of equal protection guaran-

tees of Art. I, sec. 1, Wis. Const., and the Fourteenth Amendment, U. S. Const., and the more specific requirements of Art. IV, secs. 2 and 5, Wis. Const.

In my opinion it is doubtful that the present composition of the legislature, with a 100-member assembly and a 33-member senate, can continue in light of the more recent emphasis placed on equality of voting power under both the State and Federal Constitutions.

However important it may seem to maintain the present number of representatives to the assembly at the maximum allowed by the Wisconsin Constitution, it now appears evident there is nothing so imperative in that figure, or the number of senators allowed, which will withstand the requirement of equality of representation by population.

I do not suggest that the equal protection principles most recently enunciated by the United States Supreme Court in its apportionment decisions deny vitality to the other apportionment principles set forth in our state constitution. However, I do suggest that future legislatures should appreciate the shift in emphasis and priority which these cases reflect. As stated in the *Hadley* case, *supra*, 90 S.Ct. 791, at p. 796:

“ . . . We have said before that mathematical exactitude is not required, *Wesberry, supra*, 376 U.S. at 18, 84 S.Ct. at 535, *Reynolds, supra*, 377 U.S. at 577, 84 S.Ct. at 1389; but a plan that does not automatically discriminate in favor of certain districts is.

“In holding that the guarantee of equal voting strength for each voter applies in all elections of governmental officials, we do not feel that the States will be inhibited in finding ways to insure that legitimate political goals of representation are achieved. . . .”

Our Wisconsin Supreme Court pointed out in the *Cunningham* case, *supra*, p. 531, that under our constitution there is no proper basis for the formation of senate districts until the assembly districts have been properly apportioned and formed. Therefore, if the assembly districts

are apportioned in such a manner as will, in the words of the *Hadley* case, *supra*, "insure, as far as practicable, that equal numbers of voters can vote for proportionally equal numbers of officials," it is difficult to accept the possibility of maintaining 100 seats in the assembly and 33 seats in the senate at the same time. Since the legislature must be as faithful to equal protection principles in the apportionment of senate districts as well as in the apportionment of assembly districts, and inasmuch as Art. IV, sec. 5, of our constitution prohibits the division of an assembly district in the formation of a senate district, it is doubtful that the required measure of equality of voting power could be achieved unless each senate district contained the same number of assembly districts.

RWW:JCM

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*18-Year-Old Vote—Elections—(Formal)*—Local municipal clerks should proceed with registration of 18-, 19- and 20-year-old citizens, newly enfranchised for national election purposes by the Federal Voting Rights Act Amendments of 1970, even though the Wisconsin Legislature has not as yet altered any of the state voter registration statutes so as to bring our state law into harmony with the provisions of the federal law. Art. I, secs. 2 and 4, U. S. Const.

March 29, 1971.

ROBERT C. ZIMMERMAN

*Secretary of State*

You have asked whether local municipal clerks should proceed to register citizens 18, 19 and 20 years old in light of the requirements of the Federal Voting Rights Act Amendments of 1970, as interpreted by the recent United States Supreme Court decision, *Oregon v. Mitchell* (1970), 400 U.S. 112, 91 S.Ct. 260, 27 L.ed. 2d 272, and companion cases, even though the Wisconsin Legislature has not as yet altered any of the state statutes dealing with voter registra-

tion so as to bring our state law into harmony with the provisions of the federal law.

Title III (18-year-old vote) of the Federal Voting Rights Act Amendments of 1970, Pub. L. 91-285, 84 Stat. 314, provides, in part, as follows:

#### “PROHIBITION

“Sec. 302. Except as required by the Constitution, no citizen of the United States *who is otherwise qualified to vote* in any State or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older.” (emphasis added)

In considering this language of the federal law and in treating the constitutional challenge to its validity, the court held in *Oregon v. Mitchell, supra*, “. . . that the 18-year-old vote provisions of the Voting Rights Act Amendments of 1970 are constitutional and enforceable insofar as they pertain to Federal elections and unconstitutional and unenforceable insofar as they pertain to state and local elections.” 91 S.Ct. 260, 261.

Title III of the 1970 Act makes no direct reference to the registration of newly enfranchised 18-year-old electors and no uniform federal standards are established in this regard. However, the law does provide that in order to exercise his federal franchise, the prospective voter must be “otherwise qualified to vote” in his state or political subdivision. It is my opinion, therefore, based on the foregoing language, that Congress intended that the 18-year-old franchise be implemented by and subject to existing state and local voter registration machinery and laws.

I consider the views of Mr. Justice BLACK, who announced the judgments of the Court, most instructive in this regard, particularly since his ultimate conclusions appear to have been adopted as the judgment of the court on the question of the 18-year-old vote. Mr. Justice BLACK, at page 263, first indicates, as a basic proposition, that Congress possesses the power “. . . to make or alter election regulations in national elections, including the qualifications of

voters . . . ." He next quotes at length from the opinion of an unanimous court in *Smiley v. Holm* (1932), 285 U.S. 355, 52 S.Ct. 397, 76 L.ed. 795, holding that Art. I, sec. 4, U.S. Const., authorizes Congress to *supplement* election regulations that the legislatures of the states are authorized to prescribe with respect to congressional elections, or to *substitute* its own. He, therefore, concludes, at page 264 :

"In short, the Constitution allotted to the States the power to make laws regarding national elections, but provided that if Congress became dissatisfied with the state laws, Congress could alter them . . . ."

Mr. Justice BLACK again emphasizes the point at page 265 of the opinion, where he states :

". . . Moreover, Art. I, § 2, is a clear indication that the Framers intended the States to determine the qualifications of their own voters for state offices, because those qualifications were adopted for federal offices unless Congress directs otherwise under Art. I, § 4. . . ."

While registration at this time may lead to some confusion on the part of both the newly franchised voter and local clerks, this cannot justify denying such a voter his right to register and vote. Even though legislative guidelines are inexact at present, it is my opinion that local clerks will neither be violating their oaths of office nor any state law by registering citizens of Wisconsin who are entitled to exercise their newly acquired federal franchise. In fact, it is undoubtedly the responsibility of all local clerks to implement the new federal franchise by utilizing the present registration statutes insofar as possible.

Local clerks should be reminded, however, that they must maintain a dual system of registrations; i.e., the registrations of under-21 voters must be segregated from registrations of voters 21 or over, since voters under age 21 may not presently vote in State or local elections under Wisconsin law. I also wish to point out that registration is not required in all municipalities. See sec. 6.27, Stats. Until the legislature acts, persons 18 to 20, claiming a right to vote in federal elections in municipalities where registration is not

required will have to assert such right at the polls or when they request an absentee ballot.

The foregoing points to the obvious and immediate need for implementive legislation to clarify the duties of the local clerks. In this connection I feel it would be most appropriate for you to urge early consideration of this matter by the legislature. I would not hesitate joining you in this regard if you would so desire.

In the interim, however, it appears that local municipal clerks have the duty to proceed with registration of newly enfranchised 18- to 21-year-old voters in accord with the federal mandate and in accord with Wisconsin registration statutes insofar as applicable in order that these voters are not denied their right to vote in federal elections on account of age.

RWW:JCM

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*Illegal Practice of Law—Attorney-Client—(Informal)—*  
Officers and employes of a bank are not illegally practicing law where they fill out lease forms which have been designed and prepared by the attorney representing the owner of the property being leased under a property management agreement between the owner and the bank.

March 31, 1971.

JOHN B. MCCARTHY

*Staff Counsel, State Bar of Wisconsin*

You ask my advise as to whether the following set of facts may constitute unauthorized practice of law by a bank's officers or employes:

Where a private hospital, which has purchased residential or apartment-type real estate properties for the purpose of future expansion of its facilities, engages a local banking institution as its agent to manage the properties on a fee basis, and the banking institution utilizes a form lease for

residential and commercial leasing prepared by the hospital's attorney (not WB Form 22-Wisconsin Real Estate Examining Board form), with the bank's officers or employes filling in only the location of the leased premises, name of the lessee and the monthly rental which is predetermined by the owner prior to rental, and the execution of a security deposit form.

It is significant that the hospital's attorney has prepared a form lease for residential and commercial leasing. That function, obviously, when done for another, is the practice of law. The question, then, is whether what the bank's officers or employes do, that is, the filling in of the location, the name of the lessee, the monthly rental, and the security deposit form, constitutes the practice of law within the meaning of sec. 256.30, Stats.

In the case of *State ex rel. Reynolds v. Dinger* (1961), 14 Wis. 2d 193, 109 N.W. 2d 685, the Supreme Court, which has the exclusive power to regulate the practice of law, concluded that a rule of the Real Estate Brokers' Board, which included provisions allowing the completion and use of standardized forms by brokers in transferring title to real estate, permitted to a limited extent the practice of law by nonlawyers. However, the court refused to declare the rule invalid, even though it affected the practice of law, because it considered the rule a salutary one which in its essentials continued a practice of laymen which the court had long tacitly permitted and which had worked reasonably well.

The court pointed out, however, that whenever in the court's view the public interest required it, the court would discontinue its approval of the practices relating to the practice of law which had been approved in an administrative rule of the Real Estate Brokers' Board.

In the present case, it appears that the officers and employes of the bank are merely filling out forms which have already received the professional attention of the attorney for the principal. Therefore, it can be concluded that, in fact, that attorney is probably responsible for the clerical

functions that are being performed by the bank's officers or employes. Thus, even though those clerical functions might possibly be considered to be within the practice of law, they are not the unauthorized or illegal practice of law within the meaning of the *Dinger* case.

Thus, I must conclude that if any action was brought against the bank's officers or employes, such action would certainly fail if criminal in nature, and would probably fail if brought in quo warranto in the absence of a showing of " \* \* \* danger and expense to the public in any substantial degree \* \* \* ." *Dinger*, p. 205.

RWW:LJD

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*State University System—Tenure—(Informal)*—Under sec. 37.31, Stats., the faculty acquires tenure in the system as distinct from tenure at one particular institution within the system.

March 31, 1971.

SAMUEL G. GATES

*Associate Director, Wisconsin State Universities*

You have requested my opinion as to whether members of the faculty of the Wisconsin State University System acquire tenure at a particular institution within the system, or whether they acquire tenure in the system at large.

This question involves interpretations of secs. 37.02(1), 37.11(2), 37.11(3), and 37.31, Stats. The pertinent provisions of these sections and subsections of the statutes read as follows:

"37.02(1) The Board of Regents \* \* \* are constituted a body corporate \* \* \*."

"37.11 The Board of Regents shall have the government and control of all the state universities, \* \* \*"

“37.11 (2) Appoint a president and assistant and such other teachers and officers and employ such persons as may be required for each of said State Universities; \* \* \*”

“37.11 (3) Remove at pleasure any president, assistant or other officer or person from any office or employment in connection with any such state university, but discharge of teachers shall be governed by s. 37.31.”

“37.31 (1) (a) All teachers in any state university shall initially be employed on probation. The employment shall be permanent, during efficiency and good behavior, after appointment and acceptance thereof for a sixth consecutive year in the state university system as a teacher. \* \* \*”

“37.31 (1m) A teacher shall lose tenure upon discharge or resignation from the state university system. \* \* \*”

In my opinion, these statutes concern the same general subject matter and, therefore, must be considered *in pari materia*.

It is apparent at first blush, from my reading of these statutes, that particular institutions within the state university system have no legal identity. The only entity created by the law is the corporate entity, the Board of Regents. This fact, plus the provisions of secs. 37.11 (2) and 37.11 (3), Stats., leave no room for argument with the proposition that the faculty consists of employes of the corporate entity, the Board.

The language of the tenure statute (sec. 37.31, Stats.) specifically refers, in my opinion, to tenure in the system as distinct from tenure at any particular institution. For example, sec. 37.31 (1) (a), Stats., reads in part:

“\* \* \* acceptance thereof for a sixth consecutive year *in the state university system* as a teacher. \* \* \*” (Emphasis supplied)

And subsection (1m) reads in part:

“a teacher \* \* \* from *the state university system*. \* \* \*” (Emphasis supplied)

In answer to your question, tenure is acquired in the system at large.

The consequences of this result are, as suggested in your letter, that a tenured teacher must be given an opportunity to teach at another institution within the system if his position is abolished at his present institution, provided the teacher is competent and that there is an opening at some other institution.

Aside from the statutes involved, the courts have recognized that notwithstanding the good faith abolishment of a position, the employe should be given the opportunity of continued employment if there is a suitable position available (100 ALR 2d 1163). The principle stated in this authority is clearly in harmony with my interpretation of tenure under our particular statutes.

It is important to note that the opinions expressed in this letter are only applicable to the tenured faculty and do not relate to those teachers who are hired to teach at a particular institution for a particular term and who have not acquired tenure. The nontenured faculty are hired as a matter of contract law to teach for a specific term at a particular institution and it would, in my opinion, be a breach of the employment contract to attempt a unilateral transfer of this employe during the term of his contract.

RWW:CAB

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*Real Estate Broker's License—Tenants Union—(Informal)*—Actions of tenants union on behalf of members may require license as real estate broker.

April 1, 1971.

GERALD C. NICHOL

*District Attorney, Dane County*

Your predecessor requested an opinion whether tenants may organize for mutual self-help purposes with respect to

rental properties. You indicate that you still have need for advice in this area.

I am of the opinion that tenants can organize. However, in the achievement of their goals, such persons, including any profit or nonprofit corporation, must use methods which are not proscribed by law.

You specifically inquire whether the Madison Tenants Union must obtain a real estate broker's license to engage in certain activities exercised on behalf of tenant members.

Although the information furnished with the inquiry of your predecessor did not disclose information as to the organization of the Madison Tenants Union, the Wisconsin Real Estate Examining Board has furnished us with a file of some substance. I am advised that much of this material was previously made available to your office.

The Tenants Union was previously organized as an unincorporated voluntary association. Its constitution provided for membership on payment of fee, an executive committee of ten who had power to enact and repeal bylaws and to carry out administrative functions. The executive committee had limited power to enter into contracts which directly affected any member or group of members, subject to ratification by a voting majority of the members affected. The constitution stated that one of the purposes of the association was to promote:

“ \* \* \* better landlord-tenant relations, better housing conditions, fair rents, just and equitable settlement of disputes and grievances between landlords and tenants, *and to secure leases between landlords and tenants which promote the above purposes*, through collective bargaining.” (See Exhibit B, attached.)

On or about August 4, 1970, the MTU reorganized as a nonstock, nonprofit corporation under ch. 181, Stats. The stated purpose was “to organize and assist tenants in their efforts to improve housing terms and conditions in the Madison, Wisconsin area.” (Exhibit A, attached.)

Chapter 136, Stats., was renumbered to ch. 452, by ch. 336, Laws of 1969.

Section 452.03, Stats., provides in part:

“No person shall engage in or follow the business or occupation of, or advertise or hold himself out as or act temporarily or otherwise as a real estate broker or salesman without a license.”

Section 452.01 (2) (a), Stats., defines a real estate broker to include one who:

“(a) For another, and for commission, money or other thing of value, sells, exchanges, buys or rents, or offers or attempts to negotiate a sale, exchange, purchase or rental of an interest or estate in real estate.”

Where rental of real estate is involved, violation would result only where it was proven that there was (1) an offer or attempt to *negotiate*, (2) it was performed for *another* and (3) for a commission, money or other thing of value.

On the basis of the documented information furnished by the Wisconsin Real Estate Examining Board, it is my opinion that certain members of the voluntary association and officers of the corporation probably did engage in activities which would require licensing under ch. 452, Stats. If the corporation is to continue to engage in activities of negotiation of rental leases for others, even though they be tenant members, and for a consideration, such corporation would also require a license.

On the basis of the following exhibits, there is no question but that there were acts of negotiation or attempted negotiation of contracts for the rental of real estate on behalf of another, and for consideration.

The property involved was never that of the association or corporation. It was owned by third-party landlords. Actual contracts for the rental of an interest in real estate were involved. In certain cases it appears that representatives of MTU negotiated or attempted to negotiate specific lease contracts between a landlord and a tenant and acted to withhold rent, in escrow, with respect thereto. In other cases the attempted contracts between the MTU and landlord would govern, at least in part, specific terms of indi-

vidual lease contracts between the landlord and tenant. The negotiation or attempted negotiation was on behalf of another, individual tenants who were, or, for the purposes of participation, became members of the voluntary association or corporation. More is involved than mere recommendation of suggested lease terms or airing of grievances. In certain instances, it appears that the union representatives were in part acting, or sought authority to act, for the landlord as against certain tenants or tenant members. (Exhibit F, par. 3.)

It will be noted from exhibits hereinafter referred to that consideration was received or attempted to be collected from both tenants and from the landlord.

Where negotiation or attempt to negotiate the rental of an interest in real estate for another is proven, consideration will be presumed. Section 452.19, Stats., provides:

“In any prosecution for violation of this chapter proof that a person acted as a broker or agent or salesman is prima facie proof that compensation therefor was received or promised.”

Our court has construed “negotiation” as it relates to a broker’s right to a commission in listing contract disputes to mean that the efforts of the broker to interest a prospective purchaser must have proceeded to the point where the prospect would be considered a likely purchaser.

*Munson v. Furrer* (1952), 261 Wis. 634, 53 N.W. 2d 697.

*Dunn & Stringer Investment Co. v. Krauss* (1953), 264 Wis. 615, 618, 60 N.W. 2d 346.

*George Nangen & Co. v. Kenosha Auto Transport Corp.* (1965), 238 F.Supp. 157.

*Jessup v. La Pin* (1967), 35 Wis. 2d 186, 150 N.W. 2d 342.

Section 452.01 (2) (a), Stats., is broader, however, in that it also covers *attempts* to negotiate, that is, attempts to complete a contract for the sale or rental of real estate for others and for a commission.

For a discussion of the words "attempts to negotiate" as used in sec. 452.01 (2) (a), Stats., see 55 OAG 188, 189 (1966).

Indications that representatives of MTU did negotiate or attempt to negotiate is demonstrated by the red-marked areas of the following exhibits or by the exhibit itself:

1. Exhibit C. Publication of Tenants Union entitled "Build the Community — Build the Nation." Paragraph 2 (offer to negotiate).

2. Exhibit B. Constitution of Madison Tenants Union. Article I (offer to negotiate).

3. Exhibit E. Madison Tenants Union publication entitled "A Brief History of the Madison Tenant Union." Page 2, paragraphs 3 and 4, and page 3, paragraph 5. (Negotiations — Bandy, Heins and Engen.)

4. Exhibit D. Publication of Madison Tenants Union entitled "Madison Tenant Union Policy Statement." Page 2, paragraph 4 (offer to negotiate).

5. Exhibit F. Proposed agreement as negotiated between Madison Tenants Union and landlord, William T. Bandy.

6. Exhibit G. Proposed lease as negotiated by Madison Tenants Union with landlord, Richard Heins, and agreement as to Grievance Board.

7. Exhibit H. Madison Tenants Union proposed agreement with landlord, P. S. Engen.

8. Exhibit I. Madison Tenants Union proposed agreement between its Local No. 4 and landlord, Philip Engen.

9. Exhibit J. Part I of Madison Tenants Union proposed collective bargaining agreement with all landlords.

10. Exhibit K. Part II of Madison Tenants Union proposed collective bargaining agreement-lease with all landlords.

11. Exhibit L. Letter of January 5, 1970, from Madison Tenants Union to landlord, Phil Engen. (Attempt to negotiate.)

12. Exhibit M. Letter of February 19, 1970, from Madison Tenants Union to landlord, Philip S. Engen. (Attempt to negotiate.)

13. Exhibit N. Letter of January 13, 1971, from Madison Tenants Union to landlord, Philip Engen. (Attempt to negotiate.)

14. Exhibit O. Memorandum of investigator, Walter R. Eglsaer, as to conferences with landlord, Richard Heins, and his attorney, relative to Tenants Union negotiations as to a lease and grievance procedure.

As evidenced by the enclosed exhibits attached hereto, the Madison Tenants Union receives benefits and compensation in one of several ways. These benefits and compensation, depending on the circumstances of specific cases, may be of the type and nature contemplated by the language in sec. 452.01 (2) (a), Stats., which states "\* \* \* for commission, money or other thing of value \* \* \*."

1. Exhibit P. Bylaws of Madison Tenants Union, paragraph 7. Membership dues of \$2.00 charged by Madison Tenants Union.

2. Exhibit F, page 4; Exhibit G, page 8; Exhibit J, page 1. Landlord required to pay to Madison Tenants Union a fee of \$1.00 per month per tenant.

3. Exhibit F, page 4; Exhibit J, page 4, paragraph 28. Option to purchase property of landlord with percentage of landlord mortgage payment accruing as equity in the property to Madison Tenants Union.

4. Exhibit J, page 3, paragraph 25. Interest on rent deposits withheld from landlord and paid to Madison Tenants Union to accrue to Tenants Union.

5. Exhibit Q. Rent reduction kickback. Fifteen percent of rent reduction obtained for the tenant by the Tenants Union is to be retained by the Union and any interest on rent deposits to accrue to Tenants Union.

Further investigation should be made as to the compensation received by officers or agents of the corporation. It

may develop that commissions as well as salaries are involved.

The Real Estate Examining Board or your office has a number of avenues to take in the face of an alleged violation.

Section 452.18, Stats., provides for a fine of not more than \$1,000 or imprisonment of not more than six months, or both, and requires prosecution by the district attorney.

Section 452.10 (1), Stats., provides that the Examining Board may conduct an investigation and hearing on notice as to whether any person has acted as a real estate broker. It is questionable whether such procedure would be productive, and could delay or prejudice a long-term solution by way of criminal action or injunctive relief.

Section 452.10 (1a), Stats., provides that the Board, in the alternative, can proceed in circuit court through its staff counsel for a temporary restraining order or injunction or writ of *ne exeat* to determine the matter if it believes that continuation of the activity might cause injury to the public interest.

See *State ex rel. Real Estate Examining Board v. Gerhardt* (1968), 39 Wis. 2d 701, 159 N.W. 2d 622.

I suggest that you consult further with the representatives of the Wisconsin Real Estate Examining Board, or other complainants, who are willing to cooperate and sign a complaint, and marshal specific facts with respect to one or more specific incidents at given dates of time and persons before proceeding.

RWW:RJV

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*County Government—Parks—(Informal)*—The four-tenths of a mill annual tax levy applies limitations set forth in sec. 27.06, Stats., when county parks are operated by a county park commission, pursuant to secs. 27.02, *et seq.*, Stats., or a county board committee to which the functions and duties of such commission have been transferred, pur-

suant to sec. 59.15 (2) (b), Stats., but not where county parks are operated under the express provisions of sec. 27.015, Stats.

Annual taxes levied to pay principal and interest on county indebtedness incurred under ch. 67, Stats., for park purposes, must be included within the mill limitation set forth in sec. 27.06, Stats. Proceeds from the sale of part of a county park may be used for capital improvements in county parks in addition to a maximum annual levy under sec. 27.06.

April 5, 1971.

LAWRENCE R. NASH

*Corporation Counsel, Wood County*

You advise that several years ago Wood County created Dexterville Park, which includes an artificial lake, and issued its promissory notes under sec. 67.12, Stats., to fund the project. A direct, annual, irrevocable tax was levied at the time of said borrowing for the purpose of retiring said indebtedness, the principal and interest will be completely amortized in 1973. At the time the Dexterville Park was originally developed, the county's parks were apparently operated under a county park commission subject to secs. 27.02 *et seq.*, Stats. The county park commission system was abandoned in 1970, however, and operation of the county parks is now under a committee of the county board. Current 1970 census data indicates that the present population of Wood County is approximately 65,500.

You first inquire whether or not annual taxes levied by your county to pay the principal and interest on county indebtedness incurred under ch. 67, Stats., for the purpose of acquiring land for county parks and improving the same, must be included in determining the four-tenths of a mill annual tax levy limitation established under sec. 27.06, Stats.

Section 27.06, Stats., provides, in part, as follows:

"Mill-tax appropriation. The county board may annually, at the same time that other county taxes are levied, levy a

tax upon the taxable property of such county not exceeding four-tenths of a mill upon each dollar of the equalized valuation of the taxable property upon which other county taxes are levied and collected; provided, that a larger levy may be made for this purpose in counties having a population of 250,000 or more. The entire amount of such special tax shall be collected as other taxes are collected and paid into the county treasury as a separate and distinct fund, to be paid out only upon the order of the county park commission for the purchase of land and the payment of expenses incurred in carrying on the work of the [county park] commission. \* \* \*

In 30 OAG 207 (1941), our office discussed the mill rate limitation contained in sec. 27.06, Stats., at some length. Several points were made in that opinion which I feel bear directly on the question you now raise. First and foremost is the ultimate conclusion of the opinion set forth on page 211, as follows:

“It is therefore our opinion that a county *having a county park system and a county park commission* may not raise funds by general taxation and expend them for general park purposes (except in the instances covered by the express special provisions above mentioned), and is limited in raising taxes and make expenditures for that purpose to the special tax provided by sec. 27.06 and in the manner therein set forth. As the tax provided thereby is to be used ‘for the purchase of land and the payment of expenses incurred *in carrying on the work of the* [county park] commission’ it necessarily applies to all of the work of the commission which includes not only supervision but laying out, improving, maintaining and governing all county parks.” (Emphasis added)

I concur with your view that this particular opinion appears to indicate that debt service on the type of borrowing you describe must be included within the four-tenths of a mill limitation set forth in sec. 27.06, Stats. However, I cannot agree with your conclusion that the mill limitation set forth in that statute applies whether or not a county's parks are operated under a county park commission.

In 52 OAG 69 (1963), our office indicated that counties are authorized to operate county parks in any of four ways: by a county rural planning committee or by a county park board under the express provisions of sec. 27.015, Stats., under a county park commission pursuant to secs. 27.02 *et seq.*, Stats., or under a county board committee established by the county board under the authority contained in sec. 59.15 (2) (b), Stats. Section 59.15 (2) (b) reads:

“(b) The board may abolish, create or re-establish any such office, board, commission, committee, position or employment, and may transfer the functions, duties, responsibilities and privileges to any other agency including a committee of the board except as to boards of trustees of county institutions.”

Your letter does not describe the method by which your county abandoned the county park commission and then commenced operation of your parks under “a committee of the county board.” If your county board simply transferred the functions of the county park commission to a committee of your county board, the mill limitation contained in sec. 27.06, Stats., would presumably continue since it would be part of the total bundle of “functions, duties, responsibilities and privileges” being transferred. If, on the other hand, your county board acted to abolish the county park commission and created a county rural planning committee instead, under the express provisions of sec. 27.015, Stats., it would then be my conclusion that the four-tenths of a mill limitation contained in sec. 27.06, Stats., would no longer be applicable. Putting it another way, when a county is operating its parks under statutory provisions other than sec. 27.02 to sec. 27.065, Stats., relating to county park commissions, the mill limitation contained in sec. 27.06 is not applicable.

I also suggest you investigate whether the provisions of sec. 59.07 (66), Stats., have any application to the operations currently contemplated at Dexterville Park. This statute reads as follows:

“IMPROVEMENT OF ARTIFICIAL LAKES. Appropriate money for the purpose of maintaining, dredging and improving any artificial lake existing on July 1, 1955, all or a portion of

which is adjacent to or within a county park, and for the acquisition of land required in connection therewith, without regard to the limitation imposed by s. 27.06.”

You further advise, as background to your second question, that a relatively small parcel of land with buildings thereon originally purchased for the Dexterville Park development is now being sold by the county to a private purchaser. You, therefore, inquire whether the proceeds of this sale can be used for capital improvement in the county parks in addition to moneys generated by a maximum annual levy of four-tenths of a mill.

Section 27.05 (3), Stats., which sets forth the powers of the county park commission, does provide in part that no land acquired by the commission, in the name of the county, for park purposes may be disposed of by the county without the consent of said commission and that all moneys received for any such lands shall be paid into the county park fund referred to in the above quoted portion of sec. 27.06, Stats. Therefore, even if your county were still operating with a county park commission, I would have no difficulty in concluding that the proceeds from such sale could be paid into the county park fund and used for capital improvement in the county parks in addition to the moneys generated by a maximum annual levy of four-tenths of a mill. Furthermore, as pointed out in my answer to your first question, the mill limitation does not apply to a county rural planning committee operating under sec. 27.015, Stats. The county board of any county operating under that section would be authorized to make the proceeds of the sale available to said committee for capital improvements in the county parks as long as the county board adheres to the requirements of sec. 65.90, Stats., in making such funds available.

RWW:JCM

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*Chauffeur's License—Drunk Driving—(Informal)*—Upon a first conviction for drunk driving, a court must revoke both the regular and chauffeur's license.

April 5, 1971.

JAMES L. KARNS, *Administrator*

*Division of Motor Vehicles Department of Transportation*

You advised me that there is apparently some confusion in this State concerning the revocation of a chauffeur's license upon a conviction of operating a motor vehicle while under the influence of an intoxicating liquor or a narcotic or dangerous drug. You request that I render an opinion in this matter to help clarify the law. Because of the existence of two different sections in ch. 343, Stats., the revocation of a chauffeur's license depends upon whether the driving while under the influence conviction is for a first offense or for a second or any subsequent offense.

Section 343.30 (1q), Stats., provides in part:

"A court shall revoke the operating privilege of a person for a period of not less than 90 days nor more than 6 months upon such person's *first conviction* for violating s. 346.63 (1) (a) \* \* \*." (Emphasis supplied)

Section 346.63 (1) (a) Stats., is the "operating under the influence" section of the Motor Vehicle Code.

Section 343.31 (1), Stats., provides, in part:

"The administrator shall forthwith revoke a person's operating privilege upon receiving a record of conviction showing that such person has been convicted of any of the *following offenses* under a state law or under a local ordinance which is in conformity therewith, except that if a person licensed as a chauffeur was convicted for operation of a motor vehicle while under the influence of intoxicating liquor and such person was not operating a vehicle as a chauffeur at the time of such offense, only his regular license shall be revoked as provided in this section:

“ \* \* \*

“(b) Upon the *2nd* or any subsequent conviction for operation of a motor vehicle while under the influence of an intoxicating liquor or a narcotic or dangerous drug.

“ \* \* \*.” (Emphasis supplied)

Because sec. 340.01 (40), Stats., defines “operating privilege” as a license granted under ch. 343, Stats., and because “license” is defined in sec. 343.01 (2) (b), Stats., to mean the “authority to operate a motor vehicle granted pursuant to ch. 343, including \* \* \* chauffeurs’ licenses,” it is clear that the provisions of sec. 343.30 (1q), Stats., providing for the 90 day to 6 month revocation upon the conviction of the first offense of driving while under the influence, are applicable to chauffeurs’ licenses.

Thus, upon the conviction of a first offense of driving while under the influence, the *court* must revoke the operating privilege, which would include a chauffeur’s license, for not less than 90 days nor more than 6 months. Upon a conviction of a second or subsequent offense of driving while under the influence, the *Administrator* of the Division of Motor Vehicles, Department of Transportation, is the revoking authority, but he does not have the authority to revoke a chauffeur’s license if the licensee was not convicted for operating while under the influence while driving under his chauffeur’s license.

Of course, under secs. 343.10 or 343.126, Stats., a chauffeur may seek relief from a revocation of his license.

I am sure that this incongruous result is not what the legislature intended. However, there is no ambiguity in the statutes which would permit a construction in order to provide something different than what is plain on its face. It is apparent that remedial legislation is in order, and I strongly recommend such legislation.

RWW:AOH

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*Town Regulation—Mobile Homes—(Informal)*—Town cannot have more restrictive ordinance regulating use and location of mobile homes outside mobile home parks than county.

April 6, 1971.

PAUL M. NEWCOMB

*Corporation Counsel, Sauk County*

You have requested my opinion whether a town can have a more restrictive ordinance regulating the use and location of mobile homes or trailers outside mobile home parks than a county.

I am of the opinion that it probably cannot.

You state that the Sauk County zoning ordinance presently allows mobile homes and trailers only in camps or parks. You state that it is proposed to amend the county zoning ordinance to permit mobile homes of over 570 square feet at any location. Some towns do not want mobile homes that small and some do not want them outside of camps.

At the outset it can be stated that there might be some difficulty in securing passage of such an amendment to the county ordinance so as to be applicable in all towns even though it is not a comprehensive revision under sec. 59.97 (5) (d), Stats. Under sec. 59.97 (5) (e) 6, Stats., a majority of the towns may block such an amendatory ordinance.

Where a "trailer camp," alone, is concerned, sec. 66.058 (2) (c), Stats., specifically provides that:

"(c) In any town in which the town board adopts an ordinance *regulating trailers* under the provisions of this section and has also adopted and approved a county zoning ordinance under the provisions of s. 59.97, the provisions of the ordinance which is most restrictive shall apply with respect to the establishment and operation of *any trailer camp* in said town." (Emphasis added.)

There is no similar provision with respect to single mobile homes. However, sec. 66.058 (3) (e), Stats., recognizes that individual mobile homes as well as parks may be regulated by local ordinance.

“(e) If a mobile home is permitted by local ordinance to be located outside of a licensed park, the monthly parking permit fee shall be paid by the owner of the mobile home, the occupant thereof or the owner of the land on which it stands, the same as and in the manner provided for mobile homes located in mobile home parks, and the owner of such land shall be required to comply with the reporting requirements of par. (c). Nothing contained in this subsection shall prohibit the regulation thereof by local ordinance.”

Section 66.058 (3) (e), Stats., does not in itself grant specific authority to a town to regulate mobile homes. It is concerned with collection of a monthly parking fee in municipalities.

In *Des Jardin v. Town of Greenfield* (1952), 262 Wis. 43, 53 N.W. 2d 784, the court was concerned with a town ordinance regulating single trailers but did not determine the question of the power of the town in the area. It held that the ordinance could not be given retrospect effect.

The county's power to regulate mobile homes and trailer parks comes primarily from its zoning power under sec. 59.97, Stats. Section 66.058 (2) (c), Stats., recognizes that the zoning power may extend to trailer camps. Section 59.97 (4) (d), Stats., does provide:

“(d) Trailer camps, or tourist camps and motels or both and mobile home parks.”

Individual mobile homes are not referred to in sec. 59.97 (4), Stats. However, there is no reason why they necessarily must be in order to give the county general zoning and building control powers.

The county's power in zoning, however, exists only outside the limits of incorporated villages and cities.

While cities and villages and towns exercising village powers probably had power with respect to the regulation of

mobile homes before the enactment of sec. 66.058, Stats., that section, enacted in 1953, granted specific authority for cities, villages and towns to regulate trailer camps and mobile home parks.

Section 66.058, Stats., is primarily concerned with mobile home parks and the regulating and licensing thereof. Section 66.058 (2) (b), Stats., provides:

“(b) In order to protect and promote the public health, morals and welfare and to equitably defray the cost of municipal and educational services required by persons and families using or occupying trailers, mobile homes, trailer camps or mobile home parks for living, dwelling or sleeping purposes, each city council, village board and town board may establish and enforce by ordinance reasonable standards and regulations for every trailer and trailer camp and every mobile home and mobile home park; require an annual license fee to operate the same and levy and collect special assessments to defray the cost of municipal and educational services furnished to such trailer and trailer camp, or mobile home and mobile home park. They may limit the number of units, trailers or mobile homes that may be parked or kept in any one camp or park, and limit the number of licenses for trailer camps or parks in any common school district, if the mobile housing development would cause the school costs to increase above the state average or if an exceedingly difficult or impossible situation exists with regard to providing adequate and proper sewage disposal in the particular area. The power conferred on cities, villages and towns by this section is an addition to all other grants and shall be deemed limited only by the express language of this section.”

The use of the words “trailer and trailer camps and every mobile home and mobile home park” are used to give authority of the municipality over the units occupying parks as well as the parks themselves and not authority to regulate individual trailers outside of parks.

Cities, villages and counties probably have power to regulate the use and location of trailers outside of parks under

general health and welfare powers or zoning powers in the case of counties. Hence the reference in sec. 66.058 (3) (e), Stats.

Towns would also have such power under sec. 60.74, Stats.; however, the zoning power of a town exists only where the county has not adopted a county zoning ordinance under sec. 59.97, Stats. General zoning ordinances of towns exercising village powers are subject to the approval of the county board where the county has a zoning ordinance.

If it is correct to conclude that sec. 66.058, Stats., does not grant towns specific authority to regulate the type or location of individual trailers outside of trailer parks, then it follows that they do not have that power by reason of sec. 60.74, Stats., in Sauk County, since that county has a county zoning ordinance. I have been unable to find any other statute relating to towns which would grant such power. Towns have only such powers as are granted by statute or necessarily implied.

RWW:RJV

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*County Surveyor-Compensation & Duties—Contracts—(Informal)*—Compensation and duties of elected county surveyor discussed. Possible conflict of interest in public contracts.

April 13, 1971.

GERALD C. NICHOL

*District Attorney, Dane County*

You have requested my opinion on a number of questions relating to the compensation to be paid an elected county surveyor, the duties to be performed for the salary provided, and possible conflicts of interest in contracts negotiated by him.

By ch. 499, Laws of 1969, effective March 26, 1970, the legislature substantially revised sections of the statutes re-

lating to the election, duties and compensation of the county surveyor, and office and records to be maintained by him.

Section 59.12, Stats., was amended to provide that the county surveyor shall be a registered land surveyor. Although not material to your inquiry, the county was empowered:

“\* \* \* In lieu of electing a surveyor in any county, the county board may, by resolution designate that the duties under ss. 59.60 and 59.635 be performed by any registered land surveyor employed by the county. \* \* \*”

Section 59.14 (1), Stats., was amended to require the county to provide suitable office space at the county seat or at such other place as the county board directs. Such office is required to be open during usual business hours each day, with right of the public to examine and copy all books and papers required to be kept. Sections 59.60 (2) and (3), Stats., provide that the surveyor is to make and keep certain records “in file in the office of the county surveyor to be provided by the county.” Section 59.60 (6), Stats., provides that surveys for individuals or corporations may be performed by any land surveyor employed by them, providing that a true copy of the survey is filed within 60 days in the office of the county surveyor.

Section 59.65, Stats., formerly provided a schedule of fees which the county surveyor could claim for services furnished the county or from private persons employing him. In certain cases the county board could establish higher fees.

As amended, sec. 59.65, Stats., now provides:

“In addition to the regular fees of land surveyors from the parties employing him, the county surveyor shall receive a salary of \$1,500 per annum from the county; but the county board of the several counties may at any annual meeting fix the salary to be paid at a greater sum.”

It should be noted that there is no longer authority for deputies to charge on a fee or “regular fees of land surveyor” basis, and no minimum salary is provided for deputies under this section.

Section 59.60 (1), Stats., recognizes that the county surveyor may do survey work for individuals and corporations:

“(1) Execute, by himself or a deputy, any and all surveys required by the county or by any court. Surveys for individuals or corporations may be executed at the county surveyor’s discretion.”

Section 59.63 (1), Stats., was amended to make the county liable in the first instance for publication of notice, survey and perpetuation of sections or other corners thereof:

“\* \* \* The surveyor shall be paid the cost of said perpetuation from the general fund of the county.”

Section 59.635 (3) and (4), Stats., were amended to make the county liable for perpetuating landmarks in counties where there is no county surveyor. Section 59.635 (9), (10) and (11), Stats., provide:

“(9) At least 5% of all corners shown in the corner record book shall be checked by the county surveyor or a deputy and the references confirmed or new references made each year.

“(10) The county surveyor may employ other land surveyors to assist in this work and may accept checks of references for these corners from any land surveyor.

“(11) The cost of perpetuating these corners shall be paid out of the county road and bridge fund or other county fund under s. 83.11.”

Section 59.59, Stats., as amended, provides:

“The county surveyor may appoint and remove deputies at will on filing a certificate thereof with the county clerk.”

From a reading of ch. 499, Laws of 1969, it is apparent that there may be a distinction between “deputies” and other “land surveyors” employed by the county surveyor and that, whereas deputies must be registered land surveyors, there is no requirement that land surveyors employed pursuant to sec. 59.635 (10), Stats., be made deputies.

With respect to deputies paid from county funds, the county board has authority under sec. 59.15 (2), Stats., to

limit their number and provide for their compensation. If county compensation is not provided, the officer could, in theory, pay for their services out of his own salary.

It appears that the legislature, in enacting ch. 499, intended that:

1. The county surveyor be a registered land surveyor.
2. That all surveys in the county be performed by registered land surveyors.
3. That there be a central depository for the records and files of the county surveyor and for all surveys made within the county, that such records and field notes be county property, and that said depository be at the office of the county surveyor in offices furnished by the county and open during usual business hours.
4. That a concerted effort be made to update all corners within the county at county expense.
5. That the statutory fee system be replaced with a salary plus "regular fees of land surveyors" basis, subject to control in the county board.

You state that the elected county surveyor in Dane County has an established salary of \$5,088.

You inquire:

"In view of the fact that we pay our county surveyor an annual salary, do the duties required of him under secs. 59.635 (8) and (9) constitute duties covered by his annual salary?"

You have not furnished me with the resolution establishing the salary of the surveyor under sec. 59.15 (1) (a), Stats., which provides:

"(a) The board shall, prior to the earliest time for filing nomination papers for any elective office to be voted on in the county (other than supervisors and circuit judges), which officer is paid in whole or part from the county treasury, establish the total annual compensation for services to be paid him (exclusive of reimbursements for ex-

penses out-of-pocket provided for in sub. (3)). The annual compensation may be established by resolution or ordinance, on a basis of straight salary, fees, or part salary and part fees, and if the compensation established is a salary, or part salary and part fees, it shall be in lieu of all fees, including per diem and other forms of compensation for services rendered, except those specifically reserved to the officer in such resolution or ordinance. The compensation established shall not be increased nor diminished during the officer's term and shall remain for ensuing terms unless changed by the board."

It is my opinion that a county board, under this section and sec. 59.15 (1) (b), Stats., could, even in view of the language in secs. 59.60 (1), 59.63 (1) and 59.635 (11), Stats., limit compensation paid to the county surveyor to the salary established, in lieu of all fees, and could even require that the county surveyor pay into the county treasury any fees collected from private individuals or corporations for surveys executed under his authority as county surveyor.

Section 59.15 (4), Stats., provides:

"(4) INTERPRETATION. In the event of conflict between this section and any other statute, this section to the extent of such conflict shall prevail."

Where a county board has not acted to limit compensation to salary, in lieu of all fees, it is my opinion that the county surveyor can charge and retain fees equal to those regularly charged by land surveyors in such county, from parties employing him, for surveys for private individuals and corporations, authorized by sec. 59.60 (1), Stats., and similar fees from the county for services under sec. 59.63 (1) and under sec. 59.635, Stats. The board, as hereinafter noted, could regulate the amounts of the fees to be charged the county.

Were it not for sec. 59.63 (1), Stats., I would construe sec. 59.635 (8), (9), (10) and (11), Stats., as requiring the county surveyor to check 5 percent of the corners each year, or have it done by surveyors employed by him if funds were

available, as part of his duties for which the \$1,500 or higher salary referred to in sec. 59.65, Stats., was being paid, and limit sec. 59.635 (11) to a fund for payment of land surveyors employed by the county surveyor under sec. 59.635 (10). However, sec. 59.63 (1) refers to the county surveyor and states “\* \* \* The surveyor shall be paid the cost of said perpetuation \* \* \*.”

The salary provided in sec. 59.65, Stats., does, however, cover the duties of the county surveyor to execute all surveys required by the county other than those in secs. 59.63 and 59.635, Stats., even where the resolution of the county board does not provide that it is in lieu of all other forms of compensation.

There is admittedly a problem area which would arise if a county surveyor attempted to unfairly allocate work time and charged the county for perpetuation services under sec. 59.635 (8), (9) and (11), Stats., for work which was done in connection with a county survey required under sec. 59.60 (1), Stats.

While both subsections (8) and (9) of sec. 59.635, Stats., use the word “shall” with respect to the duty of the county surveyor to check, establish or reestablish 5 percent of all corners within the county each year, it is my opinion that such figure is a desirable goal established by the legislature. Whether the 5 percent figure could be met in any county would depend upon the size of the county and number of corners “originally established in the county by government surveyors,” the ability of the county surveyor to perform the tasks or supervise the land surveyors employed for the purpose, activity of the state highway commission or county highway department registered land surveyors, the availability of registered land surveyors to be employed by the county surveyor under sec. 59.635 (10), Stats., and the amount of funds available under sec. 59.635 (11), Stats., which makes reference to sec. 83.11, Stats.

Section 83.11, Stats., provides :

“Any county board may provide that section and quarter section corners in any highway constructed in whole or in

part with county funds may be marked with suitable permanent monuments or markers; and the expense of putting in and maintaining such markers shall be paid out of the county road and bridge fund or other county fund as may be determined by the county board."

The county board, in appropriating funds to carry out the intention of the legislature, should consider the necessity of funds to provide for and maintain office facilities, including those for the preservation of records, and personnel to staff the same so that regular office hours may be maintained. In setting the salary of the county surveyor and his deputies, the board should consider the time which the county surveyor must devote to office and supervisory duties, the amount of county surveying which may be required other than checking 5 percent of corners per year, the functions which will be performed by deputies paid from the county treasury, the time the county surveyor will have to personally check, establish or reestablish corner posts as included in his salary if so specified by the board, and the estimated cost of employing independent land surveyors under sec. 59.635 (10), Stats., to meet the 5 percent goal if the county surveyor is unable to do such work personally or by means of deputies paid by the county whose duties as specified by the county board are to include such work within the salary provided.

The county board can also, under the provisions of sec. 59.15 (2) (c), Stats., establish the general terms and rates of compensation to be paid land surveyors employed by the county surveyor under sec. 59.635 (10) and (11), Stats., at, or reasonably above or below, the rates regularly charged by land surveyors in the area.

Your second question is whether there would be a violation of sec. 946.13, Stats., in a county where the resolution of the county board establishing the salary of the surveyor *did not provide* that it was in lieu of all fees, where the county surveyor did work under sec. 59.635 (8) and (9), Stats., and was paid in excess of \$2,000 therefor.

I am of the opinion that there would be no violation. The county surveyor does not gain a right to do such work and

charge for the same by contract. The right arises from statute, and such work is performed in his official capacity.

You state that the county surveyor also operates a private surveying firm in sole proprietorship and employs land surveyors in such firm.

You inquire whether the county surveyor could contract with such firm to perform survey work under sec. 59.635 (10), Stats.

I am of the opinion that he could contract with said firm (himself as an independent contractor) only to the extent that the contracts within one year did not aggregate more than \$2,000.

He could contract with land surveyors, who were from time to time employed by him in his firm, as independent contractors, providing that he had no private pecuniary interest direct or indirect in such contracts. If he had a private pecuniary interest in such contracts, he could contract only to the extent that the contracts within one year did not aggregate more than \$2,000.

I am of the further opinion that, pursuant to secs. 59.01 (1), 59.07 (5) and 59.15 (1) and (2) (c), Stats., the county board could restrict the county surveyor from contracting with a firm privately operated by him or in which he had a direct or indirect interest.

RWW:RJV

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*Layoff Procedures—Personnel Board—(Informal)*—Rule Pers. 22.06, being unrelated to layoff procedures, is not authorized under the rule-making authority of sec. 16.24 (2), Stats., and is contrary to sec. 16.10 (3), Stats. Rule Pers. 22.05, however, is a valid rule relating to layoff procedures under the rule-making authority granted in sec. 16.24 (2), Stats. Other statutes discussed: 16.01, 111.91 (1) (b), 16.274, 16.276 (3), and 16.10 (3), Stats.

April 23, 1971.

JOHN H. SHIELS

*Chairman, Personnel Board*

You have asked for my informal opinion as to whether the Personnel Board has exceeded its statutory authority in enacting rule Pers. 22.05.

Subsection (2) of sec. 16.24, Stats., provides in part:

“. . . In case of a reduction in force because of a stoppage or lack of work or funds or because of material changes in duties or organization, permanent employes shall be laid off in accordance with rules established by the personnel board. The seniority and service ratings of employes shall be considered, in such manner as the rules shall provide, in determining the order of layoffs and reinstatements. The appointing officer shall confer with the director relative to a proposed layoff a reasonable time before the effective date thereof in order to assure compliance with the rules. Persons so laid off shall be placed on the appropriate reinstatement list. . . .”

Except for that portion of the language relating to giving consideration to seniority and service ratings, this language originated in ch. 465, Laws of 1929. The index card for this law at the Legislative Reference Bureau states:

“REMARKS:

A revision of the civil service law worked out mainly by A. E. Garey, secretary of the civil service commission, in conjunction with Harold C. Henderson, special advisor in the executive office. Frank E. Telford, director, Bureau of Public Personnel Administration, Washington, also brought to Madison for consultation on this bill, which was treated as an administrative measure. Amdts 1, A., 1, S. and 3, N. also prepared for Senator Garey.”

The language relating to seniority and service ratings originated in ch. 321, Laws of 1941, and the Bureau's index card on that law states:

## "REMARKS:

This measure based on Sub. Amdt 2, A. to Bill 463, A., 1939 session, which was offered by the same author. It was worked out by Speaker Thomson in cooperation with Roy E. Kubista, executive secretary of the State Employees Association, and A. J. Opstedal, acting director of the Bureau of Personnel. Adopted Amdt 6, S. not drafted by us. Amendment 1, S. requested by Elmer E. Barlow for the executive office. The remaining adopted amendments supported by the State Employees Association."

The first portion of sec. 16.24 (2), Stats., which is not quoted above, provides that provisional employes, emergency employes, limited term employes and seasonal employes may be laid off at the discretion of the appointing officer. The quoted portion relating to permanent employes directs that more than the discretion of the appointing officer controls when conditions require permanent employes to be laid off. The legislature has delegated to the Personnel Board the authority to adopt rules to implement layoffs of permanent employes, specifically directing that both seniority and service ratings of employes be considered "in such manner as the rules shall provide."

Although "layoff" is not defined, per se, it is intended to mean "a reduction in force because of stoppage or lack of work or funds or because of material changes in duties or organization."

Pursuant to this legislative authority, the Personnel Board has adopted Pers. 22.05, which provides:

"Pers. 22.05 *Demotion in lieu of separation*. In the event that the services of a permanent employe are about to be terminated in a given class as a result of reduction in force, such employe shall be entitled to a position in the same department in a lower class in the series or to a transfer to a class in another series in which his training and experience as a state employe have qualified him, provided that the order of layoff as set forth in the law and these rules permits."

This rule allows a permanent employe in jeopardy of being laid off to bump another employe in a lower class in

the same series or another series for which he is qualified, providing he can favorably compete with the other employe on the basis of greater seniority and superior service ratings. The rule gives practical effect to the often stated doctrine that "civil service law has in view not only security of tenure but efficiency of service as well." *Jabs v. State Board of Personnel* (1967), 34 Wis. 2d 245, 148 N.W. 2d 853. *State ex rel. Nelson v. Henry* (1936), 221 Wis. 127, 132, 266 N.W. 227. *State ex rel. Esser v. McBride* (1934), 215 Wis. 574, 578, 254 N.W. 657. The rule encourages civil service employes to better themselves within the service by competing for more responsible positions. It provides additional incentive for employes to achieve better service ratings. The absence of such a rule would strike at the heart of the State's merit system by penalizing the loyal and competent employe who advances in position.

The rule is consistent with the statement of policy in sec. 16.01 of the State's civil service law which declares:

"16.01 Statement of Policy. It is the purpose of this subchapter to provide the state's agencies with adequate and competent staffs which furnish the state's services to its citizens as efficiently and effectively as possible. It is the policy of the state that, in the classified service, such staffs shall and can best be provided by personnel management methods which apply the merit principle, with adequate civil service safeguards. To this end, the personnel board and the department of administration, its officers and employes, shall develop, promote and protect a personnel management program which assures that the state hires the best qualified persons available and bases the treatment of its employes upon the relative value of each employe's services and his demonstrated competence and fitness."

The bumping process is a part of the layoff process, and is directly tied into seniority. It is an accepted practice in the private sector and usually is established through negotiated contracts resulting from collective bargaining. Such cannot be the case under present State civil service law, since sec. 111.91 (1)(b), Stats., authorizes collective bargaining on seniority as limited to the "application of sen-

iority rights as affecting the matters contained herein." In other words, seniority rights can be the subject of collective bargaining on the enumerated matters listed in sec. 111.91 (1), Stats., which only includes grievance procedures, work schedules, vacations, sick leave, work rules, health and safety practices and intradepartmental transfers. Under present State civil service law, the authority for a rule on bumping comes from sec. 16.24 (2), Stats.

Bumping situations referred to in other sections of Subchapter II of ch. 16, Stats., the State civil service law, are found in sec. 16.274 and sec. 16.276 (3), Stats. The former refers to permanent employes leaving the classified service to take a position in the unclassified service, and being "entitled to return to such former position or to one with equivalent responsibility and pay in the classified service without loss of seniority or civil service status." The latter refers to employes leaving the classified service to fulfill their obligation in the armed forces. It provides for the restoration of employment for the returning veteran. The substitute employe bumped by the veteran must be transferred to a similar position in the same agency if one is available.

Your letter makes reference to an informal opinion of my predecessor written on February 9, 1965, to Mr. C. K. Wetengel, Director, Bureau of Personnel. I am in accord with that portion of the opinion which concludes that a permanent employe laid off under sec. 16.24 (2), Stats., is not entitled to an administrative review of such action before the Personnel Board, but would have to seek a Chapter 227 judicial review of the decision producing his layoff in Dane County Circuit Court.

That opinion also concluded that Pers. 22.06 is an invalid rule, unauthorized by statute, and an attempt to confer on appointing officers a power clearly not conferred on them by statute. Pers. 22.06 provides:

"Pers. 22.06 Reduction in pay or position. The appointing officer may, in lieu of layoff, demote or reduce an employe in pay or position."

I am also in accord with that portion of the opinion. Because its reasoning may appear to be in conflict with the subject matter of the instant opinion, which recognizes the validity of Pers. 22.05, a further explanation is needed.

Bumping, the subject matter of Pers. 22.05, is directly related to seniority rights and is generally considered a part of layoff procedures. Accordingly, it is my opinion that the rule is an appropriate response to the legislative directive in sec. 16.24 (2), Stats., for the Personnel Board to establish rules on layoff procedures. The particular consideration required to be given seniority and service ratings is preserved by the proviso at the end of the rule which is an indirect reference to Pers. 22.04. Pers. 22.05 must be read with Pers. 22.04, both rules relating to different stages of the layoff procedure.

On the other hand, I share my predecessor's view that Pers. 22.06 is an alternative action to layoff, and not authorized by statute.

The argument raised in the former opinion relating to sec. 16.10 (3), Stats., is not applicable to Pers. 22.05. That subsection states:

“(3) No person shall be appointed, transferred, removed, reinstated, promoted or reduced as an officer, clerk, employe or laborer in the classified service in any manner or by any means, other than those prescribed in ss. 16.01 to 16.32.”

The term “laid off” is not mentioned in that subsection, nor do I think the word “removed” was intended to include “laid off” within its meaning. My reasoning is based upon the heading to sec. 16.24, Stats., which is indicative of legislative intent, and a careful reading of the section. The heading includes the terms, “*Removals*, suspensions, discharges, reductions, dismissals, *layoffs*, [and] resignations.” Subsection (1) of sec. 16.24, Stats., concerns itself with *removals*, suspensions, discharges and reductions. Subsection (2) of sec. 16.24, Stats., concerns itself with dismissals, *layoffs* and resignations. Removals and layoffs are distinct matters separately treated under the statutes. Accordingly, Pers. 22.06 being unrelated to layoff procedures, is not

authorized under the rule-making authority of sec. 16.24 (2), and is contrary to sec. 16.10 (3), Stats.

However, the same reasoning cannot be applied to Pers. 22.05, which is a valid rule relating to layoff procedures under the rule-making authority granted in sec. 16.24 (2), Stats.

RWW:APH

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*Licensing—Funeral Establishments—(Informal)*—Licensing requirements of sec. 156.105, Stats., prohibit operators of funeral establishments to allow free-lance funeral direction. The statute does not prohibit operation of two establishments from one location nor regular use of a church for funeral services.

April 27, 1971.

GEORGE H. HANDY, M.D.

*State Health Officer*

Your predecessor, Dr. Jorris, raised a number of questions concerning an interpretation of the provisions of ch. 156, Stats., relating to activities of funeral directors. It was stated that there is an apparent conflict between present interpretation of the issuance of a funeral director license or a funeral director certificate in good standing in accordance with sec. 156.06, Stats., and the issuance of funeral establishment permits in accordance with sec. 156.105, Stats.

A basic fact situation was presented as follows:

“Funeral Director ‘A’ lives in Town ‘A’ but does not own a funeral establishment and is not an employee of any funeral director. He is doing business at a funeral establishment licensed to funeral director ‘B’ for which he reimburses funeral director ‘B’ a fixed amount each month for the privilege of conducting funerals out of the ‘B’ funeral establishment.”

With respect to the foregoing fact situation, the following set of questions were asked:

“For purposes of 156.105 (5), is funeral director ‘A’ considered an employee of funeral director ‘B’, an operating partner of funeral establishment ‘B’, or neither? If this answer is neither, may funeral director ‘B’ allow funeral director ‘A’ to conduct funerals out of his funeral establishment?”

The critical statute involved in the questions presented is sec. 156.105 (5), Stats., which reads as follows:

“No operator of a funeral establishment shall allow any licensed funeral director to operate out of such funeral establishment unless such licensed funeral director is the *operator* of or an *employee* of the operator of a funeral establishment which has been granted a permit by the department.”

The underlined words provide the keys to an interpretation of the above-cited statute. It is well established that words used in a statute are to be given their common understood meaning unless the context clearly indicates that the legislature intended otherwise. Sec. 990.01 (1), Stats.

The word “employee” or “employeee” means a person who works for wages or a salary in the service of an employer. *Webster’s New Collegiate Dictionary*, 2nd Edition. The term does not embrace the status of an independent contractor. *Black’s Law Dictionary*, 3rd Edition.

It is apparent to me that a person who rents the use of a facility on an as-needed basis is not an employee. Rather, he has the status of an independent contractor who is not subject to the controls implicit in the employee-employer relationship. Therefore, it must be concluded that funeral director “A” is not an employee of funeral director “B.”

The second key word in the critical statute under consideration is “operator.” The definition section of the statute refers to the “operator of funeral establishment” as meaning “any person who conducts, maintains, manages or operates a funeral establishment.” Sec. 156.01 (9), Stats.

A fair reading of the statutory definitions cited above indicates that an operator of a funeral establishment is the person responsible for the day-to-day management of the mortuary business. He need not be a funeral director. The scope of the business is much broader than the duties of a director. The funeral establishment operator may be likened to a proprietor of a business. 38 Am. Jur. 2d, *Funeral Directors and Embalmers*, §22.

In view of the foregoing, I conclude that funeral director "A" is neither an "employee" nor an "operator" within the meaning of sec. 156.105 (5), Stats.

The language of the statute seems clear enough. It is apparent that the legislature intended to prevent funeral directors from free-lancing and to eliminate the itinerant funeral director. The history of the statute indicates that this is the correct view of what the legislature intended to accomplish by enactment of subsec. (5).

Prior to 1933, it was not necessary for funeral directors to secure licenses. Chapter 302, Laws of 1933, created secs. 156.04 and 156.06, Stats., as amended, setting forth the requirements for licenses and renewal of licenses respectively. In 1941, one of my predecessors was asked to interpret sec. 156.06, relating to the renewal of the funeral director's license. The statute required then, as it does now, that an applicant for the renewal of a funeral director's license be doing business at a recognized funeral establishment at the time he applies for his license. This requirement was held to be sufficiently met by showing that the applicant had a contract with the owner of a funeral establishment permitting him to conduct funerals there and that such contract need not be for the full license year, merely that it be in effect at the time of the granting of the renewal license. 30 OAG 139. In the wake of this opinion, the succeeding legislature enacted present 156.105 (5), Stats., prohibiting an operator of a funeral establishment to allow funeral directors to conduct funerals out of his business establishment unless they were either an employe of an operator or an operator of another establishment. Thus, the legislatures sought to eliminate a free-lance funeral director.

The next question with respect to the basic fact situation is as follows:

“Does such an association disqualify funeral director ‘A’ from having a funeral director’s license in accordance with 156.04 (1) (2), 156.06 and 156.105 (1) (5) or any other existing statutes?”

The proscription contained in the statute under discussion, i.e., sec. 156.105 (5), runs against operators not funeral directors. The penalty imposed upon operators for violating the provisions of the statute in question is either suspension or revocation of the funeral establishment permit. Sec. 156.105 (4), Stats. The penalty would not disqualify funeral director “A” from being licensed. Licensing statutes are strictly construed in favor of the individual against the government on the theory that such legislation is penal in nature and therefore requires a rule of strict construction. 51 Am. Jur. 2d, *Licenses and Permits*, §58.

The third question relating to the original fact situation set forth at the beginning of this opinion is as follows:

“If the answers to the two preceding questions do not allow funeral director ‘A’ and ‘B’ to do business as described above, may this conflict with the law be avoided by issuing two or more funeral establishment permits for the same establishment under two or more separate business names? If yes, what minimum facilities are required with each permit?”

The operation of more than one funeral home from a single location is not prohibited by the statutes. A funeral establishment is defined as “any building or part of a building” which must contain a preparation room properly equipped for the preparation and embalming of dead human bodies for burial, transportation or other disposition. Sec. 156.01 (5), Stats.

The primary requirement in this matter is that such establishments have a preparation room. In the factual situation posed by the question under consideration, each funeral establishment would have a preparation room, jointly oper-

ated, and common to the premises of each establishment. The sanitation purposes of the statute relating to the preparation rooms would be fulfilled. There being no violation of the spirit or letter of the law, funeral establishment permits could be issued to both funeral director "A" and funeral director "B." As noted, the responsibility for the preparation room is a joint enterprise under the factual situation submitted even though the operators of each establishment may be independent of each other for other purposes. It follows that if the preparation room does not come up to department standards, both operators are subject to provisions relating to permit revocation. Minimum facilities required for the issuance of a funeral establishment permit are prescribed by sec. 156.01 (5), Stats., and by Rule H 16.04. Both the cited statute and Rule relate to specific requirements with respect to the preparation room of a funeral establishment. No other specific requirements or regulations as to size or adequacy are imposed.

The final question raised by the opinion request results from the following stated fact situation:

"The answers to questions 1, 2, or 3 may allow a licensed funeral director to conduct funerals out of a funeral establishment which may not be convenient to most of the families he serves. In such a situation the funeral director may do the preparation work in a licensed funeral establishment, returning the body for visitation to the chapel lounge in a convenient church or public building such as a cemetery chapel. This chapel is not necessarily used for the worship service but may be used strictly for visitation purposes."

The specific question asked is as follows:

"In the above situation may such a licensed funeral director, on a permanent basis, use a church chapel or public building such as a cemetery chapel strictly for funeral visitation purposes to circumvent the law requiring him to have a funeral establishment?"

Generally speaking, the regular use of a church for funeral services is not precluded by licensing requirements. The business of a funeral director "commences when the work

of the physician ends and continues until the final disposition of the body." 38 Am. Jur. 2d, *Funeral Directors and Embalmers*, §3. It is obvious that his work cannot be confined to a particular building. Moreover, the statutes provide that funeral services may be held in any private residence, church, or lodge hall. Sec. 156.105, Stats. Where there is no mortuary in a particular area, it would seem apparent that, in order to accommodate kin and friends of the deceased, funeral services necessarily must be conducted elsewhere than a funeral home. Accordingly, where a licensed funeral director regularly holds services in such areas, there can be no objection by the department to such regular use of a particular chapel provided that the director holds a current license, that statutes relating to preparation and transportation are observed, and that his actions conform to professional and business ethics as provided by sec. 156.12 (4), Stats. Had the legislature intended otherwise, it appears to me that the statutory language relating to the use of private residences or churches would have been more restrictive. Reading language that simply does not exist into a statute is in effect legislating rather than interpreting the law.

RWW:WLJ

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*Articles of Incorporation, Restated—Nonstock Corporations—(Informal)*—The contents of restated articles of incorporation of nonstock corporations must, according to sec. 181.39, Stats., contain all the elements required by sec. 181.31, Stats., of original articles of incorporation; sec. 181.37, Stats., as it relates to the contents of amended articles of incorporation, does not apply to restated articles of incorporation of nonstock corporations.

May 3, 1971.

ROBERT C. ZIMMERMAN  
*Secretary of State*

I am writing in response to your recent inquiry concerning certain sections of ch. 181, Stats., which relates to non-stock corporations. You have inquired whether the provisions of sec. 181.37, Stats., relating to the contents of amended articles of incorporation, must be complied with when restated articles of incorporation are filed pursuant to sec. 181.39, Stats. It is my opinion that the contents of restated articles of incorporation do not have to comply with the provisions of sec. 181.37, which relate to the contents of amended articles of incorporation.

There are five separate and essential elements to consider in analyzing the nature of both amended articles of incorporation and restated articles of incorporation of nonstock corporations. These five elements are: (1) manner of adoption; (2) manner of execution; (3) filing; (4) recording; and (5) contents of the articles. In regard to amended articles of incorporation of nonstock corporations, sec. 181.36, Stats., sets forth the manner of adoption; sec. 181.37, Stats., sets forth the manner of execution and the contents of the articles; and sec. 181.38, Stats., sets forth the requirements as to filing and recording. In regard to restated articles of incorporation of nonstock corporations, sec. 181.31 (1), Stats., states that the manner for adoption of restated articles of incorporation is to be "by action taken in the same manner as required for amendment of articles of incorporation. . . ." Section 181.39 (2), Stats., also states that restated articles are to be executed, filed and recorded "in the manner prescribed in this chapter for articles of amendment." However, in regard to the final element discussed above, namely, the contents of the restated articles, sec. 181.39 (1), Stats., states that "restated articles of incorporation shall contain all the statements required by this chapter to be included in original articles of incorporation [with certain enumerated exceptions not relevant here]." Thus, sec. 181.39, Stats., contains a clear reference to sec. 181.31, Stats., which sets forth the required contents of original articles of incorporation, and not to sec. 181.37, Stats., which sets forth the required contents of amended articles of incorporation. For these reasons, it is my opinion that restated articles of incorporation of nonstock corporations need con-

tain only those items set forth in sec. 181.31, and need not contain those items enumerated in sec. 181.37.

A further reason why the contents of restated articles of incorporation are required to be similar to original articles of incorporation and not to amended articles may be understood by viewing the nature of restated articles of incorporation. Section 181.39, Stats., pertaining to nonstock corporations is repeated nearly verbatim in sec. 180.55, Stats., pertaining to business corporations, this latter statute being created by ch. 731, Laws of 1951. One of the authors of ch. 731, Professor George Young, writing in the 1952 Wisconsin Law Review, noted that: "Restated articles are simply the original articles and all amendments put into one document, in short, the articles as amended. When executed and filed, restated articles supersede the original articles and amendments." Young, George, *Some Comments on the New Wisconsin Business Corporation Law*, 1952 Wis. L. Rev. 5, 15.

RWW:BS

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*Property Tax Exemption—Pollution Control Facilities—(Formal)*—The property tax exemption for pollution control facilities provided in sec. 70.11 (21) (a), Stats., applies to pollution control facilities incorporated into new plants to be constructed, in addition to those installed to abate or eliminate existing pollution sources.

May 4, 1971.

ROBERT P. RUSSELL

*Milwaukee County Corporation Counsel*

You have asked for my opinion as to whether sec. 70.11 (21) (a), Stats., provides an exemption from property taxation for pollution control facilities incorporated into new plants to be constructed, or whether the exemption is limited to pollution control facilities installed to abate or eliminate existing pollution sources.

Section 70.11 (21) (a), Stats., as affected by chs. 206, 276, 366 and 392, Laws of 1969, provides:

“70.11 Property exempted from taxation. The property described in this section is exempted from general property taxes:

\* \* \*

“(21) (a) All property purchased or constructed with the approval of the committee on water pollution, department of health and social services, a city council, a village board or county board pursuant to s. 59.07 (53) or (85), for the purpose of abating or eliminating pollution of surface waters or the air, and all property purchased or constructed with the approval of the department of resource development or the department of natural resources for the purposes of abating or eliminating pollution of the air or waters of the state, but only air and water pollution abatement property associated with income producing property may be exempt under this provision.”

Tax exemptions, deductions and privileges are matters purely of legislative grace, and tax statutes are to be strictly construed against the granting of the same. *Comet Co. v. Department of Taxation* (1943), 243 Wis. 117, 123, 9 N.W. 2d 620.

However, a strict construction of the statutory exemption from taxation, while the general rule, neither requires an unreasonable construction nor that the narrowest possible meaning be given thereto, but envisages that a “strict but reasonable construction” will be applied. *Columbia Hospital Association v. Milwaukee* (1967), 35 Wis. 2d 660, 668, 151 N.W. 2d 750.

For reasons discussed in this opinion, I believe that limiting the statute’s application to existing pollution sources would defeat its legislative intent and be unreasonable. Accordingly, it is my opinion that the exemption also applies to pollution control facilities incorporated into new plants to be constructed.

It has been suggested that the statutory language of "abating or eliminating" and the absence of the word "preventing" in the statute presupposes that pollution must exist in fact before the exemption applies.

Such a strict interpretation would lead to the unreasonable alternative of encouraging new plants to be constructed without incorporating pollution control facilities therein. The new plant then would create a new source of pollution. Subsequently, pollution control facilities could be installed which then would be exempt from property taxation. Such a roundabout requirement to gain the benefit of the exemption not only would be unreasonable, but also contrary to secs. 144.04 and 144.555, Stats., which require approval by the Department of Natural Resources of all pollution control facilities to be constructed in the state.

There is no better way to eliminate pollution than to prevent its initial occurrence.

Section 70.11 (21) (a), Stats., was adopted from a report of the Natural Resources Committee (now Council) of State Agencies. The initial draft of Assembly Bill 21A which was adopted as ch. 183, Laws of 1953, was prepared directly from this report, according to the records of the Legislative Reference Library. That report expressed the following purposes for the proposed bill:

"To encourage the prevention of water and air pollution by allowing amounts paid for industrial waste treatment works and smoke elimination equipment and plant to be amortized at an accelerated rate for income tax purposes, and exempt such property from real and personal property taxes for a limited period.

"Whereas the state legislature recognized the benefits resulting to public health, welfare and recreation by the enactment of sections 144.51-144.57, and 146.10 of the statutes; and

"Whereas one of the major problems in the abatement of surface water and air pollution is the construction and purchase of costly and nonproductive treatment plants, equipment and land by private individuals and corporations; and

“Whereas it is desirable to give impetus to the construction of pollution elimination plant:

“The following section be created.”

Although the above quoted language did not appear in the bill draft itself, the recommended wording for sec. 70.11 (21) (a), Stats., from that same report did appear in substantially the same form in the enacted bill. Thus it appears that the wording of sec. 70.11 (21) (a), Stats., always was intended to incorporate within its meaning the purposes above quoted. Of particular significance is the fact that the use of the words “abating or eliminating” in the report and in the bill was intended to be broad enough in its scope so as “to encourage the *prevention* of water and air pollution.” (Emphasis supplied)

An extensive note of the Legislative Council attached to the end of Assembly Bill 21A shows that the bill was offered to the legislature with this intent:

“This bill should have the following results:

“1. Assist the committee on water pollution, city councils and village boards in securing early compliance with their orders.

“2. Increase property values in the areas affected by desist orders.

“3. Eliminate conditions injurious to health.

“4. Aid in reestablishing fish and game habitat.

“5. Aid the economy in Wisconsin by keeping some of our basic industries sound.”

My conclusion is consistent with these stated purposes.

In preparing this opinion no consideration has been given to constitutional or statutory issues other than those raised in your question.

RWW:APH

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*Disposable Bottles—Solid Waste Disposal—(Formal)*—A carefully drawn county ordinance prohibiting the sale of “disposable” bottles and cans would not, on its face, exceed the police power granted in sec. 59.07 (64), Stats., and would not constitute an unreasonable burden on interstate commerce, although a careful consideration of relevant factors may result in a finding of unreasonableness on both counts.

The proposed Richland County ordinance is, however, imprecisely drawn and creates an impermissible classification in violation of the due process and equal protection provisions of the State and Federal constitutions.

May 20, 1971.

RALPH W. FINK

*District Attorney, Richland County*

You have asked for my opinion on the validity of a proposed Richland County ordinance prohibiting the sale of certain “no-deposit-no-return” bottles. The pertinent portion of the proposed ordinance reads as follows:

“ . . . effective July 1, 1971, . . . it will be illegal for the sale in any retail establishment, of what is commonly known today as the non-deposit throw-away carbonated soda pop bottle or commonly known as the non-deposit throw-away beer bottle, regardless of the size of the container that it is bottled in.”

The proposed ordinance provides for a \$200 forfeiture (or up to 90 days imprisonment) for violation, and contains the following declaration of intent:

“We . . . recognize the fact that such throw-away glass containers, specifically soda pop and beer bottles, have proved to be a danger not only to human life, but to conservation and agriculture, and it has become a great burden upon private citizens, highway department and park personnel to remove these items from private property, parks, rights-of-way, highways, etc.”

As will be seen below, the particular language used in the ordinance raises insurmountable due process and equal protection problems. Since these errors can, and undoubtedly will be corrected, and recognizing also the wide public interest in laws and ordinances of this type, I will discuss the broader questions involved.

Once the question of the municipality's basic power to adopt such an ordinance is determined, the question becomes one of reasonableness—whether the particular regulation is a reasonable exercise of the police power, and, if so, whether it strikes a reasonable balance between advancement of local interests and interstate commerce.

### I. The County's Power to Adopt a "Disposal Bottle" Ordinance

A county, as an arm of the state, has only such powers as may have been granted to it by the legislature, and such others as may be fairly implied from the legislative grant. 54 OAG 101, 103, (1965); *Dodge County v. Kaiser* (1943), 243 Wis. 551, 11 N.W. 2d 348.

The basic statutory grant of power to counties is found in sec. 59.07 (5) and (64), Stats., which provide as follows:

"The board of each county may exercise the following powers, which shall be broadly and liberally construed and limited only by express language:

" \* \* \*

"(5) . . . have the management of the business and concerns of the county in all cases where no other provision is made, . . .

" \* \* \*

"(64) Enact ordinances to preserve the public peace and good order within the county."

The county board of supervisors, as a legislative body directly responsible to the electorate, has been said to possess broad powers. *Kenosha County C. H. Local v. Kenosha County* (1966), 30 Wis. 2d 279, 283, 140 N.W. 2d 277. A

county is a governmental agency of the State, and "performs primarily the functions of the state locally." *State ex rel. Bare v. Schinz* (1927), 194 Wis. 397, 400, 216 N.W. 509; *Kyncl v. Kenosha County* (1968), 37 Wis. 2d 547, 555, 155 N.W. 2d 583. General police powers such as those granted by sec. 59.07 (64), Stats., are, of course, inherent attributes of government, and encompass regulations for the protection of the lives, health and property of citizens, and the promotion of good order and morals. *Chicago M. & St. P. R. Co. v. Milwaukee* (1897), 97 Wis. 418, 422, 72 N.W. 1118; *State ex rel. Baer v. Milwaukee* (1967), 33 Wis. 2d 624, 629, 148 N.W. 2d 21.

There are very few cases dealing with the statutory police power grant to counties. There is, however, an abundance of authority interpreting the statutory (as opposed to "home rule") police power of cities—authority which would be equally applicable in interpreting the general county police power. The statutory police powers of cities and villages are, of course, not to be confused with their home rule powers under Art. XI, sec. 3, Wis. Const. The two sources of authority—statutory grants of police power and the constitutional home rule reservation—have been treated separately by the courts, and where home rule is not under consideration, the decisions interpreting the *statutory* grants to cities are equally applicable to counties.

Under sec. 62.11 (5), Stats., city councils are charged with "the management and control of city property . . ." and are granted the ". . . power to act for the government and good order of the city . . . and for the health, safety and welfare of the public, . . ." Like counties, cities have only such powers as are expressly granted—or necessarily implied—by statute. *City of Madison v. Tolzmann* (1959), 7 Wis. 2d 570, 573, 97 N.W. 2d 513.

The scope of a municipality's authority to enact ordinances under its police power was described as follows in *J. & N. Corp. v. Green Bay* (1965), 28 Wis. 2d 583, 585, 137 N.W. 2d 434:

"It is elementary that an ordinance is presumed to be constitutional and that the attacking party must establish

its invalidity beyond a reasonable doubt. If there is any reasonable basis for its enactment, the ordinance must be sustained. Furthermore, this court will not interfere with a municipality's exercise of police power unless it is clearly illegal . . ."

In *Boden v. City of Milwaukee* (1959), 8 Wis. 2d 318, 325, 99 N.W. 2d 156, the court stated that:

" . . . except in clear cases of oppressiveness or unreasonableness, it is not within the province of the courts to interfere with the exercise of such police power. This is because the legislative bodies of municipal corporations are *prima facie* the sole judges of the reasonableness of an ordinance enacted under their police power, and every intendment is to be made in favor of the reasonableness of such ordinance. (citing cases) . . ."

The power to pass ordinances must, of course, be reasonably exercised, but within the fields delegated by the legislature, ". . . it may go to the boundaries of reason, and within that field the municipality's discretionary power is supreme." *Yorkville v. Fonk* (1958), 3 Wis. 2d 371, 375, 88 N.W. 2d 319.

Finally, in *Cream City B. P. Co. v. Milwaukee* (1914), 158 Wis. 86, 95, 99, 147 N.W. 25, the court upheld the validity of an ordinance regulating billboard advertising, stating:

"In order to support legislation of this kind, a public need therefor must exist, and the act must at least have a tendency to support such need . . . and if a public purpose can reasonably be conceived which might rationally justify the act, the court cannot further weigh the adequacy of the need or the wisdom of the method."

" . . . Between the point where an ordinance is obviously reasonable and the one where it is obviously unreasonable there is a wide range, a broad field for the exercise of legislative discretion. The action of the municipal authorities within that range is conclusive. Reasonable minds may well differ concerning the extent of it, and, this being so, legislative action should not be declared to be without justification unless it is clear beyond reasonable controversy that it is so . . ."

Some courts have held that the regulation—and even the outright prohibition—of billboards can be sustained, on aesthetic grounds alone, as promoting the general welfare. See *Dade County v. Gould* (Fla., 1957), 99 So. 2d 236.

Under the above rules, the Wisconsin Court has upheld, as a reasonable exercise of the police power, a city ordinance imposing certain standards on housing units stating that, under the general statutory grant of police power:

“ . . . The prohibition of a condition that tends to depress adjoining property values falls within the scope of promoting the general welfare and does not violate due process. (citing cases)” *Boden v. City of Milwaukee, supra*. 8 Wis. 2d at 325.

In *Yorkville v. Fonk, supra*, a town ordinance limited the number of spaces in any trailer park within the town to 25. The court upheld the ordinance as a reasonable exercise of the police power on the following basis: (1) It is “not beyond the bounds of reason” to assume that trailer parks present problems of health, safety, morality and general welfare; and (2) assuming this is so, it is not beyond the bounds of reason to believe that the larger the trailer park, the greater the problem. 3 Wis. 2d at 375.

In *J. & N. Corp. v. Green Bay, supra*, the local billboard ordinance applied only to gas station signs, and it was upheld as reasonable on the basis that no showing had been made that other entities, such as drive-ins, etc., presented similar ingress and egress traffic problems. 28 Wis. 2d at 586-7.

These and other cases indicate that the question of the reasonableness or unreasonableness of a police power regulation, when raised in court, will depend largely on the facts presented. It cannot be disputed that municipalities in Wisconsin and elsewhere are experiencing serious problems in the area of solid waste disposal. Facts abound on the subject—particularly on the contribution to these problems made by non-degradable solid waste materials such as bottles and cans. On January 24, 1971, for example, the *New York Times* reported (sec. 4, p. 3) that in 1969 more than 36 billion bottles and glass jars were produced in the United States.

That amounts to 178 for every man, woman and child in the country—or 750,000,000 for Wisconsin alone (see 1970 *Wisconsin Blue Book* 717, for the state population estimate). Beer and pop bottles comprised fully half of these totals. A glance at local newspapers will reveal the seriousness of solid waste disposal problems in Wisconsin. In Dane County, for example, the situation is becoming acute. Facts such as these [together with facts concerning the industry (or industries) involved—is it primarily local, such as the soda-pop bottling industry? Does the ordinance allow sufficient time to “re-tool” back to returnable containers?] as well as many other factual considerations, would have to be dealt with before a final determination of reasonableness or unreasonableness could be made.

My conclusion that county boards have the power to adopt such ordinances is bolstered by the fact that other statutes have given to counties the power to adopt anti-littering ordinances (sec. 349.06, Stats.), building and sanitary codes (sec. 59.07 (51), Stats.), and air pollution regulations (secs. 144.30-144.46, Stats.). In addition, sec. 144.44 (2), appears to authorize counties, as “local governing bodies” to regulate solid waste disposal. These statutes—particularly the solid waste control provisions—coupled with supporting findings of fact that non-returnable bottles and cans create a heavy burden on the condition and operation of disposal sites within the county, support a conclusion that the power to enact a “can-ban” ordinance is necessarily implied in the specific grant of power to regulate the disposal of solid wastes.

