

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

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

**VOLUME 61**

**January 1, 1972 through December 31, 1972**

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**ROBERT W. WARREN**  
Attorney General



**MADISON, WISCONSIN**  
1972

# 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, Milwaukee .....	from Oct.	7, 1862, to Jan.	1, 1866
CHARLES R. GILL, Watertown .....	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, Mineral 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, Madison .....	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. STURDEVANT, 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, Milwaukee .....	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, Milwaukee.....	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, Milwaukee...	from Nov.	15, 1948, to Jan.	1, 1951
VERNON W. THOMSON, Richland Center .....	from Jan.	1, 1951, to Jan.	7, 1957
STEWART G. HONEK, Madison .....	from Jan.	7, 1957, to Jan.	5, 1959
JOHN W. REYNOLDS, Green Bay .....	from Jan.	5, 1959, to Jan.	7, 1963
GEORGE THOMPSON, LaCrosse .....	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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ARVID A. SATHER.....	Deputy Attorney General
DANIEL P. HANLEY, Jr. ....	Executive Assistant
JAMES P. ALTMAN.....	Assistant Attorney General
JOHN E. ARMSTRONG.....	Assistant Attorney General
THOMAS J. BALISTRERI.....	Assistant Attorney General
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BRUCE A. CRAIG.....	Assistant Attorney General
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STEVEN M. EPSTEIN.....	Assistant Attorney General
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DOUGLAS J. HAAG.....	Assistant Attorney General
HAROLD L. HARLOWE.....	Assistant Attorney General
ALBERT O. HARRIMAN.....	Assistant Attorney General
THOMAS A. HENDRICKSON.....	Assistant Attorney General
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ROY G. MITA.....	Assistant Attorney General
JAMES V. MONTGOMERY.....	Assistant Attorney General
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STEPHEN J. NICKS.....	Assistant Attorney General

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WILLIAM A. PLATZ.....	Assistant Attorney General
THEODORE L. PRIEBE.....	Assistant Attorney General
ROBERT D. REPASKY .....	Assistant Attorney General
CARL L. RICCIARDI .....	Assistant Attorney General
JAMES A. ROGERS.....	Assistant Attorney General
GORDON SAMUELSEN .....	Assistant Attorney General
WARREN M. SCHMIDT .....	Assistant Attorney General
STEPHEN H. SCHOENFELD.....	Assistant Attorney General
STEVEN M. SCHUR .....	Assistant Attorney General
GEORGE B. SCHWAHN .....	Assistant Attorney General
GEORGE F. SIEKER .....	Assistant Attorney General
DONALD W. SMITH.....	Assistant Attorney General
MARK E. SMITH.....	Assistant Attorney General
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MICHAEL L. ZALESKI.....	Assistant Attorney General

OPINIONS  
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Volume 61

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*County Board—Vacancy Of County Supervisor*—A vacancy on the county board due to resignation may be filled by appointment by the county board chairman when county board is not in session.

January 3, 1972.

W. PATRICK DONLIN, *District Attorney*  
*Price County*

You have requested my opinion whether a vacancy on the county board which resulted from a resignation can be filled by appointment by the county board chairman when the board is not in session.

You state that the board will not meet in regular session until February and that the chairman would like to fill the vacancy, subject to approval by the board, when it meets.

I am of the opinion that the person appointed would have legal authority to serve after appointment by the chairman even though the appointment had not been approved by the county board.

Section 59.03 (2) (e), Stats., provides:

“(e) Vacancies. In the event of a vacancy on the county board caused by death, resignation or removal from office, the county board chairman with the approval of the county board shall appoint a person, who is a qualified elector and resident of the supervisory district, to fill the vacancy for the unexpired portion of the term to which he is appointed and until his successor is elected and qualified.”

The law abhors a vacancy and where a vacancy does in fact exist, as in the case of resignation or death, the person appointed would attain a *de facto* status.

County supervisor is an elective office. There is no directly applicable provision in sec. 17.21, Stats. Section 17.22 (2), Stats., however, which applies to appointive offices, provides in part:

“(2) Vacancies in the offices of officers appointed by the county board, occurring when the board is not in session, shall be filled in manner and for terms as follows:

“\* \* \*

“(d) In the office of any other officer appointed by the county board, by temporary appointment by the chairman of the county board. A person so appointed shall hold office until his successor is appointed and qualifies, and such successor shall be appointed by the county board for the residue of the unexpired term at its meeting next after such vacancy occurred.”

The person appointed would not attain *de jure* status until approved by the county board.

The matter could be expedited by having a special meeting of the board, called pursuant to sec. 59.04 (2) (a), Stats., and there may be other county business which would warrant the expense of resorting to such call.

RWW:RJV

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*Real Estate Broker—Sales Plan*—Real estate brokers may engage in guaranteed sales plans if there is full disclosure and broker does not engage in fraud, misrepresentation or improper dealing.

January 6, 1972.

ROY E. HAYS, *Executive Secretary*

*Wisconsin Real Estate Examining Board*

You have requested my opinion whether a Wisconsin licensed real estate broker or salesman could engage in a guaranteed sales plan similar to that described below without violating the provisions of sec. 452.10 (2) ((a) through (1)) or sec. 452.05 (2), Stats.

The guaranteed sales plan involves:

1. Appraisal by the real estate broker.
2. A guaranteed valuation analysis, which includes the current market value of the house as appraised by the real estate broker, a listing of the broker's estimate of the normal costs to the owner to sell the home, which includes regular commission at going rate, required repairs to place the house in shape for sale, transfer tax, recording costs, F.H.A. or V.A. discount points, required F.H.A. inspection, abstracting or legal fees, revenue stamps and other costs. These costs would be deducted from the appraised price and the result would be net proceeds to the seller on an ordinary sale if there were no mortgage or guaranteed sales plan. However, in the case illustrated, there was a mortgage and the present amount of the mortgage, plus the costs of the broker holding the property for four months, if necessary, to sell the property for his own account are deducted to arrive at the net guaranteed price to seller. Such costs "to the trade-in company," which is the real estate broker, include interest on money for four months, taxes for four months, maintenance and utilities, a second transfer tax, recording fees, abstracting and legal fees, insurance and revenue stamps.

The real estate owner in effect pays the costs he would pay in an ordinary sale plus the costs the broker would pay in a second sale, estimated on the basis of the broker selling the property for his own account within four months.

3. The guarantee to purchase agreement, in the illustration forwarded, is signed by owner and broker.

a. The agreement describes real estate and included property, provides for conditions on liens or encumbrances, form of conveyance, evidence of title and place of closing.

b. Provides that the broker shall offer the property for sale for the first 30 days at a slight advance over the appraised price, for the next \_\_ days at the appraisal price, and for the next \_\_ days at a slightly lower price, and the broker agrees that if the property is not sold by a given date, *he will purchase* the property at the net guaranteed sales price as determined in the guaranteed valuation analysis referred to in 2. above.

c. Provides for risk of loss from fire, etc., on owner until deed is recorded, proration of taxes, interest and insurance as of date of settlement.

d. Provides that, if property is sold to third party and broker does not purchase it, owner agrees to pay broker, in addition to regular sales commissions, a fee of 1-1/2 percent of the sale price *for the guarantee*.

e. Owner agrees to pay any payoff penalty on any mortgage, to give broker termite clearance certificate and to warrant potability of water system and proper functioning of any septic system.

f. Provides that if broker must advance funds to owner to assure settlement on property owner is purchasing prior to settlement of property he is selling, owner will pay broker interest at 8 percent per annum.

I am not aware of any provision of ch. 452, Stats., or of any provision of the insurance or securities laws which would make the plan illegal *per se*.

The plan would appear to be heavily weighted in favor of the broker, however.

A real estate broker can neither purchase from, nor sell to, his principal unless the principal expressly assents thereto or with full knowledge of all the facts acquiesces in such a course. *Sphatt v. Roth* (1948), 253 Wis. 339, 34 N.W. 2d 222.

As a fiduciary, he must exert his best efforts to effect a sale on the terms listed, and is duty bound to communicate all offers to purchase to his principal unless the principal has issued specific instructions relieving the broker of such duty. He must point out the advantages and disadvantages of any offer to purchase. He has a duty to make full disclosure to the seller of all information material to the transaction.

*Nolan v. Wis. Real Estate Brokers' Board* (1958), 3 Wis. 2d 510, 89 N.W. 2d 317;

*Ford v. Wisconsin Real Estate Examining Board* (1970), 48 Wis. 2d 91, 179 N.W. 2d 786;

*Hilboldt v. Wis. Real Estate Brokers' Board* (1965), 28 Wis. 2d 474, 137 N.W. 2d 482;

*Degner v. Moncel* (1959), 6 Wis. 2d 163, 93 N.W. 2d 857; 54 OAG 31 (1965).

A guaranteed sales plan undoubtedly increases the possibility of fraud, misrepresentation or improper dealing on the part of the broker. The courts would give such close transactions special scrutiny. It might behoove a seller, contemplating entering into such an agreement, to consult with his attorney and to have an independent appraisal made. While sellers have customarily relied upon the judgment of licensed real estate brokers' knowledge of values in setting offering prices, a conflict arises where the broker is interested as a potential contract purchaser, in the event the property is not moved. An unscrupulous broker might not use his best knowledge in the appraisal or best efforts in attempts to advertise, show and sell the property. In addition, some of the cost of sale items in the guarantee valuation analysis can be inflated in favor of the broker where the seller is not fully informed on economic or legal matters even though they are probably negotiable items as between broker and seller.

Such a plan can, of course, be of great value to the seller where the broker makes full disclosure, uses his expert knowledge and exercises his best efforts to effect a sale. In such cases, the seller may be willing to pay the added costs of a guaranteed sale.

RWW:RJV

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*Deferred Salary Plan—Board Of Regents*—The Board of Regents of the University of Wisconsin System has no authority to provide a deferred salary plan for employes other than through the State Teachers Retirement System or the Wisconsin Retirement Fund.

January 6, 1972.

CLARKE SMITH, *Secretary*

*The Regents of the University of Wisconsin System*

The Ad Hoc Organization Committee of the Board of Regents of the University of Wisconsin system has requested my opinion as to the legality of the deferred salary plan between the University of Wisconsin and President John C. Weaver as set forth by resolution dated June 18, 1971. Such resolution reads as follows:

“That the Board of Regents of the University of Wisconsin, in accordance with the informal understanding at the time that President John C. Weaver was appointed, provide President Weaver with a deferred salary plan, subject to the provisions of sec. 20.903 Wisconsin Revised Statutes, as follows:

1. For each of the first 5 years of service as President of the University of Wisconsin, 6% of his average salary for the last 3 years as President.
2. For each of the second 5 years of service as President of the University of Wisconsin, 4% of his average salary for the last 3 years.

3. This deferred salary would be paid annually during President Weaver's lifetime provided his service as President reaches a minimum of 3 years. If he leaves the University any time after serving as President for 3 years, the deferred salary would be paid annually during lifetime as a deferred salary. If he leaves involuntarily prior to the 3-year minimum, he will be provided a lump sum settlement representing the then cash value of the then accrued deferred salary earned.

4. At such time as the deferred salary becomes payable in accordance with paragraphs 1, 2, and 3, he shall have the choice of accepting the deferred salary payments in a manner similar to the options available under the Wisconsin Teachers Retirement System."

The basic question is whether the Regents have authority to implement such a deferred salary plan.

Section 36.06 (1), Stats., reads in part:

"36.06 Duties of regents; additional powers. (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, \* \* \*"

State agencies have only such powers as are expressly granted by statute or necessarily implied as incidental to carrying out the duties and powers expressed in the statutes. Any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds. *American Brass Co. v. State Board of Health* (1944), 245 Wis. 440, 15 N.W. 2d 27; *The State ex rel. Priest v. The Regents of the University of Wisconsin* (1882), 54 Wis. 159, 11 N.W. 472. I am informed that Mr. Weaver is a member of the State Teachers Retirement System (STRS) formula group and that the required deposits as set forth in sec. 42.40, Stats., are forwarded by the University to the STRS. I am aware of no section of the statutes which authorizes a deferred salary plan for a state employe other than the tax-shelter annuity plan of 26 U. S. C. A. sec. 403 (b) available to teachers, which is implemented through the "additional deposits" provision of sec. 42.40 (3), Stats. I am informed, however, that Mr. Weaver has already filed an agreement under the requirements of 26 U. S.

C. A. sec. 403 (b) to have the maximum amount set aside from his salary and forwarded to the STRS to purchase a tax-deferred annuity in his behalf.

It appears that the subject deferred salary plan is intended to be a retirement plan paying, should Mr. Weaver stay 10 years, 50 percent of his average salary for the last three years of his employment with "the choice of accepting the deferred salary payments in a manner similar to the options available under the Wisconsin Teachers Retirement System." The STRS has no authority to implement such a deferred salary plan or to substitute it for the mandatory teachers' retirement plan set forth in ch. 42, Stats.

The term "salaries" as used in sec. 36.06 (1), Stats., could arguably be construed to be synonymous with compensation and, therefore, be held to authorize the Regents to institute a deferred salary plan. The fault with this is the apparent intent of the legislature that all state employes, outside of Milwaukee, belong to either the STRS or the Wisconsin Retirement Fund (WRF). The individual funds such as the Conservation Wardens Fund and the old State Retirement System are closed and being phased out of existence. While I find no court case specifically prohibiting a retirement agreement such as the one under consideration here, the legislature has in recent sessions limited retirement plans to the STRS and WRF. With this background it would be difficult to sustain an interpretation of sec. 36.06 (1), Stats., to allow a special retirement plan under definition of the word "earnings" or as a necessary implied power. Should the power given in sec. 36.06 (1), Stats., be deemed to authorize the Regents to institute such a retirement plan then the plan could equally be extended, in the words of sec. 36.06 (1), Stats., to all "professors, instructors, officers and employes" of the University, even though such persons are required to be participants of STRS, if teachers, or WRF if non-teachers. This is apparently contrary to the intent of the legislature in creating the retirement plans of chs. 41 and 42, Stats. It is, therefore, my opinion that the Board has no authority to create such a deferred salary plan since the authority therefor is not actually or impliedly provided for by sec. 36.06 (1), Stats.

In conclusion, I see no basis for construing sec. 36.06 (1), Stats., to impliedly authorize the Board to provide a deferred salary plan. The intent of the legislature in recent times has clearly been to provide only two retirement plans, the State Teachers Retirement System and the Wisconsin Retirement Fund. All state employes must mandatorily belong to one of these plans. I am confident that the legislature, by requiring that all state employes belong to one of the two systems, did not intend to allow state agencies the leeway of establishing additional retirement plans.

RWW:WMS

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*Constitutional Officers—Salaries*—The state treasurer is not authorized by law to approve payment for salaries of state constitutional officers prior to the time their services have been rendered to the state of Wisconsin. Sections 16.53 (1) (b) and 14.58 (4), Stats., discussed.

January 7, 1972.

CHARLES P. SMITH, *State Treasurer*

In your letter of January 6, 1972, you have asked for my opinion as to whether you can properly approve payment for salaries of state constitutional officers prior to the time that the services of these officers have been rendered to the state of Wisconsin.

Section 16.53 (1) (b), Stats., provides:

“Preaudit procedure. The department of administration shall preaudit claims in accordance with the following procedures:

“(1) CLAIMS AGAINST STATE.

“\* \* \*

“(b) *Payrolls*. Payrolls, to be entitled to audit, shall be certified by the proper officers who shall set forth the nature of the services rendered by each person named therein.” (Emphasis supplied)

Implicit in this particular wording is a sound public policy that the payment shall be made *after* services have been rendered. This, of course, is consistent with the manner in which other government employes are reimbursed for services. I am not aware of any reason for paying constitutional officers any differently than other state employes.

Article VI, sec. 3, Wis. Const., provides that the powers, duties and compensation of the treasurer shall be prescribed by law.

Section 14.58, Stats., sets forth the duties of the state treasurer. In particular, sec. 14.58 (4), Stats., provides in part that the state treasurer shall: "Pay out of the treasury, on demand, upon the warrants of the department of administration and not otherwise such sums *only as are authorized by law to be so paid. . . .*" (Emphasis supplied) See *State ex rel. Reynolds v. Smith* (1963), 19 Wis. 2d 577, 583, 120 N.W. 2d 664.

Accordingly, since it is my opinion that the payment for salaries of state constitutional officers prior to the time that the services of these officers have been rendered to the state of Wisconsin is not authorized by law, it is my further opinion that you cannot properly approve payment for same.

RWW:APH

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*Deputy Sheriffs—Civil Service Commission*—Where a county has a civil service plan for deputy sheriffs under sec. 59.21 (8) (a), Stats., transfers may result in promotion, and such vacancies should be filled by examination and certification of three eligibles to sheriff for appointment.

January 19, 1972.

DANIEL L. LAROCQUE, *District Attorney*  
*Marathon County*

You have requested my opinion on two questions relating to the appointment of deputy sheriffs in counties having a civil service system pursuant to sec. 59.21(8), Stats. Marathon County has a Civil Service Commission.

Your questions relate to that part of sec. 59.21 (8) (a), Stats., which provides:

“\* \* \* deputy sheriff positions shall be filled by appointment by the sheriff from a list of 3 persons for each position, such list to consist of the 3 candidates who shall receive the highest rating in a competitive examination \* \* \*”

1. Do the “positions” which are referred to as being filled by competitive examinations include departmental promotions from patrolman to sergeant, from sergeant to lieutenant, etc., or is it possible for the sheriff to appoint anyone to these senior ranks once the person has qualified as a civil service deputy?

2. Is a competitive examination required for transfer of an officer from one branch of the sheriff’s department to another, that is, for example, from a patrolman to the detective bureau or from the juvenile office to the detective bureau?

You state that in the latter situation a person who is transferred actually receives a pay raise as provided by the county board although his rank may remain the same. He also obtains certain fringe benefits, such as working in plain clothes and more regular hours, etc.

It would appear that the type of transfer you refer to results in a promotion. A civil service commission should define the term “promotion” by rule. For suggestions, part of which may be applicable, see Chapters Pers. 14, 15, Wisconsin Administrative Code.

I am of the opinion that in either case the sheriff must request certification of the names of three persons from the commission. Such persons must have passed a competitive examination which is applicable to the position to which the appointment is to be made. If an eligible list exists, certification should be made from that list by reason of sec. 63.05 (1) and (3), Stats. If no eligible list exists, an examination must be arranged for pursuant to sec. 63.05 (4), Stats.

In 48 OAG 98 (1959) it was stated that a county acting under sec. 59.21 (8), Stats., could provide for various classes of deputy sheriffs.

The provisions of sec. 63.01 to 63.17, Stats., are generally applicable by reason of the language in 59.21 (8) (a), Stats., which provides:

“\* \* \* If a civil service commission is decided upon for the selection of deputy sheriffs, then ss. 63.01 to 63.17 shall apply so far as consistent with this subsection, except ss. 63.03, 63.04 and 63.15 and except the provision governing minimum compensation of the commissioners. \* \* \*”

By reason of sec. 63.09, Stats., a person must qualify for a promotion by examination. Under sec. 63.05 (1), Stats., the commission has some latitude in establishing eligible lists for various positions. One competitive examination may qualify a person for one or more positions of similar nature, but individual lists must be established for positions where there is a variance in rank and pay range.

Even where there is not a civil service commission, the language of sec. 59.21 (8) (a), Stats., requires that the sheriff appoint from a list of three persons certified as eligible. Hence, certification of eligibles must be requested whenever a vacancy exists in a position.

RWW:RJV

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*Public Records—State Health Officer*—The right to inspection and copying of public records in decentralized offices discussed.

January 20, 1972.

GEORGE H. HANDY, M.D., *State Health Officer*

You have requested my opinion on two questions relating to the right of the public to inspect and copy documents relating to division surveys.

1. Can the Division of Health, in its central and various district offices, refuse to allow a member of the public, including members of the news media, access to files containing information relating to deficiencies found on official survey visits to health care facilities for which the Division serves as the regulatory agency prior to receipt of the official survey report by the facility?

2. In relation to the above question, does the Division, in its central and various district offices, when it is contemplated that enforcement action is to be taken by the central office on a facility following an official survey, have the right to be allowed to (a) at that time not treat the report as a file document, (b) be allowed to retain the survey report in their desk or some other appropriate area removed from the file, and (c) not file the report or, ((d) not) make it available to a second party until after enforcement action has been decided upon and such action taken by the central office? (Brackets and “(d) not” added.)

I am enclosing a copy of an opinion to the Secretary of the Department of Transportation, dated the 31st day of December, 1971, in which certain limitations on the right of public inspection and copying are discussed in depth.

On the basis of the conclusions set forth in that opinion, and by reason of the provisions of secs. 16.80 (2) (a) and 19.21 (1) and (2), Stats., my answer to your second question is that:

1. The documents referred to are *public records* in the lawful possession or control of the *legal custodial officer or his deputies*. For purposes of custody and of inspection and copying, there is no special significance to the fact of filing or placing a document in a “file” Lawful possession and control of a “public record” is all that is material, and public records include all those items set forth in sec. 16.80 (2) (a), Stats. The provisions of sec. 19.21 (1) and (2), Stats., cannot be circumvented by concealing or destroying public records. See secs. 19.21 (4) and 946.72 (1), Stats.

2. The right to inspection and copying must be made available under reasonable conditions to any person subject to the limitation that the custodial officer can withhold specific documents from inspection and copying where he determines that

the public interest in nondisclosure outweighs the strong public interest in full public access. Where inspection is to be denied, specific relevant reasons must be given as to each document.

3. Where the documents involve a potential criminal prosecution, or an existing investigation or pending licensing or disciplinary proceeding, there may be sufficient reasons to withhold inspection. The determination is for the custodian or his deputy, if authorized, and it would be improper for me to state that any or all of the documents relating to any specific investigation you now have should be withheld, since I have neither seen the documents nor been advised of other material circumstances.

Your first question embodies an erroneous assumption. The Division of Health is not the responsible legal custodian of public records received by the agency or its officers or employees.

Section 19.21 (1), Stats., makes each *officer* of the state the legal custodian of the records set forth therein, and *he* is the custodian of those public records which are in the lawful possession of himself or his deputies.

Under sec. 19.21 (2), Stats., the duty to permit inspection and copying is on the *custodial officer* subject to such orders or regulations as the *custodian* provides.

The Department of Health and Social Services is headed by a secretary and by reason of sec. 889.08 (2), Stats., the secretary or his deputy are custodians of all of the records in their agency. That section also provides that:

“\* \* \* In agencies having divisions, the heads of divisions are also legal custodians of the files and records of their division. \* \* \*”

Therefore, you, as State Health Officer, are the legal custodian of the records of your division.

Where the legal custodian of a division has not delegated authority to employes in his home office or in field offices, I am of the opinion that, since sec. 19.21 (2), Stats., provides that the custodial officer shall grant access to public records for purposes of inspection or copying, he has the right to view the public record

before permitting any person to inspect or copy the same. This is necessarily true since, under the holding in *State ex rel. Youmans v. Owens* (1965), 28 Wis. 2d 672, 682, 137 N.W. 2d 470, the custodial officer has the duty to deny inspection:

“\* \* \* If he determines that permitting inspection would result in harm to the public interest which outweighs any benefit that would result from granting inspection, \* \* \*”

In large agencies or divisions, especially where there are outlying offices or where the responsible custodial officer is not readily available, delegation of authority is necessary. In most instances, inspection should be granted by the custodial officer, or his delegate, at the place where the document is, and if delegation is present the delegate should permit inspection or deny the same giving specific reasons. Even where delegation is present, the responsible custodial officer can by regulation or specific direction in each case provide that he shall be promptly notified in important instances and require that the document be delivered to him so that he can determine whether access should be withheld.

I have reviewed the administrative procedures you have forwarded and with respect to 1 and 2, which relate to access to public records, make the following observations:

I am in agreement with the provisions of 1 and 2 (a) (b) (c) (d). With respect to the second (a) under 2 (which relates to health care facility records), I agree that identification may be required, but would not agree that the person seeking inspection must or should state a reason for inspection. With respect to (b), I question whether a person must give the name of any person they represent, and suggest that inspection probably cannot be limited to a specific file requested. Subsection (f) is also suspect in those respects. However, it is a reporting provision and the information could be forwarded if available. Subsection (c) is void insofar as it prohibits copying.

After you have considered this opinion, you may wish to provide further regulations as to who is the responsible legal custodian and any chain of delegation, together with provisions for prompt notification of the responsible legal custodian in special cases.

RWW:RJV

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*Leased Property—Relocation Assistance Payments*—A lessee under a five-year lease is a joint owner of real property within the intent of sec. 32.19, Stats., and is eligible to receive relocation assistance payments provided by sec. 32.19 (4) (a) 5, Stats. (1969), and ch. 103, sec. 4, Laws of 1971.

January 20, 1972.

ROBERT P. RUSSELL, *Corporation Counsel*  
*Milwaukee County*

In a letter from Assistant Corporation Counsel Robert G. Polasek, dated October 15, 1971, the following facts were stated.

The Milwaukee County Expressway and Transportation Commission has an option to purchase real property consisting of land and a building, housing a tavern and an apartment, and another building—a half lot cottage. The real property has been leased by the owner to the operator of the tavern under a five-year lease. The lessee subleases the apartment. The question posed is whether the lessee is eligible for statutory compensation for rent loss.

Section 32.19 (4) (a) 5., Stats. (1969), provided:

“(a) In addition to amounts otherwise authorized by this chapter, the condemnor shall reimburse the owner of real property acquired for a project for all reasonable and necessary expenses incurred for:

“5. Net rental losses resulting from vacancies during the year preceding the taking of the property, . . .”

This provision was repealed and recreated by ch. 103, Laws of 1971, effective retroactive to January 2, 1971. Section 32.19 (4) (c) 6., Stats. (1971), now provides:

“6. Reasonable net rental losses where a) the losses are directly attributable to the public improvement project and b) such losses are shown to exceed the normal rental or vacancy experience for similar properties in the area.”

Section 235.50, Stats. (1969), provided:

“The term ‘conveyance,’ as used in this chapter, shall be construed to embrace every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged or assigned or by which the title to any real estate may be affected in law or equity, except wills and leases for a term not exceeding three years; and the term ‘purchaser,’ as so used, shall be construed to embrace every person to whom any estate or interest in real estate shall be conveyed for a valuable consideration. . .”

A lease for more than three years under sec. 235.50, Stats. (1969), constituted “real estate” in Wisconsin.

“. . . A long-term leasehold under the circumstances is clearly ‘an interest in lands’ and therefore is ‘real estate’. . .” *Catholic Knights of Wisconsin v. Levy* (1952), 261 Wis. 284, 288, 53 N.W. 2d 1.

Chapter 285, Laws of 1969, repealed sec. 235.50, Stats., and created sec. 706.01 (1), (2) (c) and (3), Stats. These provisions read:

“(1) Subject to the exclusions in sub. (2), this chapter shall govern every transaction by which any interest in land is created, aliened, mortgaged, assigned or may be otherwise affected in law or in equity.

“(2) Excluded from the operation of this chapter are transactions which an interest in land is affected:

“ . . .

“(c) By lease for a term limited to one year or less; . . .”

“(3) A ‘conveyance’ is a written instrument, evidencing a transaction governed by this chapter, which satisfies the requirements of s. 706.02”

Chapter 285, Laws of 1969, became law July 1, 1971. Section 235.50, Stats. (1969), treated a lease of more than three years as a "conveyance" and defined "purchaser" as ". . . every person to whom any . . . interest in real estate shall be conveyed . . ."

The new chapter refers to grantors and grantees.

"Grantor" means the person from whom an interest in lands passes by conveyance and includes, without limitation, lessors, vendors, mortgagors, optionors, releasors, assignors and trust settlors of interest in lands. "Grantee" means the person to whom such interest passes. . . ." sec. 706.01 (5), Stats.

In construing the new chapter, it is my opinion that the legislative intent was to incorporate sec. 235.50, Stats., as construed by the court into ch. 285, Laws of 1969, and to broaden its coverage by defining leases in excess of one year as "real estate." Technically, real estate refers only to land, and real property refers to land and improvements. These terms were made interchangeable by sec. 990.01 (35), Stats.

Under Wisconsin law, a lessee with a lease for more than one year is a joint owner with the lessor of real property. Consequently, such a lessee would qualify for payment pursuant to sec. 32.19 (4) (a) 5., Stats., and ch. 103, Laws of 1971, sec. 4.

RWW:EGY

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*Unemployment Compensation Act—Institutions of Higher Education*— Institutions of higher education are included within the provisions of the Unemployment Compensation Act by reason of 26 U.S.C.A., sec. 3309 (a) and (d).

January 20, 1972.

EUGENE I. LEHRMANN, *State Director*  
*Board of Vocational, Technical & Adult Education*

On November 18, 1971, I advised you that the Vocational, Technical & Adult Education districts probably will be included within the definition of "institution of higher education" as

provided by new sec. 108.02 (27), Stats., subject to policy decisions and determinations by the Department of Industry, Labor and Human Relations. Section 108.02 (27), Stats., is nearly a carbon copy of the definition of institution of higher education found in 26 U.S.C.A. sec. 3309 (d), a new section of the Unemployment Compensation Act.

By letter dated December 29, 1971, you have asked the same question in a different way—i.e., whether Vocational, Technical & Adult Education districts are “instrumentalities” of the state subject to the provisions of 26 U.S.C.A. sec. 3309 (a). The answer is again in the affirmative. 26 U.S.C.A. sec. 3309 (a) provides in part as follows:

“(a) State law requirements.\* \* \*

“(1) except as otherwise provided in subsections (b) and (c), the services to which this paragraph applies are—

“\* \* \*

“(b) service performed in the employ of the State, or any instrumentality of the State or of the State and one or more other States, for a hospital or institution of higher education located in the State, *if such service is excluded from the term ‘employment’ solely by reason of paragraph (7) of section 3306 (c) \* \* \**”(Emphasis supplied)

26 U.S.C.A. sec 3306 (c) (7), provides in part as follows:

“(c) Employment.—For purposes of this chapter, the term ‘employment’ means any service performed \* \* \* except—

“(7) service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more States or political subdivisions \* \* \*”

The plain language of the statute indicates that a state “instrumentality” previously excepted from the Unemployment Compensation Act solely by reason of 26 U.S.C.A. sec. 3306 (c) (7), now is within the provisions of the Act. This interpretation is supported further by the fact that 26 U.S.C.A. sec. 3309 (b) and (c) provides a new list of exceptions from the provisions of the Act which does not include institutions of higher education.

Another approach to the same conclusion is apparent. The term "instrumentality" as used in 26 U.S.C.A. secs. 3306 (c) (7) and 3309, is generic in nature. A cursory examination of ch. 38, Stats., entitled Special Schools, indicates that a Vocational, Technical & Adult Education district falls within the general reference to "instrumentality" of the state.

Thus, institutions of higher education are included within the provisions of the Unemployment Compensation Act by reason of 26 U.S.C.A. sec. 3309 (a) and (d).

RWW:JPA

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*Absentee Ballot—Election*—Where an American citizen abandons his Wisconsin residency, moves from the United States and establishes a new permanent residence in a foreign country, no present provisions of law afford such citizen the right to vote for president in the election district of former residence by absentee ballot.

January 20, 1972.

ROBERT C. ZIMMERMAN

*Secretary of State*

You advise that your office has received inquiry from a local election official as to whether a former resident and registered voter of his district, who has informed him that she now resides permanently in a foreign country, has the right to vote for president in the election district of her former residence by absentee ballot, since she has retained her United States citizenship.

As a general proposition, qualifications for voting are established in the first instance by the respective states. As stated in 25 Am. Jur. 2d, *Elections*, sec. 58, at page 751:

“The right to vote may be dependent on the existence of certain conditions or on compliance with prescribed requirements, and such conditions and qualifications vary, of course, with the constitutions or laws of the several states.”

However, the federal government may, if it so desires, modify or eliminate the application of state voter regulations as they relate to federal elections. It did so, for instance, in adopting The Voting Rights Act of 1965, 79 Stat. 437; 42 U.S.C. 1973 seq. This law, as amended, was more recently treated by the United States Supreme Court in *Oregon v. Mitchell* (1970), 400 U.S. 112, 91 S.Ct. 260, 27 L.ed. 2d 272, and companion cases, which held that the 18-year-old vote provisions set forth in Title III of The Voting Rights Act Amendments of 1970, Pub. L. 91-285, 84 Stat. 314, were constitutional and enforceable insofar as they pertained to *federal* elections, and unconstitutional and unenforceable insofar as they pertained to *state and local* elections.

The views of Mr. Justice BLACK, who announced the judgments of the court in *Oregon v. Mitchell*, appear most instructive in reference to the question here being considered, 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 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, . . .” (Loc. cite 27 L.ed. 2d 279). He next quotes at length from the opinion of a 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 state are authorized to prescribe with respect to congressional elections, or to *substitute* its own. He, therefore, concludes, at 27 L.ed. 2d 281:

“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 27 L.ed. 2d 282, where he states:

“. . . Moreover, Art. I, sec. 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, sec. 4. . . .”

Therefore, although the state may not discriminate between its residents regarding the exercise of their franchise in an unconstitutional manner, voting regulations are within the jurisdiction of the state and are to be exercised as the state directs, except to the extent that Congress has restricted state action in reference to federal elections. The following general statement of the law appears in 25 Am. Jur. 2d, *Elections*, sec. 54 at pages 744-745:

“sec. 54. Source of right.

“The privilege to vote in any state is not given by the Federal Constitution, or by any of its amendments. Nor is it a privilege or immunity springing from citizenship of the United States. The privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and on such terms as it may deem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution. Generally speaking, the right of suffrage is derived from the states under state constitutions, or, in territories or territorial possession of the United States, under acts of Congress or territorial legislatures.

“Although the right to vote for Representatives in Congress is sometimes spoken of as a right derived from the state, it has been said that this is true only in the sense that the states are authorized by the Constitution to legislate on the subject to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections and its more general power to make all laws that are necessary and proper for carrying into execution the power specifically delegated to it, and that the *right of the people to choose Representatives in Congress* is a right established and guaranteed by the Constitution and hence *is one secured by it to those citizens and inhabitants of the state entitled to exercise the right*” (Emphasis added)

Thus, we note that voter qualifications established by the state, including the state resident requirement, apply to persons seeking to vote in federal elections as well as in state and local elections, unless the federal law prescribes otherwise. As stated in 25 Am. Jur. 2d, *Elections*, sec. 66, at page 758:

“A state has power to impose reasonable residence restrictions on the availability of the ballot, and state constitutions and statutes generally require as a prerequisite to the right to vote that the elector shall have been a resident of the state, county, and voting district for a specified period prior to the election. . . .”

Residency is a basic voter qualification in Wisconsin. 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.

I am aware that Title II of the Federal Voting Rights Act Amendments of 1970 include provisions intended to affect the *durational* residency requirements of the various states as they relate to voting for president and vice president and establish uniform standards in reference to absentee registration and voting in presidential elections. Although the thrust of these various provisions, as set forth in sec. 202 of the new statute, is to greatly liberalize the regulations relating to voting for president and vice president, they do not affect the basic function of this state under its constitution and statutes to determine who are and who are not residents of the state. See *Carrington v. Rash* (1965), 380 U.S. 89, 85 S.Ct. 775, 13 L.ed. 2d 675; *Evans v. Cornman* (1970), 398 U.S. 419, 90 S.Ct. 1752, 26 L.ed. 2d 370. Furthermore, although sec. 202 (c) of the new federal statute does make limited provision for a citizen to utilize the absentee ballot in the state of his prior residence, where he does not qualify to vote in the state or political subdivision to which he has removed, the federal statute does not appear to be applicable to a situation where an American citizen has abandoned his Wisconsin residency, removed from the United States and has established a new permanent residence in a foreign country for a number of months or years prior to the presidential election involved.

I am also aware that sec. 6.18, Stats., contains provisions similar to the absentee ballot provisions of the above-mentioned federal law. Since Art. III, sec. 1, Wis. Const., requires that an elector reside in the election district where he offers to vote, *State ex rel. Wannemaker* (1894), 87 Wis. 554, 558, 58 N.W. 1045, it was necessary that the statute be submitted to the vote of the electorate under a special referendum procedure which is set forth in this constitutional provision before it could become part of the law of this state. See ch. 512, Laws of 1961 (approved November, 1962) and 44 OAG 106 (1955). This statute, which appears more liberal than the federal law, authorizes any former qualified Wisconsin elector to vote by absentee ballot in the precinct of his prior residence, in any presidential election occurring within 24 months after leaving Wisconsin, if that person is ineligible to qualify as an elector in the state to which he has moved. You will note that the statute not only includes a time period after which the privilege to vote absentee ceases, but also relates solely to removal from one state to another. Therefore, it does not appear that the Wisconsin Statutes provide authority for allowing former residents of this state, who now reside permanently in a foreign country, to vote by absentee ballot in a presidential election in the election district of the former residence in the State of Wisconsin, simply because the person has retained their United States citizenship.

The foregoing response should adequately answer the specific question you have raised. However, I feel I should further direct your attention to my previous opinion, dated June 7, 1971, concerning absentee voting by people who appeared to have abandoned their Wisconsin residence and moved to another state. Much of what was said in that opinion also appears to be equally applicable to your present inquiry. That opinion, a copy of which is attached, discusses the nature of residency as a basic voter qualification in Wisconsin, and points out that, in order to insure that an ultimate determination on a question of voter qualification is legally effective, it must be reached by procedures in accord with the statutes governing elections. In the situation where a person appears to have abandoned his Wisconsin residence and established a permanent residence elsewhere, the specific question as to a voter's residency will probably most often arise and be treated under the provisions of secs. 6.48 (challenging

registration), 6.50 (revision of registry), or 6.93 (challenging the absent elector), Stats. These statutes are also discussed in the June 7, 1971, opinion referred to.

RWW:JCM

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*Assessors' Plats—Public Hearing*—Section 236.295, Stats., does not apply to assessors' plats. The amendment or correction of an assessor's plat under sec. 70.27 (4), Stats., is an exercise of the police power which is accomplished for the same purposes and in the same manner as the original assessor's plat.

The governing body involved is not required to conduct a "public hearing" concerning a proposed amendment or correction to an assessor's plat of record. Other questions concerning the amendment or correction of an assessor's plat answered.

January 20, 1972.

CHARLES M. HILL, *Secretary*

*Department of Local Affairs & Development*

You have requested my opinion on five questions concerning amendments or corrections to assessors' plats. You first inquire as follows:

"In the event it is determined that amendment(s) or correction(s) be made to an assessor's plat of record, may they be prepared and recorded similarly as provided by Section 236.295, Wisconsin Statutes? If not, by what specific procedure and in what form should such an amendment or correction be accomplished?"

Section 236.295, Stats., as amended by ch. 41, Laws of 1971, relates to subdivision plats and provides as follows:

"Correction instruments. (1) Correction instruments may be recorded in the office of the register of deeds in the county in which the plat is recorded and may include:

“a. What is meant by the wording ‘*plat of the area affected?*’ What size sheet does it imply? How is it to be prepared, etc.?”

The words “plat of the area affected” refers to a new assessor’s plat covering all of the area which is intended to be affected by the amendment or correction. The plat must be prepared in full compliance with all the provisions of sec. 70.27, Stats., and all the applicable provisions of secs. 236.15 and 236.20, Stats. The latter provisions are set forth in sec. 236.03 (2), Stats., above quoted. 58 OAG 198 (1969). One of these provisions, sec. 236.20 (1) (a), Stats., requires that the plat be prepared on muslin-backed white paper, 22” x 30”.

The second part of your second question reads as follows:

“b. What is meant by the wording ‘made and authenticated as provided by this section?’ Is the prepared amendment or correction plat required to be approved as similarly required for the original related assessor’s plat? Are the provisions of Section 70.27 (8) required for such prepared amendment or correction plat?”

The requirement in sec. 70.27 (4), Stats., that amendments and corrections be “made and authenticated as provided in this section” means that the prepared amendment of correction plat is required to be approved in the same manner as the original related assessor’s plat, including compliance with the provisions of sec. 70.27 (8), Stats. The word “authenticated” appears to have been first used in sec. 4, ch. 187, Laws of 1933, the direct predecessor of our modern assessor’s plat statute. Part of this enactment added the following language to the then existing statute:

“ . . . Both such plat and list (designating each parcel) shall be certified to by the person making the same, approved by the council or board, acknowledged various certificates and mayor or the village clerk and president and recorded in the office of the register of deeds of the county in which said city or village is located. . . . Amendments may be made to the plat at any time by the council or board by recording with the register of deeds a plat and accompanying list of such amendment, *authenticated in the same manner as the original plat and list . . .*” (Emphasis added)

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RWW:JCM

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*Assessors' Plats—Public Hearing*—Section 236.295, Stats., does not apply to assessors' plats. The amendment or correction of an assessor's plat under sec. 70.27 (4), Stats., is an exercise of the police power which is accomplished for the same purposes and in the same manner as the original assessor's plat.

The governing body involved is not required to conduct a "public hearing" concerning a proposed amendment or correction to an assessor's plat of record. Other questions concerning the amendment or correction of an assessor's plat answered.

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Section 236.295, Stats., as amended by ch. 41, Laws of 1971, relates to subdivision plats and provides as follows:

"Correction instruments. (1) Correction instruments may be recorded in the office of the register of deeds in the county in which the plat is recorded and may include:

“(a) Affidavits to correct distances, angles, directions, bearings chords, block or lot numbers, street names or other details shown on a recorded plat; and

“(b) Ratifications of a recorded plat signed and acknowledged in accordance with s. 706.07.

“(c) Certificates of owners and mortgagees of record at time of recording.

“(2) Each affidavit in sub. (1) (a) shall be approved prior to recording by the governing body of the municipality or town in which the subdivision is located. The register of deeds shall note on the plat a reference to the page and volume in which the affidavit or instrument is recorded. The record of such affidavit or instrument, or a certified copy thereof, shall be prima facie evidence of the facts stated therein.”

In my opinion, an amendment or a correction to an assessor's plat of record may not be prepared and recorded as provided by sec. 236.295, Stats.

First of all, even in the case of a subdivision plat, sec. 236.295, Stats., does not authorize any change or amendment other than specific corrections of the nature described therein. The correction instruments referred to therein are intended to be substituted in the place of inaccurate information or to rectify noncompliance with a statutory standard. However, true amendments to an original subdivision plat, by way of any other modification, deletion or addition to said plat, presumably formulated for the general purpose of improving the same, can only be accomplished under the statutory provisions for vacating and altering subdivision plats, set forth in secs. 236.36 through 236.445, Stats. 49 OAG 113, 114 (1960); 55 OAG 14, 18 (1966).

The purpose of ch. 236, Stats., is to regulate the division of land for the purpose of sale or of building development, while the purpose of assessors' plats, prepared pursuant to sec. 70.27, Stats., is to eliminate uncertainties and reconcile discrepancies in real estate descriptions which have arisen in the past and presently hinder various local governmental functions. Secs. 236.02 (8) and 70.27 (1), Stats. This general distinction accounts for the fact that most of the provisions of ch. 236, Stats., including sec. 236.295,

Stats., do not apply to assessors' plats. The only provisions of ch. 236, with which assessors' plats must comply, are set forth in sec. 236.03 (2), Stats., which provides:

"This chapter does not apply to cemetery plats made under s. 157.07 and assessors' plats made under s. 70.27, but such assessors' plats shall, except in counties having a population of 500,000 or more, comply with ss. 236.15 (1) (a) to (g) and 236.20 (1) and (2) (a) to (e)."

There is, in fact, no need to go outside the provisions of sec. 70.27, Stats., to find the statutory authority for amending and correcting an assessor's plat. Section 70.27 (4), Stats., provides:

"AMENDMENTS. *Amendments or corrections* to an assessor's plat *may be made* at any time by the governing body *by recording* with the register of deeds *a plat* of the area affected by such amendment or correction, made and authenticated as provided by this section. It shall not be necessary to refer to any amendment of the plat, but all assessments or instruments wherein any parcel of land is described as being in an assessor's plat, shall be construed to mean *the assessor's plat of lands with its amendments or corrections* as it stood on the date of making such assessment or instrument, or *such plats* may be identified by number." (Emphasis added)

This section clearly requires that the amendments or corrections be accomplished by the recording of a plat rather than by some other method.

The provisions of sec. 70.27 (2), (5), (6), (7) and (8), Stats., set forth the specific procedure and form which is to be followed to amend an assessor's plat. Subsections (5), (6) and (7) set forth the manner in which the surveyor is to conduct his survey and place monuments as well as the form and procedure to be followed in certifying the plat to the governing body. Subsection (5) also provides for notice to owners of record of lands lying within the plat. Subsection (8) contains most of the specific procedures which are to be followed by the governing body subsequent to the filing of the completed plat by the surveyor.

Your second question refers to the above-quoted provisions of sec. 70.27 (4), Stats., and first asks:

“a. What is meant by the wording ‘*plat of the area affected?*’ What size sheet does it imply? How is it to be prepared, etc.?”

The words “plat of the area affected” refers to a new assessor’s plat covering all of the area which is intended to be affected by the amendment or correction. The plat must be prepared in full compliance with all the provisions of sec. 70.27, Stats., and all the applicable provisions of secs. 236.15 and 236.20, Stats. The latter provisions are set forth in sec. 236.03 (2), Stats., above quoted. 58 OAG 198 (1969). One of these provisions, sec. 236.20 (1) (a), Stats., requires that the plat be prepared on muslin-backed white paper, 22” x 30”.

The second part of your second question reads as follows:

“b. What is meant by the wording ‘made and authenticated as provided by this section?’ Is the prepared amendment or correction plat required to be approved as similarly required for the original related assessor’s plat? Are the provisions of Section 70.27 (8) required for such prepared amendment or correction plat?”

The requirement in sec. 70.27 (4), Stats., that amendments and corrections be “made and authenticated as provided in this section” means that the prepared amendment of correction plat is required to be approved in the same manner as the original related assessor’s plat, including compliance with the provisions of sec. 70.27 (8), Stats. The word “authenticated” appears to have been first used in sec. 4, ch. 187, Laws of 1933, the direct predecessor of our modern assessor’s plat statute. Part of this enactment added the following language to the then existing statute:

“. . . Both such plat and list (designating each parcel) shall be certified to by the person making the same, approved by the council or board, acknowledged various certificates and mayor or the village clerk and president and recorded in the office of the register of deeds of the county in which said city or village is located. . . . Amendments may be made to the plat at any time by the council or board by recording with the register of deeds a plat and accompanying list of such amendment, *authenticated in the same manner as the original plat and list . . .*” (Emphasis added)

Under the 1933 law, as now, the original assessor's plat, as well as any amendment or correction thereto, is "authenticated" by the various certificates and verifications which the statute requires be added to the plat to attest to its accuracy and compliance with statute. Presently, these include the "sworn certificate of the surveyor" required by subsec. (7), the certificate of the head of the planning function of the Department of Local Affairs and Development that the plat complies with the applicable provisions of secs. 236.15 and 236.20, Stats., and the certificate of the clerk of the governing body causing the plat to be made indicating that all provisions of sec. 70.27, Stats., have been complied with, both as required by subsec. (8), and finally the requirement of subsec. (2) that the clerk acknowledge the instrument as that which was authorized and approved by the governing body. See 38 OAG 295 (1949) for discussion of the form of acknowledgment.

Your third question asks:

"What limitations are involved concerning the amendment or correction of an assessor's plat of record? For example, many boundaries of lots within the originally recorded assessor's plat be changed by such amendment or correction?"

The first part of this question is too general to allow a meaningful response. In response to the second part of the question, however, it is my opinion that the boundaries of lots as shown within the original recorded assessor's plat may be changed by virtue of an amendment or correction adopted in compliance with sec. 70.27, Stats.

Your next question asks:

"Is it necessary for the governing body to conduct a 'public hearing' concerning proposed amendment(s) or correction(s) to an assessor's plat of record?"

In my opinion, the governing body is not required to conduct a "public hearing" concerning a proposed amendment or correction to an assessor's plat of record.

Action by the governing body ordering an assessor's plat is based on a determination that certain inaccuracies and errors exist in the real estate descriptions of a particular area which hinder various local governmental functions, such as the

assessment and taxation of property or the location of streets. In making this initial judgment as well as in otherwise proceeding under the statute, the governing body, as well as those acting as officers and agents thereof, is engaged in the *bona fide* exercise of its police power in the advancement of the general welfare. Nevertheless, since matters relating to the property rights of individual citizens are treated by sec. 70.27, Stats., I can appreciate that question might arise whether the absence of such a public hearing would render the statute vulnerable as denying the due process of law guaranteed by the Fourteenth Amendment to the United State Constitution. In my opinion, however, the statute is not defective in this regard.

The relationship between the valid exercise of the police power and due process is generally stated in 16 Am. Jur. 2d, *Constitutional Law*, sec. 296, at pp. 578-580, as follows:

“The balance between police power and due process is more or less in a state of unstable equilibrium, changing with sociological and economic development. On the one hand, the general rule is firmly settled that the provisions of the Fourteenth Amendment prohibiting any state from depriving any person of life, liberty, or property without due process of law do not operate as a limitation upon the police power of the state to pass and enforce such laws as will inure to the health, morals, and general welfare of the people. The state is not deprived of the power to enact regulations reasonable in character, and a statute or ordinance which is a valid exercise of the police power does not violate the due process clauses of the state and federal constitutions. Indeed, regulation under a proper exercise of the police power is due process, even though a property in whole or in part is taken or destroyed or burdens and expenses of various types are imposed. . . .

“On the other hand, the United States Supreme Court has pointed out that the Fourteenth Amendment requires that governmental regulation shall be accomplished by methods consistent with due process, and that the due process clause is a limitation upon an improper exercise of the police power by the states in that it prevents an arbitrary or unreasonable exercise of the power through laws or regulations.”

Our office has previously recognized that some consideration must be given to procedural due process in reference to assessors' plats. 23 OAG 11, 12 (1934). And, due process does require that, when governmental action adversely affects certain rights or privileges, notice and opportunity for hearing appropriate to the nature of the case must be afforded before such action becomes effective. *Bell v. Burson* (1971), 402 U.S. 535, 91 S.Ct. 1586, 1591, 29 L.ed. 2d 90; *Wisconsin v. Constantineau* (1971), 400 U.S. 433, 91 S.Ct. 507, 27 L.ed. 2d 515; *Goldberg v. Kelly* (1970), 397 U.S. 254, 90 S.Ct. 1011, 25 L.ed. 2d 287; *Sniadach v. Family Finance Corp.* (1969), 395 U.S. 337, 89 S.Ct. 1820, 23 L.ed. 2d 349.

However, it appears clear that decision to order the plat in the first instance rests solely in the hands of the governing body and that due process does not require that that decision be prefaced by a public hearing. As stated in 48 Am. Jur., *Special Or Local Assessments*, sec. 176, at pp. 713-714:

"A right to notice, protest, and hearing does not exist with respect to a determination by the legislature, municipal council, or other duly constituted authority of the creation of an improvement district or area, the size of the district or area, and what property is included therein. . . ."

Furthermore, sec. 70.27 (1), Stats., already sets forth a formula which determines the share of the expense of making the assessors' plat which will be assessed against each parcel. That subsection reads, in part, as follows:

". . . The actual and necessary costs and expenses of making assessors' plats shall be paid out of the treasury of the city, village, town or county whose governing body ordered the plat, and all or any part of such cost may be charged to the land, without inclusion of improvements, so platted in the proportion that the last assessed valuation of each parcel bears to the last assessed total valuation of all lands including in the assessor's plat, and collected as a special assessment on such land, as provided by s. 66.60."

Where, as here, the legislature establishes a formula for payment, there is little purpose in holding a public hearing on the matter of the apportionment of such costs, since, as indicated in 48 Am. Jur., *Special Or Local Assessments*, sec. 157, at pp. 697-698:

“If a special or local assessment is made in accordance with a fixed rule adopted by a legislative act, there is no right to notice or a hearing, and when the cost of an improvement is, as by law in proper cases it may be, apportioned by mere mathematical calculation, notice and hearing are not necessary. . . .”

and, as indicated in 48 Am. Jur., *Special or Local Assessments*, sec. 176, at p. 714:

“A right to notice, protest, and hearing does not exist with respect to a determination of the mode of apportionment of a special or local assessment, at least, where such determination is by the legislature. In the enactment of the law, property owners are represented, and while it may be usual and proper for a lawmaking body to hear arguments as to measures of taxation, pro and con, through committees or otherwise, such hearing cannot be demanded as a legal right. . . .”

Nevertheless, since the ultimate intended effect of the adoption of an assessor's plat is to reconcile discrepancies and inconsistencies in property descriptions, such a plat will undoubtedly affect many of the owners of real property lying within the plat. These owners have reason to expect that they will be assured timely and adequate notice of the proposed plat as well as an effective opportunity to present their views and obtain information in reference to the plat. Section 70.27 (5), Stats., establishes such a procedure:

“. . . The owners of record of lands in the plat shall be notified by registered letter mailed to their last known address, in order that they shall have opportunity to examine the map, view the temporary monuments, and make known any disagreement with the boundaries as shown by the temporary monuments. It is the duty of the surveyor making the plat to reconcile any discrepancies that may be revealed, so that the plat as certified to the governing body is in conformity with the records of the register of deeds as nearly as is practicable. When boundary lines

between adjacent parcels, as evidenced on the ground, are mutually agreed to in writing by the owners of record, such lines shall be the true boundaries for all purposes thereafter, even though they may vary from the metes and bounds descriptions previous of record. . . .”

In addition, even after the surveyor and the head of the planning function of the Department of Local Affairs and Development have executed their certificates on the plat, an additional opportunity to challenge the plat in court is given interested parties by sec. 70.27 (8), Stats. This subsection provides, in part, as follows:

“ . . . After the plat has been so certified the clerk shall promptly publish a class 3 notice thereof, under ch. 985. The plat shall remain on file in the clerk’s office for 30 days after the first publication. At any time within such 30-day period any person or public body having an interest in any lands affected by the plat may bring a suit to have such plat corrected. . . .”

The above-described procedure quite adequately protects interested property owners and fully satisfies due process requirements.

Your last question asks:

“May the governing body levy and collect a special assessment for the expense of making amendment(s) or correction(s) to an assessor’s plat of record, as provided by Section 70.27 (1) and Section 66.60, Wisconsin Statutes?”

The answer to this question is “yes” Section 70.27 (1), Stats., provides, in part, as follows:

“ . . . The actual and necessary costs and expenses of making assessors’ plats . . . may be charged to the land, . . . and collected as a special assessment on such land, as provided by s. 66.60.”

As pointed out in my previous comments, the making of amendments or corrections to an assessor’s plat, under sec. 70.27, Stats., is an exercise of the police power which is to be accomplished for the same purposes and in the same manner as

the original assessor's plat. This, of course, includes the assessment of the "actual and necessary costs and expenses" of making the amendment or correction.

RWW:JCM

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*Certified Survey Maps—Platting*—Section 236.34 (2), Stats., requires that certified survey maps be numbered consecutively without dependent reference to ownership, developer or surveyor.

January 27, 1972.

WILLIAM A. BABLITCH, *District Attorney*  
*Portage County*

You have requested my opinion concerning the proper way to number certified survey maps as required by sec. 236.34 (2), Stats. This section provides, in part:

"Certified survey maps prepared in accordance with sub. (1) shall be numbered consecutively by the register of deeds and shall be recorded in a bound volume to be kept in the register of deeds' office, known as the 'Certified Survey Maps of . . . County' . . ."

You refer to two interpretations of sec. 236.34 (2), Stats., presently being implemented in Wisconsin.

In one case, a name is given the map, such as John Doe survey map no. 1, indicating the name of the owner and the number of the survey under that ownership. If two or more maps are recorded by a single owner, they are entered under his name and numbered consecutively. This, together with the volume and page, is considered by some Registers' of Deeds as being numbered consecutively under the statute in question.

In the second case, every certified survey recorded within a county is entitled ". . . County Certified Survey No. \_\_\_." The number indicates the order of filing of a certified survey without regard to ownership.

I am of the opinion that consecutive numbering of certified surveys without dependent reference to ownership is the method required by law, and that any other system employed would not comply with the requirements of sec. 236.34 (2), Stats. However, parenthetical reference on the survey plat to ownership, developer or surveyor is not prohibited if the plat is otherwise consecutively numbered.

The determination of this question involves the meaning of the phrase, "to be numbered consecutively." In sec. 990.01, Stats., the statutory provision governing the construction of laws, words and phrases, we find, in subsec. (1), "All words and phrases shall be construed according to common and approved usage; . . ."

The essence of the word "consecutive" as applied to numbering in succession, as following in a series or in a regular order. *Webster's Third New International Dictionary* (1961 ed.), p. 482, *Black's Law Dictionary* (4th ed.), p. 376.

Since sec. 236.34 (2), Stats., makes no reference to numbering with regard to ownership and provides for recording in volumes entitled "Certified Survey Maps of . . . County," the common meaning of consecutive numbering in this instance requires successive numbering of maps designed as ". . . County Certified Survey No. . . ." Section 236.34 (3), Stats., confirms this conclusion in providing that "the parcels of land in the map may be described by reference to the number of the survey, the volume and page where recorded, and the name of the county . . ."

Valid considerations support the legislative mandate as well as the conclusion I have reached in this opinion. The requirement of consecutive numbering makes reference to certified survey maps easier, simpler and freer from the possibility of error. Subsequent reference to a particularly numbered map will require reference to that numbered map only without the necessity of referring to a name or other index, or without the possible danger that XYZ Development Corporation might have inadvertently filed more than one "XYZ Development Corporation Certified Survey Map, No. 7" (for instance).

Section 236.34 (3), Stats., further indicates the importance of a uniform filing procedure for certified surveys in their use for determining future assessments, taxation, devise, descent and

conveyance purposes. I, therefore, conclude that sec. 236.34 (2), Stats., refers to consecutive numbering of certified survey maps without regard to ownership and that such numbers are to continue in succession regardless of volume numbers of the recording volumes.

RWW:WHW

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*Highway Commission Powers—Property*—State Highway Commission has the power to condemn lands of one property owner to provide a public access road to another property owner who would otherwise be landlocked.

January 28, 1972.

STATE DEPARTMENT OF TRANSPORTATION

You have requested my opinion on the following question:

“Within the powers granted by the Constitution and the Statutes of Wisconsin, does the State Highway Commission have the authority to condemn or otherwise acquire the lands of one person for the sole reason of providing access (across the said lands) from the lands of a second person to the State Trunk Highway System, where the lands of the said second person would otherwise be landlocked?”

We find no Wisconsin case law directly in point. However, case law in other states overwhelmingly supports an affirmative answer to your question.

*Dep't. of Public Works & B'ldg's. v. Bozarth* (1968), 101 Ill. App. 2d 99, 242 N.E.2d 54.

*Andrews v. State* (1967), 248 Ind. 525, 229 N.E.2d 806.

*Sturgill v. Commonwealth, Dep't. of Highways* (1964), Ky., 384 S.W.2d 89.

*Luke v. Massachusetts Turnpike Authority* (1958), 337 Mass. 304, 149 N.E.2d 225.

*Mississippi State Highway Comm. v. Morgan* (1965), 253 Miss. 398, 175 So.2d 606.

*State v. Davis* (1965), 87 N.J. Super. 377, 209 A.2d 633.

*State Highway Com'r. v. Totowa Lumber & Supply Co.* (1967), 96 N.J. Super. 115, 232 A.2d 655.

*May v. Ohio Turnpike Comm* (1962), 172 Ohio St. 555, 178 N.E.2d 920; *Tracey v. Preston* (1960), 114 Ohio App. 206, 181 N.E.2d 479.

The above cases hold that the acquisition of right of way from one property owner for the purpose of providing access to other landowners incidentally deprived of public access by reason of the construction of a turnpike, freeway or other limited access highways is for a public purpose and therefore constitutional.

In *Andrews v. State, supra*, the Indiana Supreme Court held:

“In truth and in fact, we must conclude that a service road would alleviate a land-locked condition of the Baldwin property and would certainly have the effect of reducing the amount of damages payable to the Baldwins. If the State of Indiana is not in a position to minimize the damages paid to land owners, then the cost of Interstate Highways would soar astronomically and Indiana would be dotted abnormally with land-locked real estate. We believe that in planning and providing for condemnation of service roads, under Burns', sec. 36-2949, *supra*, the Legislature properly intended such service roads would constitute a public use whether such road served one property owner or many. We so hold.”

The Kentucky Supreme Court, in *Sturgill v. Commonwealth, Department of Highways, supra*, expressed the law of the land on the issue with persuasive reasoning supporting its holding:

“The proposed access road is part of a comprehensive and complex highway construction plan clearly designed for public accommodation. K.R.S. 177.250 authorizes condemnation for access roads as incident to such a plan. Problems of necessity, proper design, best utilization of adjoining properties, convenience to the public, saving of expense, and promotion of traffic safety are matters which must be left to the discretion of the highway

authorities. See K.R.S. 177.240; and *Luke v. Massachusetts Turnpike Authority*, 337 Mass. 304, 149 N.E.2d 225. K.R.S. 177.081 provides in substance that specific details of the plan cannot be called in question, from the standpoint of necessity or public use, except upon a showing of fraud, bad faith or abuse of discretion. No such showing was made in this proceeding.

“Essentially appellants’ position seems to be that public use presupposes a predominating public need, and where the private advantage substantially outweighs the public benefit it cannot be said a particular taking is for a public use. Appellants emphasize the fact that this road was basically designed to provide access to and from the premises of Stilz, and principally inures to his private benefit. But this is only part of the picture. Even if we examine the road in isolation, apart from the overall plan, appellants’ argument does not take into account the dual aspect of public user.

“Any public way naturally confers a special benefit on those persons whose property adjoins it. All roads terminate somewhere. Dead end streets or highways inevitably and particularly subserve the private interests of the last property owner on the line. Yet the public has an interest in reaching other members thereof. As a practical matter, the right of condemnation for highway purposes could not be made to depend upon the predominance of the public interest over private benefit. This is too fine a line even for legal draftsmanship. If this consideration were a determining factor, the condemnor would endlessly be forced to ‘battle in every county courthouse.’ See *Commonwealth Dept. of Highways v. Burchett, Ky.*, 367 S.W.2d 262, 266. The accepted test is whether the roadway is under the control of public authorities and is open to public use, without regard to private interests or advantage.

\* \* \*

“Applying this test, the Commonwealth had the right to condemn appellants’ property to construct the access road in question.

\* \* \*

“Our conclusion is based upon long recognized precepts which allow the government broad latitude in the development of public highways. There utility is not for the courts to determine. That one member of the public specially benefits thereby does not impugn their public character if they are built for and open to public use. We find nothing illegal or unconstitutional in this taking and the circuit court properly denied injunctive relief.”

The legislature has granted to the Highway Commission broad power to acquire property for highway purposes. Section 84.09 (1), Stats., provides, in part:

“Acquisition of lands and interests therein. (1) The highway commission may acquire by gift, devise, purchase or condemnation any lands for establishing, laying out, widening, enlarging, extending, constructing, reconstructing, improving and maintaining highways, streets, roadwise parks and weighing stations which it is empowered to improve or maintain, or interests in lands in and about and along and leading to any or all of the same; . . .”

The courts will not disturb a determination made by the Highway Commission of lands necessary for highway purposes in the absence of a showing of fraud, bad faith or gross abuse of discretion. See *Brausen v. Daley* (1960), 11 Wis. 2d 160, 105 N.W. 2d 249; *Berman v. Parker* (1954), 348 U.S. 26, 75 S.Ct. 98, 99 L.ed. 27.

It is well established in Wisconsin that access to the system of public roads from a parcel of real estate is of concern to the state. Sections 80.13 and 80.14, Stats., provide that, if an owner of a parcel of real estate is landlocked, the landowner may force the public to condemn an easement of access over adjacent properties. To contend that the State Highway Commission has less authority to provide access than a private landowner does seem untenable.

I, therefore, conclude that your question must be answered in the affirmative.

RWW:WHW

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*Residency—Emancipated Minor*—An emancipated minor is not eligible for resident tuition at the University of Wisconsin if his parents are not bona fide residents of this state.

January 28, 1972.

T. H. HOOVER, *Registrar*  
*The University of Wisconsin*

You have requested my opinion as to whether sec. 36.16, Stats., recognizes an emancipated minor as being eligible for resident tuition.

You are correct in concluding that the statute in question generally sets forth the two classifications of adults and minors.

The statute also prescribes certain conditions under which minors are eligible for resident tuition such as residence of parents, guardian, etc. The statute does not mention emancipated minors. As the term "adult" is defined (sec. 990.01 (3), Stats.) as having reached the age of 21, anyone under that age, whether emancipated or not, must be considered as a minor.

The law is well settled that an emancipated minor may establish his own residency, 17 Am. Jur., *Domicil*, sec. 57; *Kidd vs. Joint School District* (1927), 194 Wis. 353.

Prior to 1939, sec. 36.16, Stats., merely referred to "student" and did not differentiate between adult and minor students. Accordingly, this office in 4 OAG 929 and 5 OAG 456 concluded that an emancipated minor could establish eligibility for resident tuition. Under sec. 36.16, Stats. 1939, the residency of an adult student was established and frozen as of his first semester, whereas the classification of a minor was subject to change. In 1963 (ch. 224, Laws of 1963) the section in question was amended so that the initial nonresident classification of the adult student was, so to speak, unfrozen by amending the term "first admission" to read "beginning of any semester."

Also, the legislature has on numerous occasions (chs. 249 and 271, Laws of 1953) broadened the eligibility of a minor for resident tuition, but it has not, in my opinion, given recognition

to the emancipated minor. Due to the restrictive language of sec. 36.16 (1) (c), Stats. 1969, it is impossible, in my opinion, to imply eligibility for the emancipated minor.

In light of the legislative history and the clear language of sec. 36.16, Stats., I must conclude as my predecessor did in 39 OAG 44, 46:

“\* \* \* it is immaterial whether the minor is emancipated and has acquired a Wisconsin residence; exemption from fees for tuition is dependent on establishing that his parents have been bona fide residents of this state for one year.”

This opinion is expressed with the caveat that, in not recognizing the legal ability of an emancipated minor to acquire residency for tuition purposes, the statute is subject to challenge under the equal protection clause of the Fourteenth Amendment of the United States Constitution.

This constitutional question, in my opinion, may only be resolved by the court.

RWW:CAB

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*Elections—Political Organization*—Filing of a proper petition under sec. 5.62, Stats., by the requisite number of electors in a senate, assembly or congressional district will qualify the political organization referred to in said petition as a party entitled to a separate ballot within the specific district only for all the state, congressional, legislative and county offices for which an elector of such district may vote. Under sec. 5.62 (2), Stats., the petition may be circulated commencing after any November general election and ending on the June 1 immediately prior to the next succeeding September primary. A petition filed February, 1972, under sec. 5.62 (2), Stats., signed by the electors of an assembly district, would not qualify filing political organization for a separate ballot at the presidential preference primary to be held at the April, 1972, spring election.

January 28, 1972.

ROBERT C. ZIMMERMAN, *Secretary of State*

You request my opinion on three questions requiring an interpretation of sec. 5.62 (2), Stats. Section 5.62, Stats., provides, in part, as follows:

“September primary ballots. At September primaries, where necessary, the following ballot shall be provided for each precinct, in substantially the same form as annexed Ballot 1.

“... ”

“(2) Any political organization may be represented by a separate ballot if, not later than June 1 in the year of a September primary, it files with the secretary of state a petition so requesting, signed either by electors equal to one-sixth of the total vote cast for governor in each of at least 10 counties at the last election or one-sixth of the electors in any senate, assembly or congressional district. *When their candidates fulfill the nomination paper requirements, they shall appear on a separate ballot within the district or state.*” (Emphasis added)

You first request my opinion as to whether the filing of a proper petition under sec. 5.62, Stats., by the requisite number of electors in a senate, assembly or congressional district, will qualify a political organization as a party entitled to a separate ballot for state-wide offices or will simply entitle it to a separate ballot for a senate, assembly or congressional candidate only.

In my opinion, if a timely petition is filed with your office pursuant to sec. 5.62 (2), Stats., which is properly signed by electors of a senate, assembly or congressional district, equal in number to one-sixth of the total vote cast for governor in the district involved at the last gubernatorial election, the political organization referred to in said petition is legally entitled to be represented by a separate ballot within the specific district only. However, its ballot must be in substantially the same form as the official primary ballot otherwise in use on a state-wide basis; i.e., the ballot must make provision for all the state, congressional, legislative and county offices for which an elector may vote at such primary. This would be true even though the only candidate

to fulfill the nomination paper requirements for inclusion on such ballot was a candidate for the senate, assembly or congressional district involved.

The above response to your first question appears to be clearly dictated by the language of the statute. The petition referred in sec. 5.62 (2), Stats., is, after all, a petition requesting that a *political organization* be represented by a separate ballot. The electors who sign the petition are not nominating anyone for any particular office. The nomination of candidates is a completely different process set forth in ch. 8, Stats. Furthermore, if sec. 5.62 (2), Stats., would be interpreted as making provision for a separate ballot for a senate, assembly or congressional candidate only, such an interpretation would affectively preclude the electors belonging to the political organization involved from casting a ballot for any office at the September primary, except the one office on his political organization's ballot. Such a result could not have been intended by the legislature.

Fortunately, our Supreme Court appears to have dealt with a previous version of sec. 5.62 (2), Stats., which is sufficiently similar to the current statute to provide meaningful judicial guidance which suggests the propriety of the foregoing interpretation of the present statute. In the case referred to, *State ex rel. Ekern v. Dammann* (1934), 215 Wis. 394, 254 N.W. 759, the court was considering the proper interpretation of sec. 5.05 (6) (e), 1933 Stats., which then read, in part, as follows:

“(e) Any other political organization which shall file with the secretary of state, not less than ninety days prior to the holding of a September primary, a petition signed by not less than one-sixth of the electors in at least ten counties therein, or by one-sixth of the electors within any senatorial, assembly or congressional district, praying that said organization be given a party ticket at the said September primary, may have a separate party ticket as a political party in such district or in the state, as the case may be, at such primary; and all candidates of such party for the nomination as candidates for the office of member of the assembly or of the senate or for representative in congress, if the petition be signed by electors in the district only, or for the nomination as candidates for state offices. If the petition be signed by the above required number of electors in at least ten

counties in the state, shall, upon complying with the provisions of law relative to nomination papers, be placed upon such ticket. . . .”

You will note that the semicolon appearing midway in the above quote separates two sentences which are the rough equivalent of the two sentences of the modern version of the law, sec. 5.62 (2), Stats. The following judicial interpretation of sec. 5.05 (6) (e), 1933 Stats., appears at pages 404-405 of the opinion:

“. . . The section is very inartificially drafted, and its construction is not free from difficulty. It is our conclusion that *the words, ‘may have a separate party ticket as a political party in such district or in the state, as the case may be, at such primary,’ have reference to territory and not to offices; that a party, the petition of which qualifies it for a party ticket in the state, is entitled to a full party ticket and not merely to a ticket containing the names of nominees for state offices. Whatever doubt there may be as to the validity of this construction is created by the following sentence:*

“(Second sentence of sec. 5.05 (5) (e) 1933 Stats., quoted.)

*“It is contended that this clause indicates the scope of the party ticket; that if a petition is filed within an assembly district only, the party ticket will contain only the candidate for assembly; that if the petition is signed by the requisite number of electors in at least ten counties of the state, the new organization will be entitled to a separate party ticket for state offices only. In so far as it may be said to be in conflict with the preceding one, this clause must yield, for it deals not with the scope of the party ticket but with the steps necessary for candidates to put themselves upon the party ballot at the primaries. It is our conclusion that the term ‘separate party ticket. . . in the state’ means a full party ticket throughout the state, including all offices, without restriction. The term is sufficiently inclusive to cover county offices and the office of United States senator, and the term is one that in common usage denotes a full party ticket throughout the state, including all offices to be voted for at the election.” (Emphasis added)*

Despite the differences in text between the 1933 and the present versions of the law here under consideration, I find nothing in those language variances which suggests that the general intent of the law, as interpreted in the above quote from the *Ekern Case*, has been purposely or inadvertently affected by such changes.

Next, you advise that, in the past, your department has interpreted sec. 5.62 (2), Stats., as authorizing the circulation of the petition during a period commencing after any November general election and ending on the June 1 immediately prior to the next succeeding September primary election. You have further advised that the petition may be filed *at any time* during this period up until June 1 in the year of the September primary election. You inquire whether my office is in agreement with such interpretation.

In my opinion, the interpretation you have given the statute in reference to the circulation and filing of the petition is correct, and I am, therefore, in accord with your office in this regard. Although the subject statute does not specifically indicate the time for the commencement of the circulation of the petition, general rules of statutory construction and logic would dictate that the time for circulating such petition is limited. Since the primary function of the petition is to secure a separate ballot for the political organization involved at a forthcoming September primary, it is obvious that the circulation of the petition must at least abide the holding of the September primary immediately preceding the primary in reference to which the petition will relate. More specifically, however, the number of signatures required for such petition is determined by the number of eligible voters who voted for governor "at the last election." Therefore, in order to maintain uniformity in the number of signatures required as between political organizations wishing to qualify for a separate ballot at a given September primary, it was natural to interpret the statute as requiring that circulation of the petition abide the holding of the gubernatorial election which immediately precedes the September primary involved. Until recently, the governor was elected for a term of two years at the November general election in each even-numbered years. Therefore, the number of electors who cast their ballot for governor in each such

election determined the number of signatures which would be required to qualify a political organization to be represented by a separate ballot at the September primary two years hence.

I am aware that Art. V, sec. 1m, Wis. Const., adopted by the electorate in April, 1967, as an amendment to the Wisconsin Constitution increases the term of office for governor from two years to four years beginning with the governor elected at the general election in 1970. This means, of course, that in the future the governor will be elected at every other general election instead of at every general election. Although the practical effect of his constitutional amendment is to extend the period of time during which the election statistics generated by a gubernatorial election may be utilized from two to four years, the amendment cannot be considered as having affected the basic legislative intent underlying sec. 5.62 (2), Stats. Considering the nature of the statute and said constitutional amendment, it appears most reasonable and in accord with sound principles of statutory constitution, to continue to construe the statute as it was intended to be understood when it was enacted. 50 Am. Jur., *Statutes*, sec. 236, p. 224. It is, therefore, my opinion that the length of the period for circulation of the petition under 5.62 (2), Stats., was not affected by the adoption of Art. V, sec. 1m, Wis. Const.

Finally, you inquire whether a political organization filing a petition under sec. 5.62 (2), Stats., which is signed by the electors in an assembly district, would qualify such organization for a separate ballot at the presidential preference primary to be held at the April, 1972, spring election if the petition was filed prior to the first Tuesday in February, 1972. You have expressed the view that such a filing would not so qualify the political organization involved. The basis for your conclusion is stated as follows:

“As indicated under s. 5.62, the first time a ‘new’ party may appear, once recognized, on the ballot would be at the September Primary. This would preclude a ‘new’ party from being placed on the ballot for the first time on the Spring Presidential Preference Primary Election.”

Section 8.21, Stats., sets forth the statutory requirements relating to the presidential preference vote. Participating in such primary is specifically limited to political parties “recognized

under s. 5.62.” One is immediately tempted to conclude that, inasmuch as the purpose of filing the petition under sec. 5.62 (2), Stats., is to obtain a separate ballot at the September primary for the political organization involved, the September primary election is the first time the organization will be considered to be a “recognized political party.” On the other hand, one of the principal political functions of the presidential primary is to provide delegates to the national convention. For instance, sec. 8.12 (3) (b), Stats., provides that the “state central committee” is to deposit the declaration of acceptance of office of each such delegate in the office of Secretary of State. But such an act would be impossible for a “new” political party, since a state central committee does not even exist until candidates for state offices, senate and assembly nominated by each political party at the September primary meet thereafter, on the first Tuesday in October, to elect such a committee. Further, the various statutory political party committees are also elected at the September primary. Sec. 8.17, Stats.

However, although the September primary will normally be the first time a petitioning political organization will appear on an official party ballot, I cannot say with absolute assurance that participation in such election is a prerequisite to recognition as a political party under sec. 5.62, Stats. It may be argued in fact that the statutes indicate that a political organization which is simply *entitled* to have its candidates on the September primary ballot is a “political party recognized under s. 5.62.” For instance, sec. 7.08 (2) (b), Stats., which describes certain duties of the Secretary of State, provides:

“(b) The certified list of candidates for president and vice president nominated at a national convention *by a party entitled to a September primary ballot* or for whom electors have been nominated under s. 8.20 shall be sent as soon as possible after the closing date for filing nomination papers, but no later than the deadlines established in s. 10.06.” (Emphasis added)

Likewise, sec. 8.16 (2), Stats., provides:

“(2) Nominees chosen at a national convention and under s. 8.18(2)(c) *by each party entitled to a September primary ballot* shall be the party’s candidates for president, vice president and presidential electors.” (Emphasis added)

Section 8.19 (3), Stats., also provides, in part, as follows:

“(3) Every political party *entitled, under s. 5.62, to have its candidates on the September primary and general election ballots* has exclusive right to the use of the name designating it at any election involving political parties. . . .” (Emphasis added)

Finally, sec. 5.60 (8), Stats., provides, in part, that:

“(8) **BALLOTS FOR PRESIDENTIAL VOTE.** There shall be a separate *ballot for each party qualified under s. 5.62*, listing the names of all potential candidates of that party determined under s. 8.12. . . .” (Emphasis added)

Also see discussions in 9 OAG 436 (1920) and 25 OAG 610 (1936) regarding the right of a political group that has not participated in election in this state to nominate presidential electors.