While it appears that a carefully drafted “can-ban” ordinance would be within the police power of the county and, in fact, I cannot say that the proposed draft is facially invalid as going beyond such power, a clear determination of the reasonableness of the regulation can be made only after consideration of a wide variety of relevant factors—none of which are before me at this time.

## II. The Commerce Clause

As a general rule, a state (or municipality) cannot legislate in a manner that unreasonably discriminates against, or

places an undue burden upon, interstate commerce. 15 C.J.S., *Commerce*, §10, pp. 404-5. The Wisconsin Court stated the rule as follows in *State v. Helwig* (1952), 262 Wis. 299, 302, 54 N.W. 2d 907:

“. . . the state may adopt proper regulations in the interests of the peace, safety, and welfare of its residents in the absence of a federal statute either dealing with or preempting the field, or unless the state regulation discriminates against persons engaged in interstate commerce or places an undue burden thereon. (citing cases)”

There is no question of preemption here: our concern is whether the proposed ordinance unduly burdens, or discriminates against, interstate commerce.

Every law that affects interstate commerce is not a prohibited regulation; although the police power cannot be used as a mere cover for regulation of interstate commerce. 15 C.J.S., *Commerce*, §11, pp. 409, 411. The commerce clause is not an absolute guarantee of the right to sell whatever one may please, regardless of the effect on the local community; and it is not the mere fact of prohibition that determines the question, but what is forbidden, and for the protection of what interests. 15 C.J.S., *Commerce*, sec. 63, pp. 627-8. Each case, then, must be considered upon its own facts, and the basic question is whether the competing demands of the local and national interests involved can be accommodated. *Metropolitan Finance Corp. v. Matthews* (1953), 265 Wis. 275, 279, 61 N.W. 2d 502; quoting from *United States v. South Eastern Underwriters Assn.* (1944), 322 U.S. 533, 547, 64 S.Ct. 1162, 88 L.ed. 1440.

Courts in other jurisdictions have applied these rules in a variety of situations. A Virginia state law prohibiting the sale or transportation of paint, without prior registration and unless the containers were labeled in a certain way, was challenged by an out-of-state paint manufacturer in *Lasting Products Co. v. Genovese* (1955), 197 Va. 1, 7 S.E. (2d) 811. The court upheld the law (which was passed to prevent deception and fraud) on the basis that it did not unduly burden or discriminate against interstate commerce, but affected it only incidentally. The U. S. Supreme Court had

earlier sustained (over similar "commerce clause" arguments) another Virginia statute requiring carriers transporting liquor through the state to (1) use the "most direct through route" and have in its possession a bill of lading showing the route to be used; (2) post a \$1000 bond; and (3) possess a bill of lading showing the name of the consignee, and that the consignee had a legal right to receive the liquor at the stated destination. *Carter v. Commonwealth* (1944), 321 U.S. 131, 64 S.Ct. 464, 88 L.ed. 605.

Ordinances prohibiting the use of certain city streets by trucks and buses have been held not to unduly burden interstate commerce, as have local laws setting limitations on truck weight. *Commonwealth v. Kennedy* (1937), 129 Pa. Super. 149, 195 A. 770; *Bakery Salvage Corp. v. City of Lackawanna* (1968), 291 N.Y.S. 2d 104.

A statute making it an offense to transport untaxed cigarettes within the state was upheld in *State v. Sedacca* (1969), 252 Md. 207, 249 A. 2d 456, 463, on the basis that it furthered the state's interest in preventing the diversion of cigarettes into "illegal channels of trade." The court noted that requiring interstate transporters to possess certain documents did not constitute a burden on interstate commerce. In *Illinois Cigarette Service Co. v. City of Chicago* (7th Cir., 1937), 89 F. 2d 610, 613, the court upheld as reasonable and non-burdensome a city ordinance prohibiting the sale and use of cigarette vending machines, stating that: "It is not for us to say that the desired end might be reached by a less burdensome ordinance." The "desired end" was keeping cigarettes out of the hands of children.

An ordinance prohibiting sale within the City of El Paso, Texas, of ice manufactured outside the city (unless made with distilled water) was upheld by the Supreme Court in *City of El Paso v. Jackson* (Tex., 1933), 59 S.W. 2d 822, cert.den. 290 U.S. 680. A city ordinance prohibiting the sale of firearms as was similarly upheld in *Cohen v. Bredenhoeft* (S. D., Tex., 1968), 290 F. Supp. 1001, aff. 402 F. 2d 61, cert.den. 393 U.S. 1086, the court stating that the commerce clause does not exclude local exercise of the police power even though it may "materially affect" interstate

commerce. 290 F. Supp. at 1003-4. The ordinance's effect on interstate commerce was held to be incidental to the primary purpose of protecting the public. To a similar effect, the Missouri court sustained an ordinance regulating the kind of coal that could be used in the city in *Ballantine v. Nester* (1942), 350 Mo. 58, 164 S.W. 2d 378. A local prohibition of billboard advertising of tobacco was upheld in *Packer Corp. v. Utah* (1932), 285 U.S. 105, 52 S.Ct. 273, 76 L.ed. 643. In *Luzier v. State Board of Health* (1933), 189 Minn. 151, 248 N.W. 664, a "beauty law" which made it impossible for the plaintiff cosmetic manufacturer's salesmen to give demonstrations within the State of Minnesota, was upheld over a "burden on interstate commerce" challenge. A "Buy American" ordinance was similarly upheld in *American Institute for Imported Steel v. Erie County* (1968), 297 N.Y.S. 2d 602, and a state law prohibiting the use of the word "halibut" on packages without additional descriptive adjectives was approved in *Atlantic Ocean Products, Inc., v. Leth* (D. C., Ore., 1968), 292 F. Supp. 615, affirmed 393 U.S. 127.

In recent years, newly-felt societal needs have led to regulation in many new areas which materially affect interstate commerce. Local gun control laws, for example, have been sustained on the basis that they are ". . . not primarily aimed at interstate commerce, and the fact that they may, to some extent, affect interstate commerce is of no consequence with respect to the issue of constitutionality." *Burton v. Sills* (1968), 99 N.J. Super. 516, 240 A. 2d 462, 467; affirmed 240 A. 2d 433, appeal dismissed 394 U.S. 812. See also *Photos v. City of Toledo* (1969), 19 Ohio Misc. 147, 250 N.E. 2d 916, and *Cohen v. Bredenhoeft*, *supra*.

Finally, local laws and restrictions designed to enhance environmental quality have withstood "commerce clause" attacks. The California court has, for example, held that a state can prohibit the possession or importation of fish or game taken outside the state when the legislature determines such action is necessary to protect the local ecology. *Adams v. Shannon* (1970), 86 Cal. Rptr. 641. The New Jersey court has upheld local aircraft noise standards over similar objections in *Township of Hanover v. Town of Morris-*

*town* (1969), 108 N.J. Super. 461, 261 A. 2d 692, 701 stating:

“The burden on interstate commerce is patently excessive only if the pattern of local regulation presents so acute conflict that aircraft cannot possibly comply with all standards and continue interstate flight.”

In 1960, the City of Detroit passed a smoke abatement ordinance. The provisions of the ordinance made it impossible for certain steamships to perform necessary cleaning of their fires within the city unless the ships were structurally altered. The corporate owner of several such ships challenged the ordinance, and the court upheld it, stating generally that (362 U.S. at 443-4):

“In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when ‘conferring upon Congress the regulation of commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. \* \* \*’”

After noting that the ordinance did not exclude vessels from the Port of Detroit, nor destroy the right of free passage, the court concluded (362 U.S. at 448):

“The claim that the Detroit ordinance, \* \* \* imposes as to the appellant’s ships an undue burden on interstate commerce needs no extended discussion. State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand. (citing cases)

“It has not been suggested that the local ordinance, applicable alike to ‘any person, firm or corporation’ within the city, discriminates against interstate commerce as such. It is a regulation of general application, designed to better the health and welfare of the community. \* \* \*’”

The decision of the U. S. Supreme Court in a Wisconsin case, *Dean Milk Co. v. City of Madison* (1951), 340 U.S. 349, 71 S.Ct. 295, 95 L.ed. 329, has been raised as a possible

bar to a "can-ban" ordinance. In that case, a Madison city ordinance made it unlawful to sell any milk in the city unless it had been bottled within five miles of the city's central square. The court struck down the ordinance as violative of the commerce clause. A close reading of that case, however, reveals that the court based its decision largely on the fact that the ordinance *discriminated* against out-of-state industries in favor of local industry:

" \* \* \* In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce. This it cannot do, \* \* \*." 340 U.S. at 354.

That discrimination was a decisive point in *Dean Milk* is borne out by the court's statement in a later case, *Breard v. City of Alexandria* (1951), 341 U.S. 622, 636, 71 S.Ct. 920, 95 L.ed. 1233, that "It was partly because the regulation in *Dean Milk Co.* discriminated against interstate commerce that it was struck down."

The *Breard* case involved a challenge to a city ordinance prohibiting all door-to-door sales except by invitation of the homeowner. The action was brought by a national magazine subscription salesman who claimed, among other things, that the ordinance imposed an undue and discriminatory burden on interstate commerce. The court rejected this argument, stating (341 U.S. at 637-8, 640-1):

"We recognize the importance to publishers of our many periodicals of the house-to-house method of selling by solicitation. As a matter of constitutional law, however, they in their business operations are in no different position so far as the Commerce Clause is concerned than the sellers of other wares. \* \* \* the usual methods of seeking business are left open by the ordinance. That such methods do not produce as much business as house-to-house canvassing is, constitutionally, immaterial \* \* \*. Taxation that threatens interstate commerce with prohibition or discrimination is bad, \* \* \* but regulation that leaves out-of-state sellers on the same basis as local sellers cannot be invalid for that reason.

“ \* \* \*

“ \* \* \* When there is a reasonable basis for legislation to protect the social, as distinguished from the economic, welfare of a community, it is not for this Court because of the Commerce Clause to deny the exercise locally of the sovereign power of Louisiana. Changing living conditions or variations in the experiences or habits of different communities may well call for different legislative regulations as to methods and manners of doing business. Powers of municipalities are subject to control by the states. Their judgment of local needs is made from a more intimate knowledge of local conditions than that of any other legislative body. We cannot say that this ordinance of Alexandria so burdens or impedes interstate commerce as to exceed the regulatory powers of that city.”

The Wisconsin Supreme Court has followed the general rules stated above in the relatively few cases dealing with interstate commerce. See *Meyers v. Matthews* (1955), 270 Wis. 453, 461, 71 N.W. 2d 368, appeal dismissed 350 U.S. 138; *State v. Helwig, supra*; *Forest Home Dodge, Inc. v. Karns* (1965), 29 Wis. 2d 78, 94, 138 N.W. 2d 214.

Included in the few Wisconsin cases of note (other than the milk trade cases culminating in *Dean Milk Co. v. City of Madison, supra*) are those upholding statutory and administrative prohibitions on “price advertising” of eyeglasses. See *Bedno v. Fast* (1959), 6 Wis. 2d 471, 95 N.W. 2d 396, and *Ritholz v. Ammon* (1942), 240 Wis. 578, 4 N.W. 2d 173. In the latter case, the court stated (240 Wis. at 588-9) :

“ \* \* \* While under the cover of exercising its police power Wisconsin cannot undertake what amounts to regulation of interstate commerce, police regulations, reasonable in themselves, addressed to local activities and bearing a genuine relation to the welfare of people of this state, are not invalid by reason of the fact that they incidentally affect interstate commerce.”

The court has also upheld a state law setting maximum lengths for vehicles using Wisconsin highways. The law was held to be a reasonable regulation of commerce over the ob-

jections of interstate automobile haulers who would have to make extensive changes to their trucks in order to comply. *State v. Wetzel* (1932), 208 Wis. 603, 243 N.W. 768. A "ton-mile" tax on trucks—both intrastate and interstate—was held not to be an excessive burden on interstate commerce in *Wis. Truck Drivers Asso. v. Public Service Comm.* (1932), 207 Wis. 664, 242 N.W. 668. In *Chicago, M. St. P. & P. R. Co. v. Public Service Comm.* (1951), 260 Wis. 212, 50 N.W. 2d 416, the court held that a state requirement that a certain interstate railroad stop its trains at particular local stations which lacked adequate service, did not unduly burden interstate commerce nor violate due process.

Determining whether a given local regulation constitutes an undue burden on interstate commerce involves a "balancing" of many factors bearing upon the reasonableness of the burden in light of local and national interests. See *Southern Pacific Co. v. Arizona* (1945), 325 U.S. 761, 65 S.Ct. 1515, 89 L.ed. 1915. Soft drinks, for example, are generally bottled locally and a glance at a supermarket shelf quickly reveals that most, if not all, major soft drink brands are packaged in both returnable and non-returnable containers. The courts surely will have to make the ultimate determination by balancing these and the many other factors affecting the reasonableness of the regulation—both as to the initial exercise of police power and also the burden on interstate commerce. I do not have these many factors before me, nor am I the proper one to weigh them.

The ordinance is one of general application and is not an attempt to discriminate against out-of-state (or out-of-county) businesses in order to promote local industry, as in *Dean Milk Co. v. City of Madison, supra*. It is not, as in *Edwards v. California* (1941), 314 U.S. 160, 62 S.Ct. 164, 86 L.ed. 119, an attempt on the part of a municipality to isolate itself from difficulties common to all. It is rather an attempt to meet a crucial local problem head-on, much as California did in 1968 when it adopted motor vehicle exhaust emission standards that forced cars sold within that state to possess special equipment. Wisconsin's long-lived ban on the sale of colored oleomargarine, and its continuing (although somewhat relaxed) lottery regulations which pro-

hibit Wisconsin residents from entering certain nationwide contests are other, less crucial, examples of valid police power regulations which constitute permissible burdens on interstate commerce. The state legislature, moreover, has recognized the "local" nature of soft drink bottling in secs. 66.053 and 66.054, Stats., which permit local regulation and licensing of such businesses.

Given the above authorities, and the presumption of validity attaching to all legislative acts, I cannot say that a local ordinance prohibiting the sale of non-returnable containers within a county would place an unreasonable burden on interstate commerce. There are, I am sure, thousands of factors which could tip the balance between a reasonable and an unreasonable burden to one side or the other. Consequently, this opinion is anything but a blanket approval of such ordinances; it is merely a recognition that, carefully drawn, and their reasonableness amply documented, they would not violate the commerce clause of the U. S. Constitution and would constitute a valid exercise of the police powers.

### III. Due Process and Equal Protection

The fault of the proposed Richland County ordinance is not in its objectives or even in its regulatory theory. The ordinance is, in my opinion, unconstitutionally vague and discriminatory in violation of the due process and equal protection clauses of the Fourteenth Amendment. Its prohibitory language, for example, refers to "what is commonly known today as the non-deposit throw-away carbonated soda pop bottle or commonly known as the non-deposit throw-away beer bottle. . . ." Taken literally, the ordinance would discriminate against uncarbonated pop bottles and the growing "canned" pop and beer. While it may well be permissible to discriminate against soft drink and beer containers because of their comparative volume sales, it would be difficult indeed to discriminate between non-returnable bottles and cans, insofar as the objects of the legislation are concerned. Due process requires that police power ordinances which attempt to regulate only certain classes

of activities or, as in this case, certain classes of goods, must meet several criteria—among them the criterion that the classification must be based upon substantial distinctions, germane to the purpose of the law, which make one class “really different from another.” *State ex rel. Ford Hopkins Co. v. Mayor* (1937), 226 Wis. 215, 221-2, 276 N.W. 311. This the proposed ordinance does not do, and, as a result cannot be sustained.

RWW:WFE

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*Board of Regents—State Printing Contracts—(Informal)*  
—Legality of appointing nominee to Board of Regents of State Universities when such person is a major stockholder in a printing company that is under contract to the state, under Art. IV, sec. 25, Wis. Const., discussed.

May 21, 1971.

EUGENE R. MCPHEE

*Executive Director,  
Board of Regents of State Universities*

You have requested my opinion as to whether there is a possible conflict of interest or violation of law in the situation where an appointee to the Board of Regents has a substantial interest in a printing company that is currently under a state printing contract to print the faculty and state newspapers at one of the state universities. The contract in question terminates September, 1972, having been awarded September, 1970.

The request for an opinion was initiated by the appointee so as to avoid any possible question of impropriety.

Article IV, sec. 25, Wis. Const. reads:

“Stationery and printing. SECTION 25. The legislature shall provide by law that all stationery required for the use of the state, and all printing authorized and required by them to be done for their use, or for the state, shall be let

by contract to the lowest bidder, but the legislature may establish a maximum price; no member of the legislature or other state officer shall be interested, either directly or indirectly, in any such contract."

Clearly, a member of the Board of Regents of State Universities is a state officer. *Martin v. Smith* (1941), 239 Wis. 314.

The party in question is the executive secretary of the company and holds 50 percent of the corporation's stock. The appointee, under such circumstances, must be deemed to have a direct interest in the printing contract.<sup>1</sup>

Administrative agencies, such as the Board of Regents of State Universities or the Department of Administration, are in fact the state, and when such state agencies execute contracts it is under law a state contract. *Sullivan v. Board of Regents of Normal Schools* (1932), 209 Wis. 242.

Consequently, for the purpose of answering this request, it is immaterial whether the Regents execute the printing contract or the Department of Administration for, in either case, it is a state printing contract. Nor is it relevant that the contract is awarded to the lowest bidder, for this criteria is recognized, even required by the constitutional provision.

Applying the facts to the constitutional provision, it must be concluded that the appointee would be a state officer having a direct interest in a state printing contract. The fact that the contract was entered into prior to the slightest hint of the appointment does not, in my opinion, affect the question as to the validity of the appointment. This conclusion is reached for it is somewhat apparent from the wording of the constitutional provision itself that something more than safeguarding the awarding of the contract was intended. This is true for the constitutional provision requires that the contract be let to the lowest bidder. A state officer, due to his position, could have an unfair advantage over other bidders. This situation would, however, in most cases, only work to the disadvantage of the other bidders, for the state

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<sup>1</sup>Sec. 946.13, Stats., Private Interest in Public Contract, defines interest at anything over 2 percent of the corporate stock.

officer would still have to be the low bidder and the interest of the state would not necessarily suffer. Subsequent to the award of the contract, however, the state officer could be in a highly advantageous position and possibly to the direct disadvantage of the state. The conflict of interest that might arise after execution of the contract is, of course, in the performance of the contract. A hypothetical situation would be to have the state university employes take the position that the contract was not being properly performed but nevertheless conceal such belief for fear of offending the state officer under whom they are employed. A similar situation was noted in *State ex rel. Hopkins v. Grove* (1921), 109 Kan. 619, 201 Pac. 82, 19 A.L.R. 1116, 1123. In this case the court stated:

“The defendant’s disqualification results from the plain and unambiguous language of the statute. It is also as clearly within the purpose and spirit of the act. The legislature obviously proceeded upon the assumption that a corporation holding a franchise from or contract with the city was likely, by reason thereof, to be drawn into controversy with it, and that a city officer who was required to take some action in relation to the matter, if he were an employee of the company in any capacity, might be influenced in his conduct by that circumstance. The provisions of the ordinances described are of such character that a dispute might readily arise out of conflicting interests, and the connection of a member of the commission with the company might prove an embarrassment. \* \* \*.”

There may possibly be some merit to the suggestion that Art. IV, sec. 25, Wis. Const., would not bar a state officer from having an interest in a printing contract that is completely divorced from his particular office. However, in the present situation, we have a printing contract, although executed by a different state agency, nevertheless provides for the furnishing of printed materials to the state officer’s own agency. The employes of the state officer’s agency have the responsibility to see that the contract is satisfactorily performed. Obviously, under this situation a conflict of interest could arise.

There is little, if any, direct authority to rely on in this matter and no Wisconsin case authority has been found to aid in the interpretation of the constitutional provision. In turning to the materials on the Wisconsin Constitutional Convention surrounding the adoption of this provision, a rather interesting and involved history is found. However, what weight should be given to this history in interpreting the provision in question is problematical.

The Journal of the Convention of 1846 shows that the delegates were highly concerned with the printing of the Journal and other materials for the Convention. The Journal shows that Beriah Brown was elected to be the printer (p. 23). As printing was apparently one of the major expenses of the Convention (p. 470), the Convention spent a great deal of time debating the matter and it became a major political issue.<sup>2</sup> The struggle is fairly well summed up in a selection from *The Madison Express*:<sup>3</sup>

"It will be seen by the reports of the proceedings of the convention that Mr. Gray of Grant County offered a resolution to have the printing let out to the lowest bidder, a measure which would have saved a large sum to the people of the territory. Had the vote been taken immediately upon it, there is no doubt that a large majority would have been found in its favor. But the consideration of the resolution was postponed, and the interim afforded an opportunity for certain leaders to 'whip in' refractory members and thus defeat the wishes of the people. When the resolution was called up it was immediately quashed, and the election of a printer gone through with, which resulted in the choice of Mr. Brown of the *Wisconsin Democrat*. Although the election of a printer was their object, yet the Old Hunkers are by no means content with the result, and an ineffectual attempt was made to reconsider the vote. We said that a large sum would have been saved to the people of the territory had the printing been let out to the lowest bidder. Economy in expenditures, however, is no part of the Locofoco creed,

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<sup>2</sup>*The Struggle Over Ratification 1846-1847*, Milo M. Quaife, pp. 17, 64, 68-69, 92, 104.

<sup>3</sup>*Id.* p. 160.

and if the people do not by their votes emphatically say so when the state has been organized, we shall be much mistaken.”

Apparently, to avoid this same problem, the delegates to the 1847-1848 Convention quickly quashed a motion by delegate Wheeler to employ a particular printing company and adopted a resolution that the contract be let to the lowest bidder. (p. 7) (All references are to pages in the Journal of the Constitutional Convention of 1847-1848.)

The Convention received several bids, two of which are of considerable interest. The Argus firm agreed to do the printing for one cent. Another firm offered to do the printing for “one-half of the sum it has already cost the people of the territory in the discussion had on that subject.” The offer of the Argus firm was accepted (pp. 31-34). The following day the Convention received a scathing petition, the first paragraph of which stated:

“The undersigned, employed printers of the village of Madison, being informed of the action of your Hon. body in letting out to the lowest bidder the printing which may be within your control, and noticing a proposition now pending, to place in the constitution a clause which shall make a similar disposition of all future printing, and properly appreciating the enlightened ‘progression,’ which has dictated such action, and desirous that the ‘true democratical principle’ thus applied to them should be extended to others, respectfully petition that an additional clause be inserted in the constitution now in progress of formation by your Hon. body letting out to the lowest bidder all the offices under the new state government, of whatever nature or kind, and all services of whatever description or character.”

And the last paragraph of the petition concluded:

“Personally, your memorialists wish the adoption of their petition from an apprehension that the action already had and contemplated, is to lessen their means of daily living, which are already scant enough; and actuated by the hope that other sources of present employment will be opened to them, they further ask that if in the power of your Hon.

body the offices now attached to it be declared vacant, and then let out to the lowest bidder, for which we pledge ourselves to make offers at far less rates than are likely otherwise to be paid." (pp. 39-40)

Needless to say, the Convention did not appreciate the sentiments contained in the petition, and the delegates' views are clearly reflected in the Journal. (pp. 40-41) Mr. Judd of the Convention moved to have the petition rejected, which it was even though one of the delegates noted that everyone has a right to petition his government. (p. 41)

The same Mr. Judd was on the committee that prepared the Article on the Legislature, which article did not, as initially reported, contain the constitutional provision now under consideration. (pp. 117-118) Nor did the rejected constitution have such a provision, a resolution providing for a similar prohibition having been defeated. (Journal of the Convention 1846, pp. 406, 419)

While the relevancy of all this may seem somewhat remote, it does, nevertheless, show the concern, almost preoccupation, of the delegates over the issue of State printing. In this regard, I think it is fair to assume from all this that the delegates to the second Convention had profited from the experiences of the first Convention. Further, the petition of the disgruntled printers must have influenced the delegates in the adoption of the constitutional provision under consideration. It is clear that it was the intent of the delegates that the printing contract for the Convention be divorced from political or personal consideration and this intent was carried over to the constitution.

This background influenced the delegates in the adoption of Art. IV, sec. 25, Wis. Const. For it certainly is significant to have a constitutional provision pertaining to printing contracts. In my opinion, the experience of the delegates and their intent was clearly expressed in sec. 25 as requiring that printing contracts be subject to competitive bidding and that no officer of this state have an interest in such contracts.

In the present situation, I can only conclude from the plain language of the constitutional provision and for the

reasons previously discussed, the appointee would be in a situation of possible conflict of interest and would be in violation of Art. IV, sec. 25, Wis. Const.

RWW: CAB

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*Compatibility of Office—Board of Vocational, Technical and Adult Education—(Informal)*—Member of local district board of vocational, technical and adult education cannot serve as State board member.

May 25, 1971.

EUGENE I. LEHRMANN, *Director,*  
*Board of Vocational, Technical and Adult Education*

You have requested my opinion whether a member of a local district board of vocational, technical and adult education could at the same time serve as a member of the State Board of Vocational, Technical and Adult Education.

I am of the opinion that he could not.

A member of the state board appointed pursuant to sec. 15.94 (3), Stats., for a term is an officer of the State since he is charged by law with the exercise of some portion of the sovereign power of the State. *Martin v. Smith* (1941), 239 Wis. 314, 332, 1 N.W. 2d 163.

A member of a local board appointed pursuant to sec. 38.15 (11), Stats., or of a local district board appointed under sec. 38.155 (5), Stats., also exercises some portion of the sovereign power of the state, and is a public officer and an officer of a minor unit of government.

The general rules of incompatibility are well stated at 58 OAG 247 (1969), in part as follows:

“Public offices may be made incompatible by statute or they may be incompatible according to well-settled principles of common law. In some instances, offices which appear to be incompatible because of a possible conflict of duties or

power of one over the other as to appointment, supervision, and pay, may be designated as compatible by statute.

“Public policy requires, that an office holder discharge his duties with undivided loyalty, therefore, in general terms, two offices are incompatible if there is a conflict of interest or duties, so that the incumbent of one office cannot discharge with fidelity and propriety the duties of both. Incompatibility is not simply a physical impossibility to discharge the duties of both offices at the same time, but is an inconsistency in the functions of the two offices. This might arise, for example, where one office is subordinate to the other, or where a contrariety and antagonism would result in the attempt by one person to discharge faithfully and impartially the duties of both.

“The doctrine of incompatibility of offices applies only to public offices and not to positions of employment. Generally, an individual employed by a government is an officer thereof if, in the performance of his duties, he is invested with some portions of the sovereign functions of government to be exercised by him for the benefit of the public.”

A reading of secs. 38.13, 38.15 (12), (13), 38.155 (1), (3), (8), (9), 38.21, and 38.215, Stats., indicates many areas of supervisory control by the state board over the district board in areas of state and federal aid, granting of degrees, boundaries of districts and alterations thereof, and qualifications and fitness of teachers and employes.

I am aware of no statute which would expressly permit a member of a local district board to serve at the same time on the state board. It is my opinion that there are areas of probable conflict and that the superintending power of the state board over the local district board makes the two offices incompatible.

You also indicate that federal funds might be allocated to a private agency on which a member of the state board serves as director. It is not clear from your letter whether such individual is a member of the state board at present or whether he is the person seeking appointment. In any event, further specific facts would be necessary before giv-

ing an opinion on the question. There might be possible violation of sec. 946.13, Stats., which prohibits public officers from having a private pecuniary interest in public contracts. It is necessary in each instance to examine the special circumstances, as there are a variety of exemptions. I suggest that you review these sections.

RWW:RJV

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*Public Defenders—Indigent Defendants—(Informal)—* County board may retain, at monthly salaries, attorneys to represent indigent defendants.

May 25, 1971.

A. W. PONATH

*Acting Corporation Counsel, Outagamie County*

You have requested the informal advice of this office on several questions arising out of a proposed resolution of the Outagamie County Board providing a method for furnishing counsel to indigent criminal defendants.

The resolution, which you indicate has been endorsed by the county and circuit judges, requests the judges to designate a "panel" of two attorneys to represent such defendants, and to negotiate contracts for their employment on a part-time, month-to-month basis. Under the plan, one of the two attorneys would be selected by the presiding judge in any case (with the provision that other counsel could be appointed if the judge determined that neither attorney would be able\* to fairly represent the defendant), and their compensation, paid by the county, could not exceed \$500 per month.

You have raised several questions, which will be considered individually.

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\*The text of the resolution reads ". . . neither . . . would . . . be unsuited . . . to fairly represent. . . ." The double negative should be corrected in order to express the intended meaning.

(1) *The County Board's authority to adopt the resolution.*

You have indicated that the board may lack authority to pass such a resolution. I disagree. The system authorized by the resolution is designed to secure legal services for indigents at reasonable cost to the county and is, in my opinion, within the legislative grant of general police powers under sec. 59.07 (64), Stats. It should be noted that the judges do indeed "appoint" counsel—although from the panel rather than the bar at large—and that the county is not establishing a defender's office, but is merely continuing to support appointed counsel at the same level of service, but at lower cost to the county.

(2) *Subsequent recovery of costs from the indigent.*

You indicate that under existing practices the county is able to recover from the indigent, at such time as he becomes financially able, the legal fees paid for his benefit; and you ask whether such recovery will continue to be available to the county under the proposed plan. I see no reason why not. The county would have "paid for" the indigent's defense within the meaning of sec. 256.66, Stats., which authorizes recovery of such costs. Problems would arise, of course, in the allocation of such portion of the \$500 monthly stipend properly "chargeable" to a given indigent in a given case. I assume, however, that these problems could be solved through efficient accounting and timekeeping practices.

(3) *Competency of counsel.*

You indicate concern over the fact that the attorneys named to the panel are likely to be recruit law school graduates and ask whether this factor might give indigents the right to complain that they were not given the benefit of competent counsel.

Obviously, any defendant has a right to competent representation—and the ancillary right to complain that he was not competently represented in a given case. This is true whether counsel is retained or appointed, and determinations are made on a case-by-case basis. Certainly there is no presumption—and, in fact, little validity to the assump-

tion—that a young lawyer is less competent than an older one; and it is my opinion that your proposed system would not give rise to any competency-of-counsel problems that are not present in any other criminal case.

(4) “*Fee*” problems.

You question whether the setting of a \$500 monthly stipend to each of the two members of the panel invades the prerogatives of the State Bar Association and its practice of setting minimum fees for attorneys.

Section 967.06, Stats., provides for compensation of counsel appointed to represent indigent defendants, and states that the amount, as set by the court, “. . . shall be such as is customarily charged by attorneys of this state for comparable service. . . .” Judges have consistently interpreted this requirement in relation to the published fee schedules of the State Bar Association—generally two-thirds of the schedule.

While there may well be some inconsistencies between such practices and the “monthly retainer” aspects of your plan, I cannot believe that sec. 967.06, Stats., would be interpreted so as to prohibit a plan such as this—a plan that would provide efficient and effective representation of indigents at substantial savings to the county.

I do, therefore, informally advise you that I see no objection to the plan or the resolution itself.

RWW:WFE

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*Transportation of Students—Pre-School Handicapped Children—(Informal)*—Effect of statutes dealing with transportation of students on nonresident pre-school handicapped children discussed.

May 25, 1971.

WILLIAM C. KAHL

*State Superintendent, Department of Public Instruction*

In your letter of January 14, 1971, you ask a number of questions concerning the application of the statutes dealing with transportation of students as they may be applied to a three and one-half-year-old child with a hearing defect who resides in a school district which does not provide services for a child with such a handicap. You state that this child has been accepted by another school district as a nonresident special student and that the Department of Public Instruction has determined that the child is handicapped as that term is defined in sec. 115.76 (1), Stats. As a result of such handicap, the Department of Public Instruction has authorized the child's attendance as a nonresident special student.

Your first question reads:

"First, must the resident school district provide full transportation for this child when authorized by the Department of Public Instruction?"

The answer to this question is yes. The resident school district must provide full transportation for this child. Section 115.82 (1) (a), Stats., provides:

"Handicapped children residing outside the area served by a program established under s. 115.81 may be admitted to the program as nonresidents."

Section 115.82 (1) (b), Stats., provides, in part:

"Handicapped children residing within or outside a school district may be admitted to special programs for handicapped children which are available in the school district according to standards of eligibility determined by the division [Division of Handicapped Children, Department of Public Instruction] and according to available facilities. A handicapped child, *including a preschool handicapped child, who resides in a school district which does not maintain a program for children with this handicap* and is eligible to attend special schools, classes or centers, may be admitted as a nonresident. \* \* \*" (Emphasis ours).

And sec. 115.82 (6), Stats., reads:

“In addition to the requirements of s. 121.54 (3), when board and lodging are not furnished to nonresident handicapped children the school district in which the child resides shall provide transportation.”

A three and one-half-year-old child is a preschool child within the meaning of this statute. “Preschool” is ordinarily defined as nursery or kindergarten school. See *Webster’s Third New International Dictionary, Unabridged*. Therefore, any child who is not an infant, but yet not old enough to attend first grade, should be considered as a “preschool” child. Ordinarily, this child would fall between the ages of two and five.

In your second question you ask whether objective standards of eligibility are required to be promulgated by the Division for Handicapped Children of the Department of Public Instruction. Again, the answer is yes. Section 115.82 (1) (b), Stats., specifically provides that handicapped children residing within or outside a school district may be admitted to special programs for handicapped children which are available in the school district according to standards of eligibility determined by the Division and according to available facilities. These standards are applicable to preschool handicapped as well as other children.

In your third question you ask whether general transportation aids would be payable for such preschool handicapped children under sec. 121.58 (2) (a) and (b), Stats. In my opinion, general transportation aids would be payable for such a purpose. Section 121.54 (3), Stats., provides that every school board shall provide transportation for handicapped children. It further provides that approval for such transportation shall be based on whether or not the child can walk to school with safety and comfort. Section 115.82 (6), Stats., embodies sec. 121.54 (3), and further provides that where board and lodging are not furnished to nonresident handicapped children, the school district in which the child resides shall provide transportation. In addition, sec. 121.58 (2) (b) reads:

“State aid for approved transportation under s. 121.54 (3) shall be paid on the same basis as it is paid for transportation of nonhandicapped children, except that state aid shall be paid for such approved transportation of less than 2 miles at the rate of \$24 per school year per pupil. Such state aid shall be supplemented by the state aid under s. 115.85 in an amount not to exceed the full cost.”

It seems clear therefore, that the general transportation aids are payable for such preschool handicapped children.

Your fourth question reads:

“Fourth, would the general aids provided in Section 121.58 (2) be supplemented under subsections 121.58 (2) (b), 115.85 (2) and 115.85 (5) to the extent of 70% of the *full* (emphasis added) cost of the transportation, with the exception provided in 121.58 (2) (b), that such state aid shall be supplemented under Section 115.85 in an amount not to exceed the full cost of transportation?”

The answer to this question is also yes. General aids provided for in sec. 121.58 (2), Stats., must be supplemented, under sec. 115.85 (2), Stats., to the extent of 70 percent of the *full* cost of transportation. This aid may be further supplemented pursuant to sec. 115.85 (5), Stats., subject to the limitation contained in sec. 121.58 (2) (b).

Transportation provided handicapped children, including the preschool children, must be approved in advance by the State Superintendent of Public Instruction. However, the Superintendent may not arbitrarily withhold approval of such transportation, thereby frustrating the intent of the legislature. The reasons for refusal to approve transportation in cases involving handicapped children must be well documented and not arbitrary or capricious.

RWW:JWC

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*Student Newspaper—Board of Regents—(Informal)—* Problems involved in the operation of a privately owned and operated student newspaper, which is subsidized by the state university, discussed.

May 25, 1971.

EUGENE R. MCPHEE

*Executive Director, Board of Regents of State Universities*

There has been some confusion over your request, made on behalf of President Dreyfus, as to the legal implications involved in the establishment of a private (school) newspaper.

Apparently, the initial request was made on August 11, 1970, and involved four rather long and complicated questions concerning this general subject matter.

Your primary concern at this time relates to the third question of that request, and I will not now attempt to answer the other three questions. The question involved was stated as:

“(3) If a state university discontinued publication of the campus newspaper and then rented physical facilities to a private newspaper company, loaned the recognized name of the discontinued newspaper to that private company, purchased space in that private newspaper for advertisements, announcements, etc., and contracted to regularly purchase 10,000 copies of that private newspaper for subsequent free distribution, could the Board of Regents, the president, or the administration of that university be held legally responsible for any content of that private newspaper, outside of the space purchased by the university?”

The objective of the plan as envisioned by this question, as I understand it, is to have a campus newspaper published by a private nonprofit corporation, which corporation is legally isolated from the state. It follows from this objective that the private newspaper corporation may not be given preferential treatment if we hope to have the court sustain this relationship on the basis of contract rather than agency law.

Of course, if a private corporation is created, the relationship between that corporation and the state should be no different than the state's relationship with other private

corporations. In other words, all general laws relating to the use of state property, contracting, purchasing and what have you, as they generally apply to state business, funds and property, would be applicable to the newspaper corporation in question just as they are applicable to any private corporation.

### USE OF STATE FACILITIES

As there does not appear to be any specific provision in ch. 37, Stats., relating to the use of school buildings or facilities, sec. 16.845, Stats., controls. This section states in part:

“Except as elsewhere expressly prohibited, the managing authority of any building or other facility owned by the state may permit the same to be used by any governmental body or official, any veterans’ organization, or any nonprofit association for the purpose of governmental business, public meetings for the free discussion of public questions, or for civic, social, recreational or athletic activities. \* \* \*”

It is doubtful, in my opinion, that this section intended to authorize the use of state facilities by a business corporation, even though nonprofit, for extended periods of time such as under a one-year lease. Nor do I find authority in ch. 37, Stats., that would clearly support a lease of school property to a private business corporation.

Even assuming, by a very liberal interpretation of sec. 16.845, Stats., that a day-to-day use of the facility is proper and allowable without the formality of a lease, the corporation would have to pay the reasonable and fair rental of such facilities. The private corporation should not be subsidized by the state, not only as a matter of law, but as a practical necessity to the maintenance of the basic concept of a truly private business corporation.

### DISTRIBUTION TO STUDENT BODY

This question presupposes free distribution to the student body. Nothing is free, and I assume the school will purchase its 10,000 copies by the use of student activity fees. This

issue is bothersome for it raises the question as to the propriety of the board assessing the student body a fee which, even assuming, and we must make the assumption that state bidding laws will be strictly followed, is predestined as payment to this particular corporation. This is, in fact and law, a state subsidy of a private corporation for the corporation could not exist without this state commitment. It must not be forgotten that student activity fees are state funds and subject to appropriation by sec. 20.265, Stats., and in this situation are intended to be used for the purchase, not of a school paper, but of a private newspaper. Whether this would be a legitimate expenditure of state funds could depend on the educational and general school purposes the paper will serve. The forced subscription of the student body to a particular private newspaper such as the New York Times, The Milwaukee Journal, or even the Capital Times, may serve some educational benefit upon which the purchase could be supported. However, the forced subscription of the student body to this particular newspaper can only be supported by speculation as to its educational benefits. Further, the paper may have little to do with the academic community except for the paid notices, announcements, etc., of the school that will appear in the paper, but will actually constitute a small part of the total publication.

The use of state funds for this purpose may be valid provided the board is able to determine a sufficient educational function is involved and reasonable controls are exercised by the board to insure that the funds are spent for this public interest, *State ex rel. W. D. A. v. Dammann* (1938), 228 Wis. 147. However, the requirements of the *Dammann* case will place the state in the extremely awkward position of attempting to insure that state funds are used for a legitimate public purpose without exercising control over a private corporation in the sensitive area of the First Amendment. In my opinion, this is an almost impossible task.

#### LIABILITY OF BOARD, SCHOOL ADMINISTRATORS, ETC.

This question cannot be answered because I do not have any facts as to what, if any, supervision or participation by

the faculty is anticipated. Certainly, if the private corporation is, in fact and law, a stranger to the Board, the school administration and the faculty, no liability could result to these parties.

#### PURCHASE OF SPACE FOR NOTICES, ANNOUNCEMENTS, ETC. BY SCHOOL

At first blush, this issues does not seem to raise any insurmountable legal problems, and the purchase of space could, in my opinion, be accomplished under existing laws. A tedious explanation regarding the application of existing statutes at this time does not seem warranted.

#### THE CONCEPT GENERALLY

The general plan is open to serious question on numerous grounds, some of which have already been discussed. Whether the courts would consider the corporation as a separate legal entity from the state, considering the fact that it is run by students, housed in school facilities and subsidized by state funds, is open to very serious question. Courts generally give more weight to substance than form.

In *Antonelli v. Hammond* (1970), 308 F.Supp. 1329, the court was concerned with a campus newspaper that was not financially independent but was dependent on an allocation of funds derived from compulsory student activity fees. It is not clear whether the newspaper was a separate legal entity from the school but it apparently was treated somewhat as such. What is clear is that the school administration could not exercise censorship over the paper by virtue of its control over the purse strings.

What we have contemplated here is the creation of a private corporate entity which is nevertheless closely related to and dependent on state facilities and state support. Should the newspaper become objectionable because of what it prints, the question presented is whether the board could refuse to grant it space and funds in the future. Although there are no cases clearly or directly in point, it would, in my opinion, be a very close question as to whether the board could terminate the relationship on such grounds. The

obvious argument would be made that the state is infringing on free speech or freedom of the press by economic coercion. This argument would be given considerable weight under such decisions as the *Antonelli* case, *Roth v. The Board of Regents* (1970), 310 F.Supp. 972, and the case of *McLaughlin v. Tilendis* (1968), 398 F. 2d 287.

RWW:CAB

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*County Corporation Counsel—Non-support and Paternity Cases—(Informal)*—Reciprocal non-support actions under sec. 52.10, Stats., and paternity proceedings may be prosecuted by corporation counsel rather than district attorney only upon direction by resolution or ordinance of the county board.

May 25, 1971.

RAY A. SUNDET

*Corporation Counsel, La Crosse County*

You ask whether a corporation counsel for a county of less than 500,000 population has the power and duty to prosecute paternity proceedings under sec. 52.21, Stats., and to prosecute reciprocal non-support actions under sec. 52.10, Stats. You note that both actions are special or civil proceedings rather than criminal prosecutions.

Section 52.22, Stats., provides that:

“The district attorney shall appear in and prosecute every paternity proceeding. . . .”

Section 52.10 (12), Stats., provides that in a reciprocal non-support proceeding, the district attorney shall represent the obligee upon request of the court or the person in charge of county welfare activities when this state is acting as the initiating state. Section 52.10 (18) (b), Stats., provides that “The district attorney shall prosecute the case diligently. . . .” after being notified by the clerk of the filing of a petition when Wisconsin is the responding state.

A corporation counsel is an appointive county officer. The office is not referred to in the Wisconsin Constitution as is the district attorney. It is an office which a county board may authorize pursuant to sec. 59.07 (44), Stats. Thus, a corporation counsel has no inherent powers. His basic authority springs from sec. 59.07 (44), which reads as follows:

“Corporation Counsel. In counties not having a population of 500,000 or more, employ a corporation counsel, and fix his salary. The corporation counsel may, when authorized by a majority of the county board, appoint one or more assistant corporation counsels to aid him in the performance of his duties. The assistants so appointed shall have authority to perform all the duties of the corporation counsel. His employment may be terminated at any time by a majority vote of all the members of the board. The duties of the corporation counsel shall be limited to civil matters and may include giving legal opinions to the board and its committees and interpreting the powers and duties of the board and county officers. *Whenever any of the powers and duties conferred upon the corporation counsel are concurrent with similar powers or duties conferred by law upon the district attorney, the district attorney’s powers or duties shall cease to the extent that they are so conferred upon the corporation counsel and the district attorney shall be relieved of the responsibility for performing such powers or duties.* Opinions of the corporation counsel on all such matters shall have the same effect as opinions of the district attorney. The corporation counsel may request the attorney general to consult and advise with him in the same manner as district attorneys as provided by s. 165.25 (3).”

The underlined language clearly indicates that the cited statute is not self-executing. Powers and duties must be conferred upon the corporation counsel by the county board. His specific authority, which is limited to civil matters, must be determined from the county ordinance or resolution creating his office unless provided by specific statute elsewhere such as sec. 319.295 (1), Stats., which places a duty upon the corporation counsel to apply to county court for a guardian or conservator of an estate of a mentally ill patient or county hospital or home resident.

In the final analysis, if a duty with respect to civil matters specifically assigned to the district attorney is not imposed as a duty of the corporation counsel by county ordinance or resolution, the duty remains with the district attorney. This view is consistent with the interpretation placed upon sec. 59.07 (44), Stats., by actual practice since inception of the statute created by ch. 186, Laws of 1949. Understandably, the duties of a corporation vary widely from county to county.

In 1957, the legislature enacted ch. 92, Laws of 1957, which created sec. 59.455 and 59.456, Stats., relating to creation of the office of corporation counsel in counties with a population over 500,000 and prescribing powers and duties for such an officer and his assistants. These sections relate to Milwaukee County only. They are informative, however, as to the general powers and duties a smaller county may wish to consider assigning to its corporation counsel. It might be noted that the district attorney in Milwaukee County has the responsibility to institute, commence or appear in all civil actions or special proceedings under sec. 52.10, Stats., the Uniform Non-support Act, whereas the corporation counsel appears in paternity actions inasmuch as it is a civil action not specifically assigned to the district attorney. Sec. 59.456 (5) (6), Stats.

I agree with your position that uniform non-support proceedings and paternity proceedings are civil matters. Since they do not involve forfeitures, statutory duties relating to these actions may be handled by the corporation counsel, but only if such duties devolve upon him by virtue of county resolution or ordinance. Further, I might add, the uniform support act traditionally has been handled by the district attorney for reasons of policy. Law enforcement personnel of foreign jurisdictions automatically refer support cases to the prosecutor of the county in which the obligor resides. Moreover, sec. 52.10 (6), Stats., relating to extradition is intertwined with criminal charges under sec. 52.05, Stats., which may be brought only by the district attorney.

RWW:WLJ

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*Indecent Articles—Family Planning—(Formal)*—The portion of Senate Bill 130, 1971, which totally prohibits sale of indecent articles probably is unconstitutional as applied to physicians and is in conflict with statutes relating to therapeutic abortions. The remainder of the bill relating to regulation of sale and advertisement of indecent articles and contraceptives probably would be constitutional if enacted into law.

May 26, 1971.

THE HONORABLE, THE SENATE

By Senate Resolution 8 you have requested an opinion on the constitutionality of Senate Bill 130, 1971, which makes certain changes in sec. 450.11, Stats., relating to indecent articles. The resolution also requests an analysis of the constitutionality of present sec. 450.11, and further that I address the question as to the effect of passage of Senate Bill 130, 1971, on Wisconsin criminal laws dealing with fornication and adultery, namely, secs. 944.15 and 944.16, Stats.

Present sec. 450.11, Stats., originally enacted into law by the 1933 Legislature, regulates the advertising, display and sale of articles used either to procure a miscarriage or to prevent pregnancy. Senate Bill 130 proposes a logical reorganization of this statute by separating the regulation of articles to procure miscarriages from the regulation of articles to prevent pregnancy by creating sec. 450.115, Stats., to control the latter type of articles.

At the outset, it should be noted that the proposed law prohibits entirely the sale by any person of indecent articles, that is, articles such as drugs, instruments or devices to procure a miscarriage. Present law permits the purchase of such articles from a pharmaceutical house or a physician. This proposed change in the law, in practical effect, outlaws therapeutic abortions now permitted under sec. 940.04 (5), Stats. The indicated problem arises from the fact that the term "miscarriage" may be used interchangeably with the term "abortion." Although there is a technical difference

as to the age of the fetus in whether the term "miscarriage" or "abortion" is used, the law regards the two terms as being practically synonymous. 1 Am. Jur. 2d, *Abortion*, §1. Also see secondary definition of "miscarriage" as meaning "abortion" contained in Webster's Seventh Collegiate Dictionary. Therapeutic abortions necessary to save the life of the mother are not only permitted under sec. 940.04 (5), but undoubtedly are constitutionally guaranteed by the due process clause of the Fourteenth Amendment of the United States Constitution.

I suspect that this change in the law proposed by Senate Bill 130 was unintentional and stems from the fact that the present statute treats two distinct subjects, miscarriage and contraceptives, in the same manner, coupled with the well-known fact that abortion-inducing drugs not only lack efficacy but are inherently dangerous. Nonetheless, whatever the reason, the proposed law entirely prohibits the sale of indecent articles. As applied to the sale of such items to a physician or surgeon, the law is unduly restrictive, and therefore unconstitutional.

Before turning to another aspect of the proposed bill, it should be noted that the term "miscarriage" is not defined consistently in lay, medical or legal dictionaries. For purposes of clarity it would be well to include a definition of this word in any proposed legislation using it.

With the exception of the difference discussed above and a significant change to be considered later, present sec. 450.11, Stats., and proposed sec. 450.115, Stats., of the bill essentially embody identical regulations with respect to the advertising and sale of contraceptive articles. Accordingly, the following capsule discussion of the constitutional highlights of the law applies to the present statute and to Senate Bill 130.

Constitutional attacks on laws regulating the sale and advertising of contraceptives have been made primarily on the ground that such regulations are a deprivation of due process guaranteed by state constitutions and the Fourteenth Amendment of the United States Constitution. Re-

regardless of the form of the attack, courts have sustained the constitutional validity of such restrictions as having a rational and reasonable relationship to the purpose of protecting public health, safety, morals and welfare. 113 A.L.R. 970. *State v. Arnold* (1933), 217 Wis. 340, 258 N.W. 843; 3 Am. Jur. 2d; *Advertising*, §6; *Baird v. Eisenstadt* (D. Mass. 1970), 310 F. Supp. 951.

The purpose of legislation which restricts the advertising and sale of contraceptive devices was well stated by a Massachusetts court many years ago in *Commonwealth v. Allison* (1917), 227 Mass. 57, 116 N.E. 265, 266:

“Manifestly . . . (the statutes) are designed to promote the public morals and in a broad sense the public health and safety. Their plain purpose is to protect purity, to preserve chastity, to encourage continence and self restraint, to defend the sanctity of the home, and thus to engender in the State and nation a virile and virtuous race of men and women.”

If we were to end a constitutional analysis of the law relating to contraceptive devices at this point, there would be no question as to the validity of either the present statute or the proposed legislation. However, recent legal developments in this area indicate that the law is somewhat in a state of flux with a portion of the very matter under discussion presently in litigation before the Supreme Court of the United States. *Baird v. Massachusetts*, 91 S.Ct. 921 (probable jurisdiction noted on March 2, 1971). Accordingly, I will attempt to highlight recent legal considerations leading up to the present posture of the law relating to contraceptive devices.

In 1965 the Supreme Court of the United States struck down a Connecticut statute which prohibited entirely the use of contraceptives on the ground that the statute was an intrusion upon the right of marital privacy. *Griswold v. State of Conn.* (1965), 381 U.S. 479, 85 S.Ct. 1678, 14 L.ed. 2d 510. It might be noted that the 1933 Wisconsin Legislature rejected the adoption of a similar law as discussed in *State v. Arnold*, *supra*.

The *Griswold* case has had its greatest impact on Massachusetts statutes relating to indecent articles. *Common-*

*wealth v. Baird* (1969), 247 N.E. 2d 574. In this case a lay person delivered a lecture to a group of unmarried persons. He used a display diagram of contraceptive devices for purposes of his lecture. At the conclusion of his lecture he gave a contraceptive device to a young, unmarried woman, whereupon he was prosecuted for both the exhibiting and disposing of contraceptive articles. On the basis of language in the *Griswold* case the Massachusetts court found that the statute prohibiting exhibition of contraceptive devices was unconstitutional as applied to the defendant whose display of contraceptive articles, the court said, was essential to graphic representation of the subject matter of his address. This ruling was grounded on the First Amendment right of free speech which the court held was not overcome by obscenity aspects of the situation in light of *Roth v. U.S.* (1957), 354 U.S. 476, 489, 77 S.Ct. 1303, 1311, 1 L.ed. 2d 1498.

The court did uphold the constitutionality of that portion of the statute which prohibited the giving away of a contraceptive device by a person other than a pharmacist or a physician.

The latter ruling was also made by a federal district court in *Baird v. Eisenstadt, supra*. This ruling then was reversed by the Court of Appeals in 429 F. 2d 1398 (1st Cir. 1970), on the ground that the statute was arbitrary and discriminatory in the absence of a showing by the state of demonstrated harm. As previously stated, this case is now before the Supreme Court of United States.

The real significance of the above cases appears to lie in the willingness of the judiciary to exercise its power to declare legislation as being constitutionally invalid. That power is not abused where legislation has no rational basis in protecting public health, safety, morals or some phase of public welfare. On the other hand, it is clear that a court overreaches its authority when it substitutes its judgment for that of the legislature as to what is socially or economically prudent. This proposition was recently expressed by the Supreme Court in *Dandridge v. Williams* (1970), 90 S.Ct. 1153, at page 1161:

“ . . . For this Court to approve the invalidation of state economic or social regulation as ‘over-reaching’ would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws ‘because they may be unwise, improvident, or out of harmony with a particular school of thought.’ *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488, 75 S.Ct. 461, 466, 99 L.ed. 563. That era long ago passed into history. *Ferguson v. Skrupa*, 372 U.S. 726, 83 S.Ct. 1028, 10 L.ed. 2d 93.”

In a case decided this year, the Supreme Court of the State of Wisconsin declared that a statute is presumed to be constitutional and that a *heavy* burden is placed on one who challenges its validity. The court further noted that its function is not to weigh evidence but only to determine whether there is any reasonable basis for the enactment, and further, that legislation is not to be struck down on the basis of belief that a statute is good, bad, wise or unwise. *Watch-making Examining Bd. v. Husar* (1971), 49 Wis. 2d 526, 182 N.W. 2d 257.

These recent pronouncements of both the Supreme Court of the United States and the Supreme Court of Wisconsin persuade me to conclude that both sec. 450.11, Stats., and that portion of Senate Bill 130 which embraces present law are probably constitutionally valid.

Senate Bill 130 proposes a significant change in present law by removing the prohibition against the sale of contraceptives to unmarried persons. Since this change does not involve any encroachment upon individual freedoms, it does not raise a constitutional issue.

You have asked me to comment on the effect of passage of Senate Bill 130 on the criminal statutes relating to adultery and fornication. While there are factual issues in this matter to be resolved by legislative determination, there is only one legal effect to be considered, i.e., whether the passage of Senate Bill 130 would be a tacit repudiation of secs. 944.15 and 944.16, Stats.

Since the Bill condones the sale of contraceptives to unmarried persons, it could be argued that the use of contra-

ceptives by unmarried persons also is condoned. Thus, the legal argument could be made that the criminal statutes relating to adultery and fornication are repealed by implication. However, repeals by implication are not looked upon with favor in the law. As was stated in *Kienbaum v. Habermy* (1956), 273 Wis. 413, 420, 78 N.W. 2d 888:

“. . . an earlier act will be considered to remain in force unless it is so manifestly inconsistent and repugnant to the later act that they cannot reasonably stand together.”

Any argument to the contrary could be foreclosed by the addition of a subsection to the effect that the section shall not supersede secs. 944.15 and 944.16, Stats. Apparent conflicts in the law are easily resolved when legislative intent is made clear.

RWW:WLJ

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*Usury Law—Retroactive Abrogation of Penalties—(Formal)*—Bill 277, S, relating to the retroactive abrogation of penalties under sec. 138.06, Stats., would be constitutional if enacted into law.

May 28, 1971.

THE HONORABLE, THE SENATE:

By Resolution 11, S, you have requested my opinion as to the constitutionality of Bill 277, S, which would create sec. 138.06 (6), Stats., to read as follows:

“138.06 (6) In connection with a sale of goods or services on credit or any forbearance arising therefrom prior to October 9, 1970, there shall be no cause of action under this section or allowance of penalties, forfeitures or other relief under this section for violation of s. 138.05, except as to those transactions on which an action has been reduced to a final judgment as of the effective date of this subsection (1971).”

If enacted into law Senate Bill 277 would have the effect of retroactively abrogating the civil and criminal penalties for usury in sec. 138.06, Stats., as applied to credit sales of goods or services prior to October 9, 1970, the date on which the Wisconsin Supreme Court handed down its decision in *State v. J. C. Penney Co.* (1970), 48 Wis. 2d 125, 179 N.W. 2d 641. Although the bill would prohibit the application of these penalty provisions as to certain past transactions, it would not affect the prohibition against usury nor would it affect any common law or other remedy for usury not set forth in sec. 138.06, Stats.

It is a general rule of statutory construction in Wisconsin that statutes are not to be construed as having a retroactive effect unless it shall plainly appear that it was so intended by the legislature, and not even then if such construction would impair vested or constitutional rights. *Department of Revenue v. Dziubek* (1970), 45 Wis. 2d 499, 173 N.W. 2d 642; *Mosing v. Hagen* (1967), 33 Wis. 2d 636, 141 N.W. 2d 194; *Pawlowski v. Eskofski* (1932), 209 Wis. 189, 244 N.W. 611; *State v. Atwood* (1860), 11 Wis. \*423; sec. 990.04, Stats. Since it is quite clear that Senate Bill 277 is intended to apply retroactively, the principal question is whether the bill would impair any vested or constitutional rights.

It is well-settled that there is no vested right in a penalty or forfeiture under the usury laws, but that parties to usurious contracts hold any right they may have to penalties subject to legislative modification or repeal so as to affect causes of action and defenses even in pending actions upon contracts previously made. *Ewell v. Dags* (1883), 108 U.S. 143, 27 L.ed. 682, 2 S.Ct. 408; *Petterson v. Berry* (9th Cir. 1903), 125 F. 902; *Tel Service Co. v. General Capital Corporation* (S.Ct. Fla. 1969), 227 So. 2d 667; *Davis v. General Motors Acceptance Corporation* (1964), 175 Neb. 865, 127 N.W. 2d 907; 45 Am. Jur. 2d, *Interest and Usury*, sec. 13, at 26; 16 C.J.S., *Constitutional Law*, sec. 254, at 1246; 82 C.J.S., *Statutes*, sec. 439 at 1014. Each of the above cases involved the retroactive repeal of statutory penalties permitting either the recovery of all interest or all interest and principal under usurious contracts. Similarly, under sec.

138.06, Stats., any contract charging in excess of the usury law maximum is rendered unenforceable as to all interest and the first \$2,000 of principal and the borrower may recover said amounts if paid. Sec. 138.06 (1) and (3), Stats.

As to the constitutionality of the retroactive repeal of such penalties, Justice Matthews in the leading case of *Ewell v. Daggs*, *supra*, at 108 U.S. 150, stated as follows:

“ The effect of the usury statute of Texas was to enable the party sued to resist a recovery against him of the interest which he had contracted to pay, and it was, in its nature, a penal statute inflicting upon the lender a loss and forfeiture to that extent. Such has been the general, if not uniform, construction placed upon such statutes. And it has been quite as generally decided that the repeal of such laws, without a saving clause, operated retrospectively, so as to cut off the defense for the future, even in actions upon contracts previously made. And such laws, operating with that effect, have been upheld, as against all objections on that ground that they deprived parties of vested rights, or impaired the obligation of contracts.’ ”

Although there is no Wisconsin law with respect to the retroactive abrogation of statutory penalties under the usury law, the retroactive repeal of statutes providing penalties has been upheld in numerous other areas of the law. See *Plankinton Packing Co. v. Wisconsin Tax Comm.* (1929), 198 Wis. 368, 224 N.W. 121; *Miller v. Chicago & N. W. R. Co.* (1907), 133 Wis. 183, 113 N.W. 384; *State v. Stone* (1877), 43 Wis. 481; *Rood v. The Chicago, Milwaukee and St. Paul Railway Co.* (1877), 43 Wis. 146. Thus, there exists ample precedent supporting the proposition that the usury penalties in sec. 138.06, Stats., may be retroactively abrogated.

Since Senate Bill 277 does not purport to prohibit any remedy other than those specifically contained in sec. 138.06, Stats., the borrower would still possess the common law right to recover any interest paid in excess of the maximum usury rate in an action for money had and received. *Fay v. Lovejoy* (1866), 20 Wis. \*403; *Wood v. Lake* (1860), 13 Wis. \*84. In addition, a usurious contract or portions of such a

contract may be determined by the Courts to be void as violative of the prohibition against usury in sec. 138.05, Stats. *Austin v. Burgess* (1874), 36 Wis. 186; *Morton v. Rutherford* (1864), 18 Wis. \*298. And see *Perma-Stone v. Merkel* (1949), 255 Wis. 565, 39 N.W. 2d 730; *Menominee River B. Co. v. Augustus Spies L. & C. Co.* (1912), 147 Wis. 559, 571, 132 N.W. 1118; *Harper v. Middle States Loan, Bldg. & Const. Co.* (1904), 55 W.Va. 149, 46 S.E. 817; *Baum v. Thoms* (1898), 150 Ind. 357, 50 N.E. 357. Thus, the proposed statute would not take away all remedies of the borrower and, therefore, would not violate Art. I, sec. 10, of the United States Constitution, relating to the impairment of contracts, or Art. I, sec. 9, of the Wisconsin Constitution, relating to the guarantee of a remedy for all injuries or wrongs. See *Forbes Pioneer Boat Line v. Board of Commissioners* (1922), 258 U.S. 338, 66 L.ed. 647, 42 S.Ct. 325; *State ex rel. Blockwitz v. Diehl* (1929), 198 Wis. 326, 223 N.W. 852; *Von Baumbach v. Bade* (1859), 9 Wis. \*559.

The only additional constitutional question is whether the proposed legislation involves an unreasonable classification. In light of the strong presumption in favor of the legislature's judgment in establishing reasonable classifications, it is my opinion that Senate Bill 277 would withstand challenge on this ground. See generally *State ex rel. Baer v. Milwaukee* (1967), 33 Wis. 2d 624, 148 N.W. 2d 21; *State ex rel. Ford Hopkins Co. v. Mayor* (1937), 226 Wis. 215, 276 N.W. 311; *State ex rel. Carnation M. Co. v. Emery* (1922), 178 Wis. 147, 160, 189 N.W. 564; *Kiley v. Chicago, M. & St. P. R. Co.* (1910), 142 Wis. 154, 125 N.W. 464. This conclusion is reenforced by the specific application of this rule in the area of usury. See *Country Motors v. Friendly Finance Corp.* (1961), 13 Wis. 2d 475, 485, 109 N.W. 2d 137; 45 Am. Jur. 2d, *Interest and Usury*, sec. 6, at page 20. As stated in the *Country Motors* case, *supra*, at 13 Wis. 2d 485 (citing *State v. Neveau* (1941), 237 Wis. 85, 99, 294 N.W. 796, 296 N.W. 622):

“ [T]he classification made by the legislature is presumed to be valid unless the court can say that no state of facts can reasonably be conceived that would sustain it. ”

It is, therefore, my legal opinion that the courts would find Senate Bill 277 constitutional if it were enacted into law. This opinion is provided pursuant to the request as set forth in Senate Resolution 11 which relates solely to the issue of constitutionality. This opinion does not address itself to the several important public policy questions raised by such proposed legislation.

RWW:JDJ

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*County Executive—Apportionment—(Informal)*—The term of office of a county executive, created pursuant to sec. 59.032 (1), Stats., begins on the first Monday in May following his election.

A county executive elected pursuant to sec. 59.032, Stats., possesses the power to veto an apportionment plan established by the county board of supervisors.

June 2, 1971.

A. W. PONATH

*Acting Corporation Counsel, Outagamie County*

You have requested my opinion on several questions relating to the office of county executive which may be created pursuant to sec. 59.032, Stats. You first inquire as to the date when the county executive takes office.

Section 59.032 (1), Stats., provides in part as follows:

“ \* \* \* ELECTION; TERM OF OFFICE. Counties having population of less than 500,000 may by resolution of the county board or by petition and referendum create the office of county executive. The county executive shall be elected the same as a county executive is elected under s. 59.031 (1) for a term of 4 years *commencing with the 1st spring election occurring at least 120 days after the creation of the office.* \* \* \*” (Emphasis added)

Section 59.031 (1), Stats., insofar as here applicable, provides as follows:

“ \* \* \* ELECTION AND TERM OF OFFICE. In each county having a population of 500,000 or more, a county executive shall be elected for a term of 4 years at the election to be held on the first Tuesday in April of each year in which county supervisors are elected, and *he shall take office on the first Monday in May following his election.* \* \* \* The first election under this section in a county presently (1959) having a population of 500,000 or more shall be held on the first Tuesday in April 1960. In any county which hereafter attains such population, such first election shall be held on the first Tuesday in April in the year following the official announcement of the federal census.” (Emphasis added)

The above quoted language of sec. 59.032 (1), Stats., resulted from an amendment of that subsection by ch. 214, Laws of 1969. Said enactment generally followed recommendations submitted by the Task Force on Local Government Finance and Organization, also known as the “Tarr Task Force,” created by ch. 22, Laws of 1967, for the general purpose of studying such matters as the organization and functions of local government in this State.

Government Organization Report No. 6, which contained an initial draft of a bill designed to provide for a county executive and county administrator, proposed amendments to sec. 59.032, Stats., to conform that statute with the statutory provisions relating to the Milwaukee county executive, i.e., sec. 59.031, Stats. However, the proposed bill draft did not include the language which I have underlined in the above quote from sec. 59.032 (1), Stats. The language underlined is that which I assume you find confusing.

Although the county executive elected in populace counties under the provisions of sec. 59.031 (1), Stats., takes office on the first Monday in May following his election, it might be argued that sec. 59.032 (1), Stats., provides that the term of a county executive in other counties commences with his election. In my opinion, however, the above quoted language of sec. 59.032 (1), clearly indicates an intent that the term of office of a county executive begins on the same day as designated in sec. 59.031 (1), i.e., the first Monday in May following his election.

The words "commencing with the 1st spring election occurring at least 120 days after the creation of the office," quite clearly appears to have been subsequently added to the original Tarr Task Force bill draft of sec. 59.032 (1), Stats., to indicate *when the first election* for county executive would be held after the creation of the office. They were not inserted to indicate the day on which the actual term began. The phrase performs the same function as the language in sec. 59.031 (1), Stats., referring to a first election in "April 1960" or in "April in the year following the official announcement of the federal census." However, the latter language would obviously be inappropriate for counties where the determination to have a county executive is not mandatory nor solely based on population. It is apparent, therefore, that the insertion of the subject language in sec. 59.032 (1) was only intended to set the time of the first election and not the beginning of the term itself.

You next inquire as to who is responsible for making a new apportionment of your county's supervisory districts based on the 1970 census.

The provisions of sec. 59.03 (2) (b) and (c), Stats., clearly indicate that your county board is responsible for devising an apportionment plan for county supervisory districts based on the 1970 federal census.

Section 59.03 (2) (c), Stats., provides as follows:

*"Apportioning supervisory districts.* Following each federal decennial census the secretary of state shall certify to each county board chairman the population of each town, village and city in the county. As soon as practicable but not more than one year after receiving the population certification, *the county board in each county shall apportion county supervisor districts* as provided in par. (b) and the chairman of the county board shall file a certified copy of the apportionment plan with the secretary of state." (Emphasis added)

Section 59.03 (2) (b), Stats., likewise provides, in part, as follows:

*“Creation of supervisory districts. The county board in each county shall establish and number supervisory districts, after a public hearing, in such a manner that each supervisor shall represent as nearly as practicable an equal number of persons, \* \* \*.”* (Emphasis added)

You finally inquire whether the county executive of a county possesses the power to veto an apportionment plan established by the county board. In my opinion, this question must be answered in the affirmative.

Section 59.02 (1), Stats., relating to the manner in which the powers of a county may be exercised, provides as follows:

“The powers of a county as a body corporate can only be exercised by the board thereof, or in pursuance of a resolution or ordinance adopted by it.”

In addition, however, sec. 59.032 (6), Stats., which is a statutory repetition of the constitutional veto powers of an elected county chief executive, provides that “Every resolution or ordinance passed by the county board shall, before it becomes effective, be presented to the county executive.” Under the provisions of that subsection, if the county executive vetoes such resolution or ordinance, the legislation is subject to the specific proceedings on veto therein set forth.

An elected county chief executive officer *with veto power* is authorized by Art. IV, secs. 23 and 23A, Wis. Const. The manner in which such officer exercises his approval or disapproval of county ordinances and resolutions is strikingly similar to that prescribed in Art. V, sec. 10, Wis. Const., for gubernatorial approval or veto of bills which have passed the State Legislature. Therefore, I feel it is logical to look to past judicial treatment of the Governor’s authority to veto legislative reapportionment bills as possibly determinative of the same issue in counties having an elected chief executive officer with veto power.

In *State ex rel. Reynolds v. Zimmerman* (1964), 22 Wis. 2d 544, 126 N.W. 2d 551, the Wisconsin Supreme Court removed any doubt as to the authority of the Governor to

participate in the apportionment of State legislative districts through the exercise of his power to approve or veto bills, by confirming that right even though Art. IV, sec. 3, Wis. Const., simply provides that after each federal census “\* \* \* the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants, \* \* \*.” (Emphasis added) The specific question before the court was whether “the legislature may effect a valid reapportionment of the state’s legislative districts by joint resolution, i.e., without the concurrence of the executive.”

In concluding that the legislature could not act unilaterally in such a matter, the court pointed out that the Governor is given an important role in the legislative process by our constitution, that apportionment is vital to the functioning of our government, and emphasized the fact that the constitutional requirements for laying out legislative districts all operate within “the overall constitutional standard of per capita equality of representation.” Further, while it was recognized that Art. IV, sec. 3, Wis. Const., provides that “the legislature” shall apportion the legislative districts and does not specify that this must be accomplished by a bill subject to veto of the Governor, the court stated that “It would be unreasonable to hold that the framers of the constitution intended to exclude from the reapportionment process the one institution guaranteed to represent the majority of the voting inhabitants of the state, the governor.” See 22 Wis. 2d 553-559.

Finally, in addition to the judicial guidance provided in the *Reynolds* case, *supra*, it appears that other cases may likewise have the effect of depriving the county board of the one distinction it conceivably might otherwise have argued would preclude a veto by the county executive, i.e., that the board in establishing the apportionment plan would act by verbal motion as distinguished from a resolution or ordinance. In *Green Bay v. Brauns* (1880), 50 Wis. 204, 6 N.W. 503, for instance, the court indicated that an oral motion adopted by the common council became a resolution or order of that body. It was later held in *Meade v. Dane*

*County* (1914), 155 Wis. 632, 145 N.W. 239, that while in some instances and for some purposes there are fundamental distinctions between an ordinance and a resolution, the words "ordinance or resolution," in the statute there being considered, "cover all exercise of power by the county board which either may lawfully be or is exercised in the form of a resolution." Therefore, all oral motions when adopted by the county board also become resolutions of that body. See also 9 OAG 573 (1920) and 44 OAG 205 (1955).

In light of the foregoing, it appears evident that a county executive elected pursuant to sec. 59.032, Stats., possesses the power to veto an apportionment plan established by his county board under the provisions of sec. 59.03 (2), Stats.

RWW:JCM

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*County Sanitarian—Environmental Sanitation—(Informal)*—County boards may direct that the county sanitarian and others employed in environmental sanitation work be supervised by a county committee other than the health committee.

June 3, 1971.

GEORGE H. HANDY, M.D.

*State Health Officer*

You advise that the Rock County Board of Supervisors established a Division of Environmental Protection and placed the direction of the Division's work under its Planning and Zoning Committee. You inquire whether the Board has the authority to place a county sanitarian and others employed to perform environmental sanitation work under the direction and supervision of a county committee other than the County Health Committee as sec. 141.06 (1) and (2), Stats., seems to require.

The controlling statute in this matter is sec. 59.15 (2), Stats., which reads in part:

“APPOINTIVE OFFICIALS, DEPUTY OFFICERS AND EMPLOYEES. (a) *The board has the powers set forth in this subsection and sub. (3) as to any office, board, commission, committee, position or employe in county service (other than elective offices included under sub. (1), supervisors and circuit judges) created under any statute, the salary or compensation for which is paid in whole or in part by the county, and the jurisdiction and duties of which lie within the county or any portion thereof and the powers conferred by this section shall be in addition to all other grants of power and shall be limited only by express language.*

“(b) *The board may abolish, create or re-establish any such office, board, commission, committee, position or employment, and may transfer the functions, duties, responsibilities and privileges to any other agency including a committee of the board except as to boards of trustees of county institutions. \* \* \**”

A committee or a position of employment “created under any statute” are established by resolution or ordinance of the county board. This method of creation is to be distinguished from the situation where a statute or a constitutional provision creates an office or a board.

Neither the employment of a county sanitarian nor the establishment of a county health committee is imposed by statute. Both must be effected by resolution or ordinance. Secs. 141.01 and 141.06, Stats. Thus, unlike the duties of a sheriff or judge, the duties of an ordinary committee or employe are subject to modification in accordance with the provisions of sec. 59.15 (2) (a), Stats. The county board, after all, is the repository of legislative power for a given jurisdiction. The committees through which it chooses to operate is a matter of internal housekeeping, particularly in the field of environmental protection.

Well before sec. 59.15, Stats., appeared in its present form, our Supreme Court declared that county boards have a wide or at least a reasonable discretion when acting within the powers conferred upon them by statute. *Kewaunee County v. Door County* (1933), 212 Wis. 518, 250 N.W. 438. Ap-

plying the indicated, and perhaps outmoded, test of reasonableness to the action of the Rock County Board of Supervisors in this matter, there appears to be no abuse of discretion. A zoning and planning committee created under sec. 59.97, Stats., is accorded extensive responsibilities in environmental control over such items as water drainage, sewers, refuse, waste and pollution to "promote public health, safety, convenience and general welfare." Moreover, if a county wishes to zone shorelands on navigable waters under sec. 59.971, Stats., the purposes are deemed to embrace all of ch. 144, Stats., relating to water, ice and sewage. Further, it might be noted that a county may employ any number of sanitarians under sec. 140.45, Stats., Accordingly, it appears that the action of the county board is reasonable and in keeping with the spirit as well as the letter of the law.

Based on the foregoing, I am of the opinion that the Rock County Board of Supervisors is not required to function through a county health committee in environmental sanitation activities.

RWW:WJ.J

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*Sanitation Systems—Plumbing—(Informal)*—Counties must secure approval of State Division of Health before engaging in private experimental sanitation systems. Citizen committees appointed by the county board may not engage in plumbing.

June 7, 1971.

GEORGE H. HANDY, M.D.

*State Health Officer*

You have requested my opinion on the legality of a number of provisions of Resolution No. 5-17 recently adopted by the Door County Board of Supervisors. You advise that the Resolution authorizes the Door County Health Commission and the Door County sanitarian to act as follows:

1. To permit the installation of and to supervise the operation of individual sanitary systems for experimental purposes, including mechanical aerobic systems and sand filtration systems.

2. To allow the depth of bedrock restrictions of the Division of Health relating to drain fields to be met by filling pursuant to the Door County sanitation ordinance.

Part of the statutory definition of plumbing under sec. 145.01 (1) (b), Stats., includes private sewage treatment and disposal systems. Power of the department to adopt rules with respect to plumbing is derived from sec. 145.02 (2), Stats., which reads:

“The department shall have general supervision of all such plumbing and shall after public hearing prescribe and publish and enforce minimum, reasonable standards therefor which shall be uniform so far as practicable. The state health officer or any employe designated by the department may act for the department in holding such public hearing.”

Pursuant to the foregoing rule-making authority, the State Board of Health (now the Division of Health) adopted a plumbing code in 1948. This code and its amendments have the effect of law in the form of minimum standards which are statewide in application. Sec. 145.13, Stats.

Pertinent provisions of the Code read as follows:

“H 62.015 Approval on experimental basis. Materials, fixtures, appurtenances, devices, appliances, system designs and layouts other than those set forth in this code may be approved by the division administrator for specific installations or for experimental use or for trial purposes.

“H 62.20 Private domestic sewage treatment and disposal systems. (1) Approvals and Limitations. (a) Allowable use. Septic tank and effluent absorption systems or other treatment tank and effluent disposal systems as may be approved by the department may be constructed when no public sewerage system is available to the property to be served or likely to become available within a reasonable time. All domestic wastes shall enter the septic or treatment tank unless

otherwise specifically exempted by the department or this section.

“\* \* \*

“(2) (d) 6. Filled area. A soil absorption system shall not be installed in a filled area unless written approval is received from the department.”

The foregoing provisions of the Code are in conflict with the previously enumerated provisions of Resolution No. 5-17. An initial question arises as to which provisions are controlling.

It has long been recognized in Wisconsin that the legislature may delegate to administrative agencies the authority to exercise such legislative power as is necessary to carry into effect the general legislative purpose to make public regulations interpreting the statute and directing the details of its execution. *Schmidt v. Department of Resource Development* (1967), 39 Wis. 2d 46, 158 N.W. 2d 306.

Specific delegation by the legislature to an administrative agency of the same power delegated to municipalities has been held to give the agency power to overrule or supersede action taken by the municipality. 2 Am. Jur. 2d, *Administrative Laws*, §210.

Section 145.02 (2), Stats., authorizes the department to prescribe, publish and enforce minimum, reasonable standards in private sewage disposal treatment. It has general supervisory power in accordance with the terms of the statute. Supervisory power means what it implies. If counties were free to do as they please, the supervisory power of the department as announced by the legislature would be a meaningless phrase. The department would be relegated to the status of a mere advisor rather than a supervisor.

On the other hand, county boards have only such legislative powers as are conferred upon them by statute, expressly or by clear implication. *Maier v. Racine County* (1957), 1 Wis. 2d 384, 84 N.W. 2d 76. *Sparlding v. Wood County* (1935), 218 Wis. 224, 260 N.W. 473.

Under sec. 59.07 (51), Stats., a county may adopt building and sanitary codes and make necessary rules and regulations in relation thereto. Nothing in the statutes prohibits experimental use of mechanical disposal units or the use of fill for soil absorption purposes as proposed by the county resolution in this matter. Nor do the statutes authorize these activities. In view of such silence, and in accord with the limited prescription of a county's general authority, I must conclude that the policy established by the plumbing code and the department supersedes the resolution of the county board in these matters.

It has been asserted that Resolution No. 5-17 is valid because it sets higher standards than those prescribed by the department. This argument assumes that mechanical systems contemplated by the board are superior to methods approved by the department. It appears to me that the factual assumption underlying this contention can be answered only by experts. However, from the standpoint of pure logic, the argument is self-defeating. Removal of restrictions cannot be equated with an increase of them. Moreover, the Resolution itself suggests that it was proposed to avoid rather than stiffen regulations recently adopted by the department.

The pertinent portion of the Resolution reads:

"Whereas, these new state regulations will restrict new construction, prevent increases in our tax base, and result in the pollution of our waters through the increased use of holding tanks."

There is no record before me upon which to base a ruling with respect to the reasonableness of the department's rules. However, the governmental structure in this matter indicates that rules requiring departmental clearance for the use of mechanical disposal units in Door County and the use of filling for drain fields are reasonable requirements within the purview of sec. 145.02, Stats. To hold otherwise would strip the department of mandated supervisory authority. Unilateral decisions by a county board with respect to this situation are not contemplated by the statutes.

Agency rules which go beyond what the legislature has authorized and which are out of harmony with the confer-

ring statute are, of course, void. *American Brass Company v. State Board of Health* (1944), 245 Wis. 440 15 N.W. 2d 27. But the rules promulgated by the department are valid from the standpoint of specific authority. Sec. 145.02 (2), Stats. Moreover, those rules appear reasonable as to the overall purpose and in harmony with the general regulatory scheme in the matter of sewage disposal control as evidenced by other statutes. Secs. 145.01 (1) (b), 145.02 (1), 145.04 (1), 145.13, Stats., and ch. 144, relating to control in other sewage matters by the Department of Natural Resources.

Before leaving the subject of mechanical systems, it should be noted that the department has approved of one such system, Yeoman's Cavillette, and that it presently is testing the Cromaglass product. Further, septic systems have been individually approved where porous fill assures adequate absorption after on-the-site inspection.

You have also requested me to comment as to the legality of a provision of Door County Resolution No. 5-17, which authorizes the appointment of a citizens' committee to establish standards for experimental sanitation systems and to supervise the installations and testing of such systems.

Again it appears that the Resolution overreaches county authority in this matter. The overall purpose of ch. 145, Stats., is to insure the people of the State of a safe water supply. 26 OAG 187. Generally, only persons licensed by the department may engage in the type of work known as plumbing. Sec. 145.06, Stats. There are a number of exceptions and exemptions to the statute, but the only one that approaches supplying legal authority for this proposal of the Resolution is sec. 145.05, Stats. This statute provides that a county may hire a person other than a plumber to be a plumbing supervisor. A fair reading of this statute against the backdrop of policy and the general rule contained in sec. 145.06 would indicate that it does not give counties blanket authority to appoint citizens' committees to engage in plumbing.

"A reasonable doubt as to the existence of a particular power must be resolved against the board." 21 ALR 717, 720.

I have been informed that Door County Resolution No. 5-17 resulted from the action of some 1500 residents. Although I am of the opinion that the Resolution transcends the prescription of county board authority, I would be remiss in failing to note that an alert, enlightened, responsible citizenry provides a key in the matter of preventing Door County and, indeed, the State itself, from becoming an island of contamination.

RWW:WLJ

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*Residence—Voting Absentee—(Informal)—Voter residency and absentee voting discussed.*

June 7, 1971.

ROBERT C. ZIMMERMAN

*Secretary of State*

You advise that each election your office receives inquiries from local election officials whose voter registration lists contain names of people who have apparently moved from the election district to another state many years before, yet through the years have continued to vote by absentee ballot, claiming to reside at their last previous address within the election district. This address is normally either the voter's previous home, which he sold upon leaving the municipality, or premises which he rented and, in both instances, is now owned and occupied by another party. Since, in either event, the local address is usually one to which the voter could not reasonably be expected to return, you request some guidelines to better enable you to assist election officials handling such situations.

Residency is, of course, a basic qualification which must be established before any person is entitled to vote. Article III, sec. 1, Wis. Const., provides, in part, that a qualified elector is one who "shall have resided" in this State and the election district where he offers to vote for a minimum period of time. See also sec. 6.02, Stats. Rules or standards

governing residence as a qualification for voting have been part of the statutes for many years. The current provisions are found in sec. 6.10, Stats. The following subsections of that statute appear most material here:

“(1) The residence of a person is the place where his habitation is fixed, *without any present intent to move*, and to which, when absent, he intends to return.

“(2) When a married man’s family resides at one place and his business is conducted at another place, the former establishes the residence. If the family place is *temporary or for transient purposes*, it is not the residence.

“\* \* \*

“(5) A person shall not lose his residence when he leaves his home and goes into another state or county, town, village or ward of this state *for temporary purposes* with an intent to return.

“\* \* \*

“(8) No person gains a residence in any ward, town or village of this state while there *for temporary purposes* only.

“\* \* \*

“(10) If a person moves to another state *with an intent to make his permanent residence there*, or, if while there he exercises his right as a citizen of that state by voting, he loses his Wisconsin residence.

“(11) Neither an intent to acquire a new residence without removal, nor a removal without intent, shall affect residence.” (Emphasis added)

Before further discussing the above rules or standards as they may apply to situations such as you describe, I wish to emphasize the fact that in order to insure that an ultimate determination on a question of voter qualification is effective, it must be reached by procedures in accord with the statutes governing elections. In the present instance, the specific question of voter residency will probably most often arise under secs. 6.48 (challenging registration), 6.50 (re-

vision of registry) or 6.93 (challenging the absent elector), Stats. All election officials should become familiar with these procedures.

Section 6.48 (1), Stats., sets forth the procedure whereby the registration of electors, in municipalities other than cities of the first class, may be challenged. Under this section, when any elector of the municipality submits an affidavit to the clerk challenging another elector's qualifications to vote and the reasons therefore, the clerk is to follow the procedure set forth in the statute to determine whether the challenged voter is or is not qualified. Section 6.48 (1) (b), Stats., specifically provides, in part, that:

“. . . If the clerk determines the person is not qualified, the name shall be stricken from the registry and the proper precinct officials notified.”

Further opportunity to resolve a question of voter residence arises in the course of revision of the voter registry. Section 6.50 (2) (c), Stats., which applies to municipalities of 500,000 or under, authorizes the municipal clerk to cancel a registration upon receipt of reliable information that a registered elector has moved from the municipality, where the elector is notified by the clerk and thereafter fails to apply for continuation of registration within 30 days. The prompt use of this statutory authorization may serve to minimize the problem situations you describe.

Finally, sec. 6.93, Stats., provides that the vote of any absent elector may be challenged for cause the same as if the ballot had been voted in person. Furthermore, under this section, the inspectors of elections are granted authority to *hear and determine the legality of the ballot*. Thus, the statute permits the challenge of a person's absentee ballot with respect to his qualifications to vote under the laws of this State, just as sec. 6.92, Stats., allows the challenge of other electors in person. It has been held that both of these statutes treat considerations different than do the provisions of sec. 9.01 (1) (a), Stats., previously contained in sec. 6.66 (1), 1963 Stats., which authorize the board of canvassers upon a recount to consider “defect, irregularity or illegality”

in the conduct of the election and make necessary correction of the count of the ballots. *Olson v. Lindberg* (1957), 2 Wis. 2d 229, 85 N.W. 2d 775.

Normally, of course, the voter is not present in person to cast his ballot as would otherwise be the case under sec. 6.92 Stats., and pertinent inquiries cannot be made of him by the question and answer method as herein contemplated. However, the absentee voter's certificate-affidavit presumably constitutes his constructive appearance at the polls and specific attention is drawn to such appearance when the election inspectors announce the absent elector's name upon opening the carrier envelope containing his ballot. Sec. 6.88 (3) (a), Stats. The apparent reason for such announcement is for the very purpose of allowing challenge. Thereafter, the envelope containing the ballot may not be opened until the inspectors find that the person offering to so vote is a "qualified elector of the precinct," and if found not so qualified the vote shall not be accepted or counted, but must be rejected. (See procedure for handling rejected absentee ballots outlined in sec. 6.88 (3) (b), Stats.) On the other hand, should the inspectors decide to receive a challenged absentee ballot, they must first properly identify the ballot by its tally sheet or voting list number as required by sec. 6.95, Stats.

Now to the basic legal principles governing such a decision relating to the absentee voters residence. The Wisconsin Statutes regulating absentee voting are to be liberally construed in aid of the right of suffrage, and one should look to the whole and every part of the election laws, the intent of the entire plan, the reasons and spirit for their adoption, and try to give effect to every portion thereof. *Sommerfeld v. Board of Canvassers of City of St. Francis* (1955), 269 Wis. 299, 69 N.W. 2d 235. *Petition of Anderson* (1961), 12 Wis. 2d 530, 107 N.W. 2d 496. However, the legislature may determine that fraud and violation of the sanctity of the ballot can much more readily be perpetrated by use of an absentee ballot than under the safeguards provided at a regular polling place. *Gradinjan v. Boho* (1966), 29 Wis. 2d 674, 684, 139 N.W. 2d 557. The procedures for challenge,

etc., described in the above statutes appear to be designed, at least in part, with this in mind.

Two fairly recent and exhaustive annotations dealing with both the validity of absentee voters' laws (97 A.L.R. 2d 218) and the construction and effect of absentee voters' laws (97 A.L.R. 2d 257) are of some assistance in considering the matter of the challenge of absentee ballots. The following citation, appearing in 94 A.L.R. 2d at p. 275, is of particular note here:

"§17. Necessity of legal residence in voting district.

"A would-be absentee voter is disqualified to cast his vote in a district of which he is not a resident.

"Thus, in *Tuthill v. Rendelman* (1944) 387 Ill 321, 56 NE 2d 375, it was held that an absentee ballot, challenged at the time it was sought to be cast, on the ground that the voter no longer lived in the precinct, it appearing that she made her home with her son part of the time and with her daughter part of the time, both of whom lived out of the precinct, had been properly excluded by the judges of election. The court said that where a vote is challenged, it appearing that the clerk of elections objected to it in the particular case, the judges of election have power to determine the legality of the ballot and whether it should be cast. . . ."

See also 29 C.J.S., *Elections*, §210 (1), at pp. 579-580.

The actual determination by the appropriate election official as to the residence of the absentee elector must, of course, be consistent with the standards set forth in sec. 6.10, Stats. Case law provides us the perspective necessary to better understand and more accurately apply these standards.

Very generally speaking, the residence of a person is said to be determined by a combination of two elements, intent and physical presence. Apparently, the above quoted provisions of sec. 6.10, Stats., merely state or attempt to apply this common law concept. See *Miller v. Sovereign Camp W.O.W.* (1909), 140 Wis. 505, 509, 122 N.W. 1126; *In re Burke* (1938), 229 Wis. 545, 561, 282 N.W. 598. Although

physical presence is essential to the establishment of a residence in the first instance, continuous physical presence is not essential to maintain that residence.

Our court has also referred to the general rule that a man must have a habitation or domicile somewhere and that he can have but one at the same time for one and the same purpose and that in order to lose one, he must acquire another. *Miller case, supra*; *Seibold v. Wahl* (1916), 164 Wis. 82, 85, 159 N.W. 546. Thus, when a person has once acquired or established a residence, it is generally held that such residence is presumed to continue until a new one is established, and the law of this State places the burden on the person who asserts the nonresidence of a voter to prove such assertion. *In re Burke, supra*, p. 556; 29 C.J.S., *Elections*, §21, p. 77.

As a practical matter, it must be accepted at the outset that there is no absolute criterion or guideline which will at once determine the question of residence in every case. Each case depends on its particular facts. 25 Am. Jur. 2d, *Elections*, §66, p. 759; *Seibold case, supra*, p. 88. However, the general situation you describe does raise a question whether the absence of the voter from the place he claims as his residence is temporary only or whether he has established a reasonably permanent residence elsewhere. Although the answer to such question is said to depend primarily on the intention of the person involved, intention, in turn, is evidenced not only by the voter's statements regarding his intent but also by his conduct. 29 C.J.S., *Elections*, §19, p. 71. It is, in fact, well established in Wisconsin that, although intention is the primary element in determining the status of an elector, his own statement as to any such mental resolution will not of itself control when not in harmony with the physical facts and circumstances of the case. *Seibold case, supra*, p. 84; *In re Burke, supra*, p. 561. Thus, it is said that the best evidence of intention to establish a voting residence ordinarily comes from a person's acts rather than his declarations. *In re Erickson*, 18 N.J. Misc. 5, 10 A. 2d 142. As stated in 25 Am. Jur. 2d, *Elections*, §67, p. 760:

"Although intention alone is insufficient to establish a residence for voting purposes, it is an important factor to

be considered in determining whether or not a residence has been acquired. In fact, a good-faith intent of a voter to make a place his home for all purposes is an essential element entering into the determination of the question of residence. The intention to be considered is that which is manifested by the voter's acts. If there exists a discrepancy between declarations of intention and acts, the declarations yield to the conclusion to be drawn from the acts. If the intention and acts of a party are in accord with the fact of residence in a particular place, there can be no doubt of the fact that the party is a resident of such place."

It is possible for a person to be temporarily absent from his place of residence even though that absence continues one or two years, or more. Furthermore, the circumstances attending his absence may be completely consistent with and actually explain why he does not maintain any particular physical location within the election district during such absence. For example, where an elector rents an apartment within the election district, the fact that he chooses not to spend the sum of money necessary to "hold" said apartment during a short absence would not, in and of itself, justify a determination that he had thereby lost his residence in his election district. Therefore, the fact that a voter can point to no present address within that election district as the specific place to which he intends to return will not necessarily preclude him from claiming his residence in that district. See *Langhammer v. Munter*, 80 Md. 518, 31 A. 300. On the other hand, long continued habitation is an important circumstance in determining the question of domicile, in the absence of other evidence showing intention, and many other facts may be shown to further indicate the establishment of a new domicile—the exercise of a franchise; the payment of income taxes; *the place of a man's dwelling house*; the place of his business, trade or occupation, and others. *Will of Eaton* (1925), 186 Wis. 124, 202 N.W. 309.

The previously quoted subsections of sec. 6.10, Stats., place primary emphasis on whether the place of habitation has permanence, i.e., is fixed without any *present intent* to move, as distinguished from residence merely for temporary

purposes. In 25 Am. Jur. 2d, *Elections*, §68, at pp. 760-761, the concept of permanence is discussed as follows:

"The word 'residence' for political or voting purposes means a place of fixed present domicil. The term carries with it an element of permanence. . . . However, it is not necessary that there be an intention to remain permanently at the chosen domicil; it is sufficient that the place is for the time being the home of the voter to the exclusion of other places. . . ."

And as further stated in 25 Am. Jur. 2d, *Elections*, §69, at p. 761:

". . . Thus, the fact that a person intends to remove at a future time does not of itself defeat his residence before he actually does remove. . . ."

Likewise, Chief Justice Winslow in his concurring opinion in the *Seibold* case, *supra*, at p. 87, notes:

". . . To acquire a voting residence in an election district one must have made it his fixed habitation (1) for no merely temporary purpose, (2) without present intention of removal elsewhere or return to his former abode for residence purposes, and (3) with intention of returning to such habitation whenever absent therefrom. *The purpose is not necessarily temporary because it is expected to end at some time more or less remote in the future. Practically all human purposes have this quality. . . .*" (Emphasis added)

Similar statements may be found in other cases. Thus, in *Barrett v. Parks* 352 Mo. 974, 180 S.W. 2d 665, the court held that, as regards the right to vote, a statute providing that the place where the family shall "permanently reside" shall be deemed a place of residence does not mean that such residence may never be changed but that there exists *no present intention* to change it; so too, *Everman v. Thomas*, 303 Ky. 156, 197 S.W. 2d 58 and *Matney v. Elswick*, 242 Ky. 183, 45 S.W. 2d 1046, indicate that a person who takes up a permanent abode in a locality becomes a resident therein for voting although he may intend to return to his former home at some indefinite time in the future or there is a mere possibility that he may return to his former home. And, a

change of voting residence has been held to occur where a voter, because of employment, moves to another county, and establishes his home there, even though he intends, on his retirement, to return to the county in which he formerly resided and still owns a house there. *Harris v. Textor*, 235 Ark. 497, 361 S.W. 2d 75.

Based on the foregoing, then, under circumstances such as you describe, it can be generally stated that a vague general determination to return to Wisconsin in the distant future, may very well be insufficient to support a contention that residency elsewhere is only for temporary purposes. However, as pointed out previously, each determination of residency rests on its own particular facts or circumstances and must be individually judged. Such guidelines as exist must, therefore, be applied in this context.

RWW:JCM

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*Emergency Public Service Announcements—Deaf—(Formal)*—Statute resulting from Assembly Bill 43 (1971) which would require every emergency public service announcement broadcast on television to be also presented in written form would be unenforceable to the extent it conflicts with federal law.

June 11, 1971.

THE HONORABLE, THE SENATE

You have requested my opinion as to the constitutionality of Assembly Bill 43 (1971), as amended by Assembly Amendment 1, which would create sec. 134.47, Stats., and provide:

“EMERGENCY PUBLIC SERVICE ANNOUNCEMENTS. Emergency public service announcements broadcast on television stations in this state shall be visually as well as verbally presented so that essential information concerning the emergency may be seen and read by the deaf.”

Assembly Amendment 1 would require such information to be presented in written as well as oral form.

The statute would provide no specific penalty for non-compliance and, as currently numbered, would be included in the chapter devoted to miscellaneous trade regulations, which chapter has no omnibus penalty provision.

It is evident that one of the purposes of the statute would be to enable deaf persons to see in written form the message contained in any emergency public service announcements made via the television media. The proposed statute does not define "emergency public service announcements" or require that they be carried. Nor is the statute concerned with the content of the announcement in terms of censorship, but deals solely with the form of presentation.

I am of the opinion that a resulting statute would, at most, have the effect of salutary advice and could not be constitutionally enforced.

Television is interstate commerce and as such is regulated by Congress under the commerce clause of the United States Constitution.

Congress, by enactment of the Communications Act of 1934 and subsequent legislation, has substantially preempted the field of regulation where television is concerned. Only small areas are available for state and local regulation in the exercise of the police power, zoning being one area.

15 C.J.S., *Commerce*, §81, 684, 685.

*Kroeger v. Stahl* (D.C. N.J. 1957), 148 F. Supp. 403, affirmed, C.A., 248 F. 2d 121.

In *Allen B. Dumont Laboratories v. Carroll*, D.C. Pa. 1949, 86 F. Supp. 813, affirmed, 184 F. 2d 153, 155, cert.den. 71 S.Ct. 490, 340 U.S. 929, 95 L.ed. 670, it was held that a state had no power of censorship over form or content of televised programs. The Court of Appeals, Third Circuit, held that the federal acts and regulations show an intention of Congress "to occupy the television broadcasting field in its entirety."

Subsequently the United States Supreme Court stated that there could be limited state regulation of certain non-technical areas.

In *Head v. New Mexico Board of Examiners in Optometry* (N.M. 1963), 83 S.Ct. 1759, 374 U.S. 424, 10 L.ed. 2d 983, state legislation proscribing price advertising of eyeglasses by any means was held applicable to radio broadcasts. The court said that, in determining whether a state's jurisdiction to regulate radio advertising has been preempted by federal law, the question must be resolved as to whether the Congress intended to make its jurisdiction exclusive, and that federal preemption of an area does not exist where national uniformity is not required. In the *Head* case the court found no conflicting federal regulations dealing with price advertising.

I am of the opinion that with respect to the broadcasting or televising of public emergency announcements the Congress intended to make its jurisdiction substantially exclusive, at least where the national interests are concerned.

Title 47 CFR §73, Subpart E, relates to television broadcast stations. 47 CFR 73.670 (3) requires a log to be kept of public service announcements as defined in Note 4 at the end of that section, and the log time for this type of service is a factor which the Federal Communications Commission considers in determining whether the station shall continue to be licensed. 47 CFR 73.675 provides for operation of commercial television stations during emergencies. Such powers are generally permissive rather than mandatory. Examples listed are announcements concerning tornadoes, hurricanes, floods, heavy snows, power failures, civil disorders, information as to school closings, changes in school bus operation, and point-to-point messages in aid of rescue operations. Subparagraph (c) provides in part that modes of operation shall be confined to those specified in license documents.

47 U.S.C.A. §606 provides that the President of the United States shall have special powers in periods of wars or national emergency. There are a number of Executive Orders now outstanding which relate to this provision and emergency preparedness functions.

Federal regulations 47 CFR 73.901 to 73.981 pertain to a national emergency action notification system and emergency broadcast system with detailed provisions as to manner of operation and broadcasts during periods of emergency.

Other federal regulations govern the use of radio for emergency purposes by various private and public agencies. 47 CFR Part 89.

47 CFR 73.597 provides for operation of noncommercial educational FM broadcast stations during various emergencies; 47 CFR 73.298 grants permissive authority to commercial FM radio stations; and 47 CFR 73.98 grants standard radio broadcast stations permissive operation powers during emergencies.

Under the federal warning system, nationwide hookups may be employed, the broadcast may originate in another state, the video portion of television transmission may be blacked out, and the President himself may be giving the emergency announcement live.

A state statute requiring the essential information contained in every emergency public service announcement on television stations to be visually as well as verbally presented, or to be presented in written form, would be unenforceable and void to the extent it conflicts with federal law relating to regulation of television.

RWW:RJV

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*Replacement Housing—Transportation—(Informal)*—  
The Secretary of the Department of Transportation, while acting as agent for airport sponsors, pursuant to sec. 114.32, Stats., can give the required assurance to the Federal Aviation Administration and provide replacement housing without violating Art. VIII, sec. 10, Wis. Const.

June 11, 1971.

NORMAN M. CLAPP, *Secretary*  
*Department of Transportation*

You state that, while acting as agent for airport sponsors, pursuant to the provisions of sec. 114.32, Stats., you must submit an application for Federal aid for the sponsor. You further state that you must submit with said application an assurance that "replacement housing will be available or provided (built if necessary) for displaced persons." You also informed me that the State shares in airport project costs by making grants to a sponsor which are equal to the sponsor's cost or a percentage thereof.

You, accordingly, request my opinion as to whether the State grant loses its identity as soon as it is placed in the sponsor's airport project account, and thus, as agent for the sponsor you may give the above assurance and so provide replacement housing from project funds without violating Art. VIII, sec. 10, Wis. Const.

The Wisconsin Supreme Court in *State ex rel. Martin v. Giessel* (1948), 252 Wis. 363, 31 N.W. 2d 626, held that portion of the Veterans' Housing Act enacted by ch. 412, Laws of 1947, so far as appropriating funds from the State general fund to be allocated to local housing authorities to carry a percentage of the cost of land, improvements and dwelling units of any veterans' housing project constructed by such local authorities, is unconstitutional as attempting to authorize the State to be a party to a work of internal improvement, in contravention of the prohibition in Art. VIII, sec. 10, Wis. Const. Section 10 was amended in 1949 so as to permit appropriations for the acquisition, improvement or construction of veterans' housing and now reads, in part, as follows:

" . . . The state shall never contract any debt for works of internal improvement, or be a party in carrying on such works; but whenever grants of land or other property shall have been made to the state, especially dedicated by the grant to particular works of internal improvement, the state may carry on such particular works and shall devote thereto the avails of such grants, and may pledge or appropriate the revenues derived from such works in aid of their completion. Provided, that the state may appropriate money in the treasury or to be thereafter raised by taxation for the

construction or improvement of public highways or the development, improvement and construction of airports or other aeronautical projects or the acquisition, improvement or construction of veterans' housing or the improvement of port facilities. . . ."

In an earlier opinion, the then attorney general stated:

"We are of the opinion that subsec. (3) is in large part unconstitutional. The state cannot provide flood control through the building of levies or other such works, nor may it engage in the removal of buildings as an incident to such work. Such activities constitute works of internal improvement in which the state cannot engage. Art. VIII, sec. 10, Wisconsin constitution: *State ex rel. Jones v. Froehlich*, 115 Wis. 32. For the same reason the state could not restore, reconstruct or repair residential properties, business establishments, public utility facilities, etc. And since the state may not engage in the erection of dikes, dams, the cleaning and enlarging of channels, etc., the committee may make no expenditures related to such work or to the other works mentioned." 32 OAG 420, 421.

The court in *State ex rel. La Follette v. Reuter* (1967), 33 Wis. 2d 384, 401, 147 N.W. 2d 304, reaffirmed the definition of "works of internal improvement" as adopted earlier:

" " "Works of internal improvement,' as used in the constitution, means, not merely the construction or improvement of channels of trade and commerce, but any kind of public works, except those used by and for the state in performance of its governmental functions such as a state capitol, state university, penitentiaries, reformatories, asylums, quarantine buildings, and the like, for the purposes of education, the prevention of crime, charity, the preservation of public health, furnishing accommodations for the transaction of public business by state officers, and other like recognized functions of state government." ' "

In *State ex rel. Warren v. Reuter* (1969), 44 Wis. 2d 201, 222-223, 170 N.W. 2d 790, the court stated:

" . . . Sixty-seven years ago in *State ex rel. Jones v. Froehlich* (1902), 115 Wis. 32, 38, 91 N.W. 115, this court defined

'internal improvement' in the concept of that day as "those things which ordinarily might, in human experience, be expected to be undertaken for profit or benefit to the property interests of private promoters, as distinguished from those other things which primarily and preponderantly merely facilitate the essential functions of government." . . ."

However, I must note that the prohibition contained in Art. VIII, sec. 10, Wis. Const., applies only to the State and not to its subdivisions. The court in *Redevelopment Authority v. Canepa* (1959), 7 Wis. 2d 643, 651, 97 N.W. 2d 695, stated:

" . . . It has been held from almost the beginning of the state that while the state is subject to the prohibitions limiting the power of the state to contract a debt and prohibiting the carrying on of works of internal improvement, governmental units created by the state and carrying on their public functions in particular localities or geographical subdivisions of the state are not so subject. . . ."

Section 114.35 (1), Stats., authorizes the Secretary of Transportation to use the amount provided by the State pursuant to sec. 20.935 (1) (h), Stats., to assist sponsors in matching Federal aid with respect to specific airport projects. In an earlier opinion it was stated:

" . . . The quoted section of the statutes evidences a clear intention that the fund appropriated to the state aeronautics commission shall be allotted by the state to the sponsor so that these funds, together with those raised by the sponsor, will constitute the 'sponsor's funds' for the purpose of establishing the amount which shall be matched by the federal grant. . . ." 37 OAG 148, 150.

Article VIII, sec. 10, Wis. Const., provides, *inter alia*, that the "state shall never contract any debt for works of internal improvement, or be a party in carrying on such works . . ." The word "party" has been defined as:

"A person concerned or having or taking part in any affair, matter, transaction, or proceeding, considered individually." *Black's Law Dictionary* (1968) Revised Fourth Edition, at p. 1278.

“An ‘agreement’ pursuant to which an obligation is imposed or a right may arise is a compact between parties who are thereby subjected to the obligation or to whom the contemplated right is thereby secured, and an agent or negotiator, acting under authority is not a ‘party’ thereto.” *People v. Mills* (1939), 290 N.Y.S. 48, 52, 160 Misc. 730.

Section 114.32 (5), Stats., provides that no county, city, village or town, shall submit a project application under the provisions of the Federal act unless the application has been approved by the Secretary of Transportation. It further provides that no such municipality shall directly accept any Federal funds but shall designate the Secretary of Transportation as its agent. Section 114.33, Stats., provides that any such municipality desiring to sponsor an airport project with Federal aid and State aid, or State aid alone, may initiate such a project by filing a petition with the Secretary of Transportation. Section 114.01, Stats., directs the Division of Aeronautics to develop a comprehensive State system of airports. The statute further provides that in selecting the general location of airports due regard shall be given to aeronautical necessity as evidenced by population, commerce and industry and other pertinent factors. The apparent legislative intent of the above quoted section designating the Secretary to act as agent for municipalities was to insure the establishment of some system and uniformity in airport development in this State.

“ . . . Pursuant to the grant of authority vested in him by the principal, the agent is the representative of the principal and acts for, in the place of, and instead of, the principal.” 3 Am. Jur. 2d, *Agency*, §1, p. 419.

Section 114.32, Stats., reads, in part, as follows:

“ \* \* \*

“(3) CONTRACTS. All contracts for the acquisition, construction, improvement, maintenance and operation of airports and other aeronautical facilities, made by the secretary of transportation either as the agent of this state or as the agent of any municipality, shall be made pursuant to the laws of this state governing the making of like contracts;

provided, however, that where the acquisition, construction, improvement, maintenance and operation of any airport or landing strip and other aeronautical facilities is financed or partially financed with federal moneys, the secretary of transportation, as agent of the state or of any municipality thereof, may let contracts in the manner prescribed by the federal authorities, acting under the laws prescribed by the federal authorities, acting under the laws of the United States, and any rules or regulations made thereunder, notwithstanding any other state law to the contrary.

“(4) DISPOSITION OF FEDERAL FUNDS. All moneys accepted for disbursement by the secretary of transportation pursuant to this section shall be deposited in the state treasury, and, unless otherwise prescribed by the authority from which the money is received, kept in separate funds, designated according to the purpose for which the moneys were made available, and held by the state in trust for such purposes. All such moneys are appropriated for the purposes for which the same were made available to be expended in accordance with federal laws and regulations and with ch. 114. The secretary of transportation, whether acting for this state or as the agent of any of its municipalities, or when requested by the U.S. government or any agency or department thereof, may disburse such moneys for the designated purposes, but this shall not preclude any other authorized method of disbursement.

“\* \* \*”

I further note that sec. 114.33 (5), Stats., provides that the sponsor's share of the cost of the project shall be deposited in the State treasury promptly upon request and held in trust for the purposes of the project.

In the absence of any agency agreement, I would be forced to conclude that you could not give the required assurance to the Federal Aviation Administration and provide replacement housing without violating Art. VIII, sec. 10, Wis. Const. However, in view of the fact that political subdivisions of the State are not subject to this constitutional prohibition, and that you are required by statute to act as agent

on behalf of the airport sponsor for the sole purpose of insuring some system and uniformity in airport development in this State, the State does not become a party thereto in a legal sense, and thus, you, as agent in behalf of the sponsor, may provide the required assurance to the Federal Aviation Administration and provide replacement housing without violating Art. VIII, sec. 10, Wis. Const. Furthermore, the State funds are a grant to the airport sponsor and become the sponsor's funds. The fact that these funds, together with those added by the community and contributed by the Federal Government, shall be placed and held in trust in the State treasury for purposes of the project does not make them State funds.

RWW:GBS

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*Vocational, Technical and Adult Education—Student Dormitories—(Informal)*—Vocational, Technical and Adult Education District has authority to purchase buildings for administration purposes or student dormitory housing, and in doing so would not violate constitutional ban on works of internal improvement.

June 14, 1971.

EUGENE I. LEHRMANN

*Director, Board of Vocational, Technical  
and Adult Education*

You have requested an opinion on the question whether a Vocational, Technical and Adult Education District has the authority to borrow money to purchase a building which could be used for administrative offices and student dormitory housing.

It is my opinion that a district has the authority to borrow money for the purposes set forth in the question.

Section 38.155 (7), Stats., provides:

“The district board may borrow money and levy taxes to be used for the purchase or construction of buildings and for additions, enlargements and improvements to buildings and for the acquisition of sites and equipment. In financing activities under this subsection, the district may issue its bonds or promissory notes under ch. 67 to pay the cost thereof.”

Section 38.155 (10), Stats., provides, in part:

“The district board may purchase machinery, tools and supplies, and purchase or lease suitable grounds or buildings for the use of such schools; rent to others any portion of such buildings and grounds not presently needed for school purposes; and erect, improve or enlarge buildings for the use of said schools. \* \* \* All conveyances, leases and contracts shall be in the name of the district.”

When these two sections of ch. 38, Stats., are considered together, it is clear that the district has been given the authority to borrow money for the purpose of building or acquiring buildings or grounds for the purposes for which the district exists.

Since administration is essential and clearly within the public purpose for which the districts exist, borrowing and expending monies for the purpose of providing space for this function is clearly within the authority of the district.

Student dormitory housing has been an integral part of institutions of learning throughout the history of education, and academy-oriented housing for students unquestionably is academically desirable and, therefore, expenditures for such purposes are within the purpose for which the district is created.

Finally, borrowing for the enumerated purposes would not violate the Wisconsin constitutional provision, Art. VIII, sec. 10, which prohibits contracting debt for works of internal improvement, since, if the district is considered to be part of the State, education clearly is a governmental function and, therefore, not within the purview of the constitutional prohibition. *State ex rel. Thompson v. Giessel* (1964),

267 Wis. 331, 65 N.W. 2d 529, holds that the constitutional provision does not apply to structures used by the State in the performance of its governmental functions. If the district is not part of the State, but rather is a unit of local government, the constitutional provision is again inoperative since it militates only against borrowing by the State or State agencies. *State ex rel. Martin v. Giessel* (1948), 252 Wis. 363, 31 N.W. 2d 626.

RWW:WHW

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*Suspension of Driver's License—Hearings Under Safety Responsibility Law—(Informal)*—Suspension of licenses under sec. 344.14, Stats., due process requires opportunity for hearing on issue of fault.

June 15, 1971.

JAMES L. KARNs, *Administrator,*  
*Division of Motor Vehicles*

In *Bell v. Burson*, decided May 24, 1971, the United States Supreme Court held the Georgia Safety Responsibility Law unconstitutional. The court ruled that before a state may suspend a driver's license and registration, it must provide a hearing procedure for determining the question whether there is a reasonable possibility of a judgment being rendered against him as a result of the accident. Since Wisconsin law is similar to the Georgia law, you are preparing to seek new legislation to provide the procedure necessary to comply with this decision. However, this may take some time and your problem is what to do in the meantime. Your basic question is whether you may immediately proceed to comply with the requirements laid down by the United States Supreme Court prior to the time the necessary statutory amendments are obtained.

It is my opinion that you can and should proceed immediately to implement the constitutional requirements laid down

by the court. We have faced a similar problem recently in relation to revocation of probation and parole. In *Hahn v. Burke* (1970), 430 F. 2d 100, the court held that due process requires a hearing before probation can be revoked. In *State ex rel. Johnson v. Cady* (1971), 50 Wis. 2d 540, the court held that even though the statutes do not provide for a hearing, due process requires that the Department of Health and Social Services provide a hearing before probation or parole can be revoked. We have advised this agency to proceed to hold the necessary hearings, as required by these court decisions, even though there is no statutory provision therefor. You should, of course, proceed to obtain the necessary statutory amendments, but in the meantime, you may proceed to hold the hearings in order to comply with the decision of the United States Supreme Court.

The Georgia Safety Responsibility Law provided for a suspension of the driver's license and motor vehicle registration of an uninsured motorist involved in an accident unless he posted security to cover the damages claimed by other parties to the accident. Such suspension was required to be made without a hearing on the question of fault. In *Bell v. Burson*, the court held that this violates the constitutional guarantee of due process. The court noted that, while the Georgia law provided for the suspension of an uninsured motorist's driver's license and vehicle registration without regard to fault, it nevertheless was fault-oriented and made "liability an important factor" in the determination to suspend the driver's license or vehicle registration. This being so, the court held that Georgia must afford a reasonable opportunity to the licensee for a hearing prior to the suspension, and that the test must be whether there is a reasonable possibility of judgment being rendered against the licensee.

Section 344.13 (1), Stats., provides, in part:

"The administrator after receipt of a report of an accident . . . shall determine, with respect to such accident, the amount of security which is sufficient in his judgment to satisfy any judgment for damages resulting from such accident which may be recovered against either operator or

owner of the vehicles involved in such accident. . . . The determination as to the amount of security required shall be made without regard to the fault of the persons involved . . .”

Since, like the Georgia law, the Wisconsin's Safety Responsibility Law is “fault-oriented,” and “makes liability an important factor’ in suspension or continued suspension (see sec. 344.14, Stats.), the last phrase in the above-quoted portion of sec. 344.13 (1), Stats., specifying that the determination is to be made without regard to fault, makes Wisconsin's law unconstitutional.

Section 990.001 (11), Stats., provides as follows:

“(11) SEVERABILITY. The provisions of the statutes are severable. The provisions of any session law are severable. If any provision of the statutes or of a session law is invalid, or if the application of either to any person or circumstances is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application.”

Under this statute, we may consider the no fault phrase is no longer applicable.

Now that we have a workable statute without the no fault phrase, we must return to the beginning portion of sec. 344.13 (1), Stats., and consider the requirement that the “administrator . . . shall determine . . . the amount of security which is sufficient in his judgment to satisfy any judgment . . .” The matter now becomes one of administrative decision. If the administrator determines that there is no reasonable possibility of a judgment, he need not require any security. Since such a determination would not operate to deprive any licensee of his entitlement, no further action or hearing is necessary. However, if the administrator makes a determination that security is required under ch. 344, he must give an opportunity to the licensee to be heard on the question of a reasonable possibility of a judgment being rendered against him as a result of the accident.

You propose to proceed as follows:

"1. Each accident case will be reviewed for reasonable possibility of a judgment being rendered. If we find that there is no reasonable possibility of judgment, no further action will be taken against the uninsured.

"2. We will change the Notice of Suspension to a 'Hearing Request Procedure and Notice of Suspension - - -'

"We will include in that notice the following paragraph :

'If you question the reasonable possibility that a judgment may be rendered against you as a result of this accident . . . you may request a hearing thereon. Such hearing request must be made in writing and be received by the Division during the Notice Period.'

"3. Of those that request a hearing, we will again review those cases and if new information indicates that there is no reasonable possibility of a judgment being rendered, we will close the case.

"We will schedule for hearing, those that show otherwise, giving highest priority to those which show liability on the Face of the report.

"4. The order of suspension will be altered from its present form to include the following paragraph :

'You have failed to comply with the "Safety Responsibility Act" (Chapter 344, Wis. Stats.) in accordance with notice given you, and have not requested a hearing on the question of the reasonable possibility of a judgment being rendered against you.' "

In my opinion, the procedure you propose is proper and legal.

Your specific questions will be treated seriatim.

Your first question is :

"Do we have the authority to close cases where there is no reasonable possibility of a judgment being rendered against the uninsured?"

The answer is yes. With the "no fault" language severed from sec. 344.13, Stats., Wisconsin's statute is very similar

to the California statute. In *Orr v. Superior Court of City & County of San Francisco* (1969), 77 Cal. Rpts. 816, 454 P. 2d 712, 716, 717, the California Supreme Court held that the department must determine whether there is a reasonable possibility that a judgment may be recovered and so must, to this extent, consider culpability. The court said:

“It is a matter of common knowledge that the accounts given by witnesses and by those involved in an accident will vary widely as to how it occurred, what caused it, and other surrounding circumstances. The question of blame or fault is commonly in dispute, and is of course one of the primary issues upon which the recovery of a judgment for damages will turn. The department, which is charged with the task of examining applicants for drivers licenses, and of issuing, refusing, suspending or revoking such licenses, should find no particular difficulties in determining from the accident reports which involved drivers are obligated to make (§16000, former §419) and from other evidence submitted to it whether there is a reasonable possibility that a judgment may be recovered against the involved driver, based on his possible culpability.”

In California, the Department of Motor Vehicles has found that they are able to process a large number of their cases on this basis and close their files without proceeding to a suspension order. It is my opinion that you are authorized to follow this same procedure.

Your second question reads:

“May we, by notice, offer to hold hearings, and hold hearings under chapter 344 to determine the reasonable possibility that a judgment may be rendered against the uninsured, without such specific authority in that chapter?”

The answer is yes. In so doing, you will be complying with the mandate of the United States Supreme Court in *Bell v. Burson*.

It is my recommendation that you follow the procedures and substantive guidelines contained in ch. 227, Stats., especially secs. 227.07 through 227.14, Stats. Any question you

may have concerning the hearing or procedures, may be the subject of further discussion and advice.

Your third question is:

“When the operator and owner of an uninsured vehicle are two different persons, is it permissible or possibly mandatory, that we may find there is a reasonable possibility of a judgment being rendered against one but not the other, and therefore we subsequently suspend only the one?”

The United State Supreme Court, discussing Georgia’s statute, stated:

“. . . Since the statutory scheme makes liability an important factor in the State’s determination to deprive an individual of his licenses, the State may not, consistently with due process, eliminate consideration of that factor in its prior hearing.”

Although this statement was made in a case involving a driver-owner, there is little reason to believe the court would not apply this same reasoning to an owner who is not the driver.

RWW:AOH

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*Ordinances—Fireworks—(Informal)*—A county or municipal ordinance may not prohibit the sale and use of articles which have been specifically excepted and exempted from the prohibitions and penalties of the State Fireworks Act. Sec. 167.10, Stats.

June 15, 1971.

WILLIAM J. SCHUH

*Corporation Counsel, Outagamie County*

Your letter of May 28, 1971, directs my attention to certain provisions of sec. 167.10, Stats., the statute which broadly regulates the storage, sale, use, etc., of fireworks in the State of Wisconsin. Subsections (10) and (12) of the statute

exempt or except certain paper cup devices and smoke and party novelties from the prohibitions and penalties provided by the statute. You advise that both your county and the City of Appleton have enacted ordinances dealing with the sale and use of fireworks identical to sec. 167.10, except that neither includes the above two subsections. You therefore inquire as follows:

“Can a county or city ordinance prohibit the sale and use of the above mentioned articles which have been specifically accepted and exempted from the prohibitions and penalties of the State Fireworks Act?”

Your question assumes the general authority of the county and city to enact ordinances regulating fireworks. However, our office has previously pointed out that a county board lacks the authority to pass an ordinance prohibiting the sale and use of fireworks within a county. 27 OAG 690 (1938). I am unaware of any change in the law subsequent to that opinion which would justify a different result today. That opinion concludes as follows:

“The absence of any statute granting authority to a county board to prohibit the sale and use of fireworks, together with *the evident legislative intent largely to preempt the field in the matter of fireworks regulation*, impels us to the conclusion that a county board does not have authority to pass an ordinance prohibiting the sale and use of fireworks within a county.” 27 OAG 690, 691. (Emphasis added)

Furthermore, although I normally would refrain from further comment regarding a city ordinance, there are several reasons which appear to justify such comment, in this particular instance, in the interest of eliminating any confusion at local governmental levels tending to contribute to unauthorized or inconsistent enforcement of this State law. For instance, by virtue of the specific statutory grant of authority contained in subsec. (8) of the statutes, the wide range of local public officials responsible for the enforcement of the statute (including mayors, village board presidents and town chairmen) actually act as arms of the State to carry

out State public policy as declared by the statute. *Flynn v. Kaukauna* (1942), 241 Wis. 163, 165, 5 N.W. 2d 754. In addition, your question not only concerns the division of responsibility and duties between the district attorney's office and your office but also between his office and other local officials responsible for enforcing the law. Therefore, since violation of this statute also constitutes a crime, I am also forwarding a copy of this letter to the District Attorney for your county, Mr. James R. Long, for his information.

There can be little doubt that State statute has for many years fully occupied the field of fireworks regulation. However, whether or not the preemption language used over 30 years ago in 27 OAG 671 may be said to apply to a city as well as a county, it is evident that no local ordinance may prohibit the sale and use of those articles specifically exempted or excluded from the wide prohibitions of sec. 167.10, Stats. While there is some variance in language used to exclude items from the operation of the statute, a positive intent to permit the sale and use of those items specified as exempt is evident on the face of the statute.

Both cities and villages possess significant powers to enact local legislation. Art. XI, sec. 3, Wis. Const., and secs. 61.34 (1) and 62.11 (5), Stats. However, the *constitutional* authority of cities only extends to local affairs and does not cover legislative enactments of statewide concern “\* \* \* as shall with uniformity affect every city or every village. \* \* \*” See *Plymouth v. Elsner* (1965), 28 Wis. 2d 102, 106, 135 N.W. 2d 799 and *Van Gilder v. Madison* (1936), 222 Wis. 58, 267 N.W. 25, 268 N.W. 108. Further, the determination of what constitute matters of “state-wide concern” or a “local affair” is primarily for the legislature based in considerations of public policy. “\* \* \* In the event of a controversy between municipalities and the state therefore the court is required to make the ultimate determination. \* \* \*” *Van Gilder, supra*, pp. 73-74. See also *Fond du Lac v. Empire* (1956), 273 Wis. 333, 337, 338, 77 N.W. 2d 699. It may be noted in this regard that our Supreme Court, in holding that a mayor acting under the State fireworks act does not act as the agent of the city, cites authorities where “a pub-

lic service not peculiarly local, or corporate" has been delegated to named officers of a municipality by the legislature. *Flynn v. Kaukauna*, *supra*. See also *Quick v. American Legion 1960 Conv. Corp.* (1967), 36 Wis. 2d 130, 135, 152 N.W. 2d 919. However, since you do not identify the city ordinance under consideration as being a charter ordinance, enacted under sec. 66.01 (4), Stats., electing to withdraw from the operation of sec. 167.10, Stats., I presume we are not dealing with an assertion of municipal home-rule under the Wisconsin Constitution.

Section 167.10, Stats., is a regulatory measure adopted in the interest of public safety, and the Supreme Court considering sec. 167.10 (1), Stats., in *Quick*, *supra*, at p. 139, has described it as "the safety statute prohibiting fireworks." The court also made reference to the fact that the trial judge had referred to both this provision, and "a Green Bay ordinance pursuant thereto," as "safety regulations." *Quick*, *supra*, at p. 137. I will, therefore, consider the extent to which a local regulatory ordinance may vary from the provisions of a State statute dealing with the same subject matter.

Generally speaking, where the State enters a field of regulation by the enactment of statutes, a city or village may nevertheless enact a valid ordinance in the same area of governmental regulation, even though such ordinance goes "further in its regulation" and provides greater restrictions or prescribes higher standards than the State law—if:

(1) the statute specifically grants a limited authority to enact local laws in the exercise of a police power in the same area of regulation and such power is exercised in a manner consistent with said grant. *Milwaukee v. Piscuine* (1963), 18 Wis. 2d 599, 603, 119 N.W. 2d 442; or

(2) the statute does not preempt the field and the ordinance properly falls within the broad home-rule powers of secs 61.34 (1) or 62.11 (5), Stats., provided said powers have not otherwise been limited by "express language" and are not exercised in a manner, inconsistent with State law. *Fox v. Racine* (1937), 225 Wis. 542, 546, 275 N.W. 513.

A local municipal ordinance such as you describe clearly falls under the second category above. Therefore, even if not preempted by state statute, the ordinance must not conflict with general State law. The test to determine whether or not an ordinance is inconsistent with a statute, as set forth in the *Fox* case, *supra*, is whether the ordinance permits or licenses that which the constitution or statute prohibits, or vice versa. A local ordinance such as you describe quite clearly purports to prohibit that which is permitted by specific statutory enactment and, therefore, conflicts with State law.

RWW:JCM

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*Public Purpose Doctrine—Public Housing—(Informal)*—Milwaukee County has authority to acquire vacant land on open market and resell it at a reduced price to private parties under a contract of sale which requires purchasers to build low and middle income housing, especially for persons displaced by expressway construction. Discussion of public purpose doctrine.

June 15, 1971.

ROBERT P. RUSSELL

*Corporation Counsel, Milwaukee County*

I am writing in response to your recent inquiry concerning whether Milwaukee County has the authority to purchase vacant land on the open market and resell it at a reduced price to private purchasers under a contract of sale which obligates the purchasers to construct new housing units under the provisions of chs. 235 and 236 of the Housing Act of 1968. The purpose of this program is to increase the supply of decent, safe and sanitary housing for low and moderate income families in the community and especially for those families who have been displaced by expressway construction. It is my opinion that Milwaukee County is acting within its authority in pursuing the above-mentioned program.

Section 59.07, Stats., sets forth the powers of county boards and sec. 59.07 (1) (a), Stats., sets forth their powers in connection with the acquisition of real property. The latter section allows county boards to acquire real property "for public uses or purposes of any nature." Section 59.07 (1) (c), Stats., states that county boards may direct the county clerk to lease, sell or convey or contract to sell or convey any county property "on such terms as the [county] board approves." The question thus is whether it is a "public use or purpose" for the county board to acquire property with the intent and for the purpose of selling it at a reduced price to private developers obligated to develop the property with housing units for low and middle income families, especially those displaced by highway construction.

In determining the limitations of the term "public purpose," it is relevant to consider the interpretations applied to the longstanding public purpose requirement applied to the use of State monies. The State public purpose doctrine has been considered by the Wisconsin Supreme Court in many cases and has been reviewed by many law review commentators (see 1970 Wis. L. Rev., p. 1113, fn. 1, for a citation of some of the more prominent commentaries). Without going into a detailed analysis of each of the many cases in which the court has interpreted the doctrine, the general rule is that the expenditure may benefit certain individuals or one particular class of people more immediately than other classes and still be a public purpose. On the other hand, incidental benefits which result from the promotion of private interests are not to be considered as the use of public funds for a public purpose. In between these two broad extremes the legislature has broad discretion in making determinations of public purpose and the court will intervene only if there is a very clear abuse of legislative discretion (*State ex rel. Thomson v. Giessel* (1963), 265 Wis. 207, 60 N.W. 2d 763). There have been dozens of cases interpreting the public purpose doctrine finding some acts within the doctrine and others to be outside its scope. In the action apparently closest to the problem you have posed, the court in *State ex rel. Wisconsin Development Authority v. Damman* (1938), 228 Wis. 147, 181, 280 N.W. 698, cited as

a public purpose a State of Washington case (*State ex rel. Board of Reclamation v. Clauson* (1920), 110 Wash. 525, 188 P. 538), in which a state reclamation board was created with authority to purchase farm lands for resale upon convenient terms to soldiers, sailors and industrial workers who desired to settle on farms.

Finally, it should be recognized that the public purpose doctrine is a highly flexible concept, adapting to meet the needs of the times. In *State ex rel. Warren v. Reuter* (1969), 44 Wis. 2d 201, 213, 170 N.W. 2d 790, 795, the court noted that "the concept of public purpose is a fluid one and varies from time to time, from age to age, as the government and its people change. Essentially, public purpose depends upon what the people expect and want their government to do for the society as a whole and in this growth of expectation, that which often starts as hope ends as entitlement." In short, we must determine the breadth of the public purpose doctrine through the needs of today. It is my opinion, in view of the numerous legislative enactments in the field of low and middle income housing in urban areas and for purposes of relocation after highway dislocation, that the purpose you have posed is a public purpose. It is my opinion, therefore, that the acquisition of land by the county for the purpose of reselling these lands for development of low and middle income housing, especially for persons displaced by expressway construction, is a public purpose.

This conclusion is supported by considering other statutes which allow Milwaukee County to acquire land for purposes which are extremely similar to the purpose in question, thereby evidencing a legislative intent that the acquisitions in question are for a public purpose. For example, in sec. 59.07 (55), Stats., Milwaukee County is empowered to build, furnish and rent housing facilities to persons "whose income is insufficient to meet the standard for such person's family . . . It is the intent of this subsection to authorize such counties to do *anything necessary* to secure the financial aid and the co-operation of the federal government in any undertaking by the county authorized by this subsection." (Emphasis added). Similarly, in creating an expressway com-

mission for Milwaukee County, sec. 59.965 (5) (d) 1, Stats., relating to the acquisition of land, empowers such a commission to acquire such lands or interests in lands "as the commission deems are necessary and required for expressway purposes, and to dispose of the same." "Expressway purposes" could readily be construed today to include the acquisition of land upon which persons displaced by the expressway could be housed. Also, sub. 6 of this subsection states that in connection with the lands which the commission has acquired for the county, "the county may use and develop any portion of said lands not directly needed for expressway-roadway purposes, . . . [including] for building purposes."

Thus, because of the breadth of the power of counties to acquire lands for public purposes, as reflected in the interpretations by the Wisconsin Supreme Court of the State public purpose doctrine, and also because of the other statutory sections which empower Milwaukee County either to do acts which may wholly or partially encompass the acts in question, it is my opinion that Milwaukee County is empowered to acquire lands on the open market for the purpose of reselling these lands at a reduced price to private developers, who will be obligated to develop housing units on these lands for middle and low income families, especially those displaced by expressway construction.

RWW:BS

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*Labor/Management Relations—Appropriation Bill—(Formal)*—Any law resulting from Assembly Bill 210 would probably be constitutional. Article VIII, sec. 8, Wis. Const., discussed.

June 21, 1971.

THE HONORABLE, THE SENATE

By Senate Resolution 12 you have requested my opinion with regard to the constitutionality of any law resulting from Assembly Bill 210, which is now before the Senate.

Your resolution states that during the Assembly debate it was held that Assembly Bill 210 did not require referral to the Joint Committee on Finance "because of the minimal and speculative nature of a possible fiscal note"; you question whether this failure to refer to the Joint Committee on Finance is in accordance with sec. 13.10 (1), Stats.

Your resolution also raises the question of compliance with sec. 16.47 (2), Stats., which in effect prohibits, prior to the passage of the general fund executive budget, the passage of any bill with fiscal implications unless recommended as emergency bills either by the Governor or the Joint Committee on Finance.

Your resolution further asks me to make special reference to the case of *State ex rel. General Motors Corporation v. Oak Creek* (1971), 49 Wis. 2d 299, 182 N.W. 2d 481.

Assembly Bill 210 as passed by the Assembly would amend sec. 111.06 (1) (c) of the statutes so as permit an employer to enter into an all-union agreement with the representatives of his employes in a collective bargaining unit if the representative of his employes has been certified as the majority representative by the Wisconsin Employment Relations Commission or the National Labor Relations Board. In present form this statute permits such an all-union agreement where at least two-thirds of such employes voting (provided such two-thirds also constitute at least a majority of the employes in such collective bargaining unit) have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the Commission. The present statute also contains other provisions including those for the termination of an all-union agreement which would be repealed by Assembly Bill 210 and which are immaterial here.

The first question is whether, if Assembly Bill 210 is enacted into law, there will have been a legislative failure to comply with constitutional mandates. Although your resolution refers to no specific constitutional vulnerability, a brief discussion of this subject may be useful.

The Wisconsin Constitution contains the following provisions governing the procedure which the legislature is to follow in passing a statute:

(1) Article IV, section 7 (a majority constitutes a quorum to do business).

(2) Article IV, section 8 (each house may determine the rules of its own proceedings).

(3) Article IV, section 17 (no law shall be enacted except by bill).

(4) Article IV, section 19 (a bill may originate in either house and may be amended by the other).

(5) Article IV, section 20 (yeas and nays of either house on any question, at the request of one-sixth of those present, shall be entered on the journal).

(6) Article V, section 10 (provides for approval, veto and other action by the Governor and passage after veto).

(7) Article VII, section 21 (provides for publication of laws).

(8) Article VIII, section 6 ( contains special provisions for laws authorizing the contracting of public debts).

(9) Article VIII, section 8 (contains special provisions for fiscal bills, requires yea and nay vote, quorum of three-fifths).

(10) Article XI, section 4 (contains special provisions for enactment of banking laws, two-thirds vote of all elected members required).

Inasmuch as Art. VIII, sec. 8, Wis. Const., deals with fiscal bills, as do the statutes to which you have referred, it is useful to consider cases construing the constitutional provision. These cases show a consistent tendency to limit the definition of a fiscal law. For example, state laws relating to city or local taxes, as distinguished from a state tax, are not included under this constitutional provision. *Watertown v. Cady* (1866), 20 Wis. 501, 503. A law relating merely to the machinery for apportioning and compelling payment of a

tax is not included. *Whittaker v. City of Janesville* (1873), 33 Wis. 76, 89. A law creating a judicial circuit, where the appropriation for the payment of salaries of circuit judges was provided for in other statutes, did not come within this provision. *McDonald v. State* (1891), 80 Wis. 407, 413, 50 N.W. 185.

An act amending the Workmen's Compensation Law which affected the exactions of money from employers paid into the State Treasury and paid out to a limited class of dependents of employes was held not to deal with "public or trust money" as used in Art. VIII, sec. 8 of the State Constitution. *Sturtevant Co. v. Industrial Comm.* (1925), 186 Wis. 10, 202 N.W. 324.

Where an appropriation bill was amended, but the amendment was not an inducement to the rest of the bill and did not itself make an appropriation, the yea and nay vote specified in Art. VIII, sec. 8 Wis. Const., was not required with respect to the amendment. *Loomis v. Callahan* (1928), 196 Wis. 518, 528, 220 N.W. 816.

In fact, in *McDonald, supra*, at pages 411-412, the court said:

"The courts will take judicial notice of the statute laws of the state, and to this end they will take like notice of the contents of the journals of the two houses of the legislature far enough to determine whether an act published as a law was actually passed by the respective houses *in accordance with constitutional requirements. Further than this the courts will not go.* When it appears that an act was so passed, no inquiry will be permitted to ascertain whether the two houses have or have not complied strictly with their own rules in their procedure upon the bill, intermediate its introduction and final passage. The presumption is conclusive that they have done so. We think no court has ever declared an act of the legislature void for non-compliance with the rules of procedure made by itself, or the respective branches thereof, and which it or they may change or suspend at will. If there are any such adjudications, we decline to follow them." (Emphasis added.)

In Sutherland, *Statutory Construction*, 3d Ed. Vol. 1, §604, p. 126, it is said:

"The decisions are nearly unanimous in holding that an act cannot be declared invalid for failure of a house to observe its own rules. Courts will not inquire whether such rules have been observed in the passage of the act. Likewise, *the legislature by statute or joint resolution cannot bind or restrict itself or its successors as to the procedure to be followed in the passage of legislation.* \* \* \* More generally applicable is the rule that the constitution having conferred this rule-making power on the legislature, excludes the court. The court without violating the separation of powers rule and the specific constitutional directions could not review the legislative act. The reason has been well stated by the Supreme Court of the United States in *United States v. Ballin*: 'The constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way could be better, more accurate or even more just. It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and, within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.' " (Emphasis added.)

One of the cases cited by Sutherland as support for the statement that the legislature by statute cannot bind or restrict itself is *State v. P. Lorillard Co.* (1923), 181 Wis. 347, 193 N.W. 613.

In *Lorillard, supra*, at page 372, the court said:

"\* \* \* There is no constitutional requirement involved. The committee referred to in the statute is a joint commit-

tee composed of members of both houses. In the senate the bill was referred to that committee.

"It will be observed that sec. 13.06 does not state that the bill shall be referred to the finance committee by each house before final passage. The language is that it 'shall be referred to the committee on finance before being passed or allowed.'

"It may be that it would be desirable, as argued by defendants' counsel, that each house should refer bills for the appropriation of money to the finance committee before it takes final action, but as we construe the statute it does not make any such requirement. *This is a question of policy for legislative, not judicial, determination.*" (Emphasis added.)

The same language from *Lorillard* was quoted by the court in *State ex rel. General Motors Corp. v. Oak Creek, supra*, at page 324. However, in *General Motors*, the court went on to say (page 324):

"Thus the court was able to avoid the question presented here since that bill had been submitted by at least one house."

The court then goes on to construe sec. 13.10, Stats., (formerly 13.06) as a mandatory, not a directory statute and in effect praises the statute as having an essential purpose of requiring additional consideration by the legislature in the exercise of its important taxing power and thus avoiding "improper" taxation. *General Motors, supra*, page 325.

The statute under consideration in *General Motors* was invalid, according to the court, because the legislature's failure to follow Art. VIII, sec. 8, Wis. Const., alone was a defect sufficient to render it a nullity. (Page 322.) The troublesome language in *General Motors* appears at page 329, where it is suggested that an alternative ground for nullifying the statute was the legislature's failure to comply with *statutory* as well as constitutional mandates dealing with enactment of taxation statutes. In light of all of the circumstances, including the well established principles set forth above, as well as the presumption of constitutionality, I conclude that until

the issue is squarely presented and argued to the court, this language should be regarded as *obiter dictum*.

Therefore, it is my opinion that any law resulting from Assembly Bill 210 would probably be held constitutional and not invalidated by reason of any of the procedures described in Senate Resolution 12. Nothing appears on the face of the bill or in the resolution which suggests a fiscal or taxation impact. As I have indicated, the court has consistently taken a narrow view of what constitutes a fiscal law. If it should later appear that Assembly Bill 210 does have significant fiscal implications, then special attention should be given to compliance with Art. VIII, sec. 8, Wis. Const.

RWW:JEA

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*School Aids—Nullified Assessment—(Informal)*—Section 120.17 (8) (b), Stats., applies only when equalized valuation decreases.

June 23, 1971.

WILLIS J. ZICK

*Corporation Counsel, Waukesha County*

You have requested an opinion whether sec. 120.17 (8) (b), Stats., may be applicable to a situation which has arisen in a joint school district in your county because of the taxation of some property in one of the municipalities of the district having been declared unconstitutional.

Section 120.17 (8) (b), Stats., provides:

“(b) When the equalized valuation of that part of a municipality lying within the school district is reduced in any one year to an amount below its equalized valuation of the previous year because of the destruction or removal of taxable property which results in an excessively inequitable apportionment of the school district tax levy on the remaining taxable property of the municipality, the school

district clerk shall notify the supervisor of assessments. If the supervisor of assessments finds that an inequitable apportionment will result, he shall reduce the equalized valuation of the previous year by the full value of the property so destroyed or removed and certify the resulting equalized valuation to the state superintendent and the school district clerk for use in computing the tax levy certifications under this subsection."

Section 70.11 (8m), Stats., provided for the property taxation of property owned by the United States and leased to a person using it for pecuniary profit. In *State ex rel. General Motors Corp. v. Oak Creek* (1971), 49 Wis. 2d 299, 182 N.W. 2d 481, that taxation provision was held invalid. A result of that holding is that between \$2,600,000 and \$2,900,000 of equalized valuation in the City of Waukesha must be taken off the tax roll. The City of Waukesha is a part of a school district which includes several towns and another city. If the above-quoted statute may be applied in this instance, it would reduce the equalized valuation per pupil in the school district, which, in turn, would produce greater State aid to the school district.

It is clear from the language of sec. 120.17 (8) (b), Stats., that the paragraph applies only in the event that the equalized valuation of that part of a municipality within a school district is reduced in one year to an amount below its equalized valuation of the previous year. Furthermore, the reduction in equalized valuation has to be because of the destruction or removal of taxable property, and that destruction or removal must result in an excessively inequitable apportionment of the school district tax levy on the remaining taxable property of the municipality.

The equalized valuations for the City of Waukesha and for the entire school district for the years 1968-1970 are as follows:

	Equalized Valuations in Millions		
	1968	1969	1970
City of Waukesha	\$289	\$332	\$354
School District	385	436	479

It is apparent from the above table that one of the requirements for applicability of the statute has not been met. Destruction or removal, in 1969 or 1970, of approximately \$3,000,000 of taxable property will not result in a lower equalized valuation than for the previous year. Also, the figures show that a reduction of \$3,000,000 in the equalized valuation for the City of Waukesha would make only a very minor readjustment in the tax burden upon the remaining taxable property of the municipality.

The wording of sec. 120.17 (8) (b), Stats., was changed from that of its predecessor statute by the revision of the school tax laws accomplished by ch. 92, Laws of 1967. Previously, this provision was found in sec. 40.35 (8), Stats., and then referred to the destruction or removal "of all or of a portion of the property of a part of the freeholders with a resulting excessively inequitable apportionment of the school district tax levy on the remaining equalized valuations \* \* \*." Thus, in the original form the intent appears to have been to prevent an excessive taxation on the taxable property in parts of the school district other than the municipality which suffered a loss in equalized valuation. In its present form, the statute appears to be an effort to prevent an excessive tax on the remainder of the taxable property in the municipality which suffers a reduction in equalized valuation.

For purposes of the present opinion, it is unnecessary to determine whether the 1967 revision was intended to create any change in the statute. It matters not whether we look at the remainder of the taxable property in the City of Waukesha or the other taxable property in the district. In either case, a \$3,000,000 reduction in equalized valuation would not produce an "excessively inequitable apportionment" of the school tax on the remaining equalized valuation, even if it could be said that the first requirement of the statute—a reduction in equalized valuation—had been met.

While there has been some discussion among members of the staff of the State Superintendent of Public Instruction and members of the staff of the Department of Revenue as to whether the removal of property referred to in the statute means only removal of property from the district or may

embrace removal of property from the tax rolls, the question need not be decided here.

From the facts you have supplied, together with the equalized valuation figures given above, I can see no possibility of the application of the statute to the situation you have mentioned.

RWW:EWW

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*Real Estate Broker's License—Partnerships—(Informal)*  
—Sale of units of interest in limited partnership are personally and not real estate, and no real estate broker's license is required.

June 30, 1971.

ROY E. HAYS

Executive Secretary, Wisconsin Real Estate Examining Board

You have requested my opinion on the two following matters:

1. SPANISH OAKS APARTMENTS, LTD. Robert W. Baird & Co.

Facts: The Robert W. Baird & Co. is, according to a prospectus filed with the Department of Securities, offering to investors a limited partnership investment for the purpose of participating in acquiring and owning a 248 unit garden apartment. The partnership, through a Florida agent, will rent, manage, etc. the project.

The transfer of an existing interest may only be to close members of the family of limited partnerships. Initially, units are to be sold in \$5000 amounts. The prospectus indicates upon dissolution the assets of the partnership will be liquidated and distributed to the members of the limited partnership.

Question: Does the sale of the limited partnership interest, the proceeds which are converted to real estate, repre-

sent sale of real estate as defined by Section 452.01 (2) (a), Wisconsin Statutes; or sale of business opportunities as defined by Section 452.01 (2) (e), Wisconsin Statutes?

Section 452.01 (2), Stats., provides in part:

“(2) ‘Real estate broker’ means any person not excluded by sub. (6), who:

“(a) For another, and for commission, money or other thing of value, sells, exchanges, buys or rents, or offers or attempts to negotiate a sale, exchange, purchase or rental of an interest or estate in real estate.”

\* \* \*

“(e) Is engaged wholly or in part in the business of selling business opportunities or good will of an existing business or is engaged wholly or in part in the business of buying and selling, exchanging or renting of any business, its good will, inventory, fixtures or an interest therein.”

I am of the opinion that the sale of units of interest in a limited partnership do not constitute the sale of an interest in real estate or the sale of business opportunities within the meaning of the two sections quoted above.

The limited partnership as a legal entity, organized pursuant to ch. 179. Stats., is the owner, manager and operator of the real estate involved. The real estate in this instance is located in another state. We are not here concerned with whether the partnership requires a Wisconsin or Florida real estate broker's license. Your attention is, however, directed to the opinion of this office directed to you, dated January 15, 1971, concerning management and rental of real estate owned by a corporation or partnership.

I am of the opinion that units of interest in a limited partnership are personalty. Section 179.18, Stats., expressly so provides:

“Nature of limited partner's interest in partnership. A limited partner's interest in the partnership is personal property.”

Units of interest in a limited partnership are securities within the meaning of sec. 551.02 (13) (a), Stats.

I do not believe that the legislature intended that the sale of such units would constitute the sale of business opportunities under sec. 452.01 (2) (e).

See 49 OAG 4 (1960) for a discussion of the sale of a corporate business by means of stock transaction. Much of the analysis there would apply to the sale of a limited partnership, although we should point out that we are concerned here only with sale of units in a limited partnership and not with the whole.

I have reviewed the opinion of Quarles, Herriott, Clemons, Teschner & Noelke and am in substantial agreement with the same. In the case of *Spanish*, there is limited regulation under the Federal Securities Act and the Wisconsin Uniform Securities Act.

## II. NATIONAL DEVELOPMENT & INVESTMENT, INC.

National Development & Investment, Inc., a Wisconsin corporation, is offering to investors a limited partnership investment for the purpose of purchasing "real estate and other property as the limited partnership may from time to time acquire, and to hold, operate, improve, finance, lease and ultimately to dispose of said real estate and other property acquired." There is no indication in the limited partnership agreement that the real property transactions will be handled by a licensed real estate broker. The limited partnerships are being sold for \$4,666.65, payable in five annual payments of \$933.33 plus interest of \$873.66 due on the date of the last payment. The number of limited partnerships is restricted to 15, thus exempting them from the Wisconsin Uniform Securities Law (Section 551.23 (10) Statutes). Limited partnership interests may be assigned only to members of the immediate family of the limited partner. The agreement indicates that on termination of the partnership, all assets shall be liquidated, repaid to the Limited Partners as their cash contributions appear, and any surplus then be divided among the partners.

Question: Does the sale of the limited partnership interest, the proceeds which are converted to real estate, represent sale of real estate as defined by Section 452.01 (2) (a), Wisconsin Statutes; or sale of business opportunities as defined by Section 452.01 (2) (e), Wisconsin Statutes?

The proposal of National Development and Investment, Inc. (First Lakeshore Limited) appears to be similar to *Spanish* except that there is no securities broker involved at present and the general partner in the limited partnership is a Wisconsin corporation and that the present real estate owned is in Wisconsin.

My conclusions applicable to *Spanish* are equally applicable to First Lakeshore Limited. The office of Commissioner of Securities for Wisconsin has stated that the offering by National is presently exempt under sec. 551.23 (10), Stats.

RWW:RJV

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*County Board Chairman—Board of Vocational, Technical & Adult Education—(Informal)*—County board chairman acts for county on special group which appoints members of district board of vocational, technical and adult education, even where there is a county administrator or executive.

June 30, 1971.

EUGENE I. LEHRMANN, Director,

*Board of Vocational, Technical & Adult Education*

You have requested my opinion whether the county board chairman is the proper officer to act for the county on the special group of municipal officials who are charged by sec. 38.155 (5) (c), Stats., with the appointment of members of the district board even though the county may have a county administrator or county executive.

Section 59.032 (2) (c) and sec. 59.033 (2) (c), Stats., set forth the powers of a county executive or county administra-

tor in counties of less than 500,000 and are identical in content.

Section 59.032 (2) (c), Stats:

“(c) Appoint the members of all boards and commissions where the law provides that such appointment shall be made by the county board or the chairman of the county board. All appointments to boards and commissions by the county executive shall be subject to the confirmation of the county board.”

Section 59.033 (2) (c), Stats.:

“(c) Appoint the members of all boards and commissions where the statutes provide that such appointment shall be made by the county board or the chairman of the county board. All appointments to boards and commissions by the county administrator shall be subject to the confirmation of the county board.”

Section 38.155 (5) (a) and (c), Stats., provides in material part:

“(5) A district shall be administered by a board consisting of 7 members, as follows:

“(a) The members shall include 2 employers, who have power to employ and discharge, 2 employes who do not have power to employ or discharge and 2 additional members.

“\* \* \*

“(c) The board members *shall be appointed by the chairmen or other executive officers of the governing bodies* of the units of government included in the district *acting jointly* at a time and place in the district fixed by the board. If the governing bodies of the units initiating the action are all school districts operating high schools the chairmen of the governing bodies shall be the presidents or chairmen of those school district boards comprising the area. *If the governing bodies of the units initiating the action are all counties, the chairmen of the governing bodies shall be the chairmen of the county boards comprising the area.* If the governing

bodies of the units initiating the action are all municipalities, the chairmen or executive officers of the governing bodies shall be the presidents or chairmen of the school districts operating high schools in which any area of the new district is located. If the governing bodies of the units initiating the action are a combination of high school districts, *counties and municipalities, the chairmen or executive officers of the governing bodies shall be the chairmen of the county boards of the counties in which any part of the district is located.* When the board creates districts the board shall designate which governing bodies shall participate in the selection of the board members. Such designation shall be consistent with the intent of this subsection. The board shall give 3 weeks' notice thereof to each governing body \* \* \*.”

The special board-appointing group is not referred to as a board, commission or committee. It is a unique group of officials charged with making district board appointments. Although the statute refers to “chairmen or other executive officers of governing bodies,” it specifically refers to county board chairmen where counties are involved.

Neither the county board nor county board chairman has power to appoint members of district boards of vocational, technical and adult education, and the provisions of secs. 59.032 (2) (c) and 59.033 (2) (c), Stats., do not, therefore, allow the county executive or county administrator to act in place of the county board chairman. The county board chairman is designated by statute to act for the county on the special group which appoints members of the district board. Appointments are made by such officials acting jointly, and neither the county administrator nor county executive can act in place of the county board chairman.

RWW:RJV

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*County Board Committee—Snowmobile Trail Planning—(Informal)*—County board committee can plan and coordinate need for planning trails for snowmobiles, bicycles, hiking, motorbikes, etc.

June 30, 1971.

LAWRENCE R. NASH

*Corporation Counsel, Wood County*

You have requested to be informally advised whether the Wood County Board may create a county board committee under the name and style of "Committee on Public Trails" to coordinate the need for planning trails for snowmobiles, motorcycles, bicycles, motorbikes, bridle paths and hiking.

You state that at the present time the Board prefers a special county board committee rather than having the task performed by the County Park Committee or Conservation and Forestry Committee.

You do not advise whether the county has a county park commission pursuant to secs. 27.02 to 27.06, Stats. Such commission would have the powers primarily sought—planning, land acquisition and management—over trails for recreational purposes. Sec. 27.05, Stats.

I am of the opinion, however, that for the purposes of planning and coordination of public trails, the county can utilize a committee of county board members appointed under sec. 59.06, Stats., and that such board members may be compensated within the limits therein set forth subject to the limitations in sec. 59.03 (2) (f), (g), (h), (i), (j), Stats.

When authorized by the Board, such committee could expend reasonable funds for investigation and public hearings. Expenditures might include cost of notices, reporter, transcripts, photographs, maps and report. While the committee could rely on advice of a citizens' advisory committee, I do not know of any statute which would permit the payment of per diem, mileage, hotel or meal expenses to the members of such committee.

Where a county has a county park commission, such commission probably has power to acquire land (including lease of private lands) for the purposes of operating and maintaining trails for hiking, biking, motorcycling, snowmobiling, etc., and to use county park and county forest lands, with county board approval, for such purposes. Secs. 27.05, 27.065, 28.11 (3) (b), 28.09 (11), Stats.

Where the trails were operated and maintained by the county park commission, the moneys expended by the commission for trail purposes would be subject to the mill-tax limit in sec. 27.06, Stats.

There is a possibility, especially where a county wanted to seek contributions from municipalities directly benefiting, that the trail project could be carried out by a "county recreation committee" created under sec. 59.07 (26), Stats. It is my opinion, however, that the county park commission has more specific power in the area.

RWW:RJV

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*Traffic Safety School—Drunk Driving—(Informal)—*  
Convicted drunk drivers may be sent to safety school in lieu of other penalties.

June 30, 1971.

NORMAN M. CLAPP, *Secretary*  
*Department of Transportation*

You have asked my opinion as to the latitude of a court in drunk driving cases to send the driver to traffic safety school under sec. 345.16, Stats., in lieu of other penalties. You also ask as to the authority of the Division of Motor Vehicles in this context under sec. 343.75, Stats.

It is my understanding that there is Federal money available for counseling and rehabilitating drunk drivers. It is proposed to set up a program under which a court could waive the usual penalties for drunk driving and instead send the driver to a special safety school where he would take part in a program designed to help him with his drinking problem. The question which has arisen is whether this could be accomplished within the framework of existing legislation. The answer is yes.

Drunk driving is punishable under sec. 346.63 (1), Stats. Section 346.65 (2), Stats., provides penalties of fine or im-

prisonment or both. Section 343.30 (1q), Stats., provides a further penalty of revocation of the driver's license for 90 days to 6 months. Section 345.16, Stats., reads:

“(1) In addition to or in lieu of other penalties provided by law for violation of chs. 346 to 348, the trial court may in its judgment of conviction order the convicted person to attend, for a certain number of school days, a traffic safety school whose course and mode of instruction is approved by the administrator of the division of motor vehicles and which is conducted by the police department of the municipality, the sheriff's office of the county or by any regularly established safety organization.

“(2) This section also applies in the case of an adjudication of violation of a local traffic regulation which is in conformity with chs. 346 to 348.”

This statute authorizes a court, which has found a driver guilty of drunk driving, to waive the criminal penalties and the revocation penalty and instead direct the driver to attend a traffic safety school. Under this statute, the court must first convict the driver before he can be sent to such school. The language “the court may in its judgement of conviction order the convicted person to attend” makes this point clear. The court should report this conviction to the Division of Motor Vehicles as required by sec. 343.28, Stats. However, in order that the Division of Motor Vehicles will not show a revocation on its records, the court should also be requested to report to that Division the fact that no revocation was ordered and that driver's school was ordered instead. This procedure would apply to a first conviction for drunk driving.

As to second and subsequent convictions for drunk driving, the procedure would be slightly different. In such cases the court does not have power to revoke the driver's license under sec. 343.30 (1q), Stats., as it does for a first offense. The court does have discretionery authority to revoke under sec. 343.30 (1), Stats., but this power is rarely used. For second and subsequent convictions, the Division of Motor Vehicles is required to revoke the driver's license for

one year under sec. 343.31 (1) (b), Stats. However, sec. 343.75, Stats., provides:

“The administrator may exempt certain persons from one or more of the mandatory requirements of ch. 343 to establish a test group in order to compare this group with a group of persons not exempted from any of the mandatory requirements of ch. 343. After comparing these 2 groups, the administrators shall determine what effect, if any, that a particular mandatory requirement may have on highway safety in this state. The administrator shall submit any findings in this regard to the secretary who shall include them in his report required under s. 15.04 (4).”

Under this statute, the Division of Motor Vehicles would be authorized to exempt certain of these drivers from such revocation for the purpose of establishing a test group in order to compare this group with another group of persons not exempted.

As to second and subsequent convictions, the court could, in its discretion, waive the criminal penalties and in place thereof, direct the driver to attend traffic safety school. The court itself would not waive the revocation because in these cases it is the Division of Motor Vehicles and not the court which orders the revocation. Then the Department of Motor Vehicles, acting under sec. 343.75, Stats., could exempt certain of these drivers from the revocation for the purpose of establishing a test group. It would then be possible to compare the subsequent driver records of these persons who attended the traffic safety school with the records of other drivers who did not so attend.

I wish to make it clear that participation in the operation of this program by the courts is purely discretionary on their part. They have the authority under sec. 345.16, Stats., to waive the penalties and send drivers to such traffic schools. However, they are in no sense compelled to do this. Each such judge is free to decide for himself in each case which comes before him whether the particular driver involved should be handled in this way.

RWW:AOH

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*County Corporation Counsel—Juvenile Court—(Informal)*—Whether the district attorney or the corporation counsel appears in children's court matters rests largely within the discretion of the presiding juvenile judge.

June 30, 1971.

ROGER L. HARTMAN, *District Attorney,*  
*Buffalo County*

You advise that Buffalo County has both a district attorney and a corporation counsel, but that the duties of the corporation counsel are limited to "social service matters." In light of the foregoing, you indicate that there is some question as to which county officer has the duty of appearing when contested matters concerning juvenile delinquency, dependency and neglect are considered by your juvenile court. You, therefore, inquire whether our office has rendered an opinion or memorandum concerning "the break in duties as between Corporation Counsel and District Attorney in the area of Social Service."

The corporation counsel of your county acts pursuant to the provisions of sec. 59.07 (44), Stats., which provides in part as follows:

"\* \* \* The duties of the corporation counsel shall be limited to civil matters and may include giving legal opinions to the board and its committees and interpreting the powers and duties of the board and county officers. Whenever any of the powers and duties conferred upon the corporation counsel are concurrent with similar powers or duties conferred by law upon the district attorney, the district attorney's powers or duties shall cease to the extent that they are so conferred upon the corporation counsel and the district attorney shall be relieved of the responsibility for performing such powers or duties. \* \* \*"

It would appear that part of the problem concerning the division of responsibility between yourself and the county corporation counsel arises from the terminology used to describe the matters handled by your corporation counsel, i.e.,

social service matters. Your letter does not indicate whether this phrase is utilized by yourself to characterize the nature of the corporation counsel's duties or is actually in use in a county ordinance to describe his duties. If the latter is the case, a clarification of the break in duties between your office and that of the corporation counsel would simply be a matter of an amendment to said ordinance to clarify this language. If, on the other hand, you have used this phrase simply to refer to the fact that the county corporation counsel acts as legal counsel to the county welfare department, your question more clearly falls within a consideration of the provisions of sec. 59.07 (44), Stats.

As you will note, the break in duties between the district attorney and the corporation counsel in counties having a population of 500,000 or more is quite clearly set forth in sec. 59.456 (6), Stats. Even there, however, you will note that whether the district attorney or the corporation counsel appears in children's court matters rests largely within the discretion of the presiding judge. Assuming that a particular given matter in juvenile court is within the limitations of the duties of the corporation counsel, it would appear that similar discretion may be exercised by juvenile judges in other counties.

Section 48.94 (3), Stats., provides that the district attorney shall perform any duties in connection with juvenile court proceedings as the judge may request. Under the provisions of sec. 59.07 (44), Stats., even though the powers and duties conferred upon corporation counsels are concurrent with similar powers and duties conferred by law upon the district attorney, district attorneys' duties cease only to the *extent* that they are so conferred. It is doubtful that this statutory provision would be interpreted in such a way as to prevent the juvenile court from requesting the assistance of the district attorney with court proceedings. On the other hand, where it is clear that the corporation counsel is to act in matters concerning the county welfare department such officer would properly be substituted for the district attorney in proceedings relating to welfare matters, including proceedings concerning the enforcement of the uni-

form reciprocal enforcement support act, at least where the lack of support is directly related to a need for public assistance through the county welfare agency.

In conclusion, then, I suggest you first look to your local county's legislation providing for an office of corporation counsel for some guidance, since, as pointed out in 44 OAG 247 (1955), at p. 248, a determination whether a corporation counsel is subject to the statutory provisions relating to the duties of the district attorney depends in part on "the extent that a county has transferred to a corporation counsel duties of a district attorney." Where the duties of the corporation counsel and the district attorney are concurrent, they will normally be performed by the corporation counsel. However, in the absence of clear legislative direction to the contrary, which officer will appear in juvenile court proceedings is still to a large extent to be considered within the discretion of the juvenile judge handling said matter.

RWW:JCM

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*"Put" and "Call" Options—State Investment Board—(Informal)*—Investment Board may not, without authorization from the legislature, engage in "put" and "call" options on its stock portfolio.

July 15, 1971.

JOHN R. PIKE, *Executive Director*  
*State Investment Board*

You request my opinion as to the authority of the Investment Board to sell "put" and "call" options on common stock. A "put" consists of an option giving the holder the privilege of delivering a stated number of shares of a given stock to the State of Wisconsin Investment Board within a certain time and at a certain price. A "call" is the opposite of a "put" and consists of an option whereby the holder is given the privilege of purchasing a given number of shares

of a given stock from the State of Wisconsin Investment Board at a certain price for a certain period of time. You inform me that these options would be written only on stock within your portfolio or for stock which the Board has approved for purchase under the applicable statutory guidelines. While writing of these options is probably consistent with the prudent man rule of sec. 320.01, Stats., the State of Wisconsin Investment Board is, by statute, more restricted in the investments it may undertake.

The types of investments permitted are specifically set forth in the statutes. Secs. 25.17 and 25.18, Stats. Section 25.17 (3) (a), Stats., by reference to sec. 206.34, Stats., permits the investment of a portion of specific trust funds in common stock. In addition, sec. 25.17 (5), Stats., requires that the assets of the variable annuity divisions be invested primarily in equity securities including common stocks. Such sections and sec. 206.34 (es) incorporated in subsec. (3) (a) read in part:

“25.17 \* \* \* The board shall:

“(3) (a) Invest any of the following funds: 1. conservation wardens pension fund; 2. state life fund; 3. state teachers retirement fund system; 4. Milwaukee teachers retirement fund; 5. Wisconsin retirement fund; 6. veterans trust fund, in loans, securities and any other investments authorized by s. 206.34, and in bonds or other evidences of indebtedness or preferred stock of companies engaged in the finance business whether as direct lenders or as holding companies owning subsidiaries engaged in the finance business, provided such investments meet all other requirements of s. 206.34. \* \* \*”

“(4) Invest the funds of the state teachers retirement system, the Wisconsin retirement fund and each teachers annuity and retirement fund created under subch. II of ch. 42 in loans, securities or investments in addition to those permitted by any other section of the statutes, but the aggregate of the loans, securities and investments made under this subsection shall not exceed 15% of the admitted assets of each of said funds.