However, regardless of a political organization’s status as a party recognized under sec. 5.62, Stats., there appear to be numerous more obvious legal impediments precluding the placement of a presidential candidate on a presidential preference primary ballot under the circumstances you describe. As previously indicated in response to your first question, where the petition filed under sec. 5.62 (2), Stats., relates only to an assembly district, the separate ballot privilege extends only to that territory. Reading the various statutes relating to the presidential primary together, it seems rather clear that the legislature intended that the parties entitled to participate in such primary be those having the separate ballot privilege *throughout* the state. Note, for instance, that sec. 5.60 (8) (a), Stats., provides, in part, that, “An official (presidential primary) ballot shall be printed and provided for use in *each voting district. . . .*” (Emphasis added) Section 8.12, Stats., which relates to the presidential preference vote, also appears consistent with such conclusion. This statute anticipates the existence of a state chairman of a state party organization “recognized by the national organization of

the respective political party," a national committeeman, a national committeewoman, a candidate whose candidacy is "generally advocated or recognized in the national news media throughout the United States," and a national convention. Sec. 8.12 (1) (a), Stats.

Finally, since one of the principal political functions of the presidential primary is to provide delegates to the national convention (selected on the basis of congressional districts as well as in the state at large), the holding of a presidential primary in only one assembly district would appear to constitute an absurd and purposeless act which could in no way have been intended by the legislature. Therefore, as previously indicated, I must agree that a political organization filing a petition under sec. 5.62 (2), Stats., under the circumstances you describe, would not qualify such organization for a separate ballot at the presidential preference primary to be held in the April, 1972, spring election.

RWW:JCM

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*Relocation Payments—Condemnation*—Question of whether ch. 103, Laws of 1971 (amending sec. 32.19, Stats.), considered with other applicable state law, places Wisconsin in compliance with the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, P.L. 91-646, 84 Stat. 1894, discussed.

February 17, 1972.

THE HONORABLE, THE ASSEMBLY

By Assembly Resolution 14 you have asked my opinion as to the legal effect of 1971 Assembly Bill 583 relating to relocation payments in eminent domain proceedings, and also whether enactment of this bill would place Wisconsin "in compliance with" the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, P.L. 91-646, 84 Stat. 1894 (hereafter referred to as "the Federal Act"). Since the passage of Assembly Resolution 14, Assembly Bill 583 has, with certain

amendments, been enacted into law as ch. 103, Laws of 1971. In responding to Assembly Resolution 14, I will relate my discussion to ch. 103, Laws of 1971, rather than to Assembly Bill 583.

In answer to your first question as to the legal effect of ch. 103, this chapter liberalizes the provisions of existing sec. 32.19, Stats. Chapter 103 does not alter the basic structure or philosophy of sec. 32.19, Stats., but rather provides for numerous technical changes, the net effect of which are to extend eminent domain relocation payments in greater dollar amounts to more persons under more circumstances. Chapter 103 also provides greater procedural rights to persons affected by condemnation than are provided in existing sec. 32.19, Stats.

Chapter 103 provides the following increased benefits for persons affected by condemnation: the dollar amounts payable to such persons and businesses are increased substantially; more payment options are available to displaced persons and businesses; the eligibility standards for such increased payments are lowered, making more persons affected by condemnation eligible to receive the benefits of sec. 32.19, Stats.; more optional payment plans are available to displaced persons and businesses; and the procedural options available to displaced persons to contest the non-extension of relocation benefits or the amount of these benefits are increased.

In certain respects, however, ch. 103 dilutes or diminishes the benefits available under sec. 32.19, Stats. In connection with replacement housing, the requirement of sec. 32.19 (3) (b) 3a, Stats., that such housing be "adequate to accommodate the displaced owner" has been removed by ch. 103; the requirement that a displaced owner purchase and occupy his replacement housing within one year subsequent to the date on which he moves from the acquired dwelling previously applied only to replacement housing payments under sec. 32.19 (3) (b) 3a, Stats., but, under the terms of ch. 103, this limitation also applies to the reimbursement of refinancing costs. This limitation, however, has been liberalized by ch. 103 to include a period either one year after the date from which the displaced person moves from the acquired dwelling or the date on which he receives payment from the condemnor, whichever is later.

Finally, ch. 103 contains language designed to insure that its relocation benefits are, in fact, extended to eligible persons displaced by any condemnation; that the condemnor partakes as fully as is legally possible of the available federal relocation payments and services under the Federal Act; that the Department of Industry, Labor and Human Relations and the Department of Local Affairs and Development have the authority to obtain court orders forcing compliance with sec. 32.19 through 32.27, Stats., in all condemnations; and that adequate relocation payment plans and relocation assistance service plans (sec. 32.25 (1), Stats.) are submitted in all condemnation proceedings, whether or not federal assistance is provided in the proceedings.

You have also asked whether enactment of ch. 103 would place the state "in compliance with" the Federal Act. In answering this question, I will refer to the Wisconsin Statutes relating to relocation payments and assistance, as amended by ch. 103, Laws of 1971, as the State Act.

Section 221 of the Federal Act, provides that the Act shall take effect on the date of its enactment. It is indicated on the Act that it was "approved" on January 2, 1971, which presumably may be considered as its date of enactment. It is stated further in sec. 221 (b) of the Federal Act that until July 1, 1972, those provisions of the Act concerning the applicability of the Act to the states shall themselves apply to the states "only to the extent that such State is able under its laws to comply with such sections." After July 1, 1972, however, the sections which apply the Act to the states shall be "completely applicable to all States."

Section 210 of the Federal Act provides that the head of a federal agency shall not approve any grant to a state agency under which federal financial assistance will be available to pay all or part of the cost of any program "which will result in the displacement of any person" unless he receives "satisfactory assurances from such State agency" that "fair and reasonable relocation payments and assistance shall be provided to or for displaced persons" in accordance with the provisions of the Federal Act relating to (1) moving and related expenses (sec. 202); (2) replacement housing for homeowners (sec. 203); (3)

replacement housing for tenants and certain others (sec. 204) and that replacement assistance advisory services (sec. 205) "shall be provided to such displaced persons."

Section 305 of the Federal Act provides further that the head of a federal agency shall not approve any federally assisted state program "which will result in the acquisition of real property" unless he receives "satisfactory assurances from such State agency" (sec. 305 (2)) that property owners will be paid or reimbursed for necessary expenses incidental to the transfer of title to the condemnor (sec. 303) and for necessary litigation expenses (sec. 304). Section 305 (1) provides similarly that the head of the federal agency assisting a state agency in a federally assisted program involving the acquisition of real property must receive satisfactory assurances from the state agency that, in acquiring such real property, the state agency will be guided "to the greatest extent practicable under State law" by the Federal Act's uniform policy of real property acquisition practices and its policies in regard to the acquisition of buildings, structures and improvements.

The Wisconsin real property acquisition and condemnation procedures differ from those policies and procedures set forth in the Federal Act. However, I will not discuss these differences in this opinion in view of the fact that the Federal Act does not, in my opinion, require any changes in state condemnation procedures, in view of the language in the Federal Act that such procedures must conform to the Federal Act only "to the greatest extent practicable." In this opinion, I will discuss whether, under ch. 103, Laws of 1971, and other applicable state law, the state is "in compliance with" those provisions of the Federal Act that will be "completely applicable" to Wisconsin after July 1, 1972, as discussed previously. I will not consider those instances where the State Act would provide a payment not allowable under the Federal Act. While I will point out some differences between ch. 103, Laws of 1971, and the Federal Act, these differences should not be construed as resulting in noncompliance with the Federal Act unless specifically so stated.

One area in which the Wisconsin Act differs from the Federal Act is in the way in which certain words and phrases used throughout both Acts are defined. The definition in the Federal

Act of "a person" is simply "any individual, partnership, corporation, or association" (sec. 101 (5)). The State Act defines "person" in sec. 32.19 (2)(a), Stats., as "any individual, partnership, corporation or association which owns a business concern; or any owner, part owner, tenant or sharecropper operating a farm; or an individual who is the head of a family; or an individual not a member of a family." A "family" is defined as "two or more individuals living together in the same dwelling unit who are related to each other by blood, marriage, adoption or legal guardianship."

The Federal Act defines "displaced person" in sec. 101 (6) as any person who moves from, or moves his personal property from, real property as a result of the whole or partial public acquisition of such real property or as a result of "the written order of the acquiring agency to vacate real property." The State Act, in sec. 32.19 (2) (c), Stats., defines such "displaced person" as one who moves similarly as a result of the acquisition of such real property "or subsequent to the issuance of a jurisdictional offer under this chapter."

The Federal Act in sec. 101 (9) defines "mortgage" as "such classes of liens as are commonly given to secure advances on, or the unpaid purchase price of, real property, under the laws of the state in which the real property is located, together with the credit instruments, if any, secured thereby." The State Act contains no definition of mortgage, although other sections of the state statutes define that term for the purposes of the sections in question. For example, "mortgage" is defined in the sections relating to housing authorities for the elderly (sec. 66.395 (3), Stats.), housing authorities (sec. 66.40 (3), Stats.) and urban redevelopment (sec. 66.405 (3), Stats.).

In defining "farm operation" the Federal Act in sec. 101 (a) includes timber and also refers to the production of agricultural products for sale *or* home use. The Wisconsin definition of farm operation in sec. 32.19 (2) (e), Stats., does not include timber and refers to the production of agricultural products for sale *and* home use.

“Business” is defined nearly identically in the two Acts, except that the federal definition in sec. 101 (7) (A) of the Federal Act includes any activity conducted primarily for the purchase, sale, lease *and* rental of personal and real property, while the State Act, in sec. 32.19 (2) (d), Stats., substitutes “*or*” where the Federal Act utilizes “*and*.”

In connection with a second optional means of reimbursing a business or farm operation for their moving expenses, both Acts define “average annual net earnings.” The Federal Act in sec. 202 (c) defines them as one-half of any net earnings of the business or farm operation, before income taxes, during the two taxable years immediately preceding the taxable year in which the business or farm operation moves from the acquired real property, or during such other period as the condemnor determines to be “more equitable” for establishing such earnings. The Federal Act then states that “average annual net earnings” includes any compensation paid by the business or farm operation to the owner or his family “during such period.” The state definition, found in sec. 32.19 (3) (b) 2b, Stats., is similar to the Federal Act, except that the term includes any compensation paid by the business or farm operation to the owner or his family “during such *two-year* period,” thereby eliminating any earnings by the owner or his family during any period (other than the two-year period) which the condemnor might find was “more equitable” for establishing such earnings.

Looking now at those provisions of the Federal and State Acts pertaining to moving and related expenses, sec. 202 (a), of the Federal Act, provides for the payment of such expenses “whenever the acquisition of real property for a program or project undertaken . . . will result in the displacement of any person . . . (the condemnor) shall make a payment to any displaced person, upon application as approved by (the condemnor).” Section 32.19 (3), Stats., provides for moving and related expenses under the following circumstances:

“(3) Relocation Payments. Any condemnor which proceeds with the acquisition of real and personal property for purposes of any project for which the power of condemnation under this chapter may be exercised, shall make fair and reasonable relocation payments to displaced persons, business concerns and

farm operations under this section. The following items shall be compensable in eminent domain proceedings where shown to exist. . . . The condemnor shall compensate a displaced person for . . .”

The provisions of the sections relating to the payment of actual, reasonable moving expenses are similar except that the Federal Act allows expenses for an individual in moving himself, his family, business, farm operation “or other personal property.” The State Act in sec. 32.19 (3) (a), Stats., provides for such expenses “including personal property.” Also, the Federal Act in sec. 202 (a) (2) provides for actual direct losses of tangible personal property as a result of moving in an amount not to exceed the reasonable expenses that would have been required to relocate such property “as determined by the head of the (condemning) agency.” The State Act does not contain the quoted phrase. However, by virtue of the definition of “property” contained in sec. 32.01 (2), Stats., the state, in essence, will be in compliance with the provisions of the Federal Act.

Both Acts contain provisions allowing displaced persons certain options as to moving expenses. Section 202 (b) of the Federal Act provides such optional payments for any displaced person eligible for payments under the section relating to the payment of actual, reasonable moving expenses and who “is displaced from a dwelling” and who elects to accept the payments authorized by this subsection in lieu of the payments authorized by the section relating to the payment of actual, reasonable moving expenses. The State Act in sec. 32.19 (3) (b) (1), Stats., provides such optional moving expense allowance to any displaced person who “moves from a dwelling” and who elects to accept the payments authorized by this paragraph in lieu of the payments authorized in the paragraph relating to the payment of actual, reasonable moving expenses.

Both Acts contain provisions for a second optional moving payment to persons displaced from their businesses or farm operations by the condemning agency. Section 202 (c) provides such second optional payments to “any displaced person eligible for payments under subsec. (a) of this section (relating to actual, reasonable moving expenses) who is displaced from his place of business or from his farm operation and who elects to accept the

payment authorized by this subsection in lieu of the payment authorized by (the sections relating to the payment of actual, reasonable moving expenses.)” The State Act in sec. 32.19 (3) (b) (2), Stats., provides such second optional moving expense payment to any displaced person who, “moves or discontinues” his business or farm operation and who elects to accept payment authorized under this paragraph in lieu of the payment authorized under the sections relating to the payment of actual, reasonable moving expenses.

Both Acts contain provisions relating to replacement housing for homeowners. Section 203 (a) (1) of the Federal Act provides for such payments “to any displaced person who is displaced from a dwelling actually owned and occupied by such displaced person. . . .” The State Act in sec. 32.19 (4) (a), Stats., provides for such payments “to the owner of real property acquired for a project which property is improved by dwelling actually owned and occupied by the owner. . . .” Section 32.19 (4) (a), Stats., of the State Act provides further that a non-profit corporation organized under ch. 181, Stats., may be considered a displaced owner for the purpose of these payments for replacement housing, if it is otherwise eligible for such payments.

The replacement housing payment allowed to homeowners by sec. 203 (a) (1) of the Federal Act, provides for a payment which when added to the acquisition “cost” of the dwelling acquired equals the reasonable cost of a comparable replacement dwelling. The State Act in sec. 32.19 (4) (1), Stats., provides for such a payment which when added to the acquisition “payment” equals the reasonable cost of a comparable replacement dwelling.

In sec. 203 (a) (1) (A) of the Federal Act, the comparable replacement dwelling which may be purchased by the displaced homeowner in order to qualify for repayment under this provision must be a decent, safe and sanitary dwelling “adequate to accommodate such displaced person” reasonably accessible to public services and places of employment and available on the private market. All of the determinations as to the conditions of the comparable replacement dwelling are to be made in accordance with standards established by the head of the federal agency making the payment. The State Act in sec. 32.19 (4) (1), Stats., differs somewhat from the federal provisions. Section 32.19

(4) (a) 1, Stats., of the State Act does not contain the requirement found in the Federal Act that the replacement dwelling must be "adequate to accommodate such displaced person." Furthermore, while sec. 32.19 (4) (a) 1, Stats., of the State Act requires the comparable replacement dwelling to be decent, safe and sanitary, it is only this condition which is to be determined by the Department of Local Affairs and Development and the Department of Industry, Labor and Human Relations jointly. The additional conditions found in the Federal Act that the replacement dwelling must be reasonably accessible to public services and places of employment and available on the private market are not, according to the State Act, specifically determinable by these two state agencies.

The Federal Act in sec. 203 (a) (1) (B), provides for a payment for the increased interest costs which the displaced owner may incur in purchasing a comparable replacement dwelling. The Federal Act provides that this payment shall be in the amount, if any, which will compensate such displaced person for any increased interest costs which such person is required to pay for financing the acquisition of any such comparable replacement dwelling. The State Act in sec. 32.19 (4) (a) 2, Stats., merely provides for the payment of "all expenses incurred by the owner to finance the purchase of another property substantially similar to the property taken," including the "increased interest cost [sic.] above that provided in the former financing."

The Federal Act sets forth certain conditions for these replacement housing payments to homeowners. The Act in sec. 203 (a) (1) (B) states that these payments shall be made only if "the dwelling acquired by the Federal agency" was encumbered by a bona fide mortgage "which was a valid lien on such dwelling for not less than 180 days prior to the initiation of negotiations for the acquisition of such dwelling." The State Act in sec. 32.19 (4) (a) 2, Stats., merely provides for such payments if "at the time of the taking the land condemned" was subject to a bona fide mortgage or was held under a vendee's interest in a bona fide land contract. The State Act provides further that such mortgage or land contract must have been executed in good faith not less than 180 days prior to the initiation of the attempt to purchase the property.

Section 203 (a) (1) (B) of the Federal Act specifies that such payments for refinancing costs "shall be equal to the excess in the aggregate interest and other debt service costs" in the replacement refinancing. Section 32.19 (4) (a) 2, Stats., of the State Act provides for the payment of such "increased interest costs," provided that the computation of such costs shall be "based upon and limited to" only certain portions of the new financing. The Federal Act allows for the reimbursement of only the excess interest and debt service costs which are related to the present value of the amount of the principal of the replacement mortgage which is equal to the unpaid balance of the mortgage on the acquired dwelling over the remainder term of the former mortgage. Section 32.19 (4) (a) 2a and b, Stats., of the State Act allows for payment of a principal amount of indebtedness "not to exceed the unpaid debt at the date of taking" for a term "not to exceed the remaining term of the original mortgage or land contract at the date of taking." Section 203 (a) (1) (B) of the Federal Act contains no limitation upon the reimbursable interest rate which the displaced person may incur on the replacement mortgage, noting that reimbursement shall be made "for any increased interest costs which such (displaced) person is required to pay. . . ." Section 32.19 (4) (a) 2c, Stats., of the State Act limits the reimbursable interest rate to a rate "not to exceed the prevailing rate charged by mortgage lending institutions doing business in the vicinity." The discount rate specified in sec. 203 (a) (1) of the Federal Act shall be the prevailing interest rate paid on savings deposits by commercial banks "in the general area in which the replacement dwelling is located." Section 32.19 (4) (a) 2d, Stats., of the State Act provides for a discount rate "computed at" the prevailing interest rate paid on savings deposits by commercial banks doing business "in the vicinity."

The Federal Act in sec. 203 (a) (1) (C) also provides for the payment of reasonable expenses incurred by such displaced person "for evidence of title, recording fees, and other closing costs incident to the purchase of the replacement dwelling, but not including prepaid expenses." Section 32.19 (4) (a) 2, Stats., of the State Act provides for the payment of "all expenses incurred by the owner to finance the purchase of another property substantially similar to the property taken. . ." including reasonable incidental fees, commissions, discounts, surveying costs

and title evidence costs necessary to refinance the balance of the debt at the time of taking, if actually incurred. Furthermore, sec. 32.19 (4) (c), Stats., of the State Act provides for the reimbursement to the owner of acquired real property for all reasonable and necessary expenses incurred for recording fees, transfer taxes and similar expenses incidental to conveying his property to the condemner, including penalty costs for prepayment of mortgages meeting certain standards.

Finally, both Acts contain a blanket statement that their respective provisions relating to replacement housing for homeowners are to apply only to those displaced owners who purchase a replacement dwelling within a one-year period. One of the points in time from which this one-year period in sec. 203, (c) (2) of the Federal Act can be measured is the date on which the displaced owner receives from the condemner "final payment of all costs of the acquired dwelling." Section 32.19 (4) (a) 3, Stats., of the State Act alternately begins measuring the one-year period within which a displaced owner can purchase a replacement dwelling and be eligible for replacement housing payments from the date on which such displaced owner "receives payment" from the condemner.

Section 203 (b) of the Federal Act, provides as follows:

"(b) The head of any Federal agency may, upon application by a mortgagee, insure any mortgage (including advances during construction) on a comparable replacement dwelling executed by a displaced person assisted under this section, which mortgage is eligible for insurance under any Federal law administered by such agency notwithstanding any requirements under such law relating to age, physical condition, or other personal characteristics of eligible mortgagors, and may make commitments for the insurance of such mortgage prior to the date of execution of the mortgage."

By virtue of secs. 221 (b) and 210 of the Federal Act, it would appear that the provisions of the above-quoted section might be applicable to Wisconsin. However, the language of the quoted section creates serious doubt whether it was the intent of Congress to make it applicable to the states. Wisconsin has no similar statutory provision. Therefore, if the quoted section is applicable

to the states, in a strict sense, Wisconsin would not be in compliance. However, I might add that if a mortgagee requires mortgage insurance and the mortgagor obtains it, the state may reimburse the mortgagor the cost thereof under sec. 32.19 (4) 2, Stats.

Both the Federal and State Acts contain provisions relating to payment for replacement housing for tenants and certain others who are displaced by condemnation. The Federal Act, in sec. 204, allows such payment "to or for any displaced person" meeting certain standards, while the State Act in sec. 32.19 (4) (b), Stats., allows such payments "to any individual or family displaced from any dwelling" and also to nonprofit corporations organized under ch. 181, Stats. Secondly, the Federal Act, in sec. 204 (1), provides that the dwelling into which the displaced person may move in order to be eligible for these payments must meet certain standards set forth in the Act. The State Act, on the other hand, expressly states in sec. 32.19 (4) (b) 1 and 2, Stats., that the standards for the dwelling to which the displaced tenant may move in order to be eligible for these replacement housing payments are to be established by the Department of Local Affairs and Development and the Department of Industry, Labor and Human Relations jointly. Also, the Federal Act requires in sec. 204 (1) that the replacement unit must be "reasonably accessible to *his* (the displaced tenant's) place of employment," while the State Act merely requires (sec. 32.19 (4) (b) 1, Stats., that the replacement dwelling be in an area not generally less desirable in regard to "*places of employment.*"

Both Acts also contain provisions enabling displaced tenants to receive payments for the purpose of making down payments on replacement dwellings. The Federal Act sets forth in sec. 204 (2) the standards which the replacement dwelling must meet in order that the displaced person will be eligible to be reimbursed for his down payment. In setting forth these standards, the Federal Act in sec. 204 (2) contains no standards in relation to places of employment or to the displaced person's place of employment. The State Act in sec. 32.19 (4) (b) 2, Stats., provides that such replacement dwellings must be in areas not generally less desirable in regard to "places of employment." Finally, sec. 204 (2) of the Federal Act relating to replacement housing

reimbursements for tenants allows for the repayment of reasonable incidental expenses incurred by the displaced tenant, including reasonable expenses for evidence of title, recording fees and other closing costs incidental to the purchase of the replacement dwelling, but not including prepaid expenses. Section 32.19 (4) (b) 2, Stats., of the State Act also provides for the repayment of incidental expenses, but the state provision includes only reasonable incidental fees, commissions, discounts, surveying costs and title evidence costs necessary to refinance the balance of the debt at the time of taking, if actually incurred.

Both Acts require that the condemnor make relocation assistance advisory services available in certain instances. The Federal Act in sec. 205 (a) provides that the condemnor "shall provide a relocation assistance advisory program for displaced persons" and each relocation advisory assistance program shall (sec. 205 (c)) include "such measures, facilities, or services as may be necessary or appropriate" in order to meet the objectives set forth in the remainder of the section. The State Act in sec. 32.25 (1), Stats., provides that the condemnor must file in writing "a relocation payment plan and relocation assistance service plan and (have) . . . both such plans approved in writing by the Department of Local Affairs and Development." Section 32.25 (3), Stats., provides that the relocation assistance service plan shall contain evidence that the condemnor has taken reasonable and appropriate steps to achieve certain enumerated objectives.

The Federal Act in sec. 205 (a) provides that the condemnor may determine that any person occupying property immediately adjacent to the real property acquired is caused substantial economic injury because of the acquisition, in which event he may offer such person relocation advisory services. No comparable provision is contained in the State Act. Thus, in a very strict sense, Wisconsin would not be in compliance with this provision of the Federal Act. However, I note that this provision is not a mandatory one. Further, Wisconsin will have established its relocation assistance program and there is nothing in Wisconsin's law that would prohibit the acquiring agency from administratively making relocation assistance available to persons affected by the taking within the purview of sec. 205 (a) of the Federal Act.

Section 205 (b) of the Federal Act provides that any federal agencies which are administering programs which may be of assistance to displaced persons covered by the provisions of the Federal Act shall cooperate "to the maximum extent feasible" with the condemning agency causing the displacement "to assure such displaced persons receive the maximum assistance to them." The State Act has no directly comparable provision, although sec. 20.901 (1), Stats., does provide that, as a general matter, "the state agencies shall co-operate in the performance and execution of state work. . . ."

Certain criteria are set forth in both Acts regarding the nature of the relocation assistance advisory programs. In sec. 205 (c) (1) of the Federal Act it is required that the program contain a determination of the need, if any, of displaced persons, for relocation assistance. No direct comparable provision exists in the State Act, although sec. 32.25 (a), Stats., requires the condemnor to determine the cost of any relocation payments and services or the methods that are going to be used to determine such costs. Assumedly, it would be necessary to determine the need prior to determining the costs. Section 32.25 (3) (g), Stats., of the State Act also requires the condemnor to take reasonable and appropriate steps to determine the approximate number of persons, farms or businesses that will be displaced by the project.

Section 205 (c) (3) of the Federal Act requires the condemnor to assure that, within a reasonable period of time prior to displacement, there will be available in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, decent, safe and sanitary dwellings as defined by the condemnor. Section 32.25 (3) (h), Stats., of the State Act provides that the condemnor's relocation assistance service plan must contain evidence that the condemnor has taken reasonable and appropriate steps to assure that "to the extent that may reasonably be accomplished" the federally described standards are met; and that this housing must meet the above-described federal standards "so far as practicable." These replacement dwellings must meet the standards established jointly by the Department of Local Affairs and Development and the Department of Industry, Labor and Human Relations for decent,

safe and sanitary dwellings. Section 205 (c) (3) of the Federal Act requires that this replacement housing must be "available to such displaced persons who require such dwellings . . . (except that) the condemnor may prescribe by regulation situations when such assurances may be waived." The State Act contains no similar provisions.

The Federal Act in sec. 205 (c) (4) requires that the condemnor must assist a displaced person displaced "from his business or farm operation" in obtaining and becoming established in a suitable "replacement" location. The parallel state provision, found in sec. 32.25 (3) (b), Stats., requires the condemnor to take reasonable and appropriate steps to assist "owners" of displaced business and farm operations, in obtaining and becoming established in suitable business locations or "replacement" farms. The Federal Act in sec. 205 (c) (6) provides that the condemnor must "provide other advisory services" to displaced persons in order to minimize hardships to such persons in adjusting to relocation. The State Act in sec. 32.25 (3) (e), merely requires the condemnor to take reasonable and appropriate steps to "assist" displaced persons in this respect.

In sec. 205 (d) the heads of federal agencies "shall" coordinate relocation activities with other governmental actions in the community or nearby areas which may affect the carrying out of relocation assistance "programs." The State Act in sec. 32.25 (3) (f), Stats., requires the condemnor to take reasonable and appropriate steps to "secure, to the greatest extent practicable," such coordination of other programs which may affect "the relocation program."

Section 302 (a), provides, *inter alia*, that the acquiring agency acquire buildings, structures, or other improvements which the acquiring agency determines will be adversely affected by the public improvement project even though such buildings, structures, or other improvements are not located on the real property acquired for the project. Under Wisconsin law, a condemning authority may not condemn property in excess of that required for the public improvement project. While the Highway Commission does have the authority to acquire property in excess of that actually required for a project, this acquisition authority may be exercised only if the owner of the real estate

involved agrees. Excess acquisition cannot take place against the landowner's desire. Therefore, the state of Wisconsin cannot be in compliance with sec. 302 (a) insofar as it requires the acquisition of property located outside of the limits required for public purpose. However, this noncompliance may be negligible since, under Wisconsin law and practice, it is the landowner and not the state that determines whether excess acquisition will occur, except that the state is not legally compelled to acquire excess property and will not do so if the landowner's position or terms are considered by the state to be unreasonable.

Section 302 (b) of the Federal Act might be construed as requiring a separate payment of a portion of the just compensation to a tenant where the property being acquired is subject to a lease. (Under what circumstances this is required under the language of this section is unclear.) While I do not construe sec. 302 (b) of the Federal Act as requiring a separate payment, if it is determined that this section does require a separate payment to the tenant, Wisconsin law does not permit compliance. A long line of cases decided by our Supreme Court clearly establishes that, in eminent domain proceedings, the property involved be appraised as a whole and that just compensation be made to the owner or owners "in gross." Chapter 32, Stats., requires that the property being acquired be appraised as a whole and that *all* owners be named on the award of damages. Further, Wisconsin's statutes do not permit separate appeals to an award of damages, but requires all owners of interest in the real estate to join in an appeal from an award of damages made in eminent domain or be barred from further appeal. Finally, Wisconsin law directs that, if the separate owners of real estate cannot agree to a division of an award of damages, any party to an award may partition, pursuant to sec. 277.01, Stats., for a proper division of the award. Thus, division of an award of damages between different owners is not permissible under Wisconsin law. Therefore, Wisconsin is not in compliance with sec. 302 (b) of the Federal Act, if it does require separate payment. However, in my opinion, Wisconsin is in compliance since such tenant, as I construe the meaning of this section, would be included as one of the owners of the real estate and would be named on the award of damages and included as a payee on any check for payment of just compensation.

Both Acts provide that the condemnor shall pay certain expenses incidental to the transfer of title to it. The Federal Act in sec. 303 provides that these payments shall be made "as soon as practicable after the date of payment of the purchase price or the date of deposit in court of funds to satisfy the award of condemnation in a condemnation proceeding to acquire real property, whichever is earlier." The State Act in sec. 32.19 (4) (c), Stats., merely states that "condemnor shall reimburse" the owner of acquired real property for certain enumerated incidental expenses. The Federal Act in sec. 303 provides that the owner shall be reimbursed for certain enumerated expenses "he necessarily incurred" to the extent the condemnor "deems fair and reasonable." The State Act in sec. 32.19 (4) (c), Stats., merely provides that the owner shall be reimbursed for "all reasonable and necessary expenses incurred" for the enumerated reimbursable expense items.

Section 304 of the Federal Act provides for the repayment to condemnees of certain litigation expenses. This section provides payment to the owner of any right or title to or interest in real property being acquired of "such sum as will in the opinion of the court reimburse such owner for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings. . . ." These expenses are only reimbursable in the event either that the final judgment is that the condemnor cannot acquire the real property by condemnation or if the proceeding is abandoned by the condemnor. These litigation expenses, when payable, are to be paid by the condemnor who was intending to acquire the property.

The only comparable provision in the State Act is found in sec. 32.06 (9), Stats. Condemnation proceedings must be instituted under sec. 32.06, Stats., for all public purposes *except* those for streets, highways, storm or sanitary sewers, water courses, alleys, airports, cemeteries, municipal acquisition of utilities and acquisitions by cities of the first class (under ch. 275, Laws of 1931, as amended; the Kline Law). Section 32.06 (9), Stats., provides that, if a condemnor proceeding under sec. 32.06, Stats., desires to abandon the proceeding, it must so petition the circuit judge of the county where the property is located. The circuit

judge shall grant such a petition "upon such terms as he deems just, which terms may include reasonable expert witness fees incurred by condemnee for not to exceed 3 expert witnesses and a reasonable attorney's fee both as approved by the judge." No comparable provision is contained within sec. 32.05, Stats., the section which must be followed in all condemnation actions not properly brought under sec. 32.06, Stats. Wisconsin law contains no provision for the payment of any costs, other than statutory costs and disbursements (which would limit recovery of attorneys' fees to \$100), to the condemnee in the event of a court determination that the acquisition is not necessary for the accomplishment of a public purpose. In this respect, the state is in noncompliance with the Federal Act. I might add parenthetically that such occurrence in Wisconsin is so rare as to be virtually nonexistent.

In conclusion, I have discussed in the preceding opinion the many variances between the Wisconsin Statutes, as amended by ch. 103, Laws of 1971, and P.L. 91-646, the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

In conclusion, it is my opinion that the Wisconsin statutes are "in compliance with" the Federal Act, except in those instances where I have specifically indicated otherwise.

Whether Wisconsin law permits compliance with sec. 217 of the Federal Act by contracting municipalities or agencies appears to be unclear, and I express no present opinion whether Wisconsin law allows compliance. Since the issue seems cloudy, it is my recommendation, in order to remove this issue from doubt, that legislation be enacted to direct compliance with sec. 217 of the Federal Act.

RWW:BS

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*Physicians—PKU Test*—A physician and parent may enter an agreement to perform a PKU test after the infant of said parent has left the hospital without violating sec. 146.02 (1), Stats.

February 18, 1972.

GEORGE H. HANDY, M.D.

*State Health Officer*

You have asked my opinion relating to an interpretation of sec. 146.02 (1), Stats., which reads as follows:

“The attending physician shall cause every infant born in each hospital or maternity home, prior to its discharge therefrom, to be subjected to a test for phenylketonuria and such other causes of mental retardation under sub. (2) as the department directs.”

You note that the so-called PKU test required above cannot be expected to be valid until an infant has been fed cow's milk for at least 24 hours or breast milk for at least 48 hours. You ask if the intent of the law would be fulfilled if the parent and the attending physician enter into an agreement to have the test done as soon as valid results could be expected, but after the infant left the hospital.

I am of the opinion your question should be answered affirmatively. Courts generally apply the principle of construction that a statute should be given an interpretation which permits a reasonable operation. 50 Am. Jur., *Statutes*, sec. 26. The burden is on the physician to have the test performed as soon as valid results can be expected so that the causes of mental retardation are not irreversible. This is the essence of the thing to be done in terms of the statutory purpose and the material provisions of the statute. 50 Am. Jur., *Statutes*, sec. 25.

Although the statutory provisions carry no penalty, I regard the statute as being absolutely mandatory in terms of protecting the mental health of the infant involved. Accordingly, failure of a physician to pursue the legislative mandate in this matter may subject such physician to disciplinary action.

RWW:WLJ

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*Municipal Corporations—Beer Licenses*—Under sec. 66.054 (4) (a), Stats., a Class “B” retail license may not be issued to a licensed wholesaler of fermented malt beverages.

February 18, 1972.

FRANK A. MEYERS, *Division of Criminal Investigation*

*Department of Justice*

You have requested an opinion upon the question of whether a wholesaler of fermented malt beverages, who is licensed pursuant to sec. 66.054 (6), Stats., may also obtain a retail Class “B” license under sec. 66.054 (8), Stats., without violating the tied-house provisions of sec. 66.054 (4) (a), Stats.

This office has previously ruled on a similar question. See 22 OAG 503 (1933), which answered in the negative the question of whether under ch. 207, Laws of 1933, a fermented malt beverage wholesaler’s license and a fermented malt beverage Class “B” retail license could be issued to the same person.

Since that 1933 opinion, the legislature has amended the statute that was the subject of that opinion. The question, therefore, becomes, as amended and as renumbered to sec. 66.054 (4) (a), Stats., does the statute now dictate a conclusion different from that contained in the 1933 opinion. The answer is in the negative.

Section 66.054 (4) (a), Stats., provides in part as follows:

“66.054 (4) RESTRICTIONS ON BREWERS, BOTTLERS AND WHOLESALERS. (a) No brewer, bottler or wholesaler shall furnish, give, lend, lease or sell any furniture, fixtures, fittings, equipment, money or other thing of value, directly or indirectly, or through a subsidiary or affiliate corporation, or by any officer, director, stockholder or partner thereof, to any Class “B” licensee, or to any person for the use, benefit or relief of any Class “B” licensee, or guarantee the repayment of any loan, or the fulfillment of any financial obligation of any Class “B” licensee . . .”

This statutory provision (as well as its predecessor as originally found in ch. 207, Laws of 1933) was designed to prevent the so-called "tied-house" relationships in the fermented malt beverage industry in the state of Wisconsin. The tied-house is a retail fermented malt beverage outlet in which a brewer, bottler or wholesaler of fermented malt beverages has a managerial interest or control. One of the outstanding features which characterizes the development of state laws in the post-prohibition era was abolition of the tied-house system. A 1960 study reports that 34 states have statutes related to tied-house regulations. See *Alcoholic Beverage Control*, an official study by the Joint Committee of the States to Study Alcoholic Beverage Laws (1960), at page 35. This office has previously recognized that the 1933 Legislature endeavored to correct one of the evils of the pre-prohibition days, namely, the tied-house relationship. See 22 OAG 814 (1933).

Careful review of sec. 66.054, Stats., indicates that the legislature clearly intended that the fermented malt beverage industry should be divided into three levels: the manufacturer, the distributor and the retailer. Recognizing that there should be three levels in the fermented malt beverage industry, the legislature realized that a potential existed for abuses to this concept and, therefore, created the tied-house prohibitions found in sec. 66.054 (4) (a), Stats. As this office said in an informal opinion on July 25, 1961:

"The object and intent of sec. 176.17 (as well as 66.054 (4) relating to fermented malt beverage) is to prevent manufacturers and wholesalers from acquiring complete or partial control of specific Class "B" retailers, directly by owning them or indirectly by creating financial or moral obligations. The purpose is clearly to assure the freest competition in the industry by preventing monopolistic practices and, to divorce entirely the wholesaler from the Class "B" retailer."

Section 66.054 (4) (a), Stats., contains language which must be construed to include the prohibition of ownership of a retail Class "B" fermented malt beverage establishment by a fermented malt beverage wholesaler. A wholesaler is prohibited from giving money or any other thing of value to any Class "B" licensee. He is also prohibited from lending any money or other thing of value

directly or indirectly to a Class "B" licensee. He is prohibited from guaranteeing the repayment of any loan or the fulfillment of any financial obligation of any Class "B" licensee. Therefore, the wholesaler is prohibited from providing whatever money or capital is necessary for the establishment of Class "B" licensed premises.

A wholesaler is prohibited from furnishing anything of value to a Class "B" retailer. "Furnished" is a very broad term which includes instances of mutual consideration as well as gratuity. 44 OAG 91, 92 (1955). Another portion of sec. 66.054 (4), Stats., provides that a wholesaler cannot provide anything of value ". . . to any person for the use, benefit, or relief of any Class "B" licensee . . ." A wholesaler who obtains a Class "B" retail license does so for the "benefit" of a Class "B" licensee since the obtaining establishes the retailer's existence.

If one were to read sec. 66.054 (4) (a), Stats., as allowing for ownership of a Class "B" retail establishment by a wholesaler, absurd results would occur. Such a reading would produce a situation in which a wholesaler could not own the bar stools or beer glasses but could hold the retail license. This interpretation produces an absurd result given the evil the legislature intended to prohibit. "The rule is that if a statute is reasonably open to any other construction it will not be given a construction which results in unreasonableness." *Williams v. City of Madison* (1962), 15 Wis. 2d 430, 439, 113 N.W. 2d 395. Absurd results are to be avoided, if possible, in construing statutes. *State v. Fischer* (1962), 17 Wis. 2d 141, 146, 115 N.W. 2d 553.

This office has previously ruled that brewers, bottlers and wholesalers may not provide a Class "B" retailer with certain forms of refrigerating units to be used on the retail Class "B" licensed premises. See 40 OAG 84 (1951). This office has previously ruled that for a brewer, bottler or wholesaler to furnish, give, lend money or anything of value to a trade association comprised of holders of Class "B" licenses is prohibited by sec. 66.054 (4) (a), Stats. See 44 OAG 34 (1955). This office has also issued an opinion that the purchase by a brewer, bottler or wholesaler of advertising space in publications published by a trade association comprised of Class "B" fermented malt beverage licensees, or the purchase of display or

other rental space from such an association, constitutes the furnishing of money and is, therefore, prohibited by sec. 66.054 (4) (a), Stats. See 44 OAG 91 (1955). It would be absurd to conclude that the forms of tied-house relationships referred to above are in violation of sec. 66.054 (4) (a), Stats., while concluding that it was not the legislative intent to prohibit wholesalers from having retail Class "B" licenses issued to them. The legislature cannot be assumed to have intended such anomalous results unless no other reasonable construction can prevail. *State ex rel. McManman v. Thomas* (1912), 150 Wis. 190, 196, 136 N.W. 623. To allow the wholesaler to obtain a Class "B" license would be an absurdity in view of the clear legislative purpose of sec. 66.054 (4), Stats., and such avoidance of legislative intent should not be countenanced. 48 C.J.S. *Intoxicating Liquor*, sec. 191.

In construing the statute, great consideration should be given to the object sought to be accomplished by the statute. *Huck v. Chicago, St. P., M. & O.R. Co.* (1958), 4 Wis. 2d 132, 137, 90 N.W. 2d 154. Clearly the legislative intent of sec. 66.054 (4) (a), Stats., is to prevent the tied-house relationship between the retailer and either the brewer or the wholesaler. In addition, in construing the statute, one must derive the intent of that statute from the act as a whole. *Smith v. City of Brookfield* (1956), 272 Wis. 1, 5, 74 N.W. 2d 770. The intent of sec. 66.054 (4), Stats., when read as a whole is to prevent a tied-house relationship existing between the wholesaler and retailer, including the possibility of the wholesaler also being a Class "B" licensee. A Wisconsin Supreme Court statement in *Beckman v. Bemis-Hooper-Hayes Co.* (1933), 212 Wis. 565, 571, 250 N.W. 420 is instructive:

"The statute is to be examined first to discover the legislative purpose, and when that purpose is discovered it is to be so construed as to effect the evident purpose of the legislature if the language admits of that construction."

What is of fundamental importance is not what is included but what is omitted from sec. 66.054, Stats. Nowhere is the wholesaler explicitly granted the privilege of holding both a wholesale and a retail license. Laws dealing with alcoholic beverages are strictly construed against the licensee and it is not

possible to extend such a law by implication. 38 OAG 540, 541 (1949). "The prohibition provision (of sec. 66.054 (4) (a), Stats.) is a sweeping, all-inclusive one, subject only to the specific exceptions set forth." 40 OAG 84, 85 (1951). These exceptions which limit the scope of the enacting clause must be strictly construed. *Sutherland Statutory Construction*, (3rd Ed. 1943) sec. 4830, p. 377. In 22 OAG 503 (1933), this office offered an opinion which indicated that a wholesaler could not be issued a Class "B" retailer's license. This opinion was based on sec. 66.05 (10) (c) 1, Stats., enacted by ch. 207, Laws of 1933. This provision read:

"(c) Restrictions on brewers, bottlers and wholesalers. 1. No brewer, bottler, wholesaler, or corporation a majority of whose stock is owned by any brewer, bottler or wholesaler, shall supply, furnish, lease, give, pay for, or take any chattel mortgage on any furniture, fixtures, fittings or equipment used in or about any place which shall require a Class "B" license except as provided in subdivision 2 of this paragraph, nor shall any brewer, bottler, wholesaler or corporation a majority of whose stock is owned by any brewer, bottler, or wholesaler, lease any real estate acquired after the effective date of this subsection to any person, for the purpose of conducting therein any business requiring a Class "B" license, but this prohibition as to leasing of real estate shall not apply to a hotel, or to a restaurant not a part of or located in or upon the premises of any mercantile establishment, or to a bona fide club, society or lodge that shall have been in existence for not less than six months prior to the date of granting such license. No brewer, bottler or wholesaler shall advance, pay or furnish money for any license fees or taxes which may be required to be paid by any retailer *or be otherwise financially interested in, directly, or indirectly*, in any Class "B" license, except as provided in subdivision 2 of this paragraph. Any licensee who shall be a party to any violation of this subdivision or who shall receive the benefits thereof shall be equally guilty of a violation of the provisions thereof." (Emphasis added)

Said subdivision 2 of sec. 66.05 (10) (c), Stats., provided in part:

“A brewer may maintain and operate in and upon the brewery premises a place for the service or sale of fermented malt beverages or light wines, for which a class “B” license shall be required.”

In 22 OAG 814 (1933), this office issued an opinion which held that the above quoted statute did not contain a prohibition against stockholders, directors or officers of a corporation whose business was that of a brewer from doing any of the prohibited acts found in the above-quoted statute. This opinion also raised some questions as to the efficacy of the prohibitions found in this above-quoted statute in reference to the corporations involved in the brewery, bottling or wholesale business.

Section 66.05 (10) (c) 1, Stats., ch. 207, Laws of 1933, was repealed and recreated by ch. 121 of the Laws of 1941. A reading of that provision would indicate the principal concern of the legislature was to broaden the scope of the tied-house prohibitions so as to eliminate the loopholes that had been created by the original language of the tied-house laws. Section 66.05 (10) (c) 1, Stats., ch. 121, Laws of 1941, read in part:

“No brewer, bottler or wholesaler shall furnish, give or lend any money or other thing of value, other than consumable merchandise intended for resale, including the containers thereof, nor furnish, give, lend, lease or sell any furniture, fixtures, fittings or equipment, directly or indirectly, or through a subsidiary or affiliate corporation, or by any officer, director, stockholder or partner thereof, to any Class “B” licensee, or to any person for the use, benefit or relief of any Class “B” licensee, or guarantee the repayment of any loan or the fulfillment of any financial obligation of any Class “B” licensee. . . .”

This provision now renumbered sec. 66.054 (4) (a), Stats., remains substantially unchanged as of this date. Removal by the 1941 Legislature of the phrase “. . . or be otherwise interested in, directly or indirectly . . .” previously found in sec. 66.054 (10) (c) 1, Stats., as enacted in 1933, did not affect the application of the law to our current question. Legislative intent clearly had not changed. The legislature broadened the scope of the prohibitions of the fermented malt beverage tied-house law in its 1941 legislation. Those prohibitions remain essentially unchanged

through today. Again, it would be absurd to read the change in legislative language found in the 1941 statute to mean that while stockholders, partners and directors or corporations which were brewers, bottlers or wholesalers could not own the bar stools or beer glasses of a Class "B" licensee, they could, in fact, hold the license itself. This absurd interpretation is clearly not the legislative intent.

The most reasonable and consistent construction of sec. 66.054 (4) (a), Stats., is that a fermented malt beverage wholesaler cannot own any interest, directly or indirectly, in any Class "B" retail fermented malt beverage license. Such an opinion is derived from the legislative intent backing sec. 66.054 (4) (a), Stats., as derived from the scope, history, context subject matter, and objects intended to be remedied and accomplished in enacting the fermented malt beverage tied-house law.

RWW:PAP

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*Resident Tuition—Students*—Various questions discussed relating to eligibility for resident tuition at the University of Wisconsin.

February 18, 1972.

ROBERT W. WINTER, JR, *Assistant Director-Business & Finance*  
*Wisconsin State Universities System*

You have requested the opinion of Mr. Bleck regarding the interpretation of sec. 37.11 (8)(ak), Stats., as created by ch. 90, Laws of 1971. In this regard, you have furnished the hypothetical situation wherein a minor, whose parents are bona fide residents of this state, enrolls as a resident student for the academic year 1969-1970; that the following academic year, 1970-1971, his parents moved from the state, and the minor student was classified as a nonresident for this academic year as well as for the first semester of the current academic year, or 1971-1972. You

now ask whether this student may be classified as a resident for tuition purposes. You are particularly concerned as to whether the statute requires continuous classification as a resident student.

The statute does not require continuous enrollment or classification as a resident student; however, in answer to the hypothetical question you have posed, the student may not be classified as a resident for tuition purposes.

Sec. 37.11 (8)(ak), Stats., of ch. 90, Laws of 1971, reads:

“Any student who is a graduate of a Wisconsin high school and whose parents are bona fide residents of this state for one year next preceding the beginning of any semester for which the student registers at a state university or whose last surviving parent was a bona fide resident of this state for the year preceding his death is entitled to the exemptions provided in par. (a).”

It was my understanding that ch. 90 was intended to alleviate the situation where a minor student is enrolled as a resident and then subsequently loses his residency status due to the removal of his parents from the state.

The statute is ambiguous in many respects. Unfortunately, the statute does not employ the phrase “whose parents had been bona fide residents of the state” or “whose parents were bona fide residents of the state.” A strict and literal reading of the statute results in the minor’s loss of resident classification by any removal of the parents from the state, for the statute uses the phrase “whose parents are bona fide residents of this state” and does not contain any language to the effect that the minor student shall continue to be entitled to resident classification, notwithstanding the removal of his parents.

The file in the Legislative Reference Bureau contains a letter from the secretary of the Board of Regents, which letter stated in part:

“However, it does seem to me that there might be some merit in considering an amendment to such legislation which would exempt from the non-resident tuition classification students who graduated from Wisconsin secondary schools *and* whose parents are legal residents of Wisconsin or whose last surviving parent was a legal resident of Wisconsin. I believe that the original intent of

such legislation was that those parents who are legal residents of Wisconsin and have supported the University through the payment of taxes should have the benefit of their children being able to attend the University exempt from the payment of non-resident tuition regardless of what their state of residency may have become following their reaching their majority."

This same file further indicates that Senator Knutson, to whom the above referred to letter was written, wished to have legislation passed which would permit resident classification or eligibility for resident tuition for those students whose parents were, in fact, residents of this state, or who had died as residents of this state.

Chapter 90 does not, in my opinion, cover the situation of where a minor's parents leave the state. In such situations, the minor loses his residency and adopts the residency of the state where the parents have established a new home.

Chapter 90 does, in my opinion, cover the situation where the student returns to the state after apparently having lost his bona fide residency. Notwithstanding this situation, this particular student may be classified as a resident if his parents are still residents of this state, or if the last surviving spouse died a resident of this state.

Additionally you have asked whether sec. 528 (3) of ch. 125, Laws of 1971, requires that the student be continuously enrolled in order to be eligible for resident tuition under sec. 37.11 (8)(am), Stats., as repealed by sec. 240 of the budget.

Sec. 528 (3) reads:

"(3) TUITION STATUS CHANGE. The treatment of sections 36.16 (1)(e) and 37.11 (8)(am) of the statutes by this act, relating to repeal of the statutory provision providing residency status to persons covered by income tax reciprocity, shall not apply to persons enrolled at university of Wisconsin or state university campuses for the first semester of the 1971-1972 academic year. Such persons, if they are freshmen, shall be entitled to 8 semesters of resident status; if they are sophomores, 6 semesters; if they are juniors, 4 semesters; and if they are seniors, 2 semesters. If they are master's degree candidates or the

equivalent, they shall be entitled to a maximum of 4 semesters of residency status, beginning with the first semester of the 1971-72 academic year. Eligibility shall terminate upon granting the master's degree or its equivalent. If the students are doctoral candidates or the equivalent, they shall be entitled to 8 semesters of eligibility, beginning with the first semester of the 1971-72 academic year. Eligibility shall terminate upon granting the doctoral degree or its equivalent."

It appears from the above-quoted language of the section that the only requirement is that the student be enrolled for the first semester of the academic year 1971-1972. Eligibility terminates upon securing of a degree or exhaustion of prescribed semesters, whichever occurs first. However, it is not necessary, in my opinion, that the student be continuously enrolled. For example, a freshman student who is enrolled the first semester of the school year 1971-1972 has eight semesters of eligibility. This student may attend the 1971-1972 year and use two semesters of his eight-semester eligibility. This student may then leave school for one year and return the following year with six semesters of eligibility remaining to his credit.

RWW:CAB

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*Forfeited Good Time—Sex Deviate Act*—The Department of Health and Social Services is not at this time required by law to restore forfeited good time allowances or immediately to release anyone committed under the Sex Crimes Act whose maximum term of commitment including forfeited good time has not expired.

The Attorney General deems it inappropriate to discuss the possible retroactive application of *Farrell* in view of pending litigation on this issue.

February 22, 1972.

WILBUR J. SCHMIDT, *Secretary*  
*Department of Health & Social Services*

You seek my opinion on the effect of *State ex rel. Farrell v. Schubert* (1971), 52 Wis. 2d 351, 190 N.W. 2d 529, upon other persons committed under the Sex Deviate Act, sec. 959.15, Stats. (1967), whose good time allowances were forfeited following recommendation of the special review board created pursuant to the Act.

Whether or not forfeitures of good time predating the *Farrell* case are null and void depends upon the procedure employed in effecting a particular forfeiture.

The Supreme Court based its decision in *Farrell* in part upon the fact that the department did not "order" the petitioner, Farrell's, good time forfeited but merely "affirmed" decisions of the special review board to effect his two forfeitures. *State ex rel. Farrell v. Shubert, supra*, 359.

If, in any instance, the department, after receiving a recommendation from the board to forfeit good time, made an independent determination to effect the forfeiture and itself ordered, rather than merely affirmed the forfeiture, that forfeiture would be valid.

"There is no doubt that under sec. 53.11 (2a) of the 1967 statutes the Department of Health & Social Services could order the forfeiture of an individual's good time." *Farrell, supra*, 359.

Where, however, as was the case with Farrell, and as appears to have been the general practice, the primary decision to forfeit good time was made by the board with the department doing no more than acquiescing in the board's decision, the forfeiture is void.

The Supreme Court left no doubt that all forfeitures of good time "recommended" by the special review board with the effect of a primary order and merely affirmed by the department are void, the affirmances of void decisions being themselves void, when it concluded:

". . . that neither expressly nor by implication is the power to recommend forfeiture of good time given to the review board. Its actions in making *such recommendations* are not merely erroneous, *they* are void ab initio." *Farrell, supra*, 359, 360 (Emphasis added).

Even in these cases, however, the department is not at this time required by law to release anyone whose term would have expired had his good time not been forfeited.

The writ of habeas corpus is only an individual remedy unless the court having jurisdiction permits a class action to be brought. Such permission was neither requested nor received in *Farrell*.

Furthermore, the Supreme Court appeared to limit its decision to Farrell's case alone. Although it left little doubt that all forfeitures effected under the procedure employed in forfeiting Farrell's good time were void, the court specifically declared only the two forfeitures of Farrell's good time to be nullities. *Farrell, supra*, 360. And the mandate of the court, ordering a recomputation of good time and granting a stay of time within which application to suspend parole could be made, was directed only at Farrell. *Id.*, 361.

I have fully considered the problem of whether or not the *Farrell* decision might be applied retroactively to other persons bringing suit whose good time was forfeited in the same manner as was Farrell's.

While I have come to certain conclusions regarding the problem and had determined to make certain recommendations, the Wisconsin Supreme Court has, in the interim, taken jurisdiction of a case in which that question is at issue.

In view of the pending litigation, I believe it would be inappropriate for me to give my opinion on whether the *Farrell* decision is applicable retroactively and on what mode of reprocessing, if any, such retroactivity might require.

RWW:TJB

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*County Felony Squad—Deputy Sheriffs*—In counties where deputy sheriffs are under civil service under sec. 59.21 (8), Stats., county board may provide job classifications for deputy sheriff positions which would form basis of selection of competent personnel who could, on appointment by and under supervision of sheriff, be assigned to perform duties on a felony squad on

countywide basis. By reason of sec. 59.24 (1), Stats., or by means of a *posse comitatus*, the sheriff could on a case-by-case basis assert leadership, direction and control over the investigation of a crime in an area which has a police department and it is the duty of local police to cooperate.

February 22, 1972.

JAMES R. LONG, *District Attorney*  
*Outagamie County*

You have requested my opinion on the following questions:

1. Does the county board have power to authorize the establishment of a felony squad under the direction of the sheriff which would have responsibility for felony investigation on a countywide basis?

2. What is the authority of the sheriff and such felony squad in a municipality which has an established police department?

The answer to your first question is "yes."

It is my opinion that such unit could not be created outside the office of the sheriff but would have to be under the sole control of the sheriff and that he would have the power of appointment of deputy sheriffs serving on such squad.

Secs. 59.21 (1), (2) and (8) (a), 59.15 (2) (b), Stats.

38 OAG 245, 247 (1949).

37 OAG 221, 222 (1948).

35 OAG 474 (1946).

*State ex rel. Kennedy v. Brunst* (1870), 26 Wis. 412.

*State ex rel. Milwaukee County v. Buech* (1920), 171 Wis. 474, 177 N.W. 781.

*Maier v. Racine County* (1957), 1 Wis. 2d 384, 84 N.W. 2d 76.

The county board in a county having a general civil service system or system pursuant to sec. 59.21 (8) (a), Stats., could provide job classifications for deputy sheriff positions which would form the basis for the selection of competent personnel who could, on appointment by and under supervision of the sheriff, be assigned to and perform the desired duties. 48 OAG 98 (1959).

There is no special magic in names such as "felony squad" or "homicide squad," etc. The efficiency of any unit depends upon the competency of its individual members, special equipment available, adequate supervision and the cooperation which is forthcoming from the public and other law enforcement agencies.

A sheriff and his deputies do have countywide jurisdiction. 50 OAG 47, 48 (1961).

In 58 OAG 72 (1969), at 73-74, it is stated:

"At the present time a sheriff and his deputies have very broad overall power with respect to law enforcement involving state statutes, county ordinances and keeping of the peace in the entire county, regardless of municipal boundary lines. The effectiveness of the department has been limited only by budgetary and manpower limitations and gentlemen's agreements to allow municipal police to have primary concern of the matters within the boundaries of a city or village. Cooperation, however, does not displace duties imposed by statute."

Also see 46 OAG 280 (1957), at 283, and 45 OAG 267 (1956), at 270.

I am of the opinion that a sheriff and his deputies have concurrent authority with local law enforcement personnel to enforce state laws regardless of municipal boundaries. While a sheriff could not exclude local authorities in the investigation of crimes or of a specific crime or from enforcement of the criminal laws or an area thereof such as felonies, he can on a case-by-case basis assert leadership, control and direction by reason of his superior position as chief law enforcement officer of the county. It is the duty of local peace officers to cooperate.

Section 59.24, Stats., provides in material part:

"(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 \* \* \* may call to their aid such persons or power of their county as they may deem necessary.* (Emphasis added)

“(2) County law enforcement agencies may request the assistance of law enforcement personnel or assist other law enforcement agencies as provided in ss. 66.305 and 66.315.”

It is my opinion that sec. 59.24(2), Stats., is an additional means of securing aid of law enforcement personnel of other agencies and does not limit the power of the sheriff to require assistance of such personnel within their areas of jurisdiction. It is clear from sec. 66.315 (1), Stats., that law enforcement personnel acting outside the territorial limits of their municipality are subject to the command of the sheriff. Section 66.315 (1), Stats., provides, in part:

“ \* \* \* who shall be required by command of the \* \* \* sheriff \* \* \* to maintain the peace \* \* \* .”

It is my opinion that local law enforcement personnel are also subject to the command of the sheriff when acting within their municipal boundaries when the sheriff exercises a call to aid under sec. 59.24 (1), Stats. That section permits the sheriff to call such “persons” and also the “power of the county” as he deems necessary. If necessary, he can form a *posse comitatus*, meaning the power of the county and by which the sheriff calls upon private citizens or other law enforcement personnel to aid him in preserving the peace or making an arrest. There must be a call by the sheriff or by a deputy empowered by him, however, before a *posse comitatus* exists, and local officers having concurrent duties in law enforcement are not necessarily acting under the direction of the sheriff when they are cooperating in investigating a crime or making an arrest.

*Schofield v. Industrial Comm.* (1931), 204 Wis. 84, 235 N.W. 396.

*Kagel v. Brugger* (1963), 19 Wis. 2d 1, 5, 119 N.W. 2d 394. 47 Am. Jur., *Sheriffs*, sec. 36 *Posse Comitatus*, 847.

80 C.J.S., *Sheriffs and Constables*, sec. 34 *Posse Comitatus*, 202, 203.

The primary statutory powers of a sheriff are set forth in secs. 59.21-59.33, 66.305, and 66.315, Stats. However, the sheriff has historical powers reserved to his office by the Wisconsin Constitution.

In *State ex rel. Kennedy v. Brunst* (1870), 26 Wis. 412, 414, it is stated:

“ \* \* \* Now, it is quite true that the constitution nowhere defines what powers, rights and duties shall attach or belong to the office of sheriff. But there can be no doubt that the framers of the constitution had reference to the office with those generally recognized legal duties and functions belonging to it in this country, and in the territory, when the constitution was adopted. \* \* \* ”

The sheriff is the chief law enforcement official in the county. 80 C.J.S., *Sheriffs and Constables* sec. 1, 152.

At 80 C.J.S., *Sheriffs and Constables*, sec. 36 Territorial Extent of Authority, 205, it is stated:

“ \* \* \* his authority extends over the entire county, and includes all municipalities and townships within his county. \* \* \* ”

At 80 C.J.S., *Sheriffs and Constables*, Sec. 42c Concurrent or Conflicting Powers and Duties, 213, it is stated:

“While the sheriff may, in the absence of information to the contrary, assume that a local police department will do its duty in enforcing the law, the primary duty of such enforcement is his and cannot be altered by custom. So the sheriff may leave local law enforcement in local hands only as long as reasonable efforts in good faith are made, by the local police authorities, to enforce the law; but if he has reason to believe that the police force is neglecting its duty or is in league with offenders he must inform himself, and if he knows that city officials are deliberately ignoring or permitting violations of law his duty to prevent and suppress offenses is the same as though there were no municipality and no police force. \* \* \* ”

“ \* \* \* The sheriff's authority is superior to that of a constable, and he has a right, and it is his duty, if he holds a felony warrant against a person held by a constable under a misdemeanor warrant, to take such person into his custody if he deems it necessary, and it is the duty of the constable to yield to the sheriff's superior authority.” (Citing *State v. McCarty* (1919), 104 Kan. 301, 179 P. 309, 3 A.L.R. 1283.)

In *Andreski v. Industrial Comm.* (1952), 261 Wis. 234, 239-241, 52 N.W. 2d 135, the court dealt with the unique power and authority of the sheriff in Wisconsin:

“The position of sheriff is one of great antiquity and honor. He was the deputy of the king in his shire and was accountable to no one but the king to whom he was responsible for the royal levies of men for the army, money for the treasury, and for the preservation of the king’s peace, for good order and for justice. Annually, or at shorter intervals, he made a progress throughout his domain, stopping at the more important towns to inquire into all matters of interest to the sovereign. He was accompanied by his court, composed as was the king’s court, of representative nobles, freeholders, and burghers, before whom his officers brought persons accused of crime. Trial was had under the supervision of the sheriff and if conviction resulted the sheriff imposed the sentence and executed it. Although in rank some noblemen might be higher, in temporal power and authority within his shire and within his term of office the sheriff was legally superior to them all. He was the representative of the king, accountable only to the king, and the king’s authority lay in him.

*“Within the field of his responsibility for the maintenance of law and order the sheriff today retains his ancient character and is accountable only to the sovereign, the voters of his county, though he may be removed by the governor for cause. No other county official supervises his work or can require a report or an accounting from him concerning his performance of his duty. He chooses his own ways and means of performing it. He divides his time according to his own judgment of what is necessary and desirable but is always subject to call and is eternally charged with maintaining the peace of the county and the apprehension of those who break it. \* \* \* (Emphasis added.)*

“\* \* \* Sec. 59.24, Stats., provides: ‘Sheriffs and their undersheriffs and deputies shall keep and preserve the peace in their respective counties. . . .’ \* \* \* *his primary duty is to preserve law and order throughout the county, \* \* \**” (Emphasis added)

Policemen within local units of government have powers which are based on statutes. The office of policeman was unknown to the common law. The early conservator of the peace was the watch or constable and all citizens were bound to take their turn in keeping the watch. 16 McQuillin, *Municipal Corporations*, sec. 45.06, p. 641. Insofar as they are empowered as peace officers to enforce state laws, they are agents of the state, as the maintenance of law and order in every section of the state is a matter of statewide concern. 16 McQuillin, *Municipal Corporations*, sec. 45.01, pp. 620, 621; *Van Gilder v. Madison* (1936), 222 Wis. 58, 76, 267 N.W. 25, 268 N.W. 108, 105 A.L.R. 244.

Police in a city have such powers and duties as constables within their municipality and such additional powers as set forth in sec. 62.09 (13), Stats.

Section 62.09 (13) (a), Stats., provides:

“The chief of police shall have command of the police force of the city under the direction of the mayor. It is his duty to obey all lawful written orders of the mayor or common council. The chief and each policeman shall possess the powers, enjoy the privileges and be subject to the liabilities conferred and imposed by law upon constables, and be taken as included in all writs and papers addressed to constables; shall arrest with or without process and with reasonable diligence take before the municipal justice or other proper court every person found in the city in a state of intoxication or engaged in any disturbance of the peace or violating any law of the state or ordinance of such city and he may command all persons present in such case to assist him therein, and if any person, being so commanded, refuses or neglects to render such assistance he shall forfeit not exceeding \$10. They shall collect the same fees allowed to constables for similar services.”

They have limited power to act beyond their municipal boundaries by reason of secs. 66.305, 66.31 and 66.315, Stats. Because of the strict territorial limits on their powers, they are frequently deputized by the sheriff on a cooperative basis so that they may at all times act throughout the county if necessary.

A village constable under sec. 61.29 Stats., has the powers and duties of a town constable. A village marshal has the power and duties of a constable plus additional limited powers within his village, as set forth in sec. 61.28, Stats. By reason of sec. 61.31 (2), Stats., village police have powers of village marshals.

Section 60.54, Stats., provides for the duties of a town constable, and subsecs. (1), (2) and (6) provide:

“(1) Serve within his county any writ, process, order or notice, and execute any order, warrant or execution lawfully directed to or required to be executed by him by any court or officer.

“(2) Attend upon sessions of the circuit court in his county when required by the sheriff.

“\* \* \*

“(6) Cause to be prosecuted all violations of law of which he has knowledge or information.”

Subsection (2) specifically refers to the sheriff as superior authority and, since the sheriff is an officer of the court, subsection (1) would also indicate that a constable is subservient to the sheriff, even if it be contended that “officer” as used therein means officer of the court. Also see sec. 60.555, Stats., which abolishes the office of constable in cities of the first class and provides that his duties shall be performed by the sheriff. This is further indication that, from a historical standpoint, constables were subservient to the sheriff. Since city police and village police have the powers and duties of constables, they are, with respect to the enforcement of state laws, subject to the command of the sheriff and, although they have concurrent power and duty to investigate and enforce state laws within their municipality, they must yield to the direction of the sheriff if he deems it necessary in a given case.

While the sheriff may, on a case-by-case basis, assert superintending authority as a matter of legal right, it would not be expedient or practical to do so in many cases. Because of personnel, training and budgetary considerations, his office, in certain counties, may not be as qualified to act as local police departments. In most instances the best law enforcement will result from mutual cooperation.

RWW:RJV

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*ID Cards, Duplicates—Register of Deeds*—Under the provisions of sec. 66.057 (2) (c), Stats., only one “duplicate” uniform state identification card may be issued to replace an original identification card.

February 22, 1972.

RUSSELL FALKENBERG, *District Attorney*  
*Chippewa County*

You request my opinion as to how many duplicate identification cards a register of deeds is required to issue to the same person under the provisions of sec. 66.057 (2) (c), Stats.

Section 66.057 (2) (c), Stats., makes provision for a uniform identification card to be used to prove age for the purchase of liquor and beer in the state of Wisconsin. Section 66.057 (2) (c), Stats., which authorizes the issuance of duplicate identification cards in the event an original card has been lost or stolen, provides as follows:

*“Duplicates.* Duplicate identification cards may be issued in the same manner as are original identification cards. The applicant for a duplicate card shall sign a sworn statement that his original card has been lost or stolen and that, if the original card is recovered, he will return it to the issuing office. A duplicate card shall be clearly stamped ‘duplicate’ by the issuing officer, and the issuing officer shall notify the county sheriff of its issuance.”

Your register of deeds has apparently received a number of requests for duplicate identification cards from the same individual, each accompanied by an affidavit of loss as set forth in the above-quoted statute. You suspect, but have no proof, that the cards are being given to friends and are not actually replacements for lost or stolen cards.

Section 66.057 (2) (c), Stats., of the present statutes, was enacted as a part of a new uniform ID card law by ch. 275, Laws of 1969. The need for a new identification card law had become obvious since the lack of standards and controls under the identification card law previously in effect had resulted in extensive forgery and improper use of identification cards by those not authorized to obtain a card in the first instance. Under the prior law, therefore, it apparently was not difficult to obtain a card through a friend since the statute then in existence made no mention of any limitation on the number of cards which could be issued to the same person, and there were instances, in fact, where individuals did make application for and receive numerous replacement cards. By contrast, sec. 66.057 (2) (c), Stats., speaks directly to the matter of issuing duplicate identification cards. In my opinion, if its provisions can be said to be ambiguous in reference to the number of duplicate identification cards which may be issued under its terms, it is most proper to construe the statute in such a manner as to take into consideration the particular evils at which the legislation was aimed and the mischief which the legislature sought to avoid in enacting the statute. 50 Am. Jur., *Statutes*, sec. 305, page 291.

Section 66.057 (2) (c), Stats., requires that the applicant for a duplicate card sign a sworn statement that his "original card" has been lost or stolen before he will be issued a "duplicate card." The applicant's sworn statement further indicates that, if the "original card" is recovered, it will be returned to the issuing office. In addition, the "duplicate card" is clearly stamped "duplicate," thus distinguishing it in physical appearance from the "original card." Finally, I note that different fees are charged for a duplicate card as opposed to the original card. Sec. 66.057 (2) (d), Stats.

From the foregoing, there can be little doubt that the legislature intended to make a distinction between the "original" identification card and the "duplicate" identification card. I also conclude from the terminology used in the statute that the legislature not only intended that there be but one original identification card but also intended that there be but one duplicate identification card. After the original card has been lost or stolen, and the one duplicate has been issued to replace the original card, the sworn statement described in the statute (which

refers only to the return of the "original" card) would be meaningless for use in reference to the issuance of any further duplicate cards.

I would also point out that notice to the sheriff of the issuance of a "duplicate" only has real significance if he is put on notice that a person using the lost or stolen "original" of such card would be doing so in violation of the statute, since the issuance of the duplicate is intended to void the original. Under such circumstances, the sheriff would be aware that no one other than the applicant would have a right to possess the card, and the owner of the lost or stolen card would have a continuing legal obligation to return the original to the issuing office. On the other hand, if any number of "duplicate" cards could be issued, no meaningful control over the issuance of identification cards would exist, and there would be little purpose in notifying the sheriff of the issuance of yet another duplicate identification card for a particular individual.

In conclusion, it is my opinion that sec. 66.057 (2) (c), Stats., does have the effect of limiting the number of duplicate cards which may be issued to a person entitled to an original identification card. Only one such "duplicate" card may be issued to replace an original identification card.

RWW:JCM

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*Elections—Eighteen-Year-Old Vote*—Governor's approval of Assembly Bill 131 would have the legal effect of requiring its submission to a vote of the people at the November, 1972, general election. Art. III, sec. 1, Wis. Const. However, the legislature can amend the current election statutes, without referendum, so as to make said statutes conform with the Twenty-Sixth Amendment to the United States Constitution.

February 24, 1972.

PATRICK J. LUCEY

*Governor of Wisconsin*

You advise that Assembly Bill 131, which provides for lowering the minimum voting age in Wisconsin for state and local elections from 21 to 18 years of age, effective upon approval by the people at the November, 1972, general election, has passed both houses of the legislature and presently awaits your signature. The apparent purpose of this bill was to expand the Wisconsin electorate so that these young citizens, newly enfranchised for national election purposes by the Federal Voting Rights Act Amendments of 1970, could also vote in state and local elections. Shortly after passage of this bill, however, the Twenty-Sixth Amendment to the United States Constitution was adopted. Section 1 of the amendment provides as follows:

“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.”

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.

While you recognize it is appropriate and advantageous to clarify the statutory provisions on voting age so that they will be consistent with the recent change to the Federal Constitution, you express concern that the referendum provided for in Assembly Bill 131 would involve considerable expense which now would appear unnecessary in light of the Twenty-Sixth Amendment. I concur with you in this regard. You further advise that the Secretary of State's office has indicated that he will abide by an opinion from my office “indicating that no referendum was necessary under the statutory change.” Therefore, you request my opinion as to whether the statewide referendum called for by Assembly Bill 131 would necessarily be held if the bill were to be signed into law.

Section 3 of Assembly Bill 131 provides, in part, as follows:

“The question of whether this act shall take effect shall be submitted to a vote of the people of this state, in the manner provided by law for the submission of an amendment to the constitution, at the general election to be held in November 1972.

If approved by a majority of all the votes cast, it shall take effect after such approval by the people; otherwise, it shall be of no effect. . . .”

The bill quite clearly is an exercise of the power expressly conferred upon the legislature by Art. III, sec. 1, Wis. Const., which presently provides:

“Section 1. Every person, of the age of twenty-one years or upwards, belonging to either of the following classes, who shall have resided in the state for one year next preceding any election, and in the election district where he offers to vote such time as may be prescribed by the legislature, not exceeding thirty days, shall be deemed a qualified elector at such election:

“(1) Citizens of the United States.

“(2) Persons of Indian blood, who have once been declared by law of congress to be citizens of the United States, any subsequent law of congress to the contrary notwithstanding.

“(3) *The legislature may at any time extend, by law, the right of suffrage to persons not herein enumerated; but no such law shall be in force until the same shall have been submitted to a vote of the people at a general election, and approved by a majority of all the votes cast on that question at such election; and provided further, that the legislature may provide for the registration of electors, and prescribe proper rules and regulations therefor.*” (Emphasis added)

In my opinion, your approval of Assembly Bill 131 would have the legal effect of requiring its submission to a vote of the people of this state. Section 10.06 (1) (i) and (j), Stats., provides, in part, that:

“(i). . . no later than the 4th Tuesday in September, the secretary of state *shall* send . . . a type C notice certifying any referenda questions to each county clerk for the general election.

“(j). . . Whenever referenda questions are to be voted on, this secretary of state also *shall* publish one type C notice on this date (the 3rd Tuesday preceding the general election).” (Emphasis added)

Once Assembly Bill 131 becomes law, the Secretary of State is duty bound to comply with the legislative directive therein and submit the act to a vote of the people. He is a mere ministerial officer, possessing no judicial powers, *West Park Realty Co. v. Porth* (1927), 192 Wis. 307, 312, 212 N.W. 651, and he is not free to exercise discretion in this matter independent of the will of the legislature. As stated in *State ex rel. Martin v. Zimmerman* (1939), 233 Wis.16, 288 N.W. 454, at pp. 20-21:

“The constitution prescribes and defines the powers of the legislative and executive departments of the government, and all officers in the discharge of their functions are under an obligation to comply with its requirements. . . .

“. . . If one ministerial officer or one officer in the performance of a ministerial duty may constitute himself a tribunal to pass upon the acts of other officers, such power might be assumed by all officers and the governmental process would be brought to a halt.”

Furthermore, although Assembly Bill 131 is complete in itself, and your approval of the bill would make it law, it is also evident that said law could only become operative to amend the various statutes referred to in secs. 1 and 2 of the bill on the happening of the very event you would seek to avoid, i.e., a referendum at the November, 1972, general election.

Although the election statutes cannot be amended in the manner you propose, i.e., by Assembly Bill 131, without the required referendum, I do not wish to imply that such statutes may not now be amended, so as to reflect the 18-year-old franchise, through the normal legislative process and without the need for a referendum. For example, although the franchise was extended to women in 1920, upon ratification of the Nineteenth Amendment to the United States Constitution by the requisite number of states, among them, the state of Wisconsin, it was not until 1934 that the Wisconsin Constitution was amended to delete the reference therein which described an elector as being male. Immediately following the adoption of the federal constitutional amendment, however, the various Wisconsin election statutes, which reflected the distinction between men and women in reference to the exercise of the franchise, were either repealed or

amended by ch. 15, Laws of 1921, without referendum, so as to eliminate any such distinction. I am not aware of any reason why the legislature could not now proceed in like manner to amend the current election statutes, without referendum, so as to make said statutes conform with the Twenty-Sixth Amendment to the United States Constitution.

RWW:JCM

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*State Bond Board—Sinking Funds*—Terms of statute in effect at time of bond issue providing for specific transfers of funds to sinking fund are a part of the bond obligation which cannot be changed by retroactive application of an amendment to that statute.

February 25, 1972.

WALTER F. WEBBER, *Secretary*  
*State Bond Board*

You have requested my opinion as to whether the amendment of sec. 18.09 (5), Stats. 1969, by sec. 44 of ch. 125, Laws of 1971, affects bond issues outstanding prior to the effective date of ch. 125, Laws of 1971, to wit, November 5, 1971.

Section 18.09 (5), Stats., 1969, reads in part as follows:

“There shall be transferred to each sinking fund a sum sufficient for the payment of the principal, interest and premium due, if any, on the bonds giving rise to it as the same falls due. Such transfers shall be so timed that there is at all times on hand in the sinking fund an amount not less than the aggregate amount of principal, interest and premium, if any, to be paid out of it during the ensuing 3 months. \* \* \*”

The effect of the amendment was to change the three-month reserve to a fifteen-day reserve.