“(5) The limitations upon the percentage of the assets of any fund which are imposed by sub. (4) or any other statute shall not be applicable to investments made by the investment board of funds in the variable annuity divisions created under s. 41.01 (2), 42.243 or 42.76, respectively, and said investments shall be excluded in computing the assets to which any such limitations apply. Assets of said variable annuity divisions shall be invested primarily in equity securities which shall include common stocks, real estate or other recognized forms of equities \* \* \*.”

“206.34 (1) (es) In common stock of any solvent company organized under the laws of the United States or of any state thereof, or of the Dominion of Canada or of any province thereof (other than common stock of corporations organized for the sole purpose of holding securities of other corporations), the issue of which has been approved by the proper public authority if such approval was required by law at the time of issue, provided \* \* \*.”

The Investment Board is limited by statute to specifically stated investments. While the statutory sections quoted above permit investment in common stocks and other equity securities, I do not deem “put” and “call” options to be included within this authorization. The purchase or sale of stock is distinguishable from the writing of options, the exercise of which is beyond the control of the Board and contingent upon the wishes of the optionee. Section 25.18 (1) (h), Stats., enforces my determination that the authority given in sec. 25.17 (3) (a), Stats., is limited solely to the purchasing and selling of stock as an investment. Section 25.18 (1) (h) reads:

“25.18 (1) In addition to the powers and duties enumerated in s. 25.17 the investment board may:

“(h) Sell stock, debentures or other securities which it has the right to acquire upon the exercise of conversion rights then owned by it.”

The legislature apparently construed the statutes regulating investments by the Board as permitting only the sale of stock, debentures or other securities owned by the Board

and not short sales or sales of securities to be procured in the future. I similarly construe the statutes to relate to and require a purchase or sale of investments on a date certain and not contingent upon the exercise or nonexercise of an option beyond the control of the Board.

The rule of statutory construction *expressio unius est exclusio alterius* is in my view determinative of the legislative intent in this matter. Since the legislature has restricted the Investment Board to specific investments and has in sec. 25.18 (1) (h), Stats., deemed it necessary to authorize any variance from the normal method of purchase or sale of securities, it is my opinion that the Investment Board may not, without authorization from the legislature, engage in "put" and "call" options on its stock portfolio.

RWW:WMS

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*School Boards—Elections—(Informal)*—Since the ratification of the Twenty-Sixth Amendment to the United States Constitution, 18-, 19- and 20-year-old citizens, who are otherwise qualified electors in the district wherein they intend to serve, are entitled to run for and, if elected, serve on local school boards.

July 16, 1971.

WILLIAM C. KAHL

*State Superintendent, Department of Public Instruction*

You advise that, since the ratification of the 26th Amendment to the United States Constitution, the Department of Public Instruction has received a number of questions concerning the right of 18-year-old citizens to run for and hold office as a member of a school board. You further indicate as follows:

"We have of necessity had to answer inquiries concerning the right of 18 year olds running for or serving on boards and have responded that 18 year olds, if qualified electors in

the district wherein they intend to serve, are entitled to run and if elected serve on such school board. The last two lines of the enclosed memo addresses itself directly to this question."

The memo that you refer to states the following:

"Question 2 asking whether 18, 19 or 20 year olds may run or hold school board office must also be answered in the affirmative. The only requirement of school board members is that they be an elector of the district wherein they intend to serve. (Subsections 120.03 (1), 120.43 (1) (a) and (b), 120.73 (1) (a), 120.04 (3), 120.05 (5) and 120.06 (2).)

"Since 18 year olds may now (since ratification of the 26th Amendment to the United States Constitution) be electors, they are, if qualified in the district wherein they intend to serve, entitled to run for and if elected serve on such school board."

You request my informal advice on whether the foregoing quotes concerning the legality of 18-year-olds running for and serving as school board members correctly reflect the present law on the subject.

It is my opinion that, since the ratification of the 26th Amendment to the United States Constitution, 18-, 19- and 20-year-old citizens, who are otherwise qualified electors in the district wherein they intend to serve, are entitled to run for and, if elected, serve on local school boards. Such a conclusion is inescapable not only because the Federal Amendment constitutes the supreme law of the land and negates the application of the reference to "twenty-one years or upward" in the definition of "a qualified elector" in Art. III, sec. 1, Wis. Const., as well as in such statutory provisions as secs. 6.02 and 6.05, Stats., but also because our own Wisconsin Legislature evidenced such intent in a very positive manner by joining in the ratification of the Federal Amendment which lowered the age qualification of an elector to citizens 18 years of age. I am, therefore, in agreement with the position taken by your Department in this matter.

RWW:JCM

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*Drunk Driving—Driver License Revocation—(Informal)*  
—Upon conviction for drunk driving, probation may be granted only pursuant to secs. 972.13 (2) and 973.09, Stats.

July 23, 1971.

JEROME P. TLUSTY

*Assistant District Attorney, Marathon County*

You have asked whether a court, upon convicting a person for drunk driving, may stay the revocation of the person's chauffeur's license and place him on probation to the court so that he may be counseled by a county probation officer under a federally funded project called Alcohol Safety Action Program. The answer is no.

Section 972.13 (2), Stats., reads:

“(2) Except in cases where ch. 975 is applicable, upon a judgment of conviction the court shall either impose or withhold sentence and, if the defendant is not fined or imprisoned, he shall be placed on probation as provided in s. 973.09. The court may adjourn the case from time to time for the purpose of pronouncing sentence.”

This statute requires the court upon conviction to impose or withhold sentence. If the defendant is not fined or imprisoned, he must be placed on probation as provided in sec. 973.09, Stats. Drunk driving is punishable by fine or imprisonment, or both, under sec. 346.65 (2), Stats. Revocation of the driver's license is no part of this sentence. Even if it were, the court has no inherent power to stay the execution of a sentence except in very limited circumstances not here involved. *Drewniak v. State ex rel. Jacquest* (1942), 239 Wis. 475, 484. The court can grant probation only as authorized by sec. 973.09 (1), Stats., which reads:

“(1) When a person is convicted of a crime, the court may, by order, withhold sentence or impose sentence and stay its execution, and in either case place him on probation to the department for a stated period, stating in the order the reasons therefor, and may impose any conditions which appear to be reasonable and appropriate. The period of pro-

bation may be made consecutive to a sentence on a different charge, whether imposed at the same time or previously."

Under this statute the defendant must be first convicted. Then the court may place him on probation to the Department of Health and Social Services. There is no authority for the court to place a person on probation to the court or to any other person or agency except the said department.

Similarly, there is no authority for a court to withhold judgment in a criminal case. Section 972.13 (1), Stats., reads:

"(1) A judgment of conviction shall be entered upon a verdict of guilty by the jury, a finding of guilty by the court in cases where a jury is waived, or a plea of guilty or no contest."

Under this statute the court must enter judgment of conviction where the defendant is found guilty or pleads guilty. The court cannot withhold judgment on condition that the person accept counseling for his drinking problem, or place him on probation. The only exception to this requirement is found in sec. 161.30 (12) (i), Stats., relating to marijuana.

Under sec. 345.16, Stats., the court is authorized to send a convicted person to traffic safety school in lieu of other penalties. This could provide the opportunity for counseling the alcoholic driver. We have recently written an opinion on this subject, and a copy is enclosed.

RWW:AOH

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*Forest Crop Law—Counties, Restrictive Covenants—(Informal)*—Iron County does not have the power to incorporate a restrictive covenant in its conveyances which prohibits the grantee from entering land under the Forest Crop Law because the State has passed controlling legislation in this area and because such covenants contradict the express policy of ch. 77, Stats.

July 29, 1971.

L. P. VOIGT, *Secretary**Department of Natural Resources*

You have inquired whether Iron County has the power to incorporate a restrictive covenant in its conveyances which prohibits the grantee from entering the land under the Forest Crop Law.

The restriction utilized by Iron County reads as follows:

“Also, so long as the within described property is not placed into forest crop reserves by the grantee and if said lands are entered into forest crop by the grantee, said property shall revert to the grantor forthwith.”

It is my opinion that this restrictive covenant is invalid for two reasons. First, the State has given the right to an owner of qualifying lands to enter his land under the Forest Crop Law. The basic question here is whether the county can further limit the rights granted to an owner of land by ch. 77, Stats. Any conflict should be resolved in favor of the State. 26 C.J.S. *Deeds*, sec. 12, p. 597, states:

“The state has an inherent right to regulate the alienation of real estate within its borders, provided it does not violate constitutional guaranties. The methods of conveyancing and the character and quality of the estates thereby created are entirely within the control of the legislature . . .”

Since the State has not further restricted qualifying lands, it seems that preemption principles should apply. This means that, since the county is an arm of the State, all of its powers derive from the State. In *State ex rel. Bare v. Schinz* (1927), 216 N.W. 509, 194 Wis. 397, the court quoted sec. 112 of Vol. 1 of McQuillan on Municipal Corporations as follows:

\* \* \*

“With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the states and are, in fact, but a branch of the general administration of that policy.”

Thus, the State determines the extent of its policies. The county has no power to extend or limit the implementation of what the State has declared to be the proper method of giving effect to its policies. The *Schinz* case, *supra*, also stated: "It (referring to county) exists not by virtue of its own will or consent, but as a result of the superimposed will of the state." Thus, the county is precluded from incorporating this type of restriction in its deeds.

The second reason for the covenant's invalidity is that the restriction contradicts an express public policy as expressed in sec. 77.01, Stats. The purpose of the statute is to encourage a policy "of reproducing and growing for the future adequate crops of forest products on lands not more useful for other purposes." To allow a county to impose such a restriction on otherwise qualifying lands would contradict the policy expressed by the State. 26 C.J.S., *Deeds*, sec. 144, p. 1042, states the general rule:

"A grantor, in a deed, may specify, limit, or restrict the use or occupation of property, or prohibit its use for a specified purpose; but conditions or restrictions affecting the use or occupation of property should not be against public policy. \* \* \*"

Here, the expressed public policy precludes the county from taking actions that would undermine the clear intent of the State.

The apparent purpose of the county's restriction is to prevent the diminution of monies received from taxation. Since the Forest Crop Laws allow favorable tax rates to the owner, it necessarily means a diminution in monies received by the county. However, a method of restricting entry of such lands of less than 40 acres is available to the county in sec. 77.16 (7), Stats., which states:

"The owner, town board or county board may petition the department of natural resources for a public hearing to take testimony and hear evidence on whether lands shall be entered or continued under this section."

With regard to an owner of more than 40 acres, there is no similar provision relating to a county. The only provisions relating to review of lands of more than 40 acres entered under this chapter pertain to the town board of the town in which the land lies to petition as to whether any lands entered, shall continue under the provisions of Chapter 77. The county is not expressly given standing to petition for a review.

Therefore, such restrictive covenants cannot be given legal effect, since the State has passed controlling legislation in this area and, since such covenants contradict the express policy of the chapter. Finally, it is left to the Department of Natural Resources to determine if the land qualifies in a "manner not hampering towns in which such lands lie from receiving their just tax revenue from such lands." No similar power resides in the county. Policy considerations also suggest that uniformity is desired in such determinations and this is one reason why the Department of Natural Resources, rather than the county, is given the sole power to determine whether lands qualify under the Forest Crop Laws.

Finally, your letter does not indicate whether incorporating this restriction is pursuant to a county ordinance or if it is being done by the county clerk without any authorization.

Although, in my opinion, such restrictive covenants are invalid, the existence of such covenants in deeds already executed may create a cloud on the purchaser's title. Such defects can be eliminated in one of three ways.

First, if such action is taken pursuant to a county ordinance, and, if the county does not voluntarily repeal it and void all restrictive covenants already executed, then a declaratory judgment may be necessary to declare the ordinance invalid.

Secondly, if such action is taken by the county clerk without any authorization, and, if it is not voluntarily discontinued, then a writ of mandamus will be necessary to compel him to cease from incorporating these restrictions and to

order him to reissue the previous deeds without the restrictions.

Thirdly, the grantee can bring an action to quiet title.

RWW:TLP

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*Compatibility of Offices—Towns—(Informal)*—Offices of town clerk and town treasurer are incompatible.

July 29, 1971.

DANIEL L. LAROCQUE

*District Attorney, Marathon County*

You have requested my opinion whether the offices of town clerk and town treasurer are incompatible.

You indicate that a vacancy occurred in the office of clerk in one of the towns in the county and the elected town treasurer was appointed, and residents of the township have questioned whether the same person can hold two offices at the same time.

I will informally advise you in this instance, even though the question appears to be beyond the scope of your duties as district attorney.

At 58 OAG 247 (1969), some of the general principles of incompatibility are set forth:

“Public offices may be made incompatible by statute or they may be incompatible according to well-settled principles of common law. In some instances, offices which appear to be incompatible because of a possible conflict of duties or power of one over the other as to appointment, supervision, and pay, may be designated as compatible by statute.

“Public policy requires, that an office holder discharge his duties with undivided loyalty, therefore, in general terms, two offices are incompatible if there is a conflict of interest or duties, so that the incumbent of one office cannot dis-

charge with fidelity and propriety the duties of both. Incompatibility is not simply a physical impossibility to discharge the duties of both offices at the same time, but is an inconsistency in the functions of the two offices. This might arise, for example, where one office is subordinate to the other, or where a contrariety and antagonism would result in the attempt by one person to discharge faithfully and impartially the duties of both."

I am of the opinion that the two offices are probably incompatible.

There is no statute which expressly prohibits one person from holding both offices at the same time, nor is there any statute which expressly permits it.

Section 60.19 (1) (a), Stats., provides that the electors shall elect three supervisors (one designated chairman), a town clerk, a town treasurer, an assessor, and that:

"\* \* \* no person shall hold the offices of treasurer and assessor at the same time. The electors may at a referendum election held at the time of any regular or special election, vote to combine the offices of assessor and clerk to take effect at the expiration of the current terms of such officers.  
\* \* \*"

It can be argued that such statute contemplates dual office holding with respect to some offices and, further, that sec. 61.195, Stats., pertaining to villages, would enable such municipality to act by charter ordinance to consolidate the offices of treasurer and clerk. Section 61.195 provides:

"61.195 Discontinuance and change of term of offices. Any village may proceed pursuant to s. 66.01 to discontinue the office of marshal or constable, to change the method of selection of or tenure of any officer other than members of the village board, to consolidate any such office or to change the term of office of members of the village board."

Since a village, under sec. 61.19, Stats., elects a president, a clerk, a treasurer, an assessor and a constable, and since the president is by virtue of his office a trustee, sec. 61.24, Stats., the legislature must have contemplated that the

words in sec. 61.195, Stats., "to consolidate *any* such office" other than members of the village board, must have included combinations including village clerk and treasurer.

There is no similar language applicable to towns in ch. 60, Stats., and even towns which have acted under sec. 60.18 (12), Stats., to permit town boards to exercise village powers could not act under sec. 61.195, Stats., since towns cannot adopt charter ordinance under sec. 66.01, Stats.

Admittedly, many of the duties of each office could be performed by one person without apparent conflict.

Section 60.45, Stats., setting forth the duties of town clerk, makes only a few references to duties which specifically refer to the town treasurer. Subsections (3), (7), (8), (17) and (19) provide:

"(3) To forthwith notify the county treasurer of the appointment by the town board of any town treasurer.

"\* \* \*

"(7) To act as clerk of the town board, to keep and record faithful minutes of their proceedings, and to enter at length every vote, order, direction, resolution or regulation made by the board or by the supervisors in their official capacity, and to file all accounts audited by the board or allowed at town meeting and enter a statement thereof in the book of records.

"(8) To furnish to the town board of audit at the annual meeting every statement received from the county treasurer of money paid to the town treasurer and all other information respecting the fiscal affairs of the town in his possession, and all accounts, claims and demands against the town filed with him.

"\* \* \*

"(17) To apportion the school money collected by the town and that received from the state for the several school districts of the town on the third Monday of March each year, or as soon as the same shall be collected or received by the town treasurer, to the several districts and parts of districts within the town as provided in these statutes.

“\* \* \*

“(19) To issue licenses, when granted by the town board, upon the presentation to him of the town treasurer’s receipt for the prescribed fee.”

Section 60.49 (7), Stats., requires the treasurer to certify to the town clerk the amount of school money in his hands to be apportioned by the town clerk. However, it is the duty of the town treasurer to comply with the provisions of sec. 60.49 (1), Stats., which, in my opinion, makes it against the public interest to permit one person to occupy both offices absent express statute permitting the same. Section 60.49 (1) provides:

“(1) To receive and take charge of all moneys belonging the treasurer thereof upon the written order of the county, town treasury, and to pay out the same only in the manner provided by section 66.042.”

Section 66.042, Stats., is one of the cornerstones for fiscal responsibility and accountability where public funds are involved. It contemplates that all disbursements from the public treasury, in this case town funds, be by the town treasurer, only upon written order from the town clerk. It is commonly referred to as the check-order system, and the safeguards sought to be provided by the legislature would appear to largely disappear where the same individual wears two hats, one as treasurer and one as town clerk.

Section 66.042 (1), Stats., provides:

“(1) Except as otherwise provided in subs. (2), (3), (4) and (5), in every county, city, village, town and school district, all disbursements from the treasury shall be made by the treasurer thereof upon the written order of the county, city, village, town or school clerk after proper vouchers have been filed in the office of the clerk; and in all cases where the statutes provide for payment by the treasurer without an order of the clerk, it shall hereafter be the duty of the clerk to draw and deliver to the treasurer an order therefor before or at the time when such payment is required to be made by the treasurer. The provisions of this section shall apply to all special and general provisions of the

statutes relative to the disbursement of money from the county, city, village, town or school district treasury except s. 67.10 (2).”

Also see ch. 34, Stats., and especially sec. 34.105, Stats., which are concerned with public deposits.

Even where the offices are held by separate persons, the system of safeguards, including audit by the town board, is not a guarantee that defalcations cannot occur. See *Grob v. Nelson* (1959), 8 Wis. 2d 8, 98 N.W. 2d 457.

The problem of dual office holding is primarily for the electorate or the appointing authority, in the first instance, where the statutes do not establish incompatibility.

If the two offices are in fact incompatible, a court might hold that there was vacation of the first office on acceptance of the second. An opinion from this office is not a suitable vehicle to pressure a duly elected or appointed official into resigning one of the offices, especially where the question of conflict is debatable.

RWW:RJV

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*Cosmetology—Licensing of Aliens—(Informal)*—An alien is eligible for a manager’s license in cosmetology even though his training was in a foreign country which had no citizenship requirement.

July 30, 1971.

GEORGE H. HANDY, M.D.  
*State Health Officer*

You have requested my opinion whether an alien is eligible for a manager’s license in cosmetology in the event his training was in a foreign country which had no citizenship requirement for training or practice as a cosmetologist.

It is well established that aliens, who are lawful residents of a state, enjoy equal protection of the law under the Four-

teenth Amendment of the United States Constitution. *Truax v. Raich*, 239 U.S. 33, 60 L.ed. 131, 36 S.Ct. 7. Accordingly, laws denying aliens the right to obtain licenses to earn their livelihood are generally invalid. For this reason, a statute prohibiting the issuance of a barber's license to an alien was struck down in *Temp'lar v. State Examiners*, 131 Mich. 254, 90 N.W. 1058, 39 A.L.R. 351.

The Wisconsin Legislature has recognized the right of an alien to secure a manager's license in the field of cosmetology under sec. 159.08 (6), Stats., which reads as follows:

"Any cosmetologist registered or licensed under the laws of another state or territory of the United States or of a foreign country or province, who can provide evidence satisfactory to the department that he has met requirements substantially comparable to the requirements of this state may be licensed as follows:

"\* \* \*

"(b) As a manager upon satisfactorily passing an examination conducted by the department to determine his fitness to practice as a manager or upon providing evidence satisfactory to the department of having practiced as a manager for 4 years during a 6-year period immediately prior to application for license in this state and satisfactorily passing an examination on the law and rules governing cosmetology in this state."

In light of the foregoing language, it is clear that United States citizenship is not necessary to acquire a manager's license. To hold otherwise would render the statute meaningless. In this connection it might be noted that it takes five years of residence in the United States before a petition may be filed to become a citizen. 8 U.S.C. §1427 (a).

The question now arises as to whether any regard should be given to citizenship requirements of a foreign country where the alien received his training and became licensed or registered as a cosmetologist. In view of the background information set forth above, this question must be answered negatively. Such a requirement has no reasonable relationship to health, safety, morals or public welfare. It smacks

of an unconstitutional flavor by creating a purely artificial class of alien-cosmetologists which cannot be rationally justified.

In 55 OAG 233, one of my predecessors suggested that an alien seeking a manager's license under sec. 159.08 (6) (b), Stats., should produce satisfactory evidence that a citizenship requirement had been met in the country where he received his training or experience. This interpretation was based on the language of the statute to the effect that the applicant must meet requirements substantially comparable to the requirements of this State. No other basis was given for this interpretation.

I find no substantial distinction in terms of public health, safety, morals and welfare between an alien who received his training and experience in a country which required citizenship and one that did not. As previously suggested, where there is no sound basis for distinguishing between classes, a court will not uphold such legislative interpretations. 111 A.L.R. 770.

Accordingly, the term "substantially comparable" as used by the statute cannot be construed to impose a citizenship requirement upon an alien seeking a manager's license, but rather the term must be viewed as requiring comparable or *equivalent training*, a phrase used in sec. 148.03 (2), Stats., concerning the licensure of foreign physicians. The substance and purpose of a licensing law is of greater importance than form and language in the judicial interpretation or construction of it. 51 Am. Jur. 2d, *Licenses and Permits*, §2.

Based on the foregoing, that portion of 55 OAG 233 relating to the question under discussion and contrary to the conclusions of this opinion is hereby overruled and withdrawn.

RWW:WLJ

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*County Parks—County Control—(Informal)*—County has full power and control over county park lands even though they are located within limits of a city.

August 4, 1971.

WALTER J. SWIETLIK

*District Attorney, Ozaukee County*

You state that Ozaukee County has purchased 240 acres of land which is located wholly within the limits of the City of Mequon for development as a county park. Federal assistance is being sought to develop the park and a condition of the Federal grant is that the county have full control over the park lands.

You have requested my opinion whether the provision of sec. 27.08 (2) (a), Stats., which provides that the city board of park commissioners shall have power:

“(a) To govern, manage, control, improve and care for all *public parks*, parkways, boulevards and pleasure drives located within, or partly within and partly without, the corporate limits of the city, and secure the quiet, orderly and suitable use and enjoyment thereof by the people; also to adopt rules and regulations to promote those purposes.” (Emphasis added)

applies to a county-owned park located within the city.

It is my opinion that it does not.

Other provisions of sec. 27.08, Stats., namely sub. (2) (c), (3), (6) (a) and (b), refer to “such lands \* \* \* as it may need for public parks” and “its public parks.”

I construe the words “all public parks” as used in sec. 27.08 (2) (a), Stats., as meaning city-owned or city-controlled public parks, and this would not include parks owned and operated by the State, under sec. 27.01, 27.011, Stats., or parks owned and operated by a county which may wholly or partly be within the limits of a city.

Section 27.14, Stats., relating to police protection, also refers to “all parks,” but this broad language is limited in the same section to those “managed and controlled by its common council or by its board of park commissioners.”

A county, under the provisions of secs. 59.07 (1), 27.015, 27.05, 27.065, Stats., can acquire lands for park purposes.

Such lands may be within the limits of a city. It is only when land within a city is to be acquired by condemnation that consent of the common council of the city is required. See sec. 27.065 (1) (a), Stats.

Section 27.05, Stats., grants the county park commission charge and supervision of all county parks, and sec. 27.05 (8), Stats., provides in part that the commission shall:

“(8) Have complete and exclusive jurisdiction and control over the improvement and maintenance of that portion of any public alley, street or highway which has heretofore been, or hereafter may be, by consent of the governing body of the town, city or village wherein such alley, street or highway is located, made a part of the county park or parkway system. \* \* \*”

Also see sec. 27.065 (14), Stats., and note the use of the word “thereafter” therein.

RWW:RJV

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*Public Records—Natural Resources Department—(Formal)*—Sec. 19.21, Stats. — Inspection of public records obtained under official pledges of confidentiality may be denied where a clear pledge has been made in order to obtain the information, where the pledge was necessary to obtain the information, and where the custodian determines that the harm to the public interest resulting from inspection would outweigh the public interest in full access to public records.

Custodian must permit inspection of information submitted under an official pledge of confidentiality where the official or agency had specific statutory authority to require its submission.

Authority of Department of Natural Resources to obtain information under secs. 144.55, 144.09, 144.555 and 144.33, Stats., discussed.

Opinion, stated in 58 OAG 67, that a member of the public does not have to show a legal interest in a public record or document which he seeks to inspect was not affected by *State ex rel. Journal Company v. County Court* (1969), 43 Wis. 2d 297, 168 N.W. 2d 836.

Right to inspect Department of Natural Resources records is not absolute, but is subject to balancing of public interests.

August 10, 1971.

L. P. VOIGT, *Secretary*

*Department of Natural Resources*

You have requested by opinion regarding whether or not the Department of Natural Resources must grant access to certain types of information obtained by the department in its pollution control program. Your letter states that much of this information was given to the department in confidence and that assurances have been given from time to time by department staff members that the confidence would not be breached. Your letter sets forth the following examples of that information:

"1. Production, cost of treatment, profit and loss, and raw materials records obtained through personal interviews. Assurances in writing were given by staff personnel that this information would be used only for a general study not identified with specific mills and would be confidential.

"2. Cooperative mill waste surveys containing a description of production processes employed, major pieces of treatment equipment, production tonnages, waste water flows and solids, BOD and PH data. Assurances of confidentiality have been orally given from time to time by staff members.

"3. Records relating to approvals under Section 144.555 of the Wisconsin Statutes.

"4. Industrial waste census forms containing productive capacity, raw materials information and waste volume concentration and point of discharge information. No assurances of confidentiality were given but concern has been

expressed by some of the companies supplying this information.

"5. Detailed expenditure information relative to installations of water pollution abatement equipment.

"6. Material which at the time of submission was not regarded as confidential but which now may be regarded as confidential and prejudicial to a competitive position to the person submitting the information."

Your letter goes on to state that the Department occasionally receives requests by individuals or companies to examine your files, and sets forth the following examples of the types of requests or demands received:

"1. A member of the general public comes into our offices and asks permission to look at our files regarding a certain company or a group of companies.

"2. A representative of the news media comes into our offices and asks permission to look at our files regarding a certain company or a group of companies.

"3. An employe or consulting engineer of one company requests permission to see the files of other companies.

"4. The files of one or more companies are subpoenaed in connection with an administrative hearing or court proceeding."

Finally, you ask in which of the above combinations must the Department open the files, and if the records are subpoenaed, would the Department have a reasonable legal basis for resisting the subpoena in some or all of the possible categories?

#### LIMITATIONS ON RIGHT TO INSPECT PUBLIC RECORDS

Section 19.21 of the Wisconsin Statutes (formerly sec. 18.01) deals specifically with the custody of public records. It is clear that the records containing the information you mention are public records under sec. 19.21 (1). *International Union v. Gooding* (1947), 251 Wis. 362, 29 N.W. 2d 730;

*State ex rel. Youmans v. Owens* (1965), 28 Wis. 2d 672, 137 N.W. 2d 470. Section 19.21 (2) provides that any person shall have full access to all public records for purposes of examination and copying. The public right of full access is, however, qualified in three respects:

1. The right to inspect is subject to such reasonable regulations with respect to hours, procedures, etc., that the custodian may prescribe to limit unreasonable interference with the ordinary operations of his office.

2. The right is limited or denied in some instance by express statutory provision.

3. The custodian may refuse inspection of certain records in instances where he believes the public interest in nondisclosure *outweighs* the strong public interest in having full public access to any public records. *State ex rel. Youmans v. Owens, supra*. In such event, the custodian must give as concrete an explanation as is possible for nondisclosure to the person requesting inspection of the record. *Beckon v. Emery* (1967), 36 Wis. 2d 510, 153 N.W. 2d 501. If the person seeking inspection is unsatisfied by such explanation, his remedy is in a *mandamus* action in circuit court. *State ex rel. Youmans v. Owens, supra*, at p. 682.

The situations in which the custodian may deny access to public records (where he is not authorized to do so by express statutory provision) are not specifically set down in the cases cited above. The court has stated, however, that sec. 19.21, Stats., will be construed *in pari materia* with sec. 66.77, Stats., formerly sec. 14.90, the Wisconsin open meeting law, and that the policy guidelines for holding closed meetings set forth in sec. 66.77 (3), Stats., will be applicable to the question of confidentiality of records under sec. 19.21. *Youmans* case, *supra* at pp. 684-685. It does not appear, however, that any of the standards of sec. 66.77 (3), are applicable to the examples you set forth in your letter.

The court in the *Youmans* case did point out that other common law exceptions remain to the public right of full access to public records. One exception specifically mentioned was the situation where information had been ob-

tained by a public agency on the promise that it would be kept confidential and not be disclosed. The court cited the case of *City & County of San Francisco v. Superior Court* (1951), 38 Cal. 2d 156, 238 Pac. 2d 581, as an illustration of this exception, stating that:

“\* \* \* There the records sought to be inspected contained information which had been gathered from employers under the pledge that it would be kept confidential. To have permitted inspection would not only have constituted a breach of this pledge, but would have seriously handicapped governmental agencies in gathering information in the future under a similar pledge because of distrust that the pledge would not be observed.” *Youmans, supra*, at pp. 681-682.

The *City & County of San Francisco* case involved a commission which was charged with the responsibility of setting a wage scale for municipal employees in accord with the generally prevailing wage scales. In order to determine this wage scale, the commission obtained data from 200 private employers in the vicinity. Representatives of the municipal employees sought inspection of the data accumulated from the private employers. The court found that the data from private employers was obtained on the promise that it would be kept confidential, that it had been given voluntarily to the commission, and that the commission had no power to obtain the data other than on a voluntary basis.

The California Supreme Court held that under these circumstances, the public interest would be harmed by disclosure. The decision was based upon the fact that the information could not have been obtained except upon the express condition and pledge that the identity of the source of the material would be treated as confidential. The public interest would suffer if the government broke its pledge of confidentiality, because public officials would be unable to obtain such information in the future. In accord is *Norwegian Nitrogen Product Co. v. U.S.* (1933), 288 U.S. 294, 53 S.Ct. 350, 77 L.ed. 796.

I am of the opinion that the situation described in the *City and County of San Francisco* case, where information was obtained under official pledge of confidentiality, and

where the information could not otherwise have been obtained by the governmental agency, constitutes an exception under sec. 19.21, Stats., where the custodian of public records containing such information may deny inspection of those records in the first instance. I would suggest that the following criteria be considered, however, in deciding whether a particular pledge of confidentiality comes within the exception, and will, therefore, hold up in court. First, there must have been a clear pledge made. Second, the pledge should have been made in order to obtain the information. Third, the pledge must have been necessary to obtain the information.

Finally, even if a pledge of confidentiality fulfills these criteria, thus making the record containing the information obtained clearly within the exception, the custodian must still make an additional determination in each instance that the harm to the public interest that would result from permitting inspection outweighs the great public interest in full inspection of public records. The general requirement of full public access creates a strong presumption in favor of permitting inspection, even though the release of information is irreversible, while the denial of access is always subject to the review of the circuit court. This presumption is sound because, as a practical matter, few private citizens have the resources available to bring the necessary legal action to compel release of information when access has been denied by the custodian.

Applying these criteria to the examples stated in your letter, I am of the opinion that none of the examples come within the exception in the first instance. Examples 3 through 5 do not concern any pledges of confidentiality at all. Example 6 does not appear to either, but even if some pledges have been made recently, it is clear that no pledge was given to obtain the information at the time the department first acquired it.

Examples 1 and 2 do appear to involve situations where clear pledges of confidentiality may have been given. However, they also involve situations where the agency has specific statutory authority to require the production of the

information it seeks, and, therefore, do not meet the third criteria that the pledge of confidentiality must be necessary to secure the information. For example, sec. 144.555, Stats., referred to in Example 3 of your letter specifically requires an industry intending to discharge new or increased waste to submit a report to the department before work is commenced:

“Any industry which intends to increase the quantity of industrial wastes discharging to the surface waters of the state or to discharge a new waste to said waters or which intends to alter an existing outlet or build a new outlet for industrial wastes shall, before starting such work, advise the department \* \* \* in writing concerning its intentions and supply the department with a general report describing steps which shall be taken to protect the surface waters of the state against new pollution or an increase in existing pollution. The report shall be submitted not less than 30 days before approval is desired, and no construction work shall be started until the report has been approved. \* \* \*”

The Department also has specific authority to acquire from industries and other owners whatever information regarding existing facilities and discharges that is necessary for the Department to perform its regulatory duties. The Department can require the keeping of records and the submission of information under secs. 144.55 and 144.09, Stats.:

“144.55 Visitorial powers of department. Every owner of an industrial establishment shall furnish to the department all information required by it in the discharge of its duties under s. 144.025 (2). Any member of the natural resources board or any employe of the department may enter any industrial establishment for the purpose of collecting such information, and no owner of an industrial establishment shall refuse to admit such member or employe. The department shall make such inspections at frequent intervals. The secretary and all members of the board shall have power for all purposes falling within the department's jurisdiction to administer oaths, issue subpoenas, compel the attendance

of witnesses and the production of necessary or essential data.”

“144.09 Enforcement. Records required by the department shall be kept by the owners and the department supplied with certified copies and such other information as it may require. Agents of the department may enter buildings, structures and premises of owners supplying the public or industrial plants with water, ice, sewerage systems, sewage or refuse disposal service and private properties to collect samples, records and information, and to ascertain if the rules and orders of the department are complied with. The department of justice shall assist in the enforcement of this chapter.”

Sections 144.55 and 144.09, Stats., contain no specific provision regarding confidentiality of the information received pursuant to the statutes. This contrasts with sec. 144.33, Stats., which does provide that:

“144.33 Confidentiality of records. Any records or other information furnished to or obtained by the department in the administration of ss. 144.30 to 144.46, which records or information, as certified by the owner or operator, relate to production or sales figures or to processes or production unique to the owner or operator or which would tend to affect adversely the competitive position of such owner or operator, shall be only for the confidential use of the department in the administration of ss. 144.30 to 144.46, unless such owner or operator expressly agrees to their publication or availability to the general public. Nothing herein shall prevent the use of such records or information by the department in compiling or publishing analyses or summaries relating to the general condition of the outdoor atmosphere, if such analyses or summaries do not identify any owner or operator or reveal any information otherwise confidential under this section.”

Section 144.33, Stats., was enacted by ch. 83, Laws of 1967, which gave the Department of Natural Resources responsibility for controlling air pollution and solid waste. Section 144.33 applies only to information gathered in the performance of the department's air pollution control and solid

waste management functions under secs. 144.30 through 144.45. In contrast, secs. 144.55 and 144.09 do not contain these sorts of explicit provisions regarding confidentiality, and are governed instead by the general public records statute, sec. 19.21, Stats.

It is my opinion that secs. 144.55 and 144.09, Stats., give the department full authority to obtain any information necessary to carry out its duties under ch. 144 (except for regulation of air pollution and solid waste under secs. 144.30 through 144.35, Stats.). This presumably includes all the information described in your letter, assuming that the department would not acquire any information that it does not need to carry out its regulatory functions.

I am of the opinion that the department must permit inspection of information submitted under a pledge of confidentiality where the information could have been obtained by the department pursuant to its statutory authority, and that the pledge of confidentiality must be considered as invalid and not binding to the officer or agency. To do otherwise would permit public officials to effectively waive the public right to know *at their own discretion* by making pledges of confidentiality when they are not necessary for the official to obtain the information, which would be clearly in violation of the public policy of sec. 19.21, Stats. Even if the pledge of confidentiality was made upon the mistaken belief that it was necessary, it would be against public policy to require that the pledge be kept. After all, the persons who submitted the information in reliance of such a pledge have no grounds for complaint because they would have been required to submit the information under secs. 144.55 and 144.09, Stats., anyway.

#### WHO MAY INSPECT

Your letter also sets forth three different examples of persons who might seek inspection under sec. 19.21, Stats.: (1) a member of the general public, (2) a representative of the news media, or (3) an employee or consultant of a competitor. In a formal opinion to E. H. Jorris, State Health Officer, dated July 16, 1969, I stated my opinion that the

common-law rule of public records, which requires a private person seeking inspection of a public record or document to show first a special, legal interest in the record or document, was not applicable in *Wisconsin*. 58 OAG 67. Stated positively, I was of the opinion that *any* member of the public, regardless of his motives, has a right to inspect any public record, subject to the three limitations stated at the beginning of this opinion. 58 OAG at 71.

Twenty days prior to the issuance of that opinion, the Wisconsin Supreme Court decided the case of *State ex rel. Journal Co. v. County Court* (1969), 43 Wis. 2d 297, 168 N.W. 2d 836, which was not discussed in my opinion to Mr. Jorris. The *Journal Co.* case turned on the question of whether there was an absolute right of inspection of a court decision, a right not subject to any balancing of the public interest under the *Youmans* case. I have found no particular statute, either predating sec. 19.21, Stats., or enacted subsequent to it, that would give the public an absolute right of inspection of the department's records such as was found to exist in the *Journal Co.* case under sec. 59.14, Stats. On the other hand, I find no indication in the *Journal Co.* case that the Wisconsin Supreme Court intended to narrow its previous line of decisions (discussed in 58 OAG 67) to the effect that a member of the public has:

“\* \* \* an absolute right to inspect a public document in the absence of specifically stated sufficient reasons to the contrary.” *Beckon v. Emery, supra*, at p. 518.

It is clear under that the *Youmans* case that there is no distinction between the three examples of persons you cite in your letter, in that they are all to be considered members of the general public seeking inspection of a public record, and are all entitled to inspection subject to the limitations previously discussed.

#### RESPONSE TO SUBPOENA

Your letter also asks my opinion as to how the department should respond to a subpoena duces tecum issued by a court or administrative agency. This matter was fully discussed in 57 OAG 138, and I am in complete agreement with my predecessor where he states at 57 OAG 142, that:

"I conclude that there are a number of good reasons why public records should not be subpoenaed from their proper depository for use in legal proceedings. They may be lost or destroyed. Until such time as they are returned they are not available for public inspection. Lack of such public records may disrupt the orderly flow of business of the public agency involved. Any person may inspect the public records and obtain certified copies. Any attorney who desires to prove the contents of a public record may do so by obtaining a certified copy in advance of the trial date. It is not proper for an attorney, who fails to prepare his case in advance by obtaining such copies, to attempt to obtain original public records at the last minute by subpoena duces tecum. This is an unwarranted imposition upon the public officer involved. The courts refuse to allow this where certified copies could be obtained instead.

"Whenever you are served with such subpoena duces tecum, they should be promptly brought to our attention. We will move to quash such subpoenas and ask for costs where appropriate."

RWW:SMS

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*Annexation and Incorporation—(Formal)—Boundary Review Board*—The legislature can constitutionally provide for the annexation of territory without referendum for approval by the electors and landowners in the territory to be annexed. Assembly Bill No. 64 (1971), proposed sec. 66.022, Stats., municipal boundary expansion plan.

August 11, 1971.

THE HONORABLE, THE ASSEMBLY

Assembly Bill No. 64 (1971) if enacted would revamp Wisconsin's statutes pertaining to incorporation, annexation and consolidation. It creates a state, three-man boundary review board and establishes statutory standards against which all incorporations and annexations are measured. All annexa-

tions, other than municipally-owned territory, have been made subject to review and approval by the boundary review board prior to becoming effective.

As to certain annexations, mainly those based on petitions from electors and landowners of the area proposed to be annexed, referendum approval within such area would be required as under present law. Section 23 of the bill amends sec. 66.021 (5) (a), Stats., to retain referendum in certain cases, and sec. 66.021 (5) (g) which provides that "If the result of the referendum is against annexation, all previous proceedings shall be nullified" is not repealed.

No referendum within the area proposed to be annexed is provided for where the proposed annexation is initiated by the city or village *under a boundary expansion program plan* pursuant to proposed sec. 66.022, Stats., contained in section 33 of the bill, and which has been proven and approved. A two-thirds vote of the members-elect of the governing body of the municipality can affect such annexation following State Board approval.

Assembly Resolution No. 27 (1971) requests my opinion whether the legislature can constitutionally provide for annexation of territory without referendum for approval by the electors and landowners in the territory to be annexed.

It is my opinion that it can. There is no right of referendum guaranteed by either the United States or Wisconsin Constitutions.

In McQuillin, *Municipal Corporations*, Vol. 2, sec. 7.17, p. 344, it is stated:

"Unless otherwise provided by the state constitution, it is discretionary with the legislature to provide for a referendum on the question of the extension of corporate limits."

At Vol. 2, sec. 7.16, p. 343, of the same authority, it is stated:

"The constitutionality of laws providing for annexation without the consent of the inhabitants has in many cases been sustained."

In *School Dist. v. Callahan* (1941), 237 Wis. 560, 570, 297 N.W. 407, the court quoted with approval the following statement in *Hunter v. Pittsburgh*, 207 U.S. 161, 178, 179, 28 S.Ct. 40, 52 L.ed. 151:

“ ‘Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. . . . The state, therefore, at its pleasure, may . . . expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the federal constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it.’ ”

This statement was again quoted with approval in *State v. Mutter* (1964), 23 Wis. 2d 407, 413, 127 N.W. 2d 15. Also see *Zawerschnik v. Joint County School Comm.* (1955), 271 Wis. 416, 73 N.W. 2d 566, and opinion at 56 OAG 145 (1967).

Wisconsin statutes have not always required or permitted referendum proceedings in connection with annexations. In *Town of Wilson v. City of Sheboygan* (1939), 230 Wis. 483, 488, 283 N.W. 312, it was held that, although then sec. 62.07 (2) (c), Stats., did provide for a referendum in detachment proceedings, no similar provision applied to attachment proceedings and no referendum could be had under the direct legislation statute, then sec. 10.43, Stats., since that section did not apply to ordinances already passed.

In *State ex rel. Madison v. Walsh* (1945), 247 Wis. 317, 324, 19 N.W. 2d 299, it was held that towns could not contest the validity of annexation of territory by a city by showing that after passage of the annexation ordinance the town boards had conducted a referendum in which the vote was against the detachment of the territory, since the statutes then in force made no provision for a referendum in case of annexation proceedings.

In *Milwaukee v. Sewerage Comm.* (1954), 268 Wis. 342, 67 N.W. 2d 624, it was held that the statute dealing with consolidation of municipal corporations, sec. 66.02, Stats., was constitutional and that while the legislature cannot delegate the power to make a law it can lay down fundamentals and standards and delegate to administrative agencies authority to exercise such legislative power as is necessary to carry into effect the general legislative purpose. The court held that consolidation and annexation are matters of state-wide concern. At page 350 the court set forth the broad scope of the legislature's power in these areas:

"The legislature is prohibited by sec. 31, art. IV of the Wisconsin constitution from enacting any special or private law regarding the incorporation of a town, city, or village. There is no constitutional limitation prohibiting the legislature from creating, enlarging, diminishing, or abolishing towns. Nor is there any constitutional restriction as to the legislature's authorization of the consolidation of cities, towns, and villages. Clearly such matters are entirely within the realm of the legislature's power and discretion."

In *Village of West Milwaukee v. Area Bd of V. T. & A. Ed.* (1971), 51 Wis. 2d 356, 373-375, 187 N.W. 2d 387, it was held that the legislature had power to establish rules for the formation and alteration of school districts and could delegate to administrative agencies the authority to exercise such legislative power as necessary to carry into effect the general legislative purpose without the necessity of election or referendum in the areas affected.

I am of the opinion that a statute resulting from enactment of Assembly Bill No. 64 (1971) would be constitutional insofar as it establishes standards against which all annexa-

tions are measured and delegates to a state boundary review board and a city council or village board power to determine whether a proposed annexation under a boundary expansion plan shall become effective, without referendum for approval by electors and landowners in the territory to be annexed.

RWW:RJV

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*Retirement Allowances—Augmented Benefits to Retired State Employees—(Formal)*—The proposed statute changes contained in Assembly Substitute Amendment 1 to 1971 Assembly Bill 541 to increase retirement allowances of retired members of the Wisconsin Retirement Fund and the Conservation Wardens Pension Fund are contrary to Art. IV, sec. 26, Wis. Const., since the funds emanate from the State Treasury and are payable to officers or employes already retired.

August 12, 1971.

REUBEN LAFAYE

*Chairman, Joint Survey Committee  
on Retirement Systems*

The Joint Survey Committee on Retirement Systems is analyzing 1971 Assembly Bill 541, Assembly Substitute Amendment 1 and other amendments thereto in preparation of the committee report required by sec. 13.50 (6) (b), Stats. You ask my opinion on a number of questions relating to the Bill and its amendments.

Your first question is:

Is the proposal contained in 1971 Assembly Substitute Amendment 1, which would increase retirement allowances of retired members of the Wisconsin Retirement Fund and the Conservation Wardens Pension Fund, in violation of Article IV, Section 26, of the Wisconsin State Constitution?

Article IV, sec. 26, Wis. Const., reads in part:

“The legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract entered into; \* \* \*”

Assembly Substitute Amendment 1 to 1971 Assembly Bill 541 provides for increased benefits to State employes already retired and receiving a retirement or disability annuity. The “Augmented Benefits,” which are the subject of this amendment, would be available only to former employes retired prior to May 1, 1965. The material portion of sec. 41.11 (14), Stats., which would be created by the substitute amendment, reads:

“41.11 (14) AUGMENTED BENEFITS. (a) Any member of the Wisconsin retirement fund having completed not less than 20 years of creditable service prior to May 1, 1965, receiving a retirement or disability annuity prior to May 1, 1965, and attaining the age of 65 years shall, subject to an appropriation under s. 20.515 (2) (d), be eligible to receive monthly an augmented benefit in an amount equal to \$2 for each year of creditable service as a member of the Wisconsin retirement fund (but not to exceed 40 such years), subject to the following:”

Further provisions of the substitute amendment would provide similar “Augmented Benefits” to annuitants under the Conservation Wardens Pension Fund.

It is my opinion that the “Augmented Benefits” provisions of Assembly Substitute Amendment 1 to 1971 Assembly Bill 541 are in violation of Art. IV, sec. 26, Wis. Const. In *State ex rel. Thomson v. Giessel* (1952), 262 Wis. 51, 53 N.W. 2d 726, the court held unconstitutional additional annuity payments to teachers who were already retired. Section 42.535, Stats. (1951), made available additional retirement benefits to retired teachers by providing that every qualified retired teacher “shall be paid an additional \$1 per month for each year of teaching experience.” These additional benefits were granted only to teachers who retired before June 30, 1951. The section granting such additional benefits, sec. 42.535, Stats. (1951), became effective there-

after on July 19, 1951. The court stated on page 55 of *Giessel*:

“\* \* \* It is apparent, therefore, that this extra compensation is not granted until after the teaching contracts had not only been entered into but the teachers’ services had been performed and the teacher had ceased to serve. If it be true, then, that the additional benefits and annuities form extra compensation, which was not granted until after the contracts were entered into or until the services had been rendered, the prohibition of sec. 26, art. IV, Const., renders the legislation void.”

After discussing and disposing of various arguments directed to the issue that the “additional benefits” were not prohibited compensation, the court held at page 65:

“\* \* \* we conclude that the effect of sec. 42.535, Stats., is to grant extra compensation to public servants after the services are rendered and to public contractors after the contracts are entered into, in violation of sec. 26, art. IV of the state constitution. \* \* \*”

The requirements for eligibility for the “Augmented Benefits” proposed in Assembly Substitute Amendment 1 to 1971 Assembly Bill 541 are similar to those of sec. 42.535, Stats. (1951), declared unconstitutional in the *Giessel* case. The substitute amendment requires that a person be retired prior to May 1, 1965, to be eligible for the “Augmented Benefit” so the benefit is clearly not available to State employees presently still employed.

The court in the *Giessel* case, *supra*, indicated at page 64 that their holding would be similar were the benefits in question available to all public employees generally and not exclusively to teachers. On page 64 the court stated:

“It has not escaped the attention of the court that a decision sustaining an increase of benefits for already retired teachers would clear the way for legislation increasing benefits for all public employees, including judges, granted by the legislature from time to time after their retirement, and such a decision would be consonant with the selfish interests

of the court. Nevertheless, as we read sec. 26, art. IV, Const., this would involve an exception to a clear and unmistakable command. If exceptions are to be made, they should not come from the legislature or the court but from those whose proper function it is to amend the constitution. When the people determined that the times required state participation in the construction of highways, airports, veterans' housing, and the preservation and development of forests, they adopted amendments to the constitution excepting these interests from the terms of sec. 10, art. VIII, which forbade the state to engage in works of internal improvement. If, now, to underwrite certain contracts against the effects of inflation is deemed, by the people, to be desirable, or if they consider that the cause of public service requires power in the legislature to grant bonuses, apart from compensation, to retired public servants, the road to amending the constitution is well traveled, and in such an amendment guides and limits to legislative and judicial authority can be set in such wise as the people consider best meets the problem to be dealt with and provides safeguards against abuse."

Thereafter on April 3, 1956, Art. IV, sec. 26, Wis. Const., was amended by adding the language:

"\* \* \* This section shall not apply to increased benefits for teachers under a teachers' retirement system when such increased benefits are provided by a legislative act passed on a call of yeas and nays by a three-fourths vote of all the members elected to both houses of the legislature."

The legislature has thereafter further apparently construed the prohibitions of Art. IV, sec. 26, Wis. Const., to apply to State officers and employes since both houses have passed on first consideration Enrolled Joint Resolution 12 which would amend the constitution to extend the teacher exception in Art. IV, sec. 26, to State officers and employes. The proposed amendment to Art. IV, sec. 26, would read:

"\* \* \* This section shall not apply to increased benefits for persons who have been or shall be granted benefits of any kind under a retirement system \* \* \*."

The "Augmented Benefits" provided, by Assembly Substitute Amendment 1 to Assembly Bill 541, to retired State

officers and employes are compensation. Since such compensation is from State funds and since it is payable to persons who are no longer working for the State, it constitutes a clear violation of Art. IV, sec. 26, Wis. Const.

Your second question is :

Could the retirement allowances of retired members of participating municipalities under the Wisconsin Retirement Fund, other than the state, be increased based on *State ex rel. Singer v. Boos*, 44 Wis. 2d 374?

In *State ex rel. Singer v. Boos* (1969), 44 Wis. 2d 374, 171 N.W. 2d 307, the court reiterated the principle that Art. I, sec. 26, Wis. Const., applies only to public officers paid out of the State Treasury and held that counties were not precluded from increasing benefits to already-retired employes. The court stated at page 380 :

“This court has repeatedly held that the constitutional prohibition in art. IV, sec. 26, applies only to public officers who are paid out of the state general fund. In the instant case, the increased pensions will be paid entirely out of county funds and thus the mandate of art. IV, sec. 26, is inapplicable.”

The important distinction between the facts in *Singer v. Boos*, *supra*, and the “Augmented Benefits” of Substitute Amendment 1 is the origin of the funds used to pay the benefits. A Milwaukee County ordinance provided the benefits solely from county funds in *Singer v. Boos*, *supra*, whereas in the matter at hand, funds come from the state treasury. Section 20.515 (2) (d), Stats., which would be created by the substitute amendment would appropriate from state funds “a sum sufficient to pay the benefits authorized under sec. 41.11 (14).” Since the funds to pay the proposed “Augmented Benefits” to already-retired members of the Wisconsin Retirement Fund, including municipal employe members, would come from State funds, such payment is prohibited by Art. IV, sec. 26, Wis. Const. *State ex rel. Thomson v. Giessel*, *supra*. The court makes it clear in *Thomson v. Giessel* that the term public funds is not synonymous with general fund but covers any public funds of the State. At page 62 the court said:

“\* \* \* Among all the contentions which have been made in this action it has not been asserted that the general fund is not a public fund. The progress of the money which pays the controversial additional annuity is from the general fund, to the contingent fund, to the annuity reserve fund, to the retired teacher. Each of these transfers is said to be for a public purpose but somewhere under the three shells it is asserted that the little pea has shed its public character and become private and, as such, acquired freedom from the restraints of sec. 26, art. IV, Const. We yield to no one in our realization of the intricacies of governmental finance and our admiration of the man who understands it, but we confess inability to follow the taxpayer’s dollar from the general fund through the others, each transfer being to effect a public purpose, and arrive at a conclusion that before it gets into the hands of the teacher it has somehow ceased to be public money. To be sure, the constitutional prohibition does not distinguish between public and nonpublic funds. If the time comes when the legislature awards extra compensation payable out of funds which are not public we may have to construe the Article with that in mind, but that question is not presented here. We conclude that the present benefits are payable from public funds and, as the Illinois court held their fund was not a public one, the Illinois cases are not persuasive authority.”

Since, therefore, as indicated above the money to pay the augmented benefits originates as a sum sufficient appropriation from the general fund, payment of the “Augmented Benefits” to retired municipal employe members of the Wisconsin Retirement Fund is precluded by Art. IV, sec. 26, Wis. Const.

Your third question is:

Inasmuch as the active and retired members of the Conservation Wardens Pension Fund receive salary paid out of segregated funds and not the state general fund could their retirement allowances be increased?

The sum sufficient appropriation set forth in proposed sec. 20.515 (2) (e) of Assembly Substitute Amendment 1 to 1971 Assembly Bill 541 is from the general fund. As stated

in the excerpt from *Thomson v. Giessel*, page 62 above, the character of the funds are not altered by passing through other funds on the way to the retiree. I see no distinction in the "Augmented Benefits" as implemented by Substitute Amendment 1 between members of the Wisconsin Retirement Fund and the Conservation Wardens Pension Fund. In both categories the increased compensation to already-retired public employes which has its source from State funds is prohibited by Art. IV, sec. 26, Wis. Const.

Your fourth question is:

The Wisconsin Retirement Fund includes employes of the Department of Natural Resources, the Department of Transportation, employes from other program revenue funded departments and employes from other segregated funds, who receive their salaries from segregated funds. Could these employes have their retirement allowances increased after retirement?

As I stated in answer to your question three above, the "Augmented Benefits" of Substitute Amendment 1 come from the general fund and the character of such funds is not altered by passing through segregated or other funds on the way to the recipient. I am not unmindful of the fact that the court in *Singer v. Boos*, *supra*, used language which would indicate that Art. IV, sec. 26, Wis. Const., prohibitions apply only to public officers paid out of the general fund. Such language at page 380 reads:

"This court has repeatedly held that the constitutional prohibition in art. IV, sec. 26, applies only to public officers who are paid out of the state general fund."

In reading the cases cited by the court for this proposition I find no showing that the court intended to change its previous holdings that the payment which is precluded by the constitution is from the State Treasury. I find no indication that the court intended, in *Singer v. Boos*, to construe Art. IV, sec. 26, Wis. Const., as allowing payment of extra compensation to employes paid from segregated funds rather than the State general fund.

*State ex rel. Holmes v. Krueger* (1955), 271 Wis. 129, 72 N.W. 2d 734, and *Columbia County v. Wisconsin Retirement Fund* (1962), 17 Wis. 2d 310, 116 N.W. 2d 142 are cited by the court as authority for the above quoted statement in *Singer v. Boos*. The *Holmes* case refers to extra compensation payable out of the public treasury of the State. No mention is made of the term *State general fund*. See pages 133 to 136. In the *Columbia County* case, the material statement on page 326 reads:

"The Wisconsin Constitution, sec. 26, art. IV, does not apply to counties. *Sieb v. Racine* (1922), 176 Wis. 617, 187 N.W. 989; *Dandoy v. Milwaukee County* (1934), 214 Wis. 586, 254 N.W. 98."

*Sieb v. Racine* (1922), 176 Wis. 617, 187 N.W. 989, at page 625, also uses the language *state treasury* as follows:

"\* \* \* It has been held that the constitutional provision referred to applies only to public officers whose salaries are paid out of the state treasury."

I, therefore, see no indication that the court intended in *Singer v. Boos*, *supra*, to except segregated funds from the constitutional prohibition and I, therefore, consider State employes paid from segregated funds subject to Art IV, sec. 26, Wis. Const.

Your fifth question is:

What is the legal definition of public officers who are paid out of the state general fund? Does it include elective officers, appointive officers or all state employes whether classified or unclassified?

The prohibition of Art. IV, sec. 26, Wis. Const., does not distinguish between public officers and employes. Such section precludes payment of extra compensation to "any public officer, agent, servant or contractor, after the services have been rendered or the contract entered into." In *State ex rel. Thomson v. Giessel*, *supra*, the court did not hold that the retired teachers were public officers but that they were servants or contractors and that the legislature could not, therefore, grant them extra compensation. While the court refer-

red solely to *public officers* as being precluded from additional or increased compensation in *Singer v. Boos*, *supra*, p. 380, I see nothing in such case or the cases cited therein which indicates that the court intended such statement to exclude employes. In light of the language of Art. IV, sec. 26, which applies uniformly to public officers and employes in those respects material to "extra compensation" I see no different result in the application of this provision of the constitution to the "Augmented Benefits" of Substitute Amendment 1.

It is, therefore, my opinion that Art. IV, sec. 26, Wis. Const., precludes payment of the "Augmented Benefits" to "any public officer, agent, servant or contractor." A discussion therefore of the distinction between a public officer and an employe is not necessary to interpretation of Substitute Amendment 1 to 1971 Assembly Bill 541.

RWW:WMS

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*Collective Bargaining—Dairy Products—(Formal)—Assembly Bill 234* would be constitutional if enacted into law.

August 16, 1971.

THE HONORABLE, THE ASSEMBLY

By Resolution 19A, you have requested my opinion as to the validity of Bill 234A which would amend sec. 100.22 (1), Stats., as follows:

"100.22 (1) Any person, firm or corporation, foreign or domestic, engaged in the business of buying milk, cream or butter fat for the purpose of manufacture, that discriminates between different sections, communities, towns, villages or cities of this state, or between persons, firms or corporations in any locality of this state, by paying for such commodity at a higher price or rate in one section, community, town, village or city, or to any person, firm or corporation in any locality of this state, than is paid for the same com-

modity by said person, firm or corporation, foreign or domestic, in another section, community, town, village or city, or to another person, firm or corporation in any locality of this state, where the effect may be to lessen substantially competition or to tend to create a monopoly or to injure, destroy or prevent competition, shall be guilty of unfair discrimination, which is hereby prohibited and declared unlawful; ~~providing, that it except:~~

“(a) It shall be a justification for such a discrimination in price if the difference is merely commensurate with an actual difference in the quality or quantity of the commodity purchased or in transportation charges or other expense of marketing involved in said purchase; ~~provided, further, that it:~~

“(b) It shall be a justification for such a discrimination in price if it is done in good faith to meet competition.

“(c) *Dairymen may combine their production for purposes of collective bargaining for price, and buyers who purchase such production through such bargaining process shall not be in violation of this section.*”

I note that some proponents of the bill have argued that sec. 100.22, Stats., is unconstitutional. Section 100.22, was created by ch. 395, Laws of 1909, as sec. 1791n-1. Section 1791n-1, reads as follows:

“Any person, firm or corporation, foreign or domestic, engaged in the business of buying milk, cream or butter-fat for the purpose of manufacture, that shall intentionally, for the purpose of creating a monopoly or of destroying the business of a competitor in any locality, discriminate between different sections, communities, towns, villages or cities of this state, by buying such commodity at a higher price or rate in one section, community, town, village or city, than is paid for the same commodity by said person, firm or corporation in another section, community, town, village or city, after making due allowance for the difference, if any, in the actual cost of transportation from the point of purchase to the locality of manufacture, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared unlawful.”

Subsection (1) of sec. 1791n-1, was amended by ch. 406, sec. 3, Laws of 1923, to read as follows:

“ \* \* \* Any person, firm or corporation, foreign or domestic, engaged in the business of buying milk, cream or butter fat for the purpose of manufacture, that shall \* \* \* discriminate between different sections, communities, towns, villages or cities of this state, or between persons, firms or corporations in any locality of this state, by \* \* \* paying for such commodity at a higher price or rate in one section, community, town, village or city, or to any person, firm or corporation in any locality of this state, than is paid for the same commodity by said person, firm or corporation, foreign or domestic, in another section, community, town, village or city, or to another person, firm or corporation in any locality of this state, \* \* \* shall be \* \* \* guilty of unfair discrimination, which is hereby prohibited and declared unlawful; provided, that it shall be a justification for such a discrimination in price if the difference is merely commensurate with an actual difference in the quality or quantity of the commodity purchased or in transportation charges or other expense of marketing involved in said purchase.”

Section 1791n-1 was renumbered 133.09 by sec. 50, ch. 449, Laws of 1923. Subsequently, sec. 133.09, Stats., was renumbered 100.22 by sec. 358, ch. 550, Laws of 1935.

The constitutionality of sec. 100.22, Stats., was challenged in *White House Milk Co. v. Reynolds* (1960), 12 Wis. 2d 143, 106 N.W. 2d 441. The New York corporation purchased milk at the same price from farmers at six different plants located at various parts in the State. The corporation alleged that the statute denied it freedom to contract and equal protection of the laws. The lower court declared the statute unconstitutional. The Wisconsin Supreme Court, however, stated that a statute is presumed to be constitutional and the burden of establishing the unconstitutionality thereof rests upon the person attacking it. The Court reversed the judgment and remanded same to the lower court for further proceedings. The Court stated at p. 150:

“We conclude that the facts pertaining to the marketing of milk in Wisconsin, the evils which may reasonably be

thought to result if buyers are legally free to offer different prices to different persons or in different localities, and the results which may reasonably be thought to flow from the existence and enforcement of sec. 100.22, Stats., should be re-examined, and the questioned validity of sec. 100.22, freshly resolved upon a record which presents the pertinent facts."

However, no further proceedings were held.

Section 100.22 (1), Stats., was amended by ch. 386, Laws of 1961, to read as follows:

"100.22 (1) Any person, firm or corporation, foreign or domestic, engaged in the business of buying milk, cream or butter fat for the purpose of manufacture, that \* \* \* *discriminates* between different sections, communities, towns, villages or cities of this state, or between persons, firms or corporations in any locality of this state, by paying for such commodity at a higher price or rate in one section, community, town, village or city, or to any person, firm or corporation in any locality of this state, than is paid for the same commodity by said person, firm or corporation, foreign or domestic, in another section, community, town, village or city, or to another person, firm or corporation in any locality of this state, *where the effect may be to lessen substantially competition or to tend to create a monopoly or to injure, destroy or prevent competition*, shall be guilty of unfair discrimination, which is hereby prohibited and declared unlawful; provided, that it shall be a justification for such a discrimination in price if the difference is merely commensurate with an actual difference in the quality or quantity of the commodity purchased or in transportation charges or other expense of marketing involved in said purchase; *provided, further, that it shall be a justification for such a discrimination in price if it is done in good faith to meet competition.*"

You have requested my opinion as to the validity of the bill. I assume you are concerned as to its constitutionality. The general rule as to the constitutionality of such trade regulations is set forth at 16 Am. Jur. 2d, *Constitutional Law*, §517, pp. 903-904 as follows:

“Since the establishment of regulations of a particular trade or business essential to the public health and safety is within the legislative capacity of the state in the exercise of its police power, the classification of the subjects of such legislation, so long as it has a reasonable basis and is not merely an arbitrary selection without real difference between the subjects included and those omitted from the law, does not deny to any person the equal protection of the laws. Legislation affecting alike all persons pursuing the same business under the same conditions is not class legislation. But if some persons engaged in a calling or business are subjected to special burdens or favored by special privileges while other persons engaged in the same calling or business are not so treated, the legislation is based upon unconstitutional discrimination.”

It could be argued that the bill, if enacted into law, would permit discrimination against individual dairymen who decide not to join an association or group for purposes of collective bargaining for price, and thus, deny them of equal protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution and Art. I, sec. 1, Wis. Const.

If the general purpose of the law is regulation, and not the suppression of lawful business, the fact that some persons on whom it operates may have to reconstruct their methods of doing business does not render the law void. *MacLoren v. State* (1910), 141 Wis. 577, 124 N.W. 667. In view of the fact that the bill would permit any dairyman to combine with others for purposes of collective bargaining for price, it is my opinion that the courts would find Assembly Bill 234 constitutional if enacted into law.

RWW:GBS

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*Public Contracts—Conflict of Interest—(Informal)—Section 946.13, Stats., prohibits a member of the Wisconsin Board of Vocational, Technical and Adult Education from bidding on and contracting for the construction of a building*

project for a vocational-technical district which would entail expenditures exceeding \$2,000 in any year, where availability of Federal funds for use on such project is subject to his approval as a member of such board.

August 19, 1971.

EUGENE I. LEHRMANN, *Director*

*Board of Vocational, Technical and Adult Education*

You advise that where Federal funds are used in the construction of a building project of a vocational-technical district in the State of Wisconsin, approval for the use of such Federal funds must be given by the Wisconsin Board of Vocational, Technical and Adult Education on a project-by-project basis. You further indicate that a recent appointee to the Board heads a family corporation consisting of four stockholders, of which he is one, which bids on the plumbing, heating, ventilation and air-conditioning phases of such projects. Based on the foregoing, you inquire whether the involvement by the Wisconsin Board of Vocational, Technical and Adult Education in the approval of Federal funds to be used for district projects would make such board member legally ineligible to bid and perform on such projects through his family corporation.

A member of the Wisconsin Board of Vocational, Technical and Adult Education is obviously functioning as a State officer, when exercising his duties and responsibilities in that capacity. Section 946.13, Stats., which prohibits public officers and employes from having a private interest in certain public contracts, provides, in part, as follows:

“946.13 Private interest in public contract prohibited. (1) Any public officer or public employe who does any of the following may be fined not more than \$500 or imprisoned not more than one year or both:

“(a) In his private capacity, negotiates or bids for or enters into a contract in which he has a private pecuniary interest, *direct or indirect*, if at the same time he is *authorized or required by law* to participate in his capacity as such of-

ficer or employe in the making of that contract or *to perform in regard to that contract some official function requiring the exercise of discretion on his part*; or

“(b) In his capacity as such officer or employe, participates in the making of a contract in which he has a private pecuniary interest, *direct or indirect*, or *performs in regard to that contract some function* requiring the exercise of discretion on his part.

“\* \* \*

“(3) A contract entered into in violation of this section is void and the state or the political subdivision in whose behalf the contract was made incurs no liability thereon.

“\* \* \*

“(5) Subsection (1) (b) shall not apply to a public officer or public employe by reason of his holding not more than 2 per cent of the outstanding capital stock of a corporate body involved in such contract.” (Emphasis added)

In addition, contracts aggregating up to \$2,000 in any year are excepted from the provisions of the statute. See sec. 946.13 (2) (a), Stats. However, I assume the contracts to which you would be making reference would entail expenditures much exceeding this sum. I will also assume that the percent of outstanding capital stock owned by the subject Board member in the family corporation far exceeds the 2 percent limitation set forth in sec. 946.13 (5), Stats. Further, since the individual involved not only holds stock in the corporation but acts as its board chairman and general manager, it is difficult to anticipate any situation where he would not be actively involved in his private capacity in reference to any contract made by the family corporation.

In my opinion, under the foregoing circumstances, the involvement by the Wisconsin Board of Vocational, Technical and Adult Education in the approval of Federal funds for use on district projects would make the above-described Board member ineligible to bid and perform on such projects, through his family corporation or otherwise. The Board member obviously has a “private pecuniary interest, direct

or indirect" in any public contract his family corporation negotiates, bids for or enters into. At the same time, the approval by the Wisconsin Board of Vocational, Technical and Adult Education of the use of Federal funds on local district projects is clearly the performance of an "official function requiring the exercise of discretion" on the part of the Board which is "authorized or required by law." In addition, our past experience with other Federal grant programs suggests that the construction contracts for the subject projects may very well contain provisions required by the Federal Government which have the same effect as sec. 946.13, Stats.

Please note that by concluding as I have in response to the specific question you ask, I do not intend in any way to suggest, by inference, that the Board member to which you refer may not also be precluded from bidding and performing on local vocational-technical district projects even though no Federal funds are involved. I note, for instance, that ch. 38, Stats., grants significant power and authority to the Board over local vocational, technical and adult education schools and their educational programs, including control over all State aid given to such schools. See sec. 38.13, Stats.

RWW:JCM

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*Cooperative Planning—Municipalities—(Formal)*—Cooperative planning among municipalities allowed by sec. 66.30, Stats., includes only planning collateral to the organization, implementation and administration of specific projects; authority for general multi-jurisdictional planning is found in sec. 66.945, Stats.

August 20, 1971

CHARLES M. HILL, SR., *Secretary*

*Department of Local Affairs & Development*

You have asked me what is the scope of the cooperative planning authority granted to local municipalities under the authority of sec. 66.30, Stats.

Section 66.30 (2), Stats., provides that:

“Any municipality may contract with another municipality or municipalities or the state or any department or agency thereof for the receipt or furnishing of services or the joint exercise of any power or duty required or authorized by statute.”

It is important to emphasize that, while sec. 66.30, Stats., authorizes cooperation between municipalities, any single municipality may contract under this section only to the extent that it alone could perform the function involved in the cooperative contract. Thus, the extent to which any group of municipalities may join together in a given enterprise under sec. 66.30 is limited to the powers possessed by the least of them.

The performance of any specific governmental function, whether by a single municipality acting in its individual capacity or by several municipalities acting jointly, requires some degree of planning. This type of planning might be referred to as project-oriented planning. Therefore, by implication, several municipalities cooperating under sec. 66.30, Stats., in the joint performance of a particular function would necessarily have authority under that section to plan cooperatively for the organization, implementation and administration of the particular project for which they had contracted.

Moreover, sec. 66.30 (3), Stats., provides specifically that:

“Any such contract may provide a plan for administration of the function or project, which may include, without limitation because of enumeration, provisions as to proration of the expenses involved, deposit and disbursement of funds appropriated, submission and approval of budgets, creation of a commission, selection and removal of commissioners, formation and letting of contracts.”

It is only reasonable to assume that the “administrative planning” authority provided for in this subsection is intended to include authority for whatever planning might be necessary for the organization and implementation of par-

ticular projects contracted for as well as for the planning necessary for the administration of such projects once they have been established or put into operation.

However, it is my opinion that sec. 66.30, Stats., is not envisioned as providing authority for regional planning in the sense that such planning would include general comprehensive planning over an area which would include the territories of several municipalities.

My primary basis for this opinion is that sec. 66.945, Stats., enacted subsequent to sec. 66.30, Stats., and providing for the creation, organization, powers and duties of regional planning commissions, deals specifically with general multi-jurisdictional planning "for the physical, social and economic development of the region." It is a well established standard of statutory construction that a more recent and specific statute controls and exists as an exception to a general statute. *Grant County Service Bureau, Inc. v. Treweek* (1963), 19 Wis. 2d 548, 120 N.W. 2d 634. Therefore, absent a contrary expression of legislative intent, the more recent and specific language of sec. 66.945 would supersede the general language of sec. 66.30 with respect to the joint exercise of general planning authority by cities, villages, towns and counties.

There does not appear to be any language in either sec. 66.30 or sec. 66.945, Stats., which conflicts directly with this conclusion. To the contrary, the enactment of ch. 596, Laws of 1959, which revised extensively sec. 66.945, seems to support this conclusion. The notes accompanying the enactment of ch. 596, Laws of 1959, read in part:

"The purpose of this bill is to revise the regional planning law in an attempt to encourage the creation of regional planning commissions in the state . . .

"The present law was examined critically by the urban problems committee with the end view of making changes in the law which would make it more acceptable to local units and which would promote the creation of such regions. . . .

“ . . . The withdrawal provision is substantially revised to assure that a stable planning area can be maintained by the commission.”

The organization, powers and duties of regional planning commissions established under sec. 66.945, Stats., are defined specifically by the provisions of that section. It would therefore be contrary to the above policy of encouraging the establishment of regional planning commissions to conclude that the limiting provisions of sec. 66.945 can be avoided by establishing multi-jurisdictional planning cooperatives under sec. 66.30.

Also, the revised withdrawal provision of sec. 66.945, Stats., has the effect of making it more difficult for participating municipalities to withdraw from a regional planning commission 90 days after the establishment of that commission. Any conclusion that the withdrawal provisions of sec. 66.945 can be avoided by establishing multi-jurisdictional planning cooperatives under sec. 66.30, Stats., would be contrary to the above policy of establishing stable planning regions.

An additional reason for concluding that sec. 66.30, Stats., is not envisioned as authority for the cooperative performance of general comprehensive planning functions by cities, villages, towns and counties is found in 47 OAG 52, at page 52, where it is pointed out that:

“Sec. 66.30 was not designed solely, or probably even primarily, as a regional planning statute. It provides that political subdivisions of the state may enter into agreements for ‘cooperative exercise’ of any of their powers or duties.

“It appears from questions submitted to this office, dealt with in such opinions as 40 O.A.G. 9, 41 O.A.G. 335, and 44 O.A.G. 8, that resort has ordinarily been had to sec. 66.30 to carry out specific projects. I see no reason why it could not furnish authority for a contract for co-operative planning, providing the participating units could reach agreement on the scope and details of a program, and providing that the matters to be planned were within the scope of the respective powers of the participating units.”

My predecessor in office then went on to conclude, at p. 54, that:

“The conditions imposed by the respective statutes seem to point to an intent that sec. 66.945 would be used when the activities are limited to general planning, affecting a substantial number of political subdivisions with varying interests; and that sec. 66.30 would be utilized to plan and carry out specific projects in which a small number of municipalities have a common interest.”

There does not appear to be any conflict between the inclusion of regional planning commissions under sec. 66.30 (1), Stats., and the limited grant of cooperative planning authority to cities, villages, towns and counties under sec. 66.30 (2), Stats., that is suggested by this opinion. Regional planning commissions were added to the list of local municipalities included under sec. 66.30 (1) by ch. 192, Laws of 1959. That Act also included a revision of sec. 66.30 (2) whereby local municipalities listed under sec. 66.30 (1) were allowed to contract “for the receipt or furnishing of services.” Viewed as a service under sec. 66.30 (2) general, comprehensive planning assistance might properly be the object of a contract between an individual city, village, town or county, on the one hand, and regional planning commission on the other hand, since regional planning commissions are particularly equipped to provide such services. However, the planning service itself being the object of the contract, the city, village, town or county participating in such a venture could not be said to be bound to implement the resultant plan.

Therefore, the inclusion of regional planning commissions under sec. 66.30 (1), Stats., appears only to be an affirmation of a concurrent change in sec. 66.945, Stats., by the enactment of ch. 596, §5, Laws of 1959, which provided that:

“(12) (b) In addition to the other powers specified in this section a regional planning commission may enter into a contract with any local unit within the region under s. 66.30 to make studies and offer advice on:

1. Land use, thoroughfares, community facilities, and public improvements;

2. Encouragement of economic and other developments.”

Another possible utilization of the contracting power authorized under sec. 66.30, Stats., with respect to regional planning commissions, would occur when several municipalities cooperating in a joint project might contract with a regional planning commission to provide assistance in establishing a plan for administering the particular project for which they had contracted under sec. 66.30. Depending upon the provisions of the contract between them, all of the contracting municipalities might, in this situation, be bound by the resultant plan.

Also, the inclusion of regional planning commissions under sec. 66.30 (1), Stats., can be interpreted as providing a mechanism for the joint exercise of general planning authority by two or more regional planning commissions. Although, as this opinion points out, sec. 66.945, Stats., was intended to supersede sec. 66.30 with respect to the joint exercise of general planning authority by cities, villages, towns and counties, the same is not necessarily true with respect to the general planning authority of regional planning commissions. Cities, villages, counties and towns are, on the one hand, provided with a specific vehicle for the joint exercise of their general planning authority under sec. 66.945. Regional planning commissions are, on the other hand, the creatures of sec. 66.945. Nothing in the latter section limits the ability of regional planning commissions to cooperate with one another under sec. 66.30; nor is there any other section which provides more specifically than sec. 66.30 for such authority.

Furthermore, there does not appear to be any conflict between the interpretation of sec. 66.30, Stats., suggested in this opinion and the provisions of sec. 22.14 (2) (c), Stats., which section is part of the basic legislation for the Department of Local Affairs and Development. Section 22.14 (2) (c) provides that:

“(2) The department shall:

“(c) Provide planning assistance to public planning agencies including, without limitation because of enumeration,

cities, villages, towns, counties, regional planning agencies and councils of government, including such entities, when operating or cooperating under s. 66.30, which have the resources and administrative personnel to carry out such planning.”

It is doubtful that the reference to “cities, villages, towns, counties, regional planning commissions and councils of government” as “public planning agencies” in sec. 22.14 (2) (c), Stats., was meant to define or expand the planning authority granted to these agencies in other sections of the statutes. It is an established rule of statutory construction that a legislative definition of a word as used in a statute is not conclusive of the meaning of that word as used in other statutes. 50 Am. Jur., *Statutes*, sec. 265, p. 256.

Certainly cities, villages, towns and counties are not primarily “public planning agencies.” They do, however, have some planning authority as appropriately defined in other sections of the statutes. Likewise, the reference to “such entities when operating or cooperating under s. 66.30” should not be interpreted as meaning that the primary function of any such cooperative is envisioned as general planning. Rather, reference should be had to other sections of the statutes for a definition of the planning authority appropriate to “such entities when operating or cooperating under s. 66.30.”

Therefore, the inclusion of “such entities when operating or cooperating under s. 66.30” in sec. 22.14 (2) (c), Stats., merely suggests that two levels of planning assistance are envisioned under that section. A broad scope of planning assistance would, on the one hand, be appropriate to municipalities exercising their general planning authority in their individual capacities and to regional planning commissions exercising their general, multi-jurisdictional planning authority under sec. 66.945, Stats. A narrower scope of planning assistance would, on the other hand, be appropriate to cities, villages, counties and towns in the joint exercise of their specific *project planning* authority under sec. 66.30, Stats.

Finally, even if cooperative planning of a general nature could be envisioned under sec. 66.30, Stats., it is doubtful that implementation of any resultant plan would be obliga-

tory upon the participating municipalities. The contractual nature of the cooperative authority granted under sec. 66.30 suggests that, in order to be binding upon the participants, the details of the contemplated project would have to be spelled out in the original contract. While the details as to how the planning function would be administered might be included in the original contract, it is axiomatic that the content of the resultant plan could not be so included. The obvious conclusion is therefore that any plan resulting from such a cooperative effort would only be advisory to the participating entities.

In summary, it is my opinion that the only cooperative planning activity envisioned under sec. 66.30, Stats., would be that planning which is collateral to the organization, implementation and administration of specific projects contracted for under the authority of that section. The grant of general regional or multi-jurisdictional planning authority appropriately falls within the scope of sec. 66.945, Stats.

If you desire that municipalities be allowed to join together under a contractual arrangement similar to that provided for in sec. 66.30, Stats., for the purpose of performing general planning functions, it is my opinion that specific legislative authorization must be obtained for that purpose.

RWW:BS

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*Traffic Patrol Officers, Powers of—Department of Transportation—(Formal)*—When properly activated by the governor under sec. 22.165, Stats., officers of the State traffic patrol have the powers of a sheriff under sec. 59.24, Stats., and may act within the county or counties designated by the Governor and could make arrests for any crime on state, county, municipal or private property to the same extent that a sheriff could act. State patrol officers are prohibited from acting in employer-employee disputes.

August 30, 1971.

NORMAN M. CLAPP, *Secretary*  
*Department of Transportation*

You have requested my opinion as to the authority of State traffic patrol officers where the State traffic patrol is acting under the provisions of sec. 22.165, Stats.

For the purposes of your questions, you assume the following fact situation: The Governor has properly activated the State traffic patrol under sec. 22.165, Stats. For the time being, no disturbances are occurring on state property, but demonstrators are creating a disturbance by throwing rocks and damaging structures and vehicles on private property. The city's police chief has asked the State patrol to restore order and make arrests for unlawful acts.

Your specific questions and my answers are as follows:

One: Can the state patrol legally respond to this situation?

Answer: Yes.

Two: Can they function under their own authority?

Answer: Yes.

Three: Must state troopers be impressed in a *posse comitatus* before they can render this aid?

Answer: No.

Four: Is the law enforcement activity of the state patrol limited to state property and the confines of the highway?

Answer: No.

Five: Would the answer be different if the state patrol were asked to rescue law enforcement officers surrounded by demonstrators and whose safety is seriously threatened?

Answer: No.

Six: If a state patrolman standing on the street is struck by a missile thrown from private property, can the state patrol go onto the private property to arrest the violator?

Answer: Yes, but limited to the same extent a sheriff could under similar circumstances.

Seven: In this circumstance, under what part of the State patrol's authority is it acting?

Answer: Sections 22.165, 59.24, 66.305, 110.07 (2m) and 968.07 (1) (d), Stats.

Eight: Can a state patrolman go onto private property to makes arrests without a warrant for a crime committed in his presence on private property?

Answer: Yes, but limited to the same extent a sheriff could in similar circumstances. See sec. 968.07 (1) (d), Stats.

Nine: Can a state patrolman arrest for an ordinance violation?

Answer: Probably not, although sec. 59.24, Stats., would enable a state patrol officer to serve processes in ordinance violation cases which are civil actions.

Ten: Where state patrolmen observe persons breaking windows and throwing Molotov cocktails on private property, can they arrest for these violations?

Answer: Yes.

Eleven: Where the Governor has invoked sec. 22.165, Stats., to protect state property in Madison, can the State Patrol make arrests for damage or attempted damage to private property in Bayfield County, for example?

Answer: Probably not, but it would depend on the scope of the language used by the Governor in his determination filed with the Secretary of State.

Section 110.07 (1) and (2), Stats., sets forth the primary duties of State traffic patrol officers with respect to the enforcement of statutes therein enumerated. Section 110.07 (2m), Stats., gives such officers additional powers with respect to general misdemeanors or felonies which are committed on a highway in the presence of an officer.

Section 110.07 (2m), Stats., reads:

“(2m) In addition to the primary powers granted by subs. (1) and (2), any officer of the state traffic patrol who is in uniform and on duty may arrest without warrant any person who commits a misdemeanor or a felony on the highway in his presence, or who is transporting a stolen motor vehicle or who is fleeing from the scene of a crime or from other law enforcement officers and deliver him to the sheriff or police chief in the jurisdiction where the arrest is made. A state traffic officer making an arrest pursuant to this subsection shall at all times be available as a witness for the state.”

Under this statute, a State Patrol officer may arrest any person who commits a crime on the highway in his presence or who transports a stolen vehicle or flees from the scene of a crime or from other law enforcement officers. For this purpose, the officer may pursue the violator onto private property to make the arrest.

The Attorney General has previously advised that State patrol officers could arrest for certain violations which occur on private property where they have been requested to aid other peace officers as a part of a *posse comitatus*. 45 OAG 152 (1956) ; 47 OAG 209 (1958) ; 56 OAG 96 (1967).

In 1969 the legislature created sec. 22.165, Stats., by ch. 349, Laws of 1969. That chapter entitled the section “State traffic patrol and conservation warden duties during civil disorder.”

It is presumed that the legislature was aware of the authority of the State patrol under the provisions of sec. 110.07 (2m), Stats., and of the statutes and opinions of the Attorney General which permitted State patrol officers to act as a part of a *posse comitatus* at the request of a sheriff or other law enforcement official pursuant to secs. 59.24 and 968.07 (2), Stats., to apprehend or secure any person for commission of a felony or breach of the peace or aid in a lawful arrest.

It is my opinion that the legislature intended that sec. 22.165, Stats., would empower State patrol officers acting under it to do more than merely protect persons on State

property and State property itself. It authorizes them to exercise the powers of a sheriff under sec. 59.24, Stats., where there is a threat to lives or property caused by conditions of a civil disorder.

Section 22.165, Stats., provides:

*“State traffic patrol and conservation warden duties during civil disorder. Without proclaiming a state of emergency, the governor may, in writing filed with the secretary of state, determine that there exists a condition of civil disorder or a threat to the safety of persons on state property or damage or destruction to state property. Upon such filing, he may call out the state traffic patrol or the conservation warden force or members thereof for use in connection with such threat to such life or property. For the duration of such threat, as determined by the governor, such officers shall have the powers of a peace officer as set forth in s. 59.24, except that such officers shall not be used in or take part in any dispute or controversy between employer or employe concerning wages, hours, labor or working conditions.”*

The statute is somewhat ambiguous on its face and is, therefore, subject to construction.

Intent of the legislature is a controlling factor in the interpretation of a statute. Statutes cannot be construed in a vacuum without resort to historical background preceding their enactment and evils sought to be obviated thereby. While titles to sections are not part of a statute, they may be resorted to in order to resolve doubt as to statutory meaning.

While the legislature has in past years been reluctant to extend the powers of the State patrol over and above their traffic patrol work, ch. 349, Laws of 1969, was enacted at a time immediately following a series of riots and civil disorders unprecedented in Wisconsin history. While certain of the events did cause damage to state property and threaten the safety of persons on State property, the legislature was aware that riots and civil disorders were equally dangerous to the safety of private property and to persons law-

fully thereon. It was also aware that there would be possible and probable threats to State property and the persons thereon if a condition of civil disorder existed on private property, especially if the condition were engendered by persons not lawfully thereon. The dominant purpose of the statute is to allow State officers, under the control of State authorities, to be used whenever and wherever a condition of civil disorder not related to an employer-employee dispute exists. The title of the section sets forth that purpose and it is also included in the body of the section. The secondary purpose is to permit the use of such force, under State control, when State property or persons upon it are in danger, this being a condition of lesser turbulence than general civil disorder and hence limited to State property.

I am of the opinion that sec. 22.165, Stats., grants authority to the Governor to call out the State traffic patrol upon a determination that *any one* of three conditions exists: (1) a civil disorder or (2) a threat to the safety of persons on State property or (3) a threat of damage or destruction to State property. The Governor may activate State traffic patrol officers for use in connection with any of the foregoing circumstances.

Given the gubernatorial written authority, such officers

“\* \* \* shall have the powers of a peace officer as set forth in s. 59.24 \* \* \*.”

Section 939.22 (22), Stats., defines “peace officer” as:

“(22) ‘Peace officer’ means any person vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes.”

Section 59.24, Stats., becomes the primary source of authority in such instances. If the officers are called out for service in a given county, they at least have county-wide powers equal to sheriffs within that county.

I am of the opinion that the Governor could give the officers power to act in one, several, or all counties by designating the same in writing, even though the major threat may be in one county.

Section 59.24 (1), Stats., provides:

“(1) Sheriffs and their undersheriffs and deputies shall keep and preserve the peace in their respective counties and quiet and suppress all affrays, routs, riots, unlawful assemblies and insurrections; for which purpose, and for the service of processes in civil or criminal cases and in the apprehending or securing any person for felony or breach of the peace they and every coroner and constable may call to their aid such persons or power of their county as they may deem necessary.”

When acting under secs. 22.165 and 59.24, Stats., I am of the opinion that State patrol officers can act under their own authority (direction by the Governor and State officials) and can “keep the peace \* \* \* and quiet and suppress all affrays, routs, riots, unlawful assemblies and insurrections” and enforce general criminal statutes without being impressed in a *posse comitatus*. Since their powers in such instance are equal to those of the sheriff, they can act on state, county, municipal and private property to the same extent as a sheriff can. They can enter a house with permission and can certainly act on or in private property at the request of the owner or occupant, as the case may be.

With respect to arrest without a warrant for misdemeanor committed in the presence of an officer, see *State v. Smith* (1971), 50 Wis. 2d 460, 184 N.W. 2d 889, which approves of the opinion reported at 45 OAG 289 (1956).

Section 954.03, Stats., was repealed by ch. 255, sec. 55, Laws of 1969, effective July 1, 1970, and arrest without a warrant is now governed by sec. 968.07, Stats., which reads in part:

“(1) A law enforcement officer may arrest a person when:

“\* \* \*

“(d) There are reasonable grounds to believe that the person is committing or has committed a crime.”

In 46 OAG 280, 283 (1957), it is stated that:

“\* \* \* As a general proposition a law enforcement officer is clothed with the powers and correlative responsibilities of

his office anywhere within the territorial limits of the governing body for which he acts. Thus, the sheriff, town constable, village marshal, and city police officer, have the duty and responsibility to maintain law and order throughout the county, town, village, and city respectively, regardless of who owns the land or buildings therein. Secs. 59.24, 60.54, 61.28, 61.31 (2) and 62.09 (13), Stats. Unless otherwise provided by statute, this general principle applies with equal force to both privately and state-owned lands and buildings. In other words, law enforcement officers have the same law enforcement powers and duties upon state-owned lands as they have everywhere else within their county, town, village or city, as the case may be, provided the offense is one falling within the cognizance of their enforcement power. This is limited, however, to enforcement of the state law and does not include local ordinances. 62 C.J.S. 319, sec. 157; 46 OAG 131."

Also see 45 OAG 267 at 270.

My conclusions do not mean that the Governor can activate the State patrol for service under sec. 22.165, Stats., without good cause. However, if he determines that there is a danger to persons on State property or danger to State property *or* there exists a condition of civil disorder, and such determination is within reason, his activation of the State patrol, wardens, or a portion thereof, enables such officers to carry out full powers under sec. 59.24.

While most arrests could be expected to be in connection with the named civil disorder or threat to the safety of persons on State property or damage to specific State property, arrests for any crime on any property, within the county or counties designated by the Governor, would be valid if they would have likewise been valid if made by a sheriff.

RWW:RJV

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*County Government—Apportionment—(Informal)*—Section 59.03 (2) (a), Stats., specifies the maximum number

of county board supervisors permitted for each of four classes of counties, but the statute does not establish a separate minimum for each class. Constitutionality of sec. 59.03 (2) (a) discussed.

September 2, 1971.

ALDWIN H. SEEFELDT

*Corporation Counsel, Washington County*

You advise that the Reapportionment Committee of the Washington County Board of Supervisors has directed that you seek my opinion regarding whether sec. 59.03 (2), Stats., imposes, by implication or otherwise, a *minimum* number of supervisors for each of the classifications set forth therein or, in the alternative, whether counties in the various population classifications must have a *minimum* number of supervisors because of constitutional requirements.

Section 59.03 (2) (a), Stats., provides as follows:

*“Classification; maximum number of supervisors. Counties having a population of less than 500,000 and more than one town are classified and entitled to a maximum number of county board supervisors, as follows:*

“1. Counties having a population of less than 500,000 but at least 100,000 shall have no more than 47 supervisors.

“2. Counties having a population of less than 100,000 but at least 50,000 shall have no more than 39 supervisors.

“3. Counties having a population of less than 50,000 but at least 25,000 shall have no more than 31 supervisors.

“4. Counties having a population of less than 25,000 and containing more than one town shall have no more than 21 supervisors.

“5. If the population of any county is within 2% of the minimum population for the next most populous grouping under this paragraph, the county board thereof, in establishing supervisory districts, may employ the maximum number for such districts set for such next most populous grouping.”

The composition of counties having a population of at least 500,000 and counties having only one town are treated in secs. 59.03 (1) and (4), Stats.

You indicate that a certain "statement" issued by the Attorney General of Wisconsin on June 11, 1965, has apparently given rise to much of the Committee's concern over the possible statutory requirement of a minimum number of supervisors for each class set forth in the statute. You quote from said statement, at page 12, as follows:

"It would appear wise, however, for each county to devise a plan which will give the greatest equality as to population between districts, and which will provide for a number of supervisors at or less than the maximum permitted, but in excess of the number permitted for the next lower class.

"The validity of a plan and the validity of the classification system set forth in the law might be a subject of real concern if one county of 100,000 population created 47 supervisory districts and another of the same population created only 3 supervisory districts. To avoid a result of holding the classifications invalid, a court might hold that the law means that a county in class one, for example, may have no less than 40 nor more than 47 supervisors."

The language utilized in sec. 59.03 (2) (a), Stats., appears plain and unambiguous. The statute clearly places a limitation on the size of the various county boards which fall within its provisions by establishing four different population groupings, each entitled to a different "maximum number of county board supervisors." I am, therefore, of the opinion that the statute, on its face, does not require a minimum number of supervisors in any classification. Furthermore, as you point out in your letter, even if the statutes were to be considered ambiguous, the legislative history preceding its enactment leads necessarily to the same conclusion.

Section 59.03 (2) (a), Stats., was enacted in its present form by ch. 20, Laws of 1965. This law was originally introduced in the legislature as 1965 Senate Bill 1, and at the time of its adoption the legislature had before it a report of the County Boards Representation Committee of the Wis-

consin Legislative Council, entitled "Report to the 1965 Wisconsin Legislature on Senate Bill 1, relating to County Board Representation," dated February 3, 1965. The following is stated at pages 4 and 5 of the report:

"The kinds of problems confronting counties and their service responsibilities generally relate to the size of the population of the counties. Because of the wide differences among the counties in terms of size, the committee concluded that all counties could not be treated identically in establishing a new system of county board representation. Also, it was asserted in testimony before the committee that some county boards are too large and unwieldy to be as effective as they could be. On the basis of these and other judgments, the committee created 4 classifications of counties, according to population groupings, and specified the maximum number of supervisors for each of the 4 groups. It was felt that such a classification system would be helpful to the county boards in apportioning supervisory districts so as to achieve, as far as possible, "equality of representation" within each county. The committee believed that it is important to leave some flexibility to the counties in determining the exact number of supervisors which would be appropriate for a particular county, so long as the county did not exceed the maximum number specified for the class. There was considerable discussion about the possibility of establishing both a maximum *and* a minimum number of supervisors per class. However, the committee concluded that this would be unnecessarily restrictive. It was the consensus of the committee that, in fact, no wide variations in the size of boards among counties in a given classification would result, and therefore substantial uniformity would prevail among counties in each class."

The minutes of the previous meetings of the above-mentioned Committee of the Wisconsin Legislative Council make it crystal clear that there was lengthy consideration of the question whether the proposed bill should set a minimum as well as a maximum number of supervisors for each of the population classifications being considered. The meeting of the Committee held on November 5, 1964, contains the following entry, at page 12:

“Mr. Torinus moved, seconded by Senator Meunier, that the committee proceed with the plan of establishing a maximum number of supervisors for each classification, giving no regard to minimums. The motion carried unanimously on a roll call vote.”

The 1965 statement of the Attorney General, quoted in part above, was undoubtedly meant as a cautionary note generated by a concern that sec. 59.03 (2) (a), Stats., might be viewed as contrary to the provisions of Art. IV, sec. 23, Wis. Const., which requires that the legislature establish but one system of county government, which shall be as nearly uniform as practicable.

It is elementary that all legislative acts are presumed constitutional, and every presumption must be indulged in to sustain the law if at all possible. *Gottlieb v. City of Milwaukee* (1967), 33 Wis. 2d 408, 415, 147 N.W. 2d 633. In addition, as previously indicated by the Wisconsin Supreme Court in *State ex rel. Scanlan v. Archibold* (1911), 146 Wis. 363, 368-371, 131 N.W. 895:

“\* \* \* the question of uniformity is subject to review by the courts, but it must also be remembered that under the repeated decisions of this court a broad discretion is vested in the legislature in determining whether the system of government under sec. 23, art. IV of the constitution is as nearly uniform as practicable. [Citations]”

The applicable tests in determining the constitutionality of legislation under the above constitutional provision were more recently set forth in *West Allis v. Milwaukee County* (1968), 39 Wis. 2d 356, 371, 372, 159 N.W. 2d 36 as follows:

“(a) Counties may be classified on the basis of population, providing there is a reasonable basis for this treatment; only the essential nature of the county government must remain uniform;

“(b) changes in county government may be made where it is not practicable to carry on the usual government in a particular class of counties, provided there is a reasonable basis for diversity;

“(c) legislative findings with respect to preservation of the public health, welfare, and convenience of a county are entitled to great weight and will not be upset unless patently unreasonable;

“(d) the government of one county may vary from that of the others, provided the system remains untouched, and that in their details the governments vary only to the extent that it is impracticable for them to be uniform;

“(e) classification must be based upon some substantial and real differences of situation, a distinction germane to the purpose of the law; not be based on existing circumstances only, so as to preclude additions to the class, and apply to all members of the class;

“(f) if the rules of classification are complied with, a class may comprise but one county;

“(g) constitutionality of the law is tested by its language in the light of such matters as the court will take judicial notice of.”

See also 52 OAG 45 (1963) for an earlier discussion of the applicable cases considering the constitutional provision dealing with uniformity of county government.

Section 59.03 (2), Stats., was enacted in its present form after the Wisconsin Supreme Court held that the previous version violated the equal-protection clause of the Fourteenth Amendment of the Federal Constitution and Art. 1, sec. 1, Wis. Const., because the statute on its face did not provide for the election of county board members on an equal population basis, since representation was by local unit rather than by population. *State ex rel. Sonneborn v. Sylvester* (1965), 26 Wis. 2d 43, 48, 49, 60, 132 N.W. 2d 249. Section 59.03 (2) (b), Stats., now simply provides that “each county shall establish and number supervisory districts” consisting of one or more municipalities or parts thereof, by taking into consideration a number of factors including adherence to municipal boundary lines.

Once the governmental unit method of determining the number of supervisory districts was found to be in violation

of "one-man-one-vote" principles, the possible number of supervisors within most counties was at least theoretically subject to a great variance. However, as a practical matter, the addition of the requirement that there be adherence to municipal boundary lines, as well as the other guidelines for the exercise of legislative judgment contained in sec. 59.03 (2) (b), Stats., significantly limits the number of combinations which would comply with the statute. Furthermore, no serious constitutional question has apparently been raised in past years, based solely on differences in the size of various county boards, at least where the county boards were established on the basis of criteria which was both reasonable and uniform. The present statute seeks to rectify the previous inequities by recognizing equality of voting power within a context which still recognizes, to the extent possible, existing municipal boundary lines. In this sense, there appears to be little difference from the statute under attack in the *Sonneborn* case, except for the fact that the statute now requires election of county board members on an equal population basis.

I am aware of the early case of *State ex rel. Peck v. Rior-dan* (1869), 24 Wis. 484, where the question was one of the constitutionality of a statute providing for a county board of eight supervisors in a particular county where the general statute relating to the organization of county government would have made provision for only three supervisors under the facts of the case. At page 489 of that case, the court said:

"\* \* \* The uniformity of the system would seem to be as much broken by the diversity in the number which should constitute the board in counties of the same population, as by diversity in the distribution of the powers which the board shall execute. \* \* \*"

Based on this statement relative to the uniformity of county government, this office has previously indicated that a law sanctioning a diversity in the number of town board members in towns of the same population would fail to comply with the "uniform as practicable" test of Art. IV, sec. 23, Wis. Const. 50 OAG 10, 15 (1961). As noted in that pre-

vious opinion of our office, the holding of the *Peck* case *supra*, regarding unwarranted diversity in the number of county board supervisors has never been reversed or qualified by subsequent decisions. See 50 OAG 15, 16.

Faced with the above judicial authorities, it is difficult to accurately forecast the factors which would be considered most weighty in a determination of the constitutional question which is suggested by the present provisions of sec. 59.03 (2), Stats. However, as the court has indicated on many previous occasions, in construing or interpreting a statute, the court is not at liberty to disregard plain, clear words. *A. O. Smith Corp. v. Wisconsin Department of Revenue* (1969), 43 Wis. 2d 420, 429, 168 N.W. 2d 887. Therefore, as pointed out previously, it is felt that the statute and its legislative history so clearly evidence an intent to establish only maximums for each classification of counties that a court would have difficulty resorting to a construction of the statute which would interpret the maximum of each class as also the minimum of the next higher class. On the other hand, in accordance with the normal presumption of constitutionality, an act of the legislature is to be sustained if possible by any reasonable construction of the constitution or of the act itself; and all mere doubts as to its validity are to be resolved in favor of the act. *In re Apportionment of Revisor of Statutes* (1910), 141 Wis. 592, 124 N.W. 670.

The court may well find basis for distinction between sec. 59.03 (2), Stats., and the statutes under consideration in the *Peck* case. For instance, in the *Peck* case, *supra*, the specific statute under attack allowed eight supervisors for a particular county which under the general law would have been entitled to only three supervisors. No justification appeared to exist for this distinction. In contrast, sec. 59.03 (2), Stats., is a general statute which provides reasonable as well as uniform criteria for the establishment of the various supervisory districts in most Wisconsin counties. The statute makes no distinction between any of the counties falling within its provisions, other than the recognition that the needs of progressively larger counties should be met by statutory authorization for progressively larger county board membership.

The court, confronted with the prospect of early judicial authority, based on different facts and formed in the context of less demanding times, might well determine that a reasonable basis exists for the variation in number of supervisors which is permissible under sec. 59.03 (2), Stats., and that inasmuch as the powers, duties and functions of the county board remain the same, the presumption of constitutionality which attaches to the statute is not overcome.

In view of the foregoing considerations, it is my opinion that sec. 59.03 (2) (a), Stats., does not require that the maximum number of supervisory districts for each of the population classifications set forth therein must be considered as the minimum for the next higher class. It is also my opinion that the lack of such a minimum does not render the statute unconstitutional, even though, in theory, excess and abuse in the application of the statute might possibly lead to an unconstitutional result. The mere possibility of an unconstitutional application of an otherwise constitutional law does not invalidate the law itself. 54 OAG 56, 59 (1965).

RWW:JCM

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*Union Advertising—Ophthalmic Devices—(Formal)—*  
The prohibition in sec. 449.10, Stats., against advertising by “any person” applies to unions and other associations who, in conjunction with optical companies, advertise glasses or other ophthalmic devices to their membership. Section 449.10, Stats. (1969), construed.

September 3, 1971.

BURLEIGH A. RANDOLPH

*District Attorney, La Crosse County*

You have inquired about the legality of a union announcing to its membership prices on various ophthalmic devices such as glasses, frames, and contact lenses. You have attached a one page letter on union letterhead addressed “Dear Union Member” and signed by the president of a union local.

The letter starts: "We have negotiated the following arrangements with the King Optical Company." It proceeds to list prices for single vision glasses, bifocals, trifocals, contact lenses, and various frames. The union member is then referred to the King Optical Company, Winona, Minnesota. The letter was distributed in Wisconsin. You make no mention of any allegations concerning fraud or deceit. The specific issue is whether this union activity is prohibited advertising under sec. 449.10, Stats.

Section 449.10, Stats., reads as follows:

"449.10 Prohibited advertising. It shall be unlawful for *any person* to advertise either directly or indirectly *by any means whatsoever* any definite or indefinite price or credit terms on lenses, frames, complete glasses or any optometric services; to advertise in any manner that will tend to mislead or deceive the public; to solicit optometric patronage by advertising that he or some other person or group of persons possess superior qualifications or are best trained to perform the service; or to render any optometric service pursuant to such advertising." (Emphasis added)

The first determination to be made is whether the union local is a "person" within the meaning of the statute.

Section 990.01 (26), Stats., provides as follows:

"(26) PERSON. 'Person' includes all partnerships, associations and bodies politic and corporate."

There is no question that the labor union or its officers doing the advertising are persons within the meaning of the statute and are, therefore, technically covered.

The second question is whether the union or its officers are persons within the actual intent and coverage of the statute, i.e., are they one of the persons covered? Our Supreme Court has interpreted the language "any person" in sec. 449.10, Stats., to cover every person. In *Bedno v. Fast* (1959), 6 Wis. 2d 471, 95 N.W. 2d 396, cert. den. 360 U.S. 931 (1959), the court specifically stated that the words "any person" are clear and unambiguous and there is no room for construcion. 66 Wis. 2d 471, 476.

In the *Bedno* case, the court held that the prohibition on price advertising extended to opticians as well as optometrists. The language of the decision indicates that it extends to other persons as well and that proof of fraud and deceit is not required. The court discussed the history and intent of sec. 449.10, Stats. (then sec. 153.10), in the following terms:

“The legislative history of sec. 153.10 Stats. (created by ch. 273, Laws of 1943, introduced as Bill No. 390, A.), shows that it was drafted by an attorney for the department of agriculture and presented by a special committee representing the state and the optometric association. It would be entirely unreasonable to presume that the members of such a committee would sponsor a bill which would have the effect of prohibiting price advertising of glasses by optometrists but not by opticians.

“Retail stores which are permitted to sell eyeglasses of a certain type incidental to their other business are prohibited by sec. 153.02, Stats., from advertising the same, except by price marking on the glasses. Is the purpose of the chapter served by prohibiting advertising by optometrists and dime stores, for instance, but not by opticians?

“We must hold that the statute means just what it says and applies to plaintiffs as ‘persons’ engaging in advertising relating to the prices of ‘lenses, frames, complete glasses.’

“ \* \* \*

“The language of sec. 153.10, Stats., in no way indicates that proof of fraud is necessary to spell out an offense under its price-advertising prohibition. The practice, which the statute is intended to protect the public against, is that of filling a prescription to meet the price rather than the needs of the patient. To permit price advertising on the part of those who deal with the human eye, even truthful advertising, is to leave the door open for the unscrupulous practitioner to lure and to defraud unsuspecting members of the public. In the *Johnson Case*, *supra*, this court relied heavily upon *Semier v. Oregon State Board of Dental Examiners* (1934), 148 Or. 50, 34 Pac. 2d 311, 294 U.S. 608, 55 S.Ct. 570, 79 L.ed. 1086, where the court stated that the question

was whether the kind of advertising prohibited afforded the unscrupulous practitioner a means of perpetrating fraud and deception upon his patients. It was there recognized that although there is nothing harmful in itself in merely advertising prices, there could be no doubt that unethical practitioners do resort to price-advertising methods to lure the credulous to their offices for the purpose of fleecing them."

The language quoted above makes it clear that the purpose of the statute would not be served by allowing a union to engage in price solicitation which is directly prohibited for King Optical Company. King would still be "filling a prescription to meet the price." It is interesting that the plaintiffs in *Bedno v. Fast* were co-partners also doing business as the King Optical Company. Because the advertising is now circulated by an intermediary does not make the intermediary's conduct lawful.

Following the *Bedno* case this office had occasion to further construe the coverage of the words "any person" in sec. 449.10, Stats. In 48 OAG 223 this office decided that a Wisconsin newspaper carrying price advertising by an out-of-state optometrist would violate the law. The newspaper, as carrier of the advertising, was a person. We specifically took the position, as did the trial court in *Bedno*, that the words any person mean "all persons." 48 OAG 223, 225 (1959).

It is clear, thus far, that a union or its officers may not advertise in light of the prohibitions in sec. 449.10, Stats. You are particularly concerned whether an announcement in the form described above constitutes advertising. In 48 OAG 223 we took the position that:

" \* \* \* An 'advertisement' \* \* \* is 'a printed announcement, as of goods for sale, in a newspaper, magazine, etc.,' and 'to advertise' is 'to give information to the public concerning; make public announcement of, by publication in periodicals, by printed bills, by broadcasting over the radio, etc.' " 48 OAG 223, 225.

Advertising is defined as "the action of calling something to the attention of the public \* \* \*." Webster's Third New International Dictionary. In the law, advertise means:

“ \* \* \* the act or practice of attracting public notice and attention. It includes all forms of public announcement which are intended directly or indirectly in the furtherance or promulgation of an idea, or in directing attention to a business, service, or entertainment. The idea underlying the word has reference not so much to the vehicle or instrumentality used in getting the notice before the public, as to the diffusion, or the bringing home to the public, of the information or matter contained in the notice.” 3 Am. Jur. 2d *Advertising* §1, p. 356.

“Advertising” as a verb may mean:

“To advise, to announce, to apprise, to command, to give notice of, to inform, to make known, to notify, to publish, or to warn, orally, or by written or printed publication \* \* \*.” 2 C.J.S. *Advertise*, p. 890.

Our statute makes it a crime to advertise, or to engage in advertising. The union officers’ and the union’s conduct here in printing and disseminating the letter is advertising. It matters not that the publication goes to a limited group of people.

The statute prohibits advertising—makes it a crime “to advertise.” The advertising need not be to the public at large to be prohibited. Every solicitation or advertisement is somehow limited, e.g., to newspaper readers, magazine subscribers, rural boxholders, etc. Limiting the solicitation to a small segment of the public does not change the nature of the act.

A California intermediate appellate court in *Barkin v. Board of Optometry* (1969) 269 CA 2d 714 decided the question of how “public” advertising had to be to constitute advertising within the meaning of the California statutes by reference to *Corpus Juris*:

“The word does not mean all the people, nor most of the people, nor very many of the people of a place, but so many of them as contra distinguishes them from a few.” (50 CJ 844, 845) *Barkin, supra*, p. 728.

The court in *Barkin* squarely held that a solicitation by a California optometrist materially similar to the one here

was prohibited advertising under the California statutes. The court concluded:

“It is perfectly plain, however, that if a practitioner is permitted to subdivide the general public he could never violate: [The applicable Calif. statute.] \* \* \*

“We think the word ‘public’ in sec. 3000 refers to any and all persons who, at the time an advertisement is addressed to them, have not yet entered into some kind of professional relationship, actual or prospective, with the licensee. Just being a member of a union which recommends the licensee to its members is obviously not enough.” *Barkin, supra*, pp. 729-730.

The application of the reasoning in *Barkin* serves the purpose behind sec. 449.10, Stats.

Moreover, sec. 449.10, Stats., makes it clear that it prohibits advertising “by any means whatsoever.” The fact that the solicitation here takes the form of a listing of union benefits to its members does not take it outside the class of prohibited advertising prescribed by the statute. To so conclude would be to emasculate the statute and allow any optical company to avoid the law merely by finding a front organization.

The final question you raise involves potential constitutional questions in applying sec. 449.10, Stats., to a union. As you pointed out in your letter, the union has an argument that such a service to its membership constitutes a protected part of the freedom of association granted to the organization by the Constitution. The case law gives little comfort to that contention under the circumstances here. The courts have gone no further than the United States Supreme Court’s decision in *United Mine Workers of America v. Illinois State Bar Association* (1967), 389 U.S. 217, 88 S.Ct. 353, 19 L.ed. 2d 426. In that case, the court held that the union could not be restrained from employing licensed attorneys on a salary basis to represent its members in workmen’s compensation litigation. The Illinois State Bar Association had sought to enjoin this practice under its state practice regulations. The court held that although the legislature and

the bar had an interest in regulating the practice of law, where those regulations in their operation significantly impaired the value of associational freedoms, the state regulations must give way. That case and its progeny are distinguishable from this case. There the court was able to view the Illinois regulations as actually affecting the exercise of vital rights. In addition, the court was able to find that the regulation was "not needed to protect the state's interest in high standards of legal ethics." 389 U.S. 217, 225. Other cases to the same effect are *Railroad Trainmen v. Virginia Bar* (1964), 377 U.S. 1, 84 S.Ct. 113, 12 L.ed. 2d 89, 11 A.L.R. 3d 1196, and *NAACP v. Button* (1963), 371 U.S. 415, 83 S.Ct. 328, 9 L.ed. 2d 405.

In April the United States Supreme Court again spoke to the issue in *United Transportation Union v. State Bar of Michigan* (1971), \_\_\_\_\_ U.S. \_\_\_\_\_ 91 S.Ct. 1076, 28 L.ed. 2d 339. That case again dealt with the "basic right to group legal action" under the First Amendment. The language and rationale of this case again gives little comfort to developing any form of group legal right to dissemination of commercial data under the circumstances here. The test has been one of balancing the interests in each of the cases dealing with legal services. Here the State's interest in the public's eyesight is clear and the need for the regulation has been recognized by our State Supreme Court. Moreover, prohibiting the union's circulation of the material in question is not a significant impairment of associational freedoms. The optometrist, the optician, the optical corporation, the newspaper, and the retail merchant are under the same restraint.

I would be remiss if I did not add that the real violator in these situations is often the person or corporation which approaches the union officials with such a plan since this approach in itself may constitute prohibited advertising. The union officers often agree to contact their members in a good faith desire to benefit their membership. This puts the union in the position of unintentionally violating the law. Under these circumstances an agreement to cease and desist may be more appropriate than criminal prosecution. In reaching a determination under the facts presented I feel that I

should point out that the issue of appropriateness of a prosecution in any particular case is not before me. That decision may rest in large part on evidence, availability of witnesses and some or all of the other discretionary factors recently described by our Supreme Court in *Kurkierewicz v. Cannon* (1969), 42 Wis. 2d 368, 166 N.W. 2d 255.

I conclude that a program such as that outlined in general terms above probably violates sec. 449.10, Stats.

RWW:DJH

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*Teacher Contracts—Collective Bargaining—(Informal)*  
—Individual teacher's contract under secs. 118.21 and 118.22, Stats., is subservient to collective bargaining contract under sec. 111.70, Stats. Relationship discussed.

September 3, 1971.

WILLIAM C. KAHL, *Superintendent*  
*Department of Public Instruction*

In your letter of August 27, 1971, you ask the following question:

“Under state law, does a school district's negotiated agreement under 111.70 that by its terms is binding on the parties and by its terms establishes an effective date for a district salary schedule prior to August 15 take precedence over an individual employment contract under 118.21 that is dated after August 15 to correspond with that employee's first day of actual employment for the new school year?”

For the reasons hereinafter stated, it is my opinion that a collective bargaining agreement between a school district and its employe members negotiated and entered into within the purview of sec. 111.70, Stats., takes precedence over individual employment contracts entered into pursuant to sec. 118.21, Stats. (and sec. 118.22, Stats.).

The relationship between individual employment contracts and a collective bargaining agreement is perhaps best described in *J. I. Case Co. v. National Labor Relations Board* (1944), 321 U.S. 332, 64 S.Ct. 516, 88 L.ed. 762:

“Contract in labor law is a term the implications of which must be determined from the connection in which it appears. Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment. Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service, which do not of themselves establish any relationships but which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established. . . .

“After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings. The employer, except as restricted by the collective agreement itself and except that he must engage in no unfair labor practice or discrimination, is free to select those he will employ or discharge. But the terms of the employment already have been traded out. There is little left to individual agreement except the act of hiring. This hiring may be by writing or by word of mouth or may be implied from conduct. In the sense of contracts of hiring, individual contracts between the employer and employee are not forbidden, but indeed are necessitated by the collective bargaining procedure.

“But, however engaged, an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement,

even if on his own he would yield to less favorable terms. The individual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits, any more than a shipper can contract away the benefit of filed tariffs, the insurer the benefit of standard provisions, or the utility customer the benefit of legally established rates.

“\* \* \*

“Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement. ‘The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices.’ *National Licorice Co. v. National Labor Relations Board* (1940), 309 U.S. 350, 364, 60 S.Ct. 569, 84 L.ed. 799, (1939 Mem. Dec.) 308 U.S. 535, 60 S.Ct. 108, 84 L.ed. 451. Wherever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility.

“It is equally clear since the collective trade agreement is to serve the purpose contemplated by the Act, the individual contract cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the trade agreement. The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit, whatever the type or terms of his pre-existing contract of employment.”

I have quoted rather extensively from the *J. I. Case* decision since it is a landmark decision and represents the law of the land on the subject, and further because the factors and rationale leading to the decision are equally applicable to the relationship between individual employment contracts and

collective bargaining agreements entered into pursuant to sec. 111.70, Stats., Wisconsin's Municipal Employment Relations Law.

In *Elmbrook Education Association v. Elmbrook Schools Joint Common School District, etc.*, Decision No. 9163-C, dated December 30, 1970, the Wisconsin Employment Relations Commission ruled:

"Further, in harmony with the language of the Supreme Court as expressed in *J. I. Case v. NLRB*,<sup>7</sup> supra, the individual teacher contracts were subsidiary to the terms of the collective bargaining agreement reached between the Association and the School Board, and the individual teachers could not waive the benefits of said agreement, which benefits are open to every employe of the represented unit, whatever the type or terms of his pre-existing contract of employment. There was no evidence adduced herein that the individual teacher contracts proffered and anticipated to be signed prior to April 15, 1969, were proffered for no other reason than because the School Board had to comply with the requirements set forth in Secs. 118.21 and 118.22 of the Wisconsin Statutes. The record is lacking in any evidence to establish or infer, that the individual teacher contracts were proffered to the individual teachers to defeat or delay the procedures prescribed by Sec. 111.70 looking to collective bargaining, nor to exclude the contracting employe from a duly ascertained bargaining unit, nor to forestall bargaining or to limit or condition the terms of the collective agreement."

Thus, we have a determination made by the agency in Wisconsin that has jurisdiction to determine such matters, that is in conformity with *J. I. Case, supra*.

The pertinent portion of secs. 118.21 and 118.22, Stats., are quoted for convenient reference:

Section 118.21 (1), Stats.:

"(1) The school board shall contract in writing with qualified teachers. The contract, with a copy of the teacher's

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<sup>7</sup>"Where the primary issue involved was whether the Employer failed and refused to bargain in good faith as required by the existing federal labor relations statute."

authority to teach attached, shall be filed with the school district clerk. Such contract, in addition to fixing the teacher's wage, may provide for compensating the teacher for necessary travel expense in going to and from the school-house at a rate not to exceed 6 cents per mile. . . .”

Section 118.22 (2), Stats.:

“(2) On or before March 15 of the school year during which a teacher holds a contract, the board by which the teacher is employed or an employe at the direction of the board shall give the teacher written notice of renewal or refusal to renew his contract for the ensuing school year. If no such notice is given on or before March 15, the contract then in force shall continue for the ensuing school year. A teacher who receives a notice of renewal of contract for the ensuing school year, or a teacher who does not receive a notice of renewal or refusal to renew his contract for the ensuing school year on or before March 15, shall accept or reject in writing such contract not later than the following April 15. No teacher may be employed or dismissed except by a majority vote of the full membership of the board. Nothing in this section prevents the modification or termination of a contract by mutual agreement of the teacher and the board. No such board may enter into a contract of employment with a teacher for any period of time as to which the teacher is then under a contract of employment with another board.”

Turning now to sec. 111.70, Stats.:

School boards are included within the definition of municipal employer in sec. 111.70 (1) (a), Stats.

Section 111.70 (2), Stats., when read in connection with sec. 111.70 (4) (i), Stats., authorizes municipal employers and employes to collectively bargain on “questions of wages, hours, and conditions of employment.”

Section 111.70 (4) (i), Stats., provides as follows:

“*Agreements.* Upon the completion of negotiations with a labor organization representing a majority of the employes in a collective bargaining unit, if a settlement is reached, the employer shall reduce the same to writing either in the

form of an ordinance, resolution or agreement. Such agreement may include a term for which it shall remain in effect not to exceed one year. Such agreements shall be binding on the parties only if express language to that effect is contained therein."

Our Supreme Court, in *Local 1226 v. Rhinelander* (1966), 35 Wis. 2d 209, 151 N.W. 2d 30, held that collective bargaining contracts entered into in accordance with sec. 111.70 (4) (i), Stats., were legally enforceable.

We are dealing with two statutory provisions, secs. 118.21 and 118.22, Stats., considered together, and 111.70, Stats. While the Supreme Court did not decide the issue of the relationship between individual employment contracts under secs. 118.21 and 118.22 and collective bargaining agreements entered into under sec. 111.70, it did discuss the general relationship between the two statutory provisions in *Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B.* (1966), 35 Wis. 540, 151 N.W. 2d 617. In reversing the trial court, the Supreme Court said (loc. cite 35 Wis. 2d 555): "One of the principal premises for the trial court's decision was that secs. [118.21 and 118.22], Stats., require the school board to contract individually with each teacher each year. . . ."

The court continued (loc. cite 35 Wis. 2d 556):

"The provisions of sec. 111.70, Stats., apply to the authority of school districts to the same extent as the authority of other municipal governing bodies. Sec. 111.70 was enacted after secs. [118.21 and 118.22] and is presumed to have been enacted with a full knowledge of preexisting statutes. Construction of statutes should be done in a way which harmonizes the whole system of law of which they are a part, and any conflict should be reconciled if possible. [Footnote citations]"

Does sec. 111.70, Stats., completely obviate the provisions of secs. 118.21 and 118.22, Stats.? In my opinion, it does not, and the two statutory provisions can be harmonized within the precepts of *J. I. Case*, and *Elmbrook*, *supra*.

First, although the terms of the collective bargaining agreement will control wages, hours and conditions of em-

ployment, the act of hiring still must be accomplished. Sections 118.21 and 118.22, Stats., still provide the method for hiring or rehiring teachers.

Second: One principal reason for sec. 118.22, Stats., is to provide early knowledge to the school board what teaching staff it may expect the ensuing school year and what replacing will be required; and, in addition, to provide early knowledge to teachers whether they have a position the ensuing school year or whether they must seek a new contract elsewhere. These reasons survive sec. 111.70, Stats., and teachers and school districts still must execute individual employment contracts in accordance with the provisions of ch. 118, Stats., though the provisions of the individual contracts may not be repugnant to the terms and conditions of the collective bargaining agreement entered into under sec. 111.70.

The fact that the terms of the collective bargaining agreement may not be settled and reduced to a written binding contract at the time of the proffering of individual teacher contracts is immaterial. The school boards and teachers may offer and accept employment within provisions of secs. 118.21 and 118.22, Stats., subject to the terms of a collective bargaining agreement yet to be agreed upon by the parties. In fact, this is a common and widespread practice under sec. 118.22, which stems from the fact that in many instances, collective bargaining for the agreement for the ensuing school year is not completed by the April 15 deadline required in sec. 118.22.

However, even though the act of hiring occurred at a time different than the effective date of the collective bargaining agreement, since many school boards consider the work period to run from the beginning of the academic school year, many contracts are "dated" as of the beginning of the school year (late August or early September), even though the offer and acceptance occurred earlier and the collective bargaining agreement already may have been negotiated and reduced to a binding written contract. There is no doubt, for the issue now under consideration, that the date affixed to the individual employment contract has no

legal significance. The terms of the contract are established as of the effective date of the collective bargaining agreement, although the act of hiring may have occurred earlier in point of time.

The salaries to be paid to an individual teacher are legally established as of the date the collective bargaining representative and the school district enter into a collective bargaining agreement. While the legally effective date of the collective bargaining agreement will vary according to the circumstances, we assume, without implying that in all cases it must, that its effective date is when the collective bargaining agreement is reduced to writing and formally accepted by the school board. This effective date is the point in time when the wage structure is legally established and legally enforceable under Wisconsin law.

The foregoing opinion is restricted solely to the question asked and to the specific facts your question assumes and does not directly treat any specific question which may arise under the federally imposed "wage-price freeze."

RWW:WHW

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*Common School Tax—County Board of Supervisors—(Informal)*—Provisions of sec. 59.07 (21), Stats., are mandatory with respect to levy to be made by county board of supervisors for common school tax.

September 9, 1971.

CHARLES B. AVERY

*District Attorney, Langlade County*

You have requested my opinion whether the provisions of sec. 59.07 (21), Stats., are mandatory with respect to the levy to be made by the county board of supervisors for the common school tax.

I am of the opinion that they are, providing there are qualifying school districts within the county or lying partly therein.

Present sections 59.07 and 59.07 (21), Stats., provide in material part:

*"59.07 General powers of board.* The board of each county may exercise the following powers, which shall be broadly and liberally construed and limited only by express language:

"\* \* \*

**"(21) COMMON SCHOOL TAX.** (a) At or before the November meeting each year levy a tax upon the equalized valuation of the county for the aid of the elementary schools of each school district of the county which has levied and placed on the tax rolls of the district for the previous year for the operation and maintenance of schools a tax of not less than 3 mills on the equalized valuation of the district for the year previous to the year of levy for elementary school purposes except where the district operates both elementary and secondary schools the minimum levy shall be 5 mills for both elementary and high school purposes. The county levy shall be sufficient to pay county aids to districts which qualify in an amount not less than \$350 per teacher unit operating in the county during the preceding year.

"(b) If a school district lies in more than one county, the county in which such elementary teachers during the preceding year are employed shall be reimbursed by any other county in which the school district lies for its share of such \$350 for the number of elementary teachers in the whole district in the ratio which the full valuation of the property of the school district lying in the other county bears to the full valuation of all the property in the district; \* \* \* The clerk of the county receiving such certification shall certify to the clerk of the other county the amount required to be reimbursed and the board of the other county shall levy a tax in such amount in the same manner and by the same method as the tax levied under par. (a). When the tax is collected, it shall be remitted by the treasurer of such other county to the treasurer of the county entitled thereto. 'Full valuation' as used in this paragraph means the full valuation prescribed in s. 121.06 (2)."

Prior to 1927, the county school tax was not really a county tax, but represented the amount the county board determined was to be raised in each town for the support of the common schools. Former sec. 59.075, Stats., was created by ch. 536, Laws of 1927, and *empowered* the county to raise a *county tax* by levy on all of the property of the county to be apportioned to the school districts within the county. The right to share in State apportionment was conditioned on levy of the county tax. In *Oconto Co. v. Town of Townsend* (1933), 210 Wis. 85, 91-93, 244 N.W. 761, 246 N.W. 410, the court held that the levy was optional.

The State Department of Public Instruction has taken the administrative position over a number of years that the provisions of sec. 59.07 (21), Stats., are mandatory.

It is unnecessary to go into the entire interim legislative history other than to state that revisions were made by chapters 143, 178, Laws of 1939; 360, 526, Laws of 1943; 435, Laws of 1945; 178, Laws of 1947; 600, Laws of 1949; 109, 224, Laws of 1951; 651, Laws of 1955; 565, Laws of 1963; and 458, Laws of 1965.

The revisions renumbered sec. 59.075 as sec. 59.07 (21), Stats., which became sec. 59.07 (21) (a), and subsection (b) was also added. Over the years, and especially in 1949, 1951 and 1955 changes, the word "shall" was used increasingly in both subsections (a) and (b), and prior to 1967, subsection (b) ended: "\* \* \* Section 40.71 (5) relating to aid shall apply to any such other county which does not comply with this paragraph."

Section 40.71 (5), 1965 Stats., was a penalty provision which provided:

"(5) COUNTY AIDS. If any county fails to raise for the support of the common schools by taxation, upon the aggregate valuation of the whole county, an amount at least equal to \$350 for each public elementary teacher employed in the county, as determined in s. 59.07 (21) and as certified to the county clerk by the state superintendent, and shall fail to apportion to each district such amount for each elementary teacher employer, the aid for the schools of that county

shall be withheld from the next succeeding apportionment except that aid may be apportioned by the state for distribution to all districts which have received a county apportionment for the preceding year.”

Section 59.07 (21), Stats., took its present form from the school revision law, ch. 92, Laws of 1967. The reference to the penalty provision was deleted from the last sentence of sec. 59.07 (21) (b), Stats. The Legislative Council note following the section states:

“NOTE: Corrects a cross reference and deletes the last sentence which alludes to a penalty in present law which this act eliminates. See note following s. 121.21 which refers to present s. 40.71 (5).”

The note to subchapter I, which follows sec. 121.21, Stats., states in part:

“NOTE: This subchapter deletes the following provisions:

“Present s. 40.71 (5) deleted. The *requirement* for a county elementary school tax of \$350 per teacher *is contained in s. 59.07 (21)*. The penalty provision in present s. 40.71 (5) is contradictory and is not used.” (Emphasis added.)

The legislative history makes it clear that the provisions of sec. 59.07 (21), Stats., are mandatory, providing that there are qualifying school districts within or lying partly within the county.

RWW:RJV

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*Retirement Fund—Annuity—(Formal)*—Payment for unused sick leave, vacation and compensatory time extends the date of termination of employment and the last day for which earnings were paid for Wisconsin Retirement Fund purposes by the period of time represented by the payment.

September 15, 1971.

CLYDE M. SULLIVAN, *Secretary*  
*Department of Employee Trust Funds*

Certain municipalities are presently paying and others are contemplating paying employes for unused sick leave, vacation and compensatory time on or just prior to the employe's date of retirement. You therefore ask my opinion as to the effect of such payment upon the starting date of an employe's annuity. Section 41.11 (6), Stats., which determines the starting date of such an annuity reads in part:

"(6) (a) The following prescribed persons shall be entitled to retirement annuities, beginning on the dates hereinafter specified:

1. Any participant who has attained age 55 and who, regardless of cause, is separated and continues to be separated until such annuity is initially approved pursuant to s. 41.04 (1) (b), from all service for every participating municipality for which he has been a participating employe prior to becoming an annuitant and for which such participating employe received compensation. \* \* \*

2. Such annuities shall begin on the date specified by the participant in the written application therefor, provided such date is not prior to the date of separation from the last participating municipality by which such participant was employed, and provided such date is not more than 60 days prior to the date of receipt of such application by the board; \* \* \*."

Under the quoted language of subparagraph (a) 1., a participant is entitled to an annuity if he is "separated until such annuity is initially approved \* \* \* from all service." The date the annuity is to begin is specified by the participant with the primary restriction, "provided such date is not prior to the date of separation from the last participating municipality by which such participant was employed." The question then arises as to whether the payment of money for unused sick leave, vacation and compensatory time at or near the date of separation is "earnings" which must be related to a period of service and thereby extends the time of service before the annuity may commence. I am informed that the Wisconsin Retirement Fund Board has, since its beginning, construed the statutes as requiring that the date of termination of employment for annuity purposes must be

after a period which is equivalent to the amount of service that such final payment would cover were the payment ordinary earnings. The courts give such construction great weight in determining the meaning of the statute. *State ex rel. Brunkhorst v. Krenn* (1959), 8 Wis. 2d 116, 125, 98 N.W. 2d 394.

It appears that proper interpretation of the statutes depends upon the definition of the terms "separated" and "date of separation" since sec. 41.11 (6), Stats., specifies that a participant is not entitled to an annuity unless he is "separated from all service" and that the annuity may not begin "prior to the date of separation." Neither of these terms is defined in sec. 41.02, Stats., the definitions, section of ch. 41, Stats. Separate is defined in Webster's Third New International as:

"3. to part by or as if by a legal separation: b: to sever contractual relations with: discharge [he was *separated* from the service with the rank of captain—E. J. Kahn] [more than 100 employees have been *separated* from the firm in the past six months] [any student who does not remove his probationary status . . . may be *separated* from the institution—*Bull. of Meharry Med. Coll.*]  
Separation is also defined therein as:

"4. b: Termination of contractual relationship; resignation, discharge [from the service] [from employment] [a serious breach of accepted standards of deportment . . . may be benefitted by loss of social privileges,—*College of William & Mary Cat.*]"

The general rule of statutory construction requires that words be used in their ordinary grammatical sense unless such construction would be obviously repugnant to the intention of the framers or would lead to some inconvenience or absurdity. It appears therefore that under the ordinary meaning of the terms "separated" and "date of separation," a severance or termination of the work relationship was intended before a participant is eligible for an annuity. The work relationship does not necessarily end when the employe terminates his work but may equally cover the entire em-

ployer-employee relationship, the period for which earnings are paid, whether or not actual work is done. *Social Security Board v. Nierotko* (1945), 327 U.S. 358, 90 L. ed. 718, 66 S.Ct. 637. Payment of unused vacation time at or near separation has been held to preclude the recipient from unemployment compensation benefits until after the period represented by the payment as wages has expired even though the court specifically held that such payment did not of itself work to extend the employee relationship. *Butler v. Bakelite Co.* (1960), 32 N.J. 154, 160 A. 2d 36, 95 ALR 2d 1373.

There are three conceivable ways in which payments for unused sick leave, vacation and compensatory time could be handled by the Retirement Bureau. The payment could be considered to be a bonus, not includable as "earnings" under sec. 41.02 (18), Stats. A second method would be to consider such payment as "earnings" to be included at the time paid. The third method, the one adopted by the Department of Employee Trust Funds, is to consider such payment as "earnings" and which extend the termination date of the employee for the period of time accounted for by such payment. The last method cited is, in my opinion, most consistent with the intent of the legislature.

The contributions and amount of resulting annuity under the present formula plan annuity system are based mainly upon "earnings." The term "earnings" is defined in sec. 41.02 (18), Stats., in part as:

"(18) 'Earnings' means an amount equal to the sum of the total amount of money earned by an employe of a municipality for personal services rendered to or for such municipality and the money value, as determined by rules prescribed by the governing body of the employing municipality, of any board, lodging, fuel, laundry and other allowances provided for such employe in lieu of money, but excluding uniforms purchased directly by the municipality and excluding employer contributions for insurance and retirement. \* \* \*"

Such definition indicates that "earnings" is intended to include more than the periodic salary of the participant and

includes all money earned by the employe for services rendered to the municipality and additionally, the money value of other, in kind, allowances. It is therefore my opinion that "earnings" as defined in sec. 41.02 (18), Stats., includes any payment for unused vacation, sick leave and compensatory time. The question which then remains is whether the subject payment is to be considered as "earnings" on the date paid or whether such payment extends the termination date by the period of time covered by such payment, were such payment the regular wages or salary of the employe.

Under the present formula plan annuity system the monthly payment available to an annuitant is based upon the average monthly earnings received in the five calendar years, during which the participant received the highest total earnings, within the last ten calendar years of employment. A specified percentage is applied to this "formula final rate of earnings" to determine the proper monthly payment to an annuitant. See secs. 41.02 (21) and 41.11 (6) (c), Stats. The effect therefore of a lump sum payment for unused vacation, sick leave and compensatory time at time of retirement results in a substantially higher annuity than was contemplated when the formula plan was adopted by the legislature. State employe participants under the plan are not paid for unused vacation, sick leave and compensatory time upon retiring. Sec. 16.275, Stats. You further inform me that at the time the formula plan was instituted by the legislature, most municipalities made no payment upon retirement for unused sick leave, vacation or compensatory time. It appears, therefore, that the legislature when instituting the formula plan did not consider the subject payments. I include the following assumed fact situation, which you have provided to me, to show the substantial increase in benefits which would result if the subject payment is considered to be earnings accountable only to the date upon which paid. Assume the following:

1. Employe stops actual work on 12/31/70, at age 65, after 35 years of creditable service.

2. The employe is eligible for payment for 6 months of accumulated sick leave.

3. His monthly earnings have been as follows:

1970	\$1,000
1969	950
1968	900
1967	850
1966	800

The essential facts under present procedures, wherein the termination date is extended, as compared to the facts under a procedure where the subject payment is considered to be earnings for the date paid, would be

Item	(A)	(B)
	Present procedure Termination date Extended	Procedure under which payment is considered earnings on date paid
1. Effective date of annuity .....	7/1/71	1/1/71
2. Years of creditable service .....	35-1/2	35
3. Formula final rate of earnings .....	\$920.00	\$1,000
4. Formula annuity (Opt. 1) .....	\$327.03	\$358.40

Thus under the (B) procedure the annuity would be about \$31.37 per month higher; the employe would contribute about \$150 more in total than under the (A) procedure, which would cover about \$1.08 of the increased annuity, leaving about \$30.29 of the increased annuity to be paid for by the employer at a total cost of about \$3,922.00. On the other hand, using the same assumptions as above, but applying them to an employe who had *no* accumulation of sick leave at 12/31/70, the results would be as follows:

1. Effective date of annuity.	1/1/71
2. Years of creditable service,	35
3. Formula final rate of earnings,	\$900
4. Formula annuity (Opt. 1)	\$313.43

Thus, under present procedure (A), the employe with an accumulation of sick leave in the above example does receive an improved annuity based on the sick leave payments he receives. He will not, however, receive the substantial increase in his annuity which would arise under the (B) procedure.

The general rule of statutory construction is that a statute should not be given a construction which results in unreasonableness if the statute is open to any other construction. *Williams v. City of Madison* (1962), 15 Wis. 2d 430, 439, 113 N.W. 2d 395. Consideration of the situation as shown in the example above indicates that substantially higher monthly payments under the formula plan, not contemplated by the legislature, could result from considering the subject payment as earnings on the date paid. I conclude, therefore, that the procedure presently followed by the Wisconsin Retirement Fund Board is the most reasonable interpretation of the statutes and suggest that such procedure be continued unless or until changed by the legislature.

RWW:WMS

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*Alcoholic Beverages—Municipally-Operated Liquor Establishments—(Informal)*—A county may not receive a combination liquor-beer license or operate an alcoholic business on its own at a county-owned golf course.

September 23, 1971.

FRED L. JACOBSON, *Administrator*  
*Division of Criminal Investigation*

You have requested my informal opinion concerning whether a town may issue a combination liquor and beer license to a county for use at a county golf course. Because the more basic question concerns the power of a county, I have rephrased your question as follows: May a county op-

erate an intoxicating liquor and fermented malt beverage business on county golf course premises?

A county has only those powers that the State chooses to delegate. As stated in *Maier v. Racine County* (1957), 1 Wis. 2d 384, 385: "County boards have only such legislative powers as are conferred upon them by statute, expressly or by clear implication." In this instance, the county has received an express delegation of power to operate a golf course:

The board of each county may exercise the following powers, which shall be broadly and liberally construed and limited only by express language: (1) . . . (d) 1. Construct, . . . develop, . . . operate and maintain all county . . . facilities hereinafter in this subsection referred to as "projects," including without limitation . . . golf courses . . . and including all property, real and personal, pertinent or necessary for such purposes. Sec. 59.07 (1) (d) 1.

Your question concerns the sale of alcoholic beverages. Therefore, it is appropriate to analyze the liquor and beer statutes first to determine if a county has received an express or necessarily implied delegation of power to engage in the sale of such beverages.

The sale of intoxicating liquor and beer is governed by ch. 176 and sec. 66.054, Stats., respectfully. These regulatory statutes are an "enactment of state-wide concern for the purpose of providing a uniform regulation of the sale of . . ." such beverages. [Sec. 176.44 and 66.054 (16), Stats.] Nowhere in these sections is a county given authority to hold a license for the sale of liquor and beer at a golf course. In fact, the statutes designate specific exceptions for when a county can engage in alcoholic businesses: sec. 176.05 (4b), Stats., allows a county to designate a concessionaire to apply for a license for use at county airports or arenas; sec. 176.05 (24), Stats., exempts a municipality, established stadiums and state fair park premises from the prohibition of operating without a license; sec. 66.054 (5) (e), Stats., allows a county to sell beer in a county park without obtaining a license; and 66.054 (8) (b), Stats., grants authority to a county fair to obtain a class B beer license.

In the same light, prior to 1969, the legislature provided an exemption for cities, villages and towns under sec. 176.08, Stats., to operate municipal liquor stores. Then, by ch. 186, Laws of 1969, sec. 176.08 was completely reversed to prohibit these units of government from engaging in the sale of liquor or beer except for the instances noted in that section. I have pointed out this section to emphasize that local units of government operate on delegated powers. When the lawmakers decide that a county or another local unit of government may engage in a certain activity, they make an express provision concerning the county in the statutes.

A county has not been expressly delegated the power to operate an alcoholic business under the liquor laws at a golf course. It is equally clear that a county is not one of those entities that is included in the coverage under these statutes. Sections 176.05 (13) and 66.054 (8), Stats., provide that licensing authorities can issue licenses to persons, domestic corporations or foreign corporations. It is true that a county is a "body corporate," sec. 59.01 (1), Stats. It is also true that the colloquial meaning of "body corporate" is synonymous with "corporation." [See Webster's Third International Dictionary] However, these two terms are not synonymous in their legal sense as can be seen by the functions each performs. As stated in 1 McQuillin, *Municipal Corporations* (3d Ed., 1959), sec. 2.03, p. 448:

"Strictly speaking, a public corporation is one that is created for political purposes only, with political powers to be exercised for purposes connected with the public good in the administration of civil government, as distinguished from a private corporation which is one created for purposes other than those of government. . . . Public corporations are not only creations, but also instrumentalities of the state. If deemed a corporation of any kind, organizations variously styled public . . . created by the sovereign power for public or political purposes, having for their object the administration of a portion of the powers of the state, include counties. . . .

The legislature was speaking of private corporations, not public corporations, in the liquor and beer laws. To say that

the legislature intended that counties should be licensed to sell liquor and beer would be to say that this unit of government, functioning for the good of the public, could promote the sale of an item that is harmful to the public.

As is stated in 9 McQuillin, *Municipal Corporations* (3d Ed., Rev. Vol.), sec. 26.186, p. 483:

“. . . It is widely if not universally recognized that intoxicating liquor businesses of all kinds are potentially if not actually dangerous or harmful to the public health, morality and welfare, and that consequently they are subject to strict supervision or prohibition by states and also by municipalities authorized to act in the matter. . . .”

While a county receives no delegation under the liquor and beer laws to engage in the sale of these items at a county golf course, it might be argued that a county is exempted from the coverage of these laws under a “sovereignty” theory. “There can be no doubt that a county stands as agent of the state.” *Kyncl v. Kenosha Co.* (1968), 37 Wis. 2d 547, 555. I recently concluded in 59 OAG 55 (1970), that the University systems may sell beer on the campus. The rationale was that “broad principles of sovereignty require that a state or its agencies performing a governmental function remain free of municipal control.” But in that instance, the agency involved was the Board of Regents and was an enumerated branch or “agency” of the Executive Department. A county does not fall within the theory of State sovereignty because it is not the same type of agency as are the various councils, boards, commissions, divisions or committees of the State. A county is not the State or sovereign, and the rules regarding the sovereign do not apply to the county. Thus, my conclusion in 59 OAG 55 (1970), would be of no assistance to the facts at hand.

The only other statute that might possibly be construed to delegate the county power to operate a liquor and beer business is sec. 59.07 (1) (d) 1, Stats., cited *supra*. The argument would be that the words “. . . including all property, real and personal, pertinent or necessary for such purposes” are an authorization for a county to obtain a combination liquor-beer license. However, it is my opinion that such a

reading would frustrate the intent of the liquor and beer laws. In addition, the sale of alcoholic beverages is not "pertinent or necessary" to the function of a golf course. A golf course is for the playing of golf, not for the consuming of liquor or beer. Finally, while I do not express my opinion on the following matter at this time, I will point out that liquor and beer licenses are ". . . more in the nature of a privilege than a vested or a property right." *State ex rel. Buffalo v. Common Council* (1968), 38 Wis. 2d 518, 523; see also *Marquette Savings and Loan Assn. v. Twin Lakes* (1968), 38 Wis. 2d 310. Under these two cases, it is possible that sec. 59.07 (1) (d) 1, does not apply to a liquor license, since this section limits itself to real or personal property.

Thus, it is my informal opinion that a county may not receive a combination intoxicating liquor-fermented malt beverage license, or operate an alcoholic business on its own, at a county-owned golf course.

RWW:PAP

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*Elections—18-Year-Old Vote—(Formal)*—Adoption of the Twenty-sixth Amendment to the United States Constitution makes question of constitutionality of Bill 212A moot.

September 24, 1971.

THOMAS P. FOX, *Director*  
*Legislative Services*

By 1971 Assembly Resolution 12, you have requested my opinion as to the constitutionality of the statute proposed by 1971 Assembly Bill 212. Bill 212A would create sec. 5.02 (1m), Stats., to read as follows:

"5.02 (1m) 'Federal election' means all primaries and elections held to nominate or elect United States senators, representatives in congress and electors of president and vice president including the election to express preferences for the person to be the presidential candidate for each party."

Assembly Resolution 12 was introduced in the Assembly February 4, 1971, and adopted April 28, 1971. At that time, it appeared that the legislature would be required to define the limits of a "federal election" or a "national election," since the United States Supreme Court had held in *Oregon v. Mitchell* (1970), 400 U.S. 112, 91 S.Ct. 260, 261, 27 L.ed. 2d 262:

" . . . that the 18-year-old vote provisions of the Voting Rights Act Amendments of 1970 are constitutional and enforceable insofar as they pertain to federal elections and unconstitutional and unenforceable insofar as they pertain to state and local elections."

As a practical result of this decision, most states, including Wisconsin, acquired a new special classification of voters, i.e., those entitled to exercise a franchise limited to "federal" or "national" elections. Bill 212A would differentiate between federal, state or local elections in order to implement the exercise of such an 18-year-old federal franchise.

Subsequent to *Oregon v. Mitchell*, *supra*, however, Congress proposed the following article as an amendment to the Constitution of the United States:

"Article—

"SECTION 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

"SEC. 2. The Congress shall have power to enforce this article by appropriate legislation."

On June 30, 1971, Ohio became the 38th state to ratify the amendment and on July 5, 1971, by virtue and in pursuance of §106b, Title 1 of the United States Code, it was certified by the United States Administrator of General Services as the Twenty-sixth Amendment to the United States Constitution. See Federal Register, Vol. 36, No. 130, July 7, 1971. By virtue of this amendment, 18-, 19- and 20-year-old citizens, who are otherwise qualified to vote, are entitled to exercise their right to vote in all future elections, whether they be federal, state or local.

The adoption of the Twenty-sixth Amendment clearly appears to have eliminated the previously existing distinction between federal elections and state or local elections. Therefore, since both Bill 212A and Assembly Resolution 12 appear to have been based on a distinction which no longer exists, it is apparent that the questions raised in your inquiry have become moot.

RWW:JCM

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*Motor Vehicles—Drunk Driving—(Informal)*—Temporary occupational licenses may be issued only after 30 days from the date of conviction.

September 27, 1971.

JEROME P. TLUSTY

*Assistant District Attorney, Marathon County*

You have asked whether, under sec. 343.10 (1), Stats., a 30-day temporary occupational license may be issued immediately upon conviction or only after 30 days have elapsed since the date of conviction. This statute reads in part:

“ . . . No order for an occupational license shall be issued until at least 30 days have elapsed, since the date of conviction or, in the case of an appeal which is subsequently dropped or affirmed, until at least 30 days have elapsed since the date of revocation following the dropping or affirmance of the appeal. If a certificate of insurance issued by the insuring company or an agent of the insuring company is submitted to the court, the court may issue a 30-day temporary occupational license. Such license shall be on forms provided to the court by the division.”

Since this section is somewhat ambiguous, statutory construction is necessary to ascertain legislative intent. In my opinion, this section must be construed to mean that, after a conviction, 30 days must elapse before the court may make an order issuing a temporary occupational license.

Section 343.10 (1), Stats., actually provides for three different and distinct licenses, and it is quite evident that the legislature treated them as having separate and distinct purposes. These three are limited chauffeur's licenses, occupational licenses, and temporary occupational licenses.

The first portion of sec. 343.10 (1), Stats., provides that if a person has had his chauffeur's license revoked he may file a petition with the administrator for a limited chauffeur's license under sec. 343.126, Stats. This section stands by itself. Section 343.126 (1), Stats., provides:

"(1) When at least 30 days of a period for which a person's chauffeur's license has been revoked have elapsed or, in the case of an appeal which is subsequently dropped or affirmed, if at least 30 days have elapsed since the date of revocation following the dropping or affirmance of the appeal, the administrator may, upon application therefor accompanied by a filing fee of \$5, issue a limited chauffeur's license to such person if:

"(a) Such person's livelihood depends upon his employment as a licensed chauffeur; and

"(b) Proof of financial responsibility covering all vehicles which the applicant will be permitted to operate has been furnished as specified in s. 343.38 (1) (c)."

Thus, the legislature has very definitely stated that an operator who has had his license revoked for a drunk driving conviction may not have a limited chauffeur's license for at least a period of 30 days thereafter. Nothing in sec. 343.10 (1), Stats., alters this legislative mandate. Thus, even though a person's job required him to drive, he could not receive a limited chauffeur's license until 30 days had elapsed after his conviction, or affirmance or dropping of an appeal upon conviction of a drunk driving charge.

It is very evident that the legislature has not confused a temporary occupational license with a limited chauffeur's license in sec. 343.10 (1), Stats.

In connection with a court order for issuance of an occupational license, this section further provides:

“ . . . If the petitioner holds a valid chauffeur’s license at the time of filing petition the order for issuance shall further restrict operation under the occupational license to travel only between the licensee’s place of residence and his place of employment, in addition to operation permitted under the chauffeur’s license. . . .”

I cannot attribute to the legislature the incongruity of providing that, if a person needs a license for his job, he can have an immediate 30-day temporary occupational license but cannot obtain a limited chauffeur’s license until 30 days after the conviction. Yet, this would be the result if we construed the statutory provision to mean that a court could issue a 30-day temporary occupational license immediately after conviction.

It is clear that a limited chauffeur’s license is issued by the administrator without a court order, and that an occupational license is issued by the administrator only upon a court order therefor. However, the temporary occupational license is issued directly by the court itself. The administrator does not issue such license. Since courts operate only through the issuance of orders or judgments, it follows that a court, in issuing a temporary occupational license, does so by way of issuing an order for such license. Since the statute clearly provides that no order for an occupational license shall be issued until at least 30 days have elapsed since the date of conviction, it would seem clear that this applies also to an order for the issuance of a temporary occupational license.

Previously, the law provided a 90-day waiting period from the date of conviction before an occupational license could be ordered. During its last session, the legislature reduced this to 30 days. The question was considered as to how long after the end of the 30-day period it would take for the Division of Motor Vehicles to act to issue the license. It was then decided to provide that the court could issue a temporary occupational license to cover this period so that a person could commence to drive immediately at the end of the 30-day period, while he was waiting to receive his occupational license from the Division of Motor Vehicles. I think that it is clear from the language of the statute that this is what

the legislature intended to accomplish. To construe the statute as permitting the issuance of a temporary occupational license immediately after conviction would defeat the very purpose of the statute.

Finally, another rule of statutory construction must be considered: The interpretation placed upon a statute by the agency authorized to administer its provisions must be given weight in construing the statute. While a long standing construction would have more cogency in this respect, nevertheless the Division of Motor Vehicles has construed the statute as I have, and due consideration must be given to the expertise possessed by the Division of Motor Vehicles in this respect.

Thus, for all of these reasons, I must conclude that the court must wait 30 days after a drunk driving conviction, or 30 days after the dropping or affirmance of an appeal, before it may order a 30-day temporary occupational license under sec. 343.10 (1), Stats.

RWW:AOH

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*Public Office—Election—(Informal)*—Discussion of conflicts arising from election of a school principal to the office of alderman.

September 28, 1971.

JAMES R. LONG

*District Attorney, Outagamie County*

Assistant District Attorney R. Thomas Cane of your office has requested my opinion relative possible conflicts arising out of the election of an individual, currently employed as principal in a city school system, to the office of alderman.

The City of Kaukauna has a city school system under secs. 120.40 to 120.58, Stats., and a fiscal board created under sec. 120.50, Stats., of which all aldermen are members.

You inquire whether said individual can continue to hold both positions.

Compatibility of offices is not involved, since only one office is involved. A school teacher in a city system is a city employe. *State ex rel. Board of Education v. Racine* (1931), 205 Wis. 389, 236 N.W. 553.

In 26 OAG 582 (1937), it was stated that a teacher in such case could not continue as alderman. The statute therein relied upon, sec. 62.09 (2) (c), Stats. (1937), is no longer on the statute books. It provided that a city office would become vacant if an officer acquired a pecuniary interest in certain contracts.

I am not aware of any statute which would totally bar a teacher in a city district from serving as alderman if elected. Elective officers are removable by recall election as provided in sec. 9.10, Stats., or by the common council, for cause. The possible conflicts which are apparent might be the basis for a recall election petition. However, whether they would amount to just cause for removal under sec. 17.16 (2), Stats., is a matter for court determination in the event the council wished to proceed in this manner.

An officer having a potential conflict must be careful to avoid violation of sec. 946.13, Stats.

In *Heffernen v. Green Bay* (1954), 266 Wis. 534, 542, 64 N.W. 2d 216, it was stated that an alderman could not avoid the impact of the statute by refraining from voting on the awarding of a contract. This decision was based on then sec. 62.09 (7) (d), Stats., which was repealed by ch. 603, Laws of 1959, when the Criminal Code was revised. In 52 OAG 367, 370 (1963), it is stated that a public officer may avoid a violation by refraining from voting or from participating in the negotiations providing that in his private capacity he did not bid for, negotiate, or enter into such contract.

Section 946.13, Stats., is a criminal statute which is to be construed strictly but most favorably to the party accused.

Section 120.49 (4) (d), Stats., provides:

“(d) All money appropriated for school purposes shall be under the direction of and shall be expended by the school board.”

The council, under sec. 120.49 (4) (a), Stats., must approve the entire school budget. Such approval is by the fiscal board where one exists, by reason of sec. 120.49 (4) (a) and sec. 120.50 (3), Stats.

Section 946.13 (1), Stats., provides:

“(1) Any public officer or public employe who does any of the following may be fined not more than \$500 or imprisoned not more than one year or both:

“(a) In his private capacity, negotiates or bids for or enters into a contract in which he has a private pecuniary interest, direct or indirect, if at the same time he is authorized or required by law to participate in his capacity as such officer or employe in the making of that contract or to perform in regard to that contract some official function requiring the exercise of discretion on his part; or

“(b) In his capacity as such officer or employe, participates in the making of a contract in which he has a private pecuniary interest, direct or indirect, or performs in regard to that contract some function requiring the exercise of discretion on his part.”

While the school board acts as the contractor in most cases, it acts as an agency of the city and many of its contracts are of the nature that might well be considered as giving a school teacher a private pecuniary interest, direct or indirect. Section 120.41 (1), Stats., makes it clear that the city school system is not a separate legal entity. Where the school board acts as contractor, it acts for the city. “Its contracts are city contracts.” *State ex rel. Board of Education v. Racine, supra*, p. 396.

Section 120.49 (3) (a), Stats., authorizes a school board to enter into a contract with a principal. Section 118.21, Stats., requires that there be a written contract which shall be filed with the school district clerk. A city contract is involved. There is no question but that the principal directly

enters into the contract within the meaning of sec. 946.13 (1) (a), Stats., or that he has a direct pecuniary interest therein. He does so in his private capacity. The only question is whether he, as alderman, is *authorized* or required by law to perform in regard to that contract some official function requiring the exercise of discretion on his part.

While it is a close question, I am of the opinion that he is authorized to perform an official function requiring the exercise of discretion on his part. The fiscal board authorizes the funding of that contract, and while the monetary amount may well be hidden in the mass of funds necessary to fund the total school budget, and while the school board is in substantial charge of allocation of such funds, the alderman exercises discretion in the total amount of funds to be approved.

Abstention from voting on the fiscal board when the question of funding the budget, and hence the contract, comes up, would not absolve the individual from probable violation of sec. 946.13 (1) (a), Stats., if he had already entered into the contract during the time he was alderman. The only question would be whether he is authorized or required by law to perform in regard to that contract some official function requiring the exercise of discretion.

Another area of potential conflict is the power of the fiscal board under sec. 120.50 (5), Stats., to abolish the city school district and fiscal board and to create a common school district or a unified school district containing the territory of the city school district. If abolished, a conveyance would be necessary, among other things, and sec. 946.13 (4), Stats., defines contract to include a conveyance. It appears to me that as a teacher in the school system he might well have a direct or indirect pecuniary interest in the change from a city school district to an independent district and would at the same time be in a position where by voting he would exercise discretion in an official capacity.

We cannot speculate on the various circumstances which might give rise to the basis for a successful prosecution. A court, or court and jury, would determine the facts and apply the law if a prosecution were brought.

Since sec. 946.13 (3), Stats., makes any contract entered into in violation of this section void, it is possible to test claimed conflict in a specific case by means of a declaratory judgments action. An interested taxpayer or city officer could bring an appropriate action which would indirectly test the alderman's right to serve as alderman and employe. *Quo warranto* is another possible method of testing the alderman's right to hold office, although its use in the instant case is somewhat questionable.

An opinion from this office is not a suitable vehicle to pressure a duly elected official into resigning as alderman or teacher, especially where the question of conflict is debatable and may be subject to avoidance.

RWW:RJV

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*Optometry—Contact Lenses—(Formal)*—The Optometry Examining Board does not have rule-making power under the Wisconsin Statutes to allow unlicensed personnel to engage in the practice of optometry under the direct supervision of a licensed optometrist or licensed physician or surgeon. Under ch. 449, Stats., no one other than a licensed optometrist or a licensed physician or surgeon may fit contact lenses.

September 29, 1971.

A. L. LINDELL, O.D.

*Secretary, Optometry Examining Board*

You have asked for my opinion regarding certain problems concerning the practice of optometry by lay refractionists and the fitting of contact lenses by opticians. Your first question is:

“(1) Does the Board have the power under Chapter 449, 227, and 15 of the Wisconsin Statutes to promulgate rules interpreting and defining Sec. 449.01 so as to allow certain objective tests to be administered by unlicensed personnel under the direct supervision of an optometrist or physician?”

The rule-making powers of the Optometry Examining Board are set forth in the following sections of the Wisconsin Statutes:

"449.03 Rule making; enforcement. (1) No rule made by the examining board shall expand the practice of optometry or affect the practice of dispensing opticians, nor shall the examining board enact rules which forbid the employment of an optometrist or declare such employment unprofessional conduct, or prohibit the operation of an optometric department by optometrists in a mercantile establishment."

"227.014 \* \* \*

"(2) Rule-making authority hereby is expressly conferred as follows:

"(a) Each agency is authorized to adopt such rules interpreting the provisions of statutes enforced or administered by it as it considers to be necessary to effectuate the purpose of the statutes, but such rules are not valid if they exceed the bounds of correct interpretation."

"15.08 \* \* \*

"(5) General Powers. Each examining board may compel the attendance of witnesses, administer oaths, take testimony and receive proof concerning all matters within its jurisdiction. It shall formulate rules for its own guidance and for the guidance of the trade or profession to which it pertains, and define and enforce professional conduct and unethical practices not inconsistent with the law relating to the particular trade or profession."

These statutes are important here because our Supreme Court has held that no administrative agency may issue a rule or regulation that is not legislatively authorized, most usually in the statutes creating such agency. *Kachian v. Optometry Examining Board* (1969), 44 Wis. 2d 1, 8, 170 N.W. 2d 743.

In order to answer your first question, one must examine the definition of the practice of optometry found in sec. 449.01 (1), Stats. In 38 OAG 520 (1949), this office had

occasion to construe this definition, which was then found in sec. 153.01, Stats. There we said:

“In studying the statutory definition of the practice of optometry quoted above it will be readily seen that such practice falls into the two phases or steps.

“First, there is the employment of any means other than drugs to determine the visual efficiency of the eyes or the measurement of the powers or defects of vision. *In other words this is the eye examination which must precede the employment of corrective measures where indicated. In the present situation this service is performed by licensed persons as it should be.*

“The second step or phase in the practice of optometry as defined in the statute is ‘the furnishing, using or employment of any means or device designed or calculated to aid in the selection or fitting of spectacles or eyeglasses; and the adaptation of lenses, prisms and mechanical therapy to aid the vision of any person.’ ” (Emphasis supplied.) 38 OAG 520, 523.

You have not specified exactly what “objective tests” these unlicensed personnel would be administering under the direct supervision of an optometrist or physician. However, if these tests are in the nature of an eye examination as discussed in the above quotation, it would then be my opinion that the persons administering the same would be engaged in the practice of optometry as defined by sec. 449.01 (1), Stats.

If this is so, these persons would have to be licensed by your examining board, unless they are exempt under the provisions of sec. 449.02, Stats. That section reads as follows:

“449.02 Licenses; exemptions. (1) No person shall practice optometry within the meaning of this chapter without a license to do so and a valid certificate of registration issued by the examining board, except that a dispensing optician need not be so licensed for the practice of optical dispensing.

“(2) This section shall not apply to physicians and surgeons duly licensed as such in Wisconsin nor shall this sec-

tion apply to the sale of spectacles containing simple lenses of a plus power only at an established place of business incidental to other business conducted therein, without advertising other than price marking on the spectacles, if no attempt is made to test the eyes. The term 'simple lens' shall not include bifocals."

In 10 OAG 247 (1921), this office was asked whether an unlicensed graduate of a school of optometry could practice optometry in the office of his father, who was a physician, before taking his board examination. This office concluded that:

"There is no provision in the statute which authorizes any person to practice optometry under a physician or under any other optometrist. If the father of this person were a licensed optometrist, it would not authorize his son to practice optometry in his office without a license. If that is true, then it is equally true that he cannot practice optometry under his father as a physician. You are therefore advised that this party cannot practice optometry until he has passed an examination and received his license as provided by law." 10 OAG 247, 248.

Furthermore, this "lay refractionist" question was directly answered by this office in an informal opinion to your predecessor dated December 8, 1966. That opinion quoted from 10 OAG 247, 248, *supra*, and our Supreme Court's decision in *State ex rel. Harris v. Kindy Optical Co.* (1940), 235 Wis. 498, 502, 292 N.W. 283, and concluded:

"Thus, it is my opinion that employment by physicians of unlicensed lay refractionists, who are subject to Ch. 153 of the Wisconsin Statutes, is in violation of said chapter."

There have been no changes in the optometry statutes since the date of the above informal opinion that would lead this office to reach a different opinion on the matter. Thus, my reply to your first question is negative.

Because this area of health care services is so important, I think it is worth noting that some states have enacted legislation concerning the rule of ancillary personnel. I

would particularly draw the board's attention to Article 18 of the California Business and Professions Code entitled "Physicians' Assistants," which was enacted in 1970. In sec. 2510 the purpose of the article is stated as being:

" \* \* \* to encourage the more effective utilization of the skills of physicians by enabling them to delegate health care tasks to qualified physician's assistants where such delegation is consistent with the patient's health and welfare."

Your board should be especially interested in the prohibited medical services set forth in sec. 2514:

"No medical services may be performed under this article in any of the following areas:

"(a) The measurement of the powers or range of human vision, or the determination of the accommodation and refractive states of the human eye or the scope of its functions in general, or the fitting or adaptation of lenses or frames for the aid thereof.

"(b) The prescribing or directing the use of, or using, any optical device in connection with ocular exercises, visual training, vision training or orthoptics.

"(c) The prescribing of contact lenses for, or the fitting or adaptation of contact lenses to, the human eye.

"(d) The practice of dentistry or dental hygiene as defined in Chapter 4 (commencing with Section 1600) of this division.

"Nothing in this section shall preclude the performance of routine visual screening."

I do not mean to pass on the merits of the California legislation in any respect. However, it may serve as a starting point for further consideration of this problem by both the board and the legislature.

Your second question to me is:

"(2) May anyone other than a licensed optometrist or physician fit contact lenses under Sec. 449.01 where such fitting of necessity requires measurement of the eye, adap-

tation of the contact lens to the eye, and other determinations concerning the fit of the lenses and the comfort of the patient?"