In your letter you note:

“The effect of this amendment is to delay the *internal* transfer of debt service funds for a period of 75 days thereby preserving the earning power of such funds to the State for that period.”

Prior to addressing myself to the legal question involved, it would perhaps be advisable to briefly analyze the state statutory scheme involved in the payment of state debt.

This analysis will merely involve one state agency and one category of authorized debt.

The state universities\* are given a sum-sufficient appropriation to reimburse sec. 20.866(1)(u), Stats., for the payment of principal and interest costs in the financing of academic facilities by sec. 20.265 (1) (e), Stats.

Section 20.866, Stats., provides for a sum-sufficient appropriation to the Bond Security and Redemption Fund (sinking fund), and for a sum-sufficient appropriation to the State Bond Board from monies appropriated by sec. 20.265 (1) (e), Stats., for the payment of principal and interest on public debt.

Section 18.09 (1), Stats., creates the Bond Security and Redemption Fund (sinking fund) for each bond issue which is to be administered by the state treasurer.

In essence, these sections provide that, whenever the State Bond Board creates debt by issuing state bonds for a state university academic facility, a bond security and redemption fund, or sinking fund, must be created in the office of the state treasurer to secure the payment of the principal and interest on such bonds. The Board of Regents of State Universities is obligated to transfer to the state treasurer for deposit in the sinking fund sufficient monies to cover principal and interest payments that are to fall due within the next three months. While these funds are being held by the state treasurer, they may be invested pursuant to the provisions of sec. 25.17 (3) (dr), Stats.

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\*It is irrelevant in this discussion to consider ch. 100, Laws of 1971, the Merger Act.

Each bond instrument contains the following or similar language:

“This bond is issued under and pursuant to and in full compliance with the constitution and laws of the State of Wisconsin including particularly Chapter 18, Wisconsin Statutes, 1969, and pursuant to a resolution duly adopted by the State Bond Board of the State of Wisconsin \* \* \* .”

You are concerned as to whether this quoted language requires the state to maintain a three-month sinking fund reserve on all bonds issued prior to November 5, 1971. In other words, the issue may be stated as whether there would be an impairment of contract or obligation if the amendment were to be applied retroactively.

The quoted language from the bond is merely a recital attesting to the validity of the instrument which the issuers may be estopped to deny. 43 Am. Jur., sec. 197, et seq. However, it has been held that the law in force at the time and place of making a contract are a part of its obligation protected by constitutional provision from impairment. *City of Little Rock, et al. v. Community Chest of Greater Little Rock* (1942), 163 S. W. 2d 522; *Clark v. City of Philadelphia, et al.* (1938), 196 A. 384.

Another way of stating the issue is whether the amendment, if applied retroactively, would lessen the likelihood of payment to the bondholders.

Under the statutory scheme previously described, it was noted that the three-month reserve could be invested pursuant to statutory provisions. Section 18.09, Stats., further provides that the “\* \* \* earnings or income from such investments shall be credited to such fund.” If the amendment were to be applied retroactively, the bondholders would lose 75 days of earnings, and, as noted in your letter, preserve this earning power to the state for that same period. This effect, in my opinion, lessens the likelihood of payment and would be an unconstitutional impairment of the obligations. 115 A.L.R. 212. Under the law, it is immaterial that as a matter of fact the bondholders are amply

protected by sum-sufficient appropriations and the full faith, credit and taxing power of the state. *City of Little Rock, et al. v. Community Chest of Greater Little Rock, supra.*

In conclusion, it is my opinion that the amendment of sec. 18.09 (5), Stats., only applies to instruments of debt issued after its effective date, November 5, 1971, and to apply it retroactively would be unconstitutional.

RWW:CAB

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*Fee Schedule For Attorneys—State Bar Of Wisconsin—* Legislation which prohibits the promulgation of a minimum fee schedule by the State Bar of Wisconsin does not offend state and federal due process or the right to freedom of speech under the First and Fourteenth Amendments of the United States Constitution. Although the legislation would not, in itself, represent an unconstitutional usurpation of the Supreme Court's right to regulate the practice of law, the Supreme Court could very likely find that matters concerning the minimum fee schedule rest solely within its judicial province to regulate the practice of law.

February 28, 1972.

THE HONORABLE, THE SENATE

You have asked my opinion on the constitutionality of 1971 Senate Bill 481, which prohibits the State Bar of Wisconsin from promulgating a minimum fee schedule for attorneys. The bill proposes to create sec. 133.01 (4), Stats., and, in effect, declares the promulgation of this fee schedule a restraint of trade. Under sec. 133.01 (3), Stats., criminal penalties attach for violation of the prohibited practices.

Specifically you ask whether the bill would be constitutional in respect to:

(1) State and federal due process, assuming the fee schedule to be recommended rather than mandatory.

(2) Freedom of speech under the First and Fourteenth Amendments of the U.S. Constitution.

(3) The usurpation of the inherent judicial power to regulate the practice of law.

### STATE AND FEDERAL DUE PROCESS

Apparently the question in this respect relates to the necessity for clear and explicit legislation, particularly in cases involving penal statutes.

In *State v. Woodington* (1966), 31 Wis. 2d 151, 181, 142 N.W. 2d 810. The court stated:

“\* \* \* Is the statute read as a whole so indefinite and vague that an ordinary person could not be cognizant of and alerted to the type of conduct, either active or passive, that is prohibited by the statute?”

It would appear from the provisions of the bill that no undue ambiguity exists. Only the term “minimum fee schedule” provides any basis for discussion. It would be possible to contend that the absence of any clarification as to whether the fee schedule is mandatory or merely recommended creates a fatal ambiguity. It would have to be assumed, however, that the legislature was aware of the fact that the materials currently published by the State Bar designate the fee schedule as a “Customary Minimum Fee Guide” and a “Minimum Fee Schedule,” and the further fact that there never has been a mandatory schedule in Wisconsin.

Consequently, it would be difficult to contend that any problems of interpretation would be encountered, particularly by the State Bar of Wisconsin, the only subject of proposed sec. 133.01 (4), Stats.

### FREEDOM OF SPEECH

Free speech, as any other constitutional right, is clearly not absolute. *Vogt Inc. v. Int'l Brotherhood of Teamsters* (1957), 354 U.S. 284, 77 S.Ct. 1166, 1 L.ed. 2d 347. The attempted purpose of SB 481 is to prohibit the promulgation of a fee schedule on the basis that it results in a restraint of trade as prohibited by sec. 133.01 (1), Stats. That an association can, by the use of non-mandatory suggested fee schedules, violate the antitrust laws has

been affirmed by the Supreme Court in *U.S. v. National Association of Real Estate Boards* (1950), 339 U.S. 485, 70 S.Ct. 711, 94 L.ed. 1007.

Without consideration of the issues next discussed in this opinion, i.e., the balance of legislative and judicial powers, it would not be difficult to conclude that the regulation of antitrust activities in the manner attempted would be proper. Recommended price lists and rates have been uniformly stricken down as price fixing and violative of the provisions of secs. 1 and 2 of the Sherman Act. Section 133.01, Stats., has been held to be a re-enactment of those provisions. cf. *Reese v. Associated Hospital Service* (1970), 45 Wis. 2d 526, 532, 173 N.W. 2d 661.

### LEGISLATIVE AND JUDICIAL POWERS

Under SB 481, the legislature would be declaring the minimum fee schedule of the State Bar a restraint of trade as prohibited by sec. 133.01, Stats.

Suggested or non-mandatory fee schedules have been held to be in violation of the antitrust laws, *U.S. v. National Association of Real Estate Boards* (1950), 339 U.S. 485, 70 S.Ct. 711, 94 L.ed. 1007. In that case the court found a non-mandatory schedule of rates published by the Washington (D.C.) Real Estate Board to be price fixing and, therefore, *per se* "an unreasonable restraint of trade." The dissenting opinion in the *Real Estate Board* case indicated that there would be no substantial difference between the rate schedules of real estate brokers and those of a "lawyer, doctor, a carpenter, or a plumber." 339 U.S. at p. 496.

Notwithstanding the possible restraints of trade involved, a state can, by law, authorize a practice or procedure which otherwise might be held to violate our antitrust laws. In *Reese v. Associated Hospital Service* (1970), 45 Wis. 2d 526, 532, the Wisconsin Supreme Court held that "the rule of reason" is to be applied to restraints of trade and only those restraints held to be "unreasonable" are covered by the antitrust statute, sec. 133.01, Stats.

The *Reese* case further stated that, if the legislature specifically authorized a practice, whether in restraint of trade or not, it would be held by the court to be "reasonable" and, therefore, not in violation of our state antitrust laws.

Wisconsin case law makes it quite clear that, pursuant to Art. VII, secs. 2 and 3 of the Wisconsin Constitution, the Supreme Court has the right to regulate the practice of law. *In re Cannon* (1932), 206 Wis. 374, 240 N.W. 441; *Integration of Bar Case* (1943), 244 Wis. 8, 11 N.W. 2d 607; *Lathrop v. Donahue* (1960), 10 Wis. 2d 230, 102 N.W. 2d 404, affirmed 367 U.S. 820. Thus, under reasonable circumstances, it would be permissible for the Supreme Court to authorize a minimum fee schedule for attorneys and, under the *Reese* doctrine, exempt it from the antitrust laws.

Since the minimum fee schedule was promulgated and adopted by the Board of Governors of the State Bar, there exists some question whether it was, in fact, "authorized" by the Supreme Court within the terms of the *Reese* doctrine and whether this "authorization" function can be delegated to the State Bar.

For the purposes of this opinion, however, it will be assumed that the Supreme Court has authorized the minimum fee schedule and exercised its right to regulate the practice of law. Clearly the court has frequently referred to the fee schedule with favor. cf. *Touchett v. E. Z. Paint Corp.* (1961), 14 Wis. 2d 479, 486, 111 N.W. 2d 419; *Conway v. Sauk County* (1963), 19 Wis. 2d 559, 604, 120 N.W. 2d 671, and *State ex. rel. Baker v. County Court* (1965), 29 Wis. 2d 1, 17, 138 N.W. 2d 162. An appendix to the *Lathrop* case also favorably discusses the minimum fee schedule. However, it is not clear whether that appendix is part of the court's decision.

Your third question asks whether the legislature's attempt to prohibit the minimum fee schedule represents, in regard to the constitutionality of the attempt, "an effort by the legislature to usurp inherent judicial powers to regulate the practice of law."

The usual criteria by which the constitutionality of a statute is evaluated are not available in this unique situation involving the Supreme Court's right to regulate the practice of law. The difficulty arises because the Supreme Court has held that not all

legislative incursions into the practice of law are improper. In the *Integration of Bar Case* (1943), 244 Wis. 8, the court stated at p. 50:

“It is quite obvious from a study of the history of the bar and the consideration of judicial decisions that the line of demarcation between the legislative field and the judicial field in matters relating to the bar is not a straight line or even a fixed one. \* \* \*”

In *State ex rel. Reynolds v. Dinger* (1961), 14 Wis. 2d 193, the court was faced by an administrative rule, REB 5.04, which purported to authorize, to a limited degree, real estate brokers to give legal advise or services. At p. 206 the *Dinger* case found that the Rule did involve the practice of law, and that although the court could declare the Rule void it would not do so because of its salutatory effect and the fact that it did not exceed previously tolerated activities. In other words, the court exercised a discretionary right in respect to matters involving legislative incursion into the judicial province. This, of course, would not be true in cases involving traditional constitutional issues. Furthermore, at times, the Supreme Court has recognized the legislature's right to declare, in the form of legislation, the legislative position in respect to the general welfare. In the *Integration of Bar Case, supra*, at p. 51, the court, in passing on a legislative attempt to integrate the Bar, stated:

“\* \* \* In the promotion of the general welfare the legislature may prescribe required qualifications, but its acts are always subject to review by the court for the purpose of ascertaining whether they embarrass the administration of justice or invade the proper exercise of the judicial function.”

In respect to the legislature's attempt to integrate the Bar, the court indicated, at p. 52, it welcomed this statement on the general welfare:

“While the legislature has no constitutional power to compel the court to act or, if it acts, to act in a particular way in the discharge of the judicial function, it may nevertheless *with propriety, and in the exercise of its power and the discharge of its duty*, declare itself upon questions relating to the general welfare which includes the integration of the bar. *The court*, as

has been exemplified during the entire history of the state, *will respect such declarations and, as already indicated, adopt them so far as they do not embarrass the court or impair its constitutional functions.*" (Emphasis supplied)

The implication of these statements is that legislative declarations are viewed as an aspect of comity between two governmental branches and will further be respected and accepted except in cases of direct conflict. It would thus appear that the legislative pronouncement, in the form of Senate Bill 481, would not, as such, be a usurpation of the judicial function. Rather, it would be a legislative statement on the general welfare to be evaluated by the Supreme Court in terms of the judicial powers and the necessary balance between the need to legislate on the general welfare and the court's responsibility to regulate the practice of law.

A number of cases such as *Touchett, Conway, Baker* and *Lathrop, supra*, indicate that the Supreme Court does view the subject of attorney's fees as clearly within its province in regulating the practice of law. Consequently, it would be my opinion that, although Senate Bill 481 is not unconstitutional on its face and would be recognized and considered by the Supreme Court as a proper legislative declaration on the public welfare, the Supreme Court could very likely, in exercising its discretion, declare that matters concerning a minimum fee schedule rest solely within the judicial power to regulate the practice of law.

RWW:BAC

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*Water Pollution—Civil Remedies*—A polluter can be forced to pay damages for pollution of a Wisconsin lake to a person owning (or having some lesser interest in) land on or near the affected body of water if the damage suffered by him is different in type and degree from that suffered by the public in general. It is doubtful that a member of the public not in the above category could recover damages.

February 29, 1972.

THOMAS P. FOX

*Director of Legislative Services*

You have asked my opinion as to:

“ . . . the remedies presently available to persons who own property on or use the lakes of this state and who seek to recover damages from polluters, both private and public, for the reduced property values, increased health hazards, reduced water quality and generally impaired use of the lakes of this state resulting from water pollution.”

It is crucial to this analysis to define clearly which of the two classes of potential plaintiffs (those who live on the water and those who merely use the water) is being discussed, since, as will be seen, the cause of action possessed by riparians is not held by most of those persons who are frustrated by the pollution of a frequented body of water but who do not own land on or near that water.

Representative of the liberality with which the courts of Wisconsin have approached suits brought by riparian owners is the statement appearing in *Middlestadt v. Waupaca Starch and Potato Co.* (1896), 93 Wis. 1, 4, 66 N.W. 713, 714, where the plaintiff riparian was complaining of starch factory refuses being thrown into the Waupaca River upstream from his property and interfering with his use and enjoyment of the river:

“ . . . It is too well settled to need discussion at this time that a riparian owner of property is entitled to have the water of a stream flow to and through or by his land in its natural purity, and that anything done which so pollutes such water as to impair its value for the purposes for which it is ordinarily used by persons so circumstanced, . . . may be restrained at the suit of the injured party. . . .”

The Wisconsin Supreme Court has repeatedly couched the riparian owner's cause of action not in terms of a riparian right *per se* but in terms of a nuisance action in which the riparian has a particular interest. This merger of concepts is seen in the following language in the *Middlestadt* case:

“Wood, Nuisances, sec. 1, states the rule thus: ‘Every unlawful use by a person of his own property in such a way as to cause an injury to the property or rights of another, and producing material annoyance, inconvenience, discomfort, or hurt, and every enjoyment by one of his own property which violates the rights of another in an essential degree, constitutes an actionable nuisance, and damages are presumed.’ ”

A similar approach had been taken earlier, in *Hazeltine, Administrator, v. Case* (1879), 46 Wis. 391, 1 N. W. 66, in which a lower riparian sued an upper riparian for keeping a large number of hogs near the waterway and thus rendering unfit for “culinary and domestic” purposes the stream as it passed plaintiff’s residence. The court said at 46 Wis. 394, 1 N.W. 66, that “The learned circuit court stated to the jury certain principles of law applicable to the use of water in running streams, a violation of which would cause a nuisance . . .” and that the appellate court did not “see that the defendant has any valid ground of objection . . .” to those instructions.

The nuisance\* alleged can be called either public or private; both are viable causes of action so long as the injury to the plaintiff is “peculiar.” This is because the Wisconsin statutes provide in sec. 280.01:

Within the larger definition is the category of private nuisance, which was defined by the Wisconsin Supreme Court in *Abdella v. Smith* (1967), 34 Wis. 2d 393, 398, 149 N.W. 2d 537, 539 as

“(A)n unreasonable interference with interests of an individual in the use or enjoyment of land . . . The interference cannot be merely trivial. It ‘must create more than an inconvenience, and must be offensive to the person or ordinary and normal sensibilities.’ ”

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\*An often-used definition of a nuisance appears in 66 C.J.S. *Nuisances*, sec. 1, P. 727:

“. . . the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal, or [the] improper, indecent, or unlawful personal conduct, working an obstruction or injury to a right of another or of the public, and producing material annoyance, inconvenience, discomfort or hurt.”

“Any person may maintain an action to recover damages for and to abate a private nuisance or any person, county, city, village or town may maintain an action to recover damages or to abate a public nuisance from which injuries peculiar to the complainant are suffered, so far as necessary to protect the complainant’s rights and to obtain an injunction to prevent the same.”

Moreover, a nuisance may be both public and private, and most of the situations giving rise to a cause of action by a riparian for pollution of the body of water on which he is situated no doubt will constitute both a private and public nuisance. For example, in *Winchell v. City of Waukesha* (1901), 110 Wis. 101, 85 N.W. 668, the defendant city built a sewage system which emptied into a stream a quarter mile above plaintiff’s land, which abutted on the stream. The stream became unfit for bathing or for watering stock and the odor emanating from the stream, under certain conditions “. . . pervaded the plaintiff’s residence, causing great distress and discomfort, and in some cases illness.” The plaintiff sued to enjoin the nuisance and to recover damages for the lessened value of the real estate, and prevailed on both points. The Supreme Court affirmed, saying:

“. . . Two entirely well recognized elements of special and private injury are established, namely, substantial defilement of the waters of a stream flowing along and over plaintiff’s land so as to prevent the beneficial use of the water, and so as to injure and impair the use of the land itself; also for the creation of noisome and noxious odors interfering with the comfort, convenience, and probably the health of plaintiff and her family in the occupation of her habitation. These injuries to the plaintiff in the use of her property and to the property itself are none the less special and private because by the same acts may be created and maintained a public nuisance in defiling the waters of a navigable stream, or in polluting the atmosphere to the detriment of the public health. . . .” 110 Wis. 101 at p. 106.

See also, *Costas v. Fond du Lac* (1964), 24 Wis. 2d 409, 413, 129 N.W. 2d 217, 220.

Other cases affirming the concept of a private recovery for pollution of a waterway have involved a municipality’s discharge from its sewage disposal plant into a stream running past

plaintiff's property (*Mitchell Realty Co. v. West Allis* (1924), 184 Wis. 352, 199 N.W. 390); the construction of a roadway from the shore of a lake to an island so as to cause the water near the plaintiff's lake frontage to become stagnant, causing growth of weeds and emission of offensive odors (*Breese v. Wagner* (1925), 187 Wis. 109, 203 N.W. 764); the reduction in value of a home due to the discharge of creamery wastes into a common waterway (*Behnisch v. Cedarburg Dairy Co.* (1923), 180 Wis. 34, 192 N.W. 764); the operation of a brewery in such a fashion as to foul the waters in the area (*Meiners v. The Frederick Miller Brewing Co.* (1890), 78 Wis. 364, 47 N.W. 430); and the maintenance of a distillery and animal pens above stream from plaintiff's home and tavern (*Greene v. Nunnemacher* (1874), 36 Wis. 50).

While riparian owners are well protected by Wisconsin nuisance law, and while, presumably, the same protection would flow to lessees or easement holders of riparian land, to the extent of their interests, (see Prosser, *Law of Torts*, 4th Ed., P. 593) it is my opinion that mere users of a body of water may not recover damages for the pollution of that water.

The case of *Kuehn v. City of Milwaukee* (1892), 83 Wis. 583, 53 N.W. 912, presents the obstacle which most fishermen whose favorite lake is polluted, or canoeists whose favorite river is being destroyed by factory wastes, as examples, would face in attempting to prosecute an action for damages. In that case a commercial fisherman brought an action sounding in public nuisance against the city of Milwaukee, which dumped garbage in Lake Michigan so close to the plaintiff's nets that by the wind and wave action the garbage was driven into the nets, killing fish and damaging the nets themselves. Apparently, the city employed this method of garbage disposal as a temporary expedient, and after this incident used a procedure more compatible with the plaintiff's fishing. The plaintiff moved for a temporary injunction, but the trial judge denied the same, with reasons that, in the Supreme Court's words, ". . . are so clearly and accurately stated . . . that but little need be added." The trial judge ruled at 83 Wis. 585, 586, 53 N.W. 912, 913:

" . . . (H)as the plaintiff shown himself entitled to have this nuisance abated at his instance? It is not necessary to go beyond this state for instruction upon this point. Our own supreme court

have settled the law as to the cases in which a private citizen may sue to restrain a public nuisance, and in which he may not, with as much certainty as any court in the country. The plaintiff in such case must show not only that he is affected by the public nuisance, in common with the other citizens of the state or of the neighborhood. He must show, beyond that, that he is affected in some way different from other citizens, and the difference must be a difference in kind, and not a difference in degree; that is to say, his injury must differ from the injury generally suffered, not only as to the amount of injury, but as to the kind of injury, suffered. The plaintiff in this case shows that he is one of a large number of fishermen affected by this alleged nuisance, and it is abundantly clear that he has no special privilege or right to fish in Lake Michigan; that every other man who is so disposed may become a fisherman in the same lake, and in the same parts of the lake, where he plies his vocation. Furthermore, he shows that a very considerable number of men are so engaged. In what respect does his injury differ from that of the general public? He has no special interest, which others have not, affected by this nuisance. He has no property, which others have not, damaged by this nuisance. He sets up no riparian rights as an owner of a portion of the shore; and, in short, he shows no special injury to himself or to his business which is not common to all the fishermen engaged in fishing along the west shore of Lake Michigan and in the neighborhood of the city of *Milwaukee* . . . (P)eople affected by the pollution of the waters of the river can none of them bring a suit of this nature, unless it be one whose land or whose permanent business is located along the bank of the river, and is thus injured in a manner not common to the whole public.”

There is always some doubt associated with a legal extrapolation based upon a single decision, especially when that decision was decided before the onrush of contemporary pressures in the anti-pollution effort. Yet it does appear that a member of the public who uses a Wisconsin body of water but does not own property on or near water (or, presumably, possess a legally recognized interest less than a fee estate in such land) does not have a right to bring an action for private nuisance or for private remedies resulting from a public nuisance. In effect, the privilege of maintaining such an action “runs with the land” on or in proximity of the water.

You have asked whether damages can be recovered from polluters for "reduced property values; increased health hazards, reduced water quality and generally impaired use of the lakes of this state. . . ." Damages certainly can be recovered for the aspects of injury you have mentioned, although most likely the recovery will be in the name of reduced property values. This is logical, for, if a waterway has become unhealthful, odorous, or just unpleasant to look at, the value of the adjoining land will drop accordingly. In *Breese v. Wagner, supra*, for example, the water along plaintiff's lakefront became stagnant, odorous, and, according to the court, unhealthy. The court synthesized these injuries into a decrease in a property value, including a loss in rental value. However, it is not essential to characterize the damages as a decrease in property value. As Professor Prosser states, with reference to a private nuisance action:

"As in the case of any other tort, the plaintiff may recover his damages in an action at law. In such an action the principal elements of damages are the value attached to the use or enjoyment of which he has been deprived, or—which often amounts to a measure of the same thing—the loss of the rental or use value of the property for the duration of a temporary nuisance, or the permanent diminution in value from a permanent nuisance, or specific losses such as crops, or the income from an established business; and in addition the value of any personal discomfort or inconvenience which the plaintiff has suffered, or of any injury to health or other personal injury sustained by the plaintiff, or by members of his family so far as they affect his own enjoyment of the premises, as well as any reasonable expenses which he has incurred on account of the nuisance.\*

RWW:JAR

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\**Prosser, supra*, at 602, 603. See, generally, Note, "Stream Pollution - Recovery of Damages," 50 Iowa L. Rev. 141 (1964).

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*County Board—Election of Chairman*—County board cannot adopt a resolution which infringes on the power of succeeding board to elect its chairman and vice-chairman. Supervisor can require that votes of county board be taken in a manner in which the vote of each supervisor may be ascertained and recorded.

February 29, 1972.

ROBERT P. RUSSELL, *Corporation Counsel*  
*Milwaukee County*

You have requested my opinion on the power of the county board to adopt and implement a resolution which purports to establish a procedure for the election of the county board chairman and two vice chairmen.

The entire board will be elected on April 4, 1972.

Section 59.05 (1), Stats., provides in part:

“(1) The board, at the first meeting after each regular election at which members are elected for full terms, shall elect a member chairman.\* \* \*”

Section 59.05 (2), Stats., provides that the board “\* \* \* at the time of the election of the chairman shall also elect a member vice chairman for the same term \* \* \*” and “\* \* \* may also elect a member 2nd vice chairman for the same term \* \* \*.”

The proposed resolution pending before the present board would require that, in each year in which there is a regular election for supervisors, beginning in 1972, each candidate for chairman shall submit to the incumbent chairman a statement of his proposed policies and programs, if elected, to include:

“1. The nature and extent of his personal commitment to the office, including the amount of time he intends to devote to the exercise of its duties;

“2. Specific objectives which he will strive to achieve during his term of office as chairman to expand, reduce, revise or eliminate existing county programs, or to introduce new programs, in order to improve the overall effectiveness of county government;

“3. A specific plan for the selection of committee chairmen and membership, outlining the roles each such committee will be expected to carry out so that his legislative and organizational goals may be achieved.”

A somewhat similar statement would be required of candidates for vice chairmen.

The resolution would further require that such statements be submitted between March 1 and the county board caucus beginning in 1972, and that such caucus would be held not less than seven nor more than 21 days following the general election. Statements are to be made available to the public. The resolution also provides:

“2. That the selection of the chairman and two vice chairmen in the caucus be by secret ballot, and that their election take place at the first meeting of the new board of supervisors, as prescribed in Sec. 59.05 (1), Stats., and Sec. 1.03, C.G.O.”

It is my opinion that the resolution, if adopted, would not be binding on the new board and that portions of the same could not be legally implemented.

Our Supreme Court has, in effect, said that the county board is a continuing body with perpetual succession. Thus, it is the same board that continues from year to year despite periodic changes in membership. While the board is a continuing body, one board cannot act in such a way as to tie the hands of a future board. 26 OAG 313, 314 (1937); 28 OAG 588 (1939).

In the absence of statutory requirements, a board may adopt its own rules of procedure to govern the conduct of its meetings. However, since the board is considered a minor deliberative body, actions of the board will be held valid if no statute requires a set procedure, even though the board's own rules of procedure were not followed. 52 OAG 57 (1963); 27 OAG 21 (1938).

Under sec. 59.05 (1) and (2), Stats., any member of the board to be next elected is eligible after filing his oath to stand for election to the office of county board chairman or vice chairman. While the board may request aspirants to set forth a program and statement of interest, the board is without power to deny any member the right to have his name placed in nomination at the

duly convened *first meeting* of the board after the regular election. Neither the present board nor the newly elected board have power to establish qualifications for the offices of chairman or vice chairman. The only statutory qualification is that they be members of the board.

The resolution is also defective in that it attempts to require that candidates for chairman set forth a specific plan for the selection of committee chairmen and committee members. Under sec. 59.06 (1), Stats., the board has power to establish committees by resolution and may designate their purpose, prescribe duties and manner of reporting. However, the same statute vests the power of appointment solely in the chairman without the necessity of confirmation. While the board can change the size of committees, prescribe their duties, abolish them and limit the number of committees a member may serve on, it cannot infringe on the power of the chairman as to who shall be appointed to authorized committees.

The procedure prescribed by the resolution is also invalid in that it would establish a meeting of the board in the nature of a caucus, which might be attempted to be secret, but which would in any event be prior to the regularly regarded first meeting of the board. A court might well hold that the caucus meeting was the first meeting of the board.

Whereas members of the county board may gather informally as members, the board can only exercise its corporate powers when it meets as a board, or in pursuance of a resolution or ordinance adopted by it, sec. 59.02 (1), Stats.

Section 59.04 (4), Stats., requires that:

“(4) The board shall sit with open doors, and all persons conducting themselves in an orderly manner may attend. \* \* \*”

Section 66.77 (2), Stats., requires: .

“\* \* \* *all meetings* of all state and local governing and administrative bodies, boards, commissions, committees and agencies, \* \* \* shall be publicly held and open to all citizens at all times, except as hereinafter provided. \* \* \* in sub. (3), \* \* \*”  
(Emphasis supplied)

None of the exceptions in subsec. (3) would permit closing of a meeting of the county board for the purpose of electing a chairman or vice chairman.

This does not mean that a county board, at the first meeting after the regular election, cannot proceed by informal votes before taking a formal vote on the election of chairman.

The Supreme Court apparently approved the use of an informal vote and, in fact, a secret ballot in *State ex rel. Burdick v. Tyrrell* (1914), 158 Wis. 425, 432, 149 N.W. 280, where neither statute nor charter required an aye or nay vote recording. At p. 434 the court also stated:

“\* \* \* The election or appointment of a city attorney was ‘transaction of business,’ and a majority of a quorum, in the absence of any statute to the contrary, was sufficient to elect.\* \* \*

“\* \* \* Perhaps, accurately speaking, under sec. 9, art. XIII, Const., and the provisions of the city charter in the instant case the council appoint and do not elect the city attorney. But whether the term ‘elect’ or ‘appoint’ be used in the charter the power of the council over the subject matter is the same. It is in reality an appointing power, and under the terms of the charter under consideration is to be exercised by the common council as a collective body, \* \* \*”

In *McQuillan Mun. Corp.* (3rd Ed.) sec. 13.43a, pp. 554, 555, it is stated:

“A municipal council generally acts by vote. It is essential to a valid election that all those who are present and are constituent members of the elective body have an opportunity to vote. Where election by ballot is authorized if requested, refusal of such a request may invalidate an election.

“A vote is but the expression of the will of a voter; and whether the formula to give expression to such law be a ballot or viva voce the result is the same; either is a vote. Where no mode of voting is prescribed by law, any mode not expressly forbidden by law, which insures to each member the right to vote, and by which the will of the majority can be fairly ascertained, may be adopted. It may be by ballot, by resolution, the adoption of a verbal motion

or in any other manner. \* \* \*” (Citing *Coon Valley v. Spellum* (1926), 190 Wis. 140, 208 N.W. 916; *The City of Green Bay v. Brauns* (1880), 50 Wis. 204, 6 N.W. 503.)

Certain statutes require some municipal governing bodies to take votes by ayes and nays and record the same at least as to certain questions. See sec. 62.11 (3) (d), Stats., applicable to cities requiring aye and nay votes on confirmations and money questions and on other questions when requested by any member.

In *McQuillan Mun. Corp.* (3rd Ed.) sec. 13.45, p. 559, it is stated:

“Two principal reasons may be suggested in favor of the requirement that whenever a vote is taken by a local legislative body on a certain proposition, the yeas and nays must be taken and recorded: First, the most important is to obtain a definite and accurate record of the corporate action in order to determine whether all of the mandatory provisions of the charter have been observed. Only in this way may it be ascertained whether the particular act is legal or illegal. Second, another purpose is to make the members of the body feel the responsibility of their action and to compel each member to bear his share in the responsibility by making a permanent written record of his action which should not be afterwards open to dispute. The inhabitants of the municipality are, as of right, entitled to know clearly the act and vote of every member, of their agents and servants, on every proposition relating to public duties, and a record of such acts and votes should be plainly made in a permanent form so that every inhabitant may have definite information.” (Citing *State ex rel. Milwaukee v. Milwaukee E.R. & L. Co.* (1911), 144 Wis. 386, 402, 129 N.W. 623.)

The statutes do not, however, expressly require that a county board vote on every question by ayes and nays, nor do they expressly authorize the board to use a ballot or secret ballot in elections by the board. They do require that the board act by voting.

Section 59.02 (2) and (3), Stats., provides:

“(2) Ordinances and resolutions may be adopted by a majority vote of a quorum or by such larger vote as may be required by law. Ordinances shall commence as follows: ‘The county board of supervisors of the county of . . . do ordain as follows.’

“(3) A majority of the supervisors entitled to a seat on the board shall constitute a quorum. *All questions shall be determined by a majority of the supervisors present unless otherwise provided.*” (Emphasis supplied)

Section 59.17 (1), Stats., which sets forth the duties of the county clerk, does, however, provide:

“\* \* \* Act as clerk of the county board at all the meetings thereof; keep and record in a book therefor true minutes of all the proceedings of the board; make regular entries of their resolutions and *decisions upon all questions; record the vote of each supervisor on any question submitted to the board, if required by any member present, \* \* \**” (Emphasis supplied)

I am of the opinion that any member can require that a vote be taken by some form in which the vote of each supervisor may be ascertained and recorded. Such request would have to be made before a vote was taken.

This would not preclude the use of a signed or otherwise identified ballot but would preclude a secret ballot. Use of a signed or identified ballot would lessen chances of members following the leader during voting but would still permit recordations for purposes of establishing a definite and accurate record of the proceedings and compel each member to bear his share in the responsibility in recorded form for information of the public.

I am of the opinion that the use of a secret ballot is contrary to the spirit and intent of sec. 59.04 (4), Stats., which requires the board to sit with open doors, and sec. 66.77, Stats., which requires open meetings of governmental bodies. The legislative intent of the latter statute is stated in sec. 66.77 (1), Stats., as follows:

“(1) In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of the state that the

public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental affairs and the transaction of governmental business.”

Citizens attending public meetings are denied the “fullest and most complete information” regarding the actions of a governmental body when such body attempts to vote in a manner which precludes even citizens who are in attendance from *any* chance of ascertaining how individual members voted.

RWW:RJV

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*Interest Payments—Condemnation*—Interest on the verdict provision of sec. 271.04 (4), Stats., does not apply to interest on the amount by which an original condemnation award was increased by a jury verdict under sec. 32.05 (11) (b), Stats.

February 29, 1972.

TIMOTHY O. KOHL, *Chief of Legal Coordination*  
*Department of Transportation*

You call my attention to the fact that ch. 141, Laws of 1971, changed the rate of interest on money judgments from 5 percent to 7 percent. The act reads as follows:

“271.04 (4) INTEREST ON VERDICT. When the judgment is for the recovery of money, interest at the ~~legal~~ rate of 7% *per annum* from the time of verdict, decision or report until judgment is entered shall be computed by the clerk and added to the costs.”

Section 138.04, Stats., defines the legal rate of interest as follows:

“The rate of interest upon the loan or forbearance of any money, goods or things in action shall be \$5 upon the \$100 for one year and according to that rate for a greater or less sum or for a longer or a shorter time; but parties may contract for the payment and receipt of a rate of interest not exceeding the rate allowed in s. 138.05, in which case such rate shall be clearly expressed in writing.”

You point out, in addition, that sec. 32.05 (11) (b), Stats., which defines the interest rate on money judgments for jury increases in awards in property condemnation, remains unchanged and seems to conflict with 271.04 (4), Stats. Section 32.05 (11) (b), Stats., reads:

“(b) If the jury verdict as approved by the court exceeds the basic award, the appellant shall have judgment for the amount of such excess plus legal interest thereon to date of payment in full from that date which is 14 days after the date of taking, plus his statutory taxable costs and disbursements pursuant to s. 271.02 (2).”

The legislature, in changing sec. 271.04 (4), Stats., did not amend sec. 32.05 (11) (b), Stats. While the subject matter is similar, the statutes address two separate and distinguishable situations. Section 271.04 (4), Stats., establishes the rate of interest upon a verdict involving an unliquidated claim. That rate of interest is assessed on the entire verdict from the time of such verdict until judgment is entered. On the other hand, on liquidated claims, interest runs from the date of liability rather than from the date of verdict. The verdict in an eminent domain suit is upon an unliquidated claim since, while the award given originally is presumptively correct, the difference between that amount and the court award is, until verdict, undetermined. The judgment is for a sum certain minus the amount of the original award plus interest and statutory costs and disbursements. If sec. 271.04 (4), Stats., controlled, the property owner would receive 7 percent of the *whole* verdict from the date of that verdict until entry of judgment.

Section 32.05 (11) (b), Stats., however, provides for payment of interest, not in the verdict, but upon the *difference* between the award and the verdict. In addition, it chooses to treat the increase over the award separately from sec. 271.04 (4), Stats., as a liquidated claim by having such interest run from the date of the liability (minus 14 days) until payment. Therefore, ch. 141, Laws of 1971, did not change sec. 32.05 (11) (b), Stats.

RWW:WHW

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*County Executive—County Highway Committee*—County executive does not have the authority to appoint members of the county highway committee. County board appoints such members by electing them.

February 29, 1972.

ROBERT RAHR FLATLEY, *Corporation Counsel*  
*Brown County*

You have requested my opinion whether a county executive has authority to appoint the members of the county highway committee.

I am of the opinion that he does not.

Section 59.032 (2) (b) and (c), Stats., provides in part:

“(b) Appoint the heads of all departments of the county except those elected by the people and except where the law provides that the appointment shall be made by a board or commission or by other elected officers; but he shall also appoint all department heads where the law provides that the appointment shall be made by the chairman of the county board or by the county board. Such appointments shall require the confirmation of the county board.\* \* \*

“(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.” (Emphasis supplied.)

The appointing power of the executive *under sec. 59.032 (2) (b)*, Stats., is only concerned with heads of departments, and excepts those departments headed by an official elected by the people and those required by statute to be appointed by a board, other than the county board, by a commission or by other elected officers. I construe “other elected officers” as those elected by the people, such as a judge, and not an official “elected” by the county board. As later herein discussed, such “election” by the county board is really an appointment. Even after it is determined

that a given area of county government constitutes a department, separate determination must be made as to what official or what official body constitutes the head of such department. The county highway committee and county highway commissioner both have substantial authority with regard to the county highway department. See secs. 83.01, 83.015, Stats. I am of the opinion that the commissioner is the head of such department within the meaning of sec. 59.032 (2), Stats. Since the county highway committee is not the head of the county highway department, sec. 59.032 (2) (b), Stats., does not provide authority for the county executive to appoint its members.

I will proceed to determine whether authority can be found under sec. 59.032 (2) (c), Stats.

Section 83.015 (1) (a), Stats., provides that each county board at its annual meeting "shall by ballot elect a committee" to serve for one year and until their successors are "elected;" that vacancies are filled by "appointment" by the chairman of the county board, "until the next meeting of the county board" and that "the committee shall be known as the 'county highway committee,' and shall be the only committee representing the county in the expenditure of county funds in constructing or maintaining \* \* \* highways." Section 83.015 (1) (b), Stats., provides that in counties over 200,000 population "the membership, *manner of appointment*, and the terms of the members" shall be fixed by the county board.

County officers must *be elected by the poeple or appointed* by the county board or other county authorities *or appointed* as the legislature may direct.

Article VI, sec. 4, Wis. Const., provides in part:

"Sheriffs, coroners, registers of deeds, district attorneys, and *all other county officers* except judicial officers and chief executive officers, shall be chosen by the electors of the respective counties once in every two years.\* \* \*"

Article XIII, sec. 9, Wis. Const., provides in part:

"All county officers whose election or appointment is not provided for by this constitution shall be *elected by the electors of the respective counties, or appointed by the boards of*

*supervisors, or other county authorities, as the legislature shall direct. \* \* \* All other officers whose election or appointment is not provided for by this constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people or appointed, as the legislature may direct.*" (Emphasis supplied.)

In *State ex rel. Williams v. Samuelson* (1907), 131 Wis. 499, 512, 111 N.W. 712, it was held that the phrase "all other county officers" incorporated into Art. VI, sec. 4, Wis. Const., by amendment in 1882, means the heads of the several major divisions of county government existing at that time, and the section as amended does not take away the legislative power mentioned in Art. XIII, sec. 9, Wis. Const., to create other county offices with other duties and to provide for the manner of filling such offices and the terms thereof.

The term "election" as used in the Wisconsin Constitution constitutes an exercise of the sovereign political power of the state by and through those who are entitled to the right of suffrage. *State ex rel. La Follette v. Kohler* (1930), 200 Wis. 518, 555, 228 N.W. 895.

In 25 Am. Jur. 2d, *Elections*, sec. 1, 691, 692, it is stated:

"The words 'elect' and 'appoint' are not legally synonymous. The term 'election' carries with it the idea of a choice in which all who are to be affected by the choice participate, whereas an appointment is generally made by one person or by a limited number acting with delegated powers. However, the words are sometimes indiscriminately employed in constitutional and statutory provisions, and for the purpose of ascertaining the correct interpretation, the courts must give to the word used a meaning according to the connection in which it is found. Thus, in some provisions the word 'election' has been held to be equivalent to the word 'appointment,' \* \* \*."

Although sec. 83.015 (1) (a), Stats., uses the word "elect," I am of the opinion that members of the highway committee are appointed by the county board. Note that subsec. (1) (b), applicable to counties having a population of over 200,000, refers to "manner of appointment."

Membership on the committee is not limited to county board members, but each serves a definite term and holds office until his successor is chosen. 48 OAG 241 (1959), 46 OAG 175, 176 (1957).

Section 45.43 (1), Stats., provides that the county board shall "elect" a county veterans' service officer. In 55 OAG 260 (1966), it was stated that he was really an officer appointed by the county board.

The only manner in which a county board can act is pursuant to a vote taken of its members. See sec. 59.02, Stats. The supervisors cast their votes to effect an appointment.

In *State ex rel. Burdick v. Tyrrell* (1914), 158 Wis. 425, 434, 149 N.W. 280, the Supreme Court considered a city charter which provided that the council may "elect" a city attorney. At page 434 the court stated:

"\* \* \* Perhaps, accurately speaking, under sec. 9, art. XIII, Const., and the provisions of the city charter in the instant case the council appoint and do not elect the city attorney. But *whether the term 'elect' or 'appoint' be used in the charter the power of the council over the subject matter is the same. It is in reality an appointing power, and under the terms of the charter under consideration is to be exercised by the common council as a collective body, \* \* \*.*" (Emphasis supplied.)

It can be argued that, since members of the county highway committee are appointed by the county board, the county executive would have power under sec. 59.032 (c), Stats., to make the appointments in a county having an executive. This would hold true only if the highway committee is a *board* or *commission* within the meaning of sec. 59.032 (2) (c), Stats. I am of the opinion that it is not.

The legislature did not include the word "committees" in sec. 59.032 (2) (c), Stats. It could easily have done so if it had intended to include committees.

The legislature may have avoided the word "committee" only to insure that there would be no question but that the county board chairman could continue to exercise the important appointive power over committees of the county board, made up

of county board members, established by board resolution pursuant to sec. 59.06, Stats. The legislature did not intend to interfere with the traditional committee system employed by various county boards to carry out county business of an investigative, legislative or minor administrative nature.

However, the legislature, if it had intended to include committees in the nature of commissions, could have specifically named the special committees involved. Having not done so, I am of the opinion that the legislature, being fully informed of the long history and function of the county highway committee, used the words "boards and commissions" advisedly to the exclusion of "committees" and did not intend that the executive have power to appoint members of the county highway committee.

RWW:RJV

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*Student Activity Fees—Board of Regents*—The Board of Regents may only charge student fees for activities that relate to a legitimate educational purpose.

February 29, 1972.

ROBERT W. WINTER, *Assistant Director*  
*Wisconsin State Universities System*

You have requested my opinion as to whether the Board of Regents of the University of Wisconsin System may charge student activity fees for the purpose of acquiring accident, death, and disability insurance coverage for the student body.

This policy would provide medical expense coverage, dismemberment and death benefits for occurrences arising out of University sanctioned activities involving off-campus travel.

The Board of Regents in the governance and administration of Chapter 37 Institutions has broad powers under sec. 37.02 (1), Stats. However, in regard to the setting of fees, these powers are somewhat more defined for sec. 37.11 (8) (a), Stats., specifies:

“\* \* \* The board of regents may also charge any student laboratory fees, book rents, fees for special departments or any incidental fee covering all such special costs. \* \* \*”

What the legislature actually intended by the phrase “or any incidental fee covering all such special costs” is open to question. This legislation could be interpreted as referring back to such items as laboratory fees, book rentals, etc. In other words, the language could be interpreted merely as authorizing the Regents to set one fee to cover all such special costs and to eliminate the need of prescribing a fee schedule for each item mentioned in the statute. Further, there is the question of whether the legislature merely intended to set up a class of special fees, or whether the legislature intended that these be the only special fees chargeable.

In addition to the statutes previously referred to, the question involves secs. 20.265 (1) (g), (gm), and (h), Stats. These statutes contain authority for the Board of Regents to charge dormitory fees, dining hall fees, parking rents, etc., but are no more helpful than the statutes first referred to.

I have been advised that the fees chargeable at the various Chapter 37 Institutions vary between the institutions and may cover such diverse and varied activities as athletics, student newspapers, guest speakers, and many other activities. Recently, I have been approached as to whether such fees could be charged and used for a student medical center and for the hiring of legal counsel. I am also under the impression that the charging of these miscellaneous fees and their appropriation for specific programs has, to some extent, been delegated to the separate individual institutions.

Twenty-three years ago in 38 OAG 516 (1949), it was noted that the fees charged and collected under sec. 37.11 (8), Stats., included fees for such items as athletic contests, concerts, class dues, cap and gown fees, etc. This opinion also noted that there was at that time no uniformity between the separate institutions. Although I am of the opinion that a strict interpretation and application of the statute is warranted, such an interpretation at this late date would present many practical, if not legal, difficulties.

The long history of liberal administrative interpretation and use of sec. 37.11 (8), Stats., and general powers of the Board has made it very difficult, if not impossible, for this office to say that this particular fee-supported activity does or does not fall within the statute and powers of the Board. Notwithstanding and regardless of how broad a particular statutory grant may be, and regardless of past administrative interpretation, there are limits as to what may or may not be a proper exercise of authority by the administrative agency.

As to the particular fee and program contemplated, it can be observed that it involves something more than school activities or the well-being of the student as a student. The death benefits payable to the designated beneficiaries of the student clearly exceed, in my opinion, a legitimate interpretation of the fee statute. A somewhat closer question is the dismemberment benefits payable to a student under the proposed program. On the other hand, the medical coverage would seem to be a proper concern of the Board, and a legitimate fee and use under sec. 37.11 (8), Stats.

The question involved is a close question and depends more on a factual determination by the Board of Regents of the University of Wisconsin System as to whether the fee and insurance program serves a legitimate school function or purpose. If, in the Board's opinion, a worthwhile benefit is achieved, which benefit can be demonstrated as relating to the educational purposes of the Chapter 37 Institutions, the fee may be imposed and the insurance program initiated. This is a policy determination, which determination can only be made by the Board of Regents.

It should, perhaps, be called to the Board's attention when it is considering this matter that, if this insurance program is made compulsory, there may be instances where particular students already have such insurance coverage, which policies may have nonduplication of coverage provisions. In such situations, the students would not be receiving the entire benefits or protection that they are forced by Board action to subscribe for.

This fee and program, as in the case of all fees and programs, requires formal Board action.

RWW:CAB

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*Civil Service Examinations—Residency*—Section 16.11 (2), Stats., is invalid so far as it requires applicants for civil service examinations for state employment in the classified service to be citizens of the United States. There is some doubt regarding the validity of the one-year residence requirement.

March 6, 1972.

JOE E. NUSBAUM, *Secretary*

*Department of Administration*

You have asked whether the Director of the Bureau of Personnel should continue to observe the requirements of sec. 16.11 (2), Stats., that applicants for civil service examinations for state employment in the classified service be (1) citizens of the United States, and (2) residents of Wisconsin for at least one year prior to the filing of the application for employment.

With regard to the requirement of United States citizenship, recent court decisions consistently have invalidated state statutes which deny aliens equal enjoyment of state benefits. In *Graham v. Richardson* (1971), 403 U.S. 305, 91 S.Ct. 1848, 29 L.ed. 2d 534, the court struck down state statutes that required United States citizenship and a prescribed duration of state residence as a prerequisite to application for welfare benefits. The court noted that the guarantee of the Fourteenth Amendment, U.S. Const., "to any person within its jurisdiction the equal protection of the laws" includes protection of aliens. A state cannot arbitrarily favor citizens over aliens in the distribution of state benefits. The court held that state statutes which restrict the rights of aliens directly interfere with overriding national policies in the area of naturalization and immigration. It determined that aliens lawfully in the country had the right to enter and abide in any state on an equality of legal privileges with all citizens; rules restricting the rights of aliens could be made only by the Federal Government.

The rationale of *Graham v. Richardson* was applied specifically to citizenship restrictions on state civil service examination in *Dougall v. Sugarman* (S.D. N.Y. 1971) 339 F. Supp. 906. The court rejected arguments that such citizenship requirement insured loyalty of service to the state and that it promoted stable and efficient government operation. The court held that aliens were subject to the same obligations and responsibilities as citizens and no evidence was presented that aliens were more or less transient than citizens. To the same effect, see *Purdy & Fitzpatrick v. State* (1969), 79 Cal. Rptr. 77, 456 P. 2d 645.

The Federal Equal Employment Opportunity Commission has published *Guidelines on Discrimination Because of National Origin*, 29 C.F.R. Ch. XIV, Part 1606, dated January 13, 1970, which states in part:

“(c) Title VII of the Civil Rights Act of 1964 protects all individuals both citizen and noncitizens, domiciled or residing in the United States, against discrimination on the basis of race, color, religion, sex, or national origin.

“(d) Because discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin, a lawfully immigrated alien who is domiciled or residing in this country may not be discriminated against on the basis of his citizenship, except that it is not an unlawful employment practice for an employer, pursuant to section 703(g), to refuse to employ any person who does not fulfill the requirements imposed in the interests of national security pursuant to any statute of the United States or any Executive order of the President respecting the particular position or the particular premises in question.

“(e) In addition, some States have enacted laws prohibiting the employment of noncitizens. For the reasons stated above such laws are in conflict with and are, therefore, superseded by Title VII of the Civil Rights Act of 1964.”

Section 111.32(5), Stats., also prohibits discrimination in employment because of natural origin.

In my opinion, the requirement of sec. 16.11 (2), Stats., that in order to be eligible for competitive examination for state employment applicants must be citizens of the United States, is unconstitutional and invalid.

State residence requirements as well have been challenged as unconstitutional. The Supreme Court of the United States in *Shapiro v. Thompson* (1969), 394 U.S. 618, 89 S.Ct. 1322, 22 L.ed. 2d 600, invalidated a state one-year residence requirement for eligibility to receive welfare benefits. The decision was predicted upon the penalizing effect of the durational residence qualification upon the fundamental constitutional right to travel interstate. Giving the statute strict scrutiny, the court found no compelling state interest had been established to justify denial of welfare benefits for lack of residence in the state for one year.

Relying on the precedent of *Shapiro*, subsequent cases have overturned a two-year residence requirement for commencement of divorce actions, *Wymelenberg v. Syman* (E.D. Wis. 1971), 328 F.Supp. 1353; a four-month residence requirement for therapeutic abortion, *Corkey v. Edwards* (W.D.N.C. 1971), 322 F.Supp. 1248, 1254; and a one-year residence requirement to take the bar examination, *Keenan v. Board of Law Examiners of State of N.C.* (E.D. N.C. 1970), 317 F.Supp. 1350, 1358-1362.

The rule formulated in *Shapiro* has not uniformly been applied to invalidate other durational residence standards. In *Whitehead v. Whitehead* (S.Ct. Hawaii, 1-19-72), 40 Law Week 2492, a state court held valid the statute requiring a year's residence for divorce as insuring good faith in the residence of parties coming from without the state and applying for divorce. The court considered that the inhibitory effect of the statute on the right of interstate travel was too speculative and remote to render the statute invalid. Statutory distinctions between residents and nonresidents in respect to state college tuition also have been upheld. *Starns v. Malkerson* (D.C. Minn. 1970), 326 F.Supp. 234.

In *Shapiro v. Thompson* (1969), 394 U.S. 618, 638 fn. 21, 89 S.Ct. 1322, 22 L.ed. 2d 600, the court stated:

“We imply no view of the validity of waiting-period of residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel.”

While there is substantial question regarding the validity of the one-year residence requirement, sec. 16.11 (2), Stats., in my opinion the issue is not so free of doubt that I can advise you not to enforce that provision in processing applications for state employment.

RWW:GS

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*Property Taxation—Agricultural Land—1971 Senate Bill 58, providing for a different classification and valuation of agricultural land for property tax purposes, is in violation of Art. VIII, sec. 1, Wis. Const. 1971 Assembly Joint Resolution 1 discussed.*

March 7, 1972.

THE HONORABLE, THE ASSEMBLY

By Assembly Resolution 54, you have asked my opinion on the constitutionality of 1971 Senate Bill 58 in the form in which it was passed by the Senate on February 1, 1972, and, in particular, on whether or not 1971 Senate Bill 58 violates the uniformity rule of Art. VIII, sec. 1, Const.

1971 Senate Bill 58 provides for a different classification and valuation of agricultural land for property tax purposes and is in violation of the uniformity clause.

The Bill creates subch. VI of ch. 77 relating to the taxation of lands actively devoted to agricultural or horticulture use. Section 77.82 (1), Stats., is created to read:

**"77.82 VALUE OF LAND ACTIVELY DEVOTED TO AGRICULTURAL AND HORTICULTURAL USE. (1) VALUATION.** (a) For general property tax purposes, the value of land, not less than 10 contiguous acres in area, which is actively devoted to agricultural or horticultural use as defined in s. 77.81 (2) and which has been so devoted for at least the 5 successive years immediately preceding the tax year in issue is the value which the land has for agricultural or horticultural use.

"(b) All structures actively devoted to agricultural or horticultural use, the farmhouse and the land on which they are located shall be assessed and taxed by the same standards, methods and procedures as other taxable structures and other land in the taxing district."

The Bill establishes a valuation for land used for agricultural or horticultural purposes which is not based on "fair market value." For tax purposes, property must be assessed at its "fair market value." *State ex rel. Evansville Mercantile Ass'n. v. City of Evansville* (1957), 1 Wis. 2d 40, 82 N.W. 2d 899. A different standard is acknowledged by the creation of a so-called "Roll-back tax" which is defined under sec. 77.82 (2), Stats., to mean:

"(2) ROLL-BACK TAX. 'Roll-back tax' means the difference, if any, between the tax paid or payable on the basis of the valuation, assessment and taxation authorized under this subchapter and the tax which would have been paid or payable had the land been valued, assessed and taxed in the same manner as other land in the taxing district."

As early as 1859, the Supreme Court determined in *Knowlton v. Supervisors of Rock County*, 9 Wis. \*410, that the Wisconsin Constitution has fixed one unbending, uniform rule of taxation for the state, and property cannot be classified and taxed by different rules. All kinds of property must be taxed uniformly or be absolutely exempt. Thus, where the city of Janesville included within its limits a large quantity of farming land, which was not within a recorded plat, but provided that land used for agricultural or horticultural purposes would not be subject to the same rate of tax as other lands, the taxes thus levied were determined void in violation of Art. VIII, sec. 1, Wis. Const., which provides that "the rule of taxation shall be uniform."

As recently as 1967, the Supreme Court determined in *Gottlieb v. Milwaukee*, 33 Wis. 2d 408, 147 N.W. 2d 633, that the following standards of tax uniformity are required by Art. VIII, sec. 1, Wis. Const.:

“1. For direct taxation of property, under the uniformity rule there can be but one constitutional class.

“2. All within that class must be taxed on a basis of equality so far as practicable and all property taxed must bear its burden equally on an *ad valorem* basis.

“3. All property not included in that class must be absolutely exempt from property taxation.

“4. Privilege taxes are not direct taxes on property and are not subject to the uniformity rule.

“5. While there can be no classification of property for different rules or rates of property taxation, the legislature can classify as between property that is to be taxed and that which is to be wholly exempt, and the test of such classification is reasonableness.

“6. There can be variations in the mechanics of property assessment of tax imposition so long as the resulting taxation shall be borne with as nearly as practicable equality on an *ad valorem* basis with other taxable property.”

Clearly, 1971 Senate Bill 58 establishes a separate class for property used for agricultural and horticultural purposes within the general class of taxable real property. It departs from the uniform manner of taxing such real property according to its fair market value, and requires such land to be valued according to its use. This is in violation of Art. VIII, sec. 1, Wis. Const.

It would appear that the most appropriate way to meet the constitutional difficulties inherent in taxing agricultural land at a different rate is through a constitutional amendment. I call to your attention 1971 Assembly Joint Resolution 1, which has passed this session of the legislature. AJR 1 is a constitutional amendment proposed for first consideration that would permit the

Wisconsin Legislature to provide for the taxation of agricultural and undeveloped land at rates which need not be uniform with each other nor with other real property.

RWW:APH

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*City School Board—Legal Counsel, Employment Of—*  
Conditions under which a joint city school district may employ legal counsel discussed. Legislature may authorize employment of counsel by joint city school district.

March 8, 1972.

THE HONORABLE, THE SENATE

By Senate Resolution 50, you have requested my opinion “as to under what conditions a city school board may be legally empowered to employ legal counsel without prior consent of the common council.”

Your resolution further states that you have, under consideration, legislation which would authorize a joint city district to hire legal counsel or to use the services of the city attorney and reimburse the city for such services.

Section 120.41, Stats., provides, among other things, that “. . . Every city operating a school system under this subchapter is a single and separate school district, but the school system does not constitute a separate legal entity. . . .”

Since a city school district (whether a joint city school district or not) is not a separate legal entity, it or its school board would not have power to employ an attorney to represent it unless specifically authorized by statute.

Section 120.49, Stats., lists eleven powers and duties of the school board of a city school district. The power to hire legal counsel is not among those delegated to the city school board. Under the usual rules of statutory construction, such an

enumeration generally restricts the delegation of authority to those powers specifically enumerated, or which may reasonably be implied to carry out the enumeration of statutory powers.

This does not mean that the city itself might not employ special counsel, or otherwise make specific arrangements for legal service to the city school district. In *Jaynes v. Stockton* (1961), 193 Cal. App. 2d 47, 14 Cal. Rptr. 49, the court held that a public agency, such as a school district created by statute, may not contract and pay for legal services which the law requires a designated public official to perform, unless the authority to do so clearly appears from the powers expressly conferred, or unless the services are unavailable for reasons beyond the agency's control, such as inability, refusal or disqualification of the public official to act.

And, in *Kay v. Board of Higher Education* (1940), 260 App. Div. 9, 20 N.Y.S. 2d 898, the court held that the authority of the New York City Corporation Council to conduct all of the law business of the city of New York and its *agencies* was exclusive, subject to fraud, collusion or corruption on the part of the Corporation Council, or the existence of a conflict of interest. In such exceptions, the court held that city officers or agencies may retain private counsel. However, under the facts of the above case, the board was not entitled to hire private counsel to appeal an order setting aside the appointment of Bertrand Russell as a professor of philosophy in the college of the city of New York.

Therefore, it is my opinion that, under existing law in Wisconsin, a city school board, whether or not joint, may hire separate counsel only upon the terms and conditions as set forth in the above-cited cases.

It is my further opinion that legislation may authorize a joint city district to hire legal counsel as proposed by Senate Bill 270. However, counsel employed by the school district pursuant to such legislation must be constantly aware of the fact that the city school district is not a legal entity separate from the city, and that this fact may well raise problems in the manner in which he renders services. For example, a policy respecting litigation would, in most instances, not be under the control of the school board since the city would be the party in any legal action.

RWW:JWC

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*Public Interest—Natural Resources, Conveyance*—The common and approved usage of the words “in the public interest” involve something in which the public, the community at large, is involved and has an interest or right which may be affected. Because the use and enjoyment of submerged lands at Lake Michigan’s shoreline are involved, any determination of public interest, whether it be by the legislature or delegated body, must be consistent with the public trust doctrine.

March 8, 1972.

THE HONORABLE, THE SENATE

By Senate Resolution 43, 1971, you have asked for my opinion on the interpretation of the words, “in the public interest” as used in 1971 Assembly Bill 859. In 1919, when the Wisconsin Legislature authorized the city of Kenosha to reclaim some submerged land at its Lake Michigan shoreline, the legislation restricted the use of the lands to: “For public park purposes.” Assembly Bill 859 would delete that restriction so that the lands can be used for any purpose as long as that purpose is now “in the public interest.”

Section 990.01 (1), Stats., indicates that “all words and phrases shall be construed according to common and approved usage; but technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning.” The common and approved usages of “public interest” involve something in which the public, the community at large, is involved and has an interest or right which may be affected. *State ex rel. Burgum v. North Dakota Hospital Service Association* (1960), 106 N.W. 2d 545. It does not mean anything so narrow as the interests of the particular localities which may be affected by the matter in question. *State v. Crockett* (1922), 206 P. 816, 86 Okl. 124. “The term ‘public interest’ is a very broad and

comprehensive one. It means different things in different connotations." *Gateway City Transfer Co. v. P.S.C.* (1948), 253 Wis. 397, 404, 34 N.W. 238.

Determinations of public interest are a legislative function and are not within the province of the judiciary. See *In re City of Beloit* (1968), 37 Wis. 2d 637, 155 N.W. 2d 633; *In re City of Fond du Lac*, (1969), 42 Wis. 2d 323, 166 N.W. 2d 225; *Outagamie County v. Smith* (1968), 38 Wis. 2d 24, 155 N.W. 2d 639. If Assembly Bill 859 becomes law, it would, in effect, be a delegation of power of the legislature to the city of Kenosha. The latter would have to initially determine whether a proposed use was in the public interest. Because the use and enjoyment of submerged land at Lake Michigan's shoreline is involved, any determination of public interest, whether it be by the legislature or delegated body, is subject to limitations imposed by the public trust doctrine. Therefore, I would like to invite your attention to that doctrine.

In Wisconsin, navigable waters are said to be held in trust by the state for the public. *State v. Public Service Commission* (1957), 275 Wis. 112, 81 N.W. 2d 71. The courts have sometimes ascribed the trust doctrine to the Northwest Ordinance of 1787. See *Attorney General v. City of Eau Claire* (1875), 37 Wis. 400, 446; and *Lundberg v. University of Notre Dame* (1938), 231 Wis. 187, 192, 282 N.W. 70, 73. The court has also attributed the public trust doctrine to the Wisconsin Constitution. See *Angelo v. Railroad Commission* (1928), 194 Wis. 543, 549, 551, 217 N.W. 570, 573, 574. Other times, the public trust doctrine has been ascribed to a combination of these sources. See *Muench v. Public Service Commission* (1952), 261 Wis. 492, 515, 53 N.W. 2d 514, 55 N.W. 2d 40, 45. Title to the lake beds passed to the state as an incident of sovereignty. A grant invests in the grantee such rights of property in respect to the beds as are consistent with the public welfare. See Page, *Alienation of Beds of Public Lakes—The Trust Doctrine*, 1928 Wis. L. Rev. 39. Traditional public trust laws also embrace park lands, especially if they have been donated to the public for specific purposes, and, as a minimum, it operates to require that such lands not be used for non-park purposes; however, it is uncommon to find decisions that constrain public authorities in the specific uses to which they may put park lands,

unless the lands are reallocated to a very different use. See Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 Mich. Rev. 556 (1970). Since the submerged land involved herein is subject to the public trust, its use must be in consonance with that trust.

Local public interests may interfere with the public trust in the same manner as private interests, for many aspects of local self-interest are as inconsistent with the broad public interest as are projects of private enterprises. See *People ex rel. San Francisco Bay Conservation and Development Commission v. Town of Emeryville* (1968), 69 Cal. 2d 533, 446 P. 2d 790. Any requirement that the facilities be public reduces the potential for overreaching by private interests and ensures the benefits will be relatively widely distributed among the citizenry. The Wisconsin Court will require that a showing of justification be made whenever resources which are generally available to the public without cost are, in any significant way, subordinated to a more limited set of private interests. See *Priewe v. Wisconsin State Land and Improvement Co.* (1896), 93 Wis. 534, 67 N.W. 918.

In *State v. Public Service Commission*, *supra*, the city of Madison, among other things, wanted to fill a portion of a lake bed and use it for park purposes. The Wisconsin Supreme Court allowed the city to do this and said that the trust doctrine would prevent a grant for a purely private purpose, and "even for a public purpose, the State could not change an entire lake into a dry land nor alter it so as to destroy its character as a lake," nonetheless, "the trust doctrine does not prevent minor alterations of natural boundaries between water and land." (275 Wis. 118) Also, the purposes of the trust include all public uses of navigable waters. The advancement of one use over another may be promoted at relatively minor sacrifice; however, the weighing of the relative values must be in harmony with the public trust doctrine. See *Ashwaubenon v. Public Service Commission* (1963), 22 Wis. 2d 38, 125 N.W. 2d 647.

Since the term "in the public interest" has a broader significance than the term "for public park purposes," it is apparent that the intended potential use of the reclaimed lands is being expanded. I am of the opinion that this augmented usage must be in harmony with the public trust doctrine, a doctrine

which requires that the submerged land be used for a public purpose or to the extent that it is granted to a private person for a private use, that use must be a part of a scheme or plan which will enhance the public rights in the use of this natural resource. See *Milwaukee v. State* (1927), 193 Wis. 423, 214 N.W. 820. Furthermore, the property subject to the trust must be maintained for particular types of uses, that is, the resource must be held available for certain traditional uses, uses which are related to the natural uses peculiar to the resource. Basically then, the trust property should be devoted to the fulfillment of the purposes of the trust, specifically, the service of the people. *Hayes v. Bowman* (1957), 91 S. 2d 795, 799.

RWW:SHS

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*Forest Crop Law—Natural Resources Department*—Requests by individual legislators and town or county boards for delay in issuing orders pursuant to ch. 77, Stats., present no basis for withholding actions by the Department of Natural Resources. If pending legislative proposals are enacted into law, they would be prospective in operation and the filing of an application creates no vested right.

March 8, 1972.

LESTER P. VOIGT, *Secretary*  
*Department of Natural Resources*

You state that you have received correspondence from town boards, county boards and legislators requesting that the Department of Natural Resources delay action on applications for entry of some 200,000 acres of land under ch. 77, Stats., known as the Forest Crop Law. The delay is being requested because of the pendency in the legislature of Assembly Bill 138 and Senate Bills 207 and 461, any of which, if enacted into law, would increase the annual acreage levy payable by the property owner on lands entered under the Forest Crop Law. The applications were received in 1971, hearings have been held and the department is prepared to issue orders and approvals on or before March 20,

1972. You state further that it has been the policy of the department to issue the orders and approvals prior to March 20 of each year on lands which meet the qualifications of the law, which orders then become effective for the whole calendar year.

You ask my opinion with respect to:

(1) What authority, if any, the Department of Natural Resources has to alter or delay the normal processing sequence on current Forest Crop Law applications in response to such requests for delay, and

(2) What effect the enactment of pending legislative proposals will have upon applications now in process.

The pertinent statute which fixes the time limitations within which the Department of Natural Resources must act is sec. 77.02 (2) and (3), Stats., which provides in part as follows:

“(2) NOTICE OF HEARING, ADJOURNMENT. Upon the filing of such petition the department of natural resources shall set such matter for public hearing at such time and place as it sees fit, but not later than one year from the date of such filing . . .

“(3) DECISION, COPIES. After hearing all the evidence offered at such hearing and after making such independent investigation as it sees fit the department of natural resources shall make its findings of fact and make and enter an order accordingly. If it finds that the facts give reasonable assurance that a stand of merchantable timber will be developed on such lands within a reasonable time, and that such lands are then held permanently for the growing of timber, rather than for agricultural, mineral, recreational or other purposes, and that all persons holding incumbrances against such land have in writing agreed to the petition, the order entered shall grant the request of the petitioner on condition that all unpaid taxes against said lands be paid within 30 days thereafter; otherwise the department of natural resources shall deny the request of the petitioner . . . Any order of the department relating to the entry of forest crop lands issued on or before March 20 of any year shall take effect in such year, but all orders issued after March 20 of any year shall take effect the year following.”

There is no stated limitation of the time within which an order must be issued after hearing.

The provision of sec. 77.02 (3), Stats., which grants the Department of Natural Resources the right to make such independent investigations as it sees fit after hearing, indicates that the legislature did not intend to compel immediate issuance of an order. The annual March 20 cutoff date for property tax abatement has no significance with respect to the date of order issuance. It provides only that orders issued prior thereto take effect for that calendar year and orders issued thereafter are effective the year following. However, although your department has adopted a policy of issuing such orders before March 20, you do not indicate whether this policy was adopted pursuant to ch. 227, Stats., or whether it is an informal practice. In any case, the requests for delay disclose no basis pursuant to either statute or administrative practice for undue delay in issuing orders.

Although there are several legislative proposals pending, the policy of the state is declared in sec. 77.01, Stats., as encouraging the preservation from destruction or premature cutting the remaining forest growth of the state. Consistent with that policy and the administrative practice of your department, it is my opinion that orders must be issued within a reasonable time after completion and review of the hearing transcript and such independent investigation as the department sees fit to make. Requests for delay by individual legislators or municipal entities are not a valid basis for withholding the normal processing procedure of applications properly made under the provisions of ch. 77, Stats.

If the department intentionally and unnecessarily delays the issuance of orders because of legislators' requests, the administrative determination would be subject to attack on the basis that the merits of the application had been disregarded. Although the decision rather than delay was at issue, the applicable principle of law was stated in *D.C. Federation v. Volpe* (1971), 459 F. 2d 1231, D.C. Cir. as follows:

“. . . the decision would be invalid if based in whole or in part on the pressures emanating from Representative Natcher. Judge Fahy agrees, and we therefore hold, that on remand the Secretary

must make new determinations based strictly on the merits and completely without regard to any considerations not made relevant by Congress in the applicable statutes.”

Since Assembly Bill 138 and Senate Bills 207 and 461 are subject to amendment and executive veto prior to becoming law, this opinion is not addressed to the effect of any specific pending proposal. However, in response to your second inquiry, legislation is prospective in operation unless the legislature expressly otherwise provides. Sec. 990.05, Stats.

Section 77.03, Stats., provides that: “. . . The passage of this act, petition by the owner, the making and recording of the order hereinbefore mentioned shall constitute a contract between the state and the owner. . . .” Until all of the foregoing elements have occurred, the owner has no vested right to have his property tax abated pursuant to ch. 77, Stats. The applicable canon of construction was set forth by the Wisconsin Supreme Court in *Department of Revenue v. Dziubek* (1970), 45 Wis. 499 at 505 as follows:

“ ‘An amendatory statute, like other legislative acts, takes effect only from its passage, and will not be construed as retroactive or as applying to prior facts or transactions, or to pending proceedings, unless a contrary intention is expressly stated or necessarily implied.’ ”

In conclusion, it is my opinion that the requests by individual legislators and petitions by town and county boards present no basis for undue delay in issuing orders, and that enactment of any of the legislative proposals would apply only to property affected by orders issued after the bills became law. The application and hearing do not create a vested right in a property owner which would survive amendatory legislation.

RWW:TLP

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*Juries—Twenty-Sixth Amendment, U. S. Const.*—Persons 18, 19 and 20, who are electors of this state, must be included within that class of citizens from which jurors are chosen for service in

the courts of our state. Existing jury panels need not be recalled, unless it appears probable, in an individual case, that failure to consider these newly enfranchised electors in the jury selection process subjects such person to disadvantage by denying him an impartial jury.

March 8, 1972.

DENNIS J. FLYNN, *Corporation Counsel*  
*Racine County*

You request my opinion on two questions concerning the relation between the recently adopted Twenty-Sixth Amendment to the United States Constitution and the law of Wisconsin relating to the qualifications of jurors. Your first question asks:

“Are individuals who are 18, 19 or 20 years old to be accorded the high privilege and obligation of serving on juries under Wisconsin Law?”

The qualification of jurors for Wisconsin courts is set forth in sec. 255.01, Stats., which provides as follows:

*“Persons (1) who are citizens of the United States, (2) Who are electors of the state, shall be liable to be drawn as grand or petit jurors.”* (Emphasis added)

The Twenty-Sixth Amendment to the Federal Constitution, which was ratified by the requisite number of states on June 30, 1971, provides as follows:

“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.”

The Nineteenth Amendment, which automatically negated state constitutional and statutory provisions restricting the right of women to vote, has generated a significant body of case law which I feel is most useful, by way of analogy, in specifically responding to your first question. Just as in the instant case, the advent of voting rights for women raised questions as to whether

the federal constitutional amendment also formed the vehicle by which those who were newly franchised would be entitled to or required to sit upon juries. Neither the Nineteenth Amendment nor the Fourteenth Amendment to the United States Constitution prohibits a state from prescribing qualifications of jurors including those which limit the selection of jurors to males. See 157 A.L.R. 461 and 9 A.L.R. 2d 661. However, the greater number of the state courts, which have considered the question, have held that, where the principal qualification of a juror was that he be an elector, the extension of the franchise to women under the Nineteenth Amendment had the effect of making them eligible as jurors. As stated in 47 Am. Jur. 2d, *Jury*, sec. 104, at page 714:

“ . . . although a contrary conclusion has been reached in some jurisdictions, where the primary qualification of a juror is that he be an elector, the majority view is that the conferring upon women of the right of suffrage also makes them eligible as jurors. . . .”

Section 255.01, Stats., is quite similar in its terms to those statutes considered by the various courts which have treated the question as to whether changes in the law, including the Nineteenth Amendment, made women eligible as jurors by virtue of their newly acquired status as electors. As pointed out previously, however, the courts are divided as to the effect of the Nineteenth Amendment. Once it is established that status as an elector is central to the determination whether a citizen may be a juror, the attitude of the various courts as to the effect of the Nineteenth Amendment appears to be largely governed by which of two competing rules of statutory construction or constitutional interpretation the particular court feels properly reflects the law of the state involved.

A minority of the courts hold that women are not eligible as jurors, despite the fact that the state statute, setting forth the qualifications of jurors, indicates that jurors are to be chosen from electors because, prior to the adoption of the Nineteenth Amendment or a similar state enactment, the statute defining an “elector” referred to male persons only. These courts apply the rule of statutory construction which provides that the statutes setting forth juror qualifications are to be construed to mean what

the legislature intended at the time of their passage, without reference to the future. See cases cited in 50 Am. Jur., *Statutes*, sec. 236, page 224; 157 A.L.R. 461, 474.

On the other hand, the majority of the courts have refused to accept the proposition that their legislature intended such a restrictive application of their law relating to jury qualifications. Generally speaking, these courts hold that, once a woman becomes an elector by virtue of an extension of the franchise, she has been placed in the class, i.e., electors, from which jurors are to be selected under statute and she is, therefore, entitled to perform jury duty on the same basis as men. See cases cited in 157 A.L.R. 461, 472. One of the better expressions of this position is found in *Commonwealth v Maxwell* (1921), 271 Pa. 378, 114 A. 825, 16 A.L.R. 1134, where the court states, at page 829:

“We then have the act of 1867, constitutionally providing that the jury commissioners are required to select ‘from the whole qualified electors of the respective county \* \* \* persons, to serve as jurors in the several courts of such county,’ and the Nineteenth Amendment to the federal Constitution, putting women in the body of electors.

“\* \* \*

“If the act of 1867 is prospective in operation, and takes in new classes of electors as they come to the voting privilege from time to time, then, necessarily, women, being electors, are eligible to jury service. That the act of 1867 does cover those who at any time shall come within the designation of electors there can be no question.”

See also 50 Am. Jur., *Statutes*, sec. 230, page 217. This was also the position taken by the Attorney General of Wisconsin in two 1921 opinions which advised that women stood on the same footing as men in the matter of eligibility for jury service. 10 OAG 369 (1921); 10 OAG 15 (1921).

In my opinion, of the two positions taken by the several state courts which have considered the question of the effect of the Nineteenth Amendment on the eligibility of women, as electors, to act as jurors, the view expressed by the majority is by far the more natural and preferable rule to apply, by way of analogy, to

resolve the question as to the effect of the Twenty-Sixth Amendment on the eligibility of 18-year-old citizens to act as jurors. While I obviously cannot predict with certainty which view would appear most convincing to our Supreme Court, I do question whether the court would conclude that the legislature intended the rigid interpretation of sec. 255.01, Stats., which would be required by adherence to the minority rule. In direct response to your question, then, it is my opinion that, since individuals who are 18, 19 or 20 years old are now electors, they must be included within that class of citizens from which jurors are chosen for service in the courts of our state.

Your second question asks:

“If 18, 19 and 20 year olds are to serve on jury panels should the now existing panels be recalled and there be an immediate creation of new panels.”