This question was previously considered by this office in 36 OAG 314 (1947), in response to an inquiry from the president of your board. It was concluded that:

"While there may be some steps in the fitting of contact lenses which do not involve the practice of optometry, such as the grinding of the prescription into the lens, it is apparent that the determination of the need for visual correction, the fitting of the lens to the eye, the optometric refraction, and the writing of the prescription are all a part of the practice of optometry and may be done only by licensed optometrists or licensed physicians and surgeons." 36 OAG 314, 316.

The discussion therein was under ch. 153 of the statutes which, as I pointed out above, has since been renumbered ch. 449 without any major change in substance. Therefore, I reaffirm the conclusion reached in 36 OAG 314, and advise you that no one other than a licensed optometrist or licensed physicians and surgeons may fit contact lenses under ch. 449 of the Wisconsin Statutes.

RWW:SS

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*Cosmetic Arts—Licensing—(Formal)*—Senate Bill No. 216 (1971) would be unconstitutional if enacted into law.

October 15, 1971.

THE HONORABLE, THE ASSEMBLY

Senate Bill No. 216 (1971), if enacted into law, would remove the exemption of licensed cosmetologists from the Barber Code and require that shaping, cutting or singeing the hair of male patrons be performed by persons who have complied with the same apprenticeship and training standards of barbers. You inquire as to the constitutionality of

the proposed law and whether it would conflict with either the Federal Civil Rights Act of 1964 or state equal opportunity laws.

The term "barbering" includes shaving; trimming the beard or cutting the hair; giving facial or scalp massages or treatments with oils, creams, lotions or other preparations, either by hand or mechanical appliances; singeing, shampooing, arranging, dressing or dyeing of the hair; applying hair tonics; applying cosmetic preparations, antiseptics, powders, oils, clay or lotion to the scalp, face or neck. Sec. 158.01, Stats.

The term "cosmetology" includes practices generally performed by beauty culturists, cosmeticians, cosmetologists or hairdressers including the arranging, dressing, curling, waving, cleansing, cutting, bleaching, coloring or similar work upon the hair of any person by any means, with hands or mechanical apparatus, or by the use of cosmetic preparations, antiseptics, tonics, lotions, creams or otherwise, and includes the massaging, cleansing, stimulating, manipulating, exercising, beautifying or similar work upon the scalp, face, neck, shoulders or hands, manicuring the nails of any person, or the removal of hair. Sec. 159.01 (1), Stats.

From the foregoing it will be observed that barbering and cosmetology practices are very similar. It has been said to be a matter of common knowledge that the trade of barbers and that of the cosmetologist are closely akin. 56 A.L.R. 2d 903. Ladies hair bobbing, in fact, is a branch of the barber business. *Words and Phrases*, "Barbering." A fundamental difference is that cosmetologists do not engage in the practice of shaving the face. 10 Am. Jur. 2d, *Barbers and Cosmetologists*, § 3.

Another difference between the two vocations involves licensing requirements. Essentially, a journeyman barber's license may be acquired only after a three-year apprenticeship. Sec. 158.10, Stats. An operator's license in cosmetology requires either a two-year apprenticeship or completion of a course of instruction of at least 1500 hours. Secs. 159.02 (3) and 159.08 (4) (a), Stats.

The right to follow any of the common occupations of life has been deemed to be an inalienable right by the United States Supreme Court. *Allgeyer v. State of Louisiana* (1897), 165 U.S. 578, 17 S.Ct. 427, 41 L.ed. 832. However, the occupation of cosmetology and of barbering are subject to regulation under the police power of the State since both are trades which operate directly on a person and directly affect health, comfort and safety of the public. 10 Am. Jur. 2d, *Barbers and Cosmetologists*, § 2. Our State Supreme Court has indicated that the code regulating these vocations is more than a health law in that it concerns safety and general welfare of the public as well. *Toebe Academy of Beauty Culture v. Kelly* (1941), 239 Wis. 103, 300 N.W. 476.

The constitutional validity of regulations enacted under the police power of the state depends on whether such regulations are reasonably conducive to securing and protecting public health, safety and welfare. 10 Am. Jur. 2d, *Barbers and Cosmetologists*, § 1. Thus, a provision of the Illinois Barbers Act denying beauty culturists the right to cut hair without a barber's license was held to be an unreasonable requirement in violation of the Due Process Clause of the Constitution because it had no definite relationship to public health, safety and welfare. *Banghart v. Walsh* (1930), 339 Ill. 132, 171 N.E. 154.

Similarly, a Minnesota statute which prohibited cosmetologists from cutting the hair of any person was found to be in violation of due process provisions of the Federal Constitution guaranteeing liberty of contract. The court said:

"It is undoubtedly true that the history of legislation pertaining to the regulation of the barber trade reveals not only the legitimate purpose to promote public health, safety and welfare but also the more questionable one of excluding the beauticians, so-called, from performing any of the work that can be brought within the definition of barber statutes."

The court noted that it was unreasonable to require time to be spent learning to shave men and trim their whiskers when such practices are entirely foreign to the beauty

trade. *Johnson v. Ervin* (1939), 205 Minn. 84, 86, 285 N.W. 77.

A Michigan court observed that the art of barbering and hairdressing are both ancient occupations. The court held that haircutting and clipping incidental to hair styling was not within the meaning of the Barbering Act. *Jeffer v. Board of Examiners of Barbers* (1948), 320 Mich. 78, 30 N.W. 2d 445.

Senate Bill No. 216 (1971), in essence, would prevent males from patronizing today's so-called hairstylist. The proposed regulation would confine the practice of the cosmetic arts to women. In terms of public health, safety and welfare, the Bill unreasonably discriminates against male persons and cosmetologists in contravention of the Fourteenth Amendment of the United States Constitution. Basic regulatory statutes are designed to protect the public, and should not be used for the primary purpose of restricting competition. *Wisconsin Collectors Asso. v. Thorp Finance Corp.* (1969), 43 Wis. 2d 229, 168 N.W. 2d 565.

Based on the foregoing, I am of the opinion that Senate Bill No. 216 (1971), if enacted into law, could not withstand a judicial test of constitutionality regardless of whether suit was brought in the form of a Federal civil rights matter or a State equal opportunity action.

RWW:WLJ

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*Board of Regents—University Merger—(Informal)—*  
Chapter 100, Laws of 1971, creates a new Board of Regents which Board supersedes the former Boards.

October 19, 1971.

CLARKE SMITH

*Secretary, Board of Regents of the  
University of Wisconsin System*

You have requested my opinion on five questions, as hereinafter set forth, relating to the operation of the State

Universities, University of Wisconsin, and the University of Wisconsin System under ch. 100, Laws of 1971.

Specifically, the questions you have asked are:

(1) When the merged Board meets and organizes, should it be as "The Board of Regents of the University of Wisconsin System" or as "The Regents of the University of Wisconsin"?

(2) When the merged Board meets to organize and elect officers, should it elect officers of "The Board of Regents of the University of Wisconsin System" and also officers of the two corporate bodies, above referred to, under Chapter 36 and 37, Wisconsin Statutes 1969?

(3) Can or should the two corporate entities continue to function as such with respect to purchase contracts, construction contracts, security registration, contracts and agreements with the federal government's agencies, etc., etc., following the publication of the legislation provided in 213S?

(4) Can the merged Board hold meetings in the name of "The Regents of the University of Wisconsin" and conduct corporate business under the title of "The Regents of the University of Wisconsin"?

(5) Should the two corporate entities, referred to under Chapter 36 and 37, continue to do business and use their existing corporate seals?

As you have indicated in your letter, the Regents under sec. 36.03, Stats., 1969, constitutes a body corporate. Similarly, the Board of Regents of the State Universities constitutes a body corporate under sec. 37.02 (1), Stats., 1969. These Boards were created and existed by virtue of secs. 15.91 and 15.88, Stats., 1969. Chapter 100 repeals secs. 15.88 and 15.91 and recreates sec. 15.91 to read in part:

"There is created a board of regents of the university of Wisconsin system \* \* \*"

Consequently, it is my opinion that by the repeal of secs. 15.88 and 15.91, Stats., 1969, those corporate entities known as The Regents of the University of Wisconsin and the Board

of Regents of State Universities no longer exist. These corporate entities are dissolved by the Act and a new body corporate is created. The intent to abolish the existing corporate bodies is also evidenced in sec. 20 (6) of the Act which reads:

“The records, property, assets and liabilities of the board of regents of the university of Wisconsin and the board of regents of state universities shall become records, property, assets and liabilities of the board of regents of the university of Wisconsin system. \* \* \*”

Similar legislative intent is also evidenced by sec. 20 of the Act which transfers all powers, duties and functions of the Regents of the University of Wisconsin and The Board of Regents of State Universities to the new Board. With this background in mind, I will address myself to your specific questions.

#### *Question 1*

Under ch. 100, Laws of 1971, and after the appointment and confirmation of the appointees as provided therein (sec. 24), the new corporate entity will be known as “Board of Regents of the University of Wisconsin System.” This is not only clear from the previously quoted language but sec. 23 of the Act likewise so provides in the following language:

“*CORRECTION OF TERMS.* Wherever the statutes refer to the board of regents of the university of Wisconsin or the board of regents of state universities, reference to the board of regents of the university of Wisconsin system is substituted.”

Therefore, in answer to your question, the new board will be known as:

“Board of Regents of the University of Wisconsin System.”

#### *Question 2*

As the corporate entities, Regents of the University of Wisconsin and the Board of Regents of the State Universities will no longer exist, there is no authority or need for these former entities to have officers.

*Questions 3-4-5*

The answer to each of these questions is no.

As stated previously, the former bodies corporate no longer exist. They have been dissolved by act of the legislature. As they no longer exist, they cannot continue to do business as if they did. Although the central administration of the two systems is retained for a period under sec. 22 of the Act, this does not in any way change the fact that the corporate entities themselves no longer exist.

Although the Act, in my opinion, appears to abolish the former Boards, it should not be forgotten that the Act requires judicial challenge. Should the Act be subsequently declared unconstitutional, the former Boards will not have been dissolved. Notwithstanding this cloud of judicial scrutiny, it is a well established rule of law that acts of the legislature are presumed constitutional. It is my opinion that the new Board should proceed on the premise that the Act is constitutional, albeit with caution.

RWW:CAB

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*Cable Television—Lottery Law—(Informal)—Monies paid by individuals to subscribe to CATV could be consideration in a 945.01 (2) (b) 2. a., Stats., prosecution.*

October 20, 1971.

JOHN E. SHEEHAN

*District Attorney, Rock County*

You have requested my informal opinion concerning the question of whether or not "cable" television falls within the meaning of "television" under sec. 945.01 (2) (b) 1., Stats. The pertinent sections of ch. 945, Stats., include:

"945.01 (2) LOTTERY. (a) A lottery is an enterprise wherein for a consideration the participants are given an opportunity to win a prize, the award of which is determined by chance, even though accompanied by some skill.

“(b) 1. ‘Consideration’ in this subsection means anything which is a commercial or financial advantage to the promoter or a disadvantage to any participant, but does not include any advantage to the promoter or disadvantage to any participant caused when any participant learns from newspapers, magazines and other periodicals, radio or television where to send his name and address to the promoter.

“2. In any game, drawing, contest, sweepstakes or other promotion, none of the following shall constitute consideration under this subsection:

“a. To listen to or watch a television or radio program.

“b. To fill out a coupon or entry blank which is received through the mail or published in a newspaper or magazine, if facsimiles thereof are acceptable.

“c. To furnish proof of purchase if the proof required does not consist of more than the container of any product as packaged by the manufacturer, or a part thereof, or a facsimile of either.

“d. To send the coupon or entry blank and proof of purchase by mail to a designated address.

“e. To fill out a coupon or entry blank obtained and deposited on the premises of a bona fide trade fair or trade show defined as an exhibition by 5 or more competitors of goods, wares or merchandise at a location other than a retail establishment or shopping center or other place where goods and services are customarily sold; but if an admission fee is charged to such exhibition all facilities for obtaining and depositing coupons or entry blanks shall be outside the area for which an admission fee is required.”

“945.02 GAMBLING. Whoever does any of the following may be fined not more than \$500 or imprisoned not more than 6 months or both:

“\* \* \*

“(3) Conducts a lottery, or with intent to conduct a lottery, possesses facilities to do so.”

The three elements of "prize," "chance," and "consideration" must all be present in order that a contest will constitute a lottery. *State ex rel. Trampe v. Multerer* (1940), 234 Wis. 50, 289 N.W. 600. For the sake of discussion, I will assume "prize" and "chance" are evident in the contest at hand, and I will direct my explanation to whether or not a contest, similar to that of "Bingo," run over a cable television network, contains sufficient "consideration" to constitute a violation of Wisconsin's lottery law.

The act of listening and watching television (945.01 (2) (b) 2. a., Stats.) and the advantage gained by the promoter or disadvantage suffered by a participant as a result of such listening and watching (945.01 (2) (b) 1., Stats.) does not constitute consideration to sustain a prosecution under Wisconsin's lottery law. The legislature does not appear to have made a distinction between television and "cable" television when sec. 945.01 (2) (b) 2. a. was adopted. This statute has the effect of prohibiting the prosecution of "Bingo" games run on television where the only possible "consideration" would be the participants viewing their sets. However, such a contest would become an illegal lottery if other "non-exempt" forms of consideration were present.

In "cable" television there is another element of consideration present which is not cited in the exemptions of sec. 945.01 (2) (b), Stats. Some participants as members of the cable system must pay for the privilege of watching the contest through means of an installation fee and monthly rents. Paying promoters for the chance to participate in the contest and not the act of watching the contest on "television" is the consideration that could support a prosecution under our lottery law. Requiring a participant to purchase a right to take a chance on winning a more valuable prize is the classic method in which a lottery is run. The test is whether the purpose, interest or tendency of the scheme, as disclosed by the scheme itself, is to induce registrants to pay out money to participate in the contest rather than to see the entertainment, and if such is the case the element of consideration is present. *Stan v. Miller* (1941), 239 Wis. 41, 300 N.W. 738. A substantial possibility exists that customers

would enroll in the cable system to take part in the contest. Therefore, sufficient consideration to define the contest as a lottery could be apparent assuming "prize" and "chance" are present.

It should be noted that not all or even a majority of participants must offer some "consideration" to participate in the proposed contest. The element of consideration is present nonetheless because some participants, who are not members of the cable system, are given chances free. Alternative methods for entering a contest, one of which constitutes consideration, injects that element into the contest and makes it a lottery. *State ex rel. Cowie v. LaCrosse Theaters Company* (1939), 232 Wis. 153; *State ex rel. Regez v. Blumer* (1940), 236 Wis. 129, 132.

Inasmuch as television and "cable" television may involve interstate commerce and are regulated by the FCC, Federal law may preempt State prosecution of lotteries broadcasted over television and "cable" systems. 18 USC § 1304, prohibits the broadcasting of lottery information. The court in *Allen B. Dumont Laboratories, Inc. v. Carroll*, (3 Cir. 1950) 184 F. 2d 153, 156, held in part,

We think it is clear that Congress has occupied fully the field of television regulation and that that field is no longer open to the States.

See also *New York State Broadcasters Ass'n v. U.S.* (2 Cir. 1969), 414 F. 2d 990, 996. The Court of Civil Appeals of Texas, in considering Federal cases has stated in *State v. Socony Mobil Oil Company, Inc.* (Tex. 1964), 386 S.W. 2d 169, 174:

"... We are convinced that Congress has pre-empted the field of regulating the broadcasting of lotteries over TV, and that we do not have jurisdiction to enjoin TV-Bingo, even though it might constitute a lottery under Texas Statutes."

Furthermore, a Wisconsin court held that it lacked jurisdiction to enjoin TV-Bingo, even though it might constitute a lottery under Texas Statutes.

Furthermore, a Wisconsin court held that it lacked jurisdiction to determine whether a community television anten-

na is a private utility because the court was of the opinion that Congress had completely occupied the television field. 89 *PUR N.S.* 149

Assuming a preemption a complaint may be directed to the FCC possibly seeking a declaratory order, but it should be noted that generally Federal decisions do not construe "consideration" as broadly as Wisconsin precedent. However, the Federal courts and the FCC have not confronted our situation and barring precise statutory language, precedent, and legislative history, they will seek interpretations from American judicial and administrative decisions which could include Wisconsin cases. *Federal Communications Commission v. American Broadcasting Co.*, (N.Y. 1954), 74 S.Ct. 593, 347 U.S. 284, 98 L.ed. 699.

There is authority for stating that while Congress has entered the field of communications it has not so preempted the field as to preclude proper local regulations in the exercise of proper police powers (15 CJS *Commerce*, sec. 81). For instance, in *TV Pix, Inc. v. Taylor* (1968), 304 F. Supp. 459 (U.S.D.C. Nevada), the court stated that while a community antenna television business is in interstate commerce such local apparatus, local franchises, local intrastate advertising and local intrastate collections gives the CATV a local flavor and State regulation [in this case regulating CATV as public utilities], in absence of Federal legislative intervention, would not constitute a burden on interstate commerce. The court explained:

"In reaching our conclusion, we have given weight to the established rule that in the absence of Congressional occupation of the field, State action in implementation of its concurrent jurisdiction over matters affecting interstate commerce, the subject not being one demanding uniformity of regulation, is presumptively constitutional and the burden is on the plaintiff [in this case the CATV] to prove the substantial adverse burden, obstruction or prejudice to commerce among the states resulting from the State Statute or regulation under attack." p. 464.

In viewing preemption, one cannot judge a claim by reference to broad statements about the "comprehensive" nature

of Federal regulation under the Federal Communications Act. Instead, one must decide case by case whether Congress and its commissions have so far exercised exclusive jurisdiction that belongs to it as to exclude the states from taking action. See *Head v. New Mexico Board* (1963), 374 U.S. 424, 83 S.Ct. 1759, 10 L.ed. 2d 983.

In conclusion, it appears that the monies paid by individuals to subscribe to a CATV system could be "consideration" in a Wisconsin CATV lottery prosecution where the promoter was realizing a commercial or financial advantage or the participant suffered a disadvantage in the contest promotion. The act of subscribing to the CATV Service is "consideration" beyond the exception enumerated in 945.01 (2) (b) 2. a., Stats., for a Wisconsin prosecution. However, possible Federal preemption of the communications field may prevent State prosecution, although this must be determined on a case-by-case basis.

I hope this information will be of service to you in analyzing your situation.

RWW:TAH

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*Taxation—County Revenue—(Informal)—County board may not control municipal use of county sales tax revenue.*

October 25, 1971.

DENNIS J. FLYNN

*Corporation Counsel, Racine County*

You have inquired as to whether a proposed county sales tax ordinance would be valid, when the sole purpose of the ordinance is to provide property tax relief in the form of credits against county taxes, municipal taxes, vocational school taxes and regular school taxes, in that order. You point out that Subchapter V of Chapter 77, Statutes, authorizes a county sales tax and that sec. 77.70 provides, in part:

“77.70 Adoption by county ordinance. Any county desiring to impose a local sales tax under this subchapter may do so by the adoption of an ordinance, stating its purpose and referring to this subchapter. \* \* \*”

The proposed ordinance does refer to the subchapter and states that the purpose of the ordinance is to provide property tax relief and that the moneys derived by the municipalities from the tax may be used for no other purpose.

You ask whether the county may dictate the purposes and use to which the sales tax revenues may be put and, if so, whether the proposed ordinance is a valid implementation of that power.

It is my conclusion that the county lacks power to dictate the purpose to which the county sales tax revenues may be put.

You state that the practical effect of the tax would be that the revenues would be applied solely against property taxes imposed by Racine County and that a concomitant would be a reduction in the county property tax. Perhaps it would be more accurate to say that, if the ordinance were adopted and were valid, the county property tax would continue as at present but that the sales tax revenues would be used as a credit against the county tax. In other words, the county would not collect the property tax which it imposes and in addition the sales tax credits.

It is difficult to determine the purpose in requiring that the sales tax revenues which might flow from this ordinance must be credited first against the county property tax, then against the local municipal property tax, etc. The property owner would pay a net tax which, combined with the sales tax credit, would be sufficient to meet the taxes imposed by the various taxing entities involved. If the purpose be to effect some change in the present methods of returning delinquent taxes, I believe the ordinance would have to be more specific in order to achieve that result.

In any event, I do not believe that the county board has power to require that the local municipality apply the sales

tax credit to any particular purpose first. County boards have only such powers as are expressly conferred by statute or necessarily implied therefrom. *Maier v. Racine County* (1957), 1 Wis. 2d 384, 84 N.W. 2d 76. The statutes which empowers a county board to adopt a county sales tax expressly provides that the revenues from that tax are to be distributed to the cities, villages and towns within the county. The statute is silent as to how the local municipalities may use those tax revenues. Certainly it cannot necessarily be implied from the language of the statute that the county board has authority to dictate the uses to which the sales tax revenues may be put.

RWW:EWW

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*Library—Tax Levies—(Informal)—Municipality must have public library or reading room to be exempt from county library tax.*

October 26, 1971.

F. R. SCHWERTFEGER

*Corporation Counsel, Dodge County*

You have requested my opinion to the following question:

“May a city, village or town which does not have a public library or a reading room, be exempted from county tax levies for libraries and in turn appropriate money for a library fund which is to be used to purchase library service from other public libraries which are outside the county?”

I am of the opinion that under the express facts stated, such city, village or town would not be exempt from the county tax levy provided for in sec. 43.25 (1) and (3), Stats.

Section 43.25 (1), Stats., provides in part:

“Municipal libraries. (1) Every city of the 2nd, 3rd or 4th class and every village, town or county may *establish, equip and maintain a public library or reading room*, or maintain and support any public library or reading room already established therein, and may annually levy a tax or

appropriate money to provide a *library fund, to be used exclusively to maintain such library or reading room; \* \* \**"

Section 43.25 (4), Stats., provides:

"(4) Any city, town or village in any county levying a tax for a county library under sub. (1) shall upon written application to the county board of such county be exempted from such tax levy, provided the city, town or village making such application expends for a library fund during the year for which such tax levy is made a sum at least equal to the sum which it would have to pay toward such county levy."

I am, however, of the opinion that a traveling library would constitute a public library as that term is used in sec. 43.25 (1), Stats. A municipality having such traveling library service within its municipal limits could raise a library fund for such service under sec. 43.25 (1) and could be exempted from the county tax by meeting the requirements of sec. 43.25 (4), Stats. The mobile unit would, of course, not have to be stationed permanently within the municipality.

I am of the opinion that such traveling library service could be contracted for by the municipal library board, with municipalities in adjoining counties by reason of secs. 43.31 and 43.30 (2), Stats. Also see 46 OAG 121.

RWW:RJV

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*Welfare Funds—Categorical Aids—(Informal)*—Department of Health and Social Services is not authorized to advance welfare funds for reimbursement purposes under sec. 49.52, Stats.

October 28, 1971.

WILBUR J. SCHMIDT, *Secretary*

*Department of Health and Social Services*

You inquire whether sec. 49.52, Stats., permits your Department to advance funds to counties, on an estimated

basis, to meet the Federal and State share of categorical aids paid by the counties, including expenses connected with the administration of such aids together with the costs of administration of the medical assistance program. Assuming such advances are authorized by the statute, you further inquire as to whether the counties' estimated pro rata share of medical assistance may be deducted from such advances.

Section 49.52 (1), Stats., relating to Federal aid, provides in part that from Federal funds for categorical aids, "the state shall *reimburse* from these moneys to each county the percentage as computed of the total amount *expended* by such county in each program." For the administration of the categorical aids, "the state shall *reimburse* the counties the amount *earned* by each county for such administration. . . ." (Emphasis supplied.)

Section 49.52 (2), Stats., relating to State aid, provides in part that: "The state aid to which any county shall be entitled shall be determined according to the amount *expended* by the county . . . including services *performed* or *purchased* by the county agency. . . ." (Emphasis supplied.)

The general rule is to give statutory words and phrases their common and approved usage excepting technical words and phrases which have a peculiar meaning in the law. *Ne-koosa-Edwards Paper Co. v. Public Service Comm.* (1959), 8 Wis. 2d 582, 99 N.W. 2d 821; *Perry Creek C. Corp. v. Hop-licins Ag. Chem. Co.* (1966), 29 Wis. 2d 429, 435, 139 N.W. 2d 96. This rule has been expressly recognized by the Wisconsin Legislature. Sec. 990.01 (1), Stats.

The cited subsections of sec. 49.52, Stats., clearly preclude your Department from making advance payments in this matter. The common dictionary meaning of the term "reimburse" is to pay back, to make restoration or payment of an equivalent to. *Webster's Seventh New Collegiate Dictionary*. The word "reimbursement" presupposes previous payment. *Words and Phrases*, "reimbursement." The common dictionary meaning of the word "expend" is to pay out. *Webster's Seventh New Collegiate Dictionary*.

Before a county is entitled to be reimbursed for its expenses in the categorical aid program, the conditions speci-

fied by the statute must be fulfilled. Future obligations cannot be equated with yesterday's debts in the face of the language of the cited statute. It is well established that where there is no ambiguity or doubt as to the meaning of the language used in the statute, there is no room for construction, and the statute must apply as it is written. *Kieckhefer Box Co. v. John Strange Paper Co.* (1923), 180 Wis. 367, 189 N.W. 145. Intentions cannot be imputed to the legislature except those to be gathered from the terms of the law. *Estate of Ries* (1950), 257 Wis. 453 49 N.W. 2d 483. In construing a statute, the courts are not at liberty to disregard the plain, clear words of the statute. *State v. Pratt* (1967), 36 Wis. 2d 312, 153 N.W. 2d 18.

You indicate that your opinion request was prompted by the fact that county appropriations for categorical aid programs, in many instances, are not adequate due to rising costs in welfare. It may well be that the pertinent statute in this matter needs correction in light of present day circumstances. Basically, however, this is a legislative problem. An administrative officer has no discretion to disregard the language of a statute in performing his duties. *Milwaukee County v. Schmidt* (1970), 52 Wis. 2d 58.

It should be noted that the legislature has anticipated the situation where a county is financially unable to perform its duties in connection with categorical aid programs. I refer, of course, to sec. 49.52 (5), Stats., wherein certain proof to a county's financial condition is required, and wherein certain procedures are set forth. Also, see Rule PW-PA 20.14. This subsection relates to a county's obligation being assumed by the State. It has no direct bearing on the question of advance payments raised in your opinion request.

Section 49.52 (1) and (2), Stats., clearly reflects the legislative intention to reimburse counties for categorical aids only after expenses have been incurred or payments have been made. Accordingly, your Department has no statutory authority to advance funds for categorical aid programs and administrative costs in anticipation of county expenses. As Mr. Justice Holmes observed: "There is no cannon against using common sense in construing laws as saying what they

obviously mean." *Roschen v. Ward* (1929), 279 U.S. 337, 49 S.Ct. 336, 73 L.ed. 722.

RWW:WLJ

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*Indigent Counsel—Fee Determination—(Informal)*—District Attorney should not participate in fixing fees for indigent counsel where there is county corporation counsel.

November 2, 1971.

RICHARD C. KELLY

*District Attorney, Juneau County*

You have requested my opinion relative to the propriety of the district attorney being permitted to participate in the determination of fees to be paid to counsel for indigent defendants.

You state it is contemplated that a procedure would be adopted requiring that, prior to determination in open court, defense counsel shall give five days written notice to the district attorney accompanied by the proposed bill and itemized statement. The district attorney would be able to waive the notice or could participate in the hearing and object to the fee.

You do not state whether the procedure is to be established by the county board or by the judges of the courts of record.

Under sec. 970.02 (6), Stats., the judges of courts of record in each county must establish procedure for the appointment of counsel.

The claim for services is essentially civil in nature. However, by reason of sec. 967.06 (2), Stats., the judge or court has final authority in the determination of the amount to be paid.

Section 967.06 (2), Stats., provides:

“(2) The judge or court under this section shall fix the amount of compensation for counsel appointed hereunder, which shall be such as is customarily charged by attorneys of this state for comparable service, and shall provide for the repayment of actual disbursements for necessary travel and other expense, automobile travel to be compensated at not over 8 cents a mile. The certificate of the clerk shall be sufficient warrant to the county treasurer to make such payment.”

In *Conway v. Sauk County* (1963), 19 Wis. 2d 599, 120 N.W. 2d 671, the court did have the advice of the district attorney who tried the matter and of the then present district attorney. The Supreme Court did not disapprove of such practice. It is noted that the county corporation counsel handled the appeal. The court held that the responsibility as to the amount to be allowed as fees to an attorney appointed to defend an indigent person must rest primarily on the trial court and the proper test for review on appeal is whether the record demonstrates that the allowance made by the court was clearly unreasonable.

It would appear that, where the judge fixing the compensation presided at the trial, there would be no legal requirement that he should seek the advice of the district attorney. The latter is essentially in an adversary position, and it could be argued that he would be unlikely to give sufficiently objective recommendations. The county does have an interest in the amount of such fees; and if objection is to be made, it might be better to have the county corporation counsel participate in any hearing before the court. In counties lacking such officer, civil matters are within the province of the district attorney who could appear at the request of the court.

In conclusion, there is no legal objection to permitting the district attorney to appear at a hearing concerning the determination of compensation to be allowed counsel for an indigent defendant. The court should weigh the objectivity of the recommendation where the district attorney has par-

ticipated in the trial, and the court has the final responsibility in establishing reasonable compensation.

RWW:RJV

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*Board of Regents—Student Participation—(Informal)—*  
Legality of having students and faculty voting participation on Board of Regents discussed.

November 2, 1971.

EUGENE R. MCPHEE

*Associate Secretary, University of Wisconsin System*

You have requested my opinion as to whether it is possible, under the law, to have students and faculty meet with committees of the Board of Regents of the University of Wisconsin System and with the Board itself, and to vote on matters or business of the committees and Board.

Under sec. 66.77, Stats., it is the declared policy of the State to have all governmental meetings open to the public. There is, of course, no problem in the Board seeking the advice and counsel of these groups at such open, as distinct from executive, sessions of the Board and its committees. However, it is an entirely different matter as to whether these groups may actually participate in Board business by voting at committee meetings or at Board meetings.

The Board is created by sec. 15.91. (All references are to ch. 100, Laws of 1971, unless otherwise indicated.) Board membership is fixed by statute (sec. 15.91) and appointments are similarly fixed by law (sec. 24).

The Board is a State agency, *Sullivan v. Board of Regents of Normal Schools* (1932), 209 Wis. 242; *Holzworth v. State* (1941), 238 Wis. 63, the composition of which, as stated previously, is fixed by law. As a State agency, the Board has only those powers and duties as are expressly granted by the legislature or those powers which are necessarily implied in the exercise of the express powers, *American Brass Company v. State Board of Health* (1944), 245 Wis. 440. To

allow faculty or student representatives a vote on the Board would be tantamount to changing the membership and composition of the Board. There is no express grant of authority from the legislature to the Board which authorizes the Board to increase its own size or membership nor can any such power, in my opinion, be implied.

Further, allowing such groups a vote on the Board would, in my opinion, be an unlawful delegation of authority and responsibility by the Board to persons who are not, under law, Board members.

In 2 Am. Jur. 2d, Administrative Law §222, it is noted:

“It is a general principle of law, expressed in the maxim ‘delegatus non potest delegare,’ that a delegated power may not be further delegated by the person to whom such power is delegated, and that in all cases of delegated authority, where personal trust or confidence is reposed in the agent and especially where the exercise and application of the power is made subject to his judgment or discretion, the authority is purely personal and cannot be delegated to another unless there is a special power of substitution either express or necessarily implied. Accordingly, apart from statute, whether administrative officers in whom certain powers are vested or upon who certain duties are imposed may deputize others to exercise such powers or perform such duties usually depends upon whether the particular act or duty sought to be delegated is ministerial, on the one hand, or, on the other, discretionary or quasi-judicial. Merely administrative and ministerial functions may be delegated to assistants whose employment is authorized, but there is no authority to delegate acts discretionary or quasi-judicial in nature. An administrative board cannot legally confer upon its employees authority that under the law may be exercised only by the board or by other officers or tribunals.

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In my opinion, this same rationale is equally applicable to allowing these groups or members a vote on committees of the Board. Much of the work of the Board is conducted in committee, and, although in many instances the work of the committees merely results in recommendations to the Board

for the Board's final action, these recommendations do carry considerable weight with the Board and should represent the deliberations of duly qualified Board members.

Therefore, in conclusion, it is my opinion that under the law you may not allow anyone, other than duly appointed Board members, to vote on Board business including those matters considered by duly constituted committees of the Board. This, of course, does not preclude the Board or any duly constituted committee of the Board from utilizing such groups in advisory capacities.

RWW:CAB

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*County Apportionment—Elections—(Formal)*—All counties subject to the provisions of sec. 59.03 (2) (c), Stats., have a duty to apportion their supervising districts in accordance with the 1970 federal decennial census so as to insure that all county supervisors in all such counties will be elected from such newly apportioned districts on the first Tuesday in April, 1972. Under current statute, apportionment should be completed by January 1, 1972, the earliest date candidates for county supervisor may circulate nomination papers for such office. Sec. 8.10 (2), Stats.

November 5, 1971.

RICHARD C. KELLY

*District Attorney, Juneau County*

You request my opinion concerning what duty sec. 59.03 (2) (c), Stats., places on county boards in the State of Wisconsin to reapportion by January 1, 1972. Your question is prompted by the fact that January 1, 1972, is the earliest date candidates may circulate nomination papers for the office of county supervisor to be filled at the Spring 1972 election. Section 8.10 (2), Stats.

Section 59.03 (2) (c), Stats., provides as follows:

“(c) *Apportioning supervisory districts.* Following each

federal decennial census the secretary of state shall certify to each county board chairman the population of each town, village and city in the county. *As soon as practicable but not more than one year after receiving the population certification, the county board in each county shall apportion county supervisory districts as provided in par. (b) and the chairman of the county board shall file a certified copy of the apportionment plan with the secretary of state.*" (Emphasis added)

Section 59.03 (2) (b), Stats., provides as follows:

*"(b) Creation of supervisory districts. The county board in each county shall establish and number supervisory districts, after a public hearing, in such a manner that each supervisor shall represent as nearly as practicable an equal number of persons, but considering such other factors as continuity of interest, compactness and contiguity of existing town, village and city lines. More than one municipality may be placed in any supervisory district and more than one district may be formed within a municipality. Whenever conditions arise where creation of a supervisory district based primarily on population cannot be achieved without violating municipal boundary lines, but where a combination of 2 or more municipalities could be established creating a supervisory district of approximately double the population average of the other supervisory districts, the county board may create such a supervisory district and designate that 2 supervisors be elected from such a district."* (Emphasis added)

It is my opinion that all counties subject to the provisions of sec. 59.03 (2) (c), Stats., have a duty to apportion their supervisory districts in accordance with the 1970 Federal decennial census so as to insure that all county supervisors in all such counties will be elected from such newly apportioned districts on the first Tuesday in April, 1972. Since the earliest date candidates may circulate nomination papers for county supervisor is presently designated by statute as January 1, 1972, apportionment should be accomplished by that date.

My response to your question is based primarily on constitutional considerations under the terms of both our Wisconsin Constitution and the U. S. Constitution. Under the Fourteenth Amendment to the Federal Constitution, legislative bodies must apportion in a *timely* fashion if given adequate opportunity to do so. *Reynolds v. Sims* (1964), 377 U.S. 533, 586, 84 S.Ct. 1362, 1394, 12 L.ed. 2d 506. The same constitutional requirement is imposed under Art. I, sec. 1, Wis. Const. *State ex rel. Sonneborn v. Sylvester* (1965), 26 Wis. 2d 43, 132 N.W. 2d 249. Therefore, the duty imposed on all Wisconsin counties, under both Federal and State Constitutions, to apportion in a timely fashion, i.e., "as soon as practicable," following the 1970 Federal decennial census, would have existed even had such requirement not also been incorporated in sec. 59.03 (2) (c), Stats. Furthermore, in emphasizing the constitutional basis for my opinion, I do not wish to suggest that such conclusion is not also in accord with the intention of the legislature which enacted sec. 59.03 (2) (c), as part of ch. 20, Laws of 1965. Although that legislature had no knowledge either of the numerous apportionment cases which were to follow or the specific manner in which the 1970 census data would be made available, its obvious intent was to implement the constitutional mandate to insure meaningful equal representation through timely apportionments at the county level of government.

The following are among the various more recent apportionment decisions of the United States Supreme Court rendered subsequent to the enactment of sec. 59.03 (2) (c), Stats., yet affecting apportionment at the county as well as other levels of government: *Burns v. Richardson* (1966), 384 U.S. 73, 86 S.Ct. 1286, 16 L.ed. 2d 376; *Swann v. Adams* (1967), 385 U.S. 440, 87 S.Ct. 569, 17 L.ed. 2d 501; *Kilgarlin v. Hill* (1967), 386 U.S. 120, 87 S.Ct. 820, 17 L.ed. 2d 771; *Dusch v. Davis* (1967), 387 U.S. 112, 87 S.Ct. 1554, 18 L.ed. 2d 656; *Kirk v. Gong* (1968), 389 U.S. 574, 88 S.Ct. 695, 19 L.ed. 2d 784; *Avery v. Midland County* (1968), 390 U.S. 474, 88 S.Ct. 1114, 20 L.ed. 2d 45; *Kirkpatrick v. Preisler* (1969), 394 U.S. 526, 89 S.Ct. 1225, 22 L.ed. 2d 519; *Wells v. Rockefeller* (1969), 394 U.S. 542, 89 S.Ct. 1234, 22 L.ed. 2d 535; *Hadley v. Junior College Dist. of Metro. Kansas City, Mo.*,

et al. (1970), 397 U.S. 50, 90 S.Ct. 791, 25 L.ed. 2d 45; *Abate v. Mandt* (1971), 403 U.S. 182, 91 S.Ct. 1904, 29 L.ed. 2d 399; *Whitcomb v. Chavis* (1971), 403 U.S. 124, 91 S.Ct. 1858, 29 L.ed. 2d 563; *Ely v. Klahr* (1971), 403 U.S. 108, 91 S.Ct. 1803, 29 L.ed. 2d 552.

The last three of the foregoing decisions were rendered June 7, 1971, and one, *Ely v. Klahr*, provides some insight as to what the court will accept as a reasonable time for a legislature to reapportion based on the 1970 census. In this case, a three-judge district court for the district of Arizona had provided in its decree as follows:

"The court, having been advised that detailed population figures for the State of Arizona will be available from the official 1970 census by the summer of 1971, assumes that the Arizona Legislature will by November 1, 1971, enact a valid plan of reapportionment for both houses of the Arizona Legislature and a valid plan of redistricting the congressional districts of Arizona. Upon failure of the Legislature so to do, any party to this action may apply to the court for appropriate relief." *Klahr v. Williams* (D.C., Ariz., 1970), 313 F. Supp. 148, 154.

Addressing this language, the U.S. Supreme Court said:

". . . but as we have often noted, districting and apportionment are legislative tasks in the first instance, and the court did not err in giving the legislature a reasonable time to act based on the 1970 census figures which the court thought would be available in the summer of 1971. *We agree with plaintiff that the District Court should make very sure that the 1972 elections are held under a constitutionally adequate apportionment plan. . . .*" 91 S.Ct. 1807 (Emphasis added)

*Skolnick v. Illinois State Electoral Board* (D.C., Ill., 1969), 307 F. Supp. 698, is another instance of the Federal courts indicating that legislative bodies are expected to commence apportionment at the first opportunity after the 1970 census and complete the task expeditiously. In this case, the court held a previous court promulgated congressional apportionment plan unconstitutional and indicated it would

order redistricting based on the 1970 census before the 1972 election, giving the legislature until July 1, 1971, to redistrict or the court would undertake "appropriate relief." Likewise, we find the district court in *Chavis v. Whitcomb* (S.D. Ind. 1969), 307 F. Supp. 1362, making this similar statement, at p. 1367:

"However, the plan adopted herein is provisional in nature and probably will be applicable for only the 1970 election and the subsequent 2-year period. This is true since the 1970 census will have been completed in the interim, and the legislature can very well redistrict itself prior to the 1972 election. . . ."

In spite of the constitutional mandate to apportion in a timely fashion, if census data necessary to perform that duty does not exist, no fault can be found in delaying apportionment until adequate population data is available. However, as I will point out, there has been a continuous flow of increasingly more detailed Federal census data relating to the population breakdown in all Wisconsin counties since January, 1971, and such data now available to all counties appears virtually complete. As will be subsequently noted, in fact, the official publication of the earliest of such Federal census data in January, 1971, may arguably require apportionment of counties by January, 1972, even under a narrow interpretation of the provisions of sec. 59.03 (2) (c), Stats., and even in the absence of constitutional considerations. Be that as it may, it is the actual availability of Federal census data during 1971, in a form usable by counties for apportionment purposes, which actually dictates my response to your question, since I find it extremely difficult to conceive of any circumstance which would justify the failure of a county possessed of such census data to affect apportionment sometime within 1971. I, therefore, feel it necessary to describe some of the printed reports and other means which were utilized to disseminate 1970 census statistics in reference to population.

Although printed reports are no longer the only means by which U.S. Bureau of the Census data is distributed, they have long been the basic source for census information.

Three printed reports of population counts are issued by the Bureau of the Census. They are designated as "Preliminary Reports," "Advance Reports" and "Final Reports." The first of these reports represent preliminary field counts, but the Advance Reports include the first of what are intended to be "official" counts of population available for use in redistricting. See "1970 Census Information Available for Redistricting" at page 2 (Issued July, 1970, by U. S. Bureau of the Census). The most significant of these reports, for the purpose of this opinion, is designated "Final Population Counts, PC(VI)-51." The cover of the 1970 census of population "Advance Report PC(VI)-51 Wisconsin," which is dated December, 1970, describes its contents, in part, as follows:

"This report presents *final 1970 census statistics* on the number of inhabitants of the State and its counties, classified by urban and rural residence. In addition, figures are shown for each county subdivision, each incorporated place, and each unincorporated place of 1,000 or more.

"The figures presented here are being issued in advance of their publication in Final Report Series PC(1)-A. The final report for this State will be issued within the next few months." (Emphasis added)

The fact that this Advance Report purported to contain "final population counts" is of significance in reference to the question here under consideration, inasmuch as the February 3, 1965, Report of the County Board Representation Committee to the 1965 Legislature, which recommended the enactment of sec. 59.03 (2) (c), Stats., in its present statutory form, indicated, at page 6:

"s. 59.03 (2) (c) establishes the procedure to be followed in apportioning supervisory districts. When the federal decennial *census figures are final*, the secretary of state certifies to each county board chairman the population of each municipality in the county. The county board then has one year in which to submit the supervisory district apportionment plan to the secretary of state." (Emphasis added)

Unfortunately, the so-called "final" status of the Wisconsin PC(VI)-51 Report was qualified somewhat by more de-

tailed statements within the report. For instance, the report indicated that the detailed distributions shown in the report had not been revised to reflect certain errors discovered after the tabulations were made and that further information would be provided in the PC(1)-A Final Report for Wisconsin. However, except for the noted errors (which appeared to be minimal), the report contained the same population statistics for each town, village and city as subsequently published in the final PC(1)-A Report certified by the Secretary of State in September, 1971.

In January, 1971, the Bureau of State Planning, Wisconsin Department of Administration, published, as "final," population count data extracted from PC(VI)-51 in a state document designated "Advance Report on 1970 Census of Population in Wisconsin." This Report was distributed throughout the state in January, 1971, and copies were forwarded during that month to the county clerks of all Wisconsin counties.

The U. S. Bureau of the Census report designated "U. S. Census of Population: 1970 NUMBER OF INHABITANTS Final Report PC(1)-A51. WISCONSIN," is the most pertinent of the final census reports for the purpose of this opinion. It is a final report which contains the final official population counts for the same areas as the PC(VI)-51 Report, as well as certain other population statistics for areas designated under Federal guidelines as "urbanized areas" and "standard metropolitan statistical areas." This report becomes part of Volume 1, "Characteristics of the Population," of the permanent bound census reports. It was this PC(1)-A Report which was certified by the Secretary of State to the various counties on September 22, 1971.

Both PC(VI)-51 and PC(1)-A51 Reports for all states should include population statistics for local units of government, such as designated in sec. 59.03 (2) (c), Stats., and conceptually at least, the population data reported in both in reference to such units, should be identical. Although, as noted, the two Wisconsin reports were not identical, the few corrections noted in the PC(1)-A Report only affected small areas of 6 of our 72 counties. Regardless, it is import-

ant to note that generally speaking, *neither report* contains much more than "the population of each town, village and city in the county" mentioned in sec. 59.03 (2) (c), Stats. Thus, regardless of which of the two reports are certified, it is obvious that *neither report* contains the more sophisticated census data required by most counties in order to satisfy the standards which must be met by present day apportionment efforts in order to insure equal representation. However, it does appear that apportionment data of the type required for such definitive redistricting of county boards already existed and was already available for study and use some time prior to the certification of the PC(1)-A Report. I consider this fact to be of far greater significance than the specific date of certification by the Secretary of State, particularly under circumstances where counties had already been informed of the contents of the PC(V1) Advance Report for Wisconsin in January, 1971. The more detailed information to which I make reference is largely a result of the new U.S. Bureau of the Census computer summary tape program (basically a three-tape series). Information from these tapes is normally disseminated through the above mentioned Bureau of State Planning.

The PC(V1) Report was extracted from what is called the "First Count Summary Tapes." This tape, received by the Bureau of State Planning early in 1971, also contained the population counts for all enumeration districts (small areas with an average population of about 800) and block groups (subdivisions of census tracts with an average population of about 1,000) in the state. This information arranged by county, town, city and village, was made available in printed form as an appendix to 1971 Senate Resolution 16, adopted March 18, 1971. Subsequently, over 290 pages of block-by-block population count statistics (based on U. S. Bureau of the Census Galley Proofs), were made available in printed form as an appendix to 1971 Assembly Resolution 30, adopted August 24, 1971. At about the same time, on August 23, 1971, the Bureau of State Planning received its second count tapes of population counts by census tract (average population of about 4,000) and on August 26, 1971, it received the last of the three series of tapes (detailed block-by-block sta-

tistics). The third count tapes are being used to insure the accuracy of the data contained in 1971 Assembly Resolution 30.

Given the foregoing facts, it is evident that the importance of the date on which the Secretary of State forwarded his formal certification of 1970 census data, is more apparent than real. Of far greater importance is the obvious legislative mandate of sec. 59.03 (2), Stats., directing county boards to proceed with the apportionment of supervisory districts "as soon as practicable" following every Federal decennial census, to the end that "each supervisor shall represent as nearly as practicable an equal number of persons." After all, such statutory mandate but echoes what is already law in Wisconsin by virtue of the State and Federal Constitutions. Therefore, as demonstrated by *State ex rel. Sonneborn v. Sylvester, supra*, counties should appreciate that the judiciary stands prepared to enforce such a legislative directive and insure that no infirmity therein results in denial of the equal protection guarantees of Art. I, sec. 1, Wis. Const., and the Fourteenth Amendment, U. S. Const.

Understood in this context, certification by the Secretary of State is more properly viewed as a simple statutory device primarily designed to *expedite* future apportionment of supervisory districts by insuring that counties are informed of the determination of the Federal Government as to the population of each town, village and city in each county. Although such certification might reasonably be expected to be first among the events which obligate Wisconsin counties to develop sophisticated reapportionment proposals, this need not necessarily be so. Since certification is a mere technical part of the machinery intended to insure prompt apportionment, delay in certification, for whatever reason, could hardly represent a legitimate basis for a county to fail or refuse to proceed to develop an apportionment plan or plans utilizing the detailed census data available. At best, the absence of certification under these circumstances could only be viewed as having the possible effect of delaying the act of apportionment until there was certification, i.e., certification would only be considered as a condition precedent to the final action adopting the apportionment plan.

The phrase "but not more than one year," which appears in the second sentence of present sec. 59.03 (2) (c), Stats., did not appear in the original draft version of the statute, but was added to the draft by the above mentioned County Boards Representation Committee at its December 9, 1964, meeting. The minutes of that meeting indicate the following, at page 8:

"The committee then considered §59.03 (2) (c) of LRB-217. Committee members agreed that the language of the draft and the committee's intent is that each county shall reapportion every 10 years following each federal decennial census, even though there may be no substantial change in district lines. Mr. Martin felt that the phrase 'but not more than 1 year' should be inserted in line 3 following the phrase 'as soon as practicable.' He then moved, seconded by Mr. Savage, that this phrase be inserted in the draft. . . ."

The motion was unanimously adopted without further discussion.

In my opinion, the one-year provision in sec. 59.03 (2) (c), Stats., can in no way be considered as limiting the constitutional mandate requiring timely apportionment. In fact, the provision appears to have been intended to act as further assurance that county boards would promptly apportion following every decennial census. Certainly, the statute could not in any sense be properly interpreted as granting county boards the option to defer or delay apportionment up to one year after the population certification. Such interpretation would be based on the unexceptionable assumption that the legislature intended to completely frustrate efforts to insure equal representation based on prompt apportionment. Nor do I believe the statute assumes the need of utilizing one year, or any other lengthy period of time, on any county apportionment. I note, for instance, that ch. 20, Laws of 1965, which set forth the new county board reorganization requirement for the very first time and directed that the first elections under the act be held in 1966, did not become effective until April 21, 1965. Since the law also gave the Secretary of State an additional 30 days after that effective date to certify the information specified in sec. 59.03 (2) (c), Stats., it was apparently anticipated that the very first apportion-

ment, under what was then an entirely new procedure, would be accomplished in the approximately seven months remaining prior to January 1, 1966. This is of significance when it is appreciated that at that time counties not only lacked the practical experience or the beneficial effect of a previous apportionment under that statute, but that they were required to apportion utilizing estimates of population and five-year-old census data instead of the highly detailed and usable census information which is available today. Nevertheless, even with these handicaps, 19 counties had apparently certified apportionment plans as of September 10, 1965.

It is evident that the legislature intended to design an orderly and uniform transition of all county boards under present sec. 59.03 (2), Stats., through the election process and in accord with equal protection principles, every two years, i.e., at the spring election in even numbered years. I find nothing to suggest that the legislature intended that apportionment of county supervisory districts after every Federal decennial census would constitute an exception to this general legislative plan. Thus, it seems completely unreasonable to interpret sec. 59.03 (2) (c), Stats., in such a way as to allow four years to pass before the first election of county supervisors based on the 1970 census. If such a delay had been anticipated or intended by the legislature, such intent could have easily been made evident. Furthermore, if some county boards apportion prior to January 1, 1972, while others delay until some later time after the Spring 1972 election, it would be possible for Wisconsin counties to be operating through county boards elected under two different decennial census, though all boards were elected at the same spring election. I cannot conclude that the legislature intended such a situation to exist. It appears far more logical to conclude that the legislature expected and intended that all county supervisors under sec. 59.03 (2), would be elected from newly apportioned districts at the first election for county board supervisors to be held after the 1970 census, i.e., in the even numbered year two years thereafter—1972. Furthermore, as previously pointed out in this opinion, county boards are obliged to accomplish apportionment of their county supervisory districts by the earliest date candi-

dates may circulate nomination papers for county supervisor, presently set by statute as January 1, 1972.

Finally, I feel I should further advise you that in the event any county board fails to apportion county supervisory districts in preparation for the 1972 Spring election, I consider the intervention of the judiciary to insure such apportionment most plausible. While the courts have long resisted judicial involvement in the detailed correction of apportionment inequities, the Federal and State apportionment cases of the 1960's and early 1970's leave no doubt but that the courts will refuse to stand idle in the face of a denial of equal protection caused by chronic indecision and fruitless legislative efforts to find practical and equitable as well as expeditious solutions to apportionment problems.

RWW:JCM

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*Leases—Rental Payments—(Informal)*—Payment of rent under long-term lease is the contracting of debt.

November 9, 1971.

LEE E. FRANKS

*Educational Communications Board*

You have requested my opinion as to whether State agencies are required by law to have their long-term lease commitments subject to the availability of funds for the payment of rents.

In *State ex rel. Owen vs. Donald* (1915), 160 Wis. 21, the court defined debt as all obligations to pay money from funds to be provided, as distinct from money or funds presently available or in the process of collection. Under this definition, a lease that runs for a period of years would seem to constitute debt.

In *Loomis vs. Callahan* (1928), 196 Wis. 518, the court concluded that a pledge of revenue from a self-amortizing

project [Memorial Union Building] for the future payment of rent did not constitute State debt.

In *State ex rel. Thomson vs. Giessel* (1955), 271 Wis. 15, the court was concerned with a non-revenue producing project to be construed by the State Building Corporation. The lease between the State and the Building Corporation contained the qualifying language and the court in commenting on this provision held on page 33:

“Since the availability of appropriations is within the sole control of the state, this condition renders the state’s rental obligation entirely optional and within its discretion. No legally enforceable obligation results.”

Similarly, the court held in *State ex rel. LaFollette vs. Reuter* (1967), 36 Wis. 2d 96, 119:

“This court has held that the constitutional debt provision of art. VIII, sec. 4, is not violated by leasing or rental agreements entered into by the state or a subdivision thereof provided that the contract: (1) Is subject to available appropriations; \* \* \*”

From this authority it can be concluded that a State lease, which provides for the payment of rentals from revenues to be derived from the leased premises, does not create a State debt. Accordingly, such a lease need not contain any qualifying language as to the payment of future rents. However, a State lease on premises from which no revenue can be expected and rentals are anticipated to be paid out of general State funds does create a State debt if the funds out of which the rents are to be paid are not presently available or in the process of collection.

The cited cases were decided prior to our constitutional amendment which has authorized State debt and the question now presented is whether a lease, which creates a State debt, falls within the constitutional provision and the enabling legislation which was enacted pursuant to the constitutional amendment.

Article VIII, sec. 7 (2) (a), Wis. Const., reads:

“(2) Any other provision of this constitution to the contrary notwithstanding:

“(a) The state may contract public debt and pledges to the payment thereof its full faith, credit and taxing power to acquire, construct, develop, extend, enlarge or improve land, waters, property, highways, buildings, equipment or facilities for public purposes.”

Subsection (e) of this same provision of the Constitution authorizes the legislature to enact laws prescribing all matters relating to the contracting of public debt. Pursuant to this provision in the Constitution, the legislature created Chapter 18 of the Wisconsin Statutes. Section 18.03 (1) of this chapter reads:

“18.03 *State bond board.* (1) Subject to the conditions and limitations contained in this chapter, the state bond board shall have supervision over all matters relating to the contracting of public debt and the issuance of evidences of indebtedness therefor.”

Additionally, the legislature authorized public debt for certain purposes and in specified amounts in sec. 20.866, Stats.

From the language of the Constitution and from the subsequent legislation, it appears that debt has been authorized for capital improvements and there is nothing in these acts which authorize the contracting of public debt incident to the mere rental or temporary use of real estate.

It is my opinion the Wisconsin Constitution does not authorize the contracting of public debt by the execution of a lease. Further, the only State agency that may contract public debt is the State Bond Board, which agency does not have the authority to acquire real estate or interests in real estate.

Finally, it is my understanding that the Department of Administration executes all such leases on behalf of other State agencies, and sec. 16.75 (4), Stats., reads:

“The department of administration may let contracts in excess of funds available \* \* \* any such contract shall state in substance that its continuance beyond the limits of funds already available shall be contingent upon appropriation of the necessary funds.”

In conclusion, it is my opinion that any State lease which contemplates the payment of rents from future general State revenues must have the following quoted language or similar language to be valid.

“This lease is subject to the availability of funds for the payment of rentals.”

RWW:CAB

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*Tax Payment—County Treasurer—(Informal)—*Second tax payment under sec. 74.03, Stats., may be made next secular day when July 31 is on Saturday and office hours unofficial.

November 18, 1971.

JOHN M. WILLIAMSON

*Assistant Corporation Counsel, Brown County*

You request my opinion whether or not the payment of a second installment of real estate taxes, which may be paid without interest on or before July 31, 1971, as provided by sec. 74.03 (2) (b), Stats., may nevertheless be made to your county treasurer on August 2, 1971, without rendering said payment delinquent and, therefore, subject to the payment of interest under the provisions of sec. 74.03 (6), Stats. The latter section provides that the real estate taxes unpaid on August 1 are delinquent and, therefore, subject to payment of interest from January 1 next preceding.

The answer to your question depends on whether your treasurer's office maintained “usual business hours” or “established official office hours,” within the meaning of those terms as used in secs. 59.14 (1) and 990.001 (4) (c), Stats., on July 31, 1971.

Section 59.14 (1), Stats., provides, in part, as follows:

“Offices where kept; when open. (1) Every . . . county treasurer . . . shall keep his office at the county seat in

the offices provided. . . . All such officers shall keep such offices open during the *usual business hours each day*, Sundays excepted, and except that the county board of each county may permit said officers to close their offices on Saturday or on legal holidays for such time as the county board directs. . . ." (Emphasis added.)

Section 990.001 (4) (c), Stats., provides, in part, as follows:

"(c) When the last day within which a proceeding is to be had or taken or an act done, which consists of any payment to . . . any officer . . . of any county, . . . of any money, . . . falls on a Saturday and the *duly established official office hours* of such officer, . . . to which such payment is to be made . . . do not include any office hours thereof on such Saturday, said proceeding may be had or taken or such act may be done on the next succeeding day that is not a Sunday or a legal holiday." (Emphasis added.)

You advise that a resolution was passed by the county board for Brown County on July 17, 1951, which provided that the courthouse would be open from 8 o'clock a.m. to 12 o'clock noon and from 1 o'clock p.m. to 4:30 p.m., Monday through Friday, and that the courthouse would be closed on Saturdays. You further advise that the county treasurer's office was in the courthouse on the date of this resolution. Although you also refer to two earlier resolutions of your county board, I consider those resolutions irrelevant, at least for the purposes of this opinion. You further advise that the practice in the county treasurer's office over the last 15 years has been to remain open from 8 o'clock a.m. to 4:30 p.m., including being open during noon hours, and that said office has normally remained closed on Saturdays during that period of time, except for a prior instance in 1965 when July 31 fell on a Saturday. In this prior instance, the office remained opened to the public.

In July of this year, the Brown County treasurer published a notice in the Green Bay Press-Gazette once a week for four consecutive weeks which warned that the final date of payment for the second installment of real estate taxes would

be July 31, 1971, and that interest would be charged on payments made after that date. The notice stated:

**“OFFICE HOURS:**

**MONDAY, thru FRIDAY 8 A.M. to 4:30 P.M.**

**Including Noon Hour**

**Since Final Date Falls on a SATURDAY,**

**OUR OFFICE WILL BE OPEN**

**ALL DAY SATURDAY, JULY 31”**

You further indicate that this same notice appeared once in the DePere Journal and in the Brown County Chronicle and was given to four radio stations and three television stations so that they could inform the public of the Saturday opening.

It is my opinion, based on the foregoing factual situation and the statutes referred to, that the Brown County treasurer's office cannot legally collect interest on payments of the second installment of real estate taxes which are made on Monday, August 2, 1971, even though the office of the treasurer was open Saturday, July 31, 1971, from 8 o'clock a.m. to 4:30 p.m.

The previously described resolution of the Brown County Board, which sets forth the hours during which certain county offices are to remain open, quite clearly establishes the “usual business hours” such offices remain open each day. While neither the language of sec. 59.14 (1), Stats., nor that of the subject ordinance require the county treasurer to close her office on Saturdays, the facts do disclose that, as a matter of normal practice, the “usual business hours” of the treasurer's office do not include hours on Saturday.

One court has defined the term “business hours” as relating to hours during which the public had a right to the services of a public office. *Montreuil v. Board of Estimate of City of New York*, 10 App. Div. 2d 266, 198 N.Y.S. 2d 891. Another court, considering a Federal rule, which provided that an office should remain open “during business hours” on all days except Sundays and legal holidays, held that the

term "business hours" in its natural sense meant those hours during which persons in the community generally kept their places open for the transaction of business. *Casaldue v. Diaz* (C.C.A. Puerto Rico), 117 F. 2d 915, 916. The hours the Brown County treasurer's office remained open on July 31, 1971, would not come within the definition of "business hours" as defined in either of these cases.

Finally, it seems quite logical to view the "usual business hours" referred to in sec. 59.14 (1), Stats., as referring to the same hours as the phrase "duly established official office hours" appearing in sec. 990.001 (4) (c), Stats. At least one court, in fact, has equated "office" hours with "business" hours. *El Paso & S. W. Ry. Co. v. Kelley*, (Tex. Civ. App.) 83 S.W. 855, 860. Therefore, in the present instance, it may be said that sec. 59.14 (1), Stats., as implemented by legislative action of the county board, establishes the official office hours. As noted in *Reichert v. Milwaukee County* (1914), 159 Wis. 25, 35, 150 N.W. 401:

"\* \* \* Within the scope of the authority conferred by the legislature *the county, through its board of supervisors, may by its acts arouse official action and official duties* upon the part of other county officers, but the powers of the latter derived from the state legislature may not be taken away or narrowed by action of the county board nor enlarged except in cases in which the legislature has authorized such limitation or enlargement. \* \* \*" (Emphasis added)

Finally, as you point out in your letter, our office has previously recognized a connection between secs. 59.14 and 990.001 (4), Stats., when considering a slightly different question in 47 OAG 41 (1958). In that opinion the following was stated, at pages 42-43:

"You have suggested that complications might arise if a county treasurer's office, for example, were open on Lincoln's Birthday, and the last date for advance payment of inheritance tax to secure discount fell on that day. You ask:

" 'Suppose a taxpayer not knowing that the office is actually open to the public, believing it to be closed as the day is a legal holiday, does not make his payment until the day

following. Would not the tax authorities say that he should have paid it by appearing at the Treasurer's office on February 12th?

"I do not see how the fact that an office is kept open for the convenience of the public could deprive a taxpayer of the rights given by sec. 990.001 (4) (b), to the effect that when the last day within which an act is to be done falls on a Sunday or legal holiday, the act may be done on the next secular day.

"It is my opinion that the legislature did not intend that sec. 59.14, by requiring offices to be kept open during certain days and hours, should preclude the county officers named from giving additional service to the public when they deem the duties of their offices could be more effectively performed by so doing."

It should also be noted that no question should any longer exist as to the general applicability of sec. 990.001 (4), Stats., to all statutory provisions, including the provisions of ch. 74, Stats., first referred to in this opinion. Shortly after present sec. 990.001 (4), Stats. was enacted as sec. 370.001 (4), Stats., by ch. 307, Laws of 1955, our office had no difficulty in concluding that "when July 31, falls on Sunday, the second installment of real estate taxes under sec. 74.03, Stats., may be paid on August 1 without interest or penalty, to the same effect as if the same had been paid on or before July 31." 44 OAG 172, 173 (1955). Our office indicated the following, at p. 173:

"In this connection, it may also be pointed out that said ch. 307, Laws 1955, also creates a sec. 370.001 (4) (c) which takes care of the situation where an office of the state or of any county, city, village, town, school district, or other subdivision of the state, is *officially* closed on Saturday. If the last day for paying any money to or serving upon or filing a document with such an office falls on Saturday, such payment may be made to or document filed with it on the next secular day."

Quite obviously, therefore, a public office may actually be kept open to the public on a particular day while at the

same time it is "officially" closed within the meaning of sec. 990.001 (4) (c), Stats. As previously indicated, it is my opinion that the hours which the Brown County treasurer kept her office open on July 31, 1971, were neither usual business hours nor duly established official office hours. Such being so, taxpayers would have until the next Monday, August 2, 1971, to pay their second installments of real estate taxes.

RWW:JCM

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*Statute of Limitations—Paternity—(Informal)*—Under sec. 893.15, Stats., statute of limitation begins to run when parents cease living together as man and wife.

November 18, 1971.

STEPHEN O. HART

*Assistant Corporation Counsel, La Crosse County*

Your letter of August 18, 1971, requested my opinion on a 1971 amendment to sec. 893.15, Stats. This amendment is contained in ch. 21, Laws of 1971. It relates to the statutory limitation on time for the commencement of actions to establish paternity.

The pertinent language of the amendment is italicized:

*"Within 5 years of the date of birth of a child or if the parents live together as man and wife after the birth of the child, 5 years after they separate: . . ."*

Since this amendment was published on April 24, 1971, it became effective on April 25, 1971, according to sec. 990.05, Stats., which provides that every law which does not expressly provide the time it takes effect becomes effective on the day after its publication.

Your question is: Does this amendment allow the mother to bring an action within a period of five years from the date of separation where the child was born April 28, 1966,

and she and the alleged father were living together from the birth of the child until August of 1971?

This question is answered affirmatively for two reasons.

First, the general rule in this area is found in 51 Am. Jur. 2d, *Limitation of Actions*, §41, p. 623, which states:

“Assuming the power to enlarge the period of limitations applicable to an existing cause of action, that is, a cause of action mature but not barred at the time the statute providing for the extended period became effective, there may remain a question whether the legislature intended the new period to apply to causes of action in existence but not barred at such time. In this respect, the view has been taken that amendments extending statutes of limitation apply to pre-existing claims not already barred, unless the amendatory act expressly provides otherwise, and with regard to a wide variety of causes of action it has been held that the particular statutes considered, enlarging limitation periods, were intended by the legislature to apply to existing causes of action not yet barred.”

This general rule raises the question of what the legislature intended by the enactment of the amendment.

In determining the intent of the legislature, there are two lines of cases which apply to this situation. The first case is *Cole v. Van Ostrand* (1970), 131 Wis. 454, 110 N.W. 884, where the holder of a tax deed claimed that her constitutional rights were invaded by a statute which, prior to the expiration of the nine months' limitation period allowed for bringing action to set aside tax deeds, enlarged the period for bringing such actions to three years. The court, in denying such contention, said, at pages 466-467:

“. . . that until the statute of limitation has completely run so as to vest title by excluding the possibility of attack thereon, the period of limitation is wholly within the province of the state legislature, and is not controlled by the federal provisions against either the impairment of the obligations of contract or the deprivation of property without due process of law.”

This case supports the general rule, *supra*. Indeed, this is the factual situation in the instant case. Both cases involve an act which extends the right to sue contains no other indicia of legislative intent as to its effect and does not call for the application of another statute in construing its effect.

However, the general rule is the opposite where the legislative intent expresses a different effect.

“. . . On the other hand, in a number of instances the language of a statute enlarging a period of limitations has been held such as to indicate the legislature's intent that it should not be applied to causes of action in existence but not barred at the time of its effective date." 51 Am. Jur. 2d, *Limitation of Actions*, §41, p. 623.

There are two types of cases in Wisconsin which support this rule. This rule does not apply to the instant case, which involves an extension of the statute. It applies to cases in which first, either there is a legislative declaration that it shall apply only to acts committed subsequent to its passage, or secondly, it applies to cases in which the act expressly or impliedly repeals the former act.

With regard to the first type of case, see *Lotten v. O'Brien* (1911), 146 Wis. 258, 131 N.W. 361. This was an action for malpractice, the alleged negligence having occurred not later than September 26, 1908, when the treatments by defendant ceased, at which time a one-year limitation period was in effect, but by a statute which became effective May 19, 1909, the limitation period for actions for negligence was extended by amendment to two years, *but with the proviso* that the amendatory statute should not apply to events causing damage which happened before the enactment of the amendatory act, and it was contended that this left the act or event here in question without other limitation than the general six-year statute. The court said, at page 260:

“. . . But we believe that in such case sec. 4976, Stats. (1898), which applies to all statutes, steps in and applies a rule that, the limitation of one year having begun to run when the act of 1909 went into effect and the latter act providing a new period of limitation, the former limitation statute is continued in effect as to such former acts. . . .”

Thus, the action in *Lotten, supra*, could arise solely under the former statute because of the legislative declaration. In the instant situation there is no such legislative *proviso* which would limit the action to the former statute.

The second type of case, which involves an act that expressly or impliedly repeals the former act, arises in the case of *Augustine v. Congregation of the Holy Rosary* (1934), 213 Wis. 517, 252 N.W. 271, where it was held that even if plaintiff's period for filing a complaint to enforce a mechanic's lien had not completely expired before the enactment of an amending statute enlarging the period of serving and filing complaints from one to two years, the amendment would have been inapplicable to his claim, where there was no provision in the amendatory statute that it was to be applicable to periods of limitation which had theretofore commenced to run. The court pointed out, at page 520:

" . . . that unless such a repealing or amending act expressly provides otherwise, the limitation or period thereby prescribed applies, in the words of the present statute, 'only to such rights or remedies as shall accrue subsequently to the time when the repealing act shall take effect, and the act repealed shall be held to continue in force and be operative to determine all such limitations and periods of time which shall have previously begun to run.' "

The *Augustine* case, *supra*, is the opposite of the *Cole* case, *supra*. Both the *Augustine* and the *Cole* cases involved a statute which *extended* the statute of limitations. In both cases, there were no further legislative declarations as to whether it applied to acts occurring before or after the enactment of the new statute. Yet, in *Cole*, the court held that the plaintiff could proceed under the new statute, whereas in *Augustine* the court said that the plaintiff could not proceed under the new statute. The distinction between the two cases is that sec. 370.06, Stats., applied in *Augustine* and not in *Cole*. This statute only applies where the new act changes the time for bringing an action and where the new statute expressly or impliedly repeals the former act. In *Augustine*, subsec. (1) of sec. 289.06, Stats., was repealed and subsec. (2) was amended. Actually, subsec. (2) was a

new subsection which replaced the older one. In any event, since the statute was expressly and impliedly repealed, sec. 370.06, Stats., became applicable because the repeal changed the time for bringing an action. Section 370.06, Stats., since renumbered 990.06, reads as follows:

“Repeal or change of law limiting time for bringing actions. In any case when a limitation or period of time prescribed in any act which shall be repealed for the acquiring of any right, or barring of any remedy, or for any other purpose shall have begun to run before such repeal and the repealing act shall provide any limitation or period of time for such purpose, such latter limitation or period shall apply only to such rights or remedies as shall accrue subsequently to the time when the repealing act shall take effect, and the act repealed shall be held to continue in force and be operative to determine all such limitations and periods of time which shall have previously begun to run unless such repealing act shall otherwise expressly provide.”

Thus, where the new statute does not state whether it applies to acts committed prior to the passage of the new act, the new act will apply only to acts occurring subsequent to its passage where the new act expressly or impliedly repeals the old.

In *Cole*, there was no repeal. The time for bringing an action was extended. Thus, the repeal statute, sec. 370.06, Stats., did not apply, since there was no repeal. The instant case falls into this category. No repeal is involved. Therefore, sec. 990.06, Stats., is inapplicable. The *Cole* rule, *supra*, pages 466-467, applies:

“. . . until a statute of limitation has completely run . . . the period of limitation is wholly within the province of a state legislature. . . .”

In conclusion, under the general rule set out on pages 1-2 and under the *Cole* case, *supra*, the action in the instant situation may be commenced since the period of limitation under the former act had not completely run when the new extension became effective. Furthermore, since a repealing of the former act is not involved, sec. 990.06, Stats., is not applicable.

The second reason which allows this action to be commenced is that the extension is remedial. It is a general maxim of the law that remedial statutes are to be construed liberally.

This statute is remedial in nature because it corrects the situation where the father of a child lives with the mother for five years after its birth. His presence lulls the mother into refraining from bringing a support action. Since he is present and presumably contributing to the support of the child there is no need to compell support. However, under the old statute if the father left after five years, the mother appeared to be barred by the state of limitations from bringing a support action. This new statute was presumably intended to cure that possible inequity. Now, the statute does not begin to run until the date of separation. It is remedial in nature. 50 Am. Jur., *Statutes*, §392, at pages 415-416, expresses the rule regarding remedial statutes:

“It is a general rule of law that statutes which are remedial in nature are entitled to a liberal construction, in favor of the remedy provided by law, or in favor of those entitled to the benefits of the statute. This is true of a curative statute having a remedial purpose, or statutes seeking the correction of recognized errors and abuses, remedying defects in earlier acts, or implying an intention to reform or extend existing rights. . . .”

In accord with the above rule is *Holl v. Merrill* (1946), 251 Wis. 203, 209, 28 N.W. 2d 363, which states:

“ . . . We think that this is entirely too narrow a construction to give to a remedial statute which should be liberally construed to advance the remedy.”

Thus, this new statute should be liberally construed to advance the remedy.”

Thus, this new statute should be liberally construed so as to advance the remedy which enables the mother to bring an action from the date of separation. This remedies the abuse which formerly occurred.

Therefore, the answer to your question is that the mother is entitled to sue the father for a period of five years from the date of separation.

Furthermore, subsequent to your letter, our Wisconsin Supreme Court rendered a decision which suggests that the mother, under the facts of your case, may be able to successfully sue the father for support despite the statute of limitations. In the very recent case of *State ex rel. Armedia Susedik v. George R. Knutson, Jr.* (November 2, 1971), the court affirmed a trial court's decision that the father was estopped from using the statute of limitations as a defense to the paternity suit, since his conduct in living with the mother as husband and wife for over five years had caused the plaintiff to rely on his representations. This reliance prevented her from commencing an action within the statutory period.

I am enclosing a copy of this decision for your use. I believe this case may also satisfactorily answer your question.

RWW:JCM

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*Public Records—Confidentiality—(Informal)*—Finance committee of county board probably has right to inspect applications of persons seeking home nursing care.

November 30, 1971.

WILLIAM LEITSCH

*Corporation Counsel, Columbia County*

You have requested my opinion whether applications of individuals applying for home nursing care provided by the county health committee pursuant to sec. 141.10, Stats., upon authorization of the county board, are open to inspection by the finance committee of the county board. You state that the finance committee is primarily interested in the financial statements filed in connection with such application, which form the basis, in part, for the charges made for such care.

You further state that the county nurse has refused to divulge this information on the grounds that it is privileged and that to reveal the information to anyone outside her office might defeat the purposes of the program.

I am of the opinion that the documents involved are public records within the meaning of sec. 19.21, Stats., and *State ex rel. Youmans v. Owens* (1965), 28 Wis. 2d 672, 137 N.W. 2d 470, and that inspection must be granted to *any person* unless the custodian in good faith believes that disclosure would cause harm to the public interest which would outweigh the benefit to be derived from granting inspection. In the latter case, specific reasons for denial must be given and the person seeking inspection can then resort to *mandamus* to test the sufficiency of the reasons given. Also note the civil forfeiture provision for unwarranted failure to permit inspection found in sec. 19.21 (4), Stats.

I am aware of no statute which makes the records referred to confidential, nor do they appear to fall in areas protected under the common law. Section 141.10 (1), Stats., does provide that home nursing care shall be provided under the direction of a physician of the patient's choice. However, the records which you are concerned with would not appear to fall within the doctor-patient privilege referred to in sec. 885.21, Stats. *Leusink v. O'Donnell* (1949), 255 Wis. 627, 39 N.W. 2d 675.

Reasons which might justify denial of inspection to members of the general public probably would not be sufficient in most cases to foreclose county officers or committees from inspection where they have an administrative or legislative duty to perform in connection with the program.

The county health committee, rather than the county nurse, may be the responsible custodian unless such power has been delegated. You state that Columbia County does not have a county health department but does have a county health committee.

Section 141.06 (1), (2) and (3), Stats., provide:

“(1) The county health committee may employ one or more county public health nurses, sanitarians, or other public

health personnel, when so authorized by the county board, to conduct generalized public health nursing, environmental sanitation, or other public programs pursuant to the direction and under the supervision of the county health committee in cooperation with the department.

“(2) The work of the county nurse, county sanitarian and other public health personnel shall be directed by a county health committee composed of 5 or more members appointed by the chairman, at least 3 of which shall be members of the county board, and a representative of the department appointed by the state health officer.

“(3) The county board shall approve and make an appropriation to carry out this section.”

Under sec. 141.10 (1), Stats., the county board may authorize the *county health committee* to establish programs of home nursing care, and subs. (2), (3) and (4) relate to the establishment and charging of fees therefor. Subsections (3) and (4) provide:

“(3) FEE SCHEDULE. A schedule of fees shall be established:

“(a) As a result of a cost study conducted at least every 3 years and filed as required with the department after approval by the county board or city council; or

“(b) By the adoption of a schedule of fees established by the department from information gathered by it.

“(4) CHARGES. Persons receiving such home nursing care shall not be charged fees in excess of the scheduled costs, and shall be charged according to their ability to pay full or part costs as determined by the policy of the county health committee or board of health. No person shall be denied necessary services, within the limits of available personnel, because of inability to pay the cost of such service. The county board or city council shall determine the procedure for collecting and depositing fees and auditing receipts.”

Such records could not be withheld from county health committee members. It is also clear that the county board has specific statutory interest in the authorization of the

program, and the determination of procedures for collecting, depositing and auditing receipts. The board could delegate some responsibilities in these areas to its finance committee. If it has, such committee would have a right to inspect records material to its purposes, even if such records could be withheld from the public. See related discussion with respect to welfare records in 59 OAG 240 (1970) at 247, where a specific confidentiality statute was involved.

RWW:RJV

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*Bidding—Real Estate, County—(Informal)—*Limitations on power of county to sell property without calling for public bids discussed.

November 30, 1971.

PAUL D. LAWENT

*Corporation Counsel, Marathon County*

You have requested my opinion concerning the right of a county to sell real and personal property without public bid. Whether a county has such power is governed, in part, by sec. 59.07 (1) (c), Stats., which provides as follows:

“General powers of board. The board of each county may exercise the following powers, which shall be broadly and liberally construed and limited only by express language:

“ . . .

“(c) *Transfers.* Direct the clerk to lease, sell or convey or contract to sell or convey *any county property*, not donated and required to be held for a special purpose, on such terms as the board approves. In addition any county property may, by gift or otherwise, be leased, rented or transferred to the United States, the state, any other county within the state or any municipality or school district within the county. Oil, gas and mineral rights may be reserved and leased or transferred separately.” (Emphasis added)

This statute applies to both real and personal property by virtue of the words "any county property," and does not purport to require counties to sell their property by the public bid method. Considering the general and broad language of the statutory grant, it would appear to authorize the sale of county owned property on much the same basis as is proper for other Wisconsin governmental entities. Several of the Wisconsin cases dealing with this general topic were discussed in 58 OAG 179 (1969), at page 181, as follows:

"... It also has been recognized that a municipality, having once decided that certain land is no longer needed for public purposes, possesses considerable discretion in the manner of its disposition and, in the absence of a statute so providing, need not sell or lease the property by the competitive bid method. *Hermann v. Lake Mills* (1957), 275 Wis. 537, 82 N.W. 2d 167. Finally, the court has indicated that before it will void the sale of municipal property, illegality, fraud, or a clear abuse of discretion on the part of the governing body of the municipality which has authorized the sale, must be shown. *Newell v. City of Kenosha* (1959), 7 Wis. 2d 516, 523, 96 N.W. 2d 845.

"In Wisconsin, therefore, unless *restrained* by statute, cities and villages possess substantial authority to sell or lease property to which they have fee title and which is not affected by a public trust. The Wisconsin Supreme Court emphasized this broad authority in *S. D. Realty Co. v. Sewerage Commission of City of Milwaukee* (1961), 15 Wis. 2d 15, 27, 112 N.W. 2d 177:

" 'At the time of execution of the 1958 lease the district possessed no express statutory power to alienate or lease property. However, we conclude that it possessed an implied power to do so.' "

Furthermore, I direct your attention to an older opinion of this office reported in 23 OAG 650 (1934), which recognizes the broad general power of a county to sell its real property which is not acquired by tax deed.

While the legislature has granted counties the general power to sell county property by the broad language set

forth in sec. 59.07 (1) (c), Stats., we should not be unmindful of the several specific instances where the legislature has also seen fit to place restrictions on the sale of such property. The statute itself excludes from its application lands which are donated to the county and required to be held for a special purpose. Likewise, since the county board also possesses the power to impose restrictions on the manner in which county property is sold, I would point out that it is always necessary to ascertain whether a resolution or ordinance exists which requires sale by public bid.

Another instance where the method of sale of specific property is limited is set forth in sec. 66.28, Stats., as follows:

“Sales of abandoned property. Cities, villages and counties may, at a public auction to be held once a year, dispose of any personal property which has been abandoned, or remained unclaimed for a period of 30 days after the taking of possession of the same by the city, village or county officers. All receipts from such sales, after deducting the necessary expenses of keeping such property and conducting such auction, shall be paid into the city, village or county treasury.”

Your letter of inquiry indicates that you appreciate that sec. 75.69, Stats., requires that the sale of tax delinquent real estate must be advertised for bid. Generally speaking, this section and sec. 75.35, Stats., require a class 3 notice of the sale and appraised value of such real estate and acceptance of the most advantageous bid which is not less than the appraised value of the property. Section 75.35, Stats., provides, in part, as follows:

“Sale of tax certificates and tax deeded lands; purchase of adjacent lands. (1) DEFINITIONS. The following terms, wherever used or referred to in this section shall have the following respective meanings, unless a different meaning clearly appears from the context:

“(a) . . .

“(b) ‘Tax deeded lands’ means lands which have been acquired by a municipality through enforcement of the col-

lection of delinquent taxes by tax deed, foreclosure of tax certificate, deed in lieu of tax deed or other means.

“(2) POWER OF MUNICIPALITY TO SELL TAX CERTIFICATES AND TAX DEEDED LANDS. (a) Except as provided in s. 75.69, any municipality shall have the power to sell and convey its lands acquired in the enforcement of delinquent tax liens in such manner and upon such terms as its governing body may by ordinance or resolution determine, . . .”

Section 75.69, Stats., provides, in part:

“Sale of tax delinquent real estate. (1) Except in counties having a population of 500,000 or more, no tax delinquent real estate acquired by a municipality as defined in s. 75.35 (1) (a), shall be sold unless the sale and appraised value of such real estate has first been advertised by publication of a class 3 notice, under ch. 985. Any such municipality may accept the bid most advantageous to it but every bid less than the appraised value of the property shall be rejected. Any such municipality is authorized to sell for an amount equal to or above the appraised value without re-advertising, any land previously advertised for sale.

“(2) This section shall not apply to exchange of property under s. 59.97 (8), to withdrawal and sale of county forest lands, nor to the sale or exchange of lands to or between municipalities or to the state.”

It is important to appreciate that even though this statute allows certain conveyances of tax delinquent land without the need for public bid, such land continues to be “tax delinquent real estate.” Such land coming into the hands of the county might be burdened with an obligation to appraise, advertise and sell through bid if it had always been in one of the exempt categories described in sec. 75.69 (2), Stats., and had never previously been offered for public bid. 42 OAG 73 (1953).

In conclusion, it is my opinion that a county does possess the general power to sell real and personal property under the authority set forth in sec. 59.07 (1) (c), Stats., without

resort to calling for public bids. The general limitations on such power are described above.

RWW:JCM

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*Oaths—Affirmations—(Informal)*—Oaths, affirmations, notary publics and jurats discussed.

November 30, 1971.

ROBERT C. ZIMMERMAN

*Secretary of State*

In your letter of August 12, 1971, you pose a number of questions relating to oath administered by notaries public, and the use of the phrase, "So help me God."

The common law is that an oath is an acknowledgement or pledge by a person bound by his or her accountability to God or by his conscience to the Supreme Being that what he or she is averring is true. See cases cited in *Black's Law Dictionary*, 4th ed. On the other hand, an affirmation is a solemn declaration of truthfulness without an appeal for divine guidance. Again, see *Black's Law Dictionary*, 4th ed.

Wisconsin recognizes this distinction. Section 887.03, Stats., provides:

"887.03 Oath, how taken. Any oath or affidavit required or authorized by law may be taken in any of the usual forms, and every person swearing, affirming or declaring in any such form shall be deemed to have been lawfully sworn."

Section 887.04, Stats., reads:

"887.04 Affirmations. (1) Every person who shall declare that he has conscientious scruples against taking the oath, or swearing in the usual form, shall make his solemn declaration or affirmation, which may be in the following form: Do you solemnly, sincerely and truly declare and affirm that the testimony you shall give in [here indicate the action, proceeding or matter on trial or being inquired into] shall

be the truth, the whole truth and nothing but the truth; and this you do under the pains and penalties of perjury.

“(2) The assent to the affirmation by the person making it may be manifested by the uplifted hand.”

In considering these two statutory provisions, we must also read sec. 990.01 (24), Stats., which provides:

“(24) Oath. ‘Oath’ includes affirmation in all cases where by law an affirmation may be substituted for an oath. If any oath or affirmation is required to be taken such oath or affirmation shall be taken before and administered by some officer authorized by the laws of this state to administer oaths, at the place where the same is required to be taken or administered, unless otherwise expressly directed, and, when necessary, duly certified by such officer. If an oath is administered it shall end with the words ‘so help me God.’ ”

In many places in the statutes the legislature uses the term “oath” when it is obvious that it meant to mean “oath or affirmation.” For example, in ch. 6, entitled, “The Electors,” the legislature uses “oath,” “swear,” and “affirm” (or variants) interchangeably. Section 6.15 (2) (a), Stats.: “. . . application . . . signed in the presence of . . . any officer authorized by law to administer oaths. . . . I, . . . hereby solemnly swear . . . .” Section 6.18, Stats.: “. . . I, . . . hereby swear or affirm . . . . Subscribe and sworn to . . . .” Section 6.30, Stats.: “. . . (b) He shall appear before any person authorized to administer oath . . . . The person administering the oath . . . .” Section 6.33 (2), Stats.: “The registration affidavit form shall be substantially as follows . . . . I hereby swear (or affirm) . . . .”

We may summarize, as follows: When a notary public administers an oath, the words, “So help me God” must be utilized, unless some other form of oath is set forth in or otherwise clearly allowed by the particular statute involved. This is in conformity with sec. 887.03, Stats.

If the deponent or declarer asserts “conscientious scruples against taking the oath” then, and only then, the notary public may “swear” the deponent or declarer in affirmation form as provided in sec. 887.04, Stats.

However, by virtue of secs. 887.03 and 990.01 (24), Stats., an affirmation has the same legal effect as does an oath. Therefore, the jurat, "subscribed and sworn," will embrace either the oath or affirmation situation. The jurat need not specify whether the words, "So help me God" were utilized since it will be presumed that the notary public administered the oath in accordance with law.

I note that sec. 137.01 (5), Stats., setting forth the powers of notaries public, grants the power to "administer oaths." While a very narrow construction of this section might lead to the conclusion that a notary public does not have the power to administer affirmations, in my opinion, this would not be a reasonable interpretation of this section. It is incongruous that the legislature would empower notaries public to administer oaths and consciously withhold the power to administer affirmations. Rather, when secs. 137.01 (5), 887.03 and 990.01 (24), Stats., are read in harmony, we must conclude that the word "oath" in sec. 137.01 (5) necessarily includes "affirmations."

RWW:WHW

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*Public Welfare—AFDC Budget—(Informal)—An AFDC budget must be computed on the basis of actual income.*

December 8, 1971.

GERALD C. NICHOL

*District Attorney, Dane County*

You have asked my opinion whether or not a method of determining an AFDC budget that was formerly used by Dane County is proper in light of recent United States Supreme Court decisions.

The situation involved is where a stranger in an AFDC home may or may not be able to contribute the amount deemed necessary for his own maintenance in the home. You state:

“Until very recently it was the policy of the Dane County Department of Social Services to adjust the AFDC grant upon the reported arrival into the household of the stranger. This was done by adding the stranger to the family unit for purposes of determining each persons share of the basic budget needs, such as fuel, lights, food, and payments on the dwelling for a family of that size. The stranger’s share was then deducted from the total basic needs and the remaining shares were deemed to be the allowable amount for the basic needs of the AFDC family. The individual needs of the family was then added to the basic budget and together they totaled the AFDC grant for the family. This computation resulted in a lower total AFDC grant for the family unit than the grant prior to the arrival of the stranger.”

Your letter continues :

“I request an opinion as to whether or not this method of computing AFDC grants is proper in light of the recent United States Supreme Court decisions. May the Dane County Department of Social Services continue with this policy or must it, in effect, develop a new policy under which each and every non-paying stranger living under this arrangement is in fact ignored and is allegedly supported at the expense of the taxpayer and the dependent children whose AFDC grant he is sharing with them?”

Where the stranger is a bona fide boarder or roomer who pays in advance, simple budgetary procedures are set forth in the State department’s service to clients manual section III, chapter III-81. I presume that the county department follows the prescribed budgetary procedure of the manual in those instances where the income is known. These procedures have been approved by the Department of Health, Education and Welfare as part of the state plan to achieve uniform standards throughout the State in accordance with 42 U.S.C.A. §602 (a) which provides that: “A State plan for aid and services to needy families with children must (1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them,” and further, “provide that the state agency

shall, in determining need, take into consideration any other income and resources of any child or relative claiming Aid to Families with Dependent Children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income \* \* \*."

The recent budgetary policy of Dane County outlined in your letter is a reflection of state policy that was in effect prior to the unanimous Supreme Court decision in *King v. Smith* (1968), 392 U.S. 309. This decision has had a tremendous impact on welfare litigation and administration. For your convenience the entire conclusion is set forth:

"Alabama's substitute father regulation, as written and as applied in this case, requires the disqualification of otherwise eligible dependent children if their mother 'cohabits' with a man who is not obligated by Alabama law to support the children. The regulation is therefore invalid because it defines 'parent' in a manner that is inconsistent with § 406 (a) of the Social Security Act. 42 U.S.C. § 606 (a). In denying AFDC assistance to appellees on the basis of this invalid regulation, Alabama has breached its federally imposed obligation to furnish 'aid to families with dependent children \* \* \* with reasonable promptness to all eligible individuals \* \* \*.' 42 U.S.C. § 602 (a) (9) (1964 ed., Supp. II). Our conclusion makes unnecessary consideration of appellees' equal-protection claim, upon which we intimate no views.

"We think it well, in concluding, to emphasize that no legitimate interest of the State of Alabama is defeated by the decision we announce today. The State's interest in discouraging illicit sexual behavior and illegitimacy may be protected by other means, subject to constitutional limitations, including state participation in AFDC rehabilitative programs. Its interest in economically allocating its limited AFDC resources may be protected by its undisputed power to set the level of benefits and the standard of need, and *by its taking into account in determining whether a child is needy all actual and regular contributions to his support.*

“All responsible governmental agencies in the Nation today recognize the enormity and pervasiveness of social ills caused by poverty. The causes of and cures for poverty are currently the subject of much debate. We hold today only that Congress has made at least this one determination: that destitute children who are legally fatherless cannot be flatly denied federally funded assistance on the transparent fiction that they have a substitute father.” (Emphasis supplied)

The clear import of the language used by the *King* court is that need determinations must be based on “actual and regular contributions to his [an AFDC child] support.” Accordingly, budgetary computations based on the assumption that income is available when, in fact, it is not, is neither realistic nor legally valid in ascertaining the needs of a dependent child.

The lesson of the *King* case, *supra*, is that welfare entitlements cannot be withheld or used as a club to require a desired standard of conduct. In tracing the history of amendments to the Social Security Act, the court noted that the concept of a “worthy person,” as initially used in the Act for purposes of eligibility, was clearly discarded by Congress in favor of rehabilitative services as a primary device to correct unacceptable circumstances. The court also noted that where an AFDC home is unsuitable, removal of the children from such home is another possibility offered by the Social Security Act.

Use of the budgetary procedures which have the effect of decreasing the amount of the AFDC grant must be based on contribution of actual income. Otherwise, the dependant children in question are penalized by a decrease of aid. In the *King* case the children were penalized by a denial of the entire AFDC grant. The difference between these two situations appears to be merely a matter of degree.

After the *King* decision, the Department of Health, Education and Welfare instructed all states that “only such net income as is actually available for current use on a regular basis will be considered” in determining need and amount of assistance. C.F.R. §233.20 (3) (ii) (c), effective January 29, 1969.

Neither the state nor the county may do as it pleases in programs where Federal reimbursement is expected. As stated by the United States Supreme Court in *Rosado v. Wyman* (1970), 397 U.S. 397: "When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states."

The *Rosado* court further noted: "We see no justification in principle for drawing a distinction between invalidating a single non-conforming provision or an entire program." (Emphasis supplied)

I am aware of the administrative convenience and the public interests which may be advanced under policy suggested in your opinion request. A controversial subject, of course, underlies the whole matter. However, the *King* court stated that Congress had clearly spoken out with respect to this controversial subject. Further, the Department of Health, Education and Welfare has formalized a specific rule concerning the matter. Accordingly, budgetary practices contrary to the rule subjects a county to indeterminate fiscal disallowances by the Federal Government in the AFDC program.

It should be clear in light of the *King* case and the specifications of the Department of Health, Education and Welfare as provided under C.F.R. §233.220 (3) (ii) (c) that an AFDC grant may not be reduced by budgeting nonexistent income. Your opinion request indicates this result would be obtained under suggested policy where a stranger, who made no financial contribution, was in an AFDC household. Obviously, a different budgetary policy must be applied to such situations if Federal requirements are to be met.

RWW:WLJ

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*Board of Regents—Branch Campuses—(Informal)—Under ch. 100, Laws of 1971, all two-year institutions are now under an executive head.*

December 9, 1971.

CLARK SMITH, *Secretary**Board of Regents of the University of Wisconsin System*

You have requested my opinion on the effect of merger (Chapter 100, Laws of 1971) on the Center and branch campuses of the former University of Wisconsin and State Universities System. Specifically you have asked the following questions:

1. Does Section 13, of Chapter 100, Laws of 1971, intend to merge the University of Wisconsin and Wisconsin State Universities centers at once by directing the board to "appoint an executive head . . . for the center system . . .?"

2. Does Section 20, (10) of Chapter 100 require the board of regents to postpone the appointment of a single executive head for the center system until merger is completed?

3. Does Section 21, of Chapter 100 intend to eliminate all branch campuses by designating these 2-year institutions as centers?

The answer to your first question is yes, but "merger" under the Act has a qualified meaning.

Section 36.06 (1m), Stats., as created by sec. 13 of ch. 100, Laws of 1971, provides in part:

"The Board of Regents shall appoint an executive head for \* \* \* the Center System \* \* \*."

Under sec. 36.02 (3), sec. 12 of the Act, the term "System" is defined as:

"36.02 (3) 'System,' unless otherwise indicated, means the university of Wisconsin system, including all schools, campuses, branches and property governed by the former board of regents of the university of Wisconsin and the former board of regents of state universities under ch. 37, 1969 stats."

Section 20 (1) (a) of the Act provides:

“SECTION 20. *TRANSFERS*. (1) *POWERS*. (a) There is transferred to the board of regents of the university of Wisconsin system all powers, duties and functions previously vested in the board of regents of the university of Wisconsin, the board of regents of state universities and, except as provided in par. (b), all powers, duties and functions previously vested in the coordinating council for higher education, except as they relate to institutions under chapter 38 of the statutes.”

Accordingly, “merger” for our purposes means a single board, a single system of institutions and an administrative head over the Center System which is included within that single system. The single Board of Regents, to whom the executive head of the Center System is responsible, must operate those institutions and campuses formerly under the Board of Regents of the State Universities pursuant to the provisions of ch. 37, Stats., and, likewise, must operate all former University of Wisconsin institutions and campuses under the provisions of ch. 36, Stats. The executive head of the Center System must comply with these same requirements and administer the former University of Wisconsin Centers and branches under the provisions of ch. 36, Stats., and the former State University branches must be administered under ch. 37, Stats. In this regard, the executive head of the Center System will necessarily have administrative control in this particular area over the separate central administrative offices which are retained under sec. 22 of the Act.

The answer to your second question is no. Section 20 of the Act, as stated previously, transfers the powers of the former Boards to the new Board. Subsection (10) requires a single Board to exercise these powers as they pertain to particular institutions within the systems. The assumption must be made that the legislature intended the chief administrative executive of the Center System to function in this same manner and to commence functioning as soon as practicable after the passage of the legislation.

In answer to your third question, sec. 14 of the Act amends sec. 36.06 (10), Stats., and provides that no

branch campus or center may be physically eliminated. Accordingly, these centers and branches must be maintained and operated.

Prior to merger and apparently up to the present time, the University of Wisconsin has operated a rather complicated system of branches, centers, and extension centers. The State Universities, on the other hand, have operated branch campuses pursuant to sec. 37.02 (5), Stats. Under merger, all two-year institutions, whether formerly known or called branches or centers, are designated University Center — (location), sec. 21, ch. 100, Laws of 1971. These two-year institutions, which mean all former two-year institutions and now designated as the Center System, will be under the direction and control of the chief executive of the Center System as provided for in sec. 13 of Chapter 100. Accordingly, in answer to your third question, all two year institutions whether previously referred to as branches or centers, are now incorporated in a single "Center System" and are subject to the administration of the executive head of the "Center System."

RWW:CAB

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*Reapportionment—Supervisory Districts—(Formal)—*  
Reapportionment of county supervisory districts under sec. 59.03 (2) (b), Stats., discussed in reference to the requirement that county boards consider existing town, village and city boundary lines in structuring the apportionment plan.

December 10, 1971.

ALDWIN H. SEEFELDT, *Corporation Counsel*  
*Washington County*

You request my opinion on a number of questions concerning the extent to which a county board must, when reapportioning its supervisory districts, adhere to the municipal boundary criteria set forth in sec. 59.03 (2) (b), Stats.

Section 59.03 (2) (b), Stats., provides as follows:

“(b) *Creation of supervisory districts. The county board in each county shall establish and number supervisory districts, after a public hearing, in such a manner that each supervisor shall represent as nearly as practicable an equal number of persons, but considering such other factors as continuity of interest, compactness and contiguity of existing town, village and city lines. More than one municipality may be placed in any supervisory district and more than one district may be formed within a municipality. Whenever conditions arise where creation of a supervisory district based primarily on population cannot be achieved without violating municipal boundary lines, but where a combination of 2 or more municipalities could be established creating a supervisory district of approximately double the population average of the other supervisory districts, the county board may create such a supervisory district and designate that 2 supervisors be elected from such a district.*” (Emphasis added)

You first inquire as follows:

“Is the statutory criteria to adhere to municipal boundary lines as definitely implied by the language of Wis. Stats., § 59.03 (2) (b) to be regarded as unconstitutional and therefore, to be ignored if strict adherence to it results in districts which have an unacceptably wide deviation of population?”

In establishing supervisory districts, the county board is required to insure that “each supervisor shall represent as nearly as practicable an equal number of persons.” This legislative directive simply emphasizes the equality of representation required under both Art. I, sec. 1, Wis. Const., and under the equal protection clause of the Fourteenth Amendment to the United States Constitution. *State ex rel. Sonneborn v. Sylvester* (1965), 26 Wis. 2d 43, 132 N.W. 2d 249. Naturally, therefore, the principle of equal representation is first among the various considerations in any county reapportionment. As you point out, however, the legislature did not view the task of achieving equal representation as necessarily inconsistent with adherence to certain standards, among them, the goal of utilizing town, village and city lines, if possible.

The February 3, 1965, Report of the County Board Representation Committee to the 1965 Legislature described the various standards to be followed in county board reapportionment under the above statute, as follows, at page 5:

“Consistent with the legislative directive to the study committee, *s. 59.03 (2) (b)* of S.B. 1 directs the county boards to establish supervisory districts which will ‘represent as nearly as practicable an equal number of persons.’ This paragraph of the bill also sets forth other standards which the boards must consider in setting up the new districts. These include:

“(1) continuity of interest:

“(2) compactness; and

“(3) contiguity of existing town, village and city lines.

“Recognizing that the distribution of population within individual counties is uneven, the committee concluded that apportionment of ‘equal population’ supervisory districts would be feasible only if the counties are permitted some flexibility in determining the boundaries of the new districts. Therefore, par. (b) provides that:

“(1) more than one municipality may be placed in any supervisory district;

“(2) more than one district may be formed within a municipality; and

“(3) under special circumstances [set forth in some detail in *s. 59.03 (2) (b)*], 2 supervisors may be elected from a single district.”

In order to provide county boards with the flexibility necessary to create districts of nearly equal population, which also follow municipal boundary lines, the legislature has made it clear that counties can place more than one whole municipality within one district or create more than one whole district within a municipality.

Furthermore, the legislature appears to have anticipated that situations would arise where honoring municipal boun-

dary lines would not be possible if the county board was to insure equal representation. It has apparently attempted to respond to this possibility by authorizing the election of two supervisors at large from a district comprising two or more municipalities, constituting approximately double the population average of the single member districts, if such would assist in apportioning county supervisory districts on town, village and city lines.

I am aware that some counties may have been reluctant to utilize multi-member districts in the past, fearing that the election at large of two supervisors from a single district would be challenged as an attempt to dilute the representation of certain segments of the voting populace. However, despite initial fear that the use of multi-member districts might not be upheld by the courts, attacks on apportionment plans utilizing this type of district elsewhere have not met with general success, at least where such districts have contained no built-in bias nor operated to impair the voting strength of any particular racial or political element of the voting population. The law on the subject of multi-member district was quite recently outlined by the United States Supreme Court in *Whitcomb v. Chavis* (1971), 403 U.S. 124, 91 S.Ct. 1858, 29 L.ed. 2d 363, at pp. 375-76, as follows:

“The question of the constitutional validity of multi-member districts has been pressed in this Court since the first of the modern reapportionment cases. These questions have focused not on population-based apportionment but on the quality of representation afforded by the multi-member district as compared with single-member district. In *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, 84 S.Ct. 1459, 12 L.ed. 2d 632 (1964), decided with *Reynolds v. Sims*, we noted certain undesirable features of the multi-member district but expressly withheld any intimation ‘that apportionment schemes which provide for the at-large election of a number of legislators from a county, or any political subdivision, are constitutionally defective.’ 377 U.S. at 731, n. 21, 84 S.Ct., at 1471. Subsequently, when the validity of the multi-member district, as such, was squarely presented, we held that such a district is not per se illegal under the Equal Protection Clause. [Cases cited.] That voters in multi-

member districts vote for and are represented by more legislators than voters in single-member districts has so far not demonstrated an invidious discrimination against the latter. But we have deemed the validity of multi-member district systems justiciable, recognizing also that they may be subject to challenge where the circumstances of a particular case may 'operate to minimize or cancel out the voting strength of racial or political elements of the voting population.' *Fortson*, 379 U.S., at 439, 85 S.Ct., at 501, and *Burns*, 384 U.S., at 88, 86 S.Ct., at 1294. . . . But we have insisted that the challenger carry the burden of proving that multi-member districts unconstitutionally operate to dilute or cancel the voting strength of racial or political elements. We have not yet sustained such an attack."

There do appear to be certain benefits which result from attempting to establish supervisory district lines along existing municipal boundaries. First, if such lines are followed, there may be less temptation to gerrymander. At least, it would seem probable that following such lines would most likely result in a more compact district consisting of people with an identifiable community of interest. Thus, following existing town, village and city boundary lines may result in also satisfying the other standards set forth by the legislature in sec. 59.03 (2) (b), Stats. It should also be appreciated that voting precincts do normally follow municipal boundary lines. Should a supervisory district sever the precinct, the conduct of an election for county board supervisor in that precinct becomes more complicated because precinct election officials must service electors voting for candidates for county board supervisor from the two or more districts lying within the precinct, unless the problem can be resolved by the division or consolidation of election precincts under the provisions of sec. 5.15, Stats.

The emphasis of our legislature on the importance of existing town, village and city boundaries appears to have had some early, if guarded, acceptance in *Reynolds v. Sims* (1964), 377 U.S. 533, 84 S.Ct. 1362, 12 L.ed. 2d 506, 537, where the court indicates that the use of political subdivision lines is constitutionally valid ". . . so long as the resulting apportionment [is] one based substantially on population and

the equal-population principle [is] not diluted in any significant way. . . ." More recently, there has been further indication that the court will accept efforts to maintain the identity of local governmental units where compatible with the general principle of population equality. Thus, in *Abate v. Mundt* (1971), 403 U.S. 182, 91 S.Ct. 1904, 29 L.ed. 2d 399, 402-403, the following is stated:

"In assessing the constitutionality of various apportionment plans, we have observed that viable local governments may need considerable flexibility in municipal arrangements if they are to meet changing societal needs, *Sailors v. Kent Board of Education*, 387 U.S. 105, 110-111, 18 L.ed. 2d 650, 654, 655, 87 S.Ct. 1549 (1967), and that a desire to preserve the integrity of political subdivisions may justify an apportionment plan which departs from numerical equality. *Reynolds v. Sims*, 377 U.S. 533, 578, 12 L.ed. 2d 506, 536, 84 S.Ct. 1362 (1964). These observations, along with the facts that local legislative bodies frequently have fewer representatives than do their state and national counterparts and that some local legislative district may have a much smaller population than do congressional and state legislative districts, lend support to the argument that slightly greater percentage deviations may be tolerable for local government apportionment schemes, cf. *Reynolds v. Sims*, supra, at 578, 12 L.ed. 2d at 536. Of course, this Court has never suggested that certain geographic areas or political interests are entitled to disproportionate representation. Rather our statements have reflected the view that the particular circumstances and needs of a local community as a whole may sometimes justify departures from strict equality."

Although the *Abate* case dealt with the reapportionment of a county board of supervisors, the case dealt with New York law and I consider the population variation approved by the court in that instance, i.e., a total deviation from equality of 11.9 percent, probably unacceptable under the law and system of local government in existence in Wisconsin today. Not only did the court emphasize the extremely limited application of its decision, but it is evident that the peculiar circumstances upon which the court relied in justifying such population variation do not exist in our state.

However, the case does point out the continuing willingness of the court to accept, as feasible, reapportionment plans which emphasize utilization of municipal boundary lines.

In direct response to your first question, then, it is my opinion that the statutory directive in sec. 59.03 (2) (b), Stats., to adhere to existing town, village and city boundary lines in the course of structuring county supervisory districts upon reapportionment, is not unconstitutional, and that such requirement must be adhered to "so long as the resulting apportionment [is] one based substantially on population and the equal-population principle [is] not diluted in any significant way." *Reynolds v. Sims, supra*, 12 L.ed. 2d, at page 537. It should be appreciated, however, that municipal boundary line criteria may be unconstitutionally applied.

Your second question asks:

"If it is determined that municipal boundary lines may be disregarded in the interest of more equalized population per district, what criteria shall be used to estimate population for the purpose of splitting municipalities?"

In addition to the two-member district discussed above, most counties have the ability to alter the number of county board supervisors, and therefore supervisory districts, under the provisions of sec. 59.03 (2) (a), Stats. However, I fully realize that despite this flexibility, county boards may not be able to utilize existing town, village and city lines in establishing supervisory districts and at the same time insure that each qualified voter be given a vote which is equally weighted, insofar as is practicable, with votes cast by all other electors in the county. Under such circumstances, of course, existing town, village and city lines not only may be disregarded, but must be disregarded in order to insure a constitutional apportionment of the county board.

However, this does not mean that the county board may resort to "estimates" of population for the purpose of splitting municipalities. Section 59.03 (2) (c), Stats., provides as follows:

"(c) *Apportioning supervisory districts.* Following each federal decennial census the secretary of state shall certify

to each county board chairman the population of each town, village and city in the county. As soon as practicable but not more than one year after receiving the population certification, the county board in each county shall apportion county supervisory districts as provided in par. (b) and the chairman of the county board shall file a certified copy of the apportionment plan with the secretary of state."

The requirement that such apportionment be made following each Federal decennial census quite clearly indicates that the *census* so taken is to be the basis of such apportionment. This view is consistent with that expressed in an early decision of the Wisconsin Supreme Court concerning similar language in our Wisconsin Constitution referring to apportionment of the legislature. In that case, *State ex rel. Lamb v. Cunningham, Secretary of State* (1892), 83 Wis. 90, 53 N.W. 35, the court said, at page 140:

" . . . It seems to be well established that courts will take judicial notice of a census, whether taken under the authority of the state or United States. . . . The apportionment is to be "according to the number of inhabitants," and made *at the next session after* the state or United States enumeration; *and the enumeration is evidently intended as the basis of apportionment.* The court will take judicial knowledge of the location, general boundaries, and the juxtaposition of the several counties, towns, and wards mentioned in the act in question, and of matters of common knowledge.' . . .

"Thus it is very obvious, under the rulings of this court in the previous case, [*State ex rel. Attorney General v. Cunningham* (1892), 81 Wis. 440, 510, 51 N.W. 724] that it is not permissible for the defendant here to allege and prove that in making the last apportionment the legislature acted upon the theory that the counties of Chippewa, Florence, Forest, Oneida, Langlade, Price, and Taylor contained 12,777 more inhabitants than appears from the census of 1890, for to do so would open the door on the other side to prove that the other counties of the state, or some of them, contained less inhabitants than appears from the census. Besides, if proved, it would only show that the legislature purposely disregarded the standard of population thus conclusively fixed

by the constitution, and based their action upon other computations, estimates, or considerations. . . .”

It must be admitted at the outset that the rules utilized by the Federal Bureau of the Census to establish population statistics leave much to be desired for basic apportionment purposes. The report of the bureau designated “U.S. Census of Population: 1970 NUMBER OF INHABITANTS Final Report PC(1)-A51 WISCONSIN,” at page 111, in fact, supports this general appraisal of the census data:

#### “USUAL PLACE OF RESIDENCE

“In accordance with census practice dating back to 1790, each person enumerated in the 1970 census was counted as an inhabitant of his usual place of residence, which is generally construed to mean the place where he lives and sleeps most of the time. This place is not necessarily the same as his legal residence, voting residence, or domicile. In the vast majority of cases, however, the use of those different bases of classification would produce substantially the same statistics, although there may be appreciable differences for a few areas.”

Likewise, although the United States Supreme Court has demanded “equal population” as the basis for apportionment, the court has not defined what it means by population. Thus, in *Burns v. Richardson* (1966), 384 U.S. 73, 91, 86 S.Ct. 1286, 16 L.ed. 2d 376, 390, the court indicates:

“. . . We start with the proposition that the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured. . . .”

However, although some other type of population basis may be constitutionally permissible, in Wisconsin the total population figures derived from the Federal decennial census has been established as the basis for apportionment. In the absence of demonstrated fraud, etc., then, such data should be utilized without alteration or adjustment.

The data obtained as a result of the 1970 Federal census contains highly detailed breakdowns of population in most areas, including population breakdowns which follow lines other than municipal boundary lines. Aside from legal considerations, therefore, the quality and detail of the current census appears to have eliminated any need for estimates of populations. If it is not possible to follow existing town, village and city boundary lines, other lines developed as part of the census data itself should be utilized. However, in those few counties where population is so sparse that no census breakdown of population within individual municipalities exists, the county board should rely on the use of the two-number district and their authority to alter the number of supervisors to insure that representation falls within constitutional limits.

Your third question asks:

“Does Wis. Stats., §59.03 (2) (b) require a county board to adopt a plan providing for a larger number of supervisors (but within the statutory maximum) if that plan violates fewer municipal boundary lines, than an alternate plan providing for fewer supervisors, assuming that both plans have the same (acceptable) percentage of deviation in population?”

There are, of course, a great many factors which affect whether or not a particular apportionment plan will ultimately be found acceptable. One of the variables available to assist county boards in achieving an equitable reapportionment which complies with the various requirements of sec. 59.03 (2) (b), Stats., is the ability of the board to alter the number of county supervisory districts. This power should be utilized to insure the most rationally designed plan possible. The “percentage of deviation” in population of each proposed district from the mean or theoretically ideal average district, is only one of several tests which are utilized to measure the quality of an apportionment effort. No one test can be said to accurately determine the validity of a plan under consideration.

Assuming that two different plans of apportionment were otherwise identical, sec. 59.03 (2) (b), Stats., would clearly

require that the county board adopt that plan which more closely adhered to existing town, village and city boundary lines. Furthermore, generally speaking, all else being equal, if a greater adherence to principles of equal representation as well as adherence to such boundary lines can be achieved by adjustments in the number of supervisors, it appears that the statute contemplates that the county board will attempt to adjust the number of supervisors so as to achieve those desired results.

As has so many times been pointed out by our courts, apportionment is essentially a legislative matter. The apportionment plan must not only be the most equitable practicable, but it must also be rationally designed. It represents, after all, an exercise of legislative judgment and a weighing of various priorities. Therefore, just as the courts have refrained from laying down any hard and fast rules dictating the degree of mathematical exactitude required in legislative apportionment, this office must refrain from dictating the extent to which county boards must utilize their ability to change the number of county supervisors to affect the legitimate goals of reapportionment.

Your last question asks:

“Same situation as #3, but the plan providing for fewer supervisors, while violating more municipal boundary lines, results in a smaller percentage of deviation in population?”

My response to your third question is obviously also largely applicable to this question as well. I would point out, however, that the principal purpose of reapportionment and the overriding consideration at all times is the assurance of equal representation. A particular plan should satisfy this as well as all the other statutory requirements of county apportionment set forth in sec. 59.03 (2) (b), Stats., if possible. However, where it becomes evident that an otherwise legitimate standard competes with the primary function of reapportionment, i.e., equality of voting power, then the course of action must be followed which favors the latter.

RWW:JCM

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*Juvenile Court—District Attorney—(Informal)*—Juvenile judge may admit or exclude district attorney in juvenile proceedings.

December 17, 1971.

GERALD C. NICHOL

*District Attorney, Dane County*

You have asked my opinion whether a juvenile court has the discretionary power to exclude the district attorney in juvenile proceedings.

Your question must be answered affirmatively. It is well established that juvenile proceedings are in the nature of a judicial investigation without adversary parties in the sense of an ordinary lawsuit. *In re Aronsen* (1953), 263 Wis. 604, 58 N.W. 2d 553. The procedure to be followed at a hearing is determined by the juvenile court judge. It may be as formal or informal as he considers desirable. Only such persons may be admitted to a hearing as the court shall find to have a direct interest in the case or in the work of the court. Sec. 48.25 (1), Stats.

Section 59.47 (11), Stats., imposes a duty upon the district attorney to "perform any duties in connection with juvenile court proceedings as the juvenile court judge may request." Section 48.04 (3), Stats., requires that "the district attorney shall perform any duties in connection with court proceedings as the judge may request."

In 1929, one of my predecessors indicated that it was not the duty of the district attorney to appear in juvenile cases unless requested to do so by the juvenile court. In contemplation of the children's code, these proceedings are not supposed to be of a criminal nature. The presence of the district attorney would give the appearance or impression of a criminal prosecution. 18 OAG 573.

Based on the foregoing, it seems fairly clear to me that the juvenile court has the discretion to admit or exclude the presence of the district attorney in juvenile proceedings.

RWW:WLJ

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*Criminal Prosecutions—Venue—(Formal)*—Substitute Amendment 1 to Assembly Bill 452, providing for statewide venue for certain sex crimes, is unconstitutional because of its conflict with Art. 1, sec. 7, Wis. Const.

December 20, 1971.

PATRICK J. LUCEY

*Governor of Wisconsin*

You have requested my opinion regarding the constitutionality of Assembly Bill 452 as amended by Assembly Substitute Amendment 1, a bill which provides in part for statewide venue in certain sex crimes prosecutions. Specifically, the pertinent portion of the bill states that:

“Where the offense is in violation of ss. 944.01, 944.02, 944.06, 944.10, 944.11, 944.12 and 944.17, it is only necessary that the state prove the event occurred in this state to establish venue.”

Article I, sec. 7, Wis. Const., provides that:

“In all criminal prosecutions *the accused shall enjoy the right* to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and in prosecutions by indictment, or information, *to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed*; which county or district shall have been previously ascertained by law.” (Emphasis added)

The right to be tried in “the county or district wherein the offense shall have been committed” is a personal one of the accused and may be waived only at his request. *Bennett v. State* (1883), 57 Wis. 69, 14 N.W. 912, 46 Am. Rep. 26. Neither the state nor an agent thereof in a criminal prosecution may waive this right. In *Wheeler v. State* (1869), 24 Wis. 52, a statute providing for a change of venue on motion of the district attorney was held an unconstitutional usurpation of the accused’s rights.

Over the years, the Wisconsin court has encountered some difficulty with that venue provision due primarily to the fact that the command is couched in terms of both county *and* district. What a county comprehends is obvious. Not so obvious is what may constitute a constitutionally valid district. The court has said in this regard that:

“The word ‘district’ here plainly means *something different* from a county; otherwise the word would be useless. In the case of *In re Eldred*, 46 Wis. 530, it was said that both words must be held to have a meaning and a use. If there may be a district with different boundaries from those of a county, why may not such district be smaller than a county, as well as larger? We see no good reason.” (Emphasis added) *Shaffel v. State* (1897), 97 Wis. 377, 380, 72 N.W. 888.

What that “something” is has never been precisely determined. Rather the court has been content to define “district” on a case by case basis. Among the conditions which have satisfied the court’s notion of a district for venue purposes are the following:

(1) *State ex rel. Brown v. Stewart* (1884), 60 Wis. 587, 19 N.W. 429. Crimes committed within 100 rods [later statutorily changed to  $\frac{1}{4}$  mile] of the boundary of county A were triable in County A. Such overlap into the next county constituted a valid district.

(2) *State v. McDonald* (1901), 109 Wis. 506, 85 N.W. 502. Crimes committed on a boundary water (such as Green Bay or Lake Winnebago) were triable in any county which abutted that water, those counties comprising a valid district.

(3) *State v. Pauley* (1860), 12 Wis. 599. Crimes such as where the victim is wounded in one county and dies in another, are triable in either of the counties.

(4) *Pamanet v. State* (1970), 49 Wis. 2d 501, 182 N.W. 2d 459. Crimes committed in Menominee County may be tried in Shawano County, the two counties comprising a single “district.”

The court has *never* sanctioned a scheme whereby the entire state would constitute a district within the venue provision of Art. I, sec. 7, Wis. Const. In order to sustain the constitutionality of A.B. 452, the court would have to so hold. This, in my opinion, requires a tortured construction of the word "district" and would effectively render the constitutional command meaningless.

It is, therefore, my opinion that the proposed statute is unconstitutional insofar as it attempts to create a statewide "district" for the trial of sex crimes.

RWW:SOT

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*Civil Rights—Liquor License—(Informal)—Restoration of civil rights under sec. 57.078, Stats., is not a "pardon" for the purposes of liquor and cigarette license statutes.*

December 22, 1971.

FRANK A. MEYERS

*Director of Operations, Division of Criminal Investigation*

You have requested my informal opinion regarding what effect, if any, sec. 57.078, Stats., has on the issuance or approval by the Department of Justice of intoxicating liquor and cigarette licenses or permits. Specifically, you ask whether the automatic restoration of civil rights to a convicted felon under sec. 57.078 can be substituted for the word "pardon" for purposes of the liquor and cigarette license statutes.

The Department of Justice may not issue a liquor or cigarette license or permit to an applicant who is not of good moral character. See secs. 176.05, 139.04 (1), and 139.37 (1), Stats. An applicant may be found not to be of good moral character if he has been convicted of a felony and has not been pardoned.

Those statutes are clear and specific. Either an applicant obtains a pardon or else the felony conviction may or shall be determinative of bad moral character. The legislature could have provided, as it did for nonintoxicating beverages under sec. 66.053 (1) (b), Stats., that a license may not be granted to a person convicted of a felony "unless such person has been restored to civil rights." Prior to 1949, sec. 66.053 (1) (b) exempted only those convicted felons who have been pardoned. After sec. 57.078, Stats., was created in 1947, the legislature deleted the word "pardon" and added "restored to civil rights" to sec. 66.053 (1) (b).

This change in the nonintoxicating beverage law has important meaning for the liquor law. The fact that no change regarding pardons was made to the liquor law in 1949, or at any subsequent time, is a clear legislative intent that pardoned felons could be considered to be of good moral character while felons who merely had their civil rights restored under sec. 57.078, Stats., could not be so considered. Furthermore, when secs. 139.34 (1) (c) 2 and 139.37 (1) (c) 2. of the cigarette license statutes were created by ch. 252, Laws of 1969, the standard of "pardon," and not "restored to civil rights" was used.

It is true that a pardon does restore civil rights. However, a pardon should not be confused with the automatic restoration procedure of sec. 57.078, Stats. A pardon is issued by the governor in his discretion. It is not automatic like sec. 57.078. Also, under the provisions of sec. 57.10, Stats., an applicant for a pardon must serve on the governor his own sworn statement, written statements by the judge and district attorney who tried the case concerning their views, and a certificate by the keeper of the prison stating whether the applicant conducted himself in a peaceful and obedient manner. The governor, equipped with these evaluations concerning the applicant, and any further investigations he may make regarding the applicant, then expresses his judgment on whether to grant a pardon. In a sense, a review has been made by several sources of the applicant's character. This is not true of the automatic restoration of civil rights procedure of sec. 57.078.

Therefore, it is my informal opinion that a convicted felon must obtain a pardon before he may be considered to be of good moral character for purposes of the intoxicating liquor and cigarette license statutes. The mere restoration of civil rights under sec. 57.078, Stats., is not a substitute for a pardon.

RWW:PAP

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*Charitable Solicitations—League of Women Voters—(Formal)*—The League of Women Voters of Wisconsin, Inc., and its local league organizations, fall within the definition of a “charitable organization” as defined in sec. 440.41 (1) (a), Stats., and, therefore, unless these organizations are “exempt persons” as described in sec. 440.41 (3), Stats., they must register with and submit annual reports to the Department of Regulation and Licensing as required by the provisions of sec. 440.41 (2) and (4), Stats. Section 440.41 (1) (a), construed.

December 23, 1971.

GEORGE GREELEY, *Secretary*

*Department of Regulation & Licensing*

You ask my opinion whether the League of Women Voters of Wisconsin, Inc., or any of its local league organizations, must comply with sec. 440.41, Stats., relating to the regulation of charitable solicitations. For the reasons hereinafter set forth, it is my opinion that they must, unless these organizations are “exempt persons” as described in sec. 440.41 (3), Stats.

The state league organization was incorporated as a non-stock, non-profit Wisconsin corporation under ch. 181, Stats., on April 11, 1968. In its Articles of Incorporation on file with the Secretary of State, the corporation’s purposes are set forth as being “to promote political responsibility through informed and active participation of citizens in government.”

A letter you received from the president of the corporation states that it is a volunteer organization which does not employ fund-raisers or bookkeeping personnel; that it does solicit contributions from non-members and that it and its local subsidiaries have been determined to be tax-exempt organizations by the Internal Revenue Service pursuant to 26 U.S.C. sec. 501 (c) (4).

The question here is whether the League is a "charitable organization" as defined by sec. 440.41 (1) (a), Stats.\* That section provides that a charitable organization includes "any benevolent, philanthropic, patriotic or eleemosynary person or one purporting to be such." The word "person" as used in this section includes all partnerships, associations and bodies politic and corporate. Sec. 990.01 (26), Stats.

This charity licensing law, which was enacted in 1961, has not yet been construed by our Supreme Court. Thus, we must examine sec. 440.41 (1) (a), Stats., in light of the generally accepted rules of statutory construction.

Since sec. 440.41 (10) (c), Stats., provides for penalties for violations of this section, it is clear that the charity licensing law is a penal statute. The general rule is that penal statutes must be strictly construed. 3 Sutherland, *Statutory Construction* (3rd ed.), sec. 5604. However, as our Supreme Court pointed out in *State v. Helmann* (1916), 163 Wis. 639, 643, 158 N.W. 286:

"\* \* \* That does not mean that such a statute should be so construed for the purpose of minimizing its effect; but be so construed to effect the legislative intent. The sole office of judicial construction of a statute is to give efficiency to the purpose of the lawmaking power."

Or, to state the rule another way, penal statutes, like any other, should be so construed as to effect the obvious legislative purpose; but they should be strictly construed to exclude from their penalties those acts which are not clearly within the legislative purpose. *State ex rel. Shinnors v. Grossman* (1933), 213 Wis. 135, 140, 250 N.W. 832.

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\*In construing this section, the term "League" includes both the parent state organization and its various local organizations.

I think it is undisputed that the legislative purpose behind sec. 440.41, Stats., is to ensure that funds solicited from the public for charitable purposes are not diverted to other uses. Sec. 440.41 (2) (a) 11., Stats. Therefore, the statute should be construed to effect this purpose.

The four adjectives used in sec. 440.41 (1) (a), Stats., are general and wide-ranging terms. Their use is entirely consistent with the legislative purpose, which is to encourage contributions to charity by making sure that such contributions are used for charitable purposes.

The New York courts, in construing a statute identical in wording to sec. 440.41 (1) (a), Stats., have held that not all the purposes of an organization need be charitable in order to have it come within the meaning and intent of such a statute. *Green v. Javits* (1957), 7 Misc. 2d 312, 166 N.Y.S. 2d 198, 201. Therefore, it is my opinion that if an organization has *any* purpose which can be defined as charitable, whatever other purposes it may have, it would be a "charitable organization" within the meaning and intent of sec. 440.41 (1) (a).

That then leads me to the determinative question in this opinion—whether any of the purposes of the League are "charitable" within the meaning and intent of this statute.

In sec. 701.10 (1), Stats., relating to charitable trusts, our legislature has defined the following as "charitable purposes" for which a charitable trust may be created:

"\* \* \* relief of poverty, advancement of education, advancement of religion, promotion of health, governmental or municipal purposes or any other purpose the accomplishment of which is beneficial to the community."

This broad definition expresses the legislative intent of favoring gifts to charity and of doing everything possible to sustain them. It is my opinion that sec. 440.41, Stats., embodies this same intent. Therefore, I feel it is proper to use the definition of "charitable purposes" found in sec. 701.10 (1), Stats., in construing sec. 440.41 (1) (a), Stats., under the rule of construction that statutes upon the same

matter or subject must be construed together. *State ex rel. Plowman v. Lear* (1922), 176 Wis. 406, 409, 186 N.W. 1014.

Applying this definition to the League's above-stated purposes, I have little difficulty in concluding that they fall within the category of being "beneficial to the community." IV *Scott on Trusts* (3rd ed.), secs. 374.4 and 374.5 and *Bogert, Trusts and Trustees* (2d ed.), sec. 378, pages 181-183.

Further support for this conclusion can be found by examining the language of 26 U.S.C. sec. 501 (c) (4), the Federal statute under which the League was granted tax-exempt status by the Internal Revenue Service. That subsection provides for an exemption as follows:

"Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes."

This subsection should be read with the provision in sec. 440.41 (3) (c), Stats., that civic organizations "which solicit contributions solely from their membership shall not be required to register with the department." Construed together, these two provisions mean that civic organizations which do solicit contributions from non-members, as the League does, are required to register with your department unless some other subsection of sec. 440.41 (3) specifically exempts them from such registration.

Section 440.41 (3), Stats., provides as follows:

"(3) EXEMPT PERSONS. The following persons shall not be required to register with the department:

"(a) Corporations organized under the religious corporations law, and other religious agencies and organizations, and charities, agencies, and organizations operated, supervised or controlled by or in connection with a religious organization; and

“(b) Educational institutions when solicitation of contributions is confined to its student body and their families, alumni, faculty and trustees.

“(c) Any charitable organization which does not intend to solicit and receive and does not actually receive contributions in excess of \$500 during any 12-month period ending December 31 of any year, provided all of its fund raising functions are carried on by persons who are unpaid for such services. However, if the gross contributions received by such charitable organization during any 12-month period ending December 31 of any year is in excess of \$500, it shall within 30 days after the date it has received total contributions in excess of \$500 register with the department under sub. (2). Fraternal, civic, benevolent, patriotic and social organizations which solicit contributions solely from their membership shall not be required to register with the department.

“(d) Persons requesting any contributions for the relief of any individual, specified by name at the time of the solicitation, if all of the contributions collected, without any deductions whatsoever, are turned over to the named beneficiary.

“(e) Any local, county or area division of a charitable organization supervised and controlled by a superior or parent organization, incorporated, qualified to do business, or doing business within this state, if the superior or parent organization files a registration statement on behalf of the local, county or area division in addition to or as part of its own registration statement. Where a registration statement has been filed by a superior or parent organization, it shall file the annual report required under sub. (4) on behalf of the local, county or area division in addition to or as part of its own report, but the accounting information required under sub. (4) shall be set forth separately and not in consolidated form with respect to every local, county or area division which raises or expends more than \$500 during any 12-month period ending December 31 of any year.”

From the information that I now have regarding the League's structure, it appears that both subsection (c) and subsection (e) might apply here.

Pursuant to subsection (c), the state organization and those of its local organizations which do not receive contributions in excess of \$500 during any 12-month period ending December 31 of any year, would be exempt from registration, provided all their fund raising functions were carried on by persons who were unpaid for such services.

Pursuant to subsection (e), the state organization, if it so desires, can file on behalf of its various local organizations as an addition to or a part of its own registration statement. If this procedure is followed, the local league organizations would be exempt from the registration requirements of sec. 440.41 (2), Stats. However, it should be pointed out that the state organization would then have the obligation of filing the annual report required by sec. 440.41 (4), Stats., on behalf of its local organizations.

Therefore, it is my opinion that the League of Women Voters of Wisconsin, Inc., and its local league organizations, fall within the definition of a "charitable organization" as defined in sec. 440.41 (1) (a), Stats. Thus, unless these organizations are "exempt persons" as described in sec. 440.41 (3), Stats., they must register with and submit annual reports to the Department of Regulation and Licensing as required by the provisions of secs. 440.41 (2) and (4), Stats.

RWW:SS

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*Microfilming—Authorized Records—(Formal)*—Registers of deeds in counties under 500,000 cannot utilize microfilming to comply with initial duty to record or file documents unless county board has elected to be controlled by ch. 228, Stats., as permitted by sec. 228.07, Stats., created by ch. 104, Laws of 1971. Sections 59.512 and 889.30, Stats., authorize such officer, with county board approval, to make microfilm copies of original records.

December 24, 1971.

DANIEL L. LAROCQUE

*District Attorney, Marathon County*

You have requested my opinion whether the provisions of sec. 59.512, Stats., regarding the microfilming of records of deeds, mortgages or other instruments, when authorized by the county board, permit the register of deeds, in a county under 500,000 population, to utilize the process of microfilming for filing and recording so as to create the primary or original record he is required to keep under sec. 59.51 (1), Stats.

I am of the opinion that they do not.

Chapter 228, Stats., does permit recording officers in counties of over 500,000 population to utilize microfilming as a means of filing or recording documents. That chapter is referred to in sec. 59.51 (1), Stats. However, the reference is not for the purpose of authorizing counties of under 500,000 to utilize the provisions of ch. 228 or otherwise rely solely on the microfilm process if they choose.

Chapter 104, Laws of 1971, created sec. 228.07, Stats., effective November 7, 1971, to provide that any county can, by county board resolution, elect to be controlled by ch. 228 Stats. Registers of deeds in counties which so qualify can utilize microfilming to comply with the initial duty to record or file documents. While ch. 228 does provide for a system of recording and copying to insure accuracy, preservation, identification, accessibility, inspection, copying and certification, counties should carefully investigate the benefits to be derived from contemplated use of ch. 228 before electing, since the cost of equipment and administrative procedure necessary to comply with the standards may be substantial.

Section 59.51 (1), Stats., provides in part:

“59.51 Register of deeds; duties. The register of deeds shall:

“(1) Record or cause to be recorded in suitable books to be kept in his office, correctly and legibly all deeds, mort-

gages, maps, instruments and writings authorized by law to be recorded in his office and left with him for that purpose, provided such documents have plainly printed or type-written thereon the names of the grantors, grantees, witnesses and notary. Any county, by county board resolution duly adopted, may combine the separate books or volumes for deeds, mortgages, miscellaneous instruments, attachments, lis pendens, sales and notices, certificates of organization of corporations, plats or other recorded or filed instruments or classes of documents as long as separate indexes are maintained. Notwithstanding any other provisions of the statutes, any county adopting a system of microfilming or like process pursuant to ch. 228 may substitute the headings, reel and image (frame) for volume and page where recorded and different classes of instruments may be recorded, reproduced or copied on the same reel or part of a reel. \* \* \*

Section 59.512, Stats., provides:

“59.512 Register of deeds; microfilming. Upon the request of the register of deeds, any county, by county board resolution, may authorize the register of deeds to photograph or microfilm records of deeds, mortgages or other instruments relating to real property in accordance with the requirements of s. 889.30 (3) and to store the original records within the county at a place designated by the county board. The storage place for the original records shall be reasonably safe and shall provide for the preservation of the records authorized to be stored under this section. The register of deeds shall keep a photograph or microfilm copy of such records in conveniently accessible files in his office and shall provide for examination of such reproduction in enlarged, easily readable form upon request. Compliance with this section satisfies the requirement of s. 59.51 (1) that the register of deeds shall keep such records in his office. The register of deeds may make certified copies reproduced from an authorized photograph or from the original records.”

Section 889.30 (1) and (2), Stats., as amended by ch. 69, Laws of 1971, provides:

“(1) The powers granted by this section shall not be exercised except with the prior approval of the county board of

supervisors evidenced by resolution duly adopted. The board shall approve the type of microform to be used in copying, including without restriction because of enumeration, reel, cartridge, microfiche, jacket, aperture card or camera card.

“(2) Any elected or appointed officer of any county or the court clerk of any court maintained in whole or in part by the county including all courts of record in the state may cause any of the public records, papers, documents, or court records listed in s. 59.715 and kept by him to be photographed, microphotographed or otherwise reproduced on film.”

Whereas sec. 228.01 and sec. 228.07, Stats., created by ch. 104, Laws of 1971, authorize county officers in counties of over 500,000 population and other qualifying counties “to file or record” by microfilming, and thus make a record, sec. 59.512 and sec. 889.30 (2), Stats., authorize county officers, when authorized by the county board, to “copy” records by the microfilm process. The copy is to be deemed an original “for all purposes” by reason of sec. 889.30 (3). That section, however, is concerned with documentary evidence and while the copy shall “stand in lieu of and have all the effect of the original document and shall be admissible in evidence,” it is not in fact the original record.

Section 59.512, Stats., provides that the register of deeds may microfilm “records of deeds, mortgages.” He must store the original records in a storage place designated by the county board. The microfilm is retained in his office to comply with the requirement of sec. 59.51 (1), Stats. Either the microfilm or the original record can be the basis of a certified copy.

RWW:RJV

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*Retirement Fund—Liberalized Benefits—(Formal)—Increased benefits to State employes and teachers retiring between the effective dates of Assembly Bill 1009 and Senate Bills 503 and 526 are not in violation of Art. IV, sec. 26,*

Wis. Const., should Senate Bills 503 and 526 pass in the form as pending before the legislature on the effective date of Assembly Bill 1009.

December 31, 1971.

PATRICK J. LUCEY

*Governor of Wisconsin*

You request my opinion on the constitutionality of 1971 Assembly Bill 1009 as amended by Assembly Amendment 1. The material part of such amended bill reads:

*“RETIREMENT LAW EFFECTIVENESS.* Every person who is a participating employe under chapter 41 of the statutes on the effective date of this law (1971), and every person who is an active member under chapter 42 of the statutes on the effective date of this law (1971), shall be entitled to receive all benefits, regardless of whether such benefits may be deemed prospective or retroactive, under chapters \_\_\_\_\_ (Senate Bill 503 or Senate Bill 526 or both), laws of 1971.”

The effective date for the liberalized retirement benefits proposed in Senate Bills 503 and 526 is July 1, 1972. Assembly Bill 1009 would permit members of the Wisconsin Retirement Fund, ch. 41, Stats., and the State Teachers' Retirement System, ch. 42, Stats., retiring between the effective date of Bill 1009 and the effective dates of Senate Bills 503 and 526 to receive the liberalized benefits of these later bills. Such liberalized benefits constitute extra compensation payable in the case of teachers and state employes, from the State Treasury.

Article IV, sec. 26, Wis. Const., reads in part:

“The legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract entered into; \* \* \*. This section shall not apply to increased benefits for teachers under a teachers' retirement system when such increased benefits are provided by a legislative act passed

on a call of yeas and nays by a three-fourths vote of all the members elected to both houses of the legislature.”

Assembly Bill 1009 was passed on a vote of 83 ayes to 15 noes in the Assembly and a vote of 30 ayes to 3 noes in the Senate, within the above quoted requirements of Art. IV, sec. 26, Wis. Const., permitting increased benefits for teachers who are no longer employed. Should Senate Bill 526 pass both houses by a three-fourths vote, the application of Assembly Bill 1009 to increase benefits for teachers would not violate Art. IV, sec. 26.

Article IV, sec. 26, Wis. Const., does not apply to retired members of the Wisconsin Retirement Fund other than State employes, since such section applies only to public officers and employes who are paid out of the State Treasury. *State ex rel. Singer v. Boos* (1969), 44 Wis. 2d 374, 171 N.W. 2d 307. The court so stated in *Singer v. Boos* at page 380:

“This court has repeatedly held that the constitutional prohibition in art. IV, sec. 26, applies only to public officers who are paid out of the state general fund. In the instant case, the increased pensions will be paid entirely out of county funds and thus the mandate of art. IV, sec. 26, is inapplicable.”

It is, therefore, only necessary to consider the effect of Art. IV, sec. 26, Wis. Const., on increased retirement benefits, as implemented by Assembly Bill 1009, to State employes and to teachers should Senate Bill 526 pass by less than a three-fourths vote. In *State ex rel. Thomson v. Giessel* (1952), 262 Wis. 51, 53 N.W. 2d 726 (hereinafter referred to as the first *Giessel* case), the court held unconstitutional additional annuity payments to teachers who were already retired. Section 42.535, Stats. (1951), made available additional retirement benefits to retired teachers by providing that every qualified retired teacher “shall be paid an additional \$1 per month for each year of teaching experience.” These additional benefits were granted only to teachers who retired before June 30, 1951. The section granting such additional benefits, sec. 42.535, became effective thereafter on July 19, 1951. The court stated on page 55 of *Giessel*:

“\* \* \* It is apparent, therefore, that this extra compensation is not granted until after the teaching contracts had not only been entered into but the teachers’ services had been performed and the teacher had ceased to serve. If it be true, then, that the additional benefits and annuities form extra compensation, which was not granted until after the contracts were entered into or until the services had been rendered, the prohibition of sec. 26, art. IV, Const., renders the legislation void.”

After discussing and disposing of various arguments directed to the issue that the “additional benefits” were not prohibited compensation, the court held at page 65:

“\* \* \* we conclude that the effect of sec. 42.535, Stats., is to grant extra compensation to public servants after the services are rendered and to public contractors after the contracts are entered into, in violation of sec. 26, art. IV of the state constitution. \* \* \*”

The court further indicated at page 64 that their holding would be similar were the benefits in question available to all public employes generally and not exclusively to teachers. The court there stated:

“It has not escaped the attention of the court that a decision sustaining an increase of benefits for already retired teachers would clear the way for legislation increasing benefits for all public employees, including judges, granted by the legislature from time to time after their retirement, and such a decision would be consonant with the selfish interests of the court. Nevertheless, as we read sec. 26, art. IV, Const., this would involve an exception to a clear and unmistakable command. If exceptions are to be made, they should not come from the legislature or the court but from those whose proper function it is to amend the constitution. \* \* \*”

There is an important distinction between the facts in the first *Giessel* case and the question raised by Assembly Bill 1009. In the first *Giessel* case the extra compensation was not granted until after the teaching contracts had not only been entered into but the teachers’ services had been performed and the teachers affected had already ceased to serve.

However, under the subject bill the increased benefits of Senate Bills 503 and 526 would be available to any State employe who is a "participating employe" or any teacher who is an "active member" on the effective date of the law created by Bill 1009. In *State ex rel. Thomson v. Giessel* (1953), 265 Wis. 558, 61 N.W. 2d 903 (hereinafter referred to as the second *Giessel* case), the court examined legislation passed after the first *Giessel* case which legislation provided for the rehiring of retired teachers on a standby basis and paying of compensation for such standby services. The court in the second *Giessel* case declined to consider the motives of the legislature in passing the legislation and found the contracts valid on their face.

In *State Teachers' Retirement Board v. Giessel* (1960), 12 Wis. 2d 5, 106 N.W. 2d 301, the court held that teachers had contractual rights in the retirement system and therefore the legislature could not use earnings of the State Teachers' Retirement System to pay a part of the cost of a study of public employe retirement systems. The court said at pages 9 and 10:

"The nature of the state teachers' retirement system and the rights of the members thereof have been the subject of four prior decisions of this court: *State ex rel. Dudgeon v. Levitan* (1923), 181 Wis. 326, 193 N.W. 499; *State ex rel. O'Neil v. Blied* (1925), 188 Wis. 442, 206 N.W. 213; *State ex rel. Stafford v. State Annuity & Investment Board* (1935), 219 Wis. 31, 261 N.W. 718; *State ex rel. Thomson v. Giessel* (1952), 262 Wis. 51, 53 N.W. 2d 726. The result of these decisions is that the teachers have a contractual relationship with the state and a vested right in the state teachers' retirement system. The contractual right and vested interest of the teachers in the retirement system are not disputed by the appellant, but it is argued the right of the teachers is not such as would exclude payment of the charge for the governor's study commission out of the earnings of the state teachers' retirement fund. It is argued that the plaintiff board is required to pay out funds according to law and appropriations from the earnings of the fund have been made by law each year, and therefore there is no vested right in the gross earnings of the fund. We do not agree.

The teacher's right, based on contract, extends to the retirement system. The earnings on investments, part of which represent contributions made by the teachers and part contributed by the state under the contract with them, constitute assets of the system. The reserve for contingencies set up by the board is a part of the system."

While I am aware of no case wherein the court has had the occasion to rule on the question of the contractual relationship of members of the Wisconsin Retirement Fund, the essential features of the teachers' fund are similar to the degree that I consider the reasoning of the *Giessel* Case as quoted just above to be persuasive in similar situations. The Wisconsin Retirement Fund and the State Teachers' Retirement System were both created as joint contributory, money-purchase systems. In both cases the contributions by the participants and municipalities are held in trust for members of the funds. Secs. 41.03 (1) (a) and 42.22 (5), Stats. Most features essential to the subject question are similar. I conclude, therefore, that members of the Wisconsin Retirement Fund have contractual and vested rights in their fund as it exists on the day of their retirement similar to those which the court has determined to be vested in teachers.

The final question which then arises is whether Assembly Bill 1009 provides additional benefits which are sufficiently certain to be vested in the members of the Wisconsin Retirement Fund or the State Teachers' Retirement System not yet retired, but who will retire before Senate Bills 503 or 526 are effective. While the terms which would account for the increased benefits are clearly set forth in Senate Bills 503 and 526, such bills are, of course, susceptible to amendment before passage. A legitimate argument could therefore be made that, since the bills are only pending in the legislative process, Assembly Bill 1009 provides no benefits definite enough to be contractual or vested. Therefore, it could be argued that Bill 1009 is nothing more than a promise to take care of employes by legislation implemented to raise benefits after their retirement and, consequently, the bills violate Art. IV, sec. 26, Wis. Const.

However, an act of the legislature is to be sustained if possible by any reasonable construction of the constitution or of the act itself and all doubts as to its validity are to be resolved in favor of the act. The courts could reasonably determine that the reference contained in Assembly Bill 1009 is Senate Bills 503 and 526 as they exist on the effective date of Bill 1009 and, therefore, that there is sufficient certainty, should the applicable portions of such bills pass in that form, to sustain Bill 1009 against the provisions of Art. IV, sec. 26, Wis. Const.

There are no clear legal precedents with respect to the question you pose. There are meritorious considerations to support both a determination of constitutionality as well as unconstitutionality of this legislation, and I am unable to predict with reasonable certainty what the courts would do if presented with a challenge to Assembly Bill 1009 should Senate Bills 503 and 526 become law. Under these circumstances, I believe it is appropriate to adopt the rule of statutory construction that a statute is presumed to be constitutional unless shown to be otherwise. It is, therefore, my opinion that Assembly Bill 1009 does not clearly violate Art. IV, sec. 26, Wis. Const., and would be upheld if challenged should Senate Bills 503 and 526 be enacted substantially as presently pending before the State Legislature

RWW:WMS

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*National Guardsmen—Special Counsel—(Formal)*—Senate Bill 363 would require that the Governor appoint special counsel to defend guardsmen for activity arising out of military duty.

December 31, 1971.

PATRICK J. LUCEY

*Governor of Wisconsin*

You have requested my opinion with respect to Senate Bill 363, which amends sec. 21.13, Stats., to delete the dis-

cretion now vested in the Governor in appointment of counsel for National Guardsmen who are prosecuted civilly or criminally for acts performed by such member while in his performance of military duty or in pursuance thereof. Your inquiry is specifically directed to the question of whether the requirement that the Governor appoint counsel requires that he appoint special counsel rather than appointing the Attorney General to defend such guardsmen.

The amendment to sec. 21.13, Stats., proposed in Senate Bill 363, retains the substantive language intact but leaves the Governor no discretion with respect to whether counsel should be appointed. This section has never been construed by the Wisconsin Supreme Court, and we are aware of no lower court determination which would aid in determining the meaning of the word "counsel" in this bill. Indeed, it has been only since 1962, when governmental immunity was terminated by the Supreme Court in *Holytz v. Milwaukee* (1962), 17 Wis. 2d 26, that there was any substantial exposure of liability to guardsmen.

The last sentence of sec. 21.13, Stats., provides that the costs and expenses of any such defense of a guardsman shall be audited by the Department of Administration and paid out of the State Treasury and charged to the special counsel appropriation in sec. 20.455. This provision is applicable only when special counsel is appointed, since the cost of defense of National Guardsmen by the Attorney General would be part of the normal Department of Justice operating budget. This language gives strong support to the conclusion that the initial legislative enactment of sec. 21.13 envisioned special counsel being appointed outside of state service.

It is, therefore, my opinion that the legislature intended, in passing Senate Bill 363, that it would require the Governor to appoint special counsel in every case when a National Guardsman is prosecuted by civil or criminal action for any act performed by such member while in the performance of his military duty or in pursuance thereof.

RWW:TLP

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*Public Records—Motor Vehicle Division—(Formal)—* Under sec. 19.21 (2), Stats., the right to examine and copy records of the Division of Motor Vehicles relating to the licensing and regulation of motor vehicle dealers, distributors and manufacturers under ch. 218, Stats., is not absolute although there is a strong public policy favoring public inspection. Access may be denied where the custodian determines that harm to the public interest outweighs the presumptive benefits to the public interest which would be accorded by disclosure and gives specific reasons therefor.

Where custodian in good faith determines disclosure should be made there is little likelihood that he could be held liable to third parties, especially where records are related to quasi-judicial or legislative rule-making functions.

December 31, 1971.

NORMAN M. CLAPP, *Secretary*

*Department of Transportation*

You have requested my opinion whether the Division of Motor Vehicles must grant access to the public under sec. 19.21 (2), Stats., to files which are directly or indirectly related to the licensing and regulation of motor vehicle dealers, distributors and manufacturers under ch. 218, Stats. Your letter states that:

“The public documents with which we are concerned are the unsolicited complaints which citizens and other entities make to our agency concerning their transactions or contacts of various kinds with automobile dealers. Some of these complaints deal with product quality and, therefore, reflect on the distributor or manufacturer.

“Each file contains the original complaint, the documents and records necessary to resolve the issue, including investigative reports of the enforcement officials involved and the final report resolving the complaint. Many of these files contain information which was given on a confidential basis to the investigators.

“We do know that a number of the original complaints were expressly provided in confidence to the Division. On

many others we feel there is a strong presumption that confidentiality is implied, but there is no showing of this on the record. All complaints are made without any statutory requirements incumbent upon the complainant, as best we can determine.”

Your first question is whether access for examination and copying must be accorded representatives of two private consumer organizations.

The reasons set forth in your letters and quoted above would not, in my opinion, justify withholding access to the requested files.

I am of the opinion that access for examination and copying must be accorded any member of the public, regardless of his motives, subject to the specific limitations contained in sec. 19.21, Stats., and the common-law limitations which existed prior to the adoption of sec. 18.01 (2), Stats., which is now sec. 19.21 (2), Stats.

*State ex rel. Youmans v. Owens* (1965), 28 Wis. 2d 672, 137 N.W. 2d 470; 58 OAG 67 (1969).

Since a custodian is required to give specific reasons in each case where a request for access is denied, and since the reasons must relate directly to the specific document or record sought to be inspected, a discussion of the general problem and court-established guidelines follows.

Section 19.21 (1), (2) and (4), Stats., provides:

“(1) Each and every officer of the state, or of any county, town, city, village, school district, or other municipality or district, is the legal custodian of and shall safely keep and preserve all property and things received from his predecessor or other persons and required by law to be filed, deposited, or kept in his office, or which are in the lawful possession or control of himself or his deputies, or to the possession or control of which he or they may be lawfully entitled, as such officers.

“(2) Except as expressly provided otherwise, any person may with proper care, during office hours and subject to

such orders or regulations as the custodian thereof prescribes, examine or copy any of the property or things mentioned in sub. (1). Any person may, at his own expense and under such reasonable regulations as the custodian prescribes, copy or duplicate any materials, including but not limited to blueprints, slides, photographs and drawings. Duplication of university expansion materials may be performed away from the office of the custodian if necessary.

“\* \* \*

“(4) Any person who violates this section shall, in addition to any other liability or penalty, civil or criminal, forfeit not less than \$25 nor more than \$2,000; such forfeiture to be enforced by a civil action on behalf of, and the proceeds to be paid into the treasury of the state, municipality, or district, as the case may be.”

In 54 OAG i, ix (1965) it is stated:

“\* \* \* The court [in *State ex rel. Youmans, supra*] further held that sec. 18.01 [now 19.21], defining public records, includes not only such books, papers and records as are required by law to be filed, deposited or kept by a public officer, but that the term ‘public records’ includes as well all written memorials made by a public officer within his authority where such writings constitute a convenient, appropriate, or a customary method of discharging the duties of his office. \* \* \*”

Insofar as state records are concerned, the definitions in sec. 16.80 (2) (a) and (b), Stats., are important and provide:

“(a) ‘Public records’ means all books, papers, maps, photographs, films, recordings, or other documentary materials or any copy thereof, regardless of physical form or characteristics, made, or received by any agency of the state or its officers or employes in connection with the transaction of public business and retained by that agency or its successor as evidence of its activities or functions because of the information contained therein; except the records and correspondence of any member of the state legislature.

“(b) ‘State agency’ means any officer, commission, board, department or bureau of state government.”

The files with which you are concerned are public records, relate to the duties of the Division of Motor Vehicles, and are open to examination and copying during office hours subject to limitation where the public interest in nondisclosure outweighs the strong public interest in full public access.

You do not claim nor have we been able to find any statute which would limit the right of access as to these records. You are aware that in another area of your responsibility a special statute, sec. 346.73, Stats., provides for confidential handling of written accident reports.

I am enclosing a copy of an opinion to the Secretary of the Department of Natural Resources, dated August 10, 1971, which is concerned with limitations on the right to inspect public records and includes a section on records received under a pledge of confidentiality. It is stated therein:

“I would suggest that the following criteria be considered, however, in deciding whether a particular pledge of confidentiality comes within the exception, and will, therefore, hold up in court. First, there must have been a clear pledge made. Second, the pledge should have been made in order to obtain the information. Third, the pledge must have been necessary to obtain the information.

“Finally, even if a pledge of confidentiality fulfills these criteria, thus making the record containing the information obtained clearly within the exception, the custodian must still make an additional determination in each instance that the harm to the public interest that would result from permitting inspection outweighs the great public interest in full inspection of public records. \* \* \*”

With respect to the files involved in your questions, no pledge was given by department officers or employes. An official pledge of confidentiality would not, therefore, be a proper reason to deny examination or copying.

There may be valid reasons, not stated in your letter, why the custodian of the records involved should deny access. The

reason for denial may vary from case to case. At pages 682-683 of *Youmans*, the court stated:

“We deem it unwise to attempt to catalog the situations in which harm to the public interest would justify refusal to permit inspection. It is a subject which had best be left to case-by-case decision.

“The duty of first determining that the harmful effect upon the public interest of permitting inspection outweighs the benefit to be gained by granting inspection rests upon the public officer having custody of the record or document sought to be inspected. If he determines that permitting inspection would result in harm to the public interest which outweighs any benefit that would result from granting inspection, it is incumbent upon him to refuse the demand for inspection and state specifically the reasons for this refusal. If the person seeking inspection thereafter institutes court action to compel inspection and the officer depends upon the grounds stated in his refusal, the proper procedure is for the trial judge to examine *in camera* the record or document sought to be inspected. Upon making such *in camera* examination, the trial judge should then make his determination of whether or not the harm likely to result to the public interest by permitting the inspection outweighs the benefit to be gained by granting inspection.

“In reaching a determination so based upon a balancing of the interests involved, the trial judge must ever bear in mind that public policy favors the right of inspection of public records and documents, and, it is only in the exceptional case that inspection should be denied. In situations, such as in the instant case, where inspection is sought of a number of documents, the ultimate decision after conducting the balancing test might be to grant inspection as to certain of the documents and deny it as to others. If a single record or document is sought to be inspected, and disclosure of only a portion is found to be prejudicial to the public interest, the trial judge has the power to direct such portion to be taped over before granting inspection.”

In *Beikon v. Emery* (1967), 36 Wis. 2d 510, 153 N.W. 2d 501, which was concerned with the refusal of a chief of police

to permit examination of a traffic citation by the attorney for the person involved, the court held that a specific reason must be given for each denial. Although no reason was given at the time, it was later contended that the reports were "confidential" and it was "contrary to the public interest" that the reports be made public. The court stated that these were legal conclusions and were not a substitute for specific reasons which might well have been available in that instance and must be given so that a court, if need be, may determine whether the reasons given would cause harm to the public interest that would outweigh the presumptive benefit to be derived from granting inspection.

In *Youmans*, the court stated that sec. 19.21, Stats., will be construed *in pari materia* with sec. 66.77, Stats., and that the policy guidelines for holding closed meetings set forth in sec. 66.77 (3), Stats., will be applicable to the question of confidentiality of records under sec. 19.21.

Section 66.77 (3), Stats., provides:

"(3) Nothing herein contained shall prevent executive or closed sessions for purposes of:

"(a) Deliberating after judicial or quasi-judicial trial or hearing;

"(b) Considering employment, dismissal, promotion, demotion, compensation, licensing or discipline of any public employe or person licensed by a state board or commission or the investigation of charges against such person, unless an open meeting is requested by the employe or person charged, investigated or otherwise under discussion;

"(c) Probation, parole, crime detection and prevention;

"(d) Deliberating or negotiating on the purchasing of public property, the investing of public funds, or conducting other public business which for competitive or bargaining reasons require closed sessions;

"(e) Financial, medical, social or personal histories and disciplinary data which may unduly damage reputations;

"(f) Conferences between any local government or committee thereof, or administrative body, and its attorney con-

cerning the legal rights and duties of such agency with regard to matters within its jurisdiction.”

### The (3) (c) Exception

Some of the records with which you are concerned may relate to violations of the criminal law. If a criminal prosecution has been commenced in which the record may be directly involved, the rules of criminal discovery or disclosure may apply to that record and the custodian should deny all access until he receives the prosecuting attorney's instructions regarding the record in question.

*State v. Miller* (1967), 35 Wis. 2d 454, 151 N.W. 2d 157; *State v. Chacon* (1971), 50 Wis. 2d 73, 183 N.W. 2d 84; Sec. 971.23, Stats.

Where no action has been commenced, but where prosecution is imminent (such as after the decision to prosecute has been made but the necessary papers have not yet been drawn up), the same course of action should be followed.

Where a record involves a potential criminal prosecution, but a determination to prosecute has not yet been made, several other factors might enter into a decision of whether or not to deny inspection. One such factor would be the amount of *time elapsed* since the receipt of the complaint or other information in the record relating to the criminal offense. As a general proposition, the longer the time that has elapsed, the less likely is there to be an overriding public interest in refusing inspection. Another important factor is the *probability* of criminal prosecution. The less probable the prosecution, then the less likely, again, that the public interest in non-inspection outweighs the public interest in free access to all public records. Another factor that may enter into the determination is whether there exists a *public need for information on a pressing public problem*, particularly when the problem is one of great importance. Another important factor is whether there is a substantial probability that inspection may *interfere* with the prosecution of the criminal violation. See discussion *infra* on interference with investigation of licensing or disciplinary proceedings.

The factors discussed above are illustrations of the kinds of factors that should enter into a custodian's decision as to whether to deny access on the grounds that the records relate to a potential criminal prosecution, and that the public interest in maintaining secrecy during the investigation outweighs the public interest in free access to all public records. They are intended as examples of practical considerations that a reviewing court may give weight to in an action to *mandamus* the records, and are not intended to be an exhaustive list of factors. Finally, these factors are suggested from a pragmatic rather than a legal viewpoint, and I do not claim any specific legal authority for the use of any particular factor.

### The (3) (e) Exception

The court has already spoken strongly on this exception in the *Youmans* case, and has placed great emphasis on the fact that damage to reputations must be "undue."

"We determine that this legislative policy of not disclosing data which may unduly damage reputations carries over to the field of inspection of public records and documents. The statutory word 'unduly' is significant. As applied to inspection it does not bar all inspection of public records and documents that might damage reputations, but requires a balancing of the interest of the public to be informed on public matters against the harm to reputations which would likely result from permitting inspection.

"In the instant situation the public interest to be served by permitting inspection is to inform the public whether defendant mayor has been derelict in his duty in not instigating disciplinary proceedings against policemen because of wrongful conduct disclosed in the report. If the report contains statements of persons having first-hand knowledge, which disclose police misconduct, the fact that reputations may be damaged would not outweigh the benefit to the public interest in obtaining inspection. \* \* \*" *State ex rel. Youmans v. Owens* (1965), 28 Wis. 2d 672 at 685.

The court did indicate, however, that protection against undue damage to reputations would be an appropriate rea-

son for denial of access to public records under some circumstances:

“\* \* \* On the other hand statements based upon hearsay or suspicion, or inconclusive in nature, would be of small public benefit if made public, and might do great harm to reputations.” *State ex rel. Youmans v. Owens, supra*, at p. 685.

The statements referred to in *Youmans* were sworn statements before a grand jury, and, consequently, it appears that the court realized that such statements would be given a great amount of credibility by the public; unsworn statements or complaints, which ordinarily carry much less credibility, may not constitute such a great danger to reputations as in the *Youmans* case.

It would appear then, that in a determination to deny access on the grounds that it would cause undue harm to reputation, the potential credibility of the document, in both a legal and a pragmatic sense, would be an important factor to consider as it relates to the amount of potential harm to reputation.

### The (3) (b) Exception

A very closely related exception to the requirement of free public access to public records raised by your letter involves

“\* \* \* licensing or discipline of any \* \* \* person licensed by a state board or commission or the investigation of charges against such person \* \* \*.” Sec. 66.77 (3) (b), Stats.

The Supreme Court, in the *Youmans* case, seems to have implied that where public access to records might interfere with an existing investigation or pending licensing or disciplinary proceeding, a custodian may validly deny inspection on that basis.

“No claim has been made that the investigation of the Waukesha police department is still continuing, or that inspection of the report would interfere with any contemplated disciplinary action.” *State ex rel. Youmans v. Owens, supra*, at p. 685.

Thus the court implies that interference with a contemplated disciplinary proceeding would be grounds for determining that the public interest in nondisclosure outweighs the public interest in free access to public records.

It is my opinion, however, that the mere existence of an investigation pursuant to such licensing or regulatory authority is not, by itself, sufficient grounds to deny access to public records. Rather, inspection should be denied only when it would substantially interfere with the carrying out of the investigation or licensing or disciplinary proceedings. Examples of such circumstances might be where inspection might disclose the identity of an informant or where a complainant fears retribution. Another circumstance where denial of inspection may be in the public interest is where premature disclosure of the contents may mean the loss of evidence or will cause the person or persons under investigation to flee the State.

One possible circumstance that is related to both the (3) (b) and (3) (e) exceptions is when charges are filed with an agency that may be malicious or false. In *Schier v. Denny* (1961), 12 Wis. 2d 544, 107 N.W. 2d 611, an action by a real estate broker for malicious prosecution against a person who had complained to the Wisconsin Real Estate Brokers' Board where charges were dismissed after hearing, the court stated at pages 550-551:

"After most careful consideration we have concluded that the public interest, of fostering the free filing of complaints with administrative agencies with respect to improper business or professional conduct without being subjected to reprisal in the form of damages exacted in a suit for malicious prosecution, outweighs the competing private interest of compensating a person whose business or profession has been injured by the malicious filing of unwarranted charges. In reaching such conclusion, we are not unmindful that the same reason advanced to support it would also be applicable to suits for malicious prosecution grounded on unsuccessful criminal prosecutions. However, we think there are distinctions existing between administrative-agency proceedings and criminal prosecutions that justify the difference in re-

sult. In the first place, arrest of the person is ordinarily a concomitant of a criminal prosecution. *Secondly, administrative agencies usually possess the power to hold a filed complaint confidential and not make public disclosure of the same until the agency has made a preliminary investigation and has determined that the same possesses some likelihood of being meritorious. If there are agencies which lack such power and discretion, the legislature can confer the same by appropriate legislation.* On the other hand, as soon as a criminal information or indictment has been filed in a court of record, it is a public record available to inspection and publicizing by anyone who cares to do so.

“Because of the conclusion so reached, we hold that, unless the proceeding instituted before an administrative agency causes the agency to take some action that directly interferes with the person or property of the party complained against, there can be no special damages recoverable in an action of malicious prosecution grounded on such proceeding.” (Emphasis added.)

It can be seen, from the sentences emphasized above, that the court has not determined whether administrative agencies in Wisconsin possess the power to deny access to filed complaints pending an initial determination that there is some likelihood of merit to them. My advice is that if a complaint is filed with the division that, on its face, provides a strong reason or reasons for believing that it is malicious or false, it would be proper to deny access to that complaint pending an initial investigation. Such investigation should then proceed at an accelerated rate. If evidence is uncovered showing that the complaint has some merit, then it should be treated as any other complaint. If, however, conclusive evidence of falseness or maliciousness is obtained, a final report to that effect should be prepared and inserted into the file and the matter be closed. Inspection of the complete file could then be permitted, including the original complaint and conclusion of the department.

The overriding policy dictates that most public records, including most filed complaints, will ordinarily be open to public inspection. That policy was succinctly expressed by the court in the *Youmans* case:

“\* \* \* the public interest to be served by permitting inspection is to inform the public whether defendant mayor has been derelict in his duty in not instigating disciplinary proceedings against policemen because of wrongful conduct disclosed in the report. \* \* \*” 28 Wis. 2d at 685.