The manner in which petit jurors are to be selected is set forth in secs. 255.04 to 255.07, Stats. Grand jurors are selected by a somewhat similar process. Sec. 255.10, Stats. Since I assume your question is intended to relate more specifically to existing panels of petit jurors, I will treat that aspect of your question first.

Section 255.04, Stats., provides, in part, as follows:

“Petit jurors; lists; number; how drawn. (1) Petit jurors for all circuit and county courts when exercising civil or criminal jurisdiction shall be drawn and obtained as prescribed in ss. 255.04 to 255.07.

“(2) (a) *The commissioners shall annually before the first Monday in April provide for each court covered by sub. (1), unless the judge or judges thereof otherwise order, one list of not less than 300 nor more than 1,000 names of persons to be drawn from the county and apportioned as nearly as practicable among towns, villages and wards of cities thereof in proportion to population according to the last national census, to serve as petit jurors. The commissioners may revise said list by striking from it the names of persons found by them to be ineligible for jury service, and add thereto the names of additional persons as*

*provided in s. 255.05. Such list shall be certified by the commissioners as having been prepared in strict conformity with the statutes thereto appertaining.* (Emphasis added)

“\* \* \*

“(5) If any person whose name appears on a regular or reserve-panel list is not impaneled and sworn on voir dire as a juror at the term for which drawn the card containing the name of such person shall be returned to the tumbler by the clerk at the end of the term and the jury commissioners shall be notified thereof.

“(6) The judges of the circuit and county courts (or the senior judges thereof in the case of courts having more than one judge) may by joint order direct that the jury lists, panel lists, and reserve-panel lists of their respective courts, or any one or more of such lists, be combined into one or more lists, and that the number of names on the combined list be as specified in the order. . . .”

Section 255.05, Stats., provides, in part, as follows:

“ . . . Whenever the list of names furnished any such court has been depleted the commissioners shall supply other names so that there will not be less than 150 nor more than 1,000 names in the tumbler at the time any drawing of jurors takes place. Such names shall be written on cards which shall be placed in envelopes and put into the tumbler as hereinbefore provided.”

Section 972.01, Stats., makes most of the statutes relating to the summoning, impaneling and qualifications of jurors in civil action applicable to criminal actions.

As previously discussed, the method used in each state to draw jurors is basically a matter within the discretion of each state legislature. Thus, in *McKissick v. State* (1971), 49 Wis. 2d 537, 182 N.W. 2d 282, at page 543, our court states the following in reference to the process of jury selection in Wisconsin:

“States are permitted to decide for themselves the method to be used in the empanelling of jurors, and the method selected will not be tampered with provided it meets constitutional requirements. (*Brown v. Allen* (1953), 344 U.S. 443, 73 S.Ct. 397, 97 L.ed. 469). The jury in this case was selected pursuant to

sec. 255.04, Stats., which method has previously been examined and approved by this court as constitutionally proper. (*State v. Bond* (1969), 41 Wis. 2d 219, 163 N.W. 2d 601)."

Section 255.04, Stats., establishes the basic framework of our petit jury selection system. Essentially, this system provides for annual certifications of jury lists each spring for the use of circuit and county courts during the ensuing year. In the event the list of names initially certified becomes depleted, the jury commissioners may add the names of additional persons to the list as provided in sec. 255.05, Stats.

Therefore, as I understand your second question, does the Twenty-Sixth Amendment, together with other constitutional provisions guaranteeing fair and impartial jury trials, require jury commissioners to discard the lists initially certified to the courts in the Spring of 1971 and initiate the process anew by certifying a new list prior to the next annual certification in the Spring of 1972. In my judgment, such action is neither required nor justified.

The Sixth and Fourteenth Amendments of the United States Constitution, as well as Art. I, sec. 7, Wis. Const., require that the criminally accused be afforded trial by an "impartial jury." Therefore, where the constitutional rights of a defendant are affected by the intentional and systematic exclusion from a jury of an identifiable group in the community which may be subject to prejudice, his conviction will not be allowed to stand. *McKissick v. State, supra*, page 542. However, as pointed out by our court in *State v. Holmstrom* (1969), 43 Wis. 2d 465, 471, 168 N.W. 2d 574, the defendant challenging the jury array has the burden of establishing a prima facie case of discrimination and the burden does not shift to the prosecution until the defendant makes such a presentation. See also *State v. Bond, supra*, page 226.

In *State v. Holmstrom, supra*, at pages 472-473, the general tests to be applied, where a defendant challenges the validity of the jury array on the basis of discrimination, were reviewed and discussed in reference to a challenge based specifically on an alleged systematic exclusion of "young people." In the *Holmstrom* case, the court said:

“We conclude from the cases cited above that to succeed on a challenge to the jury array the defendant must show:

- (1) A systematic exclusion;
- (2) Of some representative unit of citizens.

A systematic exclusion can be shown by the direct testimony of the jury commissioners or by proving a disproportionate representation of a unit of citizens on the jury array over a period of time.

“As far as defining what amounts to a cohesive unit of citizens, the United States Supreme Court has held that there should be no systematic exclusion of any

“ ‘ . . . economic, social, religious, racial, political . . . (or) geographical groups of the community . . . ’ *Thiel v. Southern Pacific Co.* (1946), 328 U.S. 217, 220, 66 Sup. Ct. 984, 90 L.Ed. 1181.

“ \* \* \*

*“We find no authority with reference to the systematic exclusion of young persons as prohibited discrimination. Nonetheless, we think systematic discrimination in regard to age would render the jury array just as defective as any other type of systematic discrimination. Within these guidelines then it is necessary to review the proof this defendant introduced in his challenge to the array.”* (Emphasis added)

The mere lack of proportional representation on a jury panel does not imply a systematic exclusion or discrimination. *McKissick v. State, supra*, page 543.

Presumably, most of the jury panels currently in use were properly drawn from lists certified prior to the ratification of the Twenty-Sixth Amendment, when the minimum age of electors under Wisconsin law was 21. Therefore, the absence of 18-, 19- and 20-year-old persons on jury lists may well be a result of prior requirements of the law rather than an improper exclusion of persons of those ages based on considerations of prejudice or preference.

Furthermore, I have been unable to find any legal basis for the conclusion that persons 18, 19 and 20 years of age constitute a "representative unit of citizens," the exclusion of which would necessarily defeat the constitutional requirements of an impartial and representative jury. In fact, in *United States v. Kuhn* (5th Cir. 1971), 441 F. 2d 179, the court indicated that a group of young citizens, having a comparable range of ages, did not constitute an identifiable or distinctive class of prospective jurors, the exclusion of which would result in a jury which failed to adequately represent a fair cross section of the community. In this case, the defendants alleged that a failure to supplement the jury selection system from time to time resulted in the systematic exclusion of the very youngest of the voting public, since persons becoming 21 years of age, during the period of several years the "master jury wheel" would be in use, would not be considered for jury service until it again became necessary to choose jurors to refill the wheel. The court states the following, at page 181:

"The burden is on defendants to make a prima facie showing of the existence of discrimination or exclusion of a district group from jury participation. (cases cited) Appellants have failed to carry their burden. There is nothing in the record to show that registered voters who had attained voting age between the time the 'Plan' became effective and the time of the proceedings below were recognizable as a class. There is nothing identifiable or distinctive about young adults in the age range of 21 to 23 to set them apart from young adults aged 23 and over who were eligible for jury duty at the time in question."

Likewise, the courts normally will allow reasonable periods for orderly transition to occur within the framework of the existing jury selection process. For instance, in *Ray v. The Lake Superior Terminal & Transfer R. Co.* (1898), 99 Wis. 617, 75 N.W. 420, the method to be used by the clerk of court to obtain jurors for a term of court had been changed before the time of the commencement of the term and the time of trial, but the clerk had already drawn jurors under the old method. In dismissing the challenge to the array of jurors, the court stated, at page 619:

". . . When jurors have been drawn and designated according to law to serve at a term of court, a mere change in the method of obtaining jurors, thereafter made, will not affect those already

drawn, but they will continue, notwithstanding such change in the law, legal jurors for the term unless excused or discharged by the court.”

Our court has also refused to hold that a jury selection process was improper simply because a temporary disparity in the proportion of electors between wards might exist from time to time because names supplied periodically were not drawn from all of the political subdivisions at once. See *State v. Bond, supra*, pages 227-228.

Finally, at least one court has indicated that where a change in the law raises doubt as to the eligibility of certain persons for jury duty, but no showing is made that the exclusion of these qualified persons by the jury commissioners resulted from “considerations of prejudice or preference” or that the defendant was thereby subjected to a disadvantage resulting in an unfair trial, the court will not disturb such a temporary exclusion of certain members of the community who are qualified for jury service. In that case, *Commonwealth v. Zell & Herr* (1923), 81 Pa. Super. 145, the court was considering the omission of women from the jury lists where the statutes required that jurors be selected “from the whole qualified electors” of the county. At page 149, the following is stated:

“ . . .It was probably the case that the commissioners were in doubt as to the qualification of women to serve as jurors as a result of the adoption of the 19th amendment. There was a difference of opinion among judges and lawyers on that subject until the determination of the question by the Supreme Court in *Com. v. Maxwell*, 271 Pa. 378. If the commissioners in view of this uncertainty deemed it wise to select for jury service for that year persons whose qualifications were not doubtful, we are unwilling to say that such exercise of discretion was unlawful and that as a consequence the jurors selected for that year were chosen in violation of law.”

As pointed out previously, the Twenty-Sixth Amendment was not ratified by the required number of states until June 30, 1971, at least three months after the annual selection of jury lists in Wisconsin, as established by sec. 255.04 (2) (a), Stats. Obviously, therefore, the lists of persons submitted by the jury

commissioners to serve as petit jurors under the provisions of that statute only included persons 21 years of age or older, since the limited franchise which 18-year-old citizens had previously gained, by virtue of Title III of the Federal Voting Rights Act Amendments of 1970, was confined to federal elections and could not reasonably have been interpreted as having the effect of qualifying such persons as "electors of the state" within the broader meaning of the term as used in sec. 255.01, Stats. In view of these circumstances, it is my opinion that, despite the subsequent ratification of the Twenty-Sixth Amendment, such list or lists may be continued in use for the drawing of juries until the next annual lists are certified by the commissioners, prior to the first Monday in April, 1972. At that time, of course, the new lists must consist of persons drawn from a cross section of the community which does not exclude qualified young electors 18 years of age and older. In the interim, prior to the certification of such new lists, whatever, *additions*, to the current lists may be required under sec. 255.05, Stats., should be drawn from a class which does not exclude consideration of 18-, 19- and 20-year-olds as potentially eligible jurors.

Obviously, most of the legal considerations previously noted apply equally to the selection of jurors for a grand jury list. However, since grand jurors only serve during the current term of court, unless the judge orders them to continue during the following term, a number of instances may exist where new jury lists have been made during the course of the year. Sec. 255.10 (6), Stats. Where any lists were drawn subsequent to the ratification of the Twenty-Sixth Amendment, they should have been drawn in such a manner as would not systematically exclude qualified young people 18 years of age and older. However, even if the jury commissioners failed to consider these newly enfranchised electors in the selection of grand jurymen, such an irregularity would probably be disregarded by the courts unless it appeared probable, in an individual case, that the person seeking to take advantage thereof was prejudiced thereby and thus denied an impartial jury. *Pamanet v. State* (1971), 49 Wis. 2d 501, 509, 182 N.W. 2d 459; *Petition of Salem* (1939), 231 Wis. 489, 491, 286 N.W. 5; *Ullman v. State* (1905), 124 Wis. 602, 609, 103 N.W. 6. As our court stated most recently in the *Pamanet* case, *supra*, at page 509:

“ . . . However, the general rule is that statutes prescribing the mode of drawing a jury panel are directory, and irregularities in carrying out such provisions are not material unless the defendant is prejudiced thereby, and that is the rule followed in this state. . . .”

RWW:JCM

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*Unemployment Compensation—Tax Warrants*—Unemployment compensation and tax warrants may be docketed by clerk of circuit court prior to issuance of sheriff for levy purposes.

March 8, 1972.

ROBERT P. RUSSELL, *Corporation Counsel*  
*Milwaukee County*

You have requested my opinion whether a clerk of circuit court may docket delinquent tax and unemployment compensation warrants pursuant to secs. 71.13 (3) and 108.22 (2), Stats., respectively, prior to the issuance of the warrants to the sheriff for levy purposes.

For the reasons that follow, it is my opinion that entry of the warrants in the judgment and tax dockets may precede their issuance to the sheriff for levy and execution purposes.

The Department of Industry, Labor and Human Relations, for the past six months, has filed revised delinquent unemployment compensation warrants with the various clerks of circuit court. The revised warrant differs from its predecessor in that it now provides for the signature of the clerk of circuit court (witnessing the entry in the docket) prior to its issuance to the sheriff.

Section 108.22 (2), Stats., states:

“If any employer fails to pay to the department any amount found to be due it in proceedings pursuant to s. 108.10, provided that no appeal of review permitted by said section is pending and

that the time for taking an appeal of review has expired, the department or any duly authorized representative may issue a warrant directed to the sheriff of any county of the state, commanding him to levy upon and sell sufficient of the real and personal property which may be found within his county of the employer who has defaulted in the payment of any amount thus found to be due to pay such amount, together with interest and costs and other fees, *and to proceed upon the same in all respects and in the same manner as upon an execution against property issued out of a court of record*, and to return such warrant to the department and pay to it the money collected by virtue thereof within 60 days after the receipt of such warrant. The sheriff shall, within 5 days after the receipt of the warrant, file with the clerk of the circuit court of his county a copy thereof, unless the employer shall make satisfactory arrangements for the payment thereof with the department, in which case the sheriff shall at the direction of the department return such warrant to it. The clerk shall enter in the judgment docket the name of the employer mentioned in the warrant and the amount of the contributions, interest, costs and other fees for which the warrant is issued and the date when such copy is filed. Thereupon the warrant so docketed shall be considered in all respects as a final judgment creating a perfected lien upon the employer's right, title and interest in all of his real and personal property located in the county wherein the warrant is docketed." (Emphasis supplied)

Section 71.13 (3), Stats., states in part:

"(a) If any income or franchise tax be not paid within 30 days after the same becomes delinquent, the department of revenue shall issue a warrant to the sheriff of any county of the state commanding him to levy upon and sell sufficient of the taxpayer's real and personal property found within his county to pay such tax with the penalties, interest and costs, *and to proceed upon the same in all respects and in the same manner as upon an execution against property issued out of a court of record*, and to return such warrant to the department and pay to it the money collected, or such part thereof as may be necessary to pay such tax, penalties, interest and costs, within 60 days after the receipt of such warrant, and deliver the balance, if any, after deduction of lawful charges to the taxpayer.

“(b) The sheriff shall, within 5 days after the receipt of the warrant, file with the clerk of the circuit court of his county a copy thereof, unless the taxpayer makes satisfactory arrangements for the payment thereof with the department, in which case, the sheriff shall, at the direction of the department, return such warrant to it. The clerk shall docket the warrant as required by s. 270.745, and thereupon the amount of such warrant, together with interest required by sub. (1) shall become a lien upon the real property of the taxpayer against whom it is issued in the same manner as a judgment duly docketed in the office of such clerk. The clerk of circuit court shall accept, file and docket such warrant without prepayment of any fee, but he shall submit a statement of the proper fee semiannually to the department covering the periods from January 1 to June 30 and July 1 to December 31. \* \* \*

“\* \* \*” (Emphasis supplied)

The emphasized language above, stating that the sheriff is to levy upon the property of the debtor “\* \* \* and to proceed upon the same in all respects and in the same manner as upon an execution against property issued out of a court of record” gives guidance to the sheriff in the various levy and execution situations covered by ch. 272, Stats. That language does not require the warrant to be docketed prior to the sheriff’s levy as is required of a judgment of a court of record prior to execution under sec. 272.05, Stats. Under secs. 108.22 and 71.13, Stats., the sheriff is clearly authorized by the legislature to levy upon the property of the delinquent employer or taxpayer without having the clerk of circuit court docket the warrant.

The probable effect of docketing the warrant with the clerk of circuit court prior to its issuance to the sheriff is that the sheriff would be “executing” against rather than “levying” upon the property of the delinquent taxpayer or employer. The distinction between “levy” and “execution” is only of theoretical importance here. The warrant owner, however, would not have a perfected lien against the debtor until the warrant is duly docketed in the judgment or tax docket in the office of the clerk of circuit court.

Therefore, although secs. 71.13 (3) and 108.22 (2), Stats., do not require the delinquent tax and unemployment compensation warrants to be docketed prior to their issuance to the sheriff, such procedure may be followed if the warrant owner wishes to perfect his lien immediately.

RWW:LEN

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*Residency—VTAE District*—Guidelines for determination of district of residency of a VTAE student and statutes affecting attendance at a particular VTAE school are discussed.

March 8, 1972.

EUGENE I. LEHRMANN, *State Director*

*Board of Vocational, Technical & Adult Education*

In your letter of December 2, 1971, you have asked several general questions with respect to the residency of minor students in vocational school districts. You point out in this connection that ch. 154, Laws of 1971, which substantially revises ch. 38, Stats., as it relates to vocational schools, makes necessary the determination of the residence of a student in order that the proper allocation of tuition charges may be made to the district wherein the student resides. Section 38.24 (3), Stats., created by sec. 14, ch. 154, Laws of 1971, provides review procedures be established by the State Board for final determination of residence.

In addition, you point out that a nonresident who is employed in the district of attendance is eligible to attend in that district; however, you question whether there would be liability for tuition from his home district. You also ask whether part-time employment would meet the requirement.

The answers to the questions you ask depend largely on the facts of each individual case. Since you have not cited specific examples, we can only furnish you with guidelines which may assist you in making the final determination required by sec.

38.24 (3) (c), Stats. You have also suggested that the guidelines for a procedure to make a final determination with respect to residency would be helpful.

This opinion, therefore, will cover the suggested procedure; guidelines for determining the residency of an unemancipated minor, and guidelines with respect to the residency of minor as well as dealing with the problem of a nonresident who is employed in the district of attendance.

### PROCEDURE FOR DETERMINING RESIDENCY

Section 38.24 (3) (c), Stats., requires the State Board to establish procedures to determine residency. It is suggested that rules be adopted providing substantially that, where a question of residency has arisen, the district director of the district of attendance make the initial finding with respect to residency and reduce the details and conclusions to writing. The District Board then, within 30 days, should affirm or reject the findings of the director. Thereafter, any district affected and the student shall be given a copy of the findings and conclusions and the District Board's action with respect thereto. They should also be notified of the right to appeal the adverse findings and conclusions to a standing committee of the State Board. This board can then make recommendations to the State Board who must make the final determination. All parties should be given an opportunity to at least submit written statements in support of their position.

### LEGAL RESIDENCE REQUIREMENTS OF A MINOR IN A VOCATIONAL SCHOOL DISTRICT

In general, the residence of an unemancipated minor is that of his father, if living; if not living, then his residence is that of his mother. If the minor is an orphan, his residence is ordinarily the residence of the guardian of his person. There are some exceptions to this rule.

“ . . . [r]esidence entitling an infant to school privileges from domicile . . . is construed in a liberal sense as meaning to live in or be an inhabitant of a school district, the purpose being not to debar from school privileges any child of school age found within the district under the care, custody or control of a resident thereof. Such a rule does not usually require that there shall be a

legal domicile; it is sufficient if the child and its parent, or the person in loco parentis, are actually resident in the district, with apparently no present purpose of removal. . . .

“For school purposes, a child’s residence is not necessarily the residence of its parent or parents, although generally a child will be held to reside where its parents reside. . . .” (47 Am. Jur., *Schools*, sec. 152)

Wisconsin is in general accord with this concept. In 24 OAG 602 (1935), my predecessor stated:

“The residence required for school purposes is not the residence required for voting purposes, etc.

“56 C.J. 810, sec. 986, points out that the rule governing the right of a child to attend school in a given district ‘does not require that there shall be a legal domicile, but it is sufficient if the child and his parent, or the person in control of him, are actually resident in the district, with apparently no present purpose of removal.’ *State ex rel. School District No. 1 v. Thayer*, 74 Wis. 48, 41 N.W. 1014.”

In *State ex rel. Smith v. Board of Education of the City of Eau Claire* (1897), 96 Wis. 95, 100, the court held that where a child of school age is sent or goes to a certain school district with the primary purpose of securing a home with a particular family, then he is entitled to the benefits of the public school of such district free of charge. (Citing *State ex rel. School District No. 1 of Waukesha v. Thayer* (1889), 74 Wis. 48, 41 N.W. 1014.) But if the primary purpose of the locating in such district is to participate in the advantages which the public schools therein afford, then he must pay tuition even though there be some other incidental purpose to be subserved while so attending school therein.

A person’s own testimony, regarding his intention with respect to acquiring a retaining residence, is not conclusive; however, oral declarations to taxing authorities and to others, and written declarations in deeds, policies of insurance with oaths, letters, election registers, mortgages, leases, contracts and other instruments constitute some evidence as to residence. The exercise

of the elective franchise or other civil and political rights is also evidence of residence in that place. (See generally 25 Am. Jur. 2d, *Domicil*, secs. 91-100.)

### RESIDENCE OF EMANCIPATED MINOR

Generally, a minor must be emancipated to establish a residence other than that of his parents or guardian, and again, generally there must be some act of acknowledgment or implied acquiescence by the parents that the child is, in fact, emancipated. However, there are exceptions. (See *State ex rel. School District No. 1 of Waukesha v. Thayer, supra.*) Once a child is determined to be emancipated, then the same rules and standards apply to him as to an adult in the determination of his district of residence.

### ELIGIBILITY OF EMPLOYED NONRESIDENT

Section 38.22, Stats., created by ch. 154, Laws of 1971, provides that every person who is at least of the age specified in sec. 118.15 (1) (b), Stats., is eligible to attend schools of a district if he is "(b) a nonresident of the district who is employed in the district." Section 38.24 (4), Stats., created by ch. 154, Laws of 1971, provides:

"(4) LIABILITY OF DISTRICT OF RESIDENCE. (a) *The district board of the student's district of residence is liable for the fee and tuition charge by the district of attendance for a nonresident student who is a resident of this state, but is not liable for the following:*

"1. Any student for whom the district board of attendance fails to file notice under s. 38.22 (2).

"2. Any student who enrolls in a collegiate transfer program, if there is located within the district of residence a public institution of higher education.

"3. Unless the district board of residence consents, any student 21 years of age or over. For purposes of this subdivision, a student shall be considered 21 years of age, if he attains the age of 21 prior to the beginning of the semester or lesser time period for which enrolled in a district school.

“(b) In the case of any disagreement between district boards under this subsection, the board shall make the final determination.”

The employed nonresident of the district of attendance is not among these exceptions. Therefore, under the usual rules of statutory construction, the district of residence is liable to the district of attendance for the tuition of a student who is admitted to the district of attendance on the basis that he is “employed” in the district of attendance.

“Employed,” for purposes of this section, means something more than casual employment. In my opinion, it must be employment that is reasonably permanent and regular as to the number of hours per day or days per week work. It need not necessarily be full time in the sense that it includes an eight-hour day or a forty-hour week, but it should be reasonably definable as to occupation and hours to be worked. There are numerous definitions of “employment” used in other statutes. I suggest that the board consider the adoption of an administrative rule defining the term more specifically if it appears that uniformity of interpretation of this term by the several districts is not otherwise possible.

RWW:JCM

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*Elections—Congressional Candidate*—Candidate for election to Congress need not be a resident of the district at the time he files his nomination papers and executes the declaration of intent to accept the office if elected. A candidate for Congress must be an inhabitant of the state at the time of election.

March 13, 1972.

ROBERT C. ZIMMERMAN, *Secretary of State*

You have requested my opinion on the following questions:

“1. Must a candidate for election to Congress be a resident of the district at the time he files his nomination papers and executes the declaration of intent to accept the office if elected?”

“2. Do the provisions of s. 8.15(4)(b), Wis. Stats., require a sworn declaration by the candidate that he is at the time of filing his nomination papers a resident of the Congressional district in which he is seeking office?”

For reasons hereafter stated, the answer to both questions is in the negative. I am of the opinion, however, that a candidate must be an inhabitant of the state on the date the election is held. Art. I, sec. 2, U. S. Const.

Article I, sec. 5, U. S. Const., however, makes each house “\* \* \* the judge of the elections, returns and qualifications of its own members \* \* \*”

Section 8.15 (4) (b), Stats., was amended by ch. 419, Laws of 1969, to include the phrase emphasized and provides:

“Each candidate shall file with his nomination papers, a declaration, sworn to before any officer authorized to administer oaths, that *he is a resident of the district or county, if he is seeking an office elected on a district or county basis* and he will qualify for office if nominated and elected. The nomination papers and the candidate’s sworn declaration are valid with or without the seal impression of the authorized officer who administered the oath.”

I am of the opinion that the word “district” in sec. 8.15 (4) (b), Stats., must be construed as relating only to *noncongressional* elections in view of the provisions of Art. I, secs. 2, 4, 5, U. S. Const.

While the statement of residency requirement would appear to be applicable to candidates for representatives to Congress, it cannot be imposed by the state as it would place an additional qualification on such candidates, and the state is without power in that area.

In 25 Am. Jur. 2d, *Elections* sec. 175, it is stated:

“The qualifications for membership in the United States Senate and House of Representatives are those provided by the Federal Constitution, which qualifications are paramount and exclusive, and state constitutions and laws can neither add to nor take away from them. In case of a conflict, provisions in the Federal Constitution prevail, so that mere possession of qualifications prescribed in the Federal Constitution makes one eligible for election to Congress, and he will not be disqualified therefor by state constitutional or statutory provisions that make the holders of particular offices ineligible for any office or employment during their term of office.”

In *State ex rel. Wettengel v. Zimmerman* (1946), 249 Wis. 237, 247, 24 N.W. 2d 504, it is stated:

“\* \* \* The process of nomination under Wisconsin law is an integral part of the election process and is therefore, as has already been stated, wholly within the jurisdiction of the United States senate. If Mr. McCarthy under Wisconsin law cannot be a candidate for nomination at the primary, he can never be a candidate at the election of any political party. He is therefore disqualified to take the first step if the argument of the relator is sound. His right to be a candidate at the election would be a barren right. Neither by constitutional provision nor legislative enactment can the state of Wisconsin prescribe qualifications of a candidate for nomination for the office of United States senator in addition to those prescribed by the constitution of the United States.”

In the same case it is stated that courts have no jurisdiction to judge the returns, elections and qualifications of United States senators (and representatives). The power of each house is exclusive.

The candidate must comply with the process of nomination and file a declaration of acceptance and intention to qualify if elected in order to get on the ballot, as the United States Constitution provides that states shall, absent congressional action, prescribe the time, places and manner of holding elections. Additional qualifications go beyond time, place and manner, and the state cannot act even as to time, place and manner where the Congress has provided the necessary legislation.

The Wisconsin Constitution refers to members of Congress in Art. XIII, sec. 3, which prohibits members of Congress from holding state offices, and in Art. XIV, sec. 10, which established the initial congressional apportionment into districts, each of which was to elect one member.

Material sections of the United States Constitution are contained in Article I:

“SECTION 2. \* \* \*

“No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, *when elected, be an inhabitant of that state* in which he shall be chosen.

“Representatives \* \* \* shall be apportioned among the several states \* \* \*

“\* \* \*

[Emphasis supplied]

“SECTION 4. The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations \* \* \*.”

Section 2 of the Fourteenth Amendment to the United States Constitution provides in part:

“Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State \* \* \*.”

In view of the provision of Art. I, sec. 2, U. S. Const., that a representative need only be *an inhabitant of the state at the time of election*, and not necessarily of the district, I am of the opinion that a stricter requirement cannot be imposed even in view of the apportionment provisions referred to in the constitution and federal statutes. Federal statutes provide that representatives shall be elected from districts. The Federal Constitution merely provides that representatives be apportioned *among the states*. The Congress did not require congressional districts until many years after the constitution was adopted.

Federal statutes provide that representatives are elected *from districts*.

2 U.S.C.A. sec. 2c provides:

“In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to section 2a(b) of this title, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress).”

Although elected from districts, it has never been doubted that representatives thus chosen represent the entire people of the state. *McPherson v. Blacker* (Mich. 1892), 13 S.Ct. 3, 7, 146 U.S. 1, 36 L.ed. 869.

I am of the opinion that the word “inhabitant” as used in Art. I, sec. 2, U. S. Const., means resident of the state; one who resides in the state, that is, has a fixed abode therein, as distinguished from a visitor. It should be noted that Art. III, sec. 4, Wis. Const., provides that:

“No person shall be deemed to have lost his residence in this state by reason of his absence on business of the United States or of this state.”

It is generally conceded that the right to hold public office is restricted to those that are qualified voters. 25 Am. Jur. 2d secs. 177, 872.

As to elections for state, county and municipal offices, a candidate must be qualified as of the day of election.

In *Cross v. Hebl* (1970), 46 Wis. 2d 356, 361, 174 N.W. 2d 737, it is stated:

“\* \* \* In its ordinary meaning, ‘candidate’ means an aspirant on the ballot for an office on election day. That is the date the electors may exercise their franchise and choose between candidates. That is the day on which the qualifications of the candidates speak.”

While the word “inhabitant” has been deemed synonymous with “resident” for many purposes, I have found no case which construes the word as used in Art. I, sec. 2 of the United States Constitution, nor has the House of Representatives expressly construed it.

Whether a candidate is “an inhabitant of that state in which he shall be chosen,” “*when elected*,” as required by Art. I, sec. 2, U. S. Const., is a matter for determination by the House of Representatives when the candidate presents his credentials.

The House and Senate now view it sufficient if the qualifications as to age and citizenship are met when the oath is administered. Thus, persons elected to either house before attaining the required age or term of citizenship have been admitted as soon as they became qualified. *Constitution of the United States, Revised and Annotated* (1964), published under the authority of Public Law 86-754, at p. 119.

At page 120 of the same authority it is stated:

“A State may not add to the qualifications prescribed by the Constitution for members of the Senate and House of Representatives. Asserting this principle, the House in 1807 seated a member whose election was contested on the ground that he had not been twelve months a resident of the district from which elected as required by State law. No attempt was made to ascertain whether these requirements were met because the State law was deemed to be unconstitutional.” Citing, 1 Hinds’ Precedents of the House of Representatives, sec. 414 (1907).

You have also forwarded a copy of the declaration of acceptance form being used for various partisan offices including that of representative and inquire whether it is legally acceptable. The form provides:

“I, ..... , a resident of ..... District/County having been duly placed in nomination by electors representing the principles of the ..... party of the State, or, of the ..... District of Wisconsin as a candidate for nomination for the office of ..... at the Primary Election to be held in the several towns, villages, wards and election precincts of said State or District on the ..... day of ..... , 19 ..... , do hereby declare that if nominated and elected to the office of ..... from the said ..... District, I will qualify as such officer.

.....

P.O. ....

“Subscribed and sworn to before me  
 this ..... day of  
 ....., A.D.  
 19 .....

.....

.....

(Official Title)”

The form is appropriate. However, I am of the opinion that nomination papers should not be rejected, even if the statement as to residence does not show that the person is a resident of the congressional district for which he is running at the time he signs the same. You could not reject the papers even if residence, as of that time, were shown as being in another state. The signers of the nomination papers, however, must be residents of the district which the candidate named therein will represent, if elected. Sec. 8.15 (3) and (4), Stats.

RWW:RJV



*Board Of Regents—Gifts And Bequests*—Board of Regents' use of gifts and bequests, effective prior to ch. 100, Laws of 1971, discussed.

March 17, 1972.

CLARKE SMITH, *Secretary*

*Board of Regents of the University of Wisconsin System*

Chapter 100, Laws of 1971, which became effective on October 12, 1971, created a Board of Regents of the University of Wisconsin System and transferred to it all the powers, duties and functions of the former Board of Regents of the University of Wisconsin, which had governed the so-called ch. 36 institutions, and the former Board of Regents of the State Universities, which had governed the so-called ch. 37 institutions. Separate central administrative offices for each of these types of institutions were maintained, however, and sec. 20 (10) of ch. 100, Laws of 1971, provides for the continued operation of the campuses of the ch. 36 institutions under ch. 36, Stats., and the campuses of the ch. 37 institutions under ch. 37, Stats.

Section 20 (6) of ch. 100, Laws of 1971, also provided:

**“RECORDS, PROPERTY, GIFTS, ETC.** 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, *except that any grant, contractor, gift, endowment, trust or segregated funds bequeathed or assigned to individual campuses for any purpose whatsoever shall not be commingled or reassigned.*” (Emphasis supplied)

In light of the above and the content of 46 OAG 143 (1957), you request my opinion on five questions. These questions are grouped, quoted below and followed by my answers to them.

“1. May the Board of Regents of the University of Wisconsin System use gifts or bequests to the University of Wisconsin which have become effective by actual transfer or the death of a testator prior to the effective date of Chapter 100 of the 1971 for or on behalf of all campuses within the present University of Wisconsin

System, or must such funds be confined for use at those institutions presently operated under Chapter 36, Wisconsin Statutes?

"2. May the Board use gifts or bequests to the Wisconsin State University System which have become effective by actual transfer or death of a testator prior to the effective date of Chapter 100 of the Laws of 1971 for or on behalf of all campuses within the present University of Wisconsin System, or must such funds be confined for use at those institutions presently operated under Chapter 37, Wisconsin Statutes?"

In answer to the above questions, it is my opinion that the Board of Regents of the University of Wisconsin System must use gifts and bequests to "The University of Wisconsin," which gifts and bequests became effective by actual transfer or death prior to October 12, 1971, for the benefit of the campuses operating under ch. 36, Stats., and in accordance with the provisions of sec. 36.065, Stats. Similarly, such gifts and bequests to "The Wisconsin State Universities" must be used for the benefit of campuses operating under ch. 37, Stats., and in accordance with the provisions of sec. 37.115, Stats.

I so conclude because the intent of the testator or other donor governs. As recently stated in *Estate of Mangel* (1971), 51 Wis. 2d 55, 64, 186 N.W. 2d 276:

"\* \* \* a will is to be construed to ascertain the intent of the testator; the intent of the testator is to be determined from the words of the will and the surrounding circumstances at the time of its execution. *Estate of Boerner* (1970), 46 Wis. 2d 183, 174 N.W. 2d 457." (Emphasis added)

Section 21 of ch. 100, Laws of 1971, designates that each four-year institution governed by the Board of Regents of the University of Wisconsin System shall be known as "University of Wisconsin-(location or name)." Prior to the effective date of ch. 100, however, "The University of Wisconsin" consisted only of campuses then (and now) operating under ch. 36, Stats., and "The Wisconsin State Universities" consisted of the campuses operating under ch. 37, Stats. The "surrounding circumstances," therefore, were such that a testator, who not only made the bequest but also died prior to October 12, 1971, clearly intended

that the bequest be for the benefit of the institutions then encompassed within the meaning of the words "The University of Wisconsin" and "The Wisconsin State Universities."

If the Board of Regents of the University of Wisconsin System accepts or acquires an already-accepted bequest or gift, it must honor the expressed intent of the testator or donor as revealed by the instrument making the bequest or gift. See secs. 36.065 and 37.115, Stats., and, in general, 14 C.J.S., *Colleges and Universities*, sec. 12, p. 1342. A gift or bequest effective by actual transfer or death of a testator prior to October 12, 1971, and made to "The University of Wisconsin" or "The Wisconsin State Universities" must, therefore, be used for the benefit of the institutions operating under ch. 36 or ch. 37, Stats., respectively.

46 OAG 143 (1957) does not concern the present type of situation and, therefore, is inapplicable to it.

"3. Must a gift or bequest to Wisconsin State University- (campus designation) be used by the Board solely for the benefit of that particular campus?"

"4. Must a gift or bequest to the University of Wisconsin- (campus designation) be used by the Board solely for the benefit of that campus?"

The answer to both of these questions is "yes." See secs. 37.115 and 36.065, Stats. Further, sec. 20 (6) of ch. 100, Laws of 1971, which is quoted *in toto* above, expressly provides that "any gift, endowment, trust or segregated funds bequeathed or assigned to individual campuses for any purpose whatsoever shall not be commingled or reassigned."

"5. If a gift is to be limited in use to a particular campus or unit within the University of Wisconsin System, must that gift or bequest indicate such designation by specific reference to the campus or unit?"

If a gift or bequest is made to the Board for the use of a particular campus or other designated unit within the University of Wisconsin System, the Board must use the gift or bequest for the benefit of that campus or unit. If a gift or bequest, however, is made to the "Board of Regents of the University of Wisconsin

System” without a designation that it be used on any particular campus it may, in the discretion of the Board, be used on any, some or all campuses.

RWW:BRB

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*County Elected Officials—Step-Salary Plan*—County board may not adopt step-salary plan for elective offices related to experience of officeholder as compensation is for office, and officer is entitled thereto as incident of office.

March 17, 1972.

PAUL D. LAWENT, *Corporation Counsel*  
*Marathon County*

You request my opinion whether a county board may establish a step-salary program for an elected official such as the district attorney to provide, for example: no experience, \$16,500; two years as district attorney, \$17,500; four years as district attorney, \$19,000; etc.

I am of the opinion that it cannot.

Section 59.15 (1) (a), Stats., provides:

“(1) ELECTIVE OFFICIALS. (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 expenses 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."

The compensation is established for the office. The officer holding the office is entitled to the compensation provided for the office as an incident of the office. *Schultz v. Milwaukee County* (1947), 250 Wis. 18, 22, 26 N.W. 2d 260.

At page 21 of *Schultz* the court stated:

"\* \* \* While it is true that the county board has the right to establish the salary for that office, it is clear that an unreasonable exercise of that power resulting in a reduction of the salary way below a fair minimum, if permitted, would amount to an abolishment of the office. This a county board would have no right to do. The portion of sec. 59.15 (1), italicized above, provides that the power of the county board extends to establishing the compensation for services. The test of reasonableness must be gauged by the duties prescribed by law, not weighted with a possible but uncertain change by legislative action. The term of office cannot be divided. It is not a matter of contractual relation."

At page 22 of *Schultz* the court stated:

"The statutes then existing, excluding of course the ordinance of May, 1942, furnished the authoritative rule fixing the terms governing the respondent's position and relation to the office. They protected him against being deprived of the salary incident to his office during the term for which he was elected. \* \* \*"

In *Feavel v. Appleton* (1940), 234 Wis. 483, 488-490, 291 N.W. 830, the court reviewed the public policy behind sec. 59.15 (1) (a), Stats., and stated in part:

"\* \* \* In *Hull v. Winnebago County*, 54 Wis. 291, 293, 11 N.W. 486, it was said:

" 'It is quite clear that the statute contemplates that the power shall be exercised at a *period remote from the time when such officers were to be chosen, in order to prevent the influence of partisan bias or personal feeling on the part of members of the*

*board in fixing the salary. And, furthermore, it was probably deemed desirable that candidates for office should know precisely what compensation was attached to the office. \* \* \**”

Under present statutes, the board can encourage experienced officers to run for reelection and highly qualified and experienced aspirants to run for office by establishing salaries as required by sec. 59.15 (1), Stats., which are reasonably gauged to the duties prescribed by law for the office and the responsibilities incident thereto. Section 59.15 (1) (a), Stats., prohibits decrease in the salary of such officer during *the officer's term*. A county could reward an experienced incumbent by increasing his salary during his term as is permitted under present sec. 66.197, Stats., where the statute is applicable.

RWW:RJV

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*Water Pollution—Boat Toilet Law*—Mississippi River is an inland water of Wisconsin and the Boat Toilet Law (sec. 31.71 (1), Stats.) may be enforced on the entire width of the Mississippi bordering Minnesota and up to the center of the main channel bordering Iowa.

March 30, 1972.

LESTER P. VOIGT, *Secretary*  
*Department of Natural Resources*

You have asked for a formal opinion from me concerning the enforcement of Wisconsin's Boat Toilet Law (sec. 30.71 (1), Stats.) on the Mississippi River.

This opinion involves two questions: Is the Mississippi River an inland water of Wisconsin and what is meant by “concurrent jurisdiction on the Mississippi River.”

The Wisconsin Boat Toilet Law reads as follows:

“No person shall operate any boat equipped with toilets on inland waters of this state unless the toilet wastes are retained for shore disposal by means of facilities constructed and operated in

accordance with rules adopted by the department of health and social services. 'Inland waters' means the waters defined as inland waters by s. 29.01 (4)."

Inland waters of the state are defined in sec. 29.01 (4), Stats.

"All waters within the jurisdiction of the state are classified as follows: Lakes Superior and Michigan, Green Bay, Sturgeon Bay, Sawyer's harbor, and the Fox river from its mouth up to the dam at De Pere are 'outlying waters.' All other waters, including the bays, bayous and sloughs of the Mississippi river bottoms, are 'inland waters.'"

It is my opinion that the Mississippi River is clearly an inland water of the state. The statute enumerates which waters are classified as outlying waters and does not include the Mississippi River. Under the legal maxim "inclusio unius est exclusio alterius" it is proper to conclude that all other waters of the state are inland waters. The statute so reads but adds the language "including the bays, bayous, and sloughs of the Mississippi river bottoms."

It is my opinion that the legislature included the words as a clarification and not as an attempt to exclude the Mississippi River itself as an inland water. The legislature eliminated any potential argument to the contrary when it specifically included bays, bayous and sloughs of the Mississippi River bottoms as inland waters.

The legislative history of sec. 30.71 (1), Stats., is persuasive in concluding that the Mississippi River is an inland water. As sec. 30.71 (1), Stats., appears in ch. 576, Laws of 1963, it includes three exceptions to the inland waters of the state.

"No person shall maintain or operate upon the inland waters of this state, *except Lake Winnebago, the Mississippi River and the Wisconsin River* for 15 miles above and below the dam at Wisconsin Dells. . ." (Emphasis supplied.)

In ch. 565, Laws of 1965, sec. 30.71 (1), Stats., reads:

No persons shall operate any boat equipped with toilets on inland waters of this state, except the Mississippi River.

In ch. 471, Laws of 1969, the legislature deleted the words "except the Mississippi River," in sec. 30.71 (1), Stats.

There would be no reason to grant the exemptions unless Lake Winnebago, parts of the Wisconsin River and the Mississippi River were inland waters. Pursuant to the legal maxim of construction that all words of a legislative act must be given their ordinary meaning, it is clear that the Mississippi River is an inland water of the state.

Consequently, the Mississippi River is covered by the Boat Toilet Law, and any boat operating on the Mississippi River equipped with toilets must comply with sec. 30.71 (1), Stats.

The second question concerns the enforcement of sec. 30.71 (1), Stats., by Wisconsin law enforcement officers. Wisconsin shares the Mississippi River with the states of Iowa and Minnesota as a border.

The act of Congress admitting Wisconsin to the Union (9 U.S. Stat., ch. LXXXIV, p. 57) (1846), provides in part as follows:

" . . . The said State of Wisconsin shall have concurrent jurisdiction on the Mississippi, and all other rivers and waters bordering on the said State of Wisconsin, so far as the same shall form a common boundary to said State and any other State or States now or hereafter to be formed or bounded by the same; . . . "

Article IX, Sec. 1, Wis. Const., provides in part:

"The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state. . . ."

The enabling legislation passed by the Congress admitting Iowa and Minnesota to the Union contained the same language as the Wisconsin Enabling Act.

An opinion of my predecessor, 56 OAG 278, carefully considered the question of concurrent jurisdiction on the Mississippi River. The opinion relied heavily upon *Nielsen v. Oregon*, 212 U.S. 315, 29 S.Ct. 383, 53 L.ed. 528, (1909), and can be summarized briefly.

As a general proposition, Wisconsin can enforce its laws up to the center of the channel of the Mississippi River. If the act prohibited on the Mississippi River is *malum in se*, Wisconsin may enforce the law on the entire width of the Mississippi. If, however, the act forbidden is *malum prohibitum*, Wisconsin may enforce the law only up to the center of the channel of the Mississippi River. Situations arise, however, when bordering states pass laws prohibiting the same act. In such cases where both states have similar laws classified as *mala prohibita*, the law of each state may be enforced on the entire width of the river.

The question then becomes one of whether or not sec. 30.71 (1), Stats., is a legislative act of *malum in se* or *malum prohibitum*.

*Black's Law Dictionary* (Fourth Edition) defines *malum in se* as:

"A wrong in itself; an act or case involving illegality from the very nature of the transaction upon principles of natural moral and public law."

*Black's* also defines *malum prohibitum* as:

"A wrong prohibited; a thing which is wrong because prohibited; an act which is not inherently immoral but becomes so because its commission is expressly forbidden by positive law. . . ."

Also, see 26 *Words and Phrases*, pp. 343-348; 22 C.J.S. *Criminal Law*, pp. 19-20, sec. 8. And *United States v. United Steel Corp.*, 328 F.Supp. 354 (1970).

I believe it is self-evident that a law requiring the installation of holding tanks on boats for disposal of wastes on shore is not a wrong in itself but rather is wrong because it is prohibited, i.e. *malum prohibitum*. In accordance with the principles set out by the United States Supreme Court and summarized by my predecessor, Wisconsin may only enforce sec. 30.71 (1), Stats., up to the center of the main channel of the Mississippi River unless Iowa and/or Minnesota have a similar law.

Your letter indicates Minnesota's law is different from Wisconsin's. This, however, is no longer the situation. The Minnesota Legislature has recently amended its law so that it is now substantially similar to Wisconsin law.

Minnesota statutes, 1969, sec. 361.29 as amended by ch. 861, Laws of 1971, and as amended by an extra session of the Minnesota Legislature on July 15, 1971, now reads:

**"361.29 WATERS AND WATERCRAFT; MARINE TOILETS.** Subdivision 1. (a) For the purposes of this section the term 'watercraft' has the meaning given to it by section 361.02, subdivision 7, and acts amendatory thereof. (b) No person owning or operating a watercraft or other marine conveyance upon the waters of the state of Minnesota ~~as designated by the pollution control agency~~ shall use, operate or permit the use or operation of any marine toilet or similar device for the disposition of sewage or other wastes, unless the toilet wastes are retained for disposition on land by means of facilities constructed and operated in accordance with rules and regulations adopted by the state board of health and approved by the pollution control agency of the state of Minnesota. No person shall discharge into the waters of this state, directly or indirectly from a watercraft or other marine conveyance, any sewage or other wastes, nor shall any container of sewage or other wastes be placed, left, discharged, or caused to be placed, left or discharged into any waters of this state by any person or persons at any time whether or not the owner, operator, guest or occupant of a watercraft or other marine conveyance. All toilets must be sealed or otherwise rendered inoperative so that no human or other waste can be discharged from such toilet into state waters."

The Minnesota law went into effect on the Mississippi River January 1, 1972. Both Wisconsin and Minnesota require the installation of devices on boats equipped with toilets for on-shore disposal.

Iowa, on the other hand, has adopted no boat toilet law as of February 18, 1972.

My conclusion, therefore, is that sec. 30.71 (1), Stats., may be enforced on the full width of the Mississippi River bordering Minnesota. Where Wisconsin shares a border with Iowa, sec. 30.71 (1), Stats., may only be enforced up the center of the main channel of the Mississippi River.

RWW:PJG

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*Elections—Vote Percentage Requirement*—The vote percentage requirement set forth in sec. 8.16 (1), Stats., applies to special partisan primary elections.

April 3, 1972.

ROBERT C. ZIMMERMAN *Secretary of State*

You inquire as to what vote percentage requirement a write-in candidate must meet in a special partisan primary election before his name may be placed on the special election ballot.

Section 8.16 (1), Stats., provides, in part, as follows:

“Party candidates. (1) The person who receives the greatest number of votes for an office on any party ballot at a primary shall be the party’s candidate for the office, and his name shall so appear on the official ballot at the next election. A person who receives only write-in votes shall not be the party’s candidate unless he receives 5% of the vote cast in the district for the party’s gubernatorial candidate at the last general election and files a declaration that he will qualify as such, if elected, within 2 days after he receives notification of his nomination. . . .”

In my opinion, the guidelines set forth in sec. 8.16 (1), Stats., apply to special partisan primary elections as well as to regular partisan primaries.

Section 8.50, Stats., relates to special elections and includes general regulations relating to the conduct of such elections. More specifically, sec. 8.50 (3) (b), Stats., provides as follows:

“(b) The provisions for September primaries under s. 8.15 are applicable to all primaries held under this section.”

Section 8.15, Stats., sets forth, in detail, the mechanics relating to the circulation and filing of nomination papers for candidates. However, the above-quoted provisions of sec. 8.16 (1), Stats., refer to the results of the voting at a partisan primary. The latter statute makes no distinction between a September and a special primary in this regard, and the guidelines therein apply to write-in candidates for partisan offices *in any partisan primary*, except to the extent federal regulations may have provided otherwise in reference to federal elections.

In my opinion, therefore, for a write-in candidate to have his name placed on the official ballot as his party's nominee in a special primary election, he must receive a number of votes in the primary at least equal to 5 percent of the votes cast in the district for the party's gubernatorial candidate at the last general election.

RWW:JCM

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*Taxation—National Audubon Society, Inc.*—Partial exemption from property taxation, proposed for land conveyed to The National Audubon Society, Inc., under 1971 Senate Bill 439, probably is unconstitutional under the equal protection clause of the Fourteenth Amendment, U. S. Const., and under the rule of uniformity set forth in Art. VIII, sec. 1, Wis. Const.

Senate Amendment 1 to such bill almost certainly would be held in violation of the uniformity requirement.

April 6, 1972.

THE HONORABLE, THE SENATE

By 1971 Senate Resolution 39, you have requested my opinion whether 1971 Senate Bill 439, if enacted, would create a valid law and whether Senate Amendment 1 to the same bill also would be valid, if enacted.

Senate Bill 439 would create a new exemption from property taxation, applicable to:

“Land owned by The National Audubon Society, Inc., to preserve unique ecological areas for all future generations in this state and provide for environmental education services therein.”

The basic question to be answered is whether such a law would create a valid classification or whether it would violate the equal protection clause of the Fourteenth Amendment to the Federal Constitution. The requirement of uniformity, provided in Art. VIII, sec. 1, Wis. Const., likewise requires that a classification for tax exemption purposes must not be purely arbitrary, but must have some reasonable basis for differentiation.

One of the leading Wisconsin cases on this general subject is *Lawrence University v. Outagamie County* (1912), 150 Wis. 244, 136 N.W. 619. The court there considered the validity of a 1901 amendment to the charter of the university, exempting from property taxation its land held for educational and endowment purposes. At the time the 1901 law was passed, the general statutes already exempted up to 40 acres of any chartered university's land. The court held the amendment of the charter invalid on the ground that Lawrence University was one of a class and could not be treated differently from others in the class, relying both upon the equal protection clause of the Fourteenth Amendment of the Federal Constitution and upon the uniformity clause of Art. VIII. sec. 1, Wis. Const.

In *Chicago & N. W. R. Co. v. State* (1906), 128 Wis. 553, at 642-643, 108 N.W. 557, the opinion stated:

“\* \* \* Under our constitution, it must be remembered, there is the amplest power on the part of the legislature to exempt an entire class of property from taxation, and to make such class very narrow, even excluding from the benefits accorded to the members thereof those owning property of the same general class, so long as the character of that owned by those of the subclass is so far different from that owned by others, as, within the boundaries of reason at least, to suggest necessity or propriety, having regard to the public good and the constitutional object to be attained, and limitations in respect thereto, of substantially different legislative treatment. Few cases that can be found have

gone further on that line than *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37, 8 N. W. 833. There, as we have seen, a very small subclass of real estate, a class so small as to be confined to one owner, was deemed sufficiently different from realty generally to warrant the legislature in exempting it from taxation. It is not likely, as we have before indicated, that this court will soon go further on that line than it did in that case. \* \* \*

In considering the requirements for valid classification under the equal protection clause of the Fourteenth Amendment, U.S. Const., the opinion in *State ex rel. Baer v. Milwaukee* (1967), 33 Wis. 2d 624, at 632-633, 148 N.W. 2d 21, stated:

“Five standards for proper classification in an ordinance were promulgated by this court in *State ex rel. Ford Hopkins Co. v. Mayor*. They are:

“ ‘(1) All classification must be based upon substantial distinctions which make one class really different from another.

“ ‘(2) The classification adopted must be germane to the purpose of the law.

“ ‘(3) The classification must not be based upon existing circumstances only. [The following sentence was added to No. 3 by *State ex rel. Risch v. Trustees*: “It must not be so constituted as to preclude addition to the numbers included within a class.”]

“ ‘(4) To whatever class a law may apply it must apply equally to each member thereof.

“ ‘ . . .

“ ‘ ‘(5) That the characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.’ ’ ’ (Footnotes omitted)

In the *Baer* case the court was considering classification in an ordinance involving exercise of the police power. The Wisconsin Supreme Court has recognized that the legislature has greater leeway in classifying for purposes of taxation than for purposes of exercise of the police power. *Hillside Transit Co. v. Larson* (1954), 265 Wis. 568, at 583, 62 N.W. 2d 722. Nevertheless, it is

the third requirement enumerated in the *Baer* case which raises a serious question as to the constitutionality of an act such as that proposed by Senate Bill 439.

In my opinion, the Wisconsin Supreme Court would not sustain the validity of the proposed sec. 70.11 (27), Stats., at least not in the absence of a clear showing that there is no other land owned by any other organization similar to the Audubon Society, which is held for the same purposes as enumerated in the proposed statute. Even if such a showing were made, the law might be held invalid, although the question would be much closer.

In your second question you ask about the validity of an act resulting from the passage of the bill with Senate Amendment 1. The amendment would add a sentence at the end of the proposed subsection, reading:

“The donor or grantor of such land shall pay to the municipality in which it is located the real property taxes on such property over a 10-year period in the manner provided in s. 70.113 (2) (b) for payments by the state to towns.”

I believe there is no substantial room for argument as to the amendment and that it would be held invalid.

Section 70.113 (2) (b), Stats., provides that the state shall make decreasing payments to towns for ten years, in connection with certain lands acquired by the state subsequent to July 1, 1969. The first year's payment is to be equal to the normal county, local and school taxes based upon the first assessment following the state acquisition of the property. The second payment is to be 90 percent of the first; the third payment, 80 percent of the first, etc. While it may be that the state may make such payments, which appear to be in lieu of taxes to a limited extent, an attempt to require the donor or grantor of land conveyed to the Audubon Society to make similar payments would be a partial exemption from property taxation for the ten-year period. A partial exemption from property taxation violates the requirement of uniformity provided by Art. VIII, sec. 1, Wis. Const. *Gottlieb v. Milwaukee* (1967), 33 Wis. 2d 408, at 424, 147 N.W. 2d 633. The same case, at the same page, holds that there cannot be any classification of property for different rules or rates

of property taxation. The amendment to Senate Bill 439 would require the donor or grantor of land conveyed to the Audubon Society to pay "real property taxes" on the property over a ten-year period, on the basis of the *first* assessment following the conveyance. Entirely aside from the diminishing percentage of taxes to be paid over the ten years, the basis for computing the tax would not be uniform with the basis for computing taxes on other property. Here, again, is a violation of the rule of uniformity.

In view of the foregoing, it seems unnecessary to consider the constitutional questions raised by the amendment insofar as it attempts to put the burden of tax payments upon the donor or grantor of land conveyed to the Audubon Society. The owner of property is not personally liable for payment of the real property taxes. In Wisconsin an action in debt for property taxes will lie only for taxes on personalty. *Nelson v. Gunderson* (1926), 189 Wis. 139, 207 N.W. 408. Also, the grantor of real property is not personally liable for the payment of such taxes. To impose such liability upon the grantor of land conveyed to the Audubon Society raises serious question of constitutionality under the uniformity rule of the Wisconsin Constitution and under the equal protection clause of the Fourteenth Amendment of the Federal Constitution.

RWW:EWW

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*County Home Rule—Milwaukee County Retirement System*—Milwaukee County may, by ordinance, provide credit in retirement system for service of employe with another municipality.

April 6, 1972.

ROBERT P. RUSSELL, *Corporation Counsel*  
*Milwaukee County*

You request my opinion as to whether Milwaukee County may provide pension benefits based on service as an officer or employe of the state or an officer or employe of any municipality in Wisconsin other than Milwaukee. It is my opinion that Milwaukee County may, by proper ordinance, amend its retirement system to provide prior service credit for employes based upon service with the state or other municipalities.

The retirement system for county employes in counties having a population of 500,000 or more was created by ch. 201, Laws of 1937. The terms "service" and "prior service" were therein defined in Section 1 as:

"(11) 'Service' shall mean service as an employe and paid for by the county.

"(12) 'Prior service' shall mean the service of a member as an employe rendered prior to the date of the establishment of the retirement system, either in the service of the county or in the service of any department in any town, village, city or metropolitan sewerage commission in the county, which department has by consolidation or merger been absorbed by the county, \* \* \*."

Chapter 432, Laws of 1945, amended ch. 201, Laws of 1937, to provide a transfer of prior service benefits and contributions under the city of Milwaukee retirement system to the county system. Such amendment reads in part:

"SECTION 1. (Chapter 201, laws of 1937) section 9 (6) is created to read:

"(Chapter 201, Laws of 1937) Section 9 (6) Each member who became or shall become a member after having been a member of a retirement system of a city of the first class established pursuant to chapter 396, laws of 1937, and who shall not have received any withdrawal benefits from such city system shall have all his prior service credits and time of active service as a member and contributions under such city system considered creditable service and contributions in the county system and he shall be entitled to a retirement annuity, pension and all other benefits of membership based upon his accumulated service credits and contributions in both city and county systems to be determined in

all other respects according to the law, rules and regulations applicable to the county system and to be paid from the funds of the county system. \* \* \*

Thereafter, the legislature determined that the Milwaukee County retirement system was a proper matter for county home rule. Chapter 405, Laws of 1965, Section 2, amended the system as follows:

“(Chapter 201, laws of 1937) Section 21. For the purpose of best protecting the employes subject to this act by granting supervisory authority over each retirement system created hereunder to the governmental unit most involved therewith, it is declared to be the legislative policy that the future operation of each such retirement system is a matter of local affair and government and shall not be construed to be a matter of state-wide concern. Each county which is required to establish and maintain a retirement system pursuant to this act is hereby empowered, by county ordinance, to make any changes in such retirement system which hereafter may be deemed necessary or desirable for the continued operation of such retirement system, but no such change shall operate to diminish or impair the annuities, benefits or other rights of any person who is a member of such retirement system prior to the effective date of any such change.”

Counties, unlike cities, do not have “home rule” power guaranteed by the Wisconsin Constitution. The Constitution does, however, authorize the legislature to authorize such “home rule” power. Article IV, sec. 22, Wis. Const., reads:

“*Powers of county boards.* Section 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.”

Chapter 405, Laws of 1965, empowers the county to make changes “which \* \* \* may be deemed necessary or desirable for the continued operation of such retirement system.” In *State ex rel. Singer v. Boos* (1969), 44 Wis. 2d 374, 171 N. W. 2d 307, such provision was broadly interpreted. The court upheld a county

board ordinance which removed a retirement allowance deduction for employes who had retired between 1958 and 1967 and stated at page 386:

“In addition, finding that sec. 201.24 (11.3) involves an expenditure for a public purpose precludes any argument that such enactment is not ‘necessary or desirable for the continued operation of the retirement system. \* \* \*”

In *Singer*, the court held proper an ordinance which, in effect, granted retroactive benefits to employes who already had retired. Clearly, then, I may predict that the court would find no fault with an ordinance designed to give credit for prior services rendered by present employes even though such prior service credit resulted from service with another municipality.

Since, as you state in your letter, “the present proposal does not contemplate any reciprocal arrangement” and “the cost of the benefits would be borne entirely by the county,” I see no impediment, constitutional or statutory, which would preclude you from granting such prior service credit.

RWW:WMS

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*Liquor License—Competitive Bidding*—The issuance of a liquor license on the basis of competitive bidding constitutes a violation of sec. 176.05 (4), Stats. A town, being a municipal corporation, is not within the definition of “person” appearing in sec. 176.41, Stats.

April 6, 1972.

RUSSELL FALKENBERG, *District Attorney*  
*Chippewa County*

You inquire as to the legality of issuing a liquor license to the highest bidder. Specifically, you pose the following questions:

1. In the event the town of Hallie did place a liquor license up for bids and the license fees as determined on the basis of the highest bid were in excess of the fees charged for the same class of

license to other licensees of that class, or in the event the license fee was in excess of \$500 on the basis of the high bid, would the town of Hallie be in violation of the Wisconsin statutes?

2. If the town of Hallie is in violation of the statutes, would sec. 176.41, Stats., apply to the town of Hallie, a municipal corporation, when the statute refers to "any person"?

As you note in your letter, sec. 176.05 (4), Stats., establishes the maximum and minimum amounts which can be charged for liquor licenses. The same statutory section requires that the fees for all licenses within the same class be the same.

Any fees which are not within these limits are invalid. See *State ex rel. Torres v. Krawczak* (1935), 217 Wis. 593, 598, 259 N.W. 607 and 35 OAG 206 (1946).

Any license issued by the town of Hallie for a fee exceeding the maximum allowed under sec. 176.05 (4), Stats., would be void. "No license shall be issued to any person in violation of this chapter and any license so issued *shall be void.*" (Emphasis added) Sec. 176.05 (5), Stats.

If the town collects, in any manner or form, more than the maximum allowed by sec. 176.05 (4), Stats., as a license fee, the license issued shall be void. If the town charges an amount for the license in question which is different from the amount charged to other licensees of that class, the license so issued is issued in violation of sec. 176.05 (4), Stats., and, therefore, would be void. Sec. 176.05 (5), Stats.

The answer to question 1 above is clearly "yes."

Furthermore, whether or not the license fee as determined by the high bid was less than \$500 or not more than the license fee charged to other licensees of the same class, any attempt to issue a liquor license on the basis of competitive bidding would be void at the outset.

Not only would the issuance of a liquor license on the basis of competitive bidding be contrary to the statutes, it would be unconstitutional as well. Article VIII, sec. 1, of the Wisconsin Constitution reads in part:

"The rule of taxation shall be uniform . . ."

It seems clear that the town of Hallie wishes to issue the liquor license on the basis of competitive bidding for the purpose of raising revenue. The Wisconsin Supreme Court has said:

“ . . . police power must not be employed for the primary purpose of raising revenue but rather must be designed to promote the public welfare.” *Milwaukee v. Hoffmann* (1965), 29 Wis. 2d 193, 198, 199, 138 N.W. 2d 223.

It is beyond dispute that liquor licensing is an exercise of the police power. *State ex rel. Martin v. Barrett* (1946), 248 Wis. 621, 626, 22 N.W. 2d 663.

In *Odelberg v. Kenosha* (1963), 20 Wis. 2d 346, 349-350, 122 N.W. 2d 345, the Wisconsin Supreme Court quoted from *Zodrow v. State* (1913), 154 Wis. 551, 555, 556, 143 N.W. 693, with respect to the justification for involving the police power on the traffic and sale of intoxicating liquors:

“The justification for the exercise of the police power in restraining or prohibiting the sale of intoxicating liquors has been stated and restated by the courts time and again. It may be summed up as resting upon the fundamental principle that society has an inherent right to protect itself; that the preservation of law and order is paramount to the rights of individuals or property in manufacturing or selling intoxicating liquors; that the sobriety, health, peace, comfort, and happiness of society demand reasonable regulation, if not entire prohibition, of the liquor traffic. Unrestricted, it leads to drunkenness, poverty, lawlessness, vice, and crime of almost every description. Against this result society has the inherent right to protect itself—a right which antedates all constitutions and written laws—a right which springs out of the very foundations upon which the social organism rests, a right which needs no other justification for its existence or exercise than that it is reasonably necessary in order to promote the general welfare of the state.”

In *Milwaukee v. Hoffmann, supra*, 29 Wis. 2d, at 199-200, the Wisconsin Supreme Court said:

“This court has previously examined the question of the constitutional propriety of imposing license fees. In *State ex rel. Attorney General v. Wisconsin Constructors* (1936), 222 Wis. 279, 289, 268 N. W. 238, appears the following:

“The distinction between a tax and an imposition under the police powers is well stated in 4 Cooley, *Taxation* (4th ed.), p. 3511:

“ ‘The distinction between a demand of money under the police power and one made under the power to tax is not so much one of form as of substance. The proceedings may be the same in the two cases, though the purpose is essentially different. The one is made for regulation and the other for revenue. If the purpose is regulation the imposition ordinarily is an exercise of the police power, while if the purpose is revenue the imposition is an exercise of the taxing power and is a tax. If, therefore, the purpose is evident in any particular instance, there can be no difficulty in classifying the case and referring it to the proper power. . . .

“(p. 3513) ‘Only those cases where regulation is the primary purpose can be specially referred to the police power. If revenue is the primary purpose and regulation is merely incidental the imposition is a tax; while if regulation is the primary purpose the mere fact that incidentally a revenue is also obtained does not make the imposition a tax, although if the imposition clearly and materially exceeds the cost of regulation, inspection or police control, it is generally held to be a tax or an illegal exercise of the police power. . . .’

“This problem was also considered in *Tesch v. Board of Deposits* (1941), 237 Wis. 527, 532, 297 N. W. 379, where this court stated as follows:

“Ch. 34, Stats., does not create a tax, but an exaction made under the police power. *State ex rel. Atty. Gen. v. Wisconsin Constructors*, 222 Wis. 279, 289, 268 N. W. 238. Hence there can be no claim that it violates the uniformity of taxation clause in the Wisconsin constitution. (Sec. 1, art. VIII.) The constitutional tests are whether the action was in a legitimate field for the exercise of police power to promote the public welfare, and whether the means bear a reasonable relation to that end. *State*

*ex rel. Carter v. Harper*, 182 Wis. 148, 152, 196 N. W. 451; *Purity Extract Co. v. Lynch*, 226 U. S. 192, 201, 33 Sup. Ct. 44, 57 L. Ed. 184.”

As may be noted, not only must liquor licensing not be utilized for the purpose of raising revenue, licensing in exercise of the police power must be conducted in such a way as to affect all those within a class equally. *Milwaukee v. Rissling* (1924), 184 Wis. 517, 519, 199 N.W. 61, affirmed 271 U.S. 644, 46 S.Ct. 848, 70 L.ed. 1129.

As the court stated in *Milwaukee v. Kaun* (1931), 204 Wis. 103, 106, 235 N.W. 551:

“It is generally understood that a proper basis for classification existing and natural and reasonable grounds therefor appearing, legislation recognizing the distinction and affecting all within the class equally does not offend against the constitutional regulations protecting individual rights.”

It should be noted parenthetically that a liquor license may not enter into an enforceable agreement to transfer a liquor license because of the personal nature of the benefit resulting from the holding of a liquor license and the personal nature of the obligations imposed on each licensee—i.e., a liquor license is not assignable. *Marquette Savings and Loan Asso. v. Twin Lakes* (1968), 38 Wis. 2d 310, 315, 156 N.W. 2d 425, and *State v. Bain* (1898), 100 Wis. 35, 38, 75 N.W. 403.

With regard to the second question you pose above, the town of Hallie, being a municipal corporation as defined in sec. 60.01, Stats., would not be a “person” within the meaning of sec. 176.41, Stats., since the word “person” as used in ch. 176 includes “firm, partnership, corporation or association.” Sec. 176.01 (13), Stats.

This definition of “person” in sec. 176.01 (13), Stats., is narrower than the definition of “person” in sec. 990.01 (26), Stats., as including all “partnerships, associations and bodies politic and corporate.” While theoretically the word “corporations” as used in sec. 176.01 (13), Stats., might refer to municipal corporations within the meaning of Art. XI, secs. 2 and 3 of the Wisconsin Constitution, a search of other provisions of the Wisconsin statutes dealing with the word “corporation”

reveals that the word is not used in connection with municipal corporations. Moreover, if it was the intent of the legislature to include a municipal corporation such as the town of Hallie, within the definition of sec. 176.01 (13), Stats., the broader definition could have been used such as that contained in sec. 990.01 (26), Stats., where "person" is defined to include "bodies politic and corporate."

From the context of the other provisions of ch. 176, Stats., a town was not intended by the legislature to be within the definition of "person" in that chapter.

This does not mean that you are powerless to take action, however. The individual members of the town board may be charged with a violation of sec. 176.05 (4), Stats., and punished as provided in sec. 176.41, Stats.

Moreover, a nuisance action pursuant to ch. 280, Stats., may be brought against any firm or individual purporting to be lawfully engaged in the business of selling alcoholic beverages under a license that was, in fact, void when granted within the meaning of sec. 176.05 (5), Stats., and such establishments may be closed. Sec. 176.72, Stats., and *State ex rel. Martin v. Barrett* (1946), 248 Wis. 621, 22 N.W. 2d 663. Any individual or firm purporting to sell liquor under a void license may be penalized as provided in sec. 176.04 (1), Stats., since a sale under a license that was void when issued is the same as a sale without a license.

Furthermore, if you notify the board of the town of Hallie that the issuance of a liquor license on the basis of competitive bidding is in violation of the statute, the town board, as a body politic and corporate within the meaning of sec. 990.01 (26), Stats., may be charged with misconduct in public office, specifically sec. 946.12 (2), Stats., which prohibits an act known to be in excess of lawful authority or known to be forbidden by law when done in an official capacity.

However, I must assume that the board of the town of Hallie will act in accordance with the law and there will be no need to consider any action once the board has been informed.

RWW:GLF

*Seller Of Checks—Savings And Loan Associations—Savings and Loan Commissioner may authorize associations as agents for federal entity as seller of checks.*

April 10, 1972.

R. J. McMAHON, *Commissioner of Savings and Loan of Wisconsin*

You inform me that the Federal Home Loan Bank of Chicago has initiated a money-order service which it intends to make available to its members. You refer to a memorandum dated May 13, 1969, issued by the general counsel of the Federal Home Loan Bank Board of Chicago, which concludes that the Federal Home Loan Bank of Chicago and member federal associations in Wisconsin are immune from the requirements of ch. 217, Stats., which deals with the power of the Commissioner of Banking of Wisconsin to issue licenses to persons to engage in the business as a seller of checks.

You state that the Federal Home Loan Bank of Chicago is most desirous to have you, as Commissioner, issue certificates of authority to state-chartered savings and loan associations pursuant to sec. 215.13 (41), Stats. As Commissioner, you are concerned over a possible competitive advantage to federal savings and loan associations should such certificates of authority be not issued by you to state savings and loan associations.

You indicate that the business of seller of checks is fairly synonymous with the money-order business.

You ask, can the Commissioner of Savings and Loan issue a certificate of authority to a state-chartered savings and loan association to engage as an authorized agent for the Federal Home Loan Bank of Chicago in the business and functions provided for in ch. 217, Stats., pursuant to sec. 215.13 (41), Stats., when the Federal Home Loan Bank of Chicago is not licensed by the office of the Commissioner of Banking as provided in ch. 217, Stats.

Section 217.02 (9), Stats., defines seller of checks as:

“\* \* \* a person who, as a service or for a fee or other consideration, engages in the business of selling and issuing checks or the receiving of money for transmission or the transmitting of money, or the transmitting of money to foreign countries, but does not include the business of a telegraph company in receiving money for immediate transmission by telegraph.”

Chapter 217, Stats., specifies some certain exemptions. Section 217.04, Stats., states that this chapter does not apply to:

“*Exemptions.* This chapter does not apply to:

“(1) Banks organized under the laws of this state or authorized to do business in this state with respect to checks sold in a bank;

“(2) Credit unions, with respect to checks sold in the credit union office, except as provided in s. 186.33;

“(3) Savings and loan associations with respect to checks sold in the savings and loan office, except as provided by s. 215.13 (41);

“(4) U.S. post-office money orders.”

Section 215.13, Stats., deals with the powers of savings and loan associations and subsec. (41) provides that savings and loan associations are empowered:

“(41) *Seller of checks.* To engage as an authorized agent in the business and functions provided for in ch. 217 for their members upon receiving a certificate of authority from the commissioner. Such applicants shall be under the jurisdiction and supervision of the commissioner and meet the same requirements as other applicants under ch. 217, but no license or investigation fee shall be charged savings and loan association applicants. The commissioner has the authority to enforce ch. 217 as it applies to savings and loan associations, the same as that granted the commissioner of banks in enforcing ch. 217. The commissioner shall determine the records that shall be maintained and he shall require the segregation of such funds as is necessary for operations permitted savings and loan associations under this subsection and ch. 217.”

It is of significance that the Federal Home Loan Bank of Chicago is not a national bank, but is an institution chartered under the Home Owners' Loan Act. Therefore, any requirements of the National Banking Act, e.g., requiring conformity to state and local policy on matters of branches and agencies, are not applicable to the Home Owners' Loan Act and institutions chartered thereunder. *U. S. ex rel. State of Wis. v. First Federal Savings & Loan Ass'n.* (D.C. 1957), 151 F. Supp. 690, 248 F. 2d 804, cert. denied, 78 S.Ct. 543.

Also, savings and loan associations are not banks. They are quasi-public corporations chartered to encourage thrift, promote ownership of homes, and are subject to strict supervision by the state. 50 OAG 38, 41 (1961)

As a preliminary to answering your question, I am constrained to conclude that the Federal Home Loan Bank of Chicago is, as a federal instrumentality, by virtue of the supremacy clause, immune from state legislation such as ch. 217, Stats., and thus is not required to obtain a license as a seller of checks. *Railroad Co. v. Peniston* (1873), 85 U.S. 5; *Johnson v. Maryland* (1920), 254 U.S. 51; *Leslie Miller, Inc. v. Arkansas* (1956), 352 U.S. 187.

Section 215.13 (41), Stats., gives the Commissioner of Savings and Loan broad powers to regulate savings and loan associations with respect to their activities as authorized agents to sell checks.

An "authorized agent" as defined by sec. 217.02 (3), Stats., is a person who is authorized by a licensee to sell its checks.

A "licensee" as defined by sec. 217.02 (2), Stats., is a person licensed under ch. 217, Stats.

A person, such as the Federal Home Loan Bank of Chicago, who is immune from the licensing requirements of ch. 217, Stats., is authorized to perform the same functions as a licensee. He is, in effect, able to conduct himself in Wisconsin as though he were a licensee, unless or until his activities pervade an area that is a proper subject of state regulation. The area of state-chartered savings and loan associations acting as authorized agents for sellers of checks, whether for licensees or constructive licensees by virtue of immunity, is a valid subject of state regulation. The permitting by the state of state-chartered associations to act as

agents for the federal instrumentality in no way interferes with or impairs the efficiency of the operations of such federal instrumentality, within the meaning of the cases cited above. Rather, such a relationship would be designed to facilitate and improve the efficiency of the operations of both entities.

Section 215.13 (41), Stats., clearly indicates that the legislature intended that the Commissioner of Savings and Loan should permit state-chartered associations to engage as authorized agents in the business of sellers of checks, provided they meet the requirements of ch. 217, Stats. It would be a strained and even absurd construction of the statute which said that the legislature intended that state-chartered savings and loan associations could only act as authorized agents for "licensed" sellers of checks but not for other perfectly legitimate and qualified sellers who, by virtue of the Federal Supremacy Clause, did not need a state license. Unreasonableness or absurdity is to be avoided in construing a statute. *State v. Surma* (1953), 263 Wis. 388, 57 N.W. 2d 370.

Therefore, I conclude that the Commissioner of Savings and Loan may issue, pursuant to sec. 215.13 (41), Stats., a certificate of authority to a state-chartered savings and loan association to engage as an authorized agent for the Federal Home Loan Bank of Chicago, which is lawfully engaged in the business of a seller of checks.

RWW:JEA

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*Register Of Deeds—Correction Of Records*—Register of deeds does not have authority to correct original recording of deed made by predecessor.

April 10, 1972.

F. R. SCHWERTFEGER, *Corporation Counsel*  
*Dodge County*

You request my opinion whether the register of deeds has authority to correct the original recording of a deed running from Dodge County to others and recorded in 1943. It is claimed that the deed covered Lots 185, 186, and 187, and that the typist omitted Lot 185 in the official record. .

Here the deficiency appears to be in the recording and not in the document left to be recorded. Section 818.07, Stats., (formerly 235.65) provides that the circuit or county court may make an order correcting an erroneous description in a conveyance.

I am of the opinion that the present register of deeds is without authority to correct the original record which is of such long standing.

Section 59.51, Stats., sets forth the duties of registers of deeds, and there is no mention therein or in any other statute, of which I am aware, which would permit correction of the original record by the register of deeds at the present time.

A register of deeds has only those powers granted by statute or necessarily implied.

In 23 OAG 563 (1934), it was stated that the register of deeds did not have authority to correct errors in documents which had been recorded.

In 27 OAG 671 (1938), it was stated that the register of deeds did not have authority to redraft plats for the purpose of correcting them. At pages 671, 672, it was said:

“\* \* \* The correction or alteration of a public record by the recording officer is without authority of law, *Jennings v. Dockham*, 99 Mich. 253, 58 N. W. 66, except that a recording officer, while in office, may correct mistakes which he had made in not complying with the duties under the statute. *People v. Hartquist*, 315 Ill. 228, 146 N. E. 140. The errors in the plats to which you have referred did not arise because of any mistakes or omissions on the part of the register of deeds in performing his duties under the law.

“Changes in public records may be made only by or under official authority. The interests of individuals, as well as the whole public, require that public records should never be altered unless the power as well as the right to alter or amend is clearly shown. \* \* \*”

In 45 Am. Jur., *Records and Recording*, sec. 71, 1971 Supplement, p. 25, it is stated:

“\* \* \* Thus, a number of decisions support the view that a recording officer, while still in office, is authorized in law to alter or amend his records of transfers or encumbrances of property, by correcting errors which he has made, so as to make the records conform to the facts. And it has been expressly held in several cases that it is the recorder’s duty to correct errors whenever he discovers them from data in his office. It seems, however, that a recorder’s authority to correct errors in the records is limited to the period in which he is in office. The authority being incidental to the office, it ends with the termination of the office. Furthermore, it seems that another officer than the one who made the original record cannot correct an error discovered after the latter has ceased to be an officer.”

Even under such liberal interpretation, a subsequent recording officer could not alter records made by his predecessor. While not directly in point here, it is noted that sec. 943.38 (1) (b), Stats., provides a criminal penalty for one who falsely alters a public record with intent to defraud.

As you have concluded, a partial remedy is available through rerecording the original document.

RWW:RJV

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*Sign Control Ordinance—Highway Safety*—Proposed billboard ordinance determined to be overly broad and not related to traffic safety on county highways. Sec. 59.07 (49), Stats.

April 14, 1972.

CLEMENS V. HEDEEN, JR., *District Attorney*  
*Door County*

You have forwarded a copy of a sign control ordinance which is presently being considered for adoption by your county. Inasmuch as the proposal has been the subject of considerable discussion and some disagreement as to the propriety of its various terms, you request my comments concerning the general nature of the proposals contained therein.

According to the terms of the proposed sign control ordinance, it would be adopted by the county board pursuant to the authorization contained in sec. 59.07 (49), Stats., which provides, as follows:

“BILLBOARD REGULATION. Regulate, by ordinance, the maintenance and construction of billboards and other similar structures on premises abutting on highways maintained by the county so as to promote the safety of public travel thereon. Such ordinances shall not apply within cities and villages which have adopted ordinances regulating the same subject matter.”

The proposed county sign ordinance would be effective in all of Door County, except those incorporated areas which have adopted ordinances regulating the maintenance and construction of billboards. Generally speaking, the ordinance permits signs, which identify the activities and/or name of the business currently operating on the premises *where the sign is located*, regardless of size, as long as they comply with certain general requirements which are applicable to all signs under the ordinance. However, off-premise signs are much more severely regulated under the terms of the ordinance.

As I understand the proposed sign ordinance, it would absolutely prohibit all “off-premise” signs, i.e., “containing a message unrelated to the premise or the use of land where such sign is located,” unless the sign is an official traffic control sign, a temporary sign permitted under the ordinance, a sign indicating the *approach of* a business or turning point (not to exceed 32 square feet in gross area) or a sign indicating the *direction to* a business not located directly adjacent to the highway (not to

exceed 12 square feet in gross area). The ordinance purports to regulate all such "off-premise signs" *which are visible* from any state, county or town road or street . . ."

In Wisconsin, our Supreme Court long ago recognized that the state, in the exercise of its police power, may reasonably regulate billboards and delegate this power of regulation to local government. *Cream City B. P. Co. v. Milwaukee* (1914), 158 Wis. 86, 93-94, 147 N.W. 25; 58 A.L.R. 2d 1314. The state of Wisconsin presently regulates billboards and other outdoor advertising devices adjacent to the interstate or primary highway system. See sec. 84.30, Stats., as repealed and recreated by ch. 197, Laws of 1971. The statutes also regulate the placement of signs within the limits of streets and highways. Secs. 86.19 and 86.191, Stats. In the case of counties, provisions regulating billboards and signs may be enacted as a part of the county's zoning ordinance under sec. 59.97, Stats., or, as proposed in this instance, as a separate ordinance under the above-quoted provisions of sec. 59.07 (49), Stats., 46 OAG 148 (1957).

Our court will not interfere with the exercise of the police power through the enactment of a local ordinance regulating billboards and signs, if there is any reasonable basis to sustain the ordinance, and the court will presume the ordinance to be constitutional unless the attacking party establishes its invalidity beyond a reasonable doubt. *J & N Corp. v. Green Bay* (1965), 28 Wis. 2d 583, 585, 137 N.W. 2d 434.

Even where the regulation of signs and billboards are proposed under broad based zoning laws, there is a general split in authority in the United States concerning whether such regulation may be justified solely on the basis of aesthetic considerations. 58 A.L.R. 2d 1327. In *Jefferson County v. Timmel* (1952), 261 Wis. 39, 61, 51 N.W. 2d 518, the Wisconsin Supreme Court recognized that the general rule, to the effect that the zoning power may not be exercised for purely aesthetic considerations, is undergoing development, and the court has subsequently expressed doubt whether this general rule any longer reflects the zoning law of the state of Wisconsin. *State ex rel. Saveland P. H. Corp. v. Wieland* (1955), 269 Wis. 262, 271, 69 N.W. 2d 217; *Kamrowski v. State* (1966), 31 Wis. 2d 256, 265, 142 N.W. 2d 793. However, whatever may be the proper place of

aesthetics in the present law of zoning in the state of Wisconsin, the sign control ordinance here under consideration would not be promulgated pursuant to the county zoning power, sec. 59.97, Stats., but would be adopted pursuant to sec. 59.07 (49), Stats., which more narrowly limits ordinances enacted under its provisions to those which "promote the safety of public travel" in reference to "highways maintained by the county." These provisions of the statute were discussed in 46 OAG 148 (1957), at page 150, as follows:

"It will be noted that the power therein conferred is limited in its exercise to the promotion of 'the safety of public travel' and to premises abutting on 'highways maintained by the county'. Although counties do maintain state highways and in many instances town roads, this maintenance is done merely on a contractual basis and not pursuant to any duty independent of contract. It is my opinion therefore that the specific authority conferred by this particular section is limited to those lands abutting highways over which the county is the maintaining authority, i. e. the county trunk system, and is further limited, in that regulation under this statute would not appear to permit any considerations other than public safety to govern its exercise."

It appears obvious, therefore, that, although a county may exercise the police power by adopting billboard regulations under sec. 59.07 (49), Stats., to be sustainable, such regulations must bear a reasonable relationship to highway safety and may not be based solely on aesthetic or artistic considerations.

I have reviewed the proposed sign control ordinance for Door County with the foregoing considerations in mind, as well as the other more general criteria, which is normally applied to test the validity of any legislative enactment. From my review of the proposed sign control ordinance, I must conclude that it would not be possible to sustain such enactment in its present form. In my opinion, the ordinance would probably be held invalid by the courts in the event of a challenge.

A sign ordinance may be proposed for enactment under sec. 59.07 (49), Stats., so as to avoid the more detailed mechanics (town approval, etc.) necessary to include the same within the county zoning ordinance. However, where sign regulations are not

enacted as part of a zoning ordinance, they do not possess all of the enforcement tools which are available under the zoning power. For instance, Section VI-A of the proposed ordinance provides that “. . . compliance with this ordinance may also be enforced by injunctive order at the suit of Door County or the owner or owners of real estate within Door County.” This language must be interpreted in the light of the established rule in Wisconsin that, “unless an act is established to be a nuisance per se or threatens to destroy property rights, an injunction will not issue” to aid in the enforcement of an ordinance. *Wind Point v. Halverson* (1968), 38 Wis. 2d 1, 11, 155 N.W. 2d 654; 59 OAG 248, 255-256 (1970). Clearly, then, this provision of the ordinance is unenforceable. For more general information, see annotation in 38 A.L.R. 3d 647 re billboards and other outdoor advertising/signs as civil nuisance.

Although sec. 59.07 (49), Stats., specifically restricts the regulation of billboards and similar structures to premises *abutting* on highways, the proposed ordinance seeks to regulate *all* off-premise signs which are *visible* “from any state, county, or town road, or street,” presumably whether or not the signs abut on the highway from which the sign is “visible.”

In my opinion, the definition of the term “abutting” accepted by the Wisconsin Supreme Court in *Royal Transit, Inc. v. Village of West Milwaukee* (1954), 266 Wis. 271, 63 N.W. 2d 62, is applicable in determining the proper interpretation of the term as used in sec. 59.07 (49), Stats. At page 274 of that opinion, the court says:

“As to who is an abutter, it is stated in 10 McQuillin, Mun. Corp. (3d ed.), p. 657, sec. 30.55:

“ ‘When no land intervenes between the land of the abutter and the street, his property is said to “abut.” If the property does abut, the lotline and streetline are in common. Of course, where there is no physical connection between the lotline and the streetline, the owner of the lot is not an abutter.’

“In our opinion this definition is the proper one to apply here. . . . There is nothing in the language or intent of the statute which requires a different interpretation of the word ‘abutting’ than the general one given by McQuillin that the lotline and the streetline must be in common.”

In light of the foregoing, it appears evident that the proposed ordinance exceeds the authority granted to counties to regulate billboards as set forth in sec. 59.07 (49), Stats., since it purports to regulate off-premise signs *visible* from various highways, whether or not they are located “on premises abutting” the highway.

As pointed out in the above quote from the opinion of our office reported in 46 OAG 148, the billboards or signs subject to regulation under the provisions of sec. 59.07 (49), Stats., must be located on premises abutting “highways maintained by the county.” However, the subject ordinance contains no such limitation. Much to the contrary, it provides for the regulation of signs and billboards located on or near state highways, town roads, and city or village streets, in addition to those located on county highways. Therefore, I must conclude that the proposed ordinance also unlawfully exceeds the authority granted counties to regulate billboards and signs in the interest of public safety in this regard.

The ordinance under consideration would prohibit all off-premise advertising signs other than *approach* and *directional* signs. Even these signs would be restricted as to what could be placed on their face. Even the largest of these two signs, the approach sign, is restricted in area to 32 square feet in gross area. This limitation would not only effectively eliminate all billboard size signs, but would obviously exclude all other advertising signs as well, regardless of size. Under the terms of the proposed ordinance, therefore, all off-premise signs, other than approved approach and directional signs, would be prohibited throughout Door County, except in cities and villages within the county which have adopted ordinances regulating billboards and other similar structures.

In my opinion, such an ordinance would be held by the courts to be an unreasonable and discriminatory attempt to entirely eliminate billboards and most other advertising signs, under the guise of regulation, without any real regard to whether any such structures are in fact dangerous or present a threat to the safety of the traveling public. Section 59.07 (49), Stats., authorizes billboard regulations relating solely to *highway safety*. The statute does not encompass the same commercial, economic, social, cultural and other broad based considerations bearing on the general welfare which underlie the exercise of other more general delegations of authority to exercise the police power, such as the zoning power.

I am in accord with your conclusion that the wording of this ordinance is inadequate in various respects. However, at your request, I have restricted my remarks to those provisions of the proposed ordinance which I felt would render the entire ordinance most vulnerable to successful challenge in the courts.

RWW:JCM

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*Federal Act—Condemnation*—Discussion of whether Wisconsin can comply with the Federal Relocation Assistance and Property Acquisition Act.

April 18, 1972.

CHARLES M. HILL, SR., *Secretary*

*Department of Local Affairs & Development*

You have asked whether Wisconsin law now enables Wisconsin communities to be in compliance with the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, P.L. 91-646, hereinafter referred to as the Federal Act.

Except as hereinafter noted, it is my opinion that the state of Wisconsin, its political subdivisions, and its municipal corporations may be in compliance with the Federal Act.

I enclose, and incorporate herein by reference, my formal opinion to the Assembly, which formal opinion discusses the question about which you ask. You will note that the opinion recites the differences between state and federal law, but indicates that, except where specifically stated, these differences would not result in an inability on the part of the state, its political subdivisions or municipal corporations to comply with the Federal Act.

I indicated in this formal opinion that Wisconsin could not be in compliance with the requirement that the acquiring agency pay actual litigation expenses incurred by a landowner in a "right to take" case in which the landowner prevailed. However, subsequently enacted ch. 244, Laws of 1971, removes this defect from the Wisconsin law, so that Wisconsin communities may now be in compliance with this requirement of the Federal Act.

I further noted that there appeared to be doubt whether Wisconsin communities could be in full compliance with sec. 217 of the Federal Act. However, any such doubt has now been removed by the provisions of ch. 244, Laws of 1971, since this law removes the possible legislative deficiency that existed prior to its enactment.

I failed to note in my formal opinion that Wisconsin law contains no provisions for the payment to landowners for actual litigation expenses incurred in "inverse condemnation" cases, and, in this respect, Wisconsin communities may not be in compliance with the Federal Act. A supplemental letter to the Assembly will be issued shortly to correct this omission in my formal opinion.

However, in my opinion, this "noncompliance" is rather inconsequential as inverse condemnation proceedings are extremely rare in Wisconsin.

On page 8 of my formal opinion, I indicated that Wisconsin has no law that would enable compliance with sec. 203 (b) of the Federal Act, providing for the issuance of mortgage insurance. However, I expressed serious doubt whether it was the intent of Congress to make this provision applicable to states. Frankly, I am of the opinion that sec. 203 (b) of the Federal Act is not applicable to states or to the political subdivisions or municipal

corporations thereof. However, in the event it is judicially determined that sec. 203 (b) does apply to states, then Wisconsin is not in compliance with the section.

On page 11 of my formal opinion, I indicated that, insofar as sec. 302 (a) of the Federal Act *requires* the acquisition of property not actually required for a public improvement against the wishes of the landowner, Wisconsin cannot be in compliance with the Federal Act, since it may not condemn property in excess of that required for the public improvement. However, I consider this "noncompliance" to be technical and, in any event, not incurring to the harm of property owners affected by the taking of property for a public improvement.

As noted on pages 11 and 12 of my formal opinion, I am of the opinion that sec. 302 (b) of the Federal Act requires payment of just compensation to all persons having an interest in the real estate acquired, including tenants, and that Wisconsin law is in accord with this requirement. If sec. 302 (b) is construed as requiring separate payments to tenants and landowners (and I am of the opinion that it does not so require), then Wisconsin would not be in compliance with the section.

In summary, it is my opinion that Wisconsin is in compliance with the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, P.L. 91-646, in all respects with the exception that there is no requirement in Wisconsin that an acquiring agency pay actual litigation expenses incurred by the landowner in a successful inverse condemnation proceeding.

RWW:WHW

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*Highway Commission—Privilege Highway Tax*—Under secs. 20.395 (2) (wd), 86.35 and 241.34, Stats., as amended by ch. 125, Laws of 1971, the Highway Commission pays the privilege highway tax directly to the State Treasurer without making adjustments for mistakes in past years.

April 19, 1972.

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

Under sec. 341.34, Stats. (1969), the Division of Motor Vehicles is required to compute the amount of the net registration and title fees derived from vehicles customarily kept in each town, village and city, and certify such amounts for each such municipality to the Highway Commission in order that such Commission can compute the privilege highway tax allotment as provided in sec. 86.35 (1), Stats. (1969). Whenever, through a mistake in computation, a municipality has received credit for an incorrect portion of such fees, the Division of Motor Vehicles is required to certify this information to the Highway Commission. The error must be found, or a complaint received within the three years after the close of the fiscal year to which the error applies. Under sec. 86.35, Stats. (1969), the Highway Commission is required to allot a privilege highway tax, which is a portion of such fees to each municipality, based upon the information furnished by the Division of Motor Vehicles. Where mistakes are found in the allotment made for a certain fiscal year, these are corrected by adjusting the allotment for a subsequent year. The Highway Commission is required to determine the respective amounts of overpayment to one municipality and corresponding underpayment to another municipality, and effect an adjustment thereof by deducting the amount of the overpayment from the next succeeding normal allotment to the municipality which received the overpayment, and by adding the amount of the underpayment to the next normal allotment to the municipality entitled thereto. Thus, a mistake in one year's allotment is corrected only by adjusting a succeeding year's allotment. If there were no allotments in succeeding years, there would be no way to correct past mistakes.

Chapter 125, Laws of 1971, has effected a substantial change in the method by which these distributions are to be computed. Section 341.34, Stats., was repealed and recreated to read:

**“341.34 CERTIFICATION OF NET REGISTRATION AND TITLE FEES.** Annually beginning October 1, 1972, the department shall certify to the highway commission the total net

registration and title fees derived from vehicles registered in the state for the fiscal year ending the previous June 30 in the manner required for the computation of the highway tax distribution provided in s. 86.35. Net registration and title fees derived from vehicles registered in the state prior to July 1, 1971, shall be certified pursuant to s. 341.34 (1), 1969 stats."

Thus, as to fees collected on and after July 1, 1971, the new law will apply. This new law makes no provisions for correction of mistakes in previous years's allotments. However, the old law will continue to apply to the initial certification of fees collected prior to that date.

Section 86.35 (1), Stats., was renumbered and amended to read:

*"86.35 DISTRIBUTION OF PRIVILEGE HIGHWAY TAX.* From the appropriation made by s. 20.395 (2) ~~(wb) (wc)~~, the highway commission shall ~~allot~~ pay annually ~~on December 15 beginning October 15, 1972,~~ to ~~each town, village and city,~~ the state treasurer a privilege highway tax in ~~an the~~ amount as ~~herein set forth in lieu of the general property tax assessed prior to 1931 on motor vehicles.~~ Each town, village and city shall receive an in this section. *Such amount shall be entered in the municipal and county shared tax account and distributed under subch. 1 of ch. 70. Such amount shall be equal to 11% of the net registration and title fees, derived from vehicles customarily kept in such town, village or city in the fiscal year ended the previous June 30 and registered under s. 341.25 (1) (c), (d) or (e) and 20% of the net registration and title fees derived from all other vehicles registered under ch. 341  $\zeta$ , excluding fees collected from nonresidents pursuant to reciprocity agreements), but in no case shall the amount allotted be less than the approximate amount collected by such town, village or city from the property tax on motor vehicles levied in the year 1930 as computed under ch. 22 laws of 1931. Allotments. Distributions made pursuant to this section shall be based on the net registration and title fees certified annually by the division of motor vehicles pursuant to s. 341.34."*

Section 86.35 (2) and (3), Stats., was repealed. Under the new law, the amount of the fees will be certified by the Division of Motor Vehicles to the Highway Commission which will, in turn, pay annually, beginning October 15, 1972, to the State Treasurer, a privilege highway tax in the amount set forth in sec. 85.35, Stats. Such amount will be entered in the municipal and county shared tax account and distributed under subch. I of ch. 79, Stats. These new statutes contain no provision for correcting mistakes in allotments for prior years by debiting or crediting allotments for succeeding years.

Also, sec. 20.395 (2) (wd), Stats., was amended to read:

*"20.395 (2) (wd) Aids to localities, motor vehicle fees. Forty cents of each fee under ss. 341.25 (1) (a) and (2) (intro.) and 341.26 (3) (a) and (g), to be allotted to the city, village or town in which the vehicle was customarily kept in the fiscal year ending the previous June 30. In cities of the 1st class the city shall apportion its allotment according to the formula under s. 86.35 (3) entered in the municipal and county shared tax account and distributed under subh. [sic] I of ch. 79. Section 20.395 (2) (wd), 1969 stats., shall be applicable in distributing such fees received prior to January 1, 1972."*

Under this statute, forty cents of the registration fees collected will be entered in the municipal and county shared tax account, and will be distributed under subch. I of ch. 79, Stats. However, the old law will be applicable in distributing fees received prior to January 1, 1972.

In this context, your question is whether municipalities still have three years to file claims for adjustments through and including revenue allocations recorded in fiscal year 1970-1971. It is my opinion that they do not. The provisions of secs. 341.34 and 86.35, Stats., providing for receiving complaints of mistakes or correcting mistakes over a three-year period, have been repealed. Thus, there is no longer any statutory authority for correcting mistakes. The fact that the legislature did not continue this method of correcting mistakes demonstrates legislative intent to eliminate such method. Also, under the old law, payments were made each year by the Highway Commission directly to the municipalities. If a municipality was overpaid one year, this

amount would be deducted from its next year's payment. This is not possible under the new law because payments are not made by the Highway Commission directly to the municipalities. Thus, an overpayment of last year cannot be deducted from the payment for this year because the Highway Commission is not making a payment directly to the municipality this year. There is nothing to deduct the overpayment from.

Under the new law, the Division of Motor Vehicles certifies to the Highway Commission the total net registration and title fees. The Highway Commission pays a portion of this amount to the State Treasurer, who enters this in the shared tax account. This is then distributed to the municipalities as provided in new secs. 79.01 through 79.07, Stats., created by sec. 418, ch. 125, Laws of 1971. There is no provision for correcting last year's mistakes by adding to or subtracting from this year's payment. New sec. 341.34, Stats., does provide that fees paid prior to July 1, 1971, shall be certified pursuant to the old statute. Mistakes made in prior years could be corrected by adding or subtracting from the amounts certified for the year ending July 1, 1971. However, the statutes provide no method for correcting mistakes after that time. Also, new sec. 20.395 (2) (wd), Stats., provides that the old law shall be applicable in distributing the forty cents of the registration fee received prior to January 1, 1972. However, this old law contains no provisions relating to correcting mistakes.

My answer to your first question is that, under the new law, municipalities do not have three years to file claims for adjustments, and you no longer are authorized to make such adjustments. This make it unnecessary for me to answer your last two questions.

RWW:AOH

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*School District—Private Instruction—Discussion of authority of school board to contract for services and facilities for “academically and socially retarded” children.*

April 20, 1972.

WILLIAM C. KAHL, *State Superintendent*  
*Department of Public Instruction*

You have asked whether a school district has authority to contract with a private organization to provide instruction or related services to the school district. In an additional letter, you have explained that the Milwaukee Title 3 Environmental Education Program for Exceptional Children has proposed a contract with the Milwaukee Boy's Club by which the club agrees to hire the staff for the educational program, with the exception of a special education teacher for the physically handicapped children, who would be hired by the Milwaukee Public Schools. The staff hired by the Boy's Club would include a social worker and a social worker aide. The teacher would conduct formal classes for half a day, and the social worker and aide, in conjunction with others on the Boy's Club staff, would conduct less structured activity for the remainder of the day.

You have enclosed with your letter a description and rationale of the proposed program. It is stated therein that there is a population of students of normal intellectual potential, who are two years academically and socially retarded. This retardation is often a function of an already existing learning disability or emotional disturbance. The description further states that these students often manifest deficits in other areas such as perceptual, sensory motor, language development, etc. These handicaps are further compounded by difficulties that these students may have within their own environment, such as marital problems between parents and/or family financial problems, social maladjustment and the like.

It is proposed that some of these students, who reside in the model cities area, will be provided with a camping experience during the first and last two weeks of the school year and during the rest of the school year will be taught in classrooms located at the Boy's Club; and, in addition to being taught by a certified teacher employed by the public schools, the Boy's Club will provide these students with an intensive guidance and recreational program. I understand that the Milwaukee Boy's Club is a private

charitable organization whose primary function is to provide counseling and recreational facilities and service to financially deprived youngsters.

School boards have only such power as may be given to them by statute or which may be necessarily implied for the performance of their statutory duties. Section 119.16 (1) and (2), Stats., provides:

“119.16 Board; duties. (1) MANAGEMENT OF SCHOOLS. The public schools in every city of the 1st class shall be under the management, control and supervision of the board.

“(2) ESTABLISH SCHOOLS AND DISTRICTS. The board shall maintain the public schools in the city and shall establish, organize and maintain such schools as the board determines are necessary to accommodate the children entitled to instruction therein. The board shall divide the city into attendance districts for such schools.”

Nowhere is there any statutory authority for the type of agreement proposed to be entered into between the Milwaukee Public School District and the Milwaukee Boy's Club, nor is there any indication that such power must be necessarily implied. On the contrary, sec. 119.16 (1), Stats., specifically provides that the public schools in the Milwaukee School District shall be under the management, control and supervision of the school board. Under the agreement, the entire environmental setting, the recreational and physical education programs, as well as counseling service and such other social service work as may be necessary, would be the responsibility of the Milwaukee Boy's Club. In my opinion, the contemplated agreement attempts to delegate the statutory duty of the school board to a private charitable organization to a degree that is not permissible under the existing statutes.

Furthermore, with respect to the property and facilities involved, my predecessor has held in 31 OAG 266 (1942) that the powers and duties of a school district are limited to property under control of the school district. The property involved here will apparently be under the control of the Milwaukee Boy's Club. As my predecessor pointed out, the school district would not be authorized to spend money in the employment of teachers or for

the operating of a school over which it had no control. My predecessor went on to state, "The statutes relating to public schools nowhere contain any language which either expressly or impliedly authorizes the expenditure of public funds for the operation of schools owned and controlled by the federal government or any other agency, public or private, except the district itself."

In addition, the program appears to be inconsistent with the statutory requirement of sec. 119.16 (4), Stats., which requires that a system of instruction in the public schools be as nearly uniform as possible.

It is, therefore, my opinion that the program cannot be lawfully accomplished in the manner proposed.

This is unfortunate, since the program appears to have considerable merit. This office would be happy to work with the Department of Public Instruction and the city of Milwaukee to explore alternative ways in which the goals sought might be legally achieved.

RWW:JWC

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*Honor Scholarships—Higher Education*—It was legally correct for the Higher Educational Aids Board Executive Committee to withhold \$100 honorary scholarships due to pending budgetary provisions.

April 20, 1972.

JAMES A. JUNG, *Executive Secretary*  
*Higher Educational Aids Board*

You have asked my opinion as to the legality of the decision made by the Executive Committee of the State of Wisconsin Higher Educational Aids Board in July, 1971, to withhold issuance of \$100 honor scholarship awards distributed under sec. 39.31, Stats.

I believe that a brief history of the issue would be helpful in arriving at such an opinion.

In March, 1971, the executive budget for 1971-1973, introduced to the legislature, contained a provision eliminating funding for the \$100 minimum honor scholarships awarded notwithstanding the students need.

On April 9, 1971, the Higher Educational Aids Board alerted all Wisconsin high schools to the fact that the 1971-1973 proposed budget called for the elimination of the \$100 honor scholarships effective for the 1971-1972 academic year.

In July, 1971, the Executive Committee of the Higher Educational Aids Board decided to take only those funding actions necessary to maintain the program until the final 1971-1973 budget was passed by the legislature.

In August, 1971, the Higher Educational Aids Board prepared student checks for the first semester of 1971-1972, but the honor scholarships for the \$100 no-need students were held up because of pending budget proposals.

From July through October, 1971, the budget was debated in the legislature and in November, 1971, the budget was signed into law by the Governor. That budget bill eliminated the \$100 honorary award funding.

It is my opinion that the Executive Committee of the Higher Educational Aids Board acted properly and legally in deciding to withhold the cash awards of the \$100 honorary scholarship students.

I believe that a decision to the contrary would have been irresponsible in view of the three budget proposals that had been placed before the legislature for their deliberation, all of which specifically eliminated the \$100 award. The Board was given the discretion it saw fit to exercise by the legislature under sec. 39.31, Stats., under the phraseology “. . . honor scholarships which *may* be awarded to qualified students . . .” (Emphasis added)

It is my understanding that all of the Wisconsin honor scholarship certificates were presented in May, 1971, to the students so designated, but that no checks were forwarded to the \$100 no-need students. In examining the face of this certificate, I find no promise to pay any funds whatsoever at any future date.

The problem of awarding the \$100 cash stipends to those students designated in March, 1971, as honor scholars appears to be moot in the light of recent legislative action.

1971 Assembly Bill 1610, commonly referred to as the "mini-budget," specifically provides for this category of students. At page 125, item 13, entitled "Honor Scholarships," the bill states:

"Notwithstanding any other law, persons who have been granted an honor scholarship under section 39.31 of the statutes prior to November 1, 1971, in the amount of \$100 and who did not receive such sum because of changes in such section by chapter 125, laws of 1971, shall be paid such sum if on the effective date of this act they continue to meet the requirements of section 39.31 of the 1969 statutes."

This bill passed the Wisconsin Assembly on March 8, 1972, and was directed to the Senate where it was altered by Senate Substitute Amendment Number 1 which passed the Senate on March 10, 1972. The amendment is now being enrolled in the Legislative Reference Bureau and will soon be forwarded to the Governor's office for final action.

Finally, I believe that all Wisconsin high schools and Wisconsin high school students should be alerted to the fact that the aforementioned provision, when and if enacted into law, while allowing payment to those students granted scholarships prior to November 1, 1971, will not provide for future \$100 no-need honor scholarships.

RWW:DWS

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*Employe Trust Funds—Unclaimed Property—Section 177.18, Stats., violates Art. X, sec. 2, Wis. Const., which requires proceeds from unclaimed property to be paid to school fund.*

April 21, 1972.

JOE E. NUSBAUM, *Secretary*  
*Department of Administration*

You refer to sec. 177.18, Stats., created by ch. 404, Laws of 1969, which deals with funds received from the proceeds from unclaimed property, and which provides that these funds are to be deposited in the general fund and then distributed to the Department of Employee Trust Funds.

You mention that sec. 177.18, Stats., was amended by sec. 474, ch. 125, Laws of 1971, so as to eliminate the requirement that these funds be transferred to the Department of Employee Trust Funds.\*

You ask whether Art. X, sec. 2, Wis. Const., requires that these funds be deposited to the credit of the school fund.

The answer is yes.

Article X, sec. 2, Wis. Const., provides:

“\* \* \* all moneys and the clear proceeds of all property that may accrue to the state by forfeiture or escheat, \* \* \* shall be set apart as a separate fund to be called ‘the school fund,’ \* \* \*”.

The Wisconsin Supreme Court has clearly stated that this provision of the constitution is to be construed so as to “throw everything possible into the school fund.” *Estate of Payne* (1932), 208 Wis. 142, 145, 242 N.W. 553. Also, see *State ex rel. Owen v. Donald* (1915), 160 Wis. 21, 96, 151 N.W. 331. It is a dragnet proviso. *Owen, supra*, p. 98.

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\*Section 177.18, Stats., as amended by sec. 474, ch. 125, Laws of 1971, provides:

“All funds received under this subchapter, including the proceeds from the sale of abandoned property under s. 177.17, shall be deposited by the office in the general fund. Before making the deposit it shall record the name and last known address of each person appearing from the holders’ reports to be entitled to the abandoned property and the name and last known address of each insured person or annuitant, and with respect to each policy or contract listed in the report of a life insurance corporation, its number, the name of the corporation and the amount due. The record shall be available for public inspection at all reasonable business hours.”

The legislature may not waive the constitution of the state or the rights of the schools of the state to funds granted them by the constitution. *Estate of Payne, supra*, p. 147.

It should be noted that in *Estate of Payne, supra*, the Supreme Court was dealing with the classic type of escheat, the death of a person intestate and without heirs or distributees. However, in modern usage "escheat" is not restricted solely to this classic situation. A state may by statute provide for other ways of bringing about an escheat. *Semrad v. Semrad* (1960), 170 Neb. 911, 104 N.W. 2d 338, 340. The courts have clearly held that unclaimed property statutes similar in nature to ch. 177, Stats., are a form of escheat. *Texas v. New Jersey* (1965), 379 U.S. 674, 85 S.Ct. 626, 13 L.ed. 2d 596, and *State v. Standard Oil Co.* (1950), 5 N.J. 281, 74 A. 2d 565, 572.

Therefore, I conclude that so much of sec. 177.18, Stats., as provided for the distribution of proceeds from unclaimed property to the Department of Employee Trust Funds was in violation of Art. X, sec. 2, Wis. Const. That provision of the constitution mandates the paying of these moneys to the school fund. This also means that paying these moneys into the general fund, as the present statute provides, is in violation of the constitutional mandate.

RWW:JEA

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*Home Base Parking—Use Of Personal Auto*—It is incumbent upon each appointing officer to establish strict guidelines in setting the use of an automobile as a condition of employment.

April 21, 1972.

PHILLIP E. LERMAN, *Chairman*

*Department of Industry, Labor and Human Relations*

You have requested my opinion whether employes of your department may be reimbursed for "home base" parking expense incurred when those employes, as a condition of employment, are required to drive their automobiles to work and utilize them in performance of their duties during the day.

If certain conditions, hereinafter enumerated, are met, these employes must be reimbursed for such expenses.

Section 16.535 (5), Stats., provides:

**"EXPENSES IN AN EMPLOYEE'S HEADQUARTER CITY.** Employees who are headquartered in a city in which the expense occurs shall be reimbursed for their actual, reasonable and necessary expenses incurred in the discharge of official duties only on the approval of the head of the employe's agency. This does not apply to travel between an employe's residence and the city in which he is headquartered, which shall not be reimburseable."

Pursuant to this statutory provision, your employes must be reimbursed for "home base" parking expense if the following conditions are met:

- (a) The expense must be actually incurred in connection with the discharge of official duties;
- (b) The expense incurred must be reasonable;
- (c) The expense must be necessarily incurred in connection with the discharge of official duties;
- (d) you, as the head of the agency involved must approve of the reimbursement.

The conditions—that the expense must be actually incurred and necessary in connection with the discharge of official duties—are not met unless you, the appointing authority, require, as a condition of employment, that the employe's bring their automobiles to work, and have them available for the discharge of their prescribed official duties. In other words, we distinguish the situation you propose from the situation where the employe is expected to drive an automobile in order to discharge his or her duties without any other condition or requirement with respect to immediate availability of the employe's automobile. In this latter

case, although travel is a condition of employment, the requirement that the employe use his own automobile and have it immediately available, and use it is not a condition of employment. Although it might be anticipated that the employe would use his own automobile, it is not required. The employe is free to use whatever method of transportation is available and feasible. Thus, in this latter situation, while an employe may use his or her personal automobile and actually incur parking expense in order to have it available for travel, the parking expense is not directly incurred or necessary in connection with the discharge of the employe's duties as a condition of employment, unless there is no other means of transportation available to the employe in specific situations.

Also, the expense must be actually incurred as a result of the condition. Thus, if an employe incurred ongoing parking expense for his own purpose or convenience, and such parking results in the car being immediately available for use, the expense would not have been actually and necessarily incurred as a condition of employment, since it would have been incurred in any event.

However, it is reasonable to assume, were it not for the proposed condition of employment, many of the employes upon whom the condition is to be imposed, would not bring their personal automobiles to work. Public transportation, car pools, riding to and from work with a neighbor or with a wife or husband who works, or even walking are common measures taken to avoid the high cost of driving to and from work and securing parking. We may safely and reasonably assume that many of the employes under consideration would utilize such measures, were it not for the condition of appointment. Therefore, reimbursement under such circumstance is entirely reasonable and falls within the intent of the legislation under consideration.

Further, the expense incurred must be necessarily incurred as a result of the condition. Therefore, if free parking is available within a reasonable distance so as to satisfy the condition of employment, any parking expense incurred would not have been necessary to satisfy the condition of employment.

The requirement that the expense incurred must be reasonable does not address the issue of whether it is reasonable to incur the expense. Rather, the requirement of reasonableness treats the reasonableness of the amount of the expense. The statute in question clearly defines what is intended by the term "reasonable." Section 16.535 (1) (b), Stats., provides: "(b) 'Reasonable' means not extreme or excessive."

Thus, if reasonably convenient parking is available at a certain rate, a claim for reimbursement for "home base" parking in excess of that rate would not meet the test of reasonableness.

With respect to the requirement that you, as head of the agency, must approve of the reimbursement, a reasonable construction of sec. 16.535 (5), Stats., is that your approval is, in effect, a certification that the expense incurred was actual, reasonable and necessary in the discharge of the employe's duties, that it occurred as a result of a condition of employment, and that you approve of the reimbursement. In view of the potential broad latitude which this section allows, I believe it is incumbent upon each appointing officer to establish strict guidelines in setting the use of an automobile as a condition of employment. Such guidelines should be reviewed periodically for compliance.

RWW:WHW

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*Criminal Law—Insanity*—Release of a person acquitted of criminal charges by reason of insanity prior to July 1, 1970, is controlled by sec. 957.11, Stats.

April 21, 1972.

PATRICK J. LUCEY

*Governor of Wisconsin*

You have requested my opinion whether sec. 971.17, Stats. (1969), or sec. 957.11, Stats. (1967), controls the release of a person acquitted of criminal charges by reason of insanity prior to July 1, 1970.

It is not the time of the commitment which determines this question but the time the criminal action was commenced.

Section 971.17, Stats. (1969), is a part of the new Criminal Procedure Code, Title XLVII of the Statutes. Section 967.01, Stats., provides:

“967.01. Title and effective date. Title XLVII may be cited as the criminal procedure code and shall be interpreted as a unit. This code shall govern all criminal proceedings and is effective on July 1, 1970. It applies in all prosecutions commenced on or after that date. *Prosecutions commenced prior to July 1, 1970, shall be governed by the law existing prior thereto.*”

Under the new procedure code, the action is commenced when the complaint is filed with a judge, as provided in sec. 968.02 (2), Stats. (1969).

Therefore, the answer to your question is that, if the prosecution was commenced by the filing of a complaint on or after July 1, 1970, the test to be applied in determining whether the patient should be released from the mental hospital is sec. 971.17, Stats. (1969). If the action was commenced before that date, the test to be applied is that stated in sec. 957.11, Stats. (1967).

RWW:WAP

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*County Board—Appointments*—County board may not delegate appointment of committee members to committee of board.

April 24, 1972.

GLENN L. HENRY, *Corporation Counsel*

*Dane County*

You have requested my opinion whether a county board can delegate to a committee of the board the authority to make all appointments to county board committees created under sec. 59.06, Stats., without necessity of further action or confirmation by the board.

It is my opinion that the board is without such authority in view of the provisions of sec. 59.06 (1), Stats., which provides:

“(1) The board may by resolution designating the purposes and prescribing the duties thereof and manner of reporting authorize their chairman to appoint before June 1 in any year committees from the members of the board, and the committees so appointed shall perform the duties and report as prescribed in such resolution.”

There is no statute which requires county boards to have committees of the board. The board can exercise the legislative and administrative powers delegated to it by the legislature as a collective body.

Article IV, sec. 22, Wis. Const., provides:

“*Powers of county boards.* SECTION 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.”

County boards in Wisconsin have traditionally carried out many of their investigative powers for legislative purposes and administrative powers through the use of committees of the board. In 19 OAG 302, 304 (1930), it is stated:

“\* \* \* committees of the board are not separate officers but are mere agents of such board and they have no power as such except to act under the authority of the appointing body to perform some duty or assist in the performance of some of the duties of such body.”

Section 59.02 (1), Stats., provides:

“(1) 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.”

The power to create a committee and to provide for its scope and purposes is legislative in nature and could not be delegated to a committee. Powers of a ministerial or administrative nature, although involving some discretion, can be delegated. A statute, however, may require a specific manner of delegation. In *French v. Dunn County* (1883), 58 Wis. 402, 406, 17 N.W. 1, it was stated:

“\* \* \* The power to purchase the farm was exercised by the committee pursuant to a resolution adopted by the board. The action taken seems to conform to both the letter and spirit of the law in respect to the execution of corporate authority, unless there is something in the nature of the act to be performed which rendered it essential it should be executed by the entire board. There are, doubtless, powers vested in the county board which could not be delegated to any committee. Powers which are legislative in their character, which are confided to the judgment and discretion of the board itself, such as the levying of taxes, must be exercised under the immediate authority of the board. \* \* \* The power to purchase a poor-farm can be as well exercised by a competent committee as by the whole body. Therefore, in the absence of any explicit provision of law showing that it was intended to intrust this duty to the county board alone, we think it might be exercised by a committee pursuant to a resolution by them adopted.”

Also see *Forest County v. Shaw* (1912), 150 Wis. 294, 301, 302, 136 N.W. 642; *First Savings & Trust Co. v. Milwaukee County* (1914), 158 Wis. 207, 227, 228, 148 N.W. 22.

It can be argued that the board can create committees, prescribe their duties and manner of reporting and can, by board action, appoint the members thereof, or at least require that members appointed be confirmed by the board. In 19 OAG 302, 304 (1930), it is stated that then sec. 59.06 (1), Stats., authorized the board to appoint members to committees. A review of sec. 59.06 (1), Stats. (1929), does not confirm a basis for such power.

The power of appointment is generally regarded as an executive function. It involves the exercise of discretion. In 42 Am. Jur., *Public Officers*, sec. 92, 951, it is stated:

“Common councils and other collective bodies are sometimes empowered to make appointments to office. In so doing they are not engaged in the deliberative business which is their ordinary work, but are exercising a special statutory authority, and such authority must be exercised in conformity to the statute conferring it.”

We need not decide here whether the county board can itself make all appointments to committees or can require confirmation. In view of present sec. 59.06 (1), Stats., a strong argument can be made that it cannot, even though it was stated in 22 OAG 997 (1933) that former sec. 59.06 (1), Stats., which provided that a county board could create committees, prescribe duties and authorize its chairman to appoint, before the first day of November, committees from the members of the *county board elect*, did not govern appointments to committees after the board had met and that such appointments could be made in accordance with its duly adopted procedural rules. At that time, absent special meeting, the November meeting would be the first meeting of the board, and there would ordinarily be vacancies on standing committees since some former committee members would no longer be members of the board. By ch. 235, Laws of 1935, the legislature created sec. 59.04 (1) (b), Stats., to require an organizational meeting on the first Tuesday of May in each year and amended sec. 59.06 (1), Stats., to provide that the chairman could appoint, on or before the first day of June in any year, committee members from members of the county board elect. Chapter 651, Laws of 1955, the overall county government revision law, renumbered sec. 59.04 (1) (b) to (c), Stats., and changed the organizational meeting to the third Tuesday of each April and amended sec. 59.06(1), Stats., to delete the reference to members of the *county board elect*, providing only that appointments be made from the members of the board.

The county board only has those powers which are granted by specific statute or which are necessarily implied. Where a statute provides that a power be exercised in a given manner, the statute must be complied with.

I am of the opinion that the reference to the June 1 date in sec. 59.06 (1), Stats., is directory and not a limitation on the power of the board to create committees for such purposes, and to

authorize appointment thereto at such times as it deems it necessary to carry out the duties of the board. With the power to create committees goes the power to abolish such committees at such times as the board determines. The board also has broad powers as to the purposes for which such committees shall be appointed, their duties and manner of reporting. I am of the opinion, however, that such committees are created under the provisions of secs. 59.02 (1) and 59.06 (1), Stats., and that the power of appointment, if not exercised by the board, lies in the chairman and cannot be delegated to a committee of the board.

RWW:RJV

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*County Liability—4-H Clubs*—Possible county liability for 4-H Club activities on county fairgrounds discussed.

May 3, 1972.

JAMES M. LA POINTE, *District Attorney*  
*Ozaukee County*

You have requested to be advised as to any possible liability the county may have for injuries which might occur on the county fairgrounds during the time some eighteen 4-H Clubs use the facilities under the general supervision of the Ozaukee County 4-H Club agent.

Your inquiry does not pose a specific question on a limited set of facts, nor have you provided this office with the benefit of any research you may have done. I will, however, make some general observations.

Although you refer to parks in one portion of your letter, you refer to fairgrounds in another. This response assumes that a county-owned fairground is involved.

Section 59.69 (1) (b), Stats., provides that the county board may grant use of the fairgrounds to agricultural and other societies for agricultural and industrial fairs and exhibitions and for such other purposes as tend to promote the public welfare. It is

without question that a county-owned fairgrounds can be used for county purposes, including activities of groups under the direct supervision of the County University Extension office.

Section 59.87, Stats., provides that a county may establish a "university extension program" in cooperation with the University of Wisconsin which is a land-grant college cooperating with the United States Department of Agriculture in the conduct of cooperative extension programs authorized by act of Congress. Section 59.87 (7), Stats., provides that for purposes of sec. 59.15 (2) (d), Stats., the university extension program shall be a department of county government. The county extension director and the county 4-H agent are at least, in part, county employes as well as university employes. They are cooperatively employed.

By reason of sec. 59.87 (6), Stats., the county extension program is required to carry on many functions, including:

"(d) Extension work provided for in an act of congress approved May 8, 1914 (38 Stat. 372) and all acts supplementary thereto.

"(e) Any other extension work authorized by local, state or federal legislation.

"(f) Take any action that will facilitate the accomplishment of any of the functions listed above, including without limitation because of enumeration, the following:

"1. Training of group leaders and the directing of group activities.

"2. Individual or group instruction or consultation.

"3. Demonstration projects, exhibits and other instructional means.

"4. Group workshops, institutes, and conferences."

4-H Club work is a part of the Cooperative Extension Service administered in part by the Federal Extension Service, U.S. Department of Agriculture, in cooperation with the University of Wisconsin, the State of Wisconsin and Ozaukee County.

See 7 U.S.C. sec. 341; 18 U.S.C. sec. 707, 916; 5 U.S.C. sec. 301; 7 C.F.R. sec. 8.1, and *Bowles v. Hansen Packing Co.* (D.C. Mont. 1946), 64 F.Supp. 131, 132.

The members of the clubs would not be county employes, and hence not subject, as the county 4-H agent or other county employe, to any workmen's compensation benefits under ch. 102, Stats., insofar as the county is concerned.

The county would have some exposure as to both employes and frequenters insofar as the safe-place statute is concerned. See ch. 101, Stats.

Since *Holytz v. City of Milwaukee* (1962), 17 Wis. 2d 26, 115 N.W. 2d 618, there is tort liability as to the state, counties, cities, villages, towns and special districts and by reason of the rule of *respondent superior* a public body may be held liable for damages for the torts of its officers, agents and employes occurring in the course of the business of such public body. Also see *Dunwiddie v. Rock County* (1965), 28 Wis. 2d 568, 137 N.W. 2d 388.

Section 895.43, Stats., governs the procedure in regard to actions for tort against political subdivisions and limits the amount of damages which may be recovered.

Counties have a duty to take reasonable steps to insure that county-owned facilities are reasonably safe for employes and users and that employes will conduct themselves and the activities they are responsible for in a reasonably safe manner. However, activities which are authorized by law and necessary to the accomplishment of good government and the promotion of the common welfare should be permitted to continue without undue restriction. The county should review its insurance policies or at least provide some reserve for contingent liability in these areas.

RWW:RJV

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*Regional Planning Commission—Zoning Power*—The fact that a county is within a regional planning commission does not affect county zoning power under sec. 59.97, Stats.

May 3, 1972.

HOMER C. MITTELSTADT, *Corporation Counsel*  
*Eau Claire County*

You request my opinion on whether the function of a county board carried on through its resource planning and zoning committee, or by any other committee designated to perform the functions of a resource planning and zoning committee, may continue in reference to the enforcement of existing county zoning laws and zoning maps, if the county becomes a member of a regional planning commission, which is organized under the provisions of sec. 66.945, Stats.

Although sec. 59.97 (1), (2) and (3), Stats., as created by ch. 77, Laws of 1967, appeared to provide ample general authority to counties to plan for their physical development, the statute also specifically excluded the application of such provisions to counties which were "included in a regional planning area under a regional planning program adopted pursuant to s. 66.945" and which were "included in a regional planning program organized pursuant to s. 66.945." Sec. 59.97 (1) and (2), Stats. In my opinion, this language was not intended to frustrate the power of counties to enact and administer their zoning laws, which power long antedated the enactment of ch. 77, Laws of 1967. Such conclusion is supported by the fact that the 1967 changes were almost exclusively planning law additions to the existing county zoning statute, and no substantive changes were made to the basic county zoning law then in existence. In addition, a reading of sec. 66.945, Stats., also makes it evident that, although plans, etc., developed by a regional planning commission may assist a county in its zoning, the commission itself plays no active role as a zoning authority.

However, there has been confusion and disagreement over the effect of these statutory provisions as they relate to a county's power to engage in certain planning activities.

Although the above-described language in sec. 59.97 (1) and (2), Stats., has tended to restrict county planning in those counties included in a regional planning area under a regional planning program organized pursuant to sec. 66.945, Stats., the

restrictive language was recently deleted from sec. 59.97, Stats., by ch. 224, Laws of 1971, effective April 12, 1972. Therefore, this most recent enactment appears to have resolved your question for the future. I emphasize again, however, that, even before the repeal of these provisions, they were not viewed by this office as removing the zoning power or zoning procedures from the hands of county governments located within the boundaries of a regional planning commission.

RWW:JCM

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*Liquor License—Decennial Federal Census*—Quota of liquor licenses that may be issued by town is tied to population as determined by decennial federal census.

May 3, 1972.

DANIEL L. LAROCQUE, *District Attorney*  
*Marathon County*

You have requested my opinion on the legality of issuing Class "B" liquor licenses on the basis of a population enumeration determined by means other than the last decennial federal census.

You mention in your letter that the person seeking the license cites *State ex rel. Fairchild v. McCarthy* (1950), 257 Wis. 62, 42 N.W. 2d 484, as authority for the proposition that Class "B" licenses may be issued on a population-quota basis where the population has been determined by a census other than the decennial federal census. However, as you note in your letter, the statute the court construed in *Fairchild*, sec. 176.05 (21), Stats. 1949, has since been amended. The statute, in fact, was amended in the next legislative session following the *Fairchild* decision. The statute construed in *Fairchild* read, in relevant part, as follows:

"No governing body of any town, village or city shall issue more than one retail 'Class B' liquor license for each 500 inhabitants or fraction thereof. . . ." Sec. 176.05 (21) (a), Stats., 1949.

The statute was amended to read as follows by ch. 589 of the Laws of 1951:

“No governing body of any town, village or city shall issue more than one retail ‘Class B’ liquor license for each 500 population or fraction thereof, *as determined by the last federal census. . .*” (Emphasis added) Sec. 176.05 (21), (a), Stats., 1951.

The statute has since been changed in its form but not in its substance. The present statute, sec. 176.05 (21) (a), Stats., 1969, defines population as “. . . the number of inhabitants as determined by the last decennial federal census. . .” Thus, the only substantive change in the definition of population of relevance to your specific problem from 1951 to the present is the insertion of the word decennial.

It is my opinion that the words of the statute are clear and admit only one reasonable construction. The legislature, by adding the words “decennial federal census,” has defined with specificity that the only sufficient criterion for a town to base its quota of liquor licenses upon is the federal census conducted each ten years. Any other means of determining population, except those means set forth for a newly incorporated municipality, are unacceptable under the language of the statute.

It would appear that the legislature in amending sec. 176.05 (21), Stats., in the session immediately following the *Fairchild* decision reversed the court’s prior construction. As is stated in 2 Sutherland, *Statutory Construction*, sec. 4510 (Horack rev.), “. . . legislative language will be interpreted on the assumption that the legislature was aware of existing . . . judicial decisions, and that if a change occurs in legislative language, a change was intended in legislative result.” See also, *State v. Superior Court of Douglas County* (1922), 176 Wis. 269, 186 N.W. 748, and *Pavelski v. Roginski* (1957), 1 Wis. 2d 345, 84 N.W. 2d 84. Here, immediately following judicial construction of sec. 176.05 (21), Stats., the legislature specifically focused attention upon the definition of population for the purpose of determining liquor license quotas. The result of the legislative action was to specifically tie the population determination to the federal census.

An ambiguous statute may be defined as one which allows more than one reasonable interpretation. Here, even assuming that this statute may be found to be ambiguous, material on file at the Legislative Reference Bureau would help to clear any such ambiguity. The following remarks were appended to the 1951 amending bill:

“The Wisconsin State Supreme Court in the August term, 1949, *State v. McCarthy*, ruled that the number of inhabitants of any town, village or city may be an accurate census as specified in section 66.102 or be at least proof of equivalent facts. This interpretation of the word inhabitants leaves a situation whereby towns, villages or cities may continually be submitting a census of inhabitants for the purpose of increasing class ‘B’ licenses. It is our opinion that using the word ‘population’ as determined by the last federal census will be definite and will eliminate controversy.”

Thus, both the clarity of the statute, and its legislative history, lead me to conclude that the town of Rib Mountain must use only the federal census conducted in 1970 for the purposes of issuing Class “B” liquor licenses. Furthermore, any license issued upon a population determined by other than the last federal decennial census would be void. “No license shall be issued to any person in violation of this chapter and any license so issued shall be void.” Sec. 176.05 (5), Stats.

RWW:PAP

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*Contracts—Bidding Procedures*—A bid proposal asking for the name of a subcontractor is contrary to sec. 16.855 (13) (a), Stats., and the request is invalid.

May 3, 1972.

PAUL L. BROWN

*Department of Administration*

You have asked for my opinion on the following two-part question:

"Does the fact that the bid specifications asked for the name of the sub-contractor for casework and laboratory equipment as an informational bid make the submission of the sub-contractor's name a part of the bid and form the basis of the award of the contract, and is the Milwaukee Equipment Company right in their contention that no other sub-contractor can be considered for the sub-contract?"

The answer is in the negative.

The following facts appear:

Bids were opened on December 22, 1971, at 2:00 p.m., on Bureau of Facilities Management Project No. 6901-20, relating to the Physical Science Addition to the University of Wisconsin at Stevens Point. The bureau's bid form asked for the "Name of subcontractor for casework and laboratory equipment, Section 1160."

The Hoffman Company, Incorporated, hereinafter referred to as Hoffman, was a successful prime contractor on the project and listed "Milwaukee Equipment" as its subcontractor for section 1160 work with its initial bid proposal for general construction work dated December 22, 1971. Hoffman was awarded this phase of the work on December 31, 1971. Subsequently, Hoffman submitted a list of subcontractors on February 3, 1972, in compliance with paragraph 34B on page 20 of the General Conditions of the Contract which requires:

"B. The Contractor shall not award any work to any Subcontractor without prior written approval of the Bureau in behalf of the Owner, which approval will not be given until the Contractor submits to the Bureau a written statement concerning the proposed award to the Subcontractor, which statement shall contain such information as the Bureau may require."

Hoffman listed under Section 1160, Casework & Laboratory Equipment (ABC Scientific) "Valley School Suppliers, Inc., Appleton, Wisconsin." The following explanation was stated in Hoffman's letter of February 3, 1972, to the state's architect:

“The Milwaukee Equipment Company was listed in error on our bid form to furnish Section 1160. A more complete analysis of proposals indicated the low bidder was Valley School Suppliers, Inc.”

Approval of Valley School Suppliers, Inc., was withheld pending the results of further tests, reports and investigations, according to a statement made by the state’s architect in a letter dated February 15, 1972. Based on the results of tests made by the University of Wisconsin at Stevens Point, the state’s architect did not approve ABC’s Artcolite Top material, as stated in its letter of March 9, 1972. However, Valley School Suppliers, Inc., agreed to furnish the solid modified epoxy resin tops as originally specified, thereby eliminating that problem. Milwaukee Equipment and Valley School Suppliers, Inc., are both acceptable subcontractors and able to perform to the satisfaction of the state. The state would not stand to gain or lose in the quality or cost of performance regardless of which subcontractor was utilized.

The controlling statute involved is sec. 16.855 (13), Stats., which provides:

“(13) (a) A list of subcontractors shall not be required to be submitted with the bid. The department may require the successful bidder to submit in writing the names of prospective subcontractors for the department’s approval before the award of a contract to the prime contractor.

“(b) All subcontractors must be approved in writing by the department prior to their employment. Requests for approval of prospective subcontractors shall be in writing.

“(c) Changes may be made in the list of subcontractors, with the agreement of the department and the prime contractor, when in the opinion of the department it is in the best interests of the state to require the change.”

The explanation of this statute contained in 1969 Senate Bill 601 provides:

“16.855 (13): A bidder may be required to submit a list of subcontractors to the department before the award of the contract. All subcontractors must be approved in writing before they can begin work for the department. The prime contractor is

permitted to make a change in subcontractors only with approval of the department. The department may require a change in subcontractors when it is in the best interests of the state."

That portion of the department's bid proposal which asked for the name of the subcontractor was contrary to the first sentence of sec. 16.855 (13) (a), Stats., which provides: "A list of subcontractors shall not be required to be submitted with the bid." Although the department asked for only one subcontractor instead of a list of all subcontractors, I do not consider this distinction sufficient to ignore the legislative prohibition of the statute. Ordinarily, the reason such a list would be requested with a bid would be to help prevent "bid shopping," a practice whereby a prime contractor on a project uses a low bid from one subcontractor to pressure other subcontractors to submit even lower bids. See "Bid Shopping," Words and Phrases.

Section 16.855 (13), Stats., prohibits the department from asking for the names of subcontractors to be submitted with the bid, thereby allowing "bid shopping" to occur. The same section permits the department to ask for the names of subcontractors subsequent to the bid opening and prior to the award of the contract to the prime contractor. Such a request was not made by the department, unless the improper request in the bid form could be so interpreted. In my opinion, since the department should not have asked for this information in the bid form, no significance can be attached to its presence. The situation must be viewed as though the department never made the request in the first place.

The list of subcontractors, which was submitted on February 3, 1972, was in response to paragraph 34B on page 20 of the General Conditions of the Contract, which is placed in the contract to meet the requirements of sec. 16.855 (13) (b), Stats. The paragraph at the end of that letter was an unnecessary request for a "change" of subcontractors in compliance with sec. 16.855 (13) (c), Stats. The reason it was unnecessary is because in my view no "change" occurred, the list of February 3, 1972, being the only valid list submitted to the department. That list was not submitted for the purpose of approving the initial award to the prime contractor, but for the purpose of satisfying the requirement that requests for approval of prospective subcontractors shall be in writing and must be approved by the

department prior to their employment by the prime contractor. There was no valid list of subcontractors requested by and submitted to the department prior to the award of the contract to the prime contractor; nor is there any evidence that the award of the contract was actually made to Hoffman on the strength of Milwaukee Equipment being the subcontractor for a phase of the work.

This situation is distinguished from that in *Druml Co. v. Knapp* (1959), 6 Wis. 2d 418, 94 N.W. 2d 615, where the statute (sec. 66.29 (7), Stats.) required:

“... a full and complete list of all the proposed subcontractors . . . and the class of work to be performed by each, as enumerated and called for in bidding documents which list shall not be added to nor altered without the written consent of the municipality.”

Although the municipal bidding statute was the basis for the state bidding statute, there are significant differences between the two, and this is one of them.

The court concluded in *Druml, supra*, at page 423:

“ . . . We conclude that this means that as soon as the bid is opened and accepted, the bidder is bound to use a particular subcontractor for each class of work indicated unless the commissioner consents to a change. Obviously, the successful bidder must at some time make his choice of which of several possible firms will be subcontractors for a particular portion of the work and the device of requiring a list which is binding upon the bidder seems fairly designed to compel that the choice be made by the time of bidding.

“Apparently the legislature still considers that it may be in the public interest that the identity of the subcontractors be determined at the time of bidding, although in 1955 it relaxed the statute from a command to permission.

“ . . . Competitive bidding among them after the contract has been awarded tends to benefit the contractor, not the public.”

In the instant case, the time of commitment for Hoffman was on February 3, 1972, upon the submission of its list of all the subcontractors it desired to be approved pursuant to sec. 16.855 (13) (b), Stats. Any change in that list would have to have been made pursuant to sec. 16.855 (13) (c), Stats. However, since no such change in that list was ever sought, sec. 16.855 (13) (c), Stats., is not applicable here.

Finally, some concern has been expressed that sec. 16.855 (1), Stats., is being ignored. That section provides:

“(1) The department shall let by contract to the lowest qualified responsible bidder all construction work when the estimated construction cost of the project exceeds \$15,000. In the absence of compelling reasons to the contrary, preference shall be given to Wisconsin-based firms.”

It must be noted that the department is contracting with Hoffman and not with Hoffman's subcontractor, and the applicability of that statute is highly questionable under these circumstances, even if we were to assume that Milwaukee Equipment has a greater nexus with the state of Wisconsin.

All subcontractors, including Valley School Supplies, Inc., were approved by the department on March 24, 1972, and it is my understanding that Valley School Supplies, Inc., has already performed certain services for Hoffman. There is no legal basis for requiring Hoffman to use Milwaukee Equipment instead of Valley School Supplies, Inc.

RWW:APH

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*County Parks—Delegation of Powers*—A city may not delegate its powers under sec. 27.08 and 27.09, Stats., to a county park commission created under sec. 27.02, et seq., Stats.

May 3, 1972.

PAUL W. LAWENT, *Corporation Counsel*  
*Marathon County*

You advise that Marathon County intends to create a county park commission, pursuant to the provisions of sec. 27.02, Stats. You request my opinion as to whether the city of Wausau, population approximately 32,000, may delegate its powers under the provisions of secs. 27.08 and 27.09, Stats., to such a county park commission.

In my opinion, the city of Wausau lacks authority to delegate powers under secs. 27.08 and 27.09, Stats., to a county park commission created for Marathon County under sec. 27.02, Stats.

Section 27.02 (1), Stats., authorizes the county board of any county having a population of less than 500,000 to provide for a county park commission by resolution, subject to secs. 27.02 to 27.06, Stats. The latter statutes provide for the organization of such a commission, authorize a preliminary survey of the need for parks and parkways, set forth the powers of such commission and make provision for an annual county mill-tax levy to be used exclusively under the direction of the county park commission to assist in carrying on its work.

The framework within which cities may operate their park systems is set forth in sec. 27.08, Stats., in terms which differ somewhat with those set forth for county park commissions in sec. 27.02, *et seq.*, Stats. Under the provisions of sec. 27.08, Stats., cities may place their park systems under the supervision and control of a city park board or the city's Board of Public Works, or the common council may retain control of the park system in its hands. One additional possible variation would exist, of course, in the event of a city operating under the city manager plan. Section 27.09, Stats., authorizes the body in control of the city's park system to employ a city forester, and the statute establishes a procedure whereby such body may engage in a program for the planting and removal of trees and shrubs on a special assessment basis.

Regardless of the manner in which the city park system is presently being operated, it is my opinion that the city council of the city of Wausau does not possess the authority to delegate its powers under secs. 27.08 and 27.09, Stats., to a Marathon County Park Commission established by your county board.

Counties are quasi-municipal corporations and have only such powers as are expressly conferred by statute or are necessarily implied therefrom. *Columbia County v. Wisconsin Retirement Fund* (1962), 17 Wis. 2d 310, 116 N.W. 2d 142; *Maier v. Racine County* (1957), 1 Wis. 2d 384, 84 N.W. 2d 76; *Spaulding v. Wood County* (1935), 218 Wis. 224, 160 N.W. 473. I find nothing in secs. 27.02 *et seq.*, Stats., which would authorize a county to operate a city's park system under the provisions of secs. 27.08 and 27.09, Stats., or any other statute. At the same time, it is apparent that the city of Wausau lacks the authority to delegate the performance of its municipal powers under these statutes to another governmental entity.

It is the responsibility of the common council of a city, or such park authority as may be created by the common council of a city, to exercise discretion in the interest of its citizens and taxpayers in the operation, management and control of a city's park system under the provisions of sec. 27.08, Stats. Under the specific provisions of sec. 27.08 (2) (a), Stats., the city is empowered and directed:

"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."

Municipal corporations have no power to alienate, delegate or otherwise bargain away the police power which they are responsible for exercising in the interest of safeguarding the health, comfort and general welfare of their inhabitants. 6 McQuillin, *Mun. Corp.* (3d ed.), sec. 24.41, p. 558; *Milwaukee v. Milwaukee Amusement, Inc.* (1964), 22 Wis. 2d 240, 253, 125 N.W. 2d 625. As stated in the McQuillin text, just cited, at page 560:

"\* \* \* The welfare of the people is the supreme law, and the welfare of the people of a municipality is to be attained through measures adopted by their governmental representatives, exercising their own judgment and discretion, and not by others. \* \* \*"

Sections 27.08 and 27.09, Stats., anticipate that a city will "adopt rules and regulations" concerning the use and enjoyment of its park system. In doing so, the city not only exercises the specific statutory authorization set forth in these statutes, but also applies its home-rule powers under the provisions of Art. XI, sec. 3, Wis. Const., and sec. 66.01, Stats. In this sense, the city's power over its parks differs from that exercised by counties.

It is difficult to appreciate how your county could effectively exercise the powers of the city of Wausau under secs. 27.08 and 27.09, Stats., unless the city could surrender its authority under these statutes to the county. However, a municipality's legislative power cannot be delegated. 2 McQuillin, *Mun. Corp.* (3d ed.), sec. 10.40, p. 845. As the Wisconsin Supreme Court most recently indicated in *State ex rel. Zupancic v. Schimenz* (1970), 46 Wis. 2d 22, 28, 174 N.W. 2d 533, ". . . a municipality may not surrender its governmental powers and functions or thus inhibit the exercise of its police or legislative powers. . . ."

Finally, although sec. 66.30, Stats., provides authority to various municipalities to contract for the joint exercise of any "power or duty required or authorized by statute," the statute cannot be considered as a vehicle for shifting responsibility for the basic functions of government. 58 OAG 72, 77 (1969). Cooperative agreements between municipalities under sec. 66.30, Stats., are intended to assist in the implementation of such local governmental powers and duties, not as a substitute for them. Furthermore, there are differences between the operation of county and city park systems under the above statutes which probably would not exist if municipalities of the same kind, for instance two cities, were to attempt to join in the operation of their park systems. This becomes important since sec. 66.30, Stats., authorizes joint contracts only "wherever *each portion* of the project is *within the scope of the authority*" of the contracting parties. 48 OAG 231 (1959); 59 OAG 126, 134 (1970). There may be aspects of the operation of the Marathon County and city of Wausau park systems which could be more effectively implemented by cooperation under the provisions of sec. 66.30, but any such cooperation would, of necessity, fall far short of the delegation of power your question contemplates.

RWW:JCM

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*Board of Vocational, Technical and Adult Education—Districts*—Under the provisions of sec. 38.06, 1971 Stats., the Board of Vocational, Technical and Adult Education does not have power to create a new vocational, technical and adult educational district by merging one district, without its consent, with another district.

May 12, 1972.

TO THE HONORABLE, THE ASSEMBLY

Chapter 292, Laws of 1965, had as its purpose the establishment of a state-wide system of vocational, technical and adult education districts. The Coordinating Committee on Higher Education, in conjunction with the State Board of Vocational, Technical and Adult Education, was ordered to prepare a proposed master plan for vocational, technical and adult education districts. It was, further, provided in ch. 292 that by July 1, 1970, the state board was to act to include all areas of the state in such education districts. The method of creating new districts was set forth and at the present time all areas of the state are included in 17 vocational, technical and adult education districts, which were created and are entities. The phase of initial creation of the new districts has been completed.

On December 21, 1971, ch. 154, Laws of 1971, was published. This chapter repealed and recreated ch. 38, 1969 Stats., which had included the renumbered contents of ch. 292, Laws of 1965, and recodified the laws governing vocational, technical and adult education. The effective date of ch. 154, Laws of 1971, is July 1, 1972. Shortly after its publication, however, I received 1971 Assembly Resolution 46. This resolution requests my opinion on:

“\* \* \* whether the board of vocational, technical and adult education may create a new vocational, technical and adult education district by merging one district, without its consent, with another district, and in effect require the nonconsenting district to assume part of the outstanding indebtedness of the other district.”

Because of the above-described sequence of events, I presume that the inquiry is directed to the power of the board after the effective date of ch. 154, Laws of 1971.

There is no doubt that the legislature can create school districts, dissolve them, abolish them, merge them and alter their boundaries. In general, see 78 C.J.S., *Schools and School Districts*, sec. 27; 47 Am. Juris., *Schools*, secs. 7, 8 and 18; 16 McQuillin, *Mun. Corp.* (3d ed. rev'd.), sec. 46.02. There is also no doubt that the legislature can delegate authority to do so to a state board, such as the Board of Vocational, Technical and Adult Education. *West Milwaukee v. Area Bd. Vocational, T. & A. Ed.* (1971), 51 Wis. 2d 356, 187 N.W. 2d 387; *School Dist. v. Callahan* (1941), 237 Wis. 560, 297 N.W. 407; *State ex rel. Horton v. Brechler* (1925), 185 Wis. 599, 202 N.W. 144. See also, *Egan v. Wisconsin State Board of Vocational, T. and A. Ed.* (E.D. Wis. 1971), 332 F. Supp. 964.

To answer the question posed, however, one must look at ch. 154, Laws of 1971, to determine whether the legislature, which can do so, has delegated to the Board of Vocational, Technical and Adult Education the power to create a new district by "merging one district, without its consent, with another district." If the board has that power, the consequence of merger would be that the "nonconsenting district" would "assume part of the outstanding indebtedness of the other district." On the subject of adjustment of assets and liabilities, see sec. 38.20, 1971 Stats.

The only portion ch. 154, Laws of 1971, which is germane to the question asked of me is section 14, which creates sec. 38.06, 1971 Stats. It provides, in part, that:

**"38.06 DISTRICT BOUNDARIES; ALTERATION OF BOUNDARIES.** (1) Each district shall include one or more counties, municipalities or school districts in any contiguous combination.

"(2) (a) *Upon order of the board, the boundaries of a district may be altered.* Changes in boundary lines shall take effect on the July 1 next succeeding the date of such approval.

“(b) The governing body of a county, municipality or school district may file a petition with the board 1) requesting that its territory be detached from the district in which it lies and attached to a district to which such territory is contiguous, or 2) if portions of its territory lie in more than one district, requesting that all such portions be placed within one of such districts. Immediately upon receipt of the petition, the board shall notify each district board affected of the receipt of the petition and the boundary alterations requested therein. Such district boards shall forthwith notify the board of their recommendations on the petition. Within 90 days of the receipt of the petition, the board shall notify the governing body filing the petition and the district boards affected of its approval or disapproval of the proposed detachment and attachment of the territory. In making its determination under this paragraph, the board shall consider the master plan for vocational, technical and adult education districts prepared by the board and the coordinating council for higher education under s. 41.155 (1), 1967 stats.”

(Emphasis supplied.)

If the board has power itself, without the mere cumulative effect of the petitioning process set forth in sec. 38.06 (2) (b), Stats., quoted above, to merge one district with another, it must be based upon the power granted to it in the underlined portion of sec. 38.06 (2) (a), Stats., to alter boundaries of districts. The question, then, becomes whether the power to alter boundaries of districts includes the power to merge districts. I do not believe that it does.

In the construction of Wisconsin Statutes all words, with certain inapplicable exceptions, are to be construed according to common and approved usage. Sec. 990.01 (1), Stats. The basic word “alter” is defined in *Webster's Third International Dictionary* as:

“\* \* \* to cause to become different in some particular characteristic (as measure, dimension, course, arrangement, or inclination) without changing into something else \* \* \*.”

*Black's Law Dictionary* (4th Ed.) defines “alter” as:

“To make a change in; to modify; to vary in some degree; to change some of the elements or ingredients or details *without substituting an entirely new thing or destroying the identity of the thing affected*. *Davis v. Campbell*, 93 Iowa, 524, 61 N.W. 1053. To change partially. *Cross v. Nee*, D.C. Mo., 18 F. Supp. 589, 594. To change in one or more respects, *but without destruction of existence or identity of the thing changed*; to increase or diminish. *Kraus v. Kraus*, 301 Ill. App. 606, 22 N.E. 2d 862. See Alteration; Change.” (Emphasis supplied.)

The Wisconsin Supreme Court has also defined the word “alter.” In *Black River Imp. Co. v. Holway* (1894), 87 Wis. 584, 590, it wrote:

“\* \* \* To alter is to make different, without destroying identity; to vary, without entire change.\* \* \*”

These definitions of “alter” are consistent with the many definitions found in 3 Words and Phrases, “Alter; Alteration.” In *Petition for Division Into Wards, Etc.* (1957), 388 Pa. 539, 130 A. 2d 695, it was held that the power, among others, “to alter lines or boundaries” of wards in a township did not include the power to abolish or consolidate wards. Similarly here, the power in the board to alter boundary lines of districts does not include the power to merge districts, since merger is a destruction of the identity of the involved existing districts and the creation of a new one. It is an “entire change” and not just an alteration of boundaries between two districts which continue to exist.

It is, therefore, my opinion that, although the legislature could have granted the Board of Vocational, Technical and Adult Education the power to merge a district, without its consent, with another district, it has not done so. It granted the board the power to alter boundaries of districts, but that power does not include the power to create a new district “by merging one district, without its consent, with another district.”

RWW:BRB

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*Social Security Tax—State Employees*—Department of Health and Social Services has authority to collect social security deductions which were not previously made.

May 12, 1972.

WILBUR J. SCHMIDT, *Secretary*

*Department of Health and Social Services*

You request my opinion as to whether the Department of Health and Social Services has the legal authority to collect social security tax deductions in situations where such deductions were not made at the time the employes were paid. You also ask whether there is any time limit after which you cannot collect such amounts, even though legally assessed by the Social Security Administration within the applicable federal statute of limitations.

It is my opinion that your department has both the authority and duty to collect the employe's portion of the social security tax in the situation referred to above. Section 40.42, Stats., provides the authority to your agency to withhold from each employe's compensation that amount required under federal regulations. Such section further provides that the state is liable for all such deductions regardless of whether or not they are made at the required time. The material portions of sec. 40.42, Stats., read:

"40.42 Financial participation. (1) Each public agency included under an agreement made pursuant to this subchapter shall be liable for and shall make the contributions required of an employer under federal regulations.

"(2) Each public agency included under such an agreement shall withhold from the persons compensated by such public agency who are covered by such agreement the portion of such compensation required to be withheld under the federal regulations.

"(3) The contributions required under sub. (1) and the amounts withheld under sub. (2) shall be remitted by each public agency in conformity with rules promulgated under s. 40.43. The state shall be liable for all such remittances due from public

agencies in conformity with the agreement under s. 40.41 (9), and shall make payment of all sums which are due under this subsection and become delinquent.”

Coverage of state and local governments is voluntary under federal law and is accomplished only by agreement between the state and the U. S. Secretary of Health, Education and Welfare. By such agreement, the state contracts to buy social security protection for employes that it brings under the agreement. The state itself is required by federal law and the federal-state agreement to assume the full financial responsibility for the cost of providing the coverage. See 42 U.S.C., sec. 418. Employer and employe contributions under the federal-state contract are the same as though the employes were mandatorily covered under the Federal Insurance Contributions Act.

It is clear from subsec. (1) of sec. 40.42, Stats., quoted above, that a “public agency” is intended to be liable and responsible only for “employer” contributions, notwithstanding the requirement of the federal-state agreement that the state must pay the required amounts when due and later collect from public agencies. See sec. 40.42 (4), Stats. I am aware of no provision of the federal code or state statutes which precludes you from collecting the “employe” contributions which were not deducted due to a mistake of law. Your department is, therefore, obligated to recover the amounts not so deducted.

In answer to your second question, the time limit after which you cannot collect from the subject recipients is controlled by sec. 893.18 (6), Stats. Such section limits an action in favor of the state to the period of ten years after the cause of action has accrued. The cause of action accrued on the date that the Public Employees Social Security Fund Bureau paid the amount that should have been deducted from the paycheck of the employe.

RWW:WMS

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*Professional Solicitors—Transfer of Registration*—Department of Regulation and Licensing does not have the authority to transfer registrations under sec. 440.41 (7), Stats.

May 12, 1972.

GEORGE GREELEY, *Secretary**Department of Regulation & Licensing*

You ask my opinion whether your department has the authority under sec. 440.41 (7), Stats., to transfer the registration of professional solicitors in the same manner that it transfers peddlers' licenses under sec. 440.84 (1), Stats. For the reasons hereinafter set forth, it is my opinion that your department does not have such authority.

Section 440.41 (7), Stats., provides as follows:

**“(7) PROFESSIONAL SOLICITOR; REGISTRATION REQUIRED.** Every professional solicitor employed or retained by a professional fund raiser required to register pursuant to this subsection shall, before accepting employment by such professional fund raiser, register with the department. Application for such registration shall be in writing, under oath, in the form prescribed by the department, and shall be accompanied by a fee of \$10. Such registration when effected shall be for a period of one year, or a part thereof, expiring on August 31, and may be renewed upon payment of the fee prescribed by the subsection, for additional one-year periods.”

Section 440.84 (1), Stats., provides as follows:

“Issue of license; tags. (1) Upon the filing of a license application and the payment of the fee the department shall issue to the applicant a license for a period of one year, from the date of the issuance thereof which license shall specify what the licensee may do and how he shall operate thereunder, and such license shall not be assignable or transferable, except on written approval of the department.”

The legislature clearly gave your department the authority to transfer peddlers' licenses by the specific language used in sec. 440.84 (1), Stats. However, sec. 440.41 (7), Stats., is silent regarding the question of transfer of registration of professional solicitors. Thus, you seek to determine the intent of the legislature regarding this issue.

But the law is clear that, where a statute is plain and unambiguous, interpretation is unnecessary, and intentions cannot be imputed to the legislature except those to be gathered from the terms of the law. *State ex rel. Badtke v. School Board* (1957), 1 Wis. 2d 208, 213, 83 N.W. 2d 724. An ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses. *Kindy v. Hayes* (1969), 44 Wis. 2d 301, 308, 171 N.W. 2d 324. Using this rationale, I am forced to conclude that sec. 440.41 (7), Stats., is unambiguous. In the absence of ambiguity, the meaning of a statute is to be read from the language used and there can be no reference to matters outside of the language of the statute. *State v. Caruso* (1969), 44 Wis. 2d 696, 699-700, 172 N.W. 2d 195.

The language of sec. 440.41 (7), Stats., does not provide for the transfer of the registration of professional solicitors. Your department cannot, under the guise of liberal construction, supply something that is not provided in the statute. *In re Application of Duveneck* (1961), 13 Wis. 2d 88, 92, 108 N.W. 2d 113.

You refer to the fact that sec. 440.41 (7), Stats., could cause considerable hardship for professional fund raisers because of the expense involved in registering their employes as professional solicitors. While we can all sympathize with the plight of these people, we still have no power to disregard the plain mandate of a valid statute merely because in some cases it may work a hardship. *Rowell v. Barber* (1910), 142 Wis. 304, 319, 125 N.W. 937. There is a policy argument which must be addressed to the legislature in asking an amendment to the statute.

Therefore, it is my opinion that the Department of Regulation and Licensing does not have the authority under the present sec. 440.41 (7), Stats., to transfer the registration of professional solicitors.

RWW:SS

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*Transportation Of Students—Public Instruction—Transportation must be on a reasonably uniform basis to all children attending either public or private schools.*

Children attending private schools must reside in attendance areas pursuant to sec. 121.54 (2) (c), Stats., in order to be entitled to transportation because of unusual hazards under sec. 121.54 (9), Stats. Private school pupils eligible for transportation must be transported on days the public schools are closed.

May 17, 1972.

WILLIAM C. KAHL, *State Superintendent*  
*Department of Public Instruction*

In your letter of November 10, 1971, you have asked three questions concerning the statute dealing with the transportation of students attending private and public schools. The following Wisconsin Statutes are relevant to your questions:

Section 121.51 (4):

“ ‘Attendance area’ is the geographic area designated by the governing body of a private school as the area from which its pupils attend and approved by the school board of the district in which the private school is located. If the private school and the school board cannot agree on the attendance area, the state superintendent shall, upon the request of the private school and the board, make a final determination of the attendance area. The attendance areas of private schools affiliated with the same religious denomination shall not overlap.”

Section 121.54 (1):

“CITY OPTION. Subsections (2) and (6) and s. 121.57 do not apply to pupils who reside in cities unless the school they attend is located outside the city but within the boundaries of the school district. Where an annual or special meeting of a common school district or a union high school district, or the school board of a city school district or unified school district determines to provide transportation for such pupils, state aid shall be paid in accordance with s. 121.58 and there shall be reasonable uniformity in the transportation furnished such pupils whether they attend public or private schools.”

Section 121.54 (2) (c):

“An annual or special meeting of a common school district or union high school district, or the school board of a city school district or unified school district may determine to provide transportation for all or part of the pupils who reside in the school district to and from the nearest public school they are entitled to attend or the private school within or without the school district within whose attendance area they reside, but if transportation is provided for less than all such pupils there shall be reasonable uniformity in the minimum distance that pupils attending public and private schools will be transported. This paragraph does not permit the annual or special meeting or school board in a district operating only elementary grades to provide for the transportation of pupils attending private schools.”

Section 121.54 (9):

“TRANSPORTATION IN AREAS OF UNUSUAL HAZARDS. In school districts in which unusual hazards exist in walking to and from school for pupils who reside less than 2 miles from the school where they are enrolled, the school board may develop a plan which shall show by map and explanation the nature of the unusual hazards to pupil travel and propose a plan of transportation which will provide proper safeguards for the school attendance of such pupils. . . .”

And, Art. I, sec. 23, Wis. Const.:

“Transportation Of School Children. SECTION 23. Nothing in this constitution shall prohibit the legislature from providing for the safety and welfare of children by providing for the transportation of children to and from any parochial or private school or institution of learning.”

In your first question, you ask whether private school pupils who live in an area recognized as unusually hazardous for purposes of transportation have to live in the private school attendance area to be eligible for transportation to that school. You note a specific example in the Racine unified district. The answer to your question is “yes.”

In commenting on sec. 121.54 (1), Stats., the court in *State ex rel. Vanko v. Kahl* (1971), 52 Wis. 2d 206, 217, 188 N.W. 2d 460, stated:

“ . . . We do note the statutory guideline that ‘there shall be reasonable uniformity in the transportation furnished . . . pupils whether they attend public or private schools.’ (Sec. 121.54 (1), Stats.) With this legislatively established lighthouse to mark the shores, the school district, the private school administrations, and the state superintendent should be able to steer without running aground on statutory or constitutional reefs.”

In *Cartwright v. Sharpe* (1968), 40 Wis. 2d 494, 505, 506, 162 N.W. 2d 5, the court stated:

“ . . . where transportation is furnished, either mandatory or permissive, it must be on a reasonably uniform basis to children attending either public or private schools.”

“ . . . What the constitutional amendment and the enabling legislation accomplished was to provide that the same consideration of safety and welfare should apply to public and private students alike.”

Under the existing law, a school district is not required to transport children attending a private school which has no attendance area. It is an elementary principle of statutory construction that statutes should be interpreted as a whole and effect given to each part in a consistent manner.

Without dwelling on the legislative history, it is suffice to say that sec. 121.54 (2) (b) and (c), Stats., provides the only statutory method by which children attending private schools may be transported. The only exception is found in sec. 121.54 (3), Stats., where a provision is made for the transportation of all handicapped children to either a public school, private school or other facility. In amending sec. 121.54, Stats., as it did, the legislature sought to provide transportation to private and public school students on an equal basis and in a uniform manner.

To require that transportation be furnished to children who are not in an attendance area, but because of choice, attend a school which requires them to travel a “hazardous area” would be making an additional classification of students to be transported, one not contemplated by the legislature.

In your second question, you ask whether private school pupils living in the areas of unusual hazard in which the school board is providing transportation within the school district may expect transportation to a private school outside the district, and less than two miles from their home. This question presents a rather unusual situation. However, if the student does not under these circumstances reside in an attendance area, he is not entitled to transportation even though a determination may have been made by the public school in the district in which the private school of attendance is located that a hazardous area does exist. Under these circumstances, the determination of an attendance area would, under existing statutes, have to be made by a school board and a private school not within the district in which the student resides. You have indicated that there is, under these circumstances, some difficulty in private school and public school officials arriving at an agreed attendance area and that the school boards in some instances are content to let the matter rest without agreeing to request the state superintendent to make the final determination as provided by sec. 121.51 (4), Stats.

Of course, under these circumstances, if the student does reside in a properly constituted attendance area, and a hazardous area as determined by the school district of attendance exists in walking to and from the school in which they are enrolled, such students are entitled to transportation pursuant to sec. 121.54 (9), Stats.

Therefore, the answer to your question depends on the detailed facts of each case which, in this instance, have not been supplied.

In addition, it is obvious that as the present statutes exist, considerable cooperation is called for by various school authorities, both public and private, for the implementation of the legislative intent that transportation be provided on an equal and uniform basis to all children whether they attend public or private schools.

In your third and last question, you ask whether public schools are required to provide transportation for eligible private school pupils on days the public schools are not in session. The answer to this question is "yes." To do otherwise would constitute an inconsistent and non-uniform application of the law.

RWW:JWC

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*Voter Registration—Age Of Majority Law*—Chapter 213, Laws of 1971, which reduces age of majority in Wisconsin, and the Twenty-Sixth Amendment to the United States Constitution, which reduces the minimum voting age from 21 to 18 years of age, discussed in reference to the determination of residence for voting purposes of students living away from their parents' home.

May 24, 1972.

ROBERT C. ZIMMERMAN, *Secretary of State*

You have requested my advice concerning the current voter registration guidelines which should be followed in the registration of students, who are living away from their parents' home while attending school, particularly in light of the adoption of the Twenty-Sixth Amendment to the United States Constitution, which reduces the minimum voting age for all elections in our state from 21 to 18 years of age.

You point out that, prior to the extension of franchise to persons 18 to 20 years of age, your office was advised by my predecessor, by informal opinion, dated October 25, 1968, that students of voting age may register and vote at their place of residence while attending school, regardless of whether they receive some financial support from their parents or return to their parents' home during the vacation periods. In my opinion, such advice remains applicable today. However, I would disagree with my predecessor regarding some of the advice given in that opinion as to what procedures the statutes provide for registration. Since it is obvious that a good deal of confusion still exists among election officials in reference to student voting, and, since recent legislative enactments and judicial interpretations have introduced additional aspects to the question, I provide the following discussion.

A basic voter qualification requirement is, of course, that the voter registrant be a bona fide resident of the state and the election district where he proposes to vote. Article III, sec. 1, Wis. Const., provides, in part, that a qualified elector is one who "shall

have resided" in the state and the election district where he offers to vote. Section 6.02, Stats., which further implements this provision of our Constitution, provides, in part, as follows:

"(1) Every United States citizen age 21 or older who has resided in this state for 6 months preceding any election and who has resided in an election district or precinct for 10 days before any election where he offers to vote is an eligible elector."

By virtue of the Twenty-Sixth Amendment, "21" in sec. 6.02, Stats., must be read as "18." It is also appropriate for me to point out here that by virtue of the United States Supreme Court decision in *Dunn v. Blumstein* (1972), 40 Law Week 4269, 405 U.S. 330, 92 S.Ct. 995, 31 L.ed. 2d 274, decided March 21, 1972, I must also conclude that the six-month state durational residency requirement set forth in sec. 6.02 would not withstand constitutional attack under the equal protection clause of the Fourteenth Amendment to the United States Constitution. Therefore, this requirement may no longer be considered as effective under the Wisconsin Constitution and statutes and should be ignored when reading any of the Wisconsin voting laws containing such provision. In my opinion, however, Wisconsin's ten-day durational residency requirement set forth in Art. III, sec. 1, Wis. Const., and sec. 6.02, Stats., remains valid in reference to all elections except presidential and vice-presidential election.\*

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\*The lengthy opinion in *Dunn v. Blumstein, supra*, appears as much directed to durational residence laws in general as to the specific voting laws under consideration and repeatedly emphasizes one dominant theme, most succinctly stated at 92 S.Ct., p. 1033, as follows:

"In sum, durational residence laws must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are 'necessary to promote a compelling government interest.' *Shapiro v. Thompson, supra*, 394 U.S., at 634, 89 S.Ct., at 1331 (emphasis added); *Kramer v. Union Free School District, No. 15, supra*, 395 U.S., at 627, 89 S.Ct., at 1889.\*\*\*"

The court has thus resolved what rule of law is to guide the courts on a question which had previously almost evenly divided the lower federal courts. Applying this standard to the case at hand, the court concluded that the state of Tennessee, which required that persons must have been residents in the state for a year and in the county for three months before they could vote, had not offered an adequate justification for its durational residence laws. (See also *Affeldt v. Whitcomb* (1970), 319 F.Supp. 69 (D.C.N.D. Ind.), which struck down Indiana's six-month durational residence requirement for voting. This decision was affirmed by the United States Supreme Court on April 3, 1972, 31 L.ed. 2d 576.)

The deletion of the six-month durational residency requirement does not affect the requirement that only bona fide residents may vote in Wisconsin. As pointed out by the court in the *Dunn* case, *supra*, at 92 S.Ct., pp. 1003-1004:

“ . . . We emphasize again the difference between bona fide residence requirements and durational residence requirements. We have in the past noted approvingly that the States have the power to require that voters be bona fide residents of the relevant political subdivision. [Cases cited.] An appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional scrutiny. . . .”

The following provisions of sec. 6.10, Stats., which statute sets forth guides and standards governing residence as a qualification for voting, appear to relate to your question:

“(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.

“ . . .

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Prior to this decision, by sec. 202 of the 1970 Federal Voting Rights Act, Congress had already abolished all durational residence requirements in reference to presidential and vice-presidential elections. 42 U.S.C. sec. 1973aa-1. In light of the foregoing, the Wisconsin six-month durational residency requirement is most assuredly invalid as to all other federal, state and local elections. In my opinion, however, the same is not true of our ten-day durational residency requirement.

Though characterized as a “stringent standard,” the court recognized that however mathematically precise the equal protection test may sound, it deals in matters of degree. Thus, at 92 S.Ct., p. 1006, the court states:

“...It is sufficient to note here than 30 days appears to be an ample period of time for the State to complete whatever administrative tasks are necessary to prevent fraud--and a year, or three months, too much...”

The court draws support for the appropriateness of a 30-day period from the fact that both the Federal Voting Rights Act of 1970 and the laws of the state of Tennessee reflect 30 days as an appropriate cutoff point after which unregistered electors may be denied the franchise, *absolutely*. Obviously, such provisions of the law impose durational residency requirements more stringent than the ten-day durational residency requirement set forth in Art. III, sec. 1, Wis. Const., and sec 6.02, Stats.

Considering the *Dunn* case, *supra*, as a whole, it is my opinion that it does not affect the continued validity of that provision of Wisconsin election law which requires that a bona fide resident of Wisconsin must reside in the election district or precinct for ten days before any election where he offers to vote.

“(4) . . . An unmarried person in a transient vocation, a teacher or a student who boards at different places for part of the week, month or year, *has his residence*, if one of the places is with his parents, *at the place of his parents unless through registration or similar act he elects to establish a residence elsewhere*. If he has no parents and if he has not registered elsewhere, his residence shall be at the place which he considered his residence in preference to any other for at least 10 days before an election. If this place is within the municipality, he is entitled to all the privileges and subject to all the duties of other citizens having their residence there, including voting.

“ . . .

“(11) Neither an intent to acquire a new residence without removal, nor a removal without intent, shall affect residence.” (Emphasis added.)

In Wisconsin, the term “residence,” as used  
in reference to voter eligibility, means domicile.

Our court has considered the meaning of the term “residence” on a number of occasions, and in various context. One of the earliest decisions, *Hall v. Hall* (1870), 25 Wis. 600, 39 N.W. 658, considered the term “shall have resided in this state” as used in the divorce statute. In concluding that the words “residence” and “domicile” were interchangeable terms, the court placed significant reliance on earlier case law, stating, at page 608, of the opinion:

“. . . In *Cranford v. Wilson*, 4 Barb. S.C. 504, is a very full and instructive discussion of the question of residence and domicil, and of what facts go to constitute them. That was an action for slander, which, in its consideration, involved the question whether a party had the right to vote at a school district meeting. Mr. Justice Paige, in his opinion, cites a great number of authorities, giving definitions of the terms ‘residence,’ ‘inhabitation’ and ‘domicil,’ and deduces the proposition that the terms ‘legal residence,’ or ‘inhabitancy,’ and ‘domicil,’ mean the same thing. ‘By legal residence,’ he says, ‘I mean the place of a man’s fixed habitation, where his political rights, such as the right of the elective franchise, are to be exercised, and where he is liable to

taxation. A person leaving such place of fixed habitation or abode temporarily, as for a particular purpose, either for business, pleasure or health, with the intent of returning to the same as soon as such purpose is accomplished, does not lose his residence or habitancy in such place of abode.' P. 522."

"Residence" has been held to mean "domicile," for the purposes of taxation, *Kellogg v. The Supervisors of Winnebago County* (1877), 42 Wis. 97, 107, 46 N.W. 254, and residence for tax situs of income and for voting purposes is generally the same. 32 OAG 92 (1943). A durational residency requirement used as a qualification for holding city office has been held to refer to domicile, *Kempster v. The City of Milwaukee* (1897), 97 Wis. 343, 347-348, 72 N.W. 743, and "residence" as used in poor relief statutes has been held to be the equivalent of the term "domicile" as generally used. *Marathon County v. Milwaukee County* (1956), 273 Wis. 541, 79 N.W. 2d 233; *Carlton v. State Department of Public Welfare* (1956), 271 Wis. 465, 468, 74 N.W. 2d 340.

Over 70 years ago, in the earliest published opinions of this office, the Attorney General considered the provisions of Art. III, sec. 1, Wis. Const., as well as earlier versions of the above-quoted provisions of secs. 6.02 (1) and 6.10 (1), Stats., in determining what constitutes "residence" for voting purposes. 1902 OAG 78. At page 80, of said opinion, the following is stated:

"Basing my conclusion upon these provisions of our State Constitution, our State Statutes and the decision of our Supreme Court [*Kempster* case, *supra*], I hold that 'residence' is used in the broad sense of domicile.

"The particular facts surrounding each case must be investigated to find out what the intention of the party is, *irrespective of his employment.*" (Emphasis added.)

In light of the foregoing, there appears to be little doubt in Wisconsin that the term "residence," as used in reference to our voting laws, means domicile. All potential electors should have a basic understanding of the character and requisites of voting residence and domicile, whether or not they are minors and whether or not they are students, since it should be evident from

the foregoing that a determination to establish such residence and domicile may involve considerations other than those immediately relating to the excise of the franchise.

A person's domicile is determined by a combination  
of two elements, intent and physical presence.

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*, sec. 66, p. 759. However, considering the great influx of new voters, who will now be registering and voting as a result of the Twenty-Sixth Amendment, reference to prior statements of our Supreme Court on the nature of domicile appears appropriate.

The definition of the word "residence" by our court in the *Kempster* case, *supra*, is still probably one of our better general statements of the law of domicile. At page 347, the court says:

" . . . In one sense a person may have more than one place of residence, but he can only have one which has the element of permanency essential in a legal sense to his domicile. He can have only one domicile at one time. To constitute that there must be an actual location, with the intent to make such place his home indefinitely. To establish the domicile does not require any considerable length of time. Residence at a place for any length of time, however short, with the concurring intention of permanently residing at such place, renders such place, in a legal sense, the person's domicile, and, being once fixed, it will continue till abandoned, without reference to any mere absence for a temporary purpose, with the fixed intention of returning when such purpose shall be accomplished. [Citations.]"

Two well-recognized and often repeated principles of the law of domicile, recognized in *Eau Claire County v. Milwaukee County* (1964), 24 Wis. 2d 292, 296, 128 N.W. 2d 666, state:

" . . . though both personal presence and intention are required to establish a domicile, a temporary absence with intent to return does not affect a change of domicile. [Citations.]

“ . . . a domicile once established continues until it is superseded by a new domicile. [Citations] . . . ”

See also sec. 6.10 (1) and (11), Stats., *supra*.

While it is true that permanency is an element of domicile, the term must be understood in the context of today's highly mobile society. As indicated in *Marathon County, supra*, at page 548:

“ . . . Establishment of a residence, while involving intent to make a home for an indefinite period, does not require either intent or ability to remain in the new residence for the rest of one's life or indeed for any particular length of time. Probably everyone, in establishing a residence, contemplates that in the future it may be necessary or desirable to abandon it and move elsewhere. . . . ”

See also, *State ex rel. Ferebee v. Dillett* (1942), 240 Wis. 465, 3 N.W. 2d 699; *Frame and others v. Thormann* (1899), 102 Wis. 653, 79 N.W. 39.

Finally, regardless of the reason or purpose which motivates a person to change his domicile, the purported change may not be fictitious, and, whether he changes it or not, depends on whether there is an actual change of residence with a bona fide intention of acquiring such new domicile. *Baker v. Department of Taxation* (1945), 246 Wis. 611, 616-617, 18 N.W. 2d 331; *Will of Heymann* (1926), 190 Wis. 97, 99-100, 104, 208 N.W. 913. Although there may be a specific reason why a person desires to change his legal residence, it is essential that he intend in good faith to make the new place his home for all purposes. 25 Am. Jur. 2d, *Elections*, sec. 67, page 760.

Citizens 18 years of age and older may  
establish a domicile for voting purposes.

Ordinarily, the residence of a minor follows that of his parents, unless he sooner becomes emancipated. *Carlton v. State Department of Public Welfare, supra*; *Kidd v. Joint School District* (1927), 194 Wis. 353, 356, 216 N.W. 499; 4 OAG 929 (1915); 54 OAG 27 (1965); 54 OAG 68, 69. Therefore, since the minimum age for voting in our state has been the age of majority, the domicile of a minor, for the purpose of establishing voting

situs, was that of the minor's parents until he became of age, at which time he was free to retain or abandon such domicile and residence, and the voting privileges based thereon. 28 OAG 208 (1939).

There is no hard-and-fast rule to determine emancipation, and much depends upon the intent and the circumstances of the emancipation. *Niesen v. Niesen* (1968), 38 Wis. 2d 599, 603, 157 N.W. 2d 660. However, "Emancipation may be partial or total and limited to certain purposes." *Niesen case, supra*, page 602. See also *Wadon v. United Nat. Indemnity Co.* (1957), 274 Wis. 383, 389, 80 N.W. 2d 262.

With the advent of the Twenty-Sixth Amendment, it appears evident that persons 18 years of age had become at least partially emancipated, i.e., at least for all purposes reasonably related to the exercise of the franchise. Subsequently, the age of majority in Wisconsin was lowered from 21 years of age to 18 years, by ch. 213, Laws of 1971, effective March 23, 1972. This means that citizens 18 years of age and older no longer are minors. They are free to establish a domicile for voting purposes in the same manner and to the same extent as any other adult.

Student status itself is not a proper consideration in determining domicile for the purpose of establishing voter eligibility.

As pointed out by the 1902 opinion of our office and in *Jolicoeur v. Mihaly* (1971), 96 Cal. Rptr. 697, 488 P. 2d 1, 8, "Student status is therefore a neutral fact in determining residence for voting purposes." The basic question in determining voter eligibility in Wisconsin is the residence or domicile of the registrant, and not his occupational or student status. It should also be noted that when sec. 6.16 (2), 1963 Stats., which set forth the form of the registration affidavit, was repealed and recreated by ch. 666, Laws of 1965, the place to show the occupation of the registrant was deleted.

The present expansion of the franchise has apparently resulted in fear on the part of some persons that students will not exercise their franchise in a responsible manner or that large student populations in small college communities will overwhelm the balance of the voters by force of number. Similar expressions of

concern have accompanied most expansions of the electorate in the past, but they normally have proved to be unjustified and exaggerated. In any event, it is clear that otherwise qualified electors may not be denied their right to vote, students or not, simply because of the manner in which they might vote. As recently stated in *Wilkins v. Bentley* (1971), 385 Mich. 670, 189 N.W. 2d 423, at page 433:

“We agree that it is no longer constitutionally permissible to exclude students from the franchise because of the fear of the way they may vote.

“ ‘ ‘Fencing out’ from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. “[T]he exercise of rights so vital to the maintenance of democratic institutions,” (*Schneider v. State of New Jersey*, 308 U.S. 147, 161, 60 S.Ct. 146, 84 L.Ed. 155) cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents.’ *Carrington v. Rash*, [1965], *supra*, 380 U.S. [89] at p. 94, 85 S.Ct. [775] at p. 779. [13 L.ed. 2d 675].”

I am aware that early decisions of our court considering the voting residence of students placed heavy reliance on parental support and periodic return to the parents’ home, even though the student had become of age. Thus, in one of four such cases considered by our court in 1916, *Seibold v. Wahl* (1916), 164 Wis. 82, 86, 159 N.W. 546, our court said:

“Much weight is to be laid upon the fact as to whether or not such student is what is commonly called ‘emancipated’ from his family so far as looking to them for a home or place to which it return or for means of support. [Citations]”

On the finding of these facts, the court concluded that the actions of the student were inconsistent with his declared intention to establish a bona fide residence where he was attending school. Over 50 years ago, such a conclusion undoubtedly reflected the social and human relationships of the time. As time has passed, however, the significance of such relationships has changed and they have come to play an increasingly less important role in determining residence, at least for voting purposes. For instance, sec. 6.10 (4), Stats., quoted

above, emphasizes the fact that a student or other person engaged in a transient vocation may establish a residence or domicile of choice at some place other than the place of his parents. Under that statute, even though he may spend part of his time at their home, registering to vote elsewhere disposes of the significance which might otherwise have been attached to that particular fact.

Residence or domicile does not depend on the character of a person's dwelling. He may establish his home at a boarding house, a hotel, an apartment, a mobile home or in a more conventional house. In the case of a student, financial or other considerations may cause him to choose a fraternity or sorority house or a dormitory over other alternatives. This fact, by itself, is not sufficient to justify a conclusion that the student does not intend to be a bona fide permanent resident of his college community.

On the other hand, this does not mean that students establish their residence for voting purposes in any different manner or pursuant to different criteria than the balance of the voting populace. Nor does student status create any special class of citizens whose bona fides cannot be challenged. The act of registration does not make a registrant, student or not, a bona fide resident of a community. The act of registration is only the registrant's affirmation that he has established a bona fide residence in the community.

Municipal clerks have responsibility for the integrity of registration and may make appropriate inquire, but may not discriminate against students by directing special questions to them concerning residents which are not asked of other registrants.

Questions continue to arise regarding the extent to which a voter registrant may be questioned by a municipal clerk concerning his past residences and his intent in reference to his present residence. The above-mentioned informal opinion of October 25, 1968, advised that the initial voter registration process is not to be considered as a substitute for the various other procedures available for questioning voter residency under the election laws. See secs. 6.48 (challenging registration), 6.50 (revision of registry), 6.92 (challenging the elector in person) or 6.93 (challenging the absent elector), Stats. Generally speaking, it

is usually unnecessary to engage in any lengthy questioning of the registrant's residence history, and the facts concerning residence which are supplied the clerk at the time of registration normally should not be questioned, unless the clerk has information or knowledge that those facts are false.

This is not to say that the registering clerk may not and should not make inquiry concerning residence beyond those specific facts which must appear on the face of the registration card. Every municipal clerk has charge and supervision of registration in his municipality, and he may take such action as may be necessary to properly conduct such registration. Secs. 7.15 (1) and 6.26, Stats. For instance, the clerk has a responsibility to ascertain whether a registrant has been previously registered in Wisconsin and, if so, where, so as to be able to cancel his voting privileges at his prior residence, as required under sec. 6.40, Stats. Likewise, the clerk should satisfy himself that the voter registrant appreciates the substance of the oath or affirmation regarding his residence, which he is required to take, as part of the registration process. However, municipal clerks may not discriminate against students or any other group of citizens by directing special questions to them which are not asked of all other registrants. As stated by the court in the *Jolicoeur* case, *supra*, at 488 P. 2d 12:

“. . . We do not imply that registrars may not question a citizen of any age as to his true domicile. . . . We hold only that registrars may not specially question the validity of an affiant's claim of domicile on account of his age or occupational status.”

For similar holdings, see *Anderson v. Brown* (1971), 332 F. Supp. 1195 (D.C.S.D. Ohio, W.D.); *Michael H. Kennedy, et al. v. Thomas Meskill, et al.* (D.C., Conn.), decided September 13, 1971; *Stephen Brooks Bright, et al. v. Charles E. Baesler, Jr.* (1971), 336 F.Supp. 527 (D.C.E.D., Ky). In the latter case, the court suggested the following questions might be appropriate for the purpose of establishing domicile at the time of registration:

“1) What is your present address?

“2) Do you regard any other place as your home?

“3) Do you intend to make Fayette County your place of residence for an indefinite or permanent period of time?

“4) Do you consider yourself to have permanently abandoned your former home or residence?

“5) Do you have no present intention to reside elsewhere or return to your former home or place of residence?”

I note that these questions reflect the same general standards governing residence as a qualification to vote as are set forth in sec. 6.10, Stats.

In conclusion, it is my opinion that initially by virtue of the Twenty-Sixth Amendment to the United States Constitution, and now also by virtue of ch. 213, Laws of 1971, citizens 18 years of age and older must be treated as adults for all purposes relating to voting, including establishing a residence or domicile. Student status is not a proper consideration in determining domicile for the purpose of establishing voter eligibility; however, students establish their residence for voting purposes in the same manner as the balance of the voting populace, and municipal clerks may make inquiry of voter registrants concerning their intent to establish a bona fide residence, as long as any such questions reasonably relate to domicile and each registrant is asked the same questions.

RWW:JCM

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*Deputy Sheriffs—Police Protection*—Neither sheriff nor his deputy can solicit or receive compensation not provided by law for official duties but deputy, while off duty, can be employed as a private security officer.

May 24, 1972.

ALLAN O. MAKI, *District Attorney*  
*St. Croix County*

You have requested my opinion relative the furnishing of police protection for bars and restaurants in your county.

You inquire as to potential liability the county may have to "private police" sent out by the sheriff, potential liability the county may have for injuries to third persons caused by such "private police," and whether the practice described below is authorized by law.

Your letter states:

"Under the present practice, bar owners and operators of all-night restaurants who foresee a problem with unruly crowds call the Sheriff's Department and request that a 'deputy' be sent out. One of the full-time deputies spends a substantial portion of his work week handling such requests and lining up persons to handle such duties.

"The County does not have a Civil Service System for its deputies. The County has enacted a Dance Hall Ordinance in accordance with state law and has a number of persons who act as dance hall inspectors. These men purchase their own badges and uniforms. Under the Dance Hall Ordinance the owner or operator of a licensed dance hall obtains a permit from the County Clerk to hold a dance and the County sends out an inspector. In practice, the same persons who have acted as dance inspectors are also sent to the bars and restaurants to act in the capacity of private police. The County pays the dance inspectors for each night they are on duty. However, the persons dispatched to the bars and restaurants are paid directly at the end of the evening by the proprietor. To my knowledge, social security and withholding tax are not being withheld or paid in properly from the money paid by the bar owner to the 'deputy'.

"I have had citizens complain to me and question the legality of this practice, which appears to the public to be one wherein the county is furnishing 'bouncers' to the taverns. I have also had a complaint from a private detective agency which complains that the County is unfairly competing with a private business by providing private police in this manner."

Specific answers cannot be given to each of your questions as there will always be a question in each case whether such individuals are acting in their private or official capacities.

As you point out, dance halls or places of amusement defined in sec. 59.07 (18) (b), Stats., are not involved, and although such individuals may at times act as dance hall inspectors, they are not so employed here.

Section 59.07 (18) (b), Stats., provides in part:

“\* \* \* Upon the passage of such an ordinance the board shall select a sufficient number of persons whose duty it shall be to supervise public dances according to assignments to be made by the board. Such persons while engaged in supervising public dances or places of amusement shall have the powers of deputy sheriffs, and shall make reports in writing of each dance visited to the clerk, and shall receive such compensation as the board determines. \* \* \*”

By reason of sec. 59.07 (18) (d), Stats., such county ordinances would not be effective in any city or village which by ordinance regulates and controls such places in any event.

Generally, a sheriff has a duty to keep the peace and enforce state law and county ordinances throughout the county regardless of municipal boundaries, and may take such means as he deems necessary to carry out those duties.

*Andreski v. Industrial Comm.* (1952), 261 Wis. 234, 52 N.W. 2d 135.

Article VI, sec. 4, Wis. Const., provides in part:

“\* \* \* the county shall never be made responsible for the acts of the sheriff. \* \* \*”

For many purposes a sheriff and his deputies are regarded as one officer, and the sheriff is held responsible for the acts of his deputies.

*Russell v. Lawton* (1861), 14 Wis. 219.

A county is no longer immune from tort liability. However, rescision of the former rule did not create any liability against the county for acts of the sheriff.

*Holytz v. Milwaukee* (1962), 17 Wis. 2d 26, 115 N.W. 2d 618.

A county is not liable for the acts of the undersheriff or deputies, at least where deputies are not under civil service. 45 OAG 152 (1956). Section 59.22 (1), Stats., makes the sheriff responsible for every default or misconduct in office of his undersheriff or deputies.

Under sec. 59.21 (2), Stats., a sheriff in noncivil-service counties can appoint as many deputies as he deems proper. However, under sec. 59.15 (2) (c), Stats., the board determines the number who shall be compensated on a salary basis by the county and the amount of compensation.

If no salary is provided by the county and no fee is established by law, a deputy cannot "in his official capacity" make a charge to private individuals for official services.

Section 946.12 (5), Stats., provides a penalty for a public officer or public employe who:

"(5) Under color of his office or employment, intentionally solicits or accepts for the performance of any service or duty anything of value which he knows is greater or less than is fixed by law."

With respect to your questions, and in light of the above, I summarize as follows:

1. A sheriff may assign a deputy to keep the peace at a given establishment. However, neither the sheriff nor the deputy can solicit compensation from such operator for the benefit of the deputy for any "on duty" services or services rendered in an official capacity.

2. An operator of a private establishment may contract with an individual who is also a deputy, for services in keeping the peace during the deputy's off-duty hours, and such individual may accept and retain compensation therefor, if not prohibited by the rules of the sheriff, and may wear his privately-owned uniform and badge, if not prohibited by the rules of the sheriff. An argument can be made that a sheriff should as a matter of policy restrict the use of the deputy's official uniform and badge to official duty situations. A deputy has official power twenty-four hours a day. However, such fact does not prohibit a deputy

compensated on a fee or part-time basis from being otherwise employed in a capacity which is not in irreconcilable conflict with his official duties.

3. The county could not be held liable for the acts of the sheriff and probably could not be held liable for acts of his deputies against third persons even while engaged in official duties, although the sheriff may be.

4. The county may be liable on a workmen's compensation basis to both the sheriff and his deputies injured in carrying out their official duties.

RWW:RJV

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*Voting Rights Of Felons—Criminal Law*—Under sec. 57.078, Stats., a person convicted of a crime may vote if he has satisfied his sentence.

June 1, 1972.

JOHN E. SHEEHAN, *District Attorney*  
*Rock County*

You have requested my opinion concerning whether a woman who served approximately two years in prison for the federal offense of "Interstate Transportation of a Stolen Vehicle" may nevertheless vote in Wisconsin.

Article III, sec. 2, Wis. Const., provides:

"Who not electors. SECTION 2. No person under guardianship, non compos mentis or insane shall be qualified to vote at any election; nor shall any person convicted of treason or *felony* be qualified to vote at any election *unless restored to civil rights.*" (Emphasis added.)

Article III, sec. 6, Wis. Const., provides:

"Exclusion from suffrage. SECTION 6. Laws may be passed excluding from the right of suffrage all persons who have been or may be convicted of bribery or larceny, or of any infamous crime,

and depriving every person who shall make or become directly or indirectly interested in any bet or wager depending upon the result of any election from the right to vote at such election.”

The right of a convicted felon to vote is also treated in sec. 6.03 (1) (b), Stats.:

“Disqualification of electors. (1) The following persons shall not be allowed to vote in any election and any attempt to vote shall be rejected.

“\* \* \*

“(b) Any person convicted of treason, felony or bribery *unless his civil rights are restored.*” (Emphasis added.)

Section 57.078, Stats., provides:

“Civil rights restored to convicted persons satisfying sentence. *Every person who is convicted of crime obtains a restoration of his civil rights* by serving out his term of imprisonment or otherwise satisfying his sentence. The certificate of the department or other responsible supervising agency that a convicted person has served his sentence or otherwise satisfied the judgment against him is evidence of that fact and that he is restored to his civil rights. Persons who served out their terms of imprisonment or otherwise satisfied their sentences prior to August 14, 1947, are likewise restored to their civil rights from and after September 25, 1959.” (Emphasis added.)

Under the latter statute, no executive clemency or executive pardon is required. Restoration of the voting privilege follows automatically after the convicted person has served his sentence or has otherwise satisfied the judgment against him. If the person is paroled, the restoration would not occur until after the parole period has expired.

Since sec. 57.078, Stats., refers to conviction for any crime, technically it is unnecessary to explore the constitutional meaning of “felony” and “infamous crime.” However, for your information, I point out that our court has held, in *State ex rel. Isenring v. Polacheck* (1898), 101 Wis. 427, 77 N.W. 708, that “felony,” as used in the Constitution, means a felony at pre-1848 common law. It is highly unlikely that “Interstate Transportation

of a Stolen Vehicle” was even a crime at that time, much less a felony. 18 U.S.C. 2312, entitled, “Transportation of a Stolen Vehicle” provides that “vehicle” means a motor vehicle, a type of conveyance not in existence in 1848. Further, the Historical and Revision Notes to 18 U.S.C.A. 2312 relate that the statute’s origin was a 1919 act. Therefore, Art. III, sec. 2, Wis. Const., probably would not have taken away this woman’s right to vote at all.

Even conceding *arguendo* that this woman’s crime was a felony in 1848, Art. III, sec. 2, Wis. Const., provides that a restoration of civil rights will restore the voting privilege. Section 57.078, Stats., would operate at such a restoration.

In *Becker v. Green County* (1922), 176 Wis. 120, 184 N.W. 715, the court held that “infamous crime” in the Constitution means any crime punishable by imprisonment in the state prison. Since this is also the statutory definition of a felony as set forth in sec. 939.60, Stats., sec. 6.03, Stats., which excludes felons from voting, may also be said to represent the legislative exercise of the authority granted under Art. III, secs. 2 and 6, Wis. Const. Since the legislature is empowered to restrict the franchise, they may also determine when the restrictions they have imposed may be lifted. Section 57.078, Stats., is such a determination, and it would operate to restore the voting privilege of one who lost the privilege under sec. 6.03, Stats. See 1946 Wis. L. Rev. 281, which discusses the constitutionality of sec. 57.078, Stats.

Based on the information you have furnished, it would appear that the woman you describe is presently eligible to vote in the state of Wisconsin, assuming she otherwise qualifies as an elector.

RWW:JCM

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*County Zoning Board Of Adjustment—Appointment—City or village residents are not eligible for service on county zoning board of adjustment.*

June 1, 1972.

CHARLES A. POLLEX, *District Attorney*  
*Adams County*

You have requested my opinion whether a resident of a city is eligible to serve on the county zoning board of adjustment provided for in sec. 59.99, Stats.

The answer to your question is in the negative.

Section 59.99 (2) (a), Stats., provides that, in counties having a population of less than 500,000, the board of adjustment shall consist of not more than five members as determined by resolution of the county board, and sec. 59.99 (2) (c), Stats., expressly provides in part:

“(c) *The members of the board shall all reside within the county and outside of the limits of incorporated cities and villages; provided, however, that no 2 members shall reside in the same town. \* \* \**” (Emphasis added.)

You also request to be furnished with a complete and current index of previous opinions of the Attorney General and copies of current decisions on reapportionment cases involving county supervisory districts.

I regret that a composite index of opinions is not available. Resort must be made to the index at the back of each bound volume of printed opinions. This office does not have copies of recent reapportionment case decisions for distribution. You may be able to secure a copy of decisions involving La Crosse and Dane or other counties which have been involved in court tests from the corporation counsel in the respective county.

RWW:RJV

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*Highways—Jurisdiction*—Local unit of government is without jurisdiction to unilaterally change segment of state highway system.

June 6, 1972.

A. HENRY HEMPE, *Corporation Counsel*  
*Rock County*

I am advised that for a number of years the State Highway Commission has been considering the improvement of highways between the counties of Rock, Walworth and Milwaukee. They finally determined that it would be more feasible to construct new roads as freeways rather than to reconstruct existing highways which served the local property owners. It was the decision of the Commission that, with the construction of new freeways, the existing roads would almost be entirely used by local traffic and, therefore, should become the responsibility of local government.

The method to accomplish this change is clearly set forth in sec. 84.02 (3) of the statutes, which reads as follows:

“(3) CHANGES IN SYSTEM. (a) Changes may be made in the state trunk system by the highway commission, if it deems that the public good is best served by making such changes. The highway commission, in making such changes, may lay out new highways by the procedure under this subsection. Due notice shall be given to the localities concerned of the intention to make changes or discontinuances, and if the change proposes to lay a highway via a new location and the distance along such deviation from the existing location exceeds 2 1/2 miles, then a hearing in or near the region affected by the proposed change shall be held prior to making the change effective. Such notice shall also be given to the secretary of natural resources and to the secretary of the soil conservation board either by registered mail or personally. Whenever the highway commission decides to thus change more than 2 1/2 miles of the system such change shall not be effective until the decision of the highway commission has been referred to and approved by the county board of each county in which any part of the proposed change is situated. A copy of the decision shall be filed in the office of the clerk of each county in which a change is made or proposed.

Where the distance along the deviation from the existing location exceeds 5 miles the change shall constitute an addition to the state trunk highway system. The pre-existing route shall

continue to be a state trunk highway unless the county board of each county in which any part of the relocation lies and the highway commission mutually agree to its discontinuance as a state trunk highway. Whenever such county board or boards and the highway commission cannot so agree the highway commission shall report the problem to the next ensuing session of the legislature for determination."

I have ascertained that, according to the records of the commission, due notice was given of its intent to lay two new roads as freeways, Highway 15 and Highways 11 and 14 (which are, in part, routed together). The notice was given to Rock and Walworth Counties on January 15, 1970. This notice was designated as Highway Change Order 675.

By resolution of the county board, Rock County approved the entire change proposal on December 17, 1970. On February 25, 1971, Walworth County approved the change order only as it applied to Highway 15. In compliance with sec. 84.02 (3) b, Stats., the Commission, by minute entry, approved the Highway 15 change as consented to by the Counties, thereby laying out this road as a state highway.

Under these circumstances, where all that the legislature required has been done, the matter is closed. A large sum of money has been spent by the Commission for construction purposes.

The Rock County Board has no authority to reconsider its decision as to Highway 15.

RWW:REB

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*Hatch Act—Political Activity By A State Commissioner—Public service commissioner may attend a political party convention as a delegate without violating sec. 15.79, Stats.*

June 15, 1972.

WILLIAM F. EICH, *Chairman**Public Service Commission*

You have inquired whether sec. 15.79, Stats., prohibits a public service commissioner from being a delegate to a district, state or national political party convention. I note that public service commissioners hold unclassified positions in Wisconsin civil service. Sec. 16.08 (2), Stats. These positions are not subject to restrictions on political activity imposed on classified positions under sec. 16.30, Stats., commonly known as the "Little Hatch Act."

Section 15.79, Stats., reads as follows:

"Public service commission; creation. There is created a public service commission. No member of the commission may have a financial interest in a railroad, public utility or motor carrier. If any member voluntarily becomes so interested, his office thereby shall become vacant. If he involuntarily becomes so interested, he shall divest himself of such interest within a reasonable time; failing to do so, his office shall become vacant. No commissioner *may serve on or under any committee of a political party*. Each commissioner shall hold office until his successor is appointed and qualified." (Emphasis supplied)

Prohibitions against political activity by public employes has undergone considerable change from the standpoint of constitutional law since Justice Holmes uttered the well-known epigram, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor, Etc., of City of New Bedford* (1892), 155 Mass. 216, 29 N.E. 517.

The distinction between a right and a privilege which underlies Justice Holmes' quotation has been modified. 81 Harv. L. Rev. 1439, 1445. In *Sherbert v. Verner* (1963), 374 U.S. 398, 83 S.Ct. 1790, 10 L.ed. 2d 965, the court held:

“It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or a privilege.” 374 U.S. at 404, 83 S.Ct. at 1794.

The *Sherbert* decision has been used as a basis in other jurisdictions for requiring that statutes limiting political activity of public employes be narrowly drawn to avoid invalid restrictions on freedom of expression and association. *Bagley v. Washington Township Hospital District* (1966), 55 Cal. Rptr. 401, 421 P. 2d 409; *Minjelly v. State* (1966), 242 Ore. 490, 411 P. 2d 69.

However, there is little doubt that a state may, as a condition of employment, require reasonable, non-discriminatory restrictions upon activities of its employes to promote efficiency and integrity of public service. *United Public Workers v. Mitchell* (1947), 330 U.S. 75, 67 S.Ct. 556, 91 L.ed. 754; *State of Oklahoma v. United States Civil Serv. Com'n.* (1947), 330 U.S. 127, 67 S.Ct. 544, 91 L.ed. 794.

The decision in *United Public Workers v. Mitchell*, cited above, has never been questioned by a federal court. Federal courts have a duty to follow a governing decision of the Supreme Court unless it has been clearly eroded by subsequent decisions which dictate a contrary result. *Wisconsin State Emp. Ass'n. v. Wisconsin Nat. Resources Bd.* (1969) W.D. Wis.), 298 F.Supp. 339, 350.

Further, it might be noted that the Hatch Act has been rigorously applied to state public employes participating in programs receiving federal funding. *Osheim v. United States Civil Service Commission* (1969 E.D. Wis.), 299 F.Supp. 317; *Smyth v. United States Civil Service Commission* (1968 E.D. Wis.), 291 F.Supp. 568.

However, a statute proscribing political activity on the part of a public employe must be precise. *Keyishian v. Board of Regents of the University of the State of New York* (1967), 385 U.S. 589, 603, 87 S.Ct. 675, 17 L.ed. 2d 629.

Against this constitutional backdrop, the question now arises as to the meaning of the phrase “committee of a political party” as used in sec. 15.79, Stats.

One source of interpretation of the phrase is the Corrupt Practice Acts enacted before the turn of the century and defined as a group of persons engaged in raising, collecting or disbursing money for election purposes. *Ekern v. McGovern* (1913), 154 Wis. 157, 288, 142 N.W. 595. The purpose of reporting expenses is to limit disbursements by or on behalf of a candidate and to free him from the temptation of accepting support conditioned upon improper obligations. The requirement does not apply to political acts which do not have for their immediate objective the promotion of the candidacy of a particular person. *State ex rel. LaFollette v. Kohler* (1930), 200 Wis. 518, 228 N.W. 895. Also, our court has said that as broad as the power of the legislature is with respect to regulation of elections, if a statute destroys the right to free speech it is to that extent void. *State ex rel. LaFollette v. Kohler, supra*, p. 561.

It does not appear to me that a party convention delegate, as such, comes within the meaning or purpose of sec. 15.79, Stats. Generally speaking a delegate represents a geographic area, not a committee, for the purpose of nominating candidates and committees. A political convention is a nominating device. 25 Am. Jur. 2d, *Elections*, sec. 164. It cannot be equated with a political committee, precisely defined.

If the legislature intended to prohibit a public service commissioner from being a delegate to a convention, an express prohibition could have been enacted similar to Minnesota law. See *Johnson v. State of Minnesota Civil Service Dept.* (1968), 280 Minn. 61, 157 N.W. 2d 747. It further should be noted that conventions are of short duration in contrast to committee service which may involve political activity for a period of at least two years at the local level to four years at the national level. Committees function not only during election periods, but also between campaigns. (See *Wisconsin Blue Book* (1968), pages 662 to 668, for detailed discussion of political party organization in Wisconsin.) In connection with the duration of political activity, it is to be observed that the precursor of present sec. 15.79, Stats., intertwined the requirement of full-time service by a public service commissioner with the prohibition against such persons serving on or under a political committee. Sec. 195.01 (4), Stats., 1967. I conclude that the legislative purpose was to prevent a

public service commissioner from engaging only in the specific activity described, i.e., serving on or under a committee of a political party.

Accordingly, I am of the opinion that sec. 15.79, Stats., does not prohibit a public service commissioner from attending a political convention purely as a delegate. However, I would be remiss if I failed to point out that the statute restricts the acceptance of committee duties at such convention to the extent indicated in this opinion. This conclusion assumes that no federal funds are administered by the Public Service Commission so as to invoke the provisions of the Hatch Act.

RWW:WLJ

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*Residency—Military Personnel—*Voting residency of family members of military personnel stationed in Wisconsin discussed.

June 15, 1972.

ROBERT C. ZIMMERMAN, *Secretary of State*

JAMES R. ERICKSON, *District Attorney*

Both of your offices have requested my opinion on several questions concerning the residence of military personnel, and their families, under the election laws of the state of Wisconsin. Since both requests ask essentially the same questions, I will treat them as one inquiry for the purpose of this opinion.

You direct my attention to the provisions of sec. 6.10, Stats., which sets forth the standards which may be applied to assist in establishing residence as a qualification for voting. Your questions refer most specifically to the second clause of sec. 6.10 (6), Stats., which reads as follows:

“(6) As prescribed in the constitution, no person loses his residence in this state while absent from this state on business for the United States or this state; *and no member of the armed forces of the United States gains a residence in this state because he is stationed within this state.*” (Emphasis added.)

You inquire as to whether this section of the statutes precludes a member of the Armed Forces stationed in Wisconsin, or other adult members of his family living with him, from electing to become Wisconsin residents.

In 35 OAG 3 (1946), when interpreting the above-quoted language of sec. 6.10 (6), Stats., then numbered sec. 6.51 (1), Stats., my predecessor advised that servicemen stationed in Wisconsin may acquire Wisconsin residency. I am in accord with that view. The facts under consideration in that opinion indicated that a soldier, who was formerly a resident of another state, had, while stationed in Wisconsin, and prior to his marriage to a Wisconsin resident, furnished evidence of an intention to permanently locate in Wisconsin and had, in fact, after the marriage, resided with his wife in Wisconsin. Under these and the other facts and circumstances present, it was concluded that his subsequent removal to camps outside Wisconsin for short periods of time prior to overseas service did not result in the loss of his Wisconsin residence. The following is stated at page 5 of the opinion:

“Subsection (1) ordinarily results in no residence being acquired by military personnel stationed in Wisconsin. However, this does not mean that such persons cannot acquire residence here if they have the intention of remaining in the state and set up homes for their families in this state. The constitutional provision referred to in sec. 6.51 (1) is Art. III, sec. 5 of the Wisconsin constitution which provides that no soldier, seaman or marine in the army or navy of the United States shall be deemed a resident of this state in consequence of being stationed within the same.

“There are no Wisconsin cases involving this particular constitutional provision, but there appears to be no valid reason why the soldier husband could not acquire his wife’s residence in Wisconsin if he so desired. \* \* \*”

This opinion reflects the conclusion reached in an earlier opinion of the office reported in 10 OAG 749 (1921), which considered whether Art. III, sec. 5, Wis. Const., prohibited a sailor from changing his residence after being inducted into the navy. In that opinion, at p. 751, the following is stated:

“\* \* \* It will be noted that there is no provision expressly prohibiting a soldier or sailor from establishing a residence in any part of the United States that he may select. That section was put into the constitution for the purpose of settling the question of whether or not a soldier or sailor who merely was in Wisconsin on duty, and with no intention of remaining here and making this state his home, would have a right to vote. This section in no sense of the word denies the right of citizenship to a soldier or sailor in case he, in good faith, desires to establish his residence here. This provision of the constitution merely requires that he should bring forward some proof other than a mere presence in the state on duty before he can vote here.”

Subsequent to these opinions, the United States Supreme Court in *Carrington v. Rash* (1965), 380 U.S. 89, 85 S.Ct. 775, 13 L.ed. 2d 675, considered a Texas constitutional provision which prohibited military personnel, who moved to Texas while on duty, from voting in any election in that state while a member of the Armed Forces. In holding this provision to be in violation of the Equal Protection Clause of the Fourteenth Amendment, the court stated at 380 U.S. 93-94:

“We stress—and this is a theme to be reiterated—that Texas has the right to require that all military personnel enrolled to vote be bona fide residents of the community. But if they are in fact residents, with the intention of making Texas their home indefinitely, they, as all other qualified residents, have a right to an equal opportunity for political representation.”

More recently, in *Dunn v. Blumstein* (1972), 405 U.S. 330, 92 S.Ct. 995, 31 L.ed. 2d 274, the court pointed to the *Carrington* decision as support for its conclusion that the state of Tennessee could not validly require that persons be residents in the state for a year, and in the county for three months before they could vote. The court states the following, at 92 S.Ct., p. 1007:

“\* \* \* the State argued that it was difficult to tell whether persons moving to Texas while in the military service were in fact bona fide residents. Thus, the State said, the administrative convenience of avoiding difficult factual determinations justified a blanket exclusion of all servicemen stationed in Texas. . . . While many servicemen in Texas were not bona fide residents, and

therefore properly ineligible to vote, many servicemen clearly were bona fide residents. Since 'more precise tests' were available 'to winnow successfully from the ranks . . . those whose residence in the State is bona fide,' conclusive presumptions were impermissible in light of the individual interests affected. \* \* \*

However, the court emphasized the state's legitimate purpose in determining whether certain persons, newly arrived in the community, were bona fide residents, stating, at 92 S.Ct., p. 1007-1008:

“\* \* \* In general, it is not very difficult for Tennessee to determine on an individualized basis whether one recently arrived in the community is in fact a resident, although of course there will always be difficult cases. Tennessee has defined a test for bona fide residence, and appears prepared to apply it on an individualized basis in various legal contexts. That test could easily be applied to new arrivals. Furthermore, if it is unlikely that would-be fraudulent voters would remain in a false locale for the lengthy period imposed by durational residence requirements, it is just as unlikely that they would collect such objective indicia of bona fide residence as a dwelling, car registration, or driver's license. \* \* \*”

It is evident from the foregoing that a person in military service may choose Wisconsin as his residence just as freely as any other person.

From what has been said in reference to the previous question, it should also be evident that the military status of a woman's husband places no greater burden on her right to choose a residence than it does in reference to her husband. As has so often been stated by our office in the past, the residence of a person for voting purposes is determined by the combination of two important elements: intent to establish a residence at a particular place for an indefinite or permanent period of time, to the exclusion of any other or former home or residence, and physical presence at the place so established, except for temporary absences with the intent to return. *State ex rel. Hallam v. Lally* (1908), 134 Wis. 253, 258, 114 N.W. 447. These general concepts,

and others, have been incorporated in sec. 6.10, Stats. The following subsections of that statute appear most pertinent to this specific inquiry:

“(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.

“\* \* \*

“(11) Neither an intent to acquire a new residence without removal, nor a removal without intent, shall affect residence.”

These provisions, in one form or another, have been part of the statutes for many years, and are simply declaratory of the common law. *Miller v. Sovereign Camp W.O.W.* (1909), 140 Wis. 505, 509, 122 N.W. 1126; *In re Burke* (1938), 229 Wis. 545, 561, 280 N.W. 598.

Generally speaking, although the place where the family resides normally establishes the residence of the individual members of the family unit, this is not true if the present family home is “temporary or for transient purposes.” In addition, the residence of a man’s wife is normally considered to be that of her husband, on the theory that she intends to live with her husband not temporarily but permanently. 17 OAG 489 (1928). Therefore, if the member of the Armed Forces is only temporarily stationed in Wisconsin, and there is no evidence that the members of the family intend to abandon a prior residence status and establish Wisconsin residence, neither the husband nor the wife may vote in Wisconsin elections. However, the fact that a family of a person in military service is required to move from one temporary location to another at frequent intervals is not inconsistent with an intention to establish and retain a permanent place of residence in Wisconsin to which, when absent, he intends to return.

On previous occasions, I have pointed out that, as a practical matter, there is no absolute criterion or guideline which will, at once, determine the question of residence in each and every case, since each individual case depends on its own particular facts. For instance, the provisions of sec. 6.10 (2), Stats., notwithstanding, the Wisconsin Supreme Court has held that where the facts are consistent with such a conclusion, a married man's residence may be held to be at a place other than the place where his family permanently resides. *State ex rel. Linarys v. Dorwin* (1964), 22 Wis. 2d 474, 126 N.W. 2d 49. Likewise, sec. 246.15, Stats., originally adopted as sec. 6.015, by ch. 529, Laws of 1921, has modified the rights of husband and wife as they existed at the common law, and restored the married women to certain rights and privileges previously considered to have been lost upon marriage. *Wait v. Pierce* (1926), 191 Wis. 202, 209 N.W. 475, 210 N.W. 822. Section 246.15, Stats., specifically provides in part that:

“Women shall have the same rights and privileges under the law as men in the exercise of suffrage . . . [and] choice of residence for voting purposes, . . .”

Our court has pointed to this statute as one of the grounds for the conclusion that where the necessary combination of intent and physical presence exists, a married woman may maintain a legal residence separate from her husband. *Lucas v. Lucas* (1947), 251 Wis. 129, 28 N.W. 2d 337. Although the court in that case was concerned with residence for the purpose of divorce, its remarks, at p. 132 of the opinion, appear equally applicable here:

“\* \* \* We have a situation, then, where, if it be that the appellant [husband] had established a domicile in Clinton, Iowa, each party was maintaining a separate domicile. Appellant's contention is that respondent as the wife did not have a right to regard her residence in Kenosha as her domicile for divorce purposes against the general rule that the domicile of the wife follows that of the husband. It is considered that she had such a right. There are a number of grounds for this conclusion. \* \* \*”

Under the provisions of sec. 246.15, Stats., therefore, a woman does not lose her ability to establish a residence under the Wisconsin election laws simply because of her married status.

However, because of the nature of marriage itself, the residence of the husband and wife is normally one and the same, and the residence of the wife will be considered as following that of her husband until she actually establishes a residence separate from her husband.

Finally, you inquire as to the ability of a serviceman's unmarried children of voting age to establish a residence separate from that of their parents. You will note that a formal opinion just forwarded to your office dated May 24, 1972, fully discusses the general law applicable to the establishment of residence by "young adults" under the election laws of the state of Wisconsin. That opinion, when read in conjunction with this opinion, should dispose of most questions concerning the residence of such "unmarried children of voting age."

RWW:JCM

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*Municipal Police—Arrest Warrants*—Municipal police may arrest and detain a person for whom another municipality in another county has issued a civil arrest warrant.

June 15, 1972.

JAMES M. LA POINTE, *District Attorney*  
*Ozaukee County*

You have requested my opinion regarding the following issue:

"Do municipal police officers who have not been deputized by the county sheriff have the authority to hold a person after the person's arrest by such municipal officer after notice by an adjoining municipality in another county that a warrant or *capias* has been issued in a non-criminal action for the arrested person?"

The officers possess such authority. Upon learning from the adjoining municipality that a civil warrant has been issued, municipal police may arrest and detain the accused without the

warrant. Sec. 968.07 (1) (b), Stats. If the person is not promptly returned to the issuing authority, bail procedures outlined in sec. 969.11, Stats., must be observed.

Arrests are, by definition, made for the purpose of detention. 6 C.J.S., *Arrest*, sec. 23.

Section 300.17, Stats., provides that process in municipal courts is governed by ch. 965 (now renumbered ch. 968). Criminal and non-criminal warrants are both covered by sec. 968.04, Stats., and no distinction is drawn between the two.

Reasonable detention is implicit in secs. 968.07, 970.01 and 969.11, Stats., the last section providing the basis for the return of the defendant to the issuing county.

Section 954.037, Stats., which has now been incorporated in sec. 969.11, Stats., provided that the officer *making the arrest* on a *felony* warrant was to convey the prisoner to the issuing jurisdiction. The felony distinction has now been deleted and, whereas sec. 954.037, Stats., charged the arresting officer with the responsibility of returning the prisoner, sec. 969.11, Stats., requires only that the defendant “. . . shall without unreasonable delay, . . . be returned to the county in which the offense was committed.” The new section makes no mention of the arresting officer.

RWW:SOT

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*Campaign Expenditures—Federal Election Campaign Act*—In light of the provisions of Titles I and II of the Federal Election Campaign Act of 1971, Pub. L. 92-225, relating to expenditures for communications media or to expenditures from the personal funds of a candidate or his immediate family, the limitations on campaign expenditures set forth in secs. 12.06 (2) and 12.20 (1) (a) and (b), Stats., have probably been invalidated. Wisconsin could enact new monetary limitations on over-all or total campaign expenditures not in conflict with the Federal Act. The reporting requirements and statements required under Title

III of the Federal Act, though similar to those required under ch. 12, Stats., are not sufficient for the purpose of compliance with state law.

June 16, 1972.

PATRICK J. LUCEY

*Governor of Wisconsin*

You request my opinion on a number of questions concerning the effect of the Federal Election Campaign Act of 1971, Pub. L. 92-225, on the Wisconsin statutes regulating campaign spending in Wisconsin.

Your initial written inquiry, which was followed with a more detailed verbal request, is prompted by the fact that both the recent federal enactment and the present Wisconsin statutes regulate and limit the amount of campaign expenditures in certain federal elections and require the filing of certain reports, reflecting campaign contributions and expenses, in such elections. Since both enactments deal with the same general subject matter, but in different terms, there are naturally instances where state law is at variance with the federal law.

You first inquire whether the monetary limitations on campaign expenditures, as set forth in the new Federal Act, conflict with similar limitations in the Wisconsin statutes. If it is determined that they do conflict, you wish to be advised as to which limitation applies, the state or the federal.

It is difficult to determine the extent to which the provisions of state law are intended to be superseded by federal legislation, in the absence of some type of legislative guidance. Congress appears to have anticipated the possibility of such conflicts in this instance, since sec. 403 of the Federal Act details the specific effect the new federal law is to have on state law. This provision reads as follows:

“SEC. 403. (a) Nothing in this Act shall be deemed to invalidate or make inapplicable any provision of any State law, except where compliance with such provision of law would result in a violation of a provision of this Act.

“(b) Notwithstanding subsection (a), no provision of State law shall be construed to prohibit any person from taking any action authorized by this Act or from making any expenditure (as such term is defined in section 301 (f) of this Act) which he could lawfully make under this Act.”

Unfortunately, subssecs. (a) and (b) of this provision constitute two essentially different approaches to the question of the relation of the Federal Act to state law. They were, in fact, lifted from two separate legislative proposals and joined in this one section, as a result of a House and Senate conference committee report to Congress.

Prior to this new federal legislation, federal law imposed a ceiling on over-all campaign spending only in respect to general election campaigns. These limitations—including the \$25,000 limitation in respect to Senators and the \$5,000 limitation in respect to Representatives—were repealed by this Act. It could be argued that this means that campaign expenditures for these offices may no longer be controlled or limited at all by state law. However, if this had been the intent of Congress, such intent could have been, and presumably would have been, more clearly and simply stated.

It will be noted that, under the provisions of this section, the provisions of the Federal Act supersede the state law dealing with “corrupt practices” which are in conflict with it. Section 403 clearly renders ineffectual all provisions of state law which either authorize any action or expenditure specifically prohibited by the Federal Act or prohibit any action or expenditure specifically authorized by the Federal Act.

Therefore, in order to fully respond to this question, it is necessary for me to briefly describe the monetary limitations on campaign expenditures set forth in both the federal and the state law.

The Wisconsin Corrupt Practices Act, ch. 12, Stats., contains a number of provisions designed to eliminate fraud and deception and maintain an element of fairness in the electoral process. Among these various provisions are statutes which require a public accounting of contributions and expenditures made for

political purposes and limit the amount of disbursements that may be made "by or on behalf of any candidate for any office under the Constitution or laws of this state. . . ."

Chapter 12, Stats., does not apply to candidates seeking the office of President and Vice President of the United States. Sec. 12.01 (2), Stats. However, the election of presidential electors is regulated by this state law. Sec. 12.20 (1) (g), Stats; 13 OAG 507 (1924). Although the chapter also applies to candidates for selection as delegates to party national conventions, there is no statutory limitation on the amount which may be spent by or on behalf of such candidates. 1912 OAG 375; 13 OAG 101 (1924).

The specific monetary and other limitations described in secs. 12.06 (2), 12.20 and 12.21 (2), Stats., appear most applicable to the present discussion. Section 12.06 (2), Stats., places limitations on expenditures by candidates for election to the United States Senate after the primary. Section 12.21 (1) Stats., allows the state central committee of a political party to make disbursements, in addition to those specifically authorized by individual candidates, up to a maximum of \$10,000, in connection with a general election. Section 12.20 Stats., establishes the specific dollar limitations on campaign expenditures for each office. The limitations apply separately for each primary and general election. In addition to the equivalent of one-fourth page of advertising and the expense of one mailing to the voters of his district, the statute specifically limits the total disbursements which may be made by a candidate, by his personal campaign committee or by a party committee in his behalf. The statutory limitation applicable to a United States Senator is \$10,000; for a representative in Congress—\$2,500; for a presidential elector at large—\$1,000, and for a presidential elector for any congressional district—\$300. The disbursement of these monies is further restricted to the certain specific purposes set forth in secs. 12.06 and 12.07, Stats. The so-called "voluntary" organizations or committees, which collect and disburse funds in support of the candidacy of a particular individual and operate under the provisions of sec. 12.09 (5), Stats., are not bound by any statutory limitation as to the amount they can spend to promote the election of a candidate and are not required to limit the nature of their expenditures.

See *State ex rel. LaFollette v. Kohler* (1930), 200 Wis. 518, 564, 568, 228 N.W. 895; 69 A.L.R. 348 and secs. 12.06 and 12.07, Stats. Note, however, that, where committees are not truly independent, because they are formed with the expressed or implied authority of the candidate, any disbursements by such committees are considered to have been made by the candidate. *State ex rel. LaFollette, supra*, p. 564.

The two principal limitations on campaign spending set forth in the Federal Election Campaign Act of 1971 appear in Titles I and II of the Act. Title I, also known as the Campaign Communications Reform Act, establishes limitations on the expenditures which may be made on behalf of the candidacy of legally qualified candidates for federal elective office, for the use of communications media. The "Federal elective office" referred to in Title I, refers to the office of President, Vice President, Senator and Representative. Since Wisconsin law does not apply to campaign expenditures for candidates for President and Vice President, only the relation between the federal law and the law of our state, in reference to the office of Senator or Representative, will be considered in reference to this and your subsequent questions.

Under the provisions of Title I, no candidate for the office of Senator or Representative, at any primary, primary run-off, general or special election, may spend more than 10 cents times the voting age population of his state or congressional district, or \$50,000, whichever is greater, for the use of communications media. No more than 60 percent of this amount may be for the use of broadcast stations, and all amounts spent on his behalf for the use of the communications media are deemed spent by the candidate and charged against his expenditure limitation, whether or not authorized by him. However, in most instances, no charge may be made by the communications media unless the expenditure is authorized in writing by the candidate or some other person on his behalf.

The term "communications media," is defined by sec. 102 (1) of the Federal Act, as follows:

“The term ‘communications media’ means broadcasting stations, newspapers, magazines, outdoor advertising facilities, and telephones; but, with respect to telephones, spending or an expenditure shall be deemed to be spending or an expenditure for the use of communications media only if such spending or expenditure is for the costs of telephones, paid telephonists, and automatic telephone equipment, used by a candidate for Federal elective office to communicate with potential voters (excluding any costs of telephones incurred by a volunteer for use of telephones by him).”

Title II of the Act consists of various amendments to the Federal Criminal Code. Section 203 amends the Code so as to prohibit a candidate for the office of United States Senator from making expenditures in excess of \$35,000, from his personal funds or the personal funds of his immediate family, in connection with his campaign for nomination or election. Neither the candidate nor a political committee (defined as an individual, committee, association, or organization which accepts contributions or makes expenditures during a calendar year in an aggregate amount exceeding \$1,000) may knowingly accept any contribution or authorize any expenditure which would violate such restriction. The same limitation, as applied to a candidate for the office of Representative, allows expenditures up to \$25,000.

The Conference Report of the Senate (No. 92-590) and House (No. 92-761) on the bill which ultimately became Public Law 92-225, appears to indicate that the limitations on expenditures for the use of communications media, as set forth in the Campaign Communications Reform Act (Title I of the Federal Election Campaign Act of 1971), and the limitations on expenditures by candidates from their personal funds, or the personal funds of their immediate families, as set forth in sec. 203 of the Act (18 U.S.C. sec. 608), are intended to be interpreted with state law dealing with the same general subject matter in such a manner as to preserve the law of both jurisdictions, if possible.

However, in my opinion, in light of the federal enactment, any application of the state campaign limitations to expenditures for communications media or from the personal funds of a candidate, or his immediate family, would tend to prohibit the full exercise of these congressional authorizations, contrary to the provisions of

sec. 403 (b) of the Federal Act, above quoted. Furthermore, although the limitations on campaign expenditures set forth in the present Wisconsin statutes might now be read to apply only to expenditures other than those for communications media or from the personal funds of a candidate or his immediate family, so as to preserve the monetary limitations presently set forth in the Wisconsin statutes, such an interpretation would probably be rejected by the courts as too strained.

It is, therefore, my opinion that the Federal Election Campaign Act of 1971 probably invalidates secs. 12.06 (2) and 12.20 (1) (a) and (b), Stats.

Your second question asks whether the state of Wisconsin could enact new monetary limitations on over-all or total campaign expenditures in addition to the limitations imposed by the Federal Election Campaign Act of 1971.

The answer to this question, like the answer to your first question, depends on the proper interpretation to be given to sec. 403 of the Federal Act, previously quoted. As I view this section, it does not prohibit a state from placing over-all campaign spending limitations on races for United States Senator or Representative, if such limitations do not prohibit any of the various expenditures which a person can lawfully make under the Federal Act. In other words, by establishing maximums for certain *types* of expenditures, I feel that Congress intended to insure that expenditures of these *types* would be allowed up to the maximums established, any state law to the contrary notwithstanding. However, Congress has not clearly indicated that it intended its legislation to preclude the enactment of state laws which were consistent with such maximums, but which imposed maximums on over-all campaign expenditures.

Finally, you inquire whether the provisions of Title III of the Federal Election Campaign Act of 1971, which require certain statements of organization by political committees and certain reports disclosing the contributions to and expenditures by candidates for election to federal office, and by political committees and others supporting such candidates, would be sufficient for the purposes of complying with the somewhat similar provisions of ch. 12, Stats.

A comparison of the various provisions of Title III of the Federal Act and the requirements of Wisconsin law concerning the reporting of receipts and disbursements by candidates and committees, principally set forth in sec. 12.09, Stats., discloses dissimilarities between the two laws as to what events require the making of such reports, what information the reportings are required to contain, and the time at which the required reportings are to be filed. In some of these respects, the federal law is more demanding than the state law. In other respects, the federal law is less demanding. In any event, it is apparent that the differences between the two laws are sufficient to require a negative answer to your question.

The foregoing discussion makes it evident that the Federal Election Campaign Act of 1971 may cause some confusion concerning campaign expenditure regulations in Wisconsin. Inasmuch as you suggest the possibility of legislation to bring Wisconsin's regulation of these matters more in line with the federal provisions, I wish to draw your attention to the fact that a serious reconsideration of all the provisions of the Wisconsin corrupt practices law is long overdue.

RWW:JCM

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*Elections—Independent Candidates*—Section 12.45, Stats., does not prohibit designation of independent candidates on ballot as “Communist Party U.S.A.”

June 16, 1972.

ROBERT C. ZIMMERMAN  
*Secretary of State*

You request my opinion as to whether the provisions of sec. 12.45, Stats., would prohibit you from certifying the names of independent candidates for ballot positions on the November, 1972, general election ballot, if the ballot designation for such candidates indicated “Communist Party U.S.A.”

Section 8.20 (2) (a), Stats., provides that the nomination of an independent candidate is by nomination papers, which may designate "the party or principle he represents, if any, in five words or less." The designation given in the nomination papers filed with your office is certified for inclusion, with the candidate's name, on the official ballot. Sec. 7.08 (2), Stats.

Section 12.45, Stats., provides, in part, as follows:

"Political party recognition and qualification. (1) Notwithstanding any other provisions of this title, *no party shall be recognized or qualified* to participate in any election which is directly or indirectly affiliated, by any means whatsoever, with the communist party of the United States. . .

"(2) The secretary of state shall, with the advice and consent of the attorney general, determine *which parties are qualified* to participate in any election. Such determination shall be subject to review under ch. 227.

"(3) This section is declared to be enacted in the exercise of the police power of this state for the protection of the public peace, safety and general welfare of the residents of this state." (Emphasis added.)

In my opinion, sec. 12.45, Stats., does not prohibit properly nominated independent candidates for public office from appearing on the November, 1972, general election ballots, even though they would appear with the designation "Communist Party U.S.A."

As I read sec. 12.45, Stats., its prohibitions extend only to the recognition of certain political parties or their participation in elections. The Communist Party of the United States is not a "recognized" political party in the state of Wisconsin. In order for a political party to be "recognized," and entitled to a party ballot, it must comply with the various provisions of sec. 5.62, Stats. Technically, therefore, the reference to the Communist Party on a candidate's nomination papers, and subsequently on the official ballot, is a statement of the "principle he represents" rather than a "party" designation. For instance, sec. 8.20 (9), Stats., provides that:

“Persons nominated by nomination papers without party designation shall be placed on the official ballot to the right or below the party candidates in their own column designated ‘Independent’. If the candidate’s name already appears under a party it shall not be listed again.”

The legislative history of sec. 12.45, Stats., provides further support for the conclusion that the statute is not intended to deny individuals, as opposed to parties, the right to participate in elections. In January, 1947, after a Communist Party candidate for Governor had been permitted to appear on the ballot as an independent candidate in the 1946 general election, Senate Bill 44 was introduced in the Wisconsin Legislature. This bill would have clearly prohibited *individuals* affiliated with the Communist Party of the United States from participating as candidates in any election. The bill proposed to amend an earlier version of present sec. 12.45 (1), Stats., so that it would read as follows:

“Notwithstanding any other provisions of this chapter, no party shall be recognized or qualified to participate in any election, *and the name of no person shall be permitted to appear as a candidate for an office on any primary or election ballot under a party designation, as an independent or otherwise, which or who is directly or indirectly affiliated, by any means whatsoever, with the communist party of the United States, . . .*” (Emphasis shows proposed amendment.)

The bill would also have created a subsec. (2a), which would have directed election officials to determine the names of persons prohibited a place on the ballot under subsec. (1). The bill did not become law.

The foregoing interpretation of sec. 12.45, Stats., also appears to be consistent with an interpretation given a roughly similar federal enactment, the Communist Control Act of 1954, 68 Stat. 775, 50 U.S.C. secs. 841-42. The latter provision reads, in part, as follows:

“The Communist Party of the United States, or any successors of such party regardless of the assumed name . . . are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; . . .”

In *Mitchell v. Donovan* (1968), 290 F.Supp. 642, a three-judge district court in Minnesota considered this, and other language of the Federal Act which had apparently been relied upon by the Secretary of State for the state of Minnesota, as grounds for refusing to accept the nomination papers of Communist Party candidates for President and Vice President of the United States in 1968 general election. Although the case subsequently became moot, and the court did not reach a decision on the merits, a "Memorandum for the United States as Amicus Curiae" was filed by the United States Attorney, at the request of the court. The position of the U.S. Attorney was characterized by the court, at 290 F.Supp., p. 644, as follows:

" . . . He [the U.S. Attorney] urges that the Act is meant to disable the Communist Party as a party only and not its members, and he suggests that the right of plaintiffs Mitchell and Zagarell to appear on the ballot, and the right of the nominees for presidential electors to be credited with the votes cast for Mitchell and Zagarell, depend in no degree on their status as nominees of the national or local Communist Party. He argues that, as a matter of Minnesota law, Mitchell and Zagarell are entitled to stand for office because their names have been submitted in a timely petition signed by the requisite number of qualified voters, and concludes that no 'right, privilege or immunity' of the Communist Party as such is involved in this lawsuit. . . ."

My previously expressed opinion concerning the application of sec. 12.45, Stats., is obviously based primarily on an interpretation of the language of the statute itself. Such interpretation is fully in accord with the provisions of sec. 5.01 (1), Stats., which provides that the election laws, including the Corrupt Practices Act, sec. 12.01, *et seq.*, must be construed liberally so as to give effect to the will of the electors. *State ex rel. Zimmerman v. Carpenter* (1949), 254 Wis. 610, 37 N.W. 2d 469. In light of such conclusion, the more subtle and complicated questions dealing with constitutionality and federal preemption need not be considered here. It should be noted, however, that federal anti-subversive legislation—the Smith Act (18 U.S.C. sec. 2385), the Internal Security Act of 1950, as amended (50 U.S.C. sec. 781, *et seq.*), and the Communist Control Act of 1954 (see 50 U.S.C. secs. 841, 842)—has been held to have so completely

occupied the field of sedition as to supersede even those state laws which only purport to supplement federal law. *Commonwealth of Pennsylvania v. Nelson* (1956), 350 U.S. 497, 76 S.Ct. 477, 100 L.ed. 640. See also *DeGregory v. Attorney General of New Hampshire* (1966), 383 U.S. 826, 86 S.Ct. 1148, 16 L.ed 2d 292; *McSurely v. Ratliff* (1967), 282 F.Supp. 848 (D.C. Ky), *appeal dismissed*, 390 U.S. 412, 88 S.Ct. 1112, 19 L.ed. 2d 1272; *State v. Jahr* (1971), 114 N.J. Super. 181, 275 A. 2d 461.

RWW:JCM

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*County Park Commission—County Board Powers*—County board in county over 500,000 probably has authority under sec. 59.15 (2) (b), Stats., to abolish county park commission and transfer duties to committee of the county board.

June 20, 1972.

ROBERT P. RUSSELL, *Corporation Counsel*  
*Milwaukee County*

You have requested my opinion whether the board of supervisors can abolish the county park commission created under sec. 27.02 (2), Stats., and transfer the authority to operate county parks to a committee of the county board.

I am of the opinion that such authority probably exists by reason of the express provisions of sec. 59.15 (2) (b), Stats.

A similar question involving counties under 500,000 population was answered in the affirmative in 52 OAG 69 (1963). Also see 30 OAG 15 (1941), 30 OAG 340 (1941).

Section 27.02 (2), Stats., provides:

“(2) In counties having a population of 500,000 or more the county park commission shall consist of 7 members elected by the county board in the manner provided by sub. (1), except that only one such member may be a member of the county board. If the term of such member of the county board shall terminate for any reason, his membership on the park commission shall become

vacant and the vacancy shall be filled as hereinabove provided. This subsection shall not apply to any member on the park commission now in office (1957) who was a member of the county board."

Section 59.15 (2) (a) (b), Stats., provides in part:

"(2) APPOINTIVE OFFICIALS, DEPUTY OFFICERS AND EMPLOYES. (a) The Board has the powers set forth in this subsection and sub. (3) as to any \* \* \* commission, \* \* \* in county service \* \* \* *created under any statute*, \* \* \* 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." (Emphasis added.)

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."

For an at-length discussion of sec. 59.15, Stats., see 49 OAG 26 (1960). At page 30 of that opinion, it is stated:

"In *Kewaunee County v. Door County*, (1933) 212 Wis. 518, 523, 250 N.W. 438, it is stated:

" \* \* \* Courts will not interfere with the actions of county boards within the powers conferred upon them by statute "on the ground that they are characterized by lack of wisdom or sound discretion;" they will interfere only in cases of fraud or arbitrary action; and county boards "have a wide or at least a reasonable discretion" when so acting.' "

Argument can be made that the broad powers contained in sec. 59.15 (2) (a) (b), Stats., are applicable only where the office, board or commission is *created under a statute* at the option of a county board and cannot apply where the office, board or commission *is created by an express statute*.

Even under this test counties under 500,000 could act under sec. 59.15 (2) (b), Stats., to abolish a county park commission as sec. 27.02 (1), Stats., is an optional means of operating county parks.

A court might hold that sec. 27.02 (2), Stats., in effect, creates park commissions for counties of over 500,000 population and that a county of that size could not abolish such a commission under sec. 59.15 (2) (b), Stats. However, until a test is made in proper case, the county board has a right to attempt the abolishment of its county park commission and transfer its functions, duties and responsibilities to a committee of the county board if it deems such action to be in the best interests of the county. The provisions of sec. 59.15 (2) (4), Stats., require that the statute be construed in favor of broad county board authority, and we cannot assume that a court would place a restrictive meaning on the words "*created under any statute*" to preclude county board action affecting a nonconstitutional office, board or commission which was created by a statute.

RWW:RJV

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*Ordinances—Plat Subdivision Regulation*—Where subdivision regulations, adopted under sec. 236.45, Stats., conflict, a plat must comply with the most restrictive requirement, sec. 236.13 (4), Stats.

June 23, 1972.

ALDWIN H. SEEFELDT, *Corporation Counsel*  
*Washington County*

You have requested my opinion as to the scope of jurisdiction of a county subdivision ordinance adopted pursuant to sec. 236.45, Stats. Your question may be stated as follows:

“When both a county and a town within that county have adopted subdivision regulations pursuant to sec. 236.45, Wis. Stats., which regulation controls where the two overlap and conflict”?

Chapter 236, Stats., governing the subdividing and platting of land, was extensively revised by the legislature in 1955. Our Supreme Court has pointed out that, at that time:

“Sec. 236.45 was revised so as to permit those localities which are feeling strong pressure of rapid urban growth and development, to legislate more intensively in the field of subdivision control than the legislature has provided for the state at large.”

*Jordan v. Village of Menominee Falls* (1965), 28 Wis. 2d 608, 613, 137 N.W. 2d 442, appeal dismissed 385 U.S. 4, 87 S.Ct. 36, 17 L.ed. 2d 3. Section 236.45, Stats., as amended by ch. 286, Laws of 1969, delegates power to local governmental units to enact such regulations. Section 236.45 (2) (a), Stats., provides, in part, that:

“(2) DELEGATION OF POWER. (a) To accomplish the purposes listed in sub. (1), any municipality, town or county which has established a planning agency may adopt ordinances governing the subdivision or other division of land which are more restrictive than the provisions of this chapter. . . .”

When both a county and a town within that county have adopted ordinances pursuant to sec. 236.45, Stats., plats of a subdivision within their joint jurisdictions must be approved by both of the governing units. Thus, sec. 236.10, Stats., provides that:

“Approvals necessary. (1) To entitle a final plat of a subdivision to be recorded, it shall have the approval of the following in accordance with the provisions of s. 236.12:

“\* \* \*

“(b) If within the extraterritorial plat approval jurisdiction of a municipality:

“1. The town board; and

“\* \* \*

“3. The county planning agency if such agency employs on a full-time basis a professional engineer, a planner or other person charged with the duty of administering zoning or other planning legislation.

“(c) If outside the extraterritorial plat approval jurisdiction of a municipality, the town board and the county planning agency, if there is one.”

To facilitate such multiple approval, sec. 236.10 (4), Stats., as amended by ch. 596, Laws of 1959, provides that:

“Any municipality, town, county or regional planning commission may pursuant to s. 66.30 agree with any other municipality, town, county or regional planning commission for the co-operative exercise of the authority to approve or review plats.”

However, sec. 126.10 (4), Stats., is not mandatory and does not extend the powers of these governmental units. It is only a recognition by the legislature that, in cases of overlapping interest, the most logical procedure for the governmental units to follow would be to prepare jointly a plan for the development of the area. 1955 *Report of the Legislative Council*, Volume IV, Subdivision and Platting of Land, page 22. Such cooperation could have the effect of facilitating the accomplishment of the purposes of subdivision regulations as listed in sec. 236.45 (1), Stats.

Nevertheless, conflicts between overlapping ordinances will continue to exist. On the 1955 revision of ch. 236, Stats., the legislature recognized this and enacted sec. 236.13 (4), Stats., in an effort to avoid the inconsistencies and delays such conflicts create. Section 236.13 (4), Stats., provides that:

“Where more than one governing body or other agency has authority to approve or to object to a plat and the requirements of such bodies or agencies are conflicting, the plat shall comply with the most restrictive requirements.”

Section 236.13 (4), Stats., puts a subdivider, faced with conflicting regulations, on notice that he must comply with the most stringent regulation, and, furthermore, avoids conflict between enactments of interested governmental units.

In light of the foregoing discussion, it is my opinion that the statutes provide a clear answer to your question. That is, where both a county and a town within that county have adopted subdivision regulations pursuant to sec. 236.45, Stats., both governmental units are required by sec. 236.10 (1) (c), Stats., to approve the final plat of a subdivision located within such town before it can be recorded; and where those subdivision regulations conflict, the plat must comply with the most restrictive regulation, pursuant to sec. 236.13 (4), Stats.

RWW:JCM

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*Huber Law—Lodging Charges*—Section 56.08 (4), Stats., fixes liability upon Huber Law prisoners for cost of lodging may not be satisfied out of Huber earnings.

June 23, 1972.

JAMES H. OLSON, *District Attorney*  
*Dodge County*

You have inquired whether under sec. 56.08 (4), Stats., when a prisoner is gainfully employed and subject to the “Huber Law” rules, he may be charged for his lodging in the county jail.

The statute presently reads, in pertinent part:

“56.08 (4) Every prisoner gainfully employed shall be liable for charges not to exceed the full per capita maintenance and cost of his board in the jail as fixed by the county board after passage of an appropriate county ordinance.”

Prior to the amendment of sec. 56.08, Stats., in 1969, and again in 1971, there was an absolute want of authority for the sheriff to assess a Huber Law prisoner for the cost of his lodging. See 53 OAG 30 (1964). However, ch. 492, Laws of 1969, added the language "full per capita maintenance" to sub. (4). The 1971 Legislature pursuant to ch. 92, Laws of 1971, added the "charges not to exceed" and "after passage of an appropriate county ordinance" provisions. The answer to your question turns upon the effect of those amendments.

The 1969 amendment adding the "full per capita maintenance" language presumably expresses a legislative intent that prisoners may be held "liable" for such costs of per capita maintenance. Presently, in light of the 1971 amendment, such liability can attach only after the county board has passed an "appropriate ordinance."

Unfortunately, however, even though sub. (4) seemingly fixes a liability upon the prisoner for his per capita maintenance while residing at the jail under the Huber Law, sub. (5) does not provide for the satisfaction of that liability out of his Huber Law earnings.

Subsection (5) explicitly states that:

"(5) By order of the court, the wages or salaries of employed prisoners *shall* be disbursed by the sheriff *for the following purposes*, in the order stated:

"(a) The board of the prisoner;

"(b) Necessary travel expense to and from work and other incidental expenses of the prisoner;

"(c) Support of the prisoner's dependents, if any;

"(d) Payment, either in full or ratably, of the prisoner's obligations acknowledged by him in writing or which have been reduced to judgment;

"(e) The balance, if any, to the prisoner upon his discharge."  
(Emphasis added)

Nothing is said regarding the prisoner's "per capita maintenance" in the list of priorities. In fact, after the first four priorities have been satisfied, the sheriff *must* pay over to the prisoner the balance of his earnings upon his discharge. Therefore, the prisoner's lodging expenses cannot be satisfied out of his Huber Law earnings.

If a county enacts an appropriate ordinance attaching liability for lodging to Huber Law prisoners, such liability may be satisfied only pursuant to a court judgment. Moreover, this judgment may not be executed upon a prisoner's Huber Law earnings while he is confined in jail. The execution of judgment would have to proceed in accordance with ch. 272, Stats., and the property exemptions provided for in sec. 272.18, Stats., would be fully applicable.

For the vast majority of Huber Law prisoners, the imposition of "per capita maintenance" as a liability in sub. (4) will be of no consequence, since there is no provision in sub. (5) for the collection of those expenses out of his Huber Law earnings.

RWW:MRK

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*Liquor License—Public School*—The definition of public school in sec. 176.05 (9m) (a), Stats., does not encompass state universities.

June 23, 1972.

PHILLIP M. STEANS, *District Attorney*  
*Dunn County*

You have requested my opinion regarding the following question:

May a retail "Class A" or "Class B" intoxicating liquor license be issued for a premises having a main entrance located within 300 feet of a state university?

As you mentioned in your letter, sec. 176.05 (9m), Stats. (1969), provides the restrictions we are dealing with. That section reads:

“(9m) RESTRICTIONS NEAR SCHOOLS, CHURCHES, AND HOSPITALS. (a) No retail ‘Class A’ or ‘Class B’ license shall be issued for premises the main entrance of which is less than 300 feet from the main entrance of any established public school, parochial school, hospital or church. Such distance shall be measured by the shortest route along the highway from the closest point of the main entrance of such school, church or hospital to the main entrance to such premises.

“(b) This subsection shall not apply to premises licensed as such on June 30, 1947, nor shall it apply to any premises licensed as such prior to the occupation of real property within 300 feet thereof by any school building, hospital building or church building.”

Research discloses that there has been no litigation on this issue to date. However, in my opinion, the statute does not prohibit the issuance of either “Class A” or “Class B” intoxicating liquor licenses to premises with a main entrance less than 300 feet from a state university. The statute prescribes that distances shall be measured from the “main entrance” to “main entrance,” thus apparently contemplating that public schools and related institutions ordinarily have fixed and definite entrances and more often than not occupy a single building. This is clearly inconsistent with the realities of a modern university with its many buildings and extensive campuses.

The statute in question was first enacted by ch. 348, Laws of 1947. As enacted it read:

“(a) No retail ‘Class A’ or ‘Class B’ license shall be issued for premises less than 300 feet from any established public school, parochial school, hospital or church. Such distance shall be measured via the shortest route along the highway from the closest point of the boundary of such school, church or hospital to the closest entrance of such premises.

“(b) This subsection shall not apply to premises licensed as such on June 30, 1947.”

In ch. 56, Laws of 1967, the legislature restricted the operation of the statutes by adding the following language to subsec. (b):

“\* \* \* Nor shall it apply to any premises licensed as such prior to the occupation of real property within 300 feet thereof by any school building, hospital building, or church building.”

The statute was further amended by the addition “main entrance” provisions in ch. 97, Laws of 1969. Thus, the legislature has evinced the policy direction that the statute should be restricted in its operation. Therefore, the inference arises that the words “public school” should be given a restrictive rather than an expansive meaning in light of the history of the statute.

Section 115.01 (1), Stats. (1969), provides a legislative definition of the phrase “public school.” That section reads:

“(1) PUBLIC SCHOOLS. Public schools are the elementary and high schools supported by public taxation.”

Furthermore, *Webster's Seventh New Collegiate Dictionary* (Merriam 1970) page 690, provides the following definition of “public school”:

“(2) A free tax-supported school controlled by a local governmental authority.”

Hence, I conclude, when used within the context of sec. 176.05 (9m), Stats. (1969), the phrase “public school” means the elementary and high schools located within the boundaries of the licensing authority and not state-supported universities and colleges.

Therefore, the local licensing authority in question may grant and issue licenses in question if it so desires. I may remind you of the provisions contained in sec. 176.43, Stats., which allows for local governmental units to prescribe additional regulations and zoning restrictions upon the sale of intoxicating liquors, for your local governmental units may wish to legislate additional conditions for the granting “Class A” and “Class B” intoxicating liquor licenses near universities and colleges within their jurisdiction.

RWW:TAH

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*Public Records—VTAE District Schools*—Public records subject to inspection and copying by any person would include list of students awaiting particular program in a Vocational, Technical and Adult Education District School.

June 29, 1972.

EUGENE I. LEHRMANN, *State Director*  
*Board of Vocational, Technical and Adult Education*

You request my opinion whether a Vocational, Technical and Adult Education District School is authorized by state law to provide a private organization with a list of students who are on a waiting list for a particular program.

Your question assumes that such a list is kept by the school.

I am of the opinion that the statutes permit such a list to be furnished to such private organization.

Such a list would constitute a public record within the meaning of sec. 19.21 (1), Stats., and subject to inspection and copying under sec. 19.21 (2), Stats.

I am enclosing a copy of an opinion to the Secretary of the Department of Transportation dated December 31, 1971, which discusses secs. 19.21 and 66.77, Stats., as interpreted by the Supreme Court in *State ex rel. Youmans v. Owens* (1965), 28 Wis. 2d 672, 137 N.W. 2d 470, and sets forth grounds which in special circumstances might be a sufficient basis for initial denial of inspection.

Note that the opinion states that the custodian is not required by sec. 19.21, Stats., to make a search or compile a list or report. 52 OAG 8 (1963)

If a list is available and demand for inspection is made at reasonable time and place, the custodian can only withhold inspection if he determines that the public interest in withholding inspection exceeds the public interest, expressed by statute, in permitting inspection by any person. Specific reasons must be

given when inspection is withheld and the person seeking the same can then resort to court action to test the sufficiency of such reasons.

In my opinion, the fact that a private organization which operated a school or service giving a somewhat related course intended to use the list to solicit students would not be a sufficient reason to deny inspection or copying.

In 58 OAG 67, 71 (1969), which involved access to birth records for commercial purposes, it was stated:

“The right to inspect and copy public records is in general extended to those who are engaged in the business of searching public records and furnishing to customers the information which is to be gained therefrom. 45 Am. Jur., Records and Recording Laws, sec. 19. However, the custodian may enforce such reasonable supervision and control of the records and those examining them as is necessary to the carrying out of the duties of his office and allowing other members of the public access to such records. \* \* \*

“Accordingly, in answer to your first question I must conclude that subject to specific statutory restrictions to the contrary, specifically stated sufficient reasons of denial by the custodian, and subject to the reasonable rules and regulations of the custodian, any person may examine and copy birth records, and his reasons for doing so are immaterial.”

RWW:RJV

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*Building Commission—Parking Facility—Building Trust Funds may not be used to construct a project that has not been provided for in either the long-range building program or specifically described in the 1969 or 1970 session laws.*

July 5, 1972.

WAYNE F. MCGOWN, *Deputy Secretary*  
*Department of Administration*

You have requested my opinion as to whether the state Building Commission may construct a parking facility, which facility was not provided for in either the past or current State Building Program.

You have advised me that the project is to be financed by advance from the State Building Trust Fund and is to be amortized over a 12-year period from user fees.

Specifically, you have asked whether sec. 20.924 (5), Stats., (ch. 125, Laws of 1971) authorizes the construction of a project that has not been enumerated by the legislature or described in the long-range building program (legislative report).

Article VIII, sec. 2, Wis. Const., provides in part:

“No money shall be paid out of the treasury except in pursuance of an appropriation by law. \* \* \*”

Your question, at first blush, raises the issue of whether there is an appropriation by l to support the expenditure of these funds for the construction of the parking facility.

In answering this question, it may be helpful to briefly analyze the building program of this state. The State Building Program consists of a conglomeration of past practices that were used in conjunction with corporation financing and rather recent practices reflecting general obligation funding. Prior to general obligation funding, the Building Commission exercised considerable discretion in determining the exact nature of the building program. With the advent of general obligation funding, the legislature severely restricted this former discretion of the Building Commission. Prior to 1969, the State Building Program consisted of a report to the Wisconsin Legislature entitled “State Building Program.” This report was made pursuant to sec. 13.48 (2)(e) 1, Stats., 1969, and either accompanied or was made a part of the budget. The exact legal significance of this report, prior to 1969, was somewhat unclear. Whether and when a particular project within the long-range building program was to be built was largely a matter of Building Commission discretion under sec. 13.48 (10), Stats. The funding of projects approved for construction by the Building Commission was either from the Building Trust Fund (sec. 13.48 (3), Stats., 1969) or under the

lease-rental authority of sec. 20.710 (2)(a), Stats., 1967. The building program or statutory scheme above described did not include the "so-called" self-amortizing projects such as student dormitories, student unions, etc., which projects were financed from user fees. The self-amortizing projects were apparently constructed and financed at the discretion of the State Building Commission.

With the advent of general obligation financing, the legislature enacted an entirely different State Building Program, restricting to a large extent the discretionary power previously enjoyed by the State Building Commission. In this regard, the 1969 Legislature specifically enumerated the building program project-by-project in sec. 375m of ch. 154, Laws of 1969. Additionally, the funding was designated for each project as either building trust funds or general obligation financing. Although the legislature did not in 1969 include in the authorized State Building Program the self-amortizing projects, it was clearly indicated that such projects would be enumerated by future sessions of the legislature (sec. 20.924 (3), Stats., 1969). The legislature, in the ensuing session, did follow through with its announced intention of enumerating the self-amortizing projects by describing such projects in ch. 125, Laws of 1971, sec. 518. Additionally, the legislature, in 1969, as well as in 1971, carried over those projects in the long-range building program or legislative report that had not been completed and by so doing, in effect, codified the long-range building program or report to the legislature, chs. 154 and 125, Laws of 1969 and 1971, respectively. The financing authority for these particular projects is somewhat confusing but apparently, for the most part at least, lies in that category referred to as previous lease-rental authority as set forth in sec. 47 of ch. 215, Laws of 1971.

To implement the authorized State Building Program and enumerated building projects, the legislature in 1969 created sec. 20.924, Stats., which was amended by ch. 125, Laws of 1971.

The basic and extensive revision in the State Building Program just described was made without any significant change, in many instances, in the prior system. Accordingly, we find ourselves operating under two systems that emerged under an entirely different philosophy or legislative intent. However, as a matter of

law, these statutes all concern the same general subject matter and, therefore, must be construed together and harmonized if at all possible, *City of Milwaukee v. Milwaukee County (1965)*, 27 Wis. 2d 53, 133 N.W. 2d 393.

The use of Building Trust Funds is controlled by sec. 13.48 (3), Stats., 1969, which reads in part:

“\* \* \* At such times as the commission directs, the governor shall authorize releases from this fund to become *available for projects in the long-range building program*, and he shall direct the department of administration to allocate from this fund such amounts as are approved for *these projects*. \* \* \*” (Emphasis supplied)

A restrictive or literal reading of this Statute would limit the use of such fund to those projects in the long-range building program or legislative report. However, the legislature, in 1969, as well as in 1971, described certain projects which were authorized for construction and clearly indicated that such projects were to be funded by Building Trust Funds, ch. 154, Laws of 1969, sec. 375m, and ch. 125, Laws of 1971, sec. 518.

In this regard, the legislature appropriated to the Building Trust Fund by sec. 20.710 (2)(f), Stats., 1969, \$23,541,400 and in sec. 375m, ch. 154, Laws of 1969, described the particular projects that were authorized to be constructed out of this fund, which projects total this amount. Similarly, in sec. 20.710 (2)(f), Stats., ch. 125, Laws of 1971, the legislature appropriated \$18,323,200 to the Building Trust Fund for projects described in sec. 518, Stats., ch. 125, Laws of 1971, which projects likewise total this amount. Consequently, the legislature has earmarked this fund project-by-project. Additionally, the Building Trust Fund has been further earmarked by the restrictive language of sec. 13.48 (3), Stats., 1969, previously referred to.

Notwithstanding, the legislature has authorized the exercise of some discretion by the Building Commission in the use of these earmarked funds by enacting sec. 20.924 (1)(d), Stats., 1969, which section reads:

“Shall exercise considered judgment in supervising the implementation of the state building program, and may authorize limited changes in the project program, and in the project budget if the commission determines that unanticipated program conditions or bidding conditions require the change to effectively and economically construct the project. However, total funds under the authorized state building program for each agency shall not be exceeded.”

However, the shifting of funds between projects must be “limited” and may only be intra-departmental or agency, for total funding authority cannot be exceeded for any particular agency or department.

By specifically describing each project and by specifically earmarking funds for each designated project, the Building Commission cannot use Building Trust Funds, in my opinion, for an unauthorized purpose.

The question may be asked as to what happens in the situation where a particular project fails to receive Building Commission approval and, consequently, is not constructed. The funding on a project that is not constructed may be used to a “limited” extent for an approved project as provided in sec. 20.924 (1)(d), Stats., 1969. However, as stated previously, it may not be used for an unauthorized project, for such use would be, as stated previously, contrary to the express language of sec. 13.48 (3) and sec. 20.710 (2)(f), Stats., 1969, which language specifically directs that these funds may only be released or used for projects in the long-range building program. Surplus funds, that is, funds derived from projects that fail to receive Building Commission approval or unconstructed projects, and not used to the limited extent as provided in sec. 20.924, Stats., should “at the end of the biennium \* \* \* revert to the fund and account from which appropriated \* \* \*” as provided in sec. 20.001 (3)(b), Stats., 1969.

In your letter, you question the meaning and intent of sec. 20.924 (5), Stats., as created in ch. 125, Laws of 1971. This section reads:

“The building commission may utilize any funds at its disposal to supplement the *otherwise authorized* building program for any agency.”

It is difficult to harmonize this section with the Building Program as previously discussed. It is obvious, however, that the legislature intended to empower the Building Commission with the authority to supplement the building program. This authority could, of course, be exercised either in the way of additional projects or additional funding of authorized projects, or both. If the statute is interpreted to include within the meaning of the term "any funds at its disposal" the Building Trust Fund, such interpretation could result in repeal by implication the language of sec. 13.48 (3) and sec. 20.710 (2)(f), Stats. Similarly, it would result in the repeal of the limitations of sec. 20.924 (1)(d), Stats. The courts do not favor repeal of legislative acts by implication, *Fleming v. Barry* (1963), 21 Wis. 2d 259, 124 N.W. 2d 93.

The Building Trust Fund is unavailable to fund any action under sec. 20.924 (5), Stats., ch. 125, Laws of 1971. The legislature, in adopting this section, failed, insofar as I am able to determine, to fund its implementation. In other words, the authority of this section was not accompanied by an appropriation. If the legislature had made an appropriation to implement sec. 20.924 (5), Stats., then, to the extent of such appropriation, the restrictions of secs. 13.48 (3), 20.924 (1) (d) and 20.710 (2)(f), Stats., would be inapplicable.

Therefore, in conclusion, it is my opinion that Building Trust Funds may not be used to construct a project that has not been provided for in either the long-range building program or specifically described in the 1969 or 1971 session laws. Further, when a designated project for a specific agency is not approved by the State Building Commission and accordingly not constructed, the funding for such project may be used only to a "limited" extent for a different project within that same agency. Appropriations that are not used for those purposes which were specifically described by the legislature or to the limited extent permitted under sec. 20.924 (1)(d), Stats., should revert to the general fund.

RWW;CAB

*Counties—Contracts For Road Work*—Counties are without power to furnish equipment or supplies or to contract to do repair work on private roads and driveways.

July 6, 1972.

ALEX J. RAINERI, *District Attorney*  
*Iron County*

You request my opinion whether Iron County has legal authority to enter into contracts with private persons for the performance of work such as furnishing and spreading of gravel and blacktop, or furnishing trailering services for heavy equipment on private roads or driveways.

I am of the opinion that the county is without such power.

Present statutes do not permit either the county board or the county highway committee to exercise such power.

Counties have only such powers as are expressly granted by statute or necessarily implied.

*Dodge County v. Kaiser* (1943), 243 Wis. 551, 11 N.W. 2d 348;

*Maier v. Racine County* (1957), 1 Wis. 2d 384, 84 N.W. 2d 76.

Section 83.018, Stats., provides:

*“Road supplies; committee may sell to municipalities.* The county highway committee is authorized to sell road building and maintenance supplies on open account to any city, village, town or school district within the county; and any such city, village, town or school district is authorized to purchase such supplies.”

This statute which is limited to cooperation *between municipalities* was discussed in 56 OAG 1 (1957) which also expressed the opinion that the rule in the *Heimerl* case governs limitations on *private work* done by municipalities.

In *Heimerl v. Ozaukee County* (1949), 256 Wis. 151, 40 N.W. 2d 564, the court declared then sec. 86.106, Stats., unconstitutional. That section provided:

*“Private road work by municipalities and counties.* Any town, city, or village, by its governing body, may enter into contracts to build, grade, drain, surface, and gravel private roads and driveways. Any county, by its governing body, may enter into agreements with a municipality to perform for it any such work.”

The court, in *Heimerl*, distinguished and gave indirect approval to sec. 86.105, Stats., which provides:

*“Snow removal in private driveways.* The governing body of any county, town, city or village may enter into contracts to remove snow from private roads and driveways.”

It stated that sec. 86.105, Stats., was of an emergency nature and that the public interest of the whole community was directly affected by the accumulation of snow when large amounts are thrown into private driveways when the public roads are plowed.

It also hinted that statutes dealing with the sale, manufacture and distribution of agricultural lime at cost to farmers, as provided by then sec. 59.08 (18), Stats., and the operation and lease of bulldozers for clearing and draining lands, secs. 59.08 (47), and 92.08, Stats., might be valid functions in the interest of the general public insofar as a county was concerned. Towns do not have these broader powers.

In *Garfield Investment Co. v. Town of Oconomowoc* (1950), 257 Wis. 98, 42 N.W. 2d 361, the town had made extensive repairs to a private road for many years, sometimes using town equipment and sometimes by private contractor. In 1946, a majority of the abutting owners petitioned the town to do extensive repairs which amounted to \$9,674.71. The board attempted to assess the cost against the owners, including plaintiff. Plaintiff had neither petitioned nor agreed to pay. The court held the assessment invalid. At page 100 it stated:

“The town has no commercial status, and can obtain money from its citizens only by taxation.”

As a general rule, it can be stated that where the benefit is primarily private in nature, use of county or town funds and county or town equipment is prohibited. These problems were discussed in 42 OAG 88 and 50 OAG 98. As to towns, also see *Pugnier v. Ramharter* (1957), 275 Wis. 70, 81 N.W. 2d 38.

RWW:RJV

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*Department Reorganization—Department Of Industry, Labor And Human Relations*—Industry, Labor and Human Relations Commission is without authority to unilaterally allocate the duties and functions of the Equal Rights Division, expressly created by statute and subject to sec. 15.03, Stats., to a newly created division to be called “Division of Equal Rights and Standards.” Limits of internal departmental reorganization discussed.

July 7, 1972.

ERNEST C. KEPPLER, *Chairman**Senate Organization Committee*

The committee on senate organization has requested my opinion whether the Industry, Labor and Human Relations Commission has authority to unilaterally reorganize the internal structure of the department it heads by merging the Equal Rights Division and Labor Standards Division into a new division to be called “Division of Equal Rights and Standards.”

I am of the opinion that the commission is without such authority.

Your second question is whether the commission has authority to carry out other proposed reorganization involving other divisions later this year.

Your inquiry does not set forth the details of the other proposed reorganization and a specific answer cannot be given. However, whereas administrative agencies possess only such powers as are expressly granted by statute or necessarily implied, the legislature has granted departments within the executive branch considerable latitude with respect to internal organization and allocation of functions.

Chapter 75, Laws of 1967, the Kellett Reorganization Act, did not have the effect of freezing the organization of the various departments. Section 15.001 (3), Stats., as created by ch. 75, Laws of 1967, establishes the goals, and provides that "Structural reorganization should be a *continuing process* through careful executive and legislative appraisal of the placement of proposed new programs and the co-ordination of existing programs in response to *changing emphasis or public needs. \* \* \**" (Emphasis added)

Matters of reorganization, however, are not solely within the discretion of the department head. There must be a reasonable basis for change, approval of the Governor must be secured, change cannot be made where the statutes expressly prohibit it or where specific statute requires a given organization, and reorganization must be accomplished in compliance with civil service requirements. Reorganizations involve more than departments, department heads and departmental functions and duties. Positions in the civil service, classified and unclassified, and employes and rights of employes are involved. New positions may be created which would require ascertainment of duties and classification under sec. 16.07, Stats., created by ch. 270, Laws of 1971, which amended and renumbered former sec. 16.105, Stats. Also see Rule, Pers 2, Wis. Adm. Code, relating to classification plan and Rule, Pers 3, as to action required by the appointing officer, director of the Bureau of Personnel and State Personnel Board as to establishing, abolishing, discontinuing, allocating or reallocating positions. Also see secs. 16.23 (1) and 16.25, Stats., as to transfer, restoration of employment and reinstatement rights, and sec. 16.28, Stats., as to layoffs, removals or reductions, all as renumbered or created by ch. 270, Laws of 1971. In addition, budgetary provisions must be complied with. Money or property appropriated for a specific use cannot be diverted contrary to sec. 20.903, Stats.

The broad powers delegated to departments are set forth in sec. 15.02 (3) (4), Stats., which, as amended by ch. 261, Laws of 1971, provide:

“(3) INTERNAL STRUCTURE. (a) The secretary of each department may, subject to sub. (4), establish the internal structure within the office of secretary so as to best suit the purposes of his department.

“(b) For field operations, departments may establish district or area offices which may cut across divisional lines of responsibility.

“(c) For their internal structure, all departments shall adhere to the following standard terms, and independent agencies are encouraged to review their internal structure and to adhere as much as possible to the following standard terms:

“1. The principal subunit of the department is the ‘division.’ Each division shall be headed by an ‘administrator.’

“2. The principal subunit of the division is the ‘bureau.’ Each bureau shall be headed by a ‘director.’

“3. If further subdivision is necessary, bureaus may be divided into subunits which shall be known as ‘sections’ and which shall be headed by ‘chiefs’ and sections may be divided into subunits which shall be known as ‘units’ and which shall be headed by ‘supervisors.’

“(4) INTERNAL ORGANIZATION AND ALLOCATION OF FUNCTIONS. The head of each department or independent agency shall, subject to the approval of the governor or, where applicable, the coordinating council for higher education, establish the internal organization of the department or independent agency *and allocate and reallocate duties and functions not assigned by law to an officer or any subunit of the department or independent agency to promote economic and efficient administration and operation of the department or independent agency. The head may delegate and redelegate to any officer or employe of the department or independent agency any function vested by law in the head.*” (Emphasis added.)

I am of the opinion that both subsections (3) and (4) are applicable to the Department of Industry, Labor and Human Relations, even though (3) uses the word “secretary.” See secs. 15.01 (1) (2) (3) (4), 15.02 (2), 15.04 (1), Stats. Although sec. 15.06 (4), Stats., vests administrative duties of each commission

in the chairman, it provides that they are "to be administered by him under the statutes and rules of the commission and subject to the policies established by the commission." By reason of sec. 15.01 (3), the commission is the head of the department. A matter of reorganization would involve policy to be determined by the commission.

In 57 OAG 91 (1968), it was stated that the Board of Health and Social Services was without power to establish a division on aging within the department where the legislature by ch. 327, Laws of 1967, had expressly created a division on aging "*which is attached to the Department of Health and Social Services under s. 15.03.*"

The negative answer to your first question is grounded on the limitations set forth in sec. 15.02 (4), Stats., and the provisions of sec. 15.03, Stats., which provides:

*"15.03 Attachment for limited purposes. Any division, commission or board attached under this section to a department or independent agency or a specified division thereof shall be a distinct unit of that department, independent agency or specified division. Any division, commission or board so attached shall exercise its powers, duties and functions prescribed by law, including rule-making, licensing and regulation, and operational planning within the area of program responsibility of the division, commission or board, independently of the head of the department or independent agency, but budgeting, program co-ordination and related management functions shall be performed under the direction and supervision of the head of the department or independent agency."* (Emphasis added.)

Section 15.04, Stats., provides in part:

*"15.04 Heads of departments and independent agencies; powers and duties. Each head of a department or independent agency shall:*

*"(1) SUPERVISION. Except as provided in s. 15.03, plan, direct, co-ordinate and execute the functions vested in his department or independent agency."*

The limitations provided in sec. 15.03, Stats., created by ch. 327, Laws of 1967, which implemented the Kellett Act, are similar to those which applied to a Type 1 transfer under ch. 75, Laws of 1967, which amounted to attachment for limited purposes.

A Type 3 transfer, on the other hand, resulted in the merging of an existing agency, its activity or program, into a department.

Section 101.60 (3), Stats. 1965, of the equal opportunities law and sec. 16.765 (3) (5) (6) (10), Stats. 1965, of the nondiscriminatory contracts law, referred to the Equal Opportunities Division of the Industrial Commission. I do not find that such division was expressly created by statute. However, it was a division which was recognized by both the legislature and the commission.

Section 21 of ch. 75, Laws of 1967, renamed the Industrial Commission to the Department of Industry, Labor and Human Relations and placed it under the direction of the renamed commission. Section 21 (2) provided that *the agency* known as the Governor's Commission on Human Rights, under then sec. 15.85, Stats., was assigned a Type 1 transfer to become the newly created *Division of Equal Rights* in the department and sec. 21 (2) (b) provided that the Equal Opportunities Division, under then sec. 101.60, Stats., was assigned a Type 3 transfer *to the Equal Rights Division and not to the Department of Industry, Labor and Human Relations*. Whereas the Industrial Commission previously had full control, subject to statutory direction, of the program and activities of the Equal Opportunities Division, that responsibility, *insofar as duties under sec. 101.60, Stats.*, only are concerned, was transferred to the newly created Equal Rights Division which was attached to the department for limited purposes subject to the provisions of present sec. 15.03, Stats. Section 21 (2) (b), ch. 75, Laws of 1967, then renamed the Governor's Commission on Human Rights, the Equal Rights Council, and since 21 (2), had already transferred all of its former functions to the newly created Division of Equal Rights, provided that the Equal Rights Council should retain or assume public educating matters relating to equal rights, responsibilities of the Fair Employment Advisory Committee under sec. 111.34, Stats., and of the Housing Advisory Committee under sec. 101.10, Stats.,

and should also function as advisory council to the *head of the department and to the administrator of the Division of Equal Rights*. Any *quasi-judicial* responsibilities vested by law in the former governor's commission were transferred *to the commission*.

Even though the Equal Opportunities Division may have been performing some tasks with respect to secs. 111.31-111.37, Stats., there was no legislative intent to transfer such functions from the department to the new Equal Rights Division. The Equal Rights Division was assigned the Advisory Committee functions referred to in sec. 111.34, Stats. (1965).

Chapter 327, Laws of 1967, implementing the Kellett Act provided in part:

*"15.22 Department of industry, labor and human relations; creation.* There is created a department of industry, labor and human relations under the direction and supervision of the industry, labor and human relations commission.

*"15.221 SAME; PROGRAM RESPONSIBILITIES.* The department of industry, labor and human relations shall have the program responsibilities specified for the department under chs. 101 to 106 and 108 and ss. 45.50 (1), 55.01, 111.33, 111.36, 132.13, 140.53, 140.56, 140.58, 140.59, 146.04, 146.085, 160.09, 160.10, 167.10, 167.11 and 167.27. In addition:

*"(1) DIVISION OF EQUAL RIGHTS.* The division of equal rights shall have the program responsibilities specified for the division under ss. 16.765, 101.60 to 101.62 and 111.34.

*"15.223 Same; specified divisions.* (1) DIVISION OF EQUAL RIGHTS. There is created in the department of industry, labor and human relations a division of equal rights.

*"15.227 Same; councils.* (1) EQUAL RIGHTS COUNCIL. There is created in the department of industry, labor and human relations an equal rights council consisting of not to exceed 35 members appointed for staggered 3-year terms. Members shall be appointed from the entire state and shall be representative of all races, creeds, groups, organizations and fields of endeavor. The equal rights council shall advise the industry, labor and human relations commission and the division of equal rights."

Section 72 of ch. 276, Laws of 1969, provided:

“SECTION 72. 15.221 (intro.) and (1) of the statutes are amended to read:

“15.221 (intro.) The department of industry, labor and human relations shall have the program responsibilities specified for the department under chs. 101 to 106 and 108 and ss. 45.50 (1), 55.01, 56.21, 66.191, 66.293, 111.33 to 111.36 132.13, 140.53, 140.56, 140.58, 140.59, 146.04, 146.085, 160.09, 160.10, 167.10, 167.11 and 167.27. In addition:

“(1) The division of equal rights shall have the program responsibilities specified for the division under ss. 16.765, 101.60 ~~to and 101.62 and 111.34.~~”

The duties specified in (1) are the only duties assigned by law to the Equal Rights Division.

Chapter 185, Laws of 1971, renumbered sections of ch. 101, Stats., but is not material here.

My conclusion as to your first question is strengthened by the fact that Assembly Bill 1548 (1971), introduced at the request of the Department of Industry, Labor and Human Relations, failed passage. That bill would have changed the name of the department, placed it under a secretary rather than a commission, abolished the statutory Division of Equal Rights and made the department directly responsible for the functions of the Division of Equal Rights.

While I have concluded that the commission cannot unilaterally abolish the Division of Equal Rights and cannot reallocate, to a separate division, duties or functions assigned by statute, limited reorganization is possible if compliance with budgetary and civil service requirements are met and gubernatorial approval secured. If the head of such division agreed without coercion, the commission could assign other duties and functions assigned to the department to such division provided they are not in conflict with and would not interfere with the regular duties and functions *assigned to the division by law*. Additional assignments could not be so extensive as to preclude the Division of Equal Rights from full and timely exercise of its regular duties and functions assigned by law. A

state agency cooperation agreement under sec. 20.901, Stats., could provide details of management, necessary extra staff and budget. Limited name variance would be permissible to reflect the additional functions provided the words "Division of Equal Rights" are utilized. As to duties required by law to be exercised by the Division of Equal Rights, primary and independent control would have to remain in the division administrator by reason of secs. 15.03, 15.04 (1), Stats.

RW:RJV

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*Relief Recipient—Auto Title*—Counties may not require relief recipient to surrender his auto title and plates as condition of receipt of assistance.

July 13, 1972.

JAMES T. MCMAHON, *Assistant Corporation Counsel*  
*Racine County*

You have requested my opinion as to whether a county has the authority to require a recipient of relief to surrender his automobile title and license plates as a condition of continuing to receive relief.

The validity of any county power must be considered in light of the well-established rule expressed in *Spaulding v. Wood County* (1935), 218 Wis. 224, 228, 260 N.W. 473:

"\* \* \* the county has only such authority as is conferred upon it by statute. Counties are purely auxiliaries of the state and can exercise only such powers as are conferred upon them by statute or such as are necessarily implied therefrom."

We fail to find any express delegation to counties of the power to condition entitlement to relief upon surrender of automobile title and license plates in either the Motor Vehicle Code, chs. 340 to 350, or ch. 49, Stats., Public Assistance. Nor do these statutes appear to imply any such power.

The authority of counties to administer public relief programs is set forth in secs. 49.02 and 49.03, Stats. Under the terms of these statutes, a county may furnish relief to all eligible dependent persons within the county.

The term "dependent person" is defined as follows in sec. 49.01 (4), Stats.:

" 'Dependent person' or 'dependent' means a person without the present available money or income or property or credit, or other means by which the same can be presently obtained, sufficient to provide the necessary commodities and services specified in subsection (1)."

Section 49.01 (1), Stats., states:

" 'Relief' means such services, commodities or money as are *reasonable and necessary under the circumstances* to provide food, housing, clothing, fuel, light, water, medicine, medical, dental, and surgical treatment (including hospital care), optometrical services, nursing, *transportation*, and funeral expenses, and include wages for work relief. The food furnished shall be of a kind and quantity sufficient to provide a nourishing diet. The housing provided shall be adequate for health and decency. Where there are children of school age the relief furnished shall include necessities for which no other provision is made by law. *The relief furnished, whether by money or otherwise, shall be at such times and in such amounts, as will in the discretion of the relief official or agency meet the needs of the recipient and protect the public.*" (Emphasis added.)

In *Outagamie County v. Brooklyn* (1962), 18 Wis. 2d 303, 311-312, 118 N.W. 2d 201, our Supreme Court held that the question of status as a dependent person is a question of fact for determination by the proper welfare authorities. In so holding, the court, at page 311, overturned the old rule which "\* \* \* gave discretion to the relief authorities to determine both the dependency of a person and the extent of his need. \* \* \*" Finally, pointing to the language set forth in the last sentence of sec. 49.01 (1), Stats., quoted above, the court ruled that the discretion of local relief officials "applies to the nature and extent of relief furnished," but not to the basic decision of whether any relief at all is to be provided.

In other words, if the relief applicant qualifies, as a matter of fact, as a "dependent" under sec. 49.01 (4), Stats., and there are no questions as to legal settlement, the welfare agency must provide him with some kind of relief, under the provisions of ch. 49, Stats. The fact that an applicant owns an automobile is only material to the factual determination of dependency insofar as the auto represents personal property potentially salable or suitable as security for a loan. If the applicant has insufficient resources, then, regardless of car ownership, the agency must aid him.

Nothing in the statutes even remotely implies that any applicant must surrender further condition to receipt of relief.

It will no noted, in fact, that "transportation" is listed among the various "needs" of the dependent person which must receive consideration. Sec. 49.01 (1), Stats. If county officials are concerned that assistance money is being or will be squandered on the use of a motor vehicle, they could solve the problem in another way. The local welfare agency presumably could use the discretion granted to them by the last sentence of sec. 49.01 (1), Stats., and make payments in kind or scrip which could not be converted to cash.

The Motor Vehicle Code not only provides no basis for implication of the power in question, but would seem to forbid any county from having such a power.

Section 349.03 (2), Stats., provides:

"No local authority may enact or enforce any traffic regulation \* \* \* in *any* manner excluding or prohibiting any motor vehicle . . . whose owner has complied with chs. 341 to 348 from the free use of all highways. \* \* \*" (Emphasis added.)

Any county ordinance requiring, for any reason, surrender to county authorities of the license plates and title of an automobile whose owner had complied with chs. 341 to 348, Stats., would clearly seem to violate the express language of this section and would be invalid.

Further, sec. 349.03 (1), Stats., provides that:

"\* \* \* No local authority may enact or enforce any traffic regulation unless such regulation:

“(a) Is not contrary to or inconsistent with chs. 341-348; or

“(b) Is expressly authorized by ss. 349.06 to 349.25 or some other provision of the statutes.”

Section 341.63, Stats., gives the administrator of the Division of Motor Vehicles the power to suspend registration of vehicles, and sec. 342.25, Stats., gives the division the power to suspend a vehicle's title. A rule giving the county even limited power to suspend title and the license would appear to be contrary to and inconsistent with these statutes and would, therefore, be invalid.

A county policy of conditioning continued receipt of relief upon surrender of a recipient's automobile license plates and title would appear to be prohibited by the Motor Vehicle Code, which reserves such power to the state, and beyond the scope of authority granted to counties allowing them to operate a public assistance program. We are of the opinion, therefore, that such a policy does not represent a legitimate exercise of authority.

RWW:JCM

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*County Funds—Charitable Organizations—Section 59.07 (95), Stats., authorizes appropriation of county funds for promotion of the “fine arts.”*

July 14, 1972.

JOSEPH J. SALITURO, *Corporation Counsel*  
*Kenosha County*

You advise that your county has recently received requests from several agencies for outright financial contributions by the county for the support of their activities. One group, known as Home Maker's Health Aid Service, Inc., assists people with “homemaking and budgeting problems, as well as teaching them how to clean and properly take care of their homes.” Any charge this group makes for their services is based on ability to pay. Another request for financial contribution has been received from

a group known as Senior Citizens Council. This organization apparently consists of retired people who wish to establish a community center where they conduct their social functions.

You note that sec. 59.07 (95), Stats., newly enacted by ch. 37, Laws of 1971, appears to contain a rather broad authorization to counties to make contributions for "cultural, artistic, educational and musical" programs and projects. You, therefore, request my opinion whether the language of this new law would allow counties to contribute monies to the two organizations briefly described above.

Section 59.07 (95), Stats., provides as follows:

**"CULTURAL AND EDUCATIONAL CONTRIBUTIONS.** Appropriate money for cultural, artistic, educational and musical programs, projects and related activities, including financial assistance to nonprofit corporations devoted to furthering the cultivation and appreciation of the art of music or to the promotion of the visual arts."

The general rule is that appropriations of public money for private purposes is unconstitutional. See discussions in 58 OAG 119, 125—131 (1969), and 59 OAG 110, 112—115 (1970). Of course, the general rule extends to appropriations for gifts and charities. 42 Am. Jur., *Public Funds*, sec. 61, p. 762. Therefore, the legality of all expenditures of public funds by governmental bodies must be measured in light of the public purpose sought to be served. *State ex rel. Warren v. Reuter* (1969), 44 Wis. 2d 201, 211, 170 N.W. 2d 790.

However, prior to any inquiry as to whether the purpose served by a particular expenditure is truly "public," a judgment must be made as to whether the legislature has, in fact, authorized the governmental body to lend its aid to the enterprises in question. See 42 Am. Jur., *Public Funds*, sec. 78, p. 774. This initial inquiry became the principal point upon which our court based its decision in *Pugnier v. Ramharter* (1957), 270 Wis. 70, 81 N.W. 38. In that case, the court concluded that a town board possessed no statutory authority to expend money from the town treasury for contributions to such charitable agencies as the United

Services Organization, American Cancer Society, American National Red Cross, etc. The court stated the following. at page 74:

“Appellant contends that the appropriations to the several relief agencies were for a public purpose. The cases cited in support of his position treat with questions involving the constitutionality of statutes and the application of the “public purpose test” thereunder. *Here the statutes do not authorize expenditures from town funds for such purposes. The test contended for by the appellant is not relevant.* Had the statute provided for contributions to agencies such as here, and had challenge been made as to the constitutionality of such provisions, we would then have been confronted with questions such as arose in *State ex rel. Wisconsin Development Authority v. Dammann* (1938), 228 Wis. 147, 277 N.W. 278, 280 N.W. 698; *State ex rel. American Legion 1941 Convention Corp. v. Smith* (1940), 235 Wis. 443, 293 N.W. 161, and others of like import. Such is not the situation here.” (Emphasis added.)

Therefore, I have considered the activities specifically described in your question in reference to the kinds of programs and projects for which financial contributions are authorized under sec. 59.07 (95), Stats. In doing so, it has been necessary for me to recognize that counties are quasi-municipal corporations, and have only such powers as are expressly conferred by statute or are necessarily implied therefrom. *Columbia County v. Wisconsin Retirement Fund* (1962), 17 Wis. 2d 310, 116 N.W. 2d 142; *Maier v. Racine County* (1957), 1 Wis. 2d 384, 84 N.W. 2d 76; *Spaulding v. Wood County* (1935), 218 Wis. 224, 160 N.W. 473. As a result of such consideration, and for the reasons more fully set forth hereafter, I am of the opinion that expenditure of public monies for such activities as set forth in your letter is neither expressly nor impliedly authorized by the statute.

Although, as you point out in your letter, the language of the above-quoted statute seems extremely broad, at least at first reading, an analysis of the specific terminology actually used by the legislature discloses an intent of much narrower scope.

Nothing which you have indicated concerning the activities of the two groups which are requesting financial aid from your county even remotely suggests that they would fall within the "cultural," "artistic" or "musical" programs mentioned in sec. 59.07 (95), Stats. For instance, The Random House Dictionary of the English Language (1967 Unabridged Edition) describes the two most frequently encountered meanings of the word "culture," as follows, at page 353:

"1. the quality in a person or society that arises from an interest in and acquaintance with what is generally regarded as excellent in arts, letters, manners, scholarly pursuits, etc. 2. that which is excellent in the arts, manners, etc. \* \* \*"

Likewise, although the word "art" or "arts" may sometimes be used very broadly, *State ex rel. Attorney General v. City of Toledo, Ohio*, O.C.D. 327, 3 C.C.N.S. 468, 490, when not otherwise qualified, it is used to designate a group of arts known as "fine arts," as distinguished from the useful or mechanical arts. *Almy v. Jones* (1891), 17 R.I. 265, 21 A. 616. Thus, it has been held that "artist," taken in its popular sense, means a person skilled in the fine arts. *United States v. Thompson* (1889), 41 F. 28, 29; *Barnes v. Ingalls*, 39 Ala. 193, 201. More specifically, the term "artistic" has been said to connote activities of an aesthetic nature, including, for example, painting, drawing, architecture, sculpture, poetry, music, dancing and dramatics. *Wills v. C. I. R.* (1969), 411 F. 2d 537, 542 (C.A. Wash.). See also *Design, Incorporated v. Emerson Company* (1970), 319 F.Supp. 8, 10 (D.C. Tex.).

Finally, if that portion of sec. 59.07 (95), Stats., which authorizes appropriations for "educational \* \* \* programs, projects and related activities" is read out of context, the statute would indeed appear to constitute an almost unlimited authorization to make grants of public monies for such purpose. For instance, as an abstract proposition, "education" is an extremely broad term and includes all knowledge, if taken in its full and not in its legal or popular sense; and, whatever is learned by observation, by conversation or by any other means, aside from what is known intuitively and instinctively, is "education." *State v. Rowan* (1937), 171 Tenn. 612, 106 S.W. 2d 861. In my

opinion, however, no meaningful construction of sec. 59.07 (95), Stats., would be possible if it would be necessary to read or interpret the statute so literally.

It should be recognized that the English word may have a variety of meanings and its precise meaning must be found in its *context* and relation to the subject matter, even though the statute is not considered ambiguous. *Lukaszewicz v. Concrete Research, Inc.* (1969), 43 Wis. 2d 335, 168 N.W. 2d 581. In fact, the doctrine of *noscitur a sociis*, a rule of statutory construction sometimes applied to restrict general descriptive language to the same class, family or gender indicated by particular words immediately preceding or characterizing the context in which the more general language is found, *Boardman v. State* (1930), 203 Wis. 173, 223 N.W. 556, appears determinative of the question as to what constitutes an "educational program," etc., under sec. 59.07 (95), Stats. This rule was more recently characterized by our court in *Lewis Realty v. Wisconsin R. E. Brokers' Board* (1959), 6 Wis. 2d 99, 94 N.W. 2d 238, as follows, at page 108:

"One of the recognized canons of statutory construction is that of *noscitur a sociis* whereby resort is had to associated words with which it is grouped to resolve the meaning of a word having a similar but more-comprehensive meaning than such associated words. 2 Sutherland, *Statutory Construction* (3d ed.), p. 393, sec. 4908. Under the rule of *noscitur a sociis* the meaning of a word takes color and expression from the purport of the entire phrase of which it is a part, and it must be construed so as to harmonize with the context as a whole. 50 Am. Jur. Statutes, p. 241, sec. 247; *Vilardo v. Sacramento County* (1942), 54 Cal. App. (2d) 413, 420, 129 Pac. (2d) 165, 168, 169."

A careful reading of sec. 59.07 (95), Stats., makes it evident that all the principal terms of the statute bear a kindred relationship to one another. The fact that the one more comprehensive term, "education," is used does not allow us to ignore what otherwise appears to be the purpose of the legislature. At times, it is necessary to enlarge or restrict the meaning of some words of a statute in order to harmonize them with the manifest intent of the entire statute. *Mutual Fed. S&L Asso. v.*

*Sav. & L. Adv. Comm.* (1968), 38 Wis. 2d 381, 157 N.W. 2d 609; *State ex rel. Neelen v. Lucas* (1964), 24 Wis. 2d 262, 128 N.W. 2d 425.

Considering sec. 59.07 (95), Stats., as a whole, it is unquestionably intended as an authorization to counties to appropriate money for the purpose of promoting what is more generally described as the "fine arts." In this context, the "educational" programs, etc., referred to in the statute must be understood to refer to those educational activities which are legitimately related to or form a part of "the cultivation and appreciation" of such art. In fact, it would appear that the educational aspects would be those which would more obviously promote the general public welfare. The facts under consideration in *Community Drama Ass'n. v. Iowa State Tax Commission* (1961), 252 Iowa 854, 109 N.W. 2d 23, form an illustration in point, since the court there was considering the activities of an organization of the type which would presumably fall within a statute such as sec. 59.07 (95), Stats., i.e., the Community Drama Association of Des Moines, a non-profit corporation. The association charged admission to its various presentations but presented free dramatic offerings to schools and institutions and provided instruction on drama and the opportunity for nonprofessionals to participate in its activities. In considering the tax status of the association, the court held that, although the activities of the community theater were not "charitable activities" within a sales tax statute provision, excepting from taxation the gross receipts from educational, religious or charitable activities, they did qualify as "educational activities." In reaching its conclusion that the association's "activities are educational, cultural and an asset to the community," the court pointed to testimony which bears a striking resemblance to the text of sec. 59.07 (95), Stats.:

"A professor in the Speech Department, College of *Fine Arts*, State University of Iowa, experienced in the work of community theatres and with a thorough background of research in his field, testified: 'The capital investment in the amateur theatre receives dividends of *educational, cultural* and social values. \* \* \* The well-administered and intelligently directed Community Theatre has been found to be an important part of community life. \* \* \*

It is not a theatre limited to the talented *artistic* few, but is instead a common medium of communal life. \* \* \* "109 N.W. 2d 23, at p. 25. (Emphasis added.)

RWW:JCM

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*Elective County Executive—County Board*—County board can abolish office of county administrator by majority vote, but is without power to abolish elective office of county executive.

July 18, 1972.

GLENN L. HENRY, *Corporation Counsel*

*Dane County*

You request my opinion relative to several questions involving an elected county executive in a county under 500,000 population.

Your first question is whether a county board has power to abolish the office of county executive after it has created such office.

I am of the opinion that it does not. The legislature could, however, empower a county board to do so by express legislation at some future date.

In 1969, Art. IV, sec. 23, Wis. Const., was amended to provide, first, that there be limited variance in the requirement for uniformity of county government and, second, that:

“\* \* \*the legislature may provide for the election at large once in every 4 years of a chief executive officer *in any county* with such powers of an administrative character as they may from time to time prescribe \* \* \*.” (Emphasis added.)

The section had previously only permitted a chief executive officer in counties of 500,000 or more population and such limiting language was deleted.

At the same time, Art. IV, sec. 23a, Wis. Const., relating to the veto power of chief executive officers, was amended to delete reference to counties having a population of 500,000 or more and, therefore, became applicable to any county having a chief executive officer.

On April 4, 1972, the electors approved amendment to Art. IV, sec. 23, Wis. Const., which deleted language requiring one system of county government which shall be as uniform as practicable, and added language authorizing the legislature to provide for "one or more systems of county government."

Senate Joint Resolution 58, Enrolled No. 32, 1969, and Senate Joint Resolution 4, Enrolled No. 13, 1971, which related to the proposed change from uniformity in county government and authorized submission of the amendment, by stated question, to the electors at the April, 1972, election, failed to recognize *both* of the changes in the section approved by the electors in April, 1969. (Also see Senate Joint Resolution 8, Enrolled No. 2, 1969.) While setting forth and providing for deletion of the limited variance language in the requirement of uniformity, the joint resolution showed the section as still including the language limiting a chief executive officer to counties having a population of over 500,000. No italics or other means were used to indicate a legislative intention to alter the change so recently approved by the electors in 1969 which permitted *any county* to have a chief executive officer. I conclude that inclusion of the limiting language was the result of oversight and indicates no intent on the part of the legislature or electors to alter the section in this regard. It is not amendatory language, but rather framing language neither necessary to nor directly related to the proposed amendment which had a single purpose, that being to remove the requirement of uniformity in county government. Article XII, sec. 1, Wis. Const., requires that amendments submitted to the electors be stated separately and set forth a single precise question. See 54 OAG 9, 13 (1965). That question, as prescribed in Senate Joint Resolution 4, Enrolled No. 13, 1971, provided that the amendment should be stated on the ballot, at the April, 1972, election, as follows:

“Shall section 23 of article IV of the constitution be amended to eliminate the requirement that there be but one system of county government, as uniform as practicable, (with administrative exceptions) and to substitute a requirement that the legislature establish one or more systems of county government?”

Pursuant to sec. 10.01 (2) (c), Stats., the explanatory statement on the ballot was stated:

“The constitution presently requires the legislature to establish but one system of county government, as nearly uniform as practicable, except that said uniformity requirement does not apply to the administrative means of exercising powers of a local legislative character conferred by the constitution on county boards. A ‘yes’ vote on this amendment would remove these provisions and replace them with a requirement that the legislature establish one or more systems of county government. However, the constitution would continue to allow the legislature to make provision for a chief executive officer with veto power.”

It is my opinion that the action of the legislature as approved by the electors did not amend Art. IV, sec. 23, Wis. Const., to limit a chief executive officer to counties over 500,000 population. Therefore, any county may elect to have such an officer.

I am advised that the Revisor of Statutes will authorize printing of Art. IV, sec. 23, Wis. Const., to provide in part:

“\* \* \* but the legislature may provide for the election at large once in every 4 years of a chief executive officer in any county with such powers of an administrative character as they may from time to time prescribe in accordance with this section and shall establish one or more systems of county government.”

Article XIII, sec. 9, Wis. Const., provides in part:

“All county officers whose election or appointment is not provided for by this constitution shall be elected by the electors of the respective counties, or appointed by the boards of supervisors, or other county authorities, as the legislature shall direct. \* \* \* All other officers whose election or appointment is not provided

for by this constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people or appointed, as the legislature may direct.”

The legislature has provided for an elective county executive in counties under 500,000. Section 59.032 (1), Stats., provides:

“(1) ELECTION; TERM OF OFFICE. Counties having a 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. Such petition and election shall follow the procedure provided for cities in s. 9.20 (1) to (6).”

The office which has a constitutional basis is optional and may be created under a statute which implements the constitutional provision.

In 59 OAG 1, 2 (1970), it was stated that the county board had power to abolish the office of county administrator:

“Generally, a county which is empowered by the legislature to create an office may, if unrestricted, abolish it. 42 Am. Jur., Public Officers, sec. 33, p. 905; 4 ALR 224, 172 ALR 1387. \* \* \*”

Article IV, sec. 22, Wis. Const., provides:

“*Powers of county boards.* SECTION 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.”

The creation or abolishment of an office is a legislative matter. Counties only have such powers as are expressly granted or necessarily implied and where the legislature has provided the county board with power to act in a given area, the board must act within the limits of the statute. The legislature, in sec. 59.15 (2) (b), Stats., has expressly authorized county boards to abolish offices created under a statute. However, such power is restricted to nonelective offices and by enactment of sec. 59.15 (2) (b), the

legislature, by implication, has declined to delegate power to the county board to abolish an elective office created under a statute. It is also noted that while sec. 59.032, Stats., provides for the creation of the elective office, it does not provide for its abolition. If the legislature had intended the county board to have such power it would have been a simple matter for the legislature to provide the express means of exercising such power. The practical necessity for an express means of exercising such power is indicated by the veto power which the executive has as to resolution or ordinances. See sec. 59.032 (6), Stats.

Your second question is whether the county board can act by majority vote to abolish the office of county administrator.

It is my opinion that a majority vote of a quorum is all that is required. See sec. 59.02 (2), (3), Stats.

Neither sec. 59.033 nor 59.15 (2) (b), Stats., require a larger vote. Abolishment of an office is separate and distinct from removal from office referred to in sec. 59.033 (7), Stats. It is possible, however, depending on when the change from county administrator to county executive is to be made, that certain allied resolutions involving budget matters would require a two-thirds vote of the entire membership of the county board. See sec. 65.90 (5), Stats.

Your third question involves succession to the office of county executive in the event the elected executive is unable to serve because of mental or physical disease.

Whereas sec. 59.031 (8), Stats., provides for succession in such case in counties over 500,000 population, there is no similar provision in sec. 59.032, Stats., or other applicable statutes. See sec. 17.025, Stats., relating to temporary vacancies in specified state and judicial offices. Section 17.03 (6), Stats., does provide that a vacancy exists where there is a decision from a competent tribunal adjudging the office holder insane. In the case of disability from limited mental illness or physical disease, a vacancy would not exist absent removal for cause. It would be a matter for determination in each case whether there existed cause, which is defined in sec. 17.16 (2), Stats., as "inefficiency, neglect

of duty, official misconduct or malfeasance." Mental and physical disease may contribute to inefficiency or neglect of duty in certain cases.

Recall of county officers is provided for in Art. XIII, sec. 12, Wis. Const., and sec. 9.10, Stats.

RWW:RJV

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*County Board Expenditures—Conservation Congress—*  
Counties lack authority to pay expenses of a person attending a meeting of the Wisconsin Conservation Congress.

July 18, 1972.

WILLIAM E. CHASE, *District Attorney*  
*Ashland County*

You have requested my opinion as to whether the Ashland County Board is authorized by law to appropriate funds to reimburse expenses incurred by representatives of Ashland County attending meetings of the Wisconsin Conservation Congress. You advise that the Ashland delegates currently attend these meetings at their own expense.

The Wisconsin Conservation Congress has been in existence since 1934 as an organization concerned with the conservation of Wisconsin's natural resources. Members of this Congress are elected by the sportsmen of each county at the public fish and game hearings held each year by the Department of Natural Resources and normally serve for terms of three years. The Congress serves as an influential voice of those state citizens who are actively involved with problems of conservation. This role has recently been recognized by the legislature. Section 15.348, Stats., created by ch. 179, Laws of 1971, provides that:

"CONSERVATION CONGRESS. The conservation congress shall be an independent organization of citizens of the state and shall serve in an advisory capacity to the natural resources board on all matters under the jurisdiction of the board. Its records,

budgets, studies and surveys shall be kept and established in conjunction with the department of natural resources. Its reports shall be an independent advisory opinion of such congress."

For the reasons hereafter set forth, I am of the opinion that a county board is not authorized by law to reimburse expenses incurred by members of the Wisconsin Conservation Congress.

It is well settled that 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, 385, 84 N.W. 2d 76; *Spaulding v. Wood County* (1935), 218 Wis. 224, 228, 260 N.W. 473. See also 40 OAG 378 (1951) and the opinions cited therein.

Section 15.348, Stats., does not expressly confer legislative powers of any sort upon county governments, nor can the statute be read to impliedly authorize counties to compensate delegates to the Wisconsin Conservation Congress. Section 15.348, Stats., is solely concerned with the Wisconsin Conservation Congress and its relationship with the Department of Natural Resources. Furthermore, I find no other statute that would provide this necessary authorization.

It will be noted that, generally, where the legislature has authorized county boards to appropriate funds to particular organizations, activities or groups it has expressly done so. For example, sec. 59.07 (19), Stats., authorizes appropriations for certain celebrations and conventions; subsec. (33) for public museums; subsec. (87) for the civil air patrol, and subsec. (95) for certain cultural, artistic and educational projects and activities.

You relate that it has been suggested that a delegate is an "elected official" of his respective county and, therefore, should be paid by that county.

Counties are authorized by sec. 59.15 (3), Stats., to reimburse certain expenses incurred by county officials and employees. Section 59.15 (3), Stats., provides, in part, that:

“REIMBURSEMENT FOR EXPENSE. The board may provide for reimbursement to any elective officer, deputy officer, appointive officer or employe of any expense out-of-pocket incurred in the discharge of his duty in addition to his salary or compensation, \* \* \*”

With respect to who are public officials holding public office, a general rule stated in *Burton v. State Appeal Board* (1967), 38 Wis. 2d 294, 300, 156 N.W. 2d 386, quoting, with approval, from *Martin v. Smith* (1941), 239 Wis. 314, 1 N.W. 2d 163, is that:

“ ‘ “to constitute a position of public employment a public office of a civil nature, it must be created by the constitution or through legislative act; must possess a delegation of a portion of the sovereign power of government to be exercised for the benefit of the public; must have some permanency and continuity, and not be only temporary or occasional; and its powers and duties must be derived from legislative authority and be performed independently and without the control of a superior power, other than the law, except in case of inferior officers specifically placed under the control of a superior officer or body, and be entered upon by taking an oath and giving an official bond, and be held by virtue of a commission or other written authority.” ’ *Martin v. Smith, supra*, page 332.”

Applying this criteria, it is apparent that, in conformance with the general characteristics set forth, a delegate to the Wisconsin Conservation Congress is not a public official such that he may receive compensation from the county. First of all, his position is not specifically provided for in the Wisconsin Statutes or Constitution as are other public officials. Secondly, a delegate does not represent the county as a political entity nor does he exercise a portion of the power delegated by law to county government. Finally, a delegate takes no oath of public office nor does he post a required bond. Rather, the members of the Congress act in a body as “an independent organization of citizens.” The organization structure becomes, in fact, the means by which conservation minded citizens can channel their desires to the Department of Natural Resources.

In view of the foregoing, you are advised that counties are not authorized by statute to pay the expenses of a person attending a meeting of the Wisconsin Conservation Congress.

RWW:JCM

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*Attorneys' Fees—Divorce Actions*—Section 49.01 (1), Stats., is not broad enough to include attorneys' fees incurred by eligible dependent person to prosecute or defend divorce action.

July 24, 1972.

DENNIS J. FLYNN, *Corporation Counsel*  
*Racine County*

You have requested my opinion whether sec. 49.01 (1), Stats., is broad enough to permit the county to pay for the services of private attorneys retained by eligible dependent persons to prosecute or defend divorce actions.

It is my opinion that it is not.

Section 49.01 (1), Stats., provides:

*Definitions.* As used in chapter 49: (1) 'Relief' means such services, commodities or money as are reasonable and necessary under the circumstances to provide food, housing, clothing, fuel, light, water, medicine, medical, dental, and surgical treatment (including hospital care), optometrical services, nursing, transportation, and funeral expenses, and include wages for work relief. The food furnished shall be of a kind and quantity sufficient to provide a nourishing diet. The housing provided shall be adequate for health and decency. Where there are children of school age the relief furnished shall include necessities for which no other provision is made by law. The relief furnished, whether by money or otherwise, shall be at such times and in such amounts, as will in the discretion of the relief official or agency meet the needs of the recipient and protect the public."

The legislature has gone to some length in setting forth the categories of special and professional services which are to be included as relief. If the legislature had intended that legal services in general or legal services in the area of domestic relations were to be included as matters of relief, it would have been a simple matter to include such language.

Recent U.S. Supreme Court cases have established that an indigent accused of a felony or certain misdemeanors must be afforded the assistance of counsel at public expense. I am not aware of any holding, however, which permits or requires the payment of such services from general relief funds.

I am aware of the decision in *Boddie v. Connecticut* (1971), 401 U.S. 371, 91 S.Ct. 780, wherein it was held that due process would be violated, in a state which provided a means to dissolve marriage, if indigents were denied a forum to be heard upon their claimed right to dissolution of a marriage. It held that a state could not impose a financial barrier to court access in the nature of filing fees and service of process costs where indigents were concerned. The case does not involve attorneys' fees. The court did not hold that the welfare grant of such indigent must be raised to cover filing and service costs, but rather that some alternatives to regularly charged fees must be provided for including possible waiver.

Section 271.29 (1), Stats., permits any person to commence, prosecute or defend any action or proceeding in any court without being required to give security for cost or to pay any service or clerk's fee or suit tax upon the filing with the court of an affidavit of poverty. Section 885.10, Stats., provides that, in criminal actions, an indigent defendant may request the court to subpoena defense witnesses at state expense. In criminal cases, judges are required by sec. 970.02 (6), Stats., to appoint counsel for indigent defendants in all cases required by the U.S. or Wisconsin Constitutions. Also see sec. 967.06, Stats.

Section 256.65, Stats., provides for the payment by the county or by the state of costs involving the trial of indigent *defendants*. Attorneys' fees are specifically included. While the statute is not specifically limited to criminal matters, it is my opinion that the legislature intended that it apply primarily to criminal actions or

proceedings or matters relating thereto, and that the statute does not apply to indigent defendants in ordinary divorce proceedings. There are other statutes which may allow a court to appoint counsel in various civil actions. See secs. 256.48, 256.49, 256.52, Stats. I find no statute which specifically provides that a court may appoint an attorney at public expense to commence or defend a divorce action on behalf of an indigent.

I do not contemplate that the U.S. Supreme Court will require states to furnish all indigents with counsel at public expense to commence, prosecute or defend divorce actions or other civil matters. In the unlikely event that it did, it would be for the legislature to provide for a means of appointment and compensation, and it is certainly questionable whether the legislature would include the matter under sec. 49.01 (1), Stats.

In closing, I would be remiss if I failed to point out that members of the State Bar have a duty to render services without charge in cases of exceptional need. In addition, attorneys' fees are recoverable from the party which does not prevail and every effort should be made to compel payment of reasonable fees by such party before any additional burden is sought to be imposed on the taxpayers.

RWW:RJV

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*Building Commission—Trust Funds—Building Commission release or use of building trust funds discussed.*

August 9, 1972.

PAUL L. BROWN, *Secretary*  
*State Building Commission*

You have requested my opinion on the following question:

“In view of the manner in which the Auxilliary Projects were approved, what kind of a list of projects is valid? How would we handle an emergency project such as a power failure if such a repair project never appeared on any list?”

The answer to this question basically involves the question as to the use of building trust funds by the State Building Commission.

The state of Wisconsin finds itself between two conflicting philosophies in the operation of its building program. On the one hand, the legislature has clearly indicated its intent to control the program by expressly and specifically passing upon each particular project within the building program. On the other hand, the Building Commission and the Department of Administration are faced with the very real and practical problem of dealing with the building program and the efficient management, operation and maintenance of facilities costing hundreds of millions of dollars on a day-to-day basis. In an opinion to Wayne F. McGown, Deputy Secretary of the Department of Administration, under date of July 5, 1972, I analyzed the historical development of the state building program and attempted to illustrate the problems caused by changing from a rather loose building program to a very stringent program, with little effort to harmonize the existing statutory building program with the newly enacted program. I further stated in the opinion that, "as a matter of law, these statutes all concern the same general subject matter and, therefore, must be construed together and harmonized if at all possible, *City of Milwaukee v. Milwaukee County* (1965), 27 Wis. 2d 53."

The expenditure of building trust funds is governed by secs. 13.48 and 20.924, Stats.

In answering the question as to how and under what conditions building trust funds may be used, I will attempt to set forth broad categories of work and discuss the use of such funds under each category.

### MAINTENANCE

Section 13.48 (1), Stats., provides in part:

“\*\*\*Projects in such long-range program shall include the necessary lands, new buildings, and all facilities and equipment required and also the remodeling, reconstruction and re-equipping of existing buildings and facilities, but shall not include ordinary maintenance.”

The term "ordinary maintenance" as used in the above statute must, of course, be defined. Generally speaking, "maintenance" means "the upkeep of property or equipment,"<sup>1</sup> or the upkeep or preservation of the condition of property.<sup>2</sup> Maintenance includes repair and, in effect, contemplates keeping the property in a fixed condition and does not include renovation or improvement.<sup>3</sup>

It is our understanding various state agencies have an appropriation in their respective budgets to cover maintenance and repair of facilities under their jurisdiction. If an emergency situation should develop as described in your question, it is the responsibility of the particular agency to provide the funds for the necessary repairs. If sufficient funds are not available within the particular agency budget, recourse is to the Board on Government Operations and not the Building Trust Fund. We understand that in the past building trust funds may have been resorted to for maintenance projects. This practice, if it has, in fact, occurred, would be in violation of legislative intent to have the maintenance of state facilities reflected in individual state agency budgets.

The long-range building program as reported to the legislature under the provisions of sec. 13.48, Stats., generally does not contemplate maintenance, and accordingly funds by and large have not been appropriated to the Building Trust Fund to cover the cost of such work. The 1971-1973 report to the legislature does contain numerous references to recommended repair work. Whether this work really constitutes strictly repair work or is in the nature of remodeling is not always clear. In future reports to the legislature, it is my opinion that care be exercised so as not to use building trust funds for projects that are clearly in the nature of maintenance or repair.

It is difficult to determine the responsibility of the Building Commission in the matter of repairs to state buildings. Under sec. 13.48 (10), Stats., the Commission has the responsibility to pass

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<sup>1</sup> Webster's Seventh New Collegiate Dictionary.

<sup>2</sup> *Bogan v. Postlewait* (1970), 265 N.E. 2d 195.

<sup>3</sup> *Schmidt v. Morival Farms* (1951), 240 S.W. 2d 952.

on all contracts for construction and reconstruction as well as contracts for remodeling and additions which exceed \$15,000 irrespective of the source of funds. As building trust funds may not be used for repair work, in my opinion, the statutory language "irrespective of the source of the funds" could be interpreted to include those funds appropriated to the individual state agencies for repair work if the term "repair" falls within the meaning of the words "construction" or "reconstruction." It seems to me that in common parlance whether a contractor is engaged in new construction or repair work he is nevertheless engaged in construction. The generic terms "construction" or "reconstruction" do not, in and of themselves, preclude repair work.

Further, it is my understanding that the Commission has, in the past, interpreted the language of this subsection to include passing on contractual repairs which exceed \$15,000.

It is my opinion the Building Commission has the responsibility to pass on construction repair contracts that exceed \$15,000 under the provision of sec. 13.48 (10), Stats.

It does not appear there was any attempt by the legislature to restrict the State Building Commission in exercising its discretion in respect to maintenance and repairs. The only restriction the legislature has imposed is found in the limits of the appropriation to the particular state agency involved.

Thus in summation, it is my opinion building trust funds are not generally available for maintenance or repairs; such costs are to be covered by the appropriation to the particular state agency involved. The legislature placed no limits on Building Commission action in approving maintenance or repair work; however, agency budgets obviously cannot be exceeded in this regard.

### MAJOR LOSSES

If the state of Wisconsin should lose a building by fire or some other disaster, the Building Commission could not authorize construction of a new facility to replace the lost facility, even

though it would be funded through ch. 210, Stats., State Insurance Fund. Section 20.924 (1) (a), Stats., which reads as follows, precludes construction to replace a destroyed facility:

“20.924 *Building program execution.* (1) In supervising and authorizing the implementation of the state building program under the appropriation authority of s. 20.710, the building commission:

“(a) Shall authorize the design and construction of any building, structure or facility costing in excess of \$250,000 regardless of funding source, only if that project is enumerated in the authorized state building program.”

#### ENUMERATED PROJECTS

The legislature appropriated \$23,541,400 in 1969 and \$18,323,200 in 1971 to the Building Trust Fund.<sup>4</sup> To a large extent, these appropriations are specifically earmarked for particular projects. It is implicit, in the law, that Building Commission approval is necessary before these projects may be built. However, there is nothing in the law that authorizes the use of these project funds for any other use except as hereinafter discussed. The Building Commission may, to a limited extent, use these earmarked funds for another enumerated project by changing the scope of the project or the budget. Such use is restricted to an intra-department basis under the provisions of sec. 20.924 (1) (d), Stats. These funds may not be used for unauthorized projects. The use of legislatively earmarked funds for an unauthorized project would violate the language of sec. 20.924 (1) (d), Stats., which allows “limited changes.”

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<sup>4</sup>Chapter 154, Laws of 1969 and ch. 125, Laws of 1971.

## AUXILIARY PROJECTS

The 1971 Legislature appropriated \$18,323,200 to the Building Trust Fund, sec. 20.710 (2) (f), ch. 125, Laws of 1971. Of this amount, approximately 5.8 million was specifically earmarked by sec. 518 of ch. 125, Laws of 1971, for particular projects. The balance, or approximately 12.5 million, was appropriated under the term "auxiliary projects" with specific amounts to particular state agencies. Although the auxiliary projects were not enumerated in sec. 518 of the budget, these appropriations were based on the report prepared pursuant to the provisions of sec. 13.48 (2) (e) 1, Stats. Under this section, the report was either made a part of the budget or accompanied the same. An examination of the report shows that auxiliary projects were listed and described on a project-by-project basis. Further examination of this report shows, in all cases but one, the estimated cost of the enumerated auxiliary projects exceeded the amounts actually appropriated by the legislature in sec. 518 of the budget.<sup>5</sup> One cannot ignore the fact that this report was or is a part of the budget. Further, it is this report that sec. 13.48, Stats., refers to when it restricts the use of building trust funds to projects "in the long-range building program."

The State Building Commission must and does have the authority to pick and choose between the projects listed in the report under the category of auxiliary projects. The fact the appropriations to cover such recommended projects were not sufficient to cover all projects makes this exercise of discretion apparent. However, to substitute a new project for the recommended projects as contained in the report is an entirely different exercise of discretion.

Section 20.924 (1) (a) and (b), Stats., provides:

"(1) In supervising and authorizing the implementation of the state building program under the appropriation authority of s. 20.710, the building commission:

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<sup>5</sup> The exception referred to is apparently an unearmarked surplus of \$18,000 to the Department of Health and Social Services.

“(a) Shall authorize the design and construction of any building, structure or facility costing in excess of \$250,000 regardless of funding source, only if that project is enumerated in the authorized state building program.

“(b) Shall authorize the acquisition of land, or the repair, remodeling or improvement to any eOg building, structure or facility costing in excess of \$250,000, regardless of funding source, only if that project is enumerated in the authorized state building program.”

These provisions allow the authorization of projects costing \$250,000 or more if specifically enumerated or provided for in the State Building Program. These statutory provisions do not say the Building Commission may authorize the construction of projects costing less than \$250,000 that do not appear in the program. This is a possible interpretation, but it is an interpretation based on what the law does not say rather than on what it does say.<sup>6</sup> This possible interpretation cannot counter the fact that the State Building Program in part consists of the report, which report enumerates the auxiliary projects. Nor can this possible interpretation counter the fact that building trust funds may only be used under sec. 13.48 (3), Stats., for projects in the “long-range building program” or, in other words, for projects enumerated in the report, and of recent date, in the budget.

There is no appropriation by law to construct projects not found in the report, except through the appropriation of federal aid, grants and gifts as hereinafter discussed. There being no appropriation by law to cover the cost of constructing a project not found in the building program, any such expenditure would, in my opinion, violate Art. VIII, sec. 2, Wis. Const.

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<sup>6</sup> There may be many explanations for this prohibition, one being that the Building Commission cannot use gift and grant funds to construct an unauthorized facility exceeding \$250,000 which the state would then become obligated to maintain.

There may be situations where funds are received by the state and appropriated to particular state agencies for building projects not found in the building program. In this regard, I have in mind federal funds which are specifically appropriated by secs. 20.710 (2) (u), and 13.48 (2) (b) 1, Stats. Appropriations carry them the implied authority to perform the act for which the funds were authorized. A contrary opinion would ignore the specific appropriation of sec. 20.710 (2) (u), Stats., as well as the provisions of sec. 13.48 (2) (b) 1, Stats.

It is my opinion that, where such non-state funds are received and appropriated to the building program, they may be used to construct facilities not in the building program, provided such facilities do not exceed \$250,000.

It must be kept in mind the appropriations to the Building Trust Fund for the 1969-1971 biennium and for the 1971-1973 biennium were biennial appropriations and unnumbered balances revert to the general fund pursuant to the provisions of sec. 20.001 (3) (b), Stats. Accordingly, unencumbered balances in the Building Trust Fund from the 1969-1971 biennium are unavailable at this time.

With this general background, I will attempt to advise as to the propriety of particular projects now before the Building Commission.

**PROJECT 1241, OREGON SCHOOL FOR GIRLS,  
RE-ROOF TWO AREAS SCHOOL BUILDING  
(\$13,150)**

Re-roofing areas of the school building, in my opinion, falls within the definition of "ordinary maintenance" and the building trust funds are, under sec. 13.48 (1), Stats., unavailable for such type of work. This project does not require Building Commission approval under sec. 13.48 (10), Stats., and should be paid out of the department operating budget.

**PROJECT 1242, WISCONSIN STATE  
PRISON-WAUPUN REMODELING  
(\$72,200)**

Chapter 125, Laws of 1971, appropriated \$2,156,000 for auxilliary projects under sec. 518 (1) (e) of the budget. The 1971-1973 State Building Program as reported to the legislature contained the following statement:

“This funding pattern provides for greater emphasis on patient and inmate needs, covers sufficient capital maintenance and allows for emergencies and unforeseen developments to be satisfied at the discretion of the agency and the Building Commission.\* \* \*”

As stated previously, the appropriation for auxiliary projects apparently exceeds by \$85,000 the estimated cost of the enumerated auxiliary projects.<sup>7</sup> I have no way of knowing whether this was by design or inadvertence, but the fact remains that surplus funds appear to be on hand. This apparent fact, coupled with the above-quoted language, leads me to conclude that this project may be authorized if it fits that portion of the quoted language “for emergencies and unforeseen developments.”

## DEPARTMENT OF MILITARY AFFAIRS

### A. Project 1331, National Guard Armory at Monroe (\$275,000, State Share \$72,000)

The total authorization for this agency in ch. 125, Laws of 1971, is \$175,000, specifically earmarked for an addition to the Adjutant General's office. The session law corresponds to the legislative report in that the report also reflects this \$175,000 item for the Adjutant General's office addition. The legislative report also requested \$80,000 for an armory at Antigo and \$80,000 for an armory at Monroe. Although these armories were not specifically mentioned in ch. 125, subsection (7) of section 518, ch. 125, Laws of 1971, does provide as follows:

“Two armories may be constructed if subsequent review by the building commission finds them to be essential.”

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<sup>7</sup>See N. 5

Assuming the language of subsection (7) as quoted above satisfies the provisions of sec. 20.924 (1) (a), Stats., requiring enumeration of all projects over \$250,000, we nevertheless have the additional problem of determining where the state's share or \$72,000 is to come from. Article VIII, sec. 2, Wis. Const., provides in part:

“No money may be paid out of the treasury except in pursuance of an appropriation by law.\* \* \*”

As previously mentioned, the addition to the Adjutant General's office is specifically enumerated in the report as well as in the session laws of 1971, even though its projected cost is less than \$250,000. Accordingly, it would be inappropriate to use these funds for this or these projects except to the limited extent permissible under sec. 20.924 (1) (d), Stats. These projects may be constructed and financed from building trust funds only if it is possible to change the project programs and budgets of the armory or armories and the office addition sufficiently to construct both projects, and at the same time satisfy the requirement of “limited changes” as set forth in sec. 20.924 (1) (d), Stats. The Building Commission is not required to approve either the armories or the office addition. However, if the Commission does approve the construction of an armory, it must be financed from those funds earmarked for the office addition by “limited” shifting of funds from the office addition to the armory. Even if the Commission decides not to authorize the construction of the office building, this does not make \$72,000 available for the armory at Monroe for this, in my opinion, would be more than a limited change. It would not be within the language of sec. 20.924 (1) (d), Stats., to defer the office addition and use \$72,000 of funds earmarked for that project for the Monroe armory. It is my opinion that, when a particular project is deferred or disapproved by the Commission, the funds earmarked for that project may not be used in total or even to a large extent for another project or projects. This type of fund shifting would clearly violate the “limited changes” concept or intent of sec. 20.924 (1) (d), Stats.

**B. Projects 1341 to 1345 and 1347, Constituting  
Various Armory Additions, etc., to be Totally  
Financed from Federal Funds.**

None of these projects are provided for in the State Building Program.

Section 13.48 (2) (b) 1, Stats., provides in part:

“\* \* \* The commission shall have all the powers necessary to carry out its duties and may accept all donations, gifts and bequests made to the state for public building purposes, including any grants made by the federal government, and apply the same in accordance with the terms of the grant or the wishes of the donors. \* \* \*”

Section 20.710 (2) (u), Stats., provides in part:

“(u) *Aids for buildings.* Unless otherwise provided by law all moneys received from the federal government or from other sources for the construction, remodeling, repairing, equipment or otherwise improving any of the state’s buildings or institutions shall be paid into the state building trust fund and are appropriated therefrom to the proper department for the purposes for which received, as certified by the governor. The state of Wisconsin hereby assents to the provisions of any act of congress making such funds available to this state for such purposes. \* \* \*”

As these projects are under \$250,000 and as federal grants are appropriated to such projects under the language quoted above, and sec. 20.465 (1) (m) and (u), Stats., they may be approved by the State Building Commission.

As explained earlier in this opinion, the specific appropriation of funds carries with it the authority to construct the projects.

I realize this conclusion results in expenditures exceeding total funds authorized in the state building program for this agency and, therefore, possibly contrary to the prohibition contained in sec. 20.924 (1) (d), Stats. There is question as to whether subsection (d) applies to a situation, such as the case at hand, where no change between projects in a program is involved. On the other hand, subsection (d), it can be argued, is applicable, for subsection (3) of sec. 20.924, Stats., specifically provides that subsection (1) of this same section should apply to program revenues, i.e., federal funds. On balance, it seems reasonable to assume that the legislature did not intend to foreclose the use of federal funds on projects costing less than \$250,000. A contrary

interpretation would vitiate the appropriation statute and violate the rule that statutes in *pari materia* should be construed so that they will all be operative. *McLoughlin v. Malnar* (1942), 237 Wis. 492.

C. Project 1348, Federal and State Financing  
(State's Share \$12,500, State Operating  
Budget Program Revenues)

Although this project exceeds \$15,000 and accordingly needs Building Commission approval under sec. 13.48 (10), Stats., building trust funds are not involved. This project is to be financed from the maintenance account of the agency (sec. 20.465 (1) (b), Stats.) and does not constitute a project within the state building program. Accordingly, it is my opinion that the Building Commission may approve this project.

D. Project 2131,  
University of Wisconsin-Madison

This request concerns an anticipated project of some \$700,000. It appears the project is to be built in two stages with phase one consisting of constructing a \$242,000 facility. Phase two would consist of constructing the balance at cost of approximately \$458,000. Phase two is contingent upon subsequent legislative authority.

In addressing myself to this project, I assume that phase one is a complete and distinct project which does not depend on or commit the state to the second phase of the project. If this assumption is not correct and phase one and two are, in fact, dependent and constitute one program, then under no circumstances may the Building Commission approve phase one. It would not only be an act of bad faith to proceed in this matter if the projects really constitute a single program, but it would be illegal.

Just what is meant by the language contained in the Wisconsin State Building Commission Agenda of July 18, 1972, which describes the funding of this project as: "The remaining \$200,000 has previously been authorized from building trust fund prior funding balances.", is not clear. However, it is my understanding

that it is the intent to fund this project under unused minor project authority as set forth in ch. 154, Laws of 1969, or under auxiliary project authority as contained in ch. 125, Laws of 1971.

The unused authority under the category, Minor Projects, University of Wisconsin-System, 1969-1971, has lapsed. This appropriation was a biannual appropriation and lapsed pursuant to the provision of sec. 20.001 (3) (b), Stats. Accordingly, no reliance may be had on the 1969-1971 unused or unencumbered funding authority. If this project is to be funded, it must be funded from the appropriation contained in sec. 518 (b) of ch. 125, Laws of 1971, entitled System-Auxiliary Projects.

I find no reference to this project in the state building program, report or budget, and, accordingly, it is my opinion that the project may not be authorized.

In regard to the possible planning of phase two of this project, I can only conclude such an expenditure would violate the provisions of secs. 13.48 (3) and 13.48 (5), Stats., as set forth below:

“ \* \* \* At such times as the commission directs, the governor shall authorize releases from this fund to become available for projects in the long-range building program, and he shall direct the department of administration to allocate from this fund such amounts as are approved for these projects. \* \* \*

“ \* \* \* The department of administration shall assist the commission in the performance of its duties. The department of administration shall, when requested by the commission, make or cause to be made such studies, preliminary plans and specifications and cost estimates with respect to any proposed project as are necessary to permit the commission to consider intelligently the approval or disapproval of the project and the appropriation of funds. The costs of such studies shall be charged against the building trust fund.”

I realize that sec. 518 (1) (j) of the budget appropriated \$2,000,000 for advance planning. What the term “advance planning” includes is difficult to determine. Surely it would encompass planning needs for future legislative action. However,

to be consistent with the laws pertaining to the state building program, it cannot be used for the actual final design of a facility that has not been approved by the legislature.

Additionally, you have asked:

“What do you advise we do about projects approved and under construction with signed contracts which never appeared on any list?”

I cannot advise on this matter without knowing exactly what the projects were, what funds were used and on what theory approval was given. If you will advise me as to the particular facts involved in each instance, I will provide what assistance and advice I can.

RWW:CAB

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*Vocational, Technical And Adult Education District Board—Contracts—Section 38.14 (3), Stats., Laws of 1971, permits district vocational, technical and adult education boards to contract only with public educational institutions for instructional services.*

August 10, 1972.

EUGENE I. LEHRMANN, *Director*

*Board of Vocational, Technical and Adult Education*

In your letter of June 7, 1972, you inquire as to whether a vocational, technical and adult education district may use monies generated from its tax revenues to contract with or fund an educational program conducted by a private organization. In particular, you indicate that recently Vocational, Technical and Adult Education District 4 has been approached by the Madison Urban League to provide funds to support a project operated by the League. You further indicated to a member of my staff that the answer to this question is of statewide importance, since

several other districts are considering, in effect, delegating part of their power with respect to instructional services to private contractors.

Chapter 154, Laws of 1971, which substantially amended the vocational, technical and adult education laws, became effective July 1, 1972. Section 38.14 (3), Stats., thereof provides as follows:

“(3) CONTRACTS FOR INSTRUCTIONAL SERVICES. The district board may contract with public educational institutions and other district boards for instructional services.”

In view of the above provision of the law, it is my opinion that district vocational, technical and adult education boards may not contract with private organizations for the rendering of instructional services. A state agency has only those powers specifically delegated to it or which may be reasonably implied as necessary for discharge of its duties. And further, under other rules of statutory construction, “where a form of conduct, the manner of its performance and operation and the persons and things to which it refers are affirmatively or negatively designated, there is an inference that all omissions were intended by the legislature.” (2 Sutherland, *Statutory Construction*, 3rd ed. 4915, pp. 412-413.)

RWW:JWC

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*Small Claims Court—Records*—A judge may destroy records without making a copy per sec. 59.715 (20) (c), Stats., only if he deems such both “obsolete and useless.”

August 10, 1972.

RAY A. SUNDET, *Corporation Counsel*  
*La Crosse County*

You ask my opinion concerning whether or not records of county small claims court from the period 1955 through 1962 may be destroyed.

Our office has previously ruled that no public records may be destroyed without express legislative authority. 46 OAG 8 (1957) Section 59.715 (20), Stats., referring to obsolete county records, provides:

“Destruction of obsolete county records. Whenever necessary to gain needed vault and filing space, county or court officers and the custodian of the records of all courts of record in the state may, subject to ss. 59.716 and 59.717, destroy obsolete records in their custody as follows:

“\* \* \*

“(20) Court records and exhibits in any civil, criminal action and proceeding, or probate proceedings of any nature under the jurisdiction of the courts of record in the state, provided the same shall first be photographed or microphotographed and preserved as provided in s. 889.30 in all cases except exhibits not of a documentary nature:

“(a) After 10 years from the entry of a final order or judgment therein, or

“(b) After 10 years from the date when the same shall have been commenced; provided that the same shall have been dormant for 10 years and that the destruction thereof shall be authorized by the order of the judge of the court whose records are to be destroyed, or

“(c) Upon a written order of the judge of the court, the records of which are to be destroyed, the records and exhibits of that court which the judge deems obsolete and useless, but not including inventories and final accounts of deceased persons, may be destroyed after 10 years as provided in pars. (a) and (b) without being first reproduced, photographed or microphotographed.”

Since this section refers to any civil or criminal proceeding under the jurisdiction of the courts of record in this state, it necessarily applies to records in small claims actions.

In 56 OAG 199, 201 (1967), we advised that obsolete county record may be destroyed only “\* \* \* if it is necessary to gain needed vault and filing space,” a requirement of the first sentence

of sec. 59.715, Stats. Further, the records must be offered to the State Historical Society as required under sec. 59.716, Stats., and the requirements expressed in sec. 59.715 (20) (a), (b) and (c), Stats., concerning time, photocopying and court order must be complied with.

Under sec. 59.715 (20) (a), Stats., obsolete records and exhibits may be destroyed 10 years after entry of final order or judgment, and under subsec. (20) (b), they may be destroyed 10 years after commencement of an action if the case has been dormant for 10 years, and the judge whose records are unvalued provides his written approval. Unlike subsec. (20) (c), destruction of records under subsec. (20) (a) and (b) must be preceded by photocopying. Since a proper photograph or microphotograph is "deemed to be an original record for all purposes," by sec. 889.30, Stats., destruction of the actual original records would have no practical effect on the rights of any person who, for any reason, would ever need those records. It would appear, therefore, that the small claims records you inquire about could be destroyed, if they are photocopied and the other statutory requirements met, without regard to the various statutes of limitation you mention in your letter. It should be noted, however, that one of the statutory requirements for photocopying of county records under sec. 889.30, Stats., is approval by the county board.

A different situation exists under sec. 59.715 (20) (c), Stats., where court records may be destroyed without being photographed if the judge deems them "obsolete and useless." This appears to be a higher standard than that set forth in subsec. (20) (a) and (b) where the term "obsolete" alone applies. Since records destroyed under subsec. (20) (c) would be gone forever, their potential usefulness must be examined very carefully. Before a judge deems a case's record "obsolete and useless," he must consider the various statutes of limitation which may apply including secs. 270.75, 270.79, 893.16 (1), 270.95, and 272.04, Stats., which you mention in your letter. Further, in certain real estate cases, the record may have potential usefulness for very many years and control the disposition of subsequent actions commenced within the 30- or 60-year period of limitation provided for in sec. 893.15, Stats. Full compliance with sec. 59.715 (20) (c), Stats., would seem to require that the judge

review each record individually. If it has the potential of serving any useful purpose, however remote, the record may only be destroyed under the auspices of subsec. (20) (a) and (b), both of which require photocopying.

RWW:PH

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*Corporation Agents—Secretary Of State*—Corporations failing to maintain registered agents after notice by Secretary of State should be reported to the Attorney General.

August 10, 1972.

ROBERT C. ZIMMERMAN

*Secretary of State*

You have requested my advice concerning the proper county for filing and recording documents of a corporation organized under ch. 180, Stats., after the resignation of the corporation's registered agent, pursuant to sec. 180.105, Stats., has become effective.

Corporations are required to have and maintain a registered agent and a registered office pursuant to sec. 180.09, Stats., which provides that:

“Registered office and registered agent. Each corporation, *shall have and continuously maintain* in this state:

“(1) A registered office which may be, but need not be, the same as its place of business.

“(2) A registered agent, which agent may be either an individual resident in this state whose business office is identical with such registered office, or a domestic corporation, or a foreign corporation authorized to transact business in this state, having a business office identical with such registered office.” (Emphasis added)

The purpose of this requirement "is to insure that all corporations maintain a convenient and accessible agent for the service of process, and for all other matters pertaining to the general supervisory control of the State of Wisconsin over its corporations." 55 OAG 24 (1966)

A registered agent may resign his position by executing a statement to that effect pursuant to sec. 180.105, Stats. Section 180.105 (3) and (4), Stats., specifically provides that:

"(3) Such statement shall be filed and recorded. At the time of filing, a triplicate shall be delivered to the secretary of state. On receipt from the register of deeds of the certificate showing the recording of the duplicate original of the statement, the secretary of state shall note on the triplicate the date of recording and mail the same to the corporation at its principal place of business as shown by the records in his office.

"(4) If no change of registered agent is previously made, the resignation shall be effective on the expiration of 60 days after the date of recording the statement, and the office of the resigned registered agent shall then cease to be the registered office of the corporation."

You advise that subsec. (4) is interpreted by your office to mean that, upon the effectiveness of the agent's resignation, the corporation no longer has a registered office. You note that this results in a situation where the corporation appears to be prevented from recording subsequent documents pursuant to sec. 180.86, Stats., which requires that duplicate originals of corporation documents filed with the Secretary of State's office "shall be recorded in the office of the register of deeds of the county in which the registered office of the corporation is located.  
\* \* \*

In a situation where a corporation is technically prevented from following the procedure set forth in sec. 180.86, Stats., our office has previously stated, in a letter to you dated January 22, 1970, that the procedure set forth in sec. 180.10, Stats., which provides the method by which a corporation may change its registered office or its registered agent may be used to "change" the registered agent of a corporation in those cases where the registered agent of the corporation has resigned or passed away.

As I noted in our previous opinion, the terms of sec. 180.10, Stats., do not explicitly lend themselves to the situation described. That letter indicated, however, that:

“\* \* \* Any other interpretation would necessarily work to penalize a given corporation upon the death of its registered agent or its failure to change its registered agent within sixty days after his resignation. I do not believe that such was the intent of this statute.

“Use of the form which you provide and compliance with the terms of sec. 180.10 will accomplish the end which registration with your office is intended to accomplish.”

I, therefore, recommend that a corporation which fails to maintain a registered office pursuant to sec. 180.09, Stats., be requested by your office to establish a new registered agent and registered office pursuant to sec. 180.10, Stats., by filing the necessary papers with your office and the register of deeds of the proper county or counties.

If the situation arises where a nonconforming corporation fails to comply with the foregoing request of your office, that corporation may be dissolved involuntarily by your office pursuant to sec. 180.769 (1) (d), Stats., which provides that:

“Involuntary dissolution. (1) A corporation may be dissolved involuntarily by a decree of any circuit court in an action commenced by the attorney-general when it is established that:

“\* \* \*

“(d) The corporation has failed for 30 days to appoint and maintain a registered agent in this state; or

“(e) The corporation has failed for 30 days after change of its registered office or registered agent to file in the office of the secretary of state a statement of such change; \* \* \*”

In those instances where the Secretary of State does not obtain compliance with his request, he should notify the Attorney General of the matter with a request that he take the necessary legal action.

RWW:JCM

*County Government—County Board*—County clerk can adjourn regular meeting of county board when requested by majority of elected members of the board. Call for bids for county general obligation bonds must be advertised two times.

August 10, 1972.

FREDERICK P. OTTO, *District Attorney*

*Crawford County*

You have requested my opinion on several questions related to county government.

“1) Can the County Clerk adjourn the regular August 15, 1972 meeting at the request of the majority of the Crawford County Board to August 22, 1972?”

I am of the opinion that the clerk has such power, when initiated by a request of a majority of the supervisors, whether the meeting scheduled for August 15, 1972, was adjourned from the April organizational meeting specified in sec. 59.04 (1) (c), Stats., which “may be adjourned in the same manner as the annual meeting” according to the provisions of sec. 59.04 (1) (b), Stats., or was a regular meeting date established by board rule pursuant to sec. 59.04 (1) (a), Stats., Where a board does act under sec. 59.04 (1) (a), Stats., to establish regular meeting dates throughout the year at which any general business may be transacted, the board has power to, by rule, authorize the clerk to adjourn the meeting on request of a majority of the board.

“2) Can a resolution be brought to the County Board to issue general obligations bonds for the Memorial Hospital at a called special meeting on July 27, 1972?”

You indicate that the special meeting for July 27, 1972, was requested by a majority of the board and that the clerk received the written request on July 19, 1972.

Section 59.04 (2) (a), Stats., provides that the time of the special meeting shall not be less than one week from the delivery of the request to the county clerk. The request appears to have been timely, and it was the duty of the clerk to forthwith mail notice of the time and place of the meeting to each supervisor.

If the special meeting was called for the purpose of considering the issuance of general obligation bonds for a county memorial hospital, some action can be taken at the meeting on July 27, 1972. The purpose appears to be within the meaning of sec. 67.04 (1) (a), Stats. Section 67.05 (3), Stats., provides that the initial resolution may be adopted at a special meeting by a two-thirds vote of the members-elect at a meeting attended by all of its members-elect. If all are not present, proof by affidavit must establish that a member not present was notified of the time, place and purpose of the meeting at least 24 hours before such time. See sec. 67.05 (7) (a) and (f), Stats., as to when referendum is permitted or required.

“3) Must the bids for county general obligation bonds be advertised two times?”

The answer is “yes.” Section 67.08 (2), Stats., provides that notice of sale of bonds (call for bids) shall be published as a class 2 notice under ch. 985, the last insertion to be at least ten days prior to the sale unless sold to the county itself.

RWW:RJV

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*Occupational Safety Laws—Industry, Labor And Human Relations Department—*Under sec. 16.54, Stats., Wisconsin may enter into an agreement with the Federal Government under sec. 18 (b), Occupational Safety and Health Act of 1970, 84 Stat. 1950, for the development, administration and enforcement, at state level, of occupational safety and health laws meeting federal standards.

August 14, 1972.

PHILIP E. LERMAN, *Chairman*  
*Department of Industry, Labor and Human Relations*

You have asked me for my opinion whether the state of Wisconsin, by its Department of Industry, Labor and Human Relations, may enter into an agreement with the Federal Government, under sec. 18(b) of the Occupational Safety and Health Act of 1970 (84 Stat. 1590, 29 U.S.C. sec. 651) (OSHA), to assume responsibility for the development and enforcement of occupational safety and health standards comparable to the federal standards.

You advise that Governor Lucey has designated your department to develop a state plan, secure its approval and administer it. Your department is developing a plan, which includes proposals for necessary legislation and rule changes, to be submitted to the United States Secretary of Labor for approval. Under this Act (OSHA), unless such state plan is submitted and approved, state activity in this area will be preempted by the Federal Government. This opinion request is one of the conditions of developmental plan approval.

It is my opinion that the state of Wisconsin may enter into such an agreement and that your department may develop, administer and enforce the occupational safety and health standards conforming to acceptable federal standards.

The Governor has authority to sign such an agreement on behalf of the state of Wisconsin.

Article V, sec. 4, Wis. Const., provides that the Governor:

“\* \* \* shall transact all necessary business with the officers of the government, civil and military. He shall expedite all such measures as may be resolved upon by the legislature; and shall take care that the laws by faithfully executed.”

By the cited paragraphs of sec. 16.54, Stats., the Governor is authorized: (1) to accept funds made available by the United States government for “education, the promotion of health” and other purposes; (2) to designate the state department to administer such funds for the purpose specified by the Act of

Congress or the department of the United States making the funds available; (4) the state agency in administering such funds shall comply with the Act, rules and regulations prescribed by the Federal Government or department making the funds available; (5) whenever the federal agency as a condition to federal aid requires the administering state agency to submit for approval "a budget, plan, application or proposal," the same shall first be approved by the Governor and reported to the Joint Committee on Finance while the legislature is in session or to the Board on Government Operations when it is not, and (6) in accepting federal funds and benefits the Governor:

"\* \* \* may take or cause to be taken all necessary acts including (without limitation because of enumeration) the making of leases or other contracts with the federal government; the preparation, adoption and execution of plans, methods, and agreements, and the designation of state, municipal or other agencies to perform specific duties."

The existing Wisconsin safety and health standards are already substantially in accord with federal standards. Your plan provides for proposed legislation including agricultural workers and makes the penalties more severe. OSHA provides that any nonconforming state plan may be approved if assurance is given that the state will take necessary steps to bring its program into substantial conformity with federal requirements within a three-year period.

Since my office now prosecutes enforcement actions for your department under state law, it is suggested that you keep me closely informed regarding plans to be submitted in this matter. It is assumed that this office will continue to handle litigation in the courts under the plan. See 52 OAG 394 (1963).

RWW:RGM

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*County Coroner—Medical Examiner—Implementation* legislation is necessary before counties under 500,000 may abolish office of coroner.

August 17, 1972.

WILLIAM A. BABLITCH, *District Attorney*  
*Portage County*

You state that Portage County is considering instituting a medical examiner system to replace the elective office of coroner and request my opinion on a number of questions relating to such change. You indicate that an election for the office of coroner is presently in progress.

Your basic question is whether the County Board of Supervisors can act at this time to abolish the elective office of coroner and institute a medical examiner system.

It is my opinion that it cannot.

At the April, 1965, election, the electors ratified an amendment to Art. VI, sec. 4, Wis. Const., to provide that:

“\* \* \* The offices of coroner and surveyor in counties having a population of 500,000 or more are abolished at the conclusion of the terms of office during which this amendment is adopted.  
\* \* \*”

Prior to April, 1972, the office of medical examiner was not mentioned in the Wisconsin Constitution. However, as early as 1943, the legislature had provided for a medical examiner to be appointed by the county board in counties over 500,000 population. In *Schultz v. Milwaukee County* (1944), 245 Wis. 111, 13 N.W. 2d 580, ch. 247, Laws of 1943, which provided for such medical examiner and prescribed the duties of the position, was held constitutional.

Sections 59.34-59.35, Stats. (1969), provide for a medical examiner in counties of over 500,000 population to be appointed by the county board under secs. 63.01-63.17, Stats., and specify the duties of the office. These provisions are expressly limited to counties over 500,000 population and cannot be utilized by other counties desiring to implement a medical examiner system.

On April 4, 1972, the electors ratified an amendment to Art. VI, sec. 4, Wis. Const., by deleting and adding the language emphasized below:

“(Article VI) Section 4. Sheriffs, coroners, register of deeds, district attorneys, and all other county officers except judicial officers and chief executive officers, shall be chosen by the electors of the respective counties once in every two years. The offices of coroner and surveyor in counties having a population of 500,000 or more are abolished ~~at the conclusion of the terms of office during which this amendment is adopted.~~ *Counties not having a population of 500,000 shall have the option of retaining the elective office of coroner or institutina a medical examinem. Two or more counties may institute a joint medical examiner system. \* \* \**”

The office of medical examiner is not one which the counstitution requires filling by election. It is not a historical office which has fixed duties. The phrase “all other county officers” incorporated into the first sentence of this section by amendment in 1882 means the heads of the several major divisions of county government existing at that time. It does not take away the legislative power mentioned in Art. XIII, sec. 9, Wis. Const., to create county offices with other duties and to provide for the manner of filling such offices and the terms thereof.

*State ex rel. Williams v. Samuelson* (1907), 131 Wis. 499, 111 N.W. 712.

Article XIII, sec. 9, Wis. Const., provides in part:

“All county officers whose election or appointment is not provided for by this constitution shall be elected by the electors of the respective counties, or appointed by the boards of supervisors, or other county authorities, as the legislature shall direct. \* \* \* All other officers whose election or appointment is not provided for by this constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people or appointed, as the legislature may direct.”

I am of the opinon that the amendment to Art. VI, sec. 4, Wis. Const., is not self-executing, since action by the legislature is required to establish the method of appointment or election of such medical examiner in counties under 500,000 population, to provide duties of such office and to establish qualifications for the position if it deems it desirable.

*Kayden Industries, Inc. v. Murphy* (1967), 34 Wis. 2d 718, 731-733, 150 N.W.2d 447.

Implementing legislation, if passed, may well provide for the orderly transition from the coroner system to the medical examiner system which would resolve other questions you raise. The legislature has power, however, to alter terms or to abolish or permit the abolishment of offices not established by the Constitution without regard to the tenure of an incumbent. *State ex rel. Reuss v. Giessel* (1952), 260 Wis. 524, 51 N.W. 2d 547. In view of the amendment giving counties the power to *retain* "the elective office of coroner or" institute a "medical examiner system," I am of the opinion that counties can abolish the office of coroner when and if the legislature provides for manner of election or appointment and duties of a medical examiner in counties under 500,000 population, without regard to the tenure of any incumbent coroner. In view of the implied power granted counties by the amendment to Art. VI, sec. 4, Wis. Const., to abolish the office of coroner at such time the legislature provides for the election or appointment of a medical examiner in counties under 500,000 population, the holding and reasoning in the second *Schultz v. Milwaukee County* case (1947), 250 Wis. 18, 26 N.W. 2d 260, is distinguishable.

RWW:RJV

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*Family Court Commissioner—Fees*—Family court commissioner is without authority to charge \$15 fee to hear order to show cause in domestic relations case.

August 17, 1972.

RAY A. SUNDET, *Corporation Counsel*  
*La Crosse County*

You request my opinion whether the family court commissioner is authorized to charge a \$15 fee for hearing an order to show cause in an action affecting marriage.

You state that the practice to collect such fee from the moving party and to transmit the same to the county treasurer has grown up in La Crosse County.

I am of the opinion that he is without such authority.

Section 247.13 (1), Stats., does provide in part:

“\* \* \* Such commissioner shall, by virtue of his office and to the extent required for the performance of his duties, have the powers of a court commissioner. Such court commissioner shall be in addition to the maximum number of court commissioners permitted by s. 252.14. \* \* \*”

Section 252.17, Stats., does provide for fees for court commissioners and the \$15 fee may have been charged in the past on the basis of sec. 252.17 (8), Stats., which provides for a \$15 fee for attendance upon the taking of testimony or examination of witnesses in any matter or proceeding.

Section 247.17, Stats. (1957), did formerly provide that a divorce counsel shall receive \$15 for appearing upon the trial and \$10 for making an investigation. However, chs. 595 and 615, Laws of 1959, amended secs. 247.17 and 247.13 (1), Stats., to provide that the family court commissioner, whether full-or part-time, shall be provided with an annual salary.

The legislative note to the revision of sec. 247.17, Stats., which was also applicable to a change made in then sec. 247.29, Stats., stated:

“In keeping with the important function of a family court commissioner this section makes it mandatory that he be a salaried employee of the county instead of being compensated on a fee basis. The county board may provide him with a furnished office, supplies and stenographic services.”

Your attention is directed to *Strandberg v. Strandberg* (1965), 27 Wis. 2d 559, 135 N.W. 2d 241. At pages 564-566 the court discusses the limits the trial court and family court commissioner should observe with respect to the services to be performed by a family court commissioner. The court stated that the commissioner is empowered by sec. 247.23 (1), Stats., to make

temporary orders concerning care, custody and suitable maintenance of minor children and support of the wife during pendency of the action.

Since such function is a duty of the family court commissioner, it is my opinion that he should not impose fees based on sec. 252.17, Stats., which may be applicable to court commissioners.

RJV

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*Bicycles—Auxiliary Seat*—Discussion of number of persons who can operate a single bicycle.

August 28, 1972.

DAVID E. NELSON, *District Attorney*  
*Richland County*

Section 346.79 (2), Stats., provides:

“No bicycle shall be used to carry more persons at one time than the number for which it is designed and equipped.”

You have informed me that, in some cases, an additional seat may be welded onto a bicycle originally designed for one person, and that no other attachments (such as footrests or handgrips) are made to the bicycle in addition to the added seat. Your question is whether the above statute is violated when two persons ride on such a bicycle. In my opinion the answer is “yes.”

This statute prohibits the use of a bicycle to carry more persons at one time than the number for which it is designed and equipped. The usual bicycle is both designed and equipped for use by one person only. The principal exception would be a bicycle built for two or more persons, and so designed and equipped with seats, handlebars and pedals or footrests for each rider. A bicycle built for one is both designed and equipped for only one rider. The addition of an extra welded seat does not change the original design. Clearly, such a bicycle was not designed for the addition of a welded seat. Neither is such a bicycle, with the added welded seat, “equipped” for an extra passenger since there are no

handholds, handlebars, footrests or pedals for such passenger. It is my opinion that the use of such a bicycle by more than one person does violate the above-quoted statute.

I have previously considered whether this statute is violated where a bicycle is equipped with an auxiliary child's seat. Such seats are designed and manufactured to fit and be fastened to the frame of a bicycle behind the rider. They are designed to hold only a small child who usually rides behind his mother or father. The seat is equipped with a footrest to protect the child's feet from the spokes of the rear wheel and a safety strap to keep him from falling out of the seat. It is my opinion that such a bicycle, with the child's auxiliary seat installed, is designed and equipped to carry a small child passenger. A parent who transports his child in such a seat does not violate sec. 346.79 (2), Stats.

RWW:AOH

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*Investment Board—Public Records*—The Investment Board can only deny members of the public from inspecting and copying portions of the minutes relating to the investment of state funds and documents pertaining thereto on a case-by-case basis where valid reasons for denial exist and are specially stated.

September 6, 1972.

JOHN R. PIKE, *Executive Director*  
*Wisconsin Investment Board*

You have requested my opinion whether the Investment Board has legal authority to preclude members of the general public from inspecting or copying *any portion* of minutes of the board relating to the investment of state funds and *every document* relating to such investments.

It is my opinion that the board is without such power. The board acting through its custodian can only deny inspection and copying on a case-by-case basis as hereinafter discussed.

By reason of secs. 25.156, 25.16, 25.17, 25.18, 889.08 (2), Stats., you are the legal custodian of such records except as may be otherwise provided by special statute. See secs. 14.58 (13), (17), (18), 25.17 (7) (b), 41.17, 41.18 (2), Stats.

I find nothing in secs. 14.58, 15.07, 15.76, 16.40, 25.14-25.40, 41.17, 41.18, 210.05, Stats., or other statutes referred to in sec. 15.761, Stats., (with the possible exception of sec. 71.20 (4) by reason of sec. 71.11 (44)) which would indicate a legislative intent or statutory basis for exempting the records of the Investment Board from general inspection and copying statutes.

It is also notes that secs. 16.40 (12), (13), 16.41, 16.42, Stats., require the director to furnish the Secretary of the Department of Administration with such reports of investments as he may require and grants the secretary free access to all financial accounts of every state department, that sec. 25.17 (51), Stats., requires the director to have the records and accounts of the board audited at least annually by the Legislative Audit Bureau and that sec. 25.17 (52), Stats., requires maintenance of certain records for reporting to the Department of Administration. Insofar as certain of the documents of investments are in the custody of the State Treasurer, sec. 19.25, Stats., is indirectly in point as to access to these records by certain state officers.

The minutes of the board and all papers and documents relating to the investment of state funds, which are in your possession "or to the possession or control of which" you "may be lawfully entitled, as such" officer, are public records within the meaning of secs. 16.80 (2) (a), 19.21 (1), Stats.

As public records they are subject to inspection and copying by any person using proper care during office hours subject to reasonable regulations as the custodian may provide. Sec. 19.21 (2), Stats. If demand for inspection and copying is made at reasonable time and place, the custodian can only withhold inspection if he determines that the public interest in withholding inspection exceeds the public interest, expressed in statute, in permitting inspection. Specific reasons must be given when inspection is withheld and the person seeking the same can then resort to court action to test the sufficiency of such reasons. Statements that the records are "confidential" or that permitting

inspection would be "contrary to the public" interest are merely legal conclusions and are not a substitute for specific reasons which must be given in each case.

*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;

58 OAG 67 (1969);

60 OAG 9 (1971), dated January 21, 1971, to District Attorney, Dane County;

60 OAG 43 (1971), dated January 26, 1971, to Chairman, Department of Industry, Labor and Human Relations;

60 OAG 285 (1971), dated August 10, 1971, to Secretary, Department of Natural Resources;

60 OAG 470 (1971), dated December 31, 1971, to Secretary, Department of Transportation.

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, Stats.

I am enclosing copies of the opinions to the Secretary of the Department of Natural Resources and the Secretary of the Department of Transportation referred to above in which the exceptions listed in sec. 66.77 (3), Stats., and certain other common law exceptions are discussed.

As a state administrative agency, the State Investment Board has only such powers as are expressly granted by statute or necessarily implied and its administrative rules must be in accord with statutory policy.

*American Brass Co. v. State Board of Health* (1944), 245 Wis. 440, 15 N.W. 2d 27;

*Josam Mfg. Co. v. State Board of Health* (1965), 26 Wis. 2d 587, 133 N.W. 2d 301.

Any overall rule or policy barring any inspection or copying would, in my opinion, be void.

Without question, portions of the board's meetings should be conducted in executive session, and certain documents relating to investments should on a case-by-case basis, be withheld from inspection. Subsections (d), (e) and (f) of sec. 66.77 (3), Stats., may form the basis for closed sessions or withholding inspection depending upon the circumstances. Subsection (d) provides:

“(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;”

Time may be an important element to consider. With respect to investments there are at least three time periods involved—the *period of acquisition*, which would involve research, deliberating, negotiating and purchasing, the *period of retention*, and the *period of disposal*, which again would involve research, deliberating, negotiating and sale.

Justification for closing of files on an investment, after acquisition and during the period of retention, may be difficult to establish. It would be even more difficult to justify closing of files after disposal. Generally speaking, however, where there may be grounds for maintaining closed files at a time which is critical in the deliberating and negotiation stages, those grounds become weakened by the passage of time.

You state that the board purchases investment advisory services from a firm which requests that the information be kept confidential and that certain information as to loan applications, appraisals, loan balances, payments and interest rates are customarily regarded as confidential in the investment industry.

In the opinion to the Secretary of the Department of Natural Resources, dated August 10, 1971, referred to above, 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:

"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. \* \* \*"

You should consider the above guide lines in making your initial determination whether inspection should be withheld, to honor a pledge of confidentiality which may have been extended, or to maintain a posture which would enhance the ability of the board to profitably compete for investment opportunities and to maintain a secure investment portfolio.

Where the custodian denies inspection, giving specific reasons, the person seeking inspection can resort to court action in an attempt to compel inspection. Where such recourse is made, it is for the court to determine whether the reasons given are sufficient in the specific case to require withholding of inspection in the interests of the public.

RWW:RJV

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*Elections—Absentee Voting*—Upon marriage to a Wisconsin serviceman, a nonresident wife may take Wisconsin voting residence of husband.

September 6, 1972.

W. PATRICK DONLIN, *District Attorney*  
*Price County*

You request my opinion as to whether the following individuals can obtain absentee ballots from Wisconsin for voting in general and primary elections:

“One individual, a male, went in the service in 1967 while living with his parents in Stevens Point, Wisconsin. Subsequently the parents moved to Price County, Wisconsin. While the individual was in service, in 1968 he was wounded in Viet Nam and was subsequently returned to the United States and assigned to a hospital located in the State of Texas for treatment. Such transfer took place in May, 1968. Ever since this time this individual has remained in the service stationed at the hospital in Texas. He has at all times maintained his Wisconsin driver's license and has filed, as I am informed, his Wisconsin income taxes. Therefore I presume as to this individual, there would be no question, that he can receive, upon proper application, an absentee ballot for Wisconsin elections.

“The second individual is the wife of the service man. They were married while in Texas and she was, at the time of the marriage, a resident of and domiciled in Texas. She has never resided in Wisconsin except for a short period of time when she and her husband vacationed in Price County in 1970. At this time, it is my understanding that their intent is to return to Wisconsin and set up a home here as soon as the serviceman is discharged. However, they have no ideas when this may be. Is the wife entitled to, upon proper application, an absentee ballot from Wisconsin?”

As you correctly assume, it appears that the serviceman you describe could obtain an absentee ballot for Wisconsin's elections. Section 6.10 (6), Stats., provides, in part, as follows:

“As prescribed in the constitution, no person loses his residence in this state while absent from this state on business for the United States or this state; \* \* \*”

However, since the facts you provide do not disclose the serviceman's age when he entered the service, the age of the serviceman on the date his parents moved from Portage County to Price County, or any other facts in reference to his possible

emancipation, it is not possible for our office to determine whether his absentee ballot should be requested from Price County or Portage County.

Generally speaking, although the place where the family resides normally establishes the residence of the individual members of the family unit, this is not true if the present family home is "temporary or for transient purposes." Sec. 6.10 (2), Stats. The foregoing comments in reference to the serviceman have, therefore, been made on the assumption that he has never abandoned his Wisconsin residence and has continued to consider his present residence in the state of Texas as a temporary residence while absent from the state of Wisconsin.

On the other hand, the situation in reference to the serviceman's wife is a bit more complicated. Section 246.15, Stats., specifically provides, in part, that:

"\* \* \* Women shall have the same rights and privileges under the law as men in the exercise of suffrage \* \* \* (and) choice of residence for voting purposes, \* \* \*" . . ."

Although it is evident that a married woman may establish a voting residence separate from her husband, under the provisions of sec. 246.15, Stats., this office has taken the position for many years that that statute does not require the abandonment of the general common law rule that the domicile of the wife follows that of her husband, at least absent facts establishing otherwise. The operation of that rule under circumstances similar to those described in your letter were previously discussed by our office in 17 OAG 489 (1928). In that opinion, it was concluded that a married woman from California, who had never resided in Wisconsin, but whose husband was a Wisconsin citizen and in the United States Army, could vote in the same Wisconsin precinct as her husband.

As a practicable matter, there is no absolute criterion or guideline which will, at once, determine the question of residence in each and every case. In addition, there may be additional facts in reference to the two situations you describe which would affect a determination as to residence in either one or both cases. However, based on the information you have furnished, I

conclude that both the serviceman and his wife would probably be entitled, upon proper application, to an absentee ballot for Wisconsin elections.

RWW:JCM

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*Elections—Residency*—A candidate for the September primary must be a resident of the district or county at the time he files declaration.

September 7, 1972.

ROBERT C. ZIMMERMAN

*Secretary of State*

You have requested my opinion on whether, under sec. 8.15 (4) (b), Stats., a candidate for a September primary must be a resident of the district or county at the time he or she files the required declaration. This section provides:

“Each candidate shall file with his nomination papers, a declaration, sworn to before any officer authorized to administer oaths, *that he is a resident of the district or county, if he is seeking an office elected on a district or county basis* and he will qualify for office if nominated and elected. The nomination papers and the candidate’s sworn declaration are valid with or without the seal impression of the authorized officer who administered the oath.” (Emphasis supplied)

It is my opinion that the clear and unambiguous language of the quoted statutory provision does not warrant an interpretation other than that the candidate must be a resident at the time he or she files nomination papers. However, because of the opinion I gave to you on March 13, 1972, this does not apply to candidates for Congress.

You have also asked what the word “resident” implies within the purview of the statutory provision under consideration.

It is my opinion that "residency" in this section must be considered to mean domicile, as opposed to temporary residency. To contend that the legislature intended temporary residency as opposed to the more permanent domiciliary status would be to attribute to the legislature an intent to legislate in vain. This is an improper statutory construction. See *Hass v. Welch* (1932), 207 Wis. 84, 86, 240 N.W. 789.

In further support of this conclusion, please refer to my opinion addressed to you, dated May 24, 1972, wherein I set forth the reasoning and law leading to the conclusion that the term "residence," as used in reference to voter eligibility, means domicile. This, coupled with the generally accepted law that the right to hold public office is restricted to those who are qualified voters, (25 Am. Jur. 2d *Elections*, sec. 177) results in the conclusion that the term "residence" in sec. 8.15 (4) (b), Stats., means domicile.

RWW:WHW

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*Competitive Bidding—Examining Board*—Examining Board of Architects, Professional Engineers, Designers and Land Surveyors lacks power to adopt rule prohibiting competitive bidding on projects by architects, professional engineers, etc.

September 11, 1972.

C. F. HURC, *Secretary*

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

You have asked whether the Examining Board of Architects, Professional Engineers, Designers and Land Surveyors has authority under sec. 443.01 (4) (d), Stats., to enact a rule prohibiting competitive bidding in the offering of services by persons registered with the Board. Your letter asks whether the Board has power "in the absence of any connection between such prohibition and the public welfare or the safeguarding of life, health or property."

It is my opinion, that the Board does not have the power to adopt the rule proposed.

As stated in *American Brass Company v. State Board of Health* (1944), 245 Wis. 440, 448, 15 N.W. 2d 27:

“\* \* \* No proposition of law is better established than that administrative agencies have only such powers as are expressly granted to them or necessarily implied and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds.”

Section 443.01 (4) (d), Stats., states in part:

“The examining board may make all bylaws and rules, not inconsistent with the constitution and laws of this state, which may be reasonably necessary for the proper performance of its duties and the regulations of the proceedings before it. \* \* \*”

The Board may enact rules to facilitate the performance of its regulatory duties. Concerning the basis and limits of the Board's powers, the court stated in *State ex rel. Wis. R of A & P E v. TV Eng.* (1966), 30 Wis. 2d 434, 438-439, 141 N.W. 2d 235 that the applicable statute:

“and its several subdivisions regulate the practice of architects and professional engineers. It is founded in the police power of the state to protect the public welfare and to safeguard the life, health and property of its citizens. This statute, as all licensing regulatory statutes, is not enacted for the benefit of the persons licensed thereunder but for the benefit and protection of the public.”

It is my opinion that the Board has authority to make rules of procedure and, further, to make rules which are related to promotion of the public health, safety and welfare and the protection of property under the police power of the state. As your letter states that the proposed rule is not connected to “safe guarding of life, health or property,” it follows that the Board does not have the authority to enact it.

It is not obvious to me that a rule prohibiting architects and engineers from engaging in competitive bidding would be in the public interest. All licensed professionals are assumed to be

competent and it is the Board's responsibility to insure that this is so. Contracts for professional services are not considered as contracts to do public works within the meaning of our statutes requiring government contracts be let to the lowest responsible bidder. *Flottum v. Cumberland* (1940), 234 Wis. 654, 662-663, 291 N.W. 777. See also 15 A.L.R. 3rd 733.

The state is not required to hire the professional who submits the lowest bid for a job even if it chooses to let bids for the services required. It has the discretion to base its selection of architects and engineers on other considerations beside price—such as past performance, experience, production capabilities and work load. It is my understanding that the Bureau of Facilities Management of the Department of Administration utilizes a set of criteria for the selection of architects and engineers which places appropriate emphasis on factors other than price. Given this discretion, it would seem to be in the public interest to receive the benefits inherent in price competition and comparison in selection of professional contracts for state work.

The professions registered and regulated by the Examining Board have been entitled for many years to submit competitive bids for projects. The subject may be amenable still to legislative mandate but is not within the administrative authority delegated to the Board. It is interesting to note that a national society of architects recently has consented to judgment in a prosecution for violation of the Federal Sherman Act which will restrain the society from adopting or recommending any policy stating that submission of price quotations for architectural services by its members is unethical or unprofessional.

RWW:GS

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*Wisconsin Retirement Fund—County Board*—County board is without authority to establish alternative retirement system.

September 15, 1972.

CHARLES A. POLLEX, *District Attorney*  
*Adams County*

You provide me with the following fact situation:

“A former employee of Adams County has recently retired. This employee worked for the County of Adams for approximately seventeen (17) years prior to January 1, 1962, the date when the County, by resolution, agreed to grant credit for prior service under the Wisconsin Retirement Fund to all its employees. As of January 1, 1962, said employee was not, however, employed with Adams County, as he had taken other employment on a temporary basis.

“Shortly after January 1, 1962, this employee came back to work for the County, and has maintained this employment to retirement. His retirement became effective in April of 1972. Some members of the County Board have indicated that they desire granting the concerned employee some form of credit for his seventeen (17) years of service prior to January 1, 1962.”

Thereafter you request my opinion as to whether there is “any statutory basis or other legal authority for the county to make what could be considered as a gift to this former employe in the form of a monthly annuity.” Such annuity would not be provided through or in conjunction with the Wisconsin Retirement Fund.

A county board has only such powers as are expressly conferred upon it or necessarily implied from those expressly given. *Dodge County v. Kaiser* (1943), 243 Wis. 551, 557. I find specific authority in the statutes authorizing county boards to provide hospital, accident and life insurance for county employes. See secs. 59.07 (2) (c) and 66.185, Stats. There is, however, no statutory authority authorizing counties to provide any retirement program other than through the Wisconsin Retirement Fund. Wisconsin Retirement Fund participation by every county having a population of less than 500,000 and not having previously elected to be covered is required by sec. 41.05 (9) (a) 1., Stats., which reads in part:

“(9) (a) 1. Notwithstanding this section every county having a population of less than 500,000 which has not hitherto elected to become a participating municipality shall on January 1, 1962, be a participating municipality.”

In 39 OAG 314, in answer to a request for an opinion from the District Attorney for Adams County on a similar fact situation, the Attorney General concluded “there is no authority for any county pension system other than the one contemplated under sec. 59.073, Stats., relating to the Wisconsin Retirement Fund.” (Section 59.073, Stats., permitted county participation in the Wisconsin Retirement Fund.) I am in agreement with such opinion.

I, therefore, conclude that a county board is without authority to establish an additional or alternative retirement program or system.

RWW:WMS

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*Political Solicitation—Universities—Ruling by Chancellor of University of Wisconsin-Eau Claire denying request to conduct door-to-door solicitation in residence halls.*

September 15, 1972.

LEONARD HAAS, *Executive Vice President*  
*University of Wisconsin System*

Your recent letter and its enclosures inform me of the following fact situation:

In February, 1971, a committee consisting of student, faculty and administrative representatives developed a policy statement on the subject of solicitation on the campus of the now University of Wisconsin-Eau Claire. “Solicitation” was defined as “selling, peddling and/or distribution of material, free or otherwise.” The statement of policy was aimed at providing to both on-campus and off-campus individuals and organizations the right to distribute information, espouse their views and solicit the student

body. It was also, however, aimed at limiting the places of solicitation on the campus so that solicitors would not unreasonably intrude on the privacy of students.

The policy statement as developed by the committee was examined and approved by the campus administration. It was also endorsed by the Student Senate and was published in the 1971-1972 Student Handbook.

The portions of the policy statement which relate to solicitation in residence halls provide:

“D. All requests for such use of University structure and grounds will be granted only upon the completion of a standard contract that may be obtained from the Director of Housing, in the case of solicitation within on-campus housing, and from the Director of University Centers in all other cases.

“E. Solicitation in the University Residence Halls will require approval of the Director of Housing, who may seek the advice of the Inter-Residence Hall Council.”

Thereafter, a representative of a student political organization requested the approval of the Director of Housing for door-to-door solicitation in the residence halls. This request was denied, although the representative was informed that his group could distribute its materials, etc., in the main lobby of the residence halls. The request for approval was denied because uninvited door-to-door solicitation in the residence halls was considered to be an unreasonable intrusion on the privacy of the student residents. Apparently, no request for door-to-door solicitation in the residence halls by any other groups or individuals has been approved.

The student representative of the political organization involved, then, asked the Inter-Residence Hall Council for permission to make door-to-door solicitations in the residence halls. That Council also refused the request and agreed with the action of the Director of Housing in refusing to approve door-to-door solicitation in the residence halls. The Council suggested that the group representative ask for a group meeting in the dorms of interested residence hall students.

Thereafter correspondence was exchanged between the Chairman of the Chippewa Valley Civil Liberties Union and the Chancellor of the University of Wisconsin-Eau Claire. The Chairman of the CVCLU asserted that the denial of approval for uninvited door-to-door solicitation in the residence halls to representatives of a political organization constituted a violation of the rights of the potential solicitors as guaranteed by the First Amendment to the United States Constitution. An additional suggestion by the University Chancellor that solicitors make appointments to see individual residents was also rejected by the Chairman.

Your letter asks for my opinion on whether the action by University of Wisconsin-Eau Claire officials in refusing to approve door-to-door solicitation in the residence halls is a violation of the constitutional rights of potential political solicitors to freedom of speech or freedom of assembly. These freedoms, as guaranteed by the First Amendment to the United States Constitution, are very important and vigorously protected constitutional rights. They are, however, subject to reasonable restrictions as to time, place, manner and duration, and accommodation of them with other constitutionally protected rights is sometimes necessary. See such cases as *Tinker v. Des Moines Independent Community School District* (1969), 393 U.S. 503, 89 S.Ct. 733, 21 L.ed. 2d 731; *Shuttlesworth v. City of Birmingham* (1965), 382 U.S. 87, 86 S.Ct. 211, 15 L.ed. 2d 176; *Cox v. Louisiana* (1965), 379 U.S. 536, 85 S.Ct. 453, 13 L.ed. 2d 471, and *Lloyd Corporation, Ltd. v. Tanner* (1972), 407 U.S. 551, 92 S.Ct. 2219, 33 L.ed. 2d 131.

No one would or could seriously challenge the right of a private landlord, who owns and operates an apartment building or rooming house, to prohibit all door-to-door solicitation, political or otherwise, in his building. There is no basic or relevant difference between residence halls of a public institution of higher learning and a privately owned apartment building or rooming house, except that a state agency is the landlord.

Merely because the state is the landlord does not mean that its premises are available as places in which trespassers or uninvited guests can exercise their First Amendment rights. As stated in *Lloyd Corporation, Ltd. v. Tanner* (1972), 407 U.S. 551, 92 S.Ct. 2219, 2228, 33 L.ed. 2d 131, which was decided on June 22, 1972:

“Although \* \* \* the courts properly have shown a special solicitude for the guarantees of the First Amendment, this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only. *Even where public property is involved, the Court has recognized that it is not necessarily available for speech, pickets or other communicative activities. \* \* \**” (Emphasis added)

The court, then, went on to cite and quote from *Adderley v. State of Florida* (1966), 385 U.S. 39, 87 S.Ct. 242, 17 L.ed. 2d 149, in which it had written:

“*The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.* For this reason there is no merit to the petitioners’ argument that they had a constitutional right to stay on the property, over the jail custodian’s objections, because this “area chosen for the peaceful civil rights demonstration was not only ‘reasonable’ but also particularly appropriate. \* \* \*” *Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on, Cox v. Louisiana, (379 U.S. 536), at 554-555, (85 S.Ct. 453, 13 L.Ed.2d 471) and (379 U.S. 559), at 563-564, (85 S.Ct. 476, 13 L.Ed.2d 487). We reject it again. The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose.’ ” (Emphasis added)*

The purpose of residence halls is to provide a "home" for those students who rent the facilities and the halls are used for that lawful purpose. The state can properly act to protect the privacy of the student resident in his "home," which is rented from the state.

In *Wauwatosa v. King* (1971), 49 Wis. 2d 398, 182 N.W. 2d 530, our Wisconsin Supreme Court was faced with a challenge to the validity of a city ordinance prohibiting picketing "before or about the residence or dwelling house of any individual." Certain pickets were arrested and convicted of a violation of the ordinance. They claimed that the ordinance was unconstitutional in that it violated their First Amendment and other federal constitutional rights. The court, after analyzing and discussing the relevant decisions of the United States Supreme Court, held, p. 406:

" \* \* \* A man is not to be made a captive in his own home. Neither is he required to defend it, as some new Alamo, against unwelcome intruders or disturbers. It is a proper serving of a proper state interest for the state or community to protect the privacy and tranquility of the home of its residents."

It is, therefore, my opinion that in the fact situation above described the state has not violated any First Amendment or other constitutional rights of potential solicitors when state officials, who operate state-owned residence halls, seek to protect the privacy of their tenants by making a nondiscriminatory refusal to approve door-to-door solicitation in the residence halls.

Although your letter also refers to the "Policy Statement/Solicitation," I will not further lengthen this letter by discussing or analyzing it. I do not believe that that is necessary in order to provide you with guidance in dealing with the problem raised by the chairman of the CVCLU. I do, however, call to your attention, and that of campus administrators, the discussion and decision in *New Left Education Project, et al. v. Board of Regents of the University of Texas System* (W.D. Tex. 1970), 326 F.Supp. 158. The opinion therein by a three-judge federal district court deals with the constitutional validity of rules on campus solicitation adopted by the Regents of the University of Texas System. The judgment in that case was subsequently

vacated by the United States Supreme Court, but this was due to a jurisdictional problem and does not constitute a rejection (or approval) of the decision on the merits of the dispute. Of interest also is *Eisner v. Stamford Board of Education* (2d Cir. 1971), 440 F. 2d 803, involving a "Policy on Distribution of Printed or Written Material" adopted by the Board of Education of Stamford, Connecticut.

I hope that the above discussion will be of assistance to you.

RWW:BRB

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*Elections—Pre-primary Financial Statements—Successful candidates in substantial compliance with sec. 12.10, Stats., must be placed on ballot.*

September 20, 1972.

ROBERT C. ZIMMERMAN

*Secretary of State*

You advise that several successful candidates at the primary election held September 12, 1972, failed to file their pre-primary financial statements with your office by September 5, 1972, as required by sec. 12.09 (1), Stats. As a result, you promptly informed all said candidates of the necessity of filing an affidavit, court order and financial statement with your office by September 12, 1972, as provided for in sec. 12.10, Stats. Although none of the candidates complied with the statutory time limitations set forth in your instructions, one of the candidates did recently file an affidavit, court order and financial statement with your office on September 18, 1972. Inasmuch as it will shortly be necessary for you to certify the names of candidates for inclusion of the November general election ballot, you request my advice concerning whether you should refuse to certify the names of any or all of the above-described candidates.

Section 12.09 (1), Stats., provides in part that all candidates at a primary election are required to file expense statements by the Tuesday preceding the primary and the Tuesday following the primary. Section 12.10, Stats., provides as follows:

“Candidate neglecting to file accounts omitted from ballot. The name of a candidate chosen at a primary or otherwise shall not be certified or printed on the official ballot for the ensuing elections, unless there has been filed by or on behalf of said candidate and by his personal campaign committee, if any, the statements of accounts and expenses relating to nominations required by this chapter up to the time for such certification. The foregoing shall not prevent the placing of the name of a candidate upon the official ballot if such statement shall be filed at least 60 days before the primary, or within 7 days after the latest time otherwise provided by law, accompanied by an order approving such filing, which may be made by the presiding judge of any court of record of this state, upon his being satisfied of the truth of an affidavit made by the candidate or by a member of his personal or campaign committee, in his behalf and duly authorized by him, setting forth the facts with regard to the omission to file such statement and showing that such omission was not intentional, which affidavit shall accompany such order and both be filed with such statement. On the petition of any elector entitled to vote for or against such candidate such order may be reviewed and set aside in a proceeding as provided in s. 12.22.”

There is no question but that all the candidates you describe have failed to fully and strictly comply with the provisions of sec. 12.10, Stats. However, previous case law interpreting the provisions of this section make it clear that our Supreme Court does not interpret the statute as requiring the strict compliance which a literal reading of the statute would otherwise demand.

In *State ex rel. Zimmerman v. Carpenter* (1949), 254 Wis. 619, 37 N.W. 2d 469, the court addressed itself to a fact situation which is, in some respects, similar to that presented by the one candidate you describe, who did file an affidavit, court order and financial statement, all being late, on September 18, 1972. For instance, in the *Carpenter* case, as in the present instance, the financial statement had not been filed in the office of the

Secretary of State within the time limited nor had the court order been made and filed by the date of the primary election as required by sec. 12.10, Stats. However, although the court realized that there had not been strict compliance with the statute, it also recognized that a literal reading of the statute could lead to harsh results and the frustration of the will of the electorate unless the statute was liberally construed to avoid such a result. Reaching its ultimate conclusion, the court, therefore, pointed to the general legislative mandate set forth in the statutes, which requires that election laws be so construed as to "give affect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of its provisions." See sec. 5.01 (1), Stats.

I should point out that, although there is similarity between the *Carpenter* case and the one instance of late filing you describe, there is one central factual difference which confuses the application of the *Carpenter* case to some extent. In *Carpenter*, although the candidate was late with his filings, he had filed his financial statement *prior* to the primary. In the present instance, there was no such filing until almost a week *after* the primary. Therefore, I recognize that it might be argued that this difference sufficiently distinguishes the two factual situations so as to require the application of different legal principles in each instance. However, I cannot advise you with any degree of assurance that the courts would recognize such a distinction, particularly in light of the emphasis which our court has given to the need for liberal construction of the provisions of sec. 12.10, Stats., as well as the necessity of viewing facts arising under the statute in a manner which will give effect to the will of the electors.

Under the circumstances, in the one instance you describe, where the candidate has filed his expense statement and affidavit, along with a court order authorizing late filing, I feel you are justified in accepting such filing as "substantial compliance" with the provisions of sec. 12.10, Stats. In doing so, of course, you will also be relying on the order of a court of record of the state. Should any elector entitled to vote for or against such candidate wish to take issue with your reliance on such court order, he may institute appropriate proceedings.

You will note that the foregoing advice relates only to the one candidate who did file an affidavit, court order and financial statement with your office on September 18, 1972. In light of my previous remarks, I am sure you appreciate that final advice concerning the manner in which you should proceed in reference to any of the other delinquent candidates must be rendered in light of the facts existing at the time you must certify candidates for ballot position.

RWW:JCM

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*Liquor Licenses—Minimum Age Requirement*—Local ordinances which raise the minimum age requirement for holding an operator's license under sec. 66.054 (11) (a), Stats., are invalid.

September 21, 1972.

FRED L. JACOBSON, *Administrator*  
*Division of Criminal Investigation*

You have requested my opinion concerning the legality of recently enacted ordinances of certain Wisconsin municipalities relating to fermented malt beverage and intoxicating liquor operator's licenses. The ordinances in question provide, in relevant part, that no operator's license shall be granted to a person under 21 years of age. You indicate you have received inquiries regarding the validity of such ordinances.

It is my opinion that these ordinances are invalid. Present state law does not permit local licensing authorities to raise the minimum age requirement for holding an operator's license from 18 years of age to 21 years of age. I believe that any ordinance which raises this age requirement is an invalid exercise of power whether asserted under the specific authority of secs. 66.054 (13) and 176.43 (1), Stats., the general police power granted by ch. 62, Stats., or under the Home Rule provisions of Art. XI, sec. 3, Wis. Const.

Wisconsin's constitutional home rule amendment provides in part, that:

“Cities and villages organized pursuant to state law are hereby empowered, to determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of state-wide concern as shall with uniformity affect every city or village. \* \* \*” (Art. XI sec. 3, Wis. Const.)

The Wisconsin Supreme Court has consistently held that this constitutional authority “ \* \* \* only extends to local affairs and does not cover matters of statewide concern.” *Plymouth v. Elsner* (1965), 28 Wis. 2d 102, 106, 135 N.W. 2d 799; *Van Gilder v. Madison* (1936), 222 Wis. 58, 267 N.W. 25, 268 N.W. 108; *Logan v. Two Rivers* (1936), 222 Wis. 891, 267 N.W. 36. The court has recognized that the liquor control laws are an enactment of state-wide concern, designed to obtain uniform regulation. See *State ex rel. Martin v. Barrett* (1946), 248 Wis. 621, 22 N.W. 2d 633; see also *State ex rel. Torres v. Krauczak* (1935), 217 Wis. 593, 607, 259 N.W. 607. The legislature has also expressly declared that the provisions of sec. 66.054 and ch. 176, Stats., shall be construed as matters of state-wide concern for the purpose of providing a uniform regulation of the sale of fermented malt beverages and intoxicating liquors. See secs. 66.054 (16) and 176.44, Stats. In *Barth v. Shorewood* (1938), 229 Wis. 151, 282, N.W. 89, the court held that a similar express statutory declaration was persuasive determining that a statute concerning the pension funds of police and fire departments did not conflict with the home-rule amendment. See also *Van Gilder v. Madison, supra*. The fact that the legislature has consistently enabled local licensing authorities to exercise wide discretion with regard to the issuance of operator’s licenses does not necessarily render such issuance purely a matter of local concern. In delegating this power, the legislature in no way restricted its authority to alter the state’s liquor regulation scheme either in substance or with regard to local discretion. Local discretion in this area derives from statutory authority, not the home-rule amendment. The fact that there is a local interest in the minimum age of operators cannot limit the right of the legislature to deal with this matter. Here, the age requirement established by the legislature is an integral part of the state’s regulatory scheme. Further, the age requirement applies uniformly to every city and village.

It should also be noted that the Wisconsin Legislature has plenary authority, in the exercise of its police power, to prohibit traffic in liquor or restrict it in any reasonable manner. *State ex rel. Martin v. Barrett, supra; Zadrow v. State* (1913), 154 Wis. 551, 143 N.W. 693. The legislature has continually exercised this power to regulate the sale of fermented malt beverages and intoxicating liquor in a comprehensive manner. Thus, the state has preempted this field and has precluded municipal regulation of liquor traffic based upon the general police power delegated to cities and villages by secs. 62.11 (5) and 61.34, Stats., respectively. Further, I do not believe that an ordinance raising the minimum operator's age can be validly enacted under the specific statutory authority of secs. 66.054 (13) and 176.43 (1), Stats.

The legislature recently enacted ch. 213, Laws of 1971, lowering the age of majority in Wisconsin to 18 years. This chapter amended sec. 66.054 (13), Stats., 1969, to read as follows:

“Nothing in this section shall be construed as prohibiting or restricting any city, village or town ordinances from placing additional regulations in or upon the sale of fermented malt beverages, *not in conflict with the terms and provisions of this section*. This subsection does not give any municipal corporation the power to enact an ordinance forbidding persons over the age of 18 years from acting as check-out clerks or delivery personnel in grocery stores licensed to sell fermented malt beverages or from preventing such check-out clerks from including fermented malt beverages in the items which they are permitted to sell or preventing such delivery personnel from delivering fermented malt beverages from the licensed premises to the cars or homes of customers.” (Emphasis added)

In a similar manner, sec. 176.43 (1), Stats., 1969, provides, in relevant part, that:

“Any city, village or town may by ordinance prescribe additional regulations in or upon the sale of intoxicating liquor, *not in conflict with the provisions of this chapter*. \* \* \*” (Emphasis added)

Thus, the legislature has expressly granted local licensing authorities the power to enact additional regulations relating to the sale of fermented malt beverages and intoxicating liquors *only* when such regulations do not conflict with the provisions of sec. 66.054 and ch. 176, Stats., respectively.

In addition, ch. 213, Laws of 1971, provides in relevant part, that:

“Wherever the term “twenty-one years,” “21 years” or “21” appear in the following sections of the statutes the term “18 years” is substituted: \* \* \* 66.054 (8) (a), (9) (g), (10) (a), (11) (a) and (b), (22) and (23), \* \* \* 176.05 (9), 176.31 (2), 176.32 (1) \* \* \*”(Section 5)

Thus, sec. 66.054 (11) (a), Stats., the statute providing for operators’ licenses, has been expressly amended to read as follows:

“(11) OPERATORS’ LICENSES. (a) Every city council, village or town board may issue a license known as an “Operator’s” license, which shall be granted only upon application in writing, and which shall not be required of any person or for any purpose other than to comply with par. (b). Said operator’s license shall be issued only to persons 18 years of age or over, of good moral character, who have been citizens of the United States and residents of this state continuously for not less than one year prior to the date of the filing of the application. Such licenses shall be operative only within the limits of the city, village or town in which issued. For the purpose of this subsection any member of the immediate family of the licensee shall be considered as holding an operator’s license.”

The ordinances in question are in conflict with sec. 66.054 and ch. 176, Stats. It must be remembered that sec. 176.05 (11), Stats., requires dispensers of intoxicating liquor to possess an operator’s license issued under sec. 66.054, Stats. In reducing the age of majority from 21 years to 18 years, the legislature *specifically* amended sec. 66.054 (11), Stats., reducing the minimum age requirement for an operator’s license to 18 years. This age requirement, along with “good moral character,” Wisconsin residency and United States citizenship for one year comprise the *only* state standards which an individual applying for an operator’s license must meet.

In enacting ch. 213, Stats., the legislature addressed itself to the wisdom of conveying the rights and responsibilities of adulthood upon 18-year-olds. The definition of "adult" was not changed, only the age at which a person legally acquires adulthood. Thus, the legislature has clearly established 18 years as the minimum age of legal adulthood as well as the minimum age standard required for operator's licenses. Local licensing authorities cannot disregard this legislative declaration when considering applicants for such an operator's license.

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An ordinance requiring an applicant to be 21 years of age in order to be considered for an operator's license has the effect of placing an additional requirement upon applicants that is not found in the legislative enactment. The Wisconsin Supreme Court held in *Morton v. Hanson* (1930), 200 Wis. 576, 229 N.W. 53, that a town board could not require a bond of an applicant for a license to sell non-intoxicating liquors under the Severson Law where the statute did not require such a bond. At page 578 the court stated that the town board had discretion only:

“\* \* \* to determine if the applicant was a *proper* person to conduct such a business, that is, a person fit, honest, or reputable, of good character . . . They were permitted to deny licenses on one ground, and only one ground, *i.e.*, that the board should deem the applicant an improper person to conduct such business.”

In conclusion, it is my opinion that municipalities cannot enact valid ordinances providing for a minimum operator's license age greater than the 18 years prescribed by state law. In light of the Wisconsin Supreme Court's long standing recognition that control of liquor traffic is a matter of state-wide concern, no constitutional home-rule power exists under which such an ordinance may be enacted. Nor is the power to enact such an ordinance available to municipalities under the statutory grants of police powers to cities and villages. The legislative action establishing standard requirements under which operator's licenses are to be issued preempts additional municipal regulation. Furthermore, any ordinance that prescribes a minimum age other than 18 years conflicts with the standards issued by state law. Section 66.054 (11) (a), Stats., does not *require* municipalities to issue operator's licenses to any particular person. However, the statute does not permit the exclusion of adults 18-20 years of age from consideration. The legislature has expressly included these persons in the class to be considered.

RWW:PAP

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*Banks—Cognovit Notes*—Chapter 327, Laws of 1971, recreating sec. 270.69, Stats., prohibits banks or other persons from taking power to confess judgment from debtors after June 18, 1972.

September 21, 1972.

ERICH MILDENBERG, *Commissioner of Banking*

You have requested my opinion on the scope and applicability of sec. 270.69, Stats., as recreated by ch. 327, Laws of 1971.

Section 270.69, Stats., formerly provided for the taking of a judgment upon a bond or promissory note without action where authorization was contained in the instrument. Such notes contained a warrant or power of attorney authorizing the confession of judgment upon default and are generally referred to as cognovit notes.

Chapter 327, Laws of 1971, repealed and recreated the section to provide:

“270.69 NO JUDGMENT WITHOUT ACTION. No creditor may take or accept a warrant or power of attorney or other authorization for the creditor, or other person acting on his behalf, to confess judgment or otherwise act as the agent for the debtor in any respect. This section shall apply to notes executed after the effective date of this section (1971).”

The effective date of the section was June 18, 1972, the day after its publication. Sec. 990.05, Stats.

The two basic questions are involved:

1. Does the statute prohibit banks or other persons, after June 18, 1972, from taking or accepting *from a debtor a warrant or power of attorney* or other authorization, for use by the creditor, *to confess judgment* or otherwise act as agent of the debtor?

It is my opinion that it does.

2. Does the statute prohibit banks or other persons, after June 18, 1972, *from acquiring*, from creditors, *notes* or other instruments, executed before or after June 18, 1972, which contain such a warrant or power of attorney?

It is my opinion that it does not. Where the instrument was executed before June 18, 1972, the *clause* containing the warrant or power is probably valid and the *remedy* of enforcement, use of the courts, is probably available. The same remedy would apply to instruments containing such provision which were executed and acquired prior to June 18, 1972. Where the instrument was executed after June 18, 1972, the warrant or power of attorney *clause* is invalid but would not void the *whole contract* if other parts were severable. However, the *remedy* provided by sec.

270.69, Stats. (1969), could not be utilized and resort to some other court remedy would have to be used to enforce the valid portions of the contract.

Both the State and Federal Constitutions prohibit the state from enacting laws which impair the obligations of contracts.

Article I, sec. 10, United States Constitution;

Article I, sec. 12, Wis. Const.

I am of the opinion that states have the power in the interests of the general welfare to prospectively prohibit such clauses and to prospectively provide that the courts shall not be used to enforce those executed after a given date which is on or after the effective date of the statute.

In 47 Am. Jur. 2d, *Judgments* sec. 1109, pp. 160, 161, it is stated:

“Sec. 1109.—*Retrospective effect.*

In some jurisdictions, statutes invalidating cognovit notes are held to be prospective in operation only, and not to affect a note executed prior to the enactment of the statute; in other jurisdictions such statutes are interpreted as being intended to have a retroactive operation, and, as so interpreted, are held not to be invalid because the statute relates merely to one of several remedies available to enforce the cause of action involved. On the other hand, on the ground that the remedies given by law to those to whom a warrant of attorney to confess judgment has been delivered enter into and form a part of the contract, there is authority in support of the rule that the state is powerless to revoke or destroy the binding effect of a warrant of attorney valid and irrevocable when executed.”

The last sentence in the quotation above is supported by the holding in *Second Ward Savings Bank of Milwaukee v. Schranck* (1897), 97 Wis. 250, 73 N.W. 31.

Also see annotation on the constitutionality, construction, application and effect of statute invalidating powers of attorneys to confess judgment or contracts giving such powers in 40 A.L.R. 3d 1158.

The constitutional issues have not been squarely faced in recent decisions of the United States Supreme Court, Wisconsin or other states, and litigation in Wisconsin will probably be necessary and forthcoming to test the full import of sec. 270.69, Stats., as recreated by ch. 327, Laws of 1971. However, as far as future practices of banks are concerned, they should not utilize forms containing such clauses and should be hesitant to acquire notes executed after June 18, 1972, employing such clauses.

RWW:RJV

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*Railroad Corporations—Merger*—Section 180.685, Stats., can be utilized to effect merger of two Wisconsin railroad corporations.

October 4, 1972.

ROBERT C. ZIMMERMAN

*Secretary of State*

You inquire whether an operating Wisconsin railroad corporation can utilize the provisions of sec. 180.685, Stats., to merge into a nonoperating Wisconsin railroad corporation. It is assumed that such corporations can meet the requirements of sec. 180.685, Stats.

I am of the opinion that use of sec. 180.685, Stats., is proper.

Section 180.97 (1), Stats., provides that the provisions of ch. 180, Stats., are applicable to domestic corporations organized under provisions other than ch. 180, Stats., where such provisions are not inconsistent with provisions of the special statutes under which such domestic corporations were organized.

I am of the opinion that sec. 180.67, Stats., relating to the effect of "merger or consolidation" would apply. In such section the legislature has treated merger and consolidation as different acts having limited different effects. In case of merger between

two or more corporations, there is one surviving corporation. In the case of consolidating of two or more corporations, a new corporation is created. Also see sec. 180.68, Stats.

Railroads are governed by ch. 190, Stats. However, there is no express provision as to merger set forth therein. Section 190.06, Stats., is concerned with consolidation of existing railroad corporations