Applied to the situation at hand, this means that the overriding public interest in free access to the records of your department is to provide the public, and any member thereof, the means to determine whether the division has adequately carried out its duties of regulation and licensing. Understandably, an agency may not welcome continual, close scrutiny into the everyday conduct of its affairs, but the work of the newly emerged public interest groups composed primarily of private citizens interested in protecting the consumer, the environment, the automobile driver, etc., has again demonstrated that such scrutiny can have a salutary effect on government, by providing impetus for stronger laws, by supporting agencies in their attempts at vigorous regulation in the public interest, by prodding other agencies into more vigorous action, and by counterbalancing the continual pressure of lobbyists representing the regulatees to which many agencies are exposed.

The reasons set forth in sec. 66.77 (3), Stats., are not all-inclusive insofar as sec. 19.21 (2), Stats., is concerned. At common law, certain other exceptions were recognized, including secrets of State such as diplomatic correspondence and certain police or prosecution records including reports of voluntary informers of crimes. 41 OAG 237 (1952). In *International Union v. Gooding* (1947), 251 Wis. 362, 372, 29 N.W. 2d 730, it is stated:

“It is enough to say that there are numerous limitations under the common law upon the right of the public to examine papers that are in the hands of an officer as such officer. Documentary evidence in the hands of a district attorney, minutes of a grand jury, evidence in a divorce action ordered sealed by the court are typical.”

The general reasons set forth in sec. 66.77 (3), Stats., however, are the primary bases upon which you should rely in determining specific reasons in each case should you

consider it necessary to deny a request for examination and copying. It is up to the custodian to determine and give specific reasons in each case of denial. It is up to the court to determine the worth of the specific reasons given where mandamus is sought.

Since the expressed legislative policy is weighted heavily in favor of free access and since sec. 19.21 (4), Stats., provides for a forfeiture for wilful denial of access, requests for examination and copying should be granted under reasonable regulations except in those cases where the custodian in good faith believes that disclosure would cause harm to the public interest which would outweigh the benefit to be derived from granting inspection.

These requirements place a great burden on the custodian in a department as large as yours and necessitate administrative controls as to filing methods and chain of responsibility so that prompt determinations may be made when requests for examinations are presented. In some cases requests are made to examine specific files. In other cases the request may be to conduct a search in a given area. Section 19.21 (2), Stats., contemplates that the citizens have the right to do either. It is suggested that files regarding which public inspection is questionable, if there are any, be "flagged." Where that is done, the secretary or other staff member can, upon request for examination, bring the matter to the attention of the custodial officer, who should make a determination at that time as to whether there are valid specific reasons why examination should be denied.

Your second question is whether the division is obligated to make a search of its records and supply the name, address and nature of complaints to a citizen.

The answer to this question is in the negative.

The custodian is not required by sec. 19.21, Stats., to make a search or compile a list or report. 52 OAG 8 (1963).

A search may be necessitated in connection with a request made under sec. 889.09, Stats., in connection with licensing matters, or documents required by law to be recorded or filed so that a certificate of nonfiling may be issued.

Section 889.08 (2), Stats., provides that both you as secretary and the head of the Motor Vehicle Division are legal custodians.

Searches can, of course, be made as a matter of accommodation or security.

Section 19.21 (2), Stats., grants any person the right to copy or duplicate any materials, *at his own expense*.

Any person may also, upon tender of the legal fee, require the custodian to furnish certified copies of official records under sec. 889.18, Stats.

It is my opinion that, where no fee is established by law, the custodian can ascertain and charge actual or a reasonably estimated cost of reproduction. 59 OAG 145, 147, 148 (1970).

Your third question is whether there is any legal liability on the part of custodial officers for permitting access to records which are not confidential by statute but which, if disclosed, might damage reputations.

As stated in *Youmans*, at pages 682-685, the fact that permitting examination might or would damage reputations is not a sufficient ground to deny access. It is only where the *custodian determines* that permitting examination would *unduly damage* reputation is it "incumbent upon him to refuse the demand for inspection and state specifically the grounds for refusal."

A custodial might in good faith determine that the benefits of permitting inspection outweighed the harmful effect on the public interest in permitting inspection even in a case where he was aware that certain parts of a document were false.

Since the legislative intent is heavily weighted in favor of permitting access, since sec. 19.21 (4), Stats., provides a penalty in the form of a forfeiture for unreasonable denial of examination, and since sec. 889.18 (3), Stats., provides an additional forfeiture for unreasonable refusal to make copies, it is difficult to conceive of a situation where a court would impose any civil liability upon a custodian who acted in good faith in permitting examination and copying.

Insofar as the records involved relate to the licensing functions of the division and may be the basis for an investigation and hearing as to whether motor vehicle dealers, distributors and manufacturers should be entitled to continued licensing, it can be argued that the division is engaged in quasi-judicial functions.

In *Schier v. Denny*, *supra*, at page 551, the court suggested that the commencement of an administrative-agency proceeding may be the date of filing of the citizen's complaint. The preliminary investigation period may, therefore, be a part of the proceeding before the administrative agency and absolutely privileged. In such case the privilege or immunity would extend to the agency as well as the complainant.

Certain of the files may relate to the exercise of the limited legislative power you possess. Investigations and hearings incident to the exercise of the power to promulgate rules and regulations under sec. 218.01 (5), Stats., are also privileged.

In *Baker v. Mueller* (1954), 127 F. Supp. 722, it was held that officials in the exercise of legislative or quasi-judicial duties, acting within their jurisdiction, are not liable for damages either for mistake, errors of judgment or corrupt conduct, and the fact that an officer acted maliciously could not be inquired into. The decision was largely based on *Wasserman v. Kenosha* (1935), 217 Wis. 223, 258 N.W. 857, which involved issuance and allegedly malicious and improper cancellation of a building permit. The *Wasserman* case was quoted with approval in *Bendorf v. Darlington* (1966), 31 Wis. 2d 570, 578, 143 N.W. 2d 449.

Good-faith acts of principal-State executive officers are accorded absolute privilege in the exercise of their duties. *Ranous v. Hughes* (1966), 30 Wis. 2d 452, 464, 465, 141 N.W. 2d 251.

*Ranous* was an action for libel by a school teacher against a school board member for publication of allegedly defamatory material. The court stated that while ordinarily a public officer is not liable in a private action for acts performed in

good faith within the scope of his authority, he may be held liable for injuries resulting from his torts. At pages 464-465, the court stated:

“\* \* \* It is a general rule that absolute privilege is accorded principal federal or state executive officers in the exercise of their duties. However, when considering the lower strata of executive officials such as defendant the majority of courts have concluded that such officials are not entitled to an absolute privilege, but only a conditional privilege, although there are authorities according absolute privilege to minor officials. \* \* \*” (Authorities cited in footnotes omitted.)

At pages 466-467, the court stated:

“In determining the scope of the privilege to be accorded public officials while acting in an executive or administrative capacity competing values exist: (1) Of insuring that government officials not to be deterred from performing their public duties in fear of being held individually liable for what they may say or publish, and (2) of protecting private citizens from having their private or professional reputations damaged by defamatory matter uttered or published by public officials. Giving due weight to these competing values, we feel that with respect to all but executive officers in the higher echelons of government the according of conditional privilege rather than absolute privilege is preferable. Therefore we conclude that school board members do not fall within the category of high ranking executive officials of government whose defamatory acts should be accorded absolute privilege. We also conclude, however, that the defense of conditional privilege is available to defendant.” (Authority cited in footnote omitted.)

The conditional privilege which protects lesser officials may be lost by abuse and the supreme court adopted the Restatement rule as to loss. At page 468 of *Ranous* the court stated:

“The Restatement further lists the four conditions which may constitute an abuse of the privilege, and the occurrence of any one causes its loss. These are: (1) The defendant

either did not believe in the truth of the defamatory matter or, if believing the defamatory matter to be true had no reasonable grounds for so believing (2) because the defamatory matter was published for some purpose other than that for which the particular privilege is given; (3) because the publication was made to some person not reasonably believed to be necessary for the accomplishment of the particular privilege; or (4) because the publication included defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the privilege is given." (Authorities cited in footnotes omitted.)

Legal custodians are also protected in good-faith execution of their duties by reason of the following statutes.

Section 165.25 (6), Stats., requires the attorney general, at the request of the department head and approval by the governor, to appear for and defend State officers and employees of departments charged with the enforcement of laws, in tort actions. Section 270.58 (1), Stats., provides that the State shall pay judgments taken against State officers and employees pertaining to carrying out of their duties where the court or jury finds that they acted in good faith.

Where a State officer is involved, the additional defense of lack of consent, by the state, to be sued would also be available. A suit against a State officer in his official capacity or for acts performed in his official capacity is a suit against the State.

*Kenosha v. State* (1967), 35 Wis. 2d 317, 323, 324, 151 N.W. 2d 36.

*Townsend v. Wisconsin Desert Horse Association and Wisconsin Exposition Department* (1969), 42 Wis. 2d 414, 424, 167 N.W. 2d 425.

*Chart v. Gutmann* (1969), 44 Wis. 2d 421, 426, 427, 171 N.W. 2d 331.

RWW:RJV

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*Salary Increases—University of Wisconsin—(Formal)*—Contracts between the Board of Regents and employes of the University were entered into on October 8, 1971, the date upon which the Board of Regents formally adopted its budget, and are subject only to subsequent funding by the State Legislature. Any payments prior to October 8, 1971, would violate Art. IV, sec. 26, Wis. Const. Sections 16.105 and 36.06 (1), Stats., also discussed.

Excerpt from the minutes of the regular meeting of the Regents of the University of Wisconsin held Friday, October 8, 1971.

The meeting reconvened at 10:00 A.M., with  
President Ziegler presiding.

President Weaver stated that the principal reason for meeting today is the matter of the 1971-72 biennial budget, and that we wish to present to the Board today the full annual operating budget for approval, conditional upon passage of the budget by the State Legislature. He stated that we are asking that our faculty salary rates for this year be approved, in order to establish the fact of our merit judgment, but that obviously the merit increases cannot be granted until the biennial budget is approved in the Legislature, and the federal freeze ended. He stated that it was his hope that the freeze limitation interpretations that will be made will permit partial or complete retroactivity. He also stated that it was important that the faculty promotions contained in the budget be approved.

Vice President Percy explained in considerable detail the "Highlights and Supporting Schedules", dated October 8, 1971 (copy on file with the papers of the meeting). He pointed out that under the details authorized in the conference committee bill, the budget would amount to \$322,700,000, or an increase of \$18,435,000. He pointed out that in the adjusted 1970-71 budget, we had a total of 17,252 positions authorized for the University, consisting of 7,400 academic staff, about 2,000 assistants and approximately 7,900 classified staff, and that in order to cover such things as increased supplies and expense, utility costs, increased civil service pay increases, etc., it has been necessary to ac-

tually reduce the number of positions authorized by 224, consisting of an increase of 117 in academic, a 153 decrease in assistants, and a decrease of 180 classified positions. With respect to the freeze, Vice President Percy pointed out that the President and Director McPhee had appealed to the Governor and the conference committee to retain in reserve the free-related funds identified by the Department of Administration, in order to cover the costs of increases that might later be permitted by the Council. He stated that the President and he would like to urge the Board to give special consideration to the matter of urging the Legislature to restore the freeze-related funds that were stripped out on the basis of some preliminary interpretation of the federal freeze in late August and early September, at which time they said that, if later rulings were made to allow relief to all or part of these faculty, ways should be found to support them.

Regent Pelisek stated that the Board is very concerned about the reaction of our faculty to the wage-price freeze, and the impact of that freeze upon our faculty and the morale of our faculty, and distributed a resolution (*EXHIBIT B* attached) and moved its adoption. The resolution was seconded by Regents Renk and Sandin. After a short discussion, the resolution was unanimously voted.

Vice President Percy continued his analysis of the budget document in some detail. The following resolution was moved by Regent Sandin and seconded by Regent Gelatt:

That subject to enactment of the State Legislature's Conference Committee budget for 1971-73 in substantially its present form, the University of Wisconsin Operating Budget for the fiscal year July 1, 1971 through June 30, 1972 in an estimated amount of \$322,788,873 (including the University Hospitals budget approved by the Board of Regents on May 21, 1971) and including salaries, fund allocations, second semester 1971-72 fee and tuition schedules (Schedule V) #, residence halls rates (Schedules A-4, A-5, A-6, A-7, A-8, D-4, D-5) #, departmental and division name changes, appointments, reappointments, changes of status\*, leaves of absence\*, resignations\*, emeritus designation\*, and

other personnel actions\* and program adjustments specified in and effected by the budget schedules presented to the Board and on file with the records of this meeting, be approved and that the University Administration be authorized to make necessary final accounting changes and such subsequent adjustments on Federal freeze-related items as may subsequently be authorized.

President Ziegler stated that he had reservations about some of the changes of status for some of the faculty and believed that Regents Nellen and Dahlstrom also probably have some reservations on these subjects.

The resolution was approved by roll call vote with Regents Fish, Gelatt, Kahl, Pelisek, Renk, Sandin, Walker, and Ziegler voting "Aye." Absent Regents Dahlstrom and Nellen.

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\*These actions to be considered effective at start of fiscal or academic year as appropriate or as otherwise specified, rather than awaiting biennial budget enactment. Related salary adjustments to be accomplished as appropriate depending upon Federal freeze interpretations.

#Included in the document entitled "Proposed University of Wisconsin 1971-72 Operating Budget, Highlights and Supporting Schedules", dated October 8, 1971, a copy of which is filed with the papers of this meeting.

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December 31, 1971.

JOE E. NUSBAUM, *Secretary*  
*Department of Administration*

You have asked for my formal opinion as to whether there would be a violation of Art. IV, sec. 26, Wis. Const., if the faculty of the University of Wisconsin were to receive salary increases for any period during the current biennium prior to the enactment of the State budget. The answer depends upon a determination of the date when the faculty contracts were entered into with the university. The State budget for the current 1971-73 biennium is in ch. 125, Laws 1971, which became effective on November 5, 1971.

Article IV, sec. 26, Wis. Const., provides in part:

“The legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services have been rendered or the contract entered into; nor shall the compensation of any public officer be increased or diminished during his term of office . . .”

Section 36.06 (1), Stats., provides:

“(1) The board of regents shall enact laws for the government of the university in all its branches; elect a president and the requisite number of professors, instructors, officers and employes, and fix the salaries and the term of office of each, and determine the moral and educational qualifications of applicants for admission to the various courses of instruction; but no instruction, either sectarian in religion or partisan in politics, shall ever be allowed in any department of the university; and no sectarian or partisan tests shall ever be allowed or exercised in the appointment of regents or in the election of professors, teachers or other officers of the university, or in the admission of students thereto or for any purpose whatever.”

A prior opinion of this office reported at 36 OAG 107 and dated March 22, 1947, concluded that a statute authorizing temporary salary increases to State civil service employes could not operate retroactively by reason of Art. IV, sec. 26, Wis. Const.

A more recent opinion reported in 54 OAG 63 and dated July 14, 1965, concluded that merit increases in salary for State employes in the classified service should be granted by departments in accordance with the new provisions of the classification and compensation plan for the 1965-67 biennium approved by the Joint Committee on Finance on June 30, 1965, with an effective date of July 1, 1965, without any further action by the legislature. The budget bill subsequently enacted by the legislature simply furnished the new appropriations needed by the State for the biennium, including its finding of classification and compensation plan approved by the Joint Committee on Finance. Implicit in the opinion is the conclusion that the action of the Joint Com-

mittee on Finance obligated the State to its classified employes prior to July 1 of the ensuing biennium.

Section 16.105, Stats., sets forth the procedure for adopting the classification and compensation plan. The respective roles of the director of the Bureau of Personnel, department heads, the Joint Committee on Finance and others is detailed in the statute. By way of contrast, the respective roles of those involved in the implementation of the University salary system is not found in the statutes. Section 36.06 (1), Stats., gives the Board of Regents the authority and responsibility to fix the salaries and the term of office of its professors, instructors, officers and employes. The long-standing legislative practice would include within this grant of power the authority to fix salary increases as well.

This office said the following in 55 OAG 92 (1966) at page 93:

“. . . Section 16.105 relates to the ‘classification and compensation plan.’ It has nothing to do with salaries or classification in the unclassified service.”

In the same opinion at page 101 the following was stated:

“It can be noted that Ch. 36, regulating the University of Wisconsin grants the board of regents the express power to *fix the salaries* and the term of office of its president ‘professors, instructors, officers *and employes*’. This language expressly includes all employes, whether classified or unclassified. Sec. 36.06 (1).”

The detail as to how university salaries become fixed comes from an examination of prior practices which have developed over the years.

A University faculty member is considered reappointed for the following year if he does not receive prior notice to the contrary from his employing department. The latest date by which nonreappointment notice normally can be given is March 1 in the case of an initial year appointee and earlier for longer term employes.

Usually, on or before March 1, the faculty member’s contract is considered renewed for the subsequent year and his

employing department determines, no later than June 30, and usually in early March, the conditions of his contract for the coming year including a formal salary recommendation. The salary recommendation is voted by the department, approved by the administration and included in the budget proposed for the following year. That budget is normally submitted to the Board of Regents no later than June of the previous fiscal year for concurrence and final action if a State budget has been passed by the legislature, or concurrence subject to funding upon passage of the State budget.

The essential steps involved in the adoption of the University faculty salary system are related to the budget process. The eventual payment of salary increases depends upon the actions of department chairmen, deans of colleges, the chancellor, the president, the Board of Regents and the State Legislature. However, it should be noted that the legislature does not fix the salaries of individual faculty members.

On or before June 28, 1971, pursuant to a directive of the University's central administration, department chairmen in conjunction with deans of colleges submitted their recommendations for the allocation of salary increases for the ensuing year, within the 3 percent limit set by the Joint Committee on Finance. They were incorporated in the budget process by the chancellor and president, and subject only to the formal approval of the Board of Regents and funding by the State Legislature.

Although the budget enacted for the current biennium does not contain funds for salary increases to cover the period of July 1 to November 13, 1971, this does not appear to be due to a change in the policy of the Board of Regents or State Legislature relating to these salary increases. The intervening factor was President Nixon's Executive Order No. 11615 of August 15, 1971, issued pursuant to the Economic Stabilization Act of 1970, Title II, Sec. 202-203 P.L. 91-379, commonly known as the "wage-price freeze." According to information contained in your letter of inquiry, it is acknowledged by all parties concerned that funding would have been provided by the legislature had it not been for a possible misapplication of this order.

Formal action of the Board of Regents in adopting its budget incorporating the new salary increases occurred on October 8, 1971, and salaries did not become fixed until that time. Section 36.06 (1), Stats., gives the authority to fix salaries to the Board of Regents, not department chairmen. Accordingly, payment of faculty salaries at the newly fixed rate for the period prior to the adoption of the budget and salaries by the Board of Regents on October 8, 1971, would violate Art. IV, sec. 26, Wis. Const. The resolution adopted by the Board of Regents is set forth immediately following this opinion.

There is no question that faculty members are employees of the Board of Regents, and that a contractual relationship exists. In *Butler v. The Regents of the University* (1873), 32 Wis. 124, 131, it was stated:

“ . . . We do not think that a professor in the university is a public officer in any sense that excludes the existence of a contract relation between himself and the board of regents that employed him, in respect to such employment. . . . ”

53 Am. Jur. 2d, *Master and Servant*, § 15 states the following in regard to the formation of the master and servant relationship:

“ . . . The relationship is a product of mutual assent, that is, of a meeting of minds expressed by some offer on the part of one to employ or to work for the other and an acceptance on the part of such other. No person can be subjected against his will to the full measure of the obligations which the law has attached to the contract of service. However, consent to the relation need not be written or even verbal; it may, and very often does, rest in the implication of circumstances. Proof of the existence of the relation can be made as fairly and fully by circumstantial evidence as it can by evidence which is direct. . . . ”

In an early opinion from this office reported in 10 OAG 1099 and dated November 18, 1921, the following reference is made to the manner of appointment:

“The members of the present instructional staff were appointed in the usual manner. Negotiations with the candi-

date for a position on the instructional staff were conducted by the chairman of the department concerned or by the dean of the college. The salary agreed upon by the candidate and the department in consultation with the dean of the college was with the approval of the president, entered upon the budget, along with the name and the rank of the candidate.

“Upon the recommendation of the president and adoption by the board of regents, those whose names appear in the 1921-1922 budget were appointed to serve at the salaries indicated opposite their names. It has not been customary for the regents to require formal acceptance of an appointment

...

“\* \* \*

“Under the facts and circumstances stated the budget constitutes an offer by the persons named therein to accept employment for the several salaries there named. The appointment made by the board of regents through the adoption of the budget and of the recommendations contained therein constitutes in the law an acceptance of those propositions and constitutes a contract between the parties.”

The process is essentially the same today, and I would concur with this reasoning of my predecessor.

In a communication subsequent to the initial request you asked me to include comment upon faculty promotional pay increases and women's equity pay adjustments intended to be retroactive to July 1, 1971. These pay adjustments were directly tied into the University's budget process along with the faculty salary increases previously discussed, and are all subject to the same effective date. Contracts were entered into on October 8, 1971, between the Board of Regents and employes of the University, subject to subsequent funding by the State Legislature. Any payments prior to that date would violate Art. IV, sec. 26, Wis. Const. Any payments are also subject to funding by the legislature, and such funding has not been provided for the period ending November 13, 1971.

RWW:APH

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*Merger—Filing Fees—(Formal)*—Under sec. 180.87, Stats., a foreign corporation which has merged into itself a domestic corporation may not take credit for the fees paid by the domestic corporation for capital authorization as a credit against the fee to be paid by the foreign corporation for capital invested in this State.

December 31, 1971.

ROBERT C. ZIMMERMAN

*Secretary of State*

You request my opinion concerning whether a foreign corporation, which has merged into itself a domestic corporation, can take credit for the fees paid by the domestic corporation for capital authorization as a credit against the fee to be paid by the foreign corporation for capital invested in this State. For reasons hereinafter set forth, it is my opinion that a foreign corporation is not entitled to such credit.

In 57 OAG 184 (1968), the then Attorney General advised you that previous fee payments made by a foreign corporation on its capital employed in Wisconsin could be credited to another foreign corporation into which it merged under sec. 180.87 (1) (j), Stats. After reviewing the legislative history of this subsection, the Attorney General found it significant that under the latest revision of that statute the filing corporation, in computing its credit, was not limited to the amount of capital on which it had previously paid a fee, but instead the filing corporation could include any capital on which a fee had previously been paid. Thus, the clear import of this language was that the filing corporation could include all of its capital upon which fees had previously been paid without regard to who actually paid such fees.

However a substantially different set of circumstances constitutes the basis for your present request. Rather than dealing with the merger of two foreign corporations, you are confronted with the problem of permitting a qualified foreign corporation, which merged into itself a domestic Wisconsin corporation, to take credit on its annual report filing fee for the fees paid on authorized capital by the domestic corporation.

Fees paid by domestic corporations and those paid by foreign corporations are based upon entirely different concepts. Domestic corporations pay fees based upon the total authorized capital, with such fees being paid at the time the articles of incorporation are filed and at the time of any subsequent amendment to the articles which increases the authorized capital. Sec. 180.87 (1) (a) and (b), Stats. Pursuant to these same subsections, domestic corporations pay their fees at the rate of one dollar per thousand, or part thereof, of authorized par value capital stock, and two cents per share for all authorized shares of no par value stock.

The handling of fees for foreign corporations is substantially different. First, foreign corporations pay a fee at the time of qualification with such fee being based upon the percentage of capital invested in the State of Wisconsin. Sec. 180.87 (1) (i), Stats. Each year at the time of filing of its annual report, a foreign corporation pays an additional fee if there has been an increase in the amount of capital so invested in this state. Sec. 180.87 (1) (j). Second, unlike that of domestic corporations, a foreign corporation's fee is based upon the capital paid in for par value stock which includes paid-in capital in excess of par value applicable to the issued shares of par value stock. The basis for valuation of no par value stock issued by a foreign corporation is the amount by which the entire property of the corporation exceeds its liabilities, but not less than ten dollars per share. The basis for these computations is set forth under sec. 180.813, Stats., especially under subsections (1) (j) and (k). This section is keyed into sec. 180.87 (1) (i), (j) and (k).

When two foreign corporations merge or when two domestic corporations merge, it is easy to justify a credit as explained in 57 OAG 184. The credit is being taken for the same type of fee which was arrived at by using an identical method of valuation. As described above, however, the merger of a foreign corporation and a domestic corporation has obviously different ramifications relative to any possible credit to be taken for filing fees.

When two domestic corporations merge, the legislature expressly has provided for a credit under sec. 180.87 (1) (c),

Stats. In fact, the conclusion contained in 57 OAG 184 was reached in large part because a contrary conclusion would have resulted in uneven treatment of merging corporations if a similar credit was not granted to foreign corporations. At the present time, there is no provision for a credit under the circumstances which you have described. Moreover, because of the greatly different concepts upon which such fees are paid, I do not consider that the failure to give a credit to a foreign corporation, which merges into itself a domestic corporation, results in uneven treatment.

My conclusion is further buttressed by the fact that your office apparently has administered sec. 180.87, Stats., consistent with the reasoning and conclusion in this opinion. Practical construction and interpretation of the law by any agency charged with the duty of applying such law is entitled to great weight and is often decisive. *Mednis v. Industrial Comm.* (1965), 27 Wis. 2d 439, 440, 134 N.W. 2d 416.

RWW:DPJ

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*County Supervisors—Election—(Formal)*—Although county supervisors are specified to be “county officers” in sec. 59.03 (2) (d), Stats., they are not “county officers” within the meaning of Art. XIII, sec. 1, Wis. Const., which provides “all state and county officers, except judicial officers” be elected at the November general election.

December 31, 1971.

THE HONORABLE, THE ASSEMBLY

By 1971 Assembly Resolution 22, you request my opinion as to whether county supervisors, who are specified to be county officers in sec. 59.03 (2) (d), Stats., must not therefore be elected on a partisan basis at the general election in November in accordance with Art. XIII, sec. 1, Wis. Const.

The answer to your question is “no.” The historical context in which Art. XIII, sec. 1, Wis. Const., was enacted

shows that the words "county officers," as used therein, were never considered to include county supervisors. This construction of that constitutional provision is not changed by a statute subsequently enacted. Such a change could be accomplished only by an amendment to the constitution.

Section 59.03 (2) (d), Stats., was repealed and recreated by ch. 20, Laws of 1965, to read, in part, as follows:

"(d) *Election and term of supervisors. Supervisors are county officers* and shall be elected for 2-year terms at the election to be held on the first Tuesday in April in even-numbered years and shall take office on the 3rd Tuesday in April of that year. . . ." (Emphasis added)

This provision was enacted as part of the statutory revision concerning county board representation which was motivated, in part at least, by *State ex rel. Sonneborn v. Sylvester* (1965), 26 Wis. 2d 43, 132 N.W. 2d 249. In that case, the court held that the then existing system of county board representation, set forth in sec. 59.03 (2), 1963 Stats., which provided that the board would be composed of town chairman and supervisors from villages and city wards, irrespective of population, was unconstitutional because it violated the equal-protection clause of the Fourteenth Amendment of the Federal Constitution and Art. I, sec. 1, Wis. Const.

Article XIII, sec. 1, Wis. Const., originally read simply as follows:

"SECTION 1. The political year for the state of Wisconsin shall commence on the first Monday in January in each year, and the general election shall be holden on the Tuesday succeeding the first Monday in November in each year."

However, the constitutional provision was subsequently amended in 1882, and presently reads:

"SECTION 1. The political year for the state of Wisconsin shall commence on the first Monday in January in each year, and the general election shall be holden on the Tuesday next succeeding the first Monday in November. *The first general election for all state and county officers, except judicial officers, after the adoption of this amendment*

*shall be holden in the year A. D. 1884, and thereafter the general election shall be held biennially.* All state, county or other officers elected at the general election in the year 1881, and whose term of office would otherwise expire on the first Monday of January in the year 1884, shall hold and continue in such offices respectively until the first Monday in January in the year 1885." (Emphasis added)

One effect of the 1882 amendment was to change the general election from an annual election to a biennial election. However, the amendment also clearly provided that "all state and county officers, except judicial officers" would be elected at the 1882 general election and at biennial general elections thereafter.

As will become evident in the course of the subsequent discussion of the above quoted statute and constitutional provision, no matter how positive be the statutory declaration in sec. 59.03 (2) (d), Stats., that members of the county board of supervisors are "county officers," the statute cannot now have the effect of bringing that office within the constitutional requirement that county officers be elected at the November general election, unless such officers were considered as within the meaning of the term "county officers" when those words were incorporated in Art. XIII, sec. 1, Wis. Const., by the 1882 amendment.

A certain measure of ambiguity regarding the nature of the office held by a member of a county board of supervisors has admittedly persisted from the time of the initial adoption of the Wisconsin Constitution to the present day. Some of the confusion concerning the office has undoubtedly been generated by the fact that specific questions relating to the status of supervisors have often arisen in reference to a particular statute. In such instances, of course, the language of the specific statute was a primary consideration, and, therefore, for some purposes and in certain contexts a supervisor was considered a county officer, while under other circumstances he would not be so considered. See 1 OAG 781 (1912); 4 OAG 957 (1915); 12 OAG 279 (1923); 14 OAG 51 (1925); 15 OAG 172 (1926); 19 OAG 268 (1930); 20 OAG 85 (1931); 25 OAG 48 (1936); 32 OAG 404 (1943); 47 OAG

32 (1958). Likewise, some uncertainty has probably resulted from the fact that although the Wisconsin Constitution does make a number of specific references to county boards of supervisors, it has remained largely silent as to the type of boards required and as to the method to be utilized in constituting such boards.

Nevertheless, although county boards have changed form a number of times because of the flexibility inherent in the fundamental law of our State, it will be noted that the organization of such boards with supervisorial districts, based principally upon minor political units or subdivisions of government within the county, was by far the dominant system from territorial days until such system was finally held unconstitutional in *State ex rel Sonneborn v. Sylvester, supra*. As the court points out at pp. 52-53 of that opinion:

“By the time our constitution was established in 1848 the state was divided into 29 counties, all of which had established a large board town-county government [consisting of the chairmen of the town boards] excepting Grant, Green, Iowa, Lafayette, and Sauk counties, which had adopted the small board or commission form [composed of three commissioners elected at large]. Thus, ‘At and prior to the time of the adoption of the constitution there existed considerable diversity in town and county government in the territory of Wisconsin.’ *State ex rel. Busacker v. Groth* (1907), 132 Wis. 283, 285, 112 N.W. 431. This diversity resulted in the enactment in the constitution by sec. 23, art. IV, that, ‘The legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable; . . .’ *Thus the type and method of composition of county boards was not resolved by the constitution* which also provided in sec. 22, ‘The legislature may confer upon the boards of supervisors of the several counties of the state such powers of a local, legislative and administrative character as they shall from time to time prescribe.’ (Emphasis added)

“In 1849 the new state legislature provided a town-county system which provided that towns were to be supervisorial districts but also provided for supervisors from cities. . . .”

It is hardly surprising that, upon the adoption of the constitution, the legislature would adhere to past practice and exercise the more generally accepted of the options it felt was available by electing to establish a supervisory system in each county which was based on representation from the various basic units of local government within such county. Under such a system the emphasis would logically be placed on the individual unit of government rather than the county government. As pointed out above, prior to the adoption of the constitution, the organization of most of the counties had been based on a system whereby election to *town* office was a prerequisite to county board membership, i.e., chairmen of the town boards were members of the county board *ex officio*. Under such circumstances, these town chairmen were essentially town supervisors who were given additional responsibilities and authority when acting jointly with other town supervisors, as a county *board of town supervisors*. Conceived in this context, they could only be considered as county officers in a very general sense. Furthermore, as pointed out in my March 24, 1971, opinion to the Joint Committee on Legislative Organization, on the matter of legislative reapportionment, town government in Wisconsin not only formed the basic fabric of local government prior to the adoption of our constitution in 1848, but also continued to play an intimate role in the early evolution of the law of municipal corporations in our State. At page 6 of that opinion the following is stated:

“The early importance of town government as a basic governmental unit is demonstrated by the fact that when the village of Milwaukee incorporated as a city in 1846 each of its wards were designated as ‘a separate township or town under the laws regulating town and county government’ and the three aldermen of each ward were *ex-officio* supervisors of such towns. Also, some of the early Wisconsin villages incorporated by special acts were joined to towns for state or county elections by virtue of such acts. *Jones v. Kolb* (1882), 56 Wis. 263, 267, 14 N.W. 177. Likewise, villages organized under such general laws as ch. 70, R. S. 1858, retained the right to vote at town elections.”

As might well be expected, the general and more persistent concept of the county board, as consisting of a number of individual local (town) supervisors sitting together as a county board of local supervisors, became no more difficult to apply to city wards and villages than it had been when the only supervisors sitting on the county board were town supervisors.

The foregoing legislative history indicates, in general, that although a member of a county board may have been considered to be a county officer in the broadest and more general sense of the term, he was not usually treated as a county officer by the territorial legislatures before the adoption of the Wisconsin Constitution, nor by legislatures during the early formative years after the adoption of the Constitution.

It should be noted, however, that by virtue of the provisions of ch. 129, Laws of 1861, for a relatively short period of time in the 1860's the election of supervisors in every county was based solely on the number of assembly districts within each county. During this period, in *State ex rel. Gill v. The Board of Supervisors of Milwaukee County* (1867), 21 Wis. \*443, the court considered the case of a supervisor who found he no longer resided in the district for which he had been elected because of changes in assembly district boundaries subsequent to his election. The question was whether such supervisor's office became vacant because he ceased to be an inhabitant of the local district "for which he shall have been elected or appointed, or within which the duties of his office are required to be discharged." Sec. 2, ch. 14, R. S. 1858. In light of the statutory provisions involved, the court held that the supervisor did not hold a local office in the sense that the incumbent must reside in the district until the end of his term, or forfeit his office, stating, at page \*447, "Every supervisor is emphatically a county officer."

Although the holding in this early decision obviously requires our careful consideration, it does not appear to dispose of the question you raise. First of all, the system under consideration in the *Gill Case*, *supra*, was not representative

of the usual type of board which generally existed in most counties from the first days of statehood up until the *Sonneborn* decision. It may be of some significance, in fact, that the assembly district system was abandoned shortly after this decision and that the county boards of all counties were reorganized and the system of county government changed by chs. 84 and 85, Laws of 1870, so as to provide that county board members would consist of town board chairmen and supervisors chosen from cities and incorporated villages. Moreover, the question before the court arose solely under the then current statutes, most specifically ch. 129, Laws of 1861, and did not involve any constitutional considerations. Thus, when similar questions have subsequently arisen, the case has generally been distinguished and an opposite conclusion reached, based on the substantial dissimilarities in the *statutory* language being considered in each instance. 1 OAG 781 (1912) ; 16 OAG 717 (1927) ; 32 OAG 404 (1943).

In considering whether county supervisors are among the "county officers" referred to in Art. XIII, sec. 1, Wis. Const., it is important to note that the same legislature and the same legislative act which submitted the above amendment of Art. XIII, sec. 1, to a vote, i.e., ch. 290, Laws of 1882, also proposed the amendment of Art. VI, sec. 4, Wis. Const. The adoption of the latter amendment had the effect of altering the first sentence of that constitutional provision in the following manner:

"SECTION 4. Sheriffs, coroners, registers of deeds,~~and~~ district attorneys, and *all other county officers except judicial officers*, shall be chosen by the electors of the respective counties,~~---once in every two years. ,---as often as vacancies shall happen.~~ \* \* \*

An additional sentence was also added to the end of this section, which provided that vacancies in such county offices would be filled by appointment.

In view of the contemporaneous nature of both of the above amendments and the obvious similarity of language, it is quite reasonable to conclude that the term "county officers" may have been used in the same sense in both constitutional provisions. It is, therefore, appropriate to consider

the manner in which this term, as used in Art. VI, sec. 4, Wis. Const., has been treated by our Supreme Court.

In *State er rel. Williams v. Samuelson* (1907), 131 Wis. 499, 111 N.W. 712, the court was confronted with the question as to whether a county supervisor of assessments was a "county officer" within the terms of Art. VI, sec. 4, Wis. Const. In concluding that such officer did not fall within the meaning of that constitutional provision, the court pointed out that a person may be considered a county officer in a broad general sense when at the same time he could not be viewed as a "county officer" in the restrictive sense in which those words are to be taken in interpreting Art. VI, sec. 4, Wis. Const. Thus, the court states, at pp. 502-504:

"Whether the office here alleged to be usurped is strictly a county office or not, it quite clearly pertains to a county, within the meaning of the law. The name of the office is 'county supervisor of assessment,' and the duties incident thereto are confined to and extend throughout the county. In the broad general sense of the term, the office is a county office.

" . . .

"Conceding for the purposes of the discussion that in the broad, most comprehensive meaning of the term 'county officers' a county supervisor of assessment would be included therein, the ultimate question is whether the language is to be taken in that sense or in a restricted sense excluding such officers."

The conclusion of the court in reference to the question under consideration appears at page 509:

"In determining whether the words 'all other county officers' were used in the constitution in their particular sense, the affirmative is suggested at once by the rule of *noscitur a sociis*. Several but not all of the principal heads of county government required to have their offices at the county seats and ordinarily in the building provided for that purpose are mentioned, followed by the term 'all other county officers except judicial officers.' In that we have a very strong indication that minor officials not usually thought of when

the term 'county officials' is used were not intended to be included, but only sheriffs, coroners, registers of deeds, and the like. Such indication is emphasized, as we shall see, with striking significance by the conditions existing at the time of the formation of the constitution and at the time sec. 4, art. VI, was amended into its present form, and the way the subject has always been treated by the legislature as we have heretofore seen."

And, at page 512:

"Without further discussion we are constrained to hold that *the term 'all other county officers' was used in the instance in question in harmony with the statutory division of officers into state, county, and town officers existing at the time of its incorporation into the fundamental law. . . .*" (Emphasis added)

In view of the foregoing statements of the court emphasizing the importance of historical perspective in determining whether a particular office is a "county office" in the constitutional sense, it appears imperative to consider more specifically how the office of supervisor was viewed immediately prior to and after the 1882 amendment to Art. XIII, sec. 1, Wis. Const. A good indication of the character of the office, at least in the minds of the contemporary legislatures, is reflected by the laws which they adopted. These acts constitute a contemporaneous legislative construction of this constitutional provision and as such should be accorded great defense. *Payne v. City of Racine* (1935), 217 Wis. 550, 259 N.W. 437; *State v. Johnson* (1922), 176 Wis. 107, 186 N.W. 729. As previously stated in 57 OAG 45 (1968) at page 47:

". . . It is presumed that words used in a constitution are to be given the natural and popular meaning in which they were usually understood by the people at the time of adoption. *Payne v. Racine* [*supra*, p. 555], *B. F. Sturtevant Co. v. Industrial Comm.* (1925), 186 Wis. 10, 19, 202 N.W. 324. In order to discover the intent of the framers of the constitution, reference may be had to other constitutional provisions, history of the times, state of the contemporary society, and prior well known practices. *State ex rel. Zimmerman v. Dammann* (1930), 201 Wis. 84, 89, 228 N.W. 593. However,

such constitutional language is to be construed in the light, not only of the conditions prevailing at the time of the adoption of the constitution, but also with reference to the changed social, economic, and governmental conditions and ideals of the present time. *Borgnis v. Falk Co.* (1911), 147 Wis. 327, 349, 133 N.W. 209.”

Much of the legislation pertinent to the present question was previously cited in 14 OAG 51 (1925) as supporting the conclusion that supervisors are not county officers under the provisions of Art. VI, sec. 4, Wis. Const., and therefore not governed by its provisions which establish two-year terms for county officers. At the time of that opinion, as at present, sec. 59.03 (1) (b), Stats., provided for a four-year term of office for Milwaukee supervisors. The following discussion of legislative history, appearing at pp. 54-55 of the opinion, appears appropriate here:

“In the revised statutes of 1878 the following provisions occur:

“SECTION 662. Every ward or part thereof of any city, and every incorporated village or part thereof, shall be represented in the county board of supervisors \* \* \* by one supervisor, who shall be elected annually \* \* \*.”

“SECTION 663. The county board of supervisors shall consist of the chairman of each of the several towns, and the supervisor of each ward, and part of ward of every city, and of each incorporated village, and part of such village situated in the county.’

“\* \* \*

“It is significant to note that the sections referred to, set forth above, are contained in ch. 36, Stats., which is headed ‘OF THE COUNTY BOARD.’ The following section is contained in ch. 37, R.S. 1878, and is headed ‘OF COUNTY OFFICERS’:

“SECTION 698. At the general election in the year one thousand eight hundred and seventy-eight, and biennially thereafter, there shall be elected in each county, for a regular term, the following county officers, viz.: a county clerk,

treasurer, sheriff, coroner, clerk of circuit court, district attorney, register of deeds, surveyor, and in the year one thousand eight hundred and seventy-nine and biennially thereafter, a county superintendent of schools in each superintendent district thereof, \* \* \*. The regular term of office of all county officers above named shall commence on the first Monday of January next succeeding their election, and continue two years; but each such officer including those now in office, shall hold his office until his successor is qualified.'

"This, then, shows the legislative conception in 1878, which was just prior to the adoption of the amendment. The county officers who were conceived to be such were included by the legislature in the section above set forth. *Since supervisors were not included, it would appear they were not considered county officers.* The amendment which provides for the election every two years of 'all county officers' was passed by the legislature in the year 1881. It was also passed again by ch. 290, Laws 1882, and was submitted to the people and ratified by them in November, 1882. (Emphasis added)

"Proceeding now to a consideration of the legislative enactment subsequent to the constitutional amendment, it appears that the same conception of county officers was entertained. By ch. 111, Laws 1883, the following provision was enacted:

" 'The county board of supervisors shall consist of the chairman of each of the several towns and the supervisor of each ward and part of ward of every city, and of each incorporated village and part of such village situated in the county; \* \* \* nor shall any county officer, or deputy county officer be eligible to any office named in this section; providing nothing herein shall affect the power of the county clerk under section 665 of the revised statutes.'

"Here, then, is a very clear statement of the legislative conception as to whether or not supervisors were county officers. This law was passed by the legislature convening immediately after the adoption of the amendment. Many of the members were undoubtedly members of the legislatures

which had passed the amendment. *It clearly shows that, for the purpose of the amendment supervisors were not considered county officers.*" (Emphasis added)

Furthermore, by the time of the 1882 constitutional amendments, elections for members of the county board were generally held in the spring. Thus, sec. 782, R. S. 1878, provided that town supervisors, including the town chairman who would sit on the county board, would be elected at the annual town meeting held on the first Tuesday of April. Similarly, secs. 871, 875 and 882, R.S. 1878, when read together, provided that supervisors from villages would be chosen at the annual charter elections held on the first Tuesday of May in each year to "represent the village in the county board." Likewise, sec. 663, R.S. 1878, provided that electors from cities and villages would select supervisors "at the same time and in the same manner as city and village officers are elected." I consider it significant that the constitutional amendments of 1882 caused little, if any, alteration in the provisions of these statutes, and that the law generally continued to provide for the spring election of supervisors. It was ch. 178, Laws of 1883, in fact, that authorized every incorporated village or city, not existing under special charter, to change the time for holding the annual elections "from the time now fixed by law to the first Tuesday of April in each year." Likewise, when the 1874 special charter of the City of Columbus was amended at about the same time, by ch. 181, Laws of 1883, it continued to provide for the spring election of "one supervisor to represent his ward in the board of supervisors of Columbia County."

In light of the foregoing, it is quite evident that the legislature did not conceive of supervisors of county boards as being county officers within the meaning of Art. XIII, sec. 1, Wis. Const., and did not intend that the 1882 amendment to that provision require the election of county supervisors at the November general election. Since the purpose of the construction of a constitutional amendment is to give effect to the intent of its framers and of the people who adopted it, *Kayden Industries, Inc. v. Murphy* (1967), 34 Wis. 2d 718, 150 N.W. 2d 447, the fact that supervisors are now desig-

nated as county officers under the provisions of sec. 59.03 (2) (d), Stats., is not controlling.

RWW:JCM

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*Highway Debt Limitation—Bonding Authority—(Formal)*—The continuing appropriation provided under sec. 20.866 (2) (ur), 1969 Stats., was limited by its terms to \$40,300,000. Section 20.002 (1), Stats., does not provide additional bonding authority to satisfy the requirements of sec. 18.04 (2), Stats. Section 84.51 (2), Stats., is an expression of legislative intent, but does not constitute an appropriation and is not the basis for additional bonding authority.

December 31, 1971.

NORMAN M. CLAPP, *Secretary*

*Department of Transportation*

You requested my opinion as to whether the continuing appropriation provided under sec. 20.866 (2) (ur), Stats., carries over after July 1, 1971, in the absence of a budget for fiscal year 1971-72. Your question was prompted by a desire to determine whether the State Bond Board had authority to arrange for the issuance of additional bonds for the purposes stated in said section prior to the enactment of the new budget.

Section 20.866 (2) (ur), Stats., provides:

“(ur) Transportation; accelerated highway improvements. As a continuing appropriation from the capital improvement fund, the amounts in the schedule to acquire, construct, develop, enlarge, or improve state highway facilities as provided, by ss. 84.06 and 84.09. The state may contract public debt in an amount not to exceed \$40,300,000 for this purpose.”

This continuing appropriation is set forth in the budget in sec. 20.005 (2), Stats., on page 344 of the 1969 Statutes as follows:

"20.866 Public debt

\* \* \*

(2) CAPITAL IMPROVEMENTS

\* \* \*

(ur) Transportation	Source	Type	1969-70	1970-71
accelerated highway	BR	C	40,300,000	0
improvements				

\* \* \*"

Section 20.001 (3), Stats., lists four basic types of appropriations: annual appropriations, biennial appropriations, continuing appropriations and sum sufficient appropriations. A continuing appropriation is specifically defined as follows under sec. 20.001 (3) (c), Stats.:

"(c) *Continuing appropriations.* Continuing appropriations, indicated by the abbreviation 'C' in s. 20.005, are appropriations which are expendable until fully depleted or repealed by subsequent action of the legislature. The appropriations for any given year shall consist of the previous fiscal year ending balance together with the revenues received or new appropriation authority granted under ss. 20.100 to 20.899 during the current fiscal year. Dollar amounts shown in the schedule under s. 20.005 represent the most reliable estimates of the amounts which will be expended during any fiscal year, but shall not be limiting. Continuing appropriations are indicated in ss. 20.100 to 20.899 either by the introductory phrase, 'as a continuing appropriation' or by the introductory phrase 'all moneys received from'."

The funds appropriated under sec. 20.866 (2) (ur), Stats., are acquired under the authority of sec. 18.04 (2), Stats., which provides:

"(2) The board shall authorize public debt to be contracted and evidences of indebtedness to be issued therefor up to the amounts specified by the legislature to acquire, construct, develop, extend, enlarge or improve land, waters, property, highways, buildings, equipment or facilities for

the classes of public purposes specified by the legislature as the funds are required. Said requirements for funds shall be established by that department or agency head having program responsibilities for which public debt has been authorized by the legislature.”

The State Bond Board may contract State debt only up to the amounts specified by the legislature. The legislature has specified under sec. 20.366 (2) (ur), Stats., that the “. . . state may contract public debt in an amount not to exceed \$40,300,000 . . .” This amount was borrowed in full through the following bond issues:

June 1970	\$11,500,000
September 1970	10,000,000
January 1971	3,000,000
April 1971	5,000,000
July 1971	10,800,000

In fiscal year 1969-70 only \$9,425,276.98 was actually expended from the \$11,500,000 of borrowed funds. In fiscal 1970-71 another \$17,219,305.91 was expended. As of July 1, 1971, there were unexpended funds of \$2,855,417.11 available plus bonding authority for an additional \$10,800,000.

Prior to the passage of a budget for fiscal year 1971-72, there were not any new appropriations by the legislature and hence there was not any authority for the State Bond Board to contract additional state debt for these purposes once the specified limit had been met.

A continuing appropriation is the type of appropriation which may be expended until fully depleted, even if it is expended in succeeding fiscal years following the fiscal year of appropriation. The \$40,300,000 appropriation was authorized as a continuing appropriation by the legislature for fiscal 1969-70. The bonding authority was exhausted through bond issues of \$11,500,000 in fiscal 1969-70, \$18,000,000 in fiscal 1970-71, and \$10,800,000 in fiscal 1971-72. Once these funds were expended, no additional funds could be contracted for in the absence of a new appropriation authorizing the issuance of additional bonds.

In this instance we are not concerned with a situation where the source of funds is a continuing receipt of revenues which are paid into the general fund and appropriated therefrom for certain specified purposes.

You have called my attention to sec. 84.51, Stats., which provides:

“84.51 Construction of state highways. (1) The highway commission, with the approval of the secretary of transportation and the governor subject to the limits of s. 20.866 (2) (ur) may direct that state debt be contracted for the construction of highways as set forth in sub. (2) and subject to the limits set herein. Said debts shall be contracted in accordance with ch. 18.

“(2) It is the intent of the legislature that state debt not to exceed \$200,000,000 for the construction of highways be appropriated over a six-year period except that no funds shall be used for the construction of the proposed Bay freeway [and] except that no funds shall be used for the ‘Augusta Bypass’ project in Eau Claire county. Nothing in this section shall be construed so as to allow the redevelopment of state trunk highway 83 in Washington and Waukesha counties. U.S. numbered highway 16 from Tomah to the interchange with I 90 east of Sparta shall be retained as part of the state highway system in the same route as in use on November 1, 1969.”

This section provides for an appropriation subject to the limits of sec. 20.866 (2) (ur), Stats., and that the debt shall be contracted for in accordance with ch. 18 of the Wisconsin Statutes which relates to bonding for public purposes. Although sec. 84.51 (2), Stats., expresses a legislative intent that \$200,000,000 will be appropriated for the construction of highways over a six-year period, the subsection itself does not constitute an appropriation and cannot be the basis of additional borrowing authority beyond the \$40,300,000 actually authorized and appropriated under sec. 20.866 (2) (ur), Stats.

You also have called my attention to sec. 20.002 (1), Stats., which provides:

“20.002 General appropriation provisions. (1) EFFECTIVE PERIOD OF APPROPRIATIONS. Unless otherwise provided appropriations shall become effective on July 1 of the fiscal year shown in the schedule under s. 20.005 and shall be expendable until the following June 30. If the legislature does not amend or eliminate any existing appropriation on or before July 1 of the odd-numbered years, such existing appropriations provided for the previous fiscal year shall be in effect in the new fiscal year and all subsequent fiscal years until amended or eliminated by the legislature.”

I do not believe this section is applicable under the instant circumstances, but a discussion of the section nevertheless appears to be in order.

The first sentence of that section does not apply to a continuing appropriation, since a continuing appropriation is expendable until fully depleted and may be expended in succeeding fiscal years following the fiscal year of appropriation. A continuing appropriation does not have to be expended by June 30 of the fiscal year of appropriation.

The second sentence applies to a continuing appropriation in this manner. The existing appropriation provided for the previous fiscal year remains in effect in succeeding fiscal years until amended or eliminated by the legislature. Therefore, in the absence of a new budget, the appropriation for the previous fiscal year would be in effect for the succeeding fiscal year.

If the provisions of sec. 20.002 (1), Stats., were to apply in the instant case, the appropriation for the previous fiscal year of 1970-71 which would remain in effect for fiscal year 1971-72 would be the difference between \$40,300,000 and the amount actually expended in fiscal year 1969-70. This is because the statutory definition of a continuing appropriation provides that the appropriation for any given fiscal year shall consist of the previous fiscal year ending balance plus any new appropriation authority granted in the current fiscal year. This difference would be in addition to the unexpended portion of the \$40,300,000 remaining as of July 1, 1971.

It could be argued that the appropriation for fiscal year 1970-71 was zero, because that amount appears in the schedule under sec. 20.005 (2), Stats., on page 344 of the 1969 Wisconsin Statutes. However, as pointed out in sec. 20.001 (3) (c), Stats., and the introductory paragraph to sec. 20.005 (2), Stats., the tabulations set forth in sec. 20.005 (2), Stats., represent the most reliable estimates of the amounts which will be expended during any fiscal year *from* the continuing appropriations established in subsecs. 20.100 to 20.899, Stats. Accordingly, sec. 20.005 (2), Stats., did not establish the continuing appropriation under discussion; that was established under sec. 20.866 (2) (ur), Stats.

The more precise question then is whether sec. 20.002 (1), Stats., provides additional bonding authority to satisfy the requirements of sec. 18.04 (2), Stats. I am of the opinion it does not.

The last sentence of sec. 20.866 (2) (ur), Stats., is controlling. It authorizes the contracting of public debt for the purpose stated therein up to a limit of \$40,300,000.

Section 20.002 (1), Stats., cannot be relied upon as authority for exceeding that limit. That section was enacted prior to the amendment to Art. VIII, sec. 7, Wis. Const., which permitted the current bonding for public purposes provisions found in ch. 18, Stats. Section 20.002 (1), was never intended to provide additional bonding authority under the circumstances being discussed here. Such bonding authority must be expressed in much more explicit terms.

Of course, since your inquiry the legislature has adopted a new budget for the 1971-73 biennium which contain additional bonding authority.

RWW:APH

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*Real Estate Examining Board—Mortgage Brokers—(Formal)*—Federal National Mortgage Association is exempt from the requirements of sec. 452.09, Stats., but private mortgage bankers or mortgage brokers licensed as real es-

tate brokers under ch. 452, Stats., and servicing mortgages for FNMA must deposit loan, insurance and tax escrow moneys in authorized trust account in a bank located in Wisconsin and subject to audit by Real Estate Examining Board.

December 31, 1971.

ROY E. HAYS, *Executive Secretary*  
*Wisconsin Real Estate Examining Board*

You have requested my opinion on four questions concerning powers of the Real Estate Examining Board with regard to requirements of licensing as a real estate broker and deposits to be made in a licensed broker's trust account.

Your first question is whether private mortgage bankers or private mortgage brokers licensed as real estate brokers under ch. 452, Stats., must deposit all moneys collected in the solicitation and servicing of mortgage loans in the Wisconsin broker's authorized real estate trust account in a bank located in and authorized to do business in Wisconsin.

Such companies, which do not qualify for exemption under sec. 452.01 (6), Stats., are required to be licensed because they fall within the definition of real estate broker set forth in sec. 452.01 (2) (a) and (c), Stats., which provide:

"(2) 'Real estate broker' means any person not excluded by sub. (6), who:

"(a) For another, and for commission, money or other thing of value, sells, exchanges, buys or rents, or offers or attempts to negotiate a sale, exchange, purchase or rental of an interest or estate in real estate;

"\* \* \*

"(c) Negotiates or offers or attempts to negotiate a loan, secured or to be secured by mortgage or other transfer of or encumbrance on real estate."

See 29 OAG 105 (1940) and *Livingston v. Linker Realty Co.* (1930), 202 Wis. 232, 231 N.W. 626.

It is noted that mortgage bankers may not be banks. See sec. 221.49, Stats.

Section 452.09, Stats., provides:

“Trust accounts. All down payments, earnest money deposits or other trust funds received by a broker or salesman on behalf of his principal or any other person, shall be deposited in a common trust account, maintained by said broker for such purpose in a bank designated by the broker, pending the consummation or termination of the transaction, except as such moneys may be paid to one of the parties pursuant to such contract or option. The name of said bank shall at all times be registered with the examining board, along with a letter authorizing the examining board to examine and audit said trust account when said examining board deems it necessary.”

REB 6.01, Wisconsin Administrative Code, is concerned with trust accounts and in material part provides:

“(1) Each broker shall maintain a common trust account in a bank for the deposit of all down payments, earnest money deposits or other trust funds received by the broker or his salesman on behalf of his principal or any other person pursuant to section 136.01 [452.01], Wis. Stats.

“(2) Each broker shall notify the board of the name of the bank or banks in which said trust account is maintained and also the name of the account on forms provided therefor.

“(3) Each broker shall authorize the board to examine said trust account and shall obtain the certification of the bank attesting to said trust account and consenting to the examination and audit of said account by a duly authorized representative of the board. Said certification and consent shall be furnished on forms prescribed by the board.

“(4) Each broker shall only deposit trust funds received on real estate or business opportunity transactions as defined in section 136.01 [452.01], Wis. Stats., in said common trust account and shall not commingle his personal funds or other funds in said trust account with the exception that a broker may deposit and keep a sum not to exceed \$100.00 in said

account from his personal funds which sum shall be specifically identified and deposited to cover bank service charges relating to said trust account.

“(5) A broker may maintain more than one trust account provided the board is advised of said account as specified in section REB 6.01 (2) and (3) above.

“(6) Each broker shall maintain a single entry bookkeeping system in his office, listing the following information on all trust account deposits:

“\* \* \*

“(d) Rent contracts, dates, names of parties, amount of rent installments.

“(e) Mortgages, dates, names of parties, amount of payments of principal and interest.

“\* \* \*

“(h) Earnest money receipts, dates, names of parties, amount of down payment.

“(i) Any other receipts pertaining to the sale, exchange, purchase, rental of real estate or business opportunities, dates, names of parties, amount of payment.

“\* \* \*

“(9) Commissions or fees earned by the broker out of moneys deposited in said trust account shall be withdrawn from said trust account within 24 hours after the transaction is consummated, terminated or after the commission or fees are earned in accordance with the contract involved.

“\* \* \*”

In 51 OAG 94 (1962) it was stated that, by reason of the statute and rule above referred to, a mortgage broker licensed as a real estate broker must deposit payments made to the broker by a mortgagee in a real estate trust account subject to audit by the board.

The answer to your first question is in the affirmative. Section 452.09, Stats., provides that the common trust ac-

count shall be "in a bank designated by the broker." However, it is my opinion that the legislative intent of strict supervision, examination and audit of licensed real estate brokers' trust accounts requires the use of a bank located in Wisconsin. It is recommended that the board amend its rule to that effect to remove any doubt.

Your second question is whether such trust funds must be maintained by the broker in an authorized trust account.

The material portion of sec. 452.09, Stats., requires trust funds to be deposited in a common trust account:

"\* \* \* pending the consummation or termination of the transaction, except as such moneys may be paid to one of the parties pursuant to such contract or option. \* \* \*"

It is my opinion that any trust funds must be maintained in an authorized trust account until the transaction is consummated or terminated *unless* the agreement between the mortgagor and mortgagee provides that such moneys may be paid out to one of the parties.

In 51 OAG 94, 99 (1962), it was stated:

"Where the loan has been negotiated by the mortgage broker, and is closed by delivery of mortgage and note, and commission has been paid, and where the mortgage broker and mortgagee enter into an agreement whereby the broker is to collect the mortgage payments, the transaction may be considered pending and continuing within the terms of sec. 136.075 [now 452.09].

"The time, manner and amount of the payments to be made by the broker to the mortgagee, or to be directly applied by the broker to payment of insurance premiums or taxes, are matters which are controlled by the agreement for servicing between the broker and mortgagee."

As noted in the second paragraph next above, however, the agreement between the mortgagor and the mortgagee is the primary document to be considered as to whether trust moneys can be paid out to one of the parties. In some situations the mortgagor and mortgagee and mortgage broker may all be parties to the servicing agreement.

The funds involved consist of payments by mortgagors and include payments for taxes and insurance. Where only mortgagor and mortgagee are involved, the payments made for taxes and insurance are in the nature of special deposits. As such, in the absence of special statute or agreement, they sometimes are treated as creating a debtor-creditor relationship. However, the standard form promulgated by the Federal Housing Administration for insurable mortgages in Wisconsin provides that monthly payments to mortgagors are to include payments for taxes and insurance, among other purposes, and requires such sums to be held by the mortgagee *in trust* to pay said ground rents, premiums, taxes and special assessments. This is required by FHA's regulations and thus is a part of the contract of insurance with that agency. 24 CFR 203.23. A parallel obligation is imposed upon the Federal National Mortgage Association, as well as others, with respect to mortgages guaranteed by the Veterans Administration.

Where such funds are held by a third-party mortgage broker for servicing purposes, it would appear without question that a trust relationship is involved.

Your questions have been prompted by objections to the Examining Board's policies made by counsel for the Federal National Mortgage Association on behalf of independent mortgage servicers and mortgage brokers licensed as real estate brokers and doing business in Wisconsin. Counsel for FNMA states:

"Finally, we challenge the application of the Board's policy on FNMA's mortgage servicers because of the nature of FNMA as a federally chartered and regulated institution, specific statutory language in its charter, and the national character of its operations as intended by the U.S. Congress, all serving to pre-empt states from imposing regulatory sanction upon it.

"The Federal National Mortgage Association is a national secondary market facility for residential mortgages, chartered by the United States Congress but owned by private shareholders. (12 U.S.C. 1716 et seq.) It is subject to the general

regulatory power of the Secretary of Housing and Urban Development. (12 U.S.C. 1723a) The corporation has a sizeable portfolio of residential mortgages which are purchased on a national basis. Nearly all funds invested by FNMA in Wisconsin are originated in the national capital markets of the United States without regard to regional or state boundaries. Likewise, escrow funds held by FNMA through its Custodial Accounts are not segregated and held on a state basis. Notwithstanding its federal charter and national character, Congress foresaw that some action by local jurisdictions might impede the corporation's function as a truly national secondary mortgage market and for that reason provided in our Charter that FNMA have power

“to conduct its business without regard to any qualification or similar statute in any State of the United States, including the District of Columbia, the Commonwealth of Puerto Rico, and the Territories and possessions of the United States.” (12 U.S.C. 1723a)

“This forcefully underscores the intent of Congress that FNMA be free of state regulation. Consistent with this, FNMA is exempt from all taxes imposed by any state, territory, possession, Commonwealth, or U.S. dependency or by any state, municipality, or local taxing authority. (12 U.S.C. 1723a) The only exception to the exemption is with respect to real property owned by FNMA.”

Your third question is whether FNMA *itself* is exempt from the provisions of ch. 452, Stats.

I am of the opinion that it is a “land mortgage or farm loan association” organized under the laws of the United States and when engaged in the transaction of business authorized by law is exempt from the provisions of ch. 452, Stats., by reason of sec. 452.01 (6), Stats., and 12 U.S.C.A. 1723a.

Also see 16 OAG 274 (1927) and 29 OAG 105 (1940).

Your fourth question is whether private mortgage servicers or mortgage bankers which service mortgages for FNMA on a contract basis are exempt from the provisions of ch. 452 and sec. 452.09, Stats., in particular.

I am of the opinion that they are not.

The exemption portion of sec. 452.01, Stats., is to be construed strictly and the board cannot allow exemptions where the statute does not so permit.

*State ex rel. Green v. Clark* (1940), 235 Wis. 628, 294 N.W. 25.

*State ex rel. Real Est. Exam. Bd. v. Gerhardt* (1968), 39 Wis. 2d 701, 159 N.W. 2d 622.

I find nothing in 12 U.S.C.A. 1723a which is indicative of a congressional intent to extend the exemptions granted FNMA to independent private individuals or corporations it may contract with in the various states, nor is there indicated congressional intent to preempt regulation of the secondary mortgage market.

Counsel for FNMA states that the policy of the Examining Board with respect to trust accounts required of mortgage servicers can result in interference with FNMA's duty to require custodial accounts for the reason that there may be a proliferation of custodial accounts which would increase the expense and ease of audit by FNMA.

Counsel for FNMA states:

"This policy of the Wisconsin Real Estate Examining Board indicates its concern that mortgagor payments to a lender for the purpose of paying real estate taxes and hazard insurance premiums be safeguarded and thus available for disbursement for the purposes for which they were collected. FNMA is similarly concerned, and, as a part of the contractual arrangement with its mortgage servicers, requires that funds representing mortgagor payments for tax and insurance escrows be maintained in an FNMA Custodial Account. Such arrangement includes the following requirement:

"Each custodial account shall be established in a bank, (or savings and loan association, if the association itself is the Servicer) the deposits of which are insured by the Federal Deposit Insurance Corporation (FDIC), or the Federal Savings and Loan Insurance Corporation (FSLIC), as ap-

propriate. The establishment of each custodial account is subject to approval by FNMA.'

“\* \* \*

“ ‘All collections shall be deposited in the Custodial Account not later than the first business day following receipt.’ (Section 204, FNMA Servicers Guide)”

It would appear to me that the trust account requirements of the Examining Board, sec. 452.09, Stats., and REB 6.01, Wis. Adm. Code, and the Custodial Account policies of FNMA are consistent in purpose and can be administered so that there is no substantial conflict.

RWW:RJV

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*Securities—Department of Health & Social Services—(Formal)*—Senate Bill 663 if enacted into law would be constitutional.

December 31, 1971

THE HONORABLE, THE SENATE

By Senate Resolution 40 you have asked for my opinion as to the constitutionality of Senate Bill 663. Senate Bill 663 would repeal sec. 20.435 (4) (ef) and sec. 49.70 of the statutes if enacted into law.

Section 49.70, Stats., provides authority to the Department of Health and Social Services to exercise options to purchase certain securities of Menomonie Enterprises, Inc., to accept an assignment of such securities, and to make loans which shall be secured by pledges of such securities. Section 49.70 (6), Stats., also provides that such securities shall be exempt assets when the owner is a minor. Section 20.435 (4) (ef), Stats., provides as a continuing appropriation all balances remaining on June 30, 1969, for the purposes set forth in sec. 49.70.

The repeal of either one of these sections or both will not affect any constitutionally protected right or privilege of any

person or their property. Under such circumstances any grant, privilege or charity presently provided by these statutes is subject to repeal at the discretion of the legislature.

RWW:RBM

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*Public Water Supply System—Department of Natural Resources—(Formal)*—The Department of Natural Resources has the authority to order a municipality to construct a public water supply under sec. 144.025 (2) (r), Stats., upon a finding that the absence of a public water supply constitutes a nuisance or menace to health or comfort.

Section 66.065, Stats., which requires a municipality to obtain voter approval through a referendum prior to the construction or acquisition of a waterworks, does not apply when a municipality is ordered to construct a public water supply system pursuant to sec. 144.025 (2) (r), Stats.

The Department may require a municipality to construct a public water supply system pursuant to sec. 144.025 (2) (r), Stats., even though the electors of the municipality voted against construction in a referendum.

December 31, 1971.

L. P. VOIGT, *Secretary*

*Department of Natural Resources*

You have requested my advice regarding a problem confronting the Department of Natural Resources in its efforts to insure safe water supplies in municipalities. Your letter states that an incorporated municipality within Wisconsin lacks a public water supply system and that private wells in the municipality have tested unsafe bacterially in 30 percent of the samples taken. Your letter further states that the attorney representing the municipality has indicated to the Department his legal opinion that the municipality is powerless to construct a public water supply system in response to an order from the Department of Natural Resources ab-

sent a referendum vote by the citizens authorizing such expenditure. He has further advised municipal officials that they could be personally liable for any such expenditure. Accordingly, you have requested a formal opinion on the following question:

“(1) Does s. 144.025 (2) (r), Wisconsin Statutes, empower the Department of Natural Resources to require a municipality to construct a public water supply system notwithstanding the provisions of s. 66.065, Wisconsin Statutes, requiring voter approval through a referendum?”

“(2) May the Department proceed to require a municipality to construct a public water supply system if the residents of such municipality vote against such construction in a referendum?”

#### I. POWER OF DEPARTMENT OF NATURAL RESOURCES TO ORDER MUNICIPALITY TO CONSTRUCT A PUBLIC WATER SUPPLY

The statutory provision whereby the Department has the power to issue an order against the municipality requiring construction of a public water supply is contained in sec. 144.025 (2) (r), Stats., the last sentence of which reads as follows:

“If the department finds that the absence of a *municipal system or plant* tends to create a nuisance or menace to health or comfort, it may order the city, village, town or town sanitary district embracing the area where such conditions exist to prepare and file complete plans of a corrective system as provided by s. 144.04, and to construct such system within a specified time.” (Emphasis supplied)

The phrase “system or plant” as used in the above-quoted section is defined in sec. 144.01 (6), Stats., as follows:

“(6) ‘System or plant’ includes water and sewerage systems and sewage and refuse disposal plants.”

Section 144.01 (3), Stats., defines “water system” as follows:

“(3) ‘Waterworks,’ or ‘water system,’ all structures, conduits and appurtenances by means of which water is delivered to consumers except piping and fixtures inside buildings served, and service pipes from building to street main.”

The above-quoted statutory provisions expressly authorize the Department to order municipalities to construct public water supply systems where the absence of such a system creates a “nuisance or menace to the health or comfort” of its citizens.

The Department’s power to order the construction of facilities under sec. 144.025 (2) (r), Stats., was found to be a valid exercise of the police power in *State ex rel. Martin v. Juneau* (1941), 238 Wis. 564, 300 N.W. 187. Although that case involved an order requiring construction of sewage treatment facilities, it is clear that an order requiring construction of a public water system, based upon a finding that absence of a public water supply constitutes a nuisance or menace to health or comfort, would also be validly based on the police power.

## II. POWER OF MUNICIPALITIES TO CONSTRUCT WATER SYSTEMS

Public water systems, or waterworks, are one of the oldest types of public utility. Consequently, there is a surprising number of cases and statutes dealing with the power of a municipality to construct, acquire, operate, expand or finance public water systems.

The Wisconsin Supreme Court initially decided that cities had the power to construct waterworks as a part of the general police power, even though their charter contained no express provisions for the construction or operation of waterworks. In *Ellinwood v. City of Reedsburg* (1895), 91 Wis. 131, 133-4, 64 N.W. 885, the court stated that:

“\* \* \* It is not necessary to seek for an express delegation of power to the city to build a waterworks and electric lighting plant in order to determine whether such power exists, for the general power in respect to police regulations, the preservation of the public health, and the general wel-

fare includes the power to use the usual means of carrying out such power, which includes municipal water and lighting services. \* \* \*”

This decision has been followed in several cases including *Eau Claire v. Eau Claire Water Company* (1909), 137 Wis. 517, 538, 119 N.W. 555, where it was held that the city can use general fund monies for the purchase of a waterworks absent specific charter restrictions, and *Wonewoc v. Taubert* (1930), 203 Wis. 73, 233 N.W. 755, where villages were found to have the same police power authority to construct waterworks.

This authority was severely limited, however, by the poor financial resources of the cities. Most found it necessary to issue bonds in order to purchase or construct waterworks, and their bonding authority was limited both by the constitutional debt limit and by a legislative requirement that a referendum be held prior to bonding for the purpose of acquiring or constructing waterworks. See *Connor v. Marshfield* (1906), 128 Wis. 280, 107 N.W. 639, for a discussion of the general statutory structure during the period.

Regarding the constitutional debt limitation, in 1921 the Supreme Court decided the case of *State ex rel. Morgan v. Portage* (1921), 174 Wis. 588, 184 N.W. 376, which dealt with a situation similar to the instant opinion request. In that case, the City of Portage had been ordered by the railroad commission (predecessor to the Public Service Commission) to construct certain improvements in its city waterworks necessitated by the inadequacies of the existing service. The railroad commission ordered that the improvements be paid through the issuance of mortgage bonds, and the court held that such bonds create a municipal debt when applied to property already owned by the municipality. The court then held that the railroad commission did not have the authority to order the city to exceed its constitutional debt limitation. When the railroad commission argued that the order could be enforced because it was requiring the city to perform a municipal function created by an overwhelming public necessity, the court responded by holding that the city was acting in a proprietary capacity and not a

municipal capacity in that it was voluntarily engaging in the water utility business :

“\* \* \* It must be borne in mind that the expenditure ordered and here in question does not pertain to a governmental function, but to a business the city is conducting in its proprietary capacity in which the city engages voluntarily. True, in the conduct of such business it can do nothing to the detriment of the public health, good order, and the general welfare. If it transgresses its legal duties in these respects it can be coerced to obey the law. It does not follow, however, that a city, in order to remedy an evil like the one the commission found exists in the city of *Portage*, can create an indebtedness in excess of the constitutional limitation. \* \* \*” 174 Wis. at 596.

The *Morgan* case has been followed mainly for the proposition that the mortgage bond system of financing did not create a municipal debt for the initial purchase of municipal property, but did create a debt if applied to improvements or additions to existing municipally owned property. The above-quoted portion, however, relating to whether a city acts in a proprietary or governmental function vis-a-vis a public water supply has been implicitly overruled in a more recent decision.

In *Froncek v. Milwaukee* (1955), 269 Wis. 276 at 283, 69 N.W. 2d 242, a case challenging the City of Milwaukee's authority to add fluorine to the water supply for purposes of improving dental health, the court came to the opposite conclusion of the court in the *Morgan* case without discussing that prior case. In adopting the decision of the trial court, which had held fluoridation was within the city's authority, the Supreme Court stated :

“He [the trial court] ruled that although a city may act in a proprietary capacity in owning and operating a water utility, the relation between the city and its inhabitants and its officers is governmental, even when the officers are performing duties which relate to the management of the city. And he said: ‘In the performance of its duty to promote and protect the public health, a city is not acting in a private or proprietary capacity, but purely in a govern-

mental capacity in the discharge of one of the highest duties it owes to its citizens. *State ex rel. Martin v. Juneau*, 238 Wis. 564, 570 [300 N.W. 187].” 269 Wis. at 283.

Despite the fact that the *Morgan* case was not explicitly discussed, it was clearly overruled by *Froncek*. Under the fact situation that you outlined in the opinion request, then, a municipality acting in response to an order of the Department of Natural Resources issued pursuant to sec. 144.025 (2) (r), Stats., would clearly be acting in its governmental capacity in complying with the order, and not in a proprietary capacity. Thus, the constitutional limitation on indebtedness would not apply to such a municipality. See also *Columbia County v. Wisconsin Retirement Fund* (1962), 17 Wis. 2d 310, 331, 116 N.W. 2d 142, where the court held that the statutory obligation of a county created by the enlargement of the Wisconsin Retirement Fund did not constitute indebtedness within the meaning of the constitution because it was not “an indebtedness voluntarily incurred by the county” but rather “an obligation imposed upon the county by law.”

In addition to the general police power, municipalities have express statutory authorization to construct waterworks. See sec. 62.22, Stats., (cities); sec. 61.34 (3), (villages). Furthermore, cities and villages are specifically exempted from the requirement of holding a referendum as a condition precedent to the issuance of municipal bonds for waterworks. Sec. 67.05 (5) (b), Stats. Construction of waterworks can also be financed from the municipal general fund absent any specific charter restriction. *Eau Claire v. Eau Claire Water Co.*, *supra*. A municipality may also construct or purchase a public water supply system under the provisions of chapters 196 and 197, the State’s public utility regulation law. Sec. 197.01, Stats. The authority to construct a water utility under chapters 196 and 197 has been held to constitute a separate and complete method of acquisition, unrelated to any other method of acquisition provided for in the statutes. *Janes v. Racine* (1913), 155 Wis. 1, 143 N.W. 707; *Wisconsin P. & L. v. Public Service Comm.* (1936), 222 Wis. 25, 267 N.W. 386; *Henderson v. Hoesley* (1937), 225 Wis. 596, 275

N.W. 443; *Superior W., L. & P. Co. v. Public Service Comm.* (1939), 232 Wis. 616, 288 N.W. 243.

All of which brings us to the main question raised in your opinion request—does sec. 66.065, Stats., require prior approval of a majority of the electorate in a referendum when a municipality has been ordered by your Department to construct a public water supply system? I am of the opinion the answer is no. Section 66.065, as it relates to this opinion request, provides as follows:

“Acquisition. (1) Any town, village or city may construct, acquire or lease any plant and equipment \* \* \* for furnishing water, \* \* \* to the municipality, or to its inhabitants \* \* \*; may acquire a controlling portion of the stock of any corporation owning private waterworks \* \* \*; and may purchase the equity of redemption in a mortgaged or bonded waterworks \* \* \*.

“(2) A resolution, specifying the method of payment and submitting the question to a referendum, shall be adopted by a majority of all the members of the board or council at a regular meeting, after publication at least one week previous in the official paper.

“(3) The notice of the referendum shall include a general statement of the plant equipment or part thereof it is proposed to acquire or construct and of the manner of payment.

“(4) Referendum elections under this section shall not be held oftener than once a year, except that a referendum so held for the acquisition, lease or construction of any of the types of property enumerated in subsection (1) shall not bar the holding of one referendum in the same year for the acquisition and operation of a bus transportation system by the municipality.

“(4a) The provisions of subs. (2), (3) and (4) shall not apply to the acquisition of any plant, equipment or public utility for furnishing water service when such plant, equipment or utility is acquired by the municipality by dedication or without monetary or financial consideration.”

Section 66.065, Stats., was originally enacted by ch. 665, Laws of 1907 as secs. 927-11 through 19, Stats. 1907. It was

later renumbered by ch. 396, Laws of 1921 to sec. 66.06 (8), Stats. 1921, and was renumbered again by ch. 362, Laws of 1947 to sec. 66.065, Stats. It has clearly been construed as requiring referendum approval prior to the initial construction or purchase of a waterworks. See, for example *Denning v. Green Bay* (1955), 271 Wis. 230, 72 N.W. 2d 730. As such, it constitutes a specific legislative restriction on a municipality's authority to construct waterworks. A general statute, such as 66.065, requiring referendum approval has been held to take preference over the more specific statute permitting bonding without referendum, such as sec. 67.05 (5) (b), Stats. *Appleton Waterworks Co. v. Appleton* (1903), 116 Wis. 363, 93 N.W. 262. On the other hand, however, sec. 66.065 has been held to be not applicable when a municipality proceeds to acquire a waterworks in accordance with the general public utility law (chs. 196, 197). *Janes v. Racine, supra*.

... A very similar question was put to one of my predecessors in 20 OAG 935, where a municipality had been ordered by the State Board of Health to construct a sewage treatment plant, and where a municipality would have exceeded its constitutional bonding limitation. My predecessor applied the *Morgan* case and concluded that the city could not go beyond its bonding power, but advised that the city could, nonetheless, levy a special tax or borrow temporarily in order to finance the construction. He then concluded that it was the city's duty to do so, stating as follows:

“\* \* \* There are a number of cases decided by our supreme court which indicate that where by charter or by statute a power is given to a city or an obligation is placed thereon to do certain things in its governmental capacity, that power or command carries with it the right to levy taxes and to borrow money *even though such levy or borrowing ostensibly violates some other charter or statutory provision*. *Ellinwood v. City of Reedsburg*, 91 Wis. 131, 134; *Oconto City Water Supply Co. v. City of Oconto*, 105 Wis. 76, 85; *State ex rel. Elliott v. Kelly*, 154 Wis. 482; *Milwaukee v. Raulf*, 164 Wis. 172; *Miles v. Ashland*, 172 Wis. 605.” 20 OAG at 936. (Emphasis supplied).

I believe the opinion of my predecessor was correct and, when applied to the facts of this opinion request, lead to the conclusion that the municipality has the power to construct a public water supply system without holding a referendum when so ordered by your Department.

I do not agree with the interpretation of the municipal attorney cited to me in your opinion request. As I have discussed above, there is ample authority, both provided expressly by statute or necessarily implied therefrom, for a municipality to carry out its duties under an order of the Department. Section 66.065, Stats., was intended to limit the authority of a municipality to *voluntarily* engage in the operation of waterworks *in its proprietary capacity*. To apply that section in this situation would be to interpret sec. 66.065 in derogation of the State's sovereign police power in a matter which the Supreme Court has already found to be of highest importance:

“\* \* \* In the performance of its duty to protect the public health the city of Juneau is not acting in a private or proprietary capacity but purely in a governmental capacity in the discharge of one of the highest duties it owes to its citizens. \* \* \*” *State ex rel. Martin v. Juneau, supra*, at 570.

In *State ex rel. Martin v. Juneau, supra*, the court held that the legislature has unrestricted power over municipal corporations in the matter of the promotion and protection of the public health, which is a matter of statewide concern. *State ex rel. Martin v. Juneau, supra*, at 570-1. Section 66.065 contains no expression of any legislative intent to limit the State's authority in this area. Absent any such express limitation, it must be presumed that the legislature did not intend to limit the Department's authority to order the construction of a public water supply system under sec. 144.025 (2) (r), Stats., either directly, or indirectly by limiting a municipality's power to comply with the order. *State v. City of Milwaukee* (1911), 145 Wis. 131, 135, 129 N.W. 1101, Ann. Cases 1912A, 1212; *Door County v. Plumbers, etc., Local No. 298* (1958), 4 Wis. 2d 142, 150, 89 N.W. 2d 920. I, therefore, conclude that the requirement of voter approval in a referendum under sec. 66.065, does not apply

when a municipality is ordered to construct a public water supply system pursuant to sec. 144.025 (2) (r).

Your second question asks whether the Department may require a municipality to construct a public water supply system pursuant to sec. 144.025 (2) (r), Stats., if the electors of the municipality voted against such construction in a referendum. The answer to this question is yes. The case of *Denning v. Green Bay, supra*, is wholly on point here and states clearly that where a referendum is not required to construct a public water supply system (or a portion thereof), then the holding of a referendum, and a negative vote thereon, is advisory only and does not serve to prevent the governing body of the municipality from proceeding with the project in question.

RWW:SMS

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**STATUTES AND CONSTITUTIONAL PROVISIONS,  
SESSION LAWS, LEGISLATIVE BILLS,  
OPINIONS OF THE ATTORNEY GENERAL, AND  
RESOLUTIONS REFERRED TO AND CONSTRUED**

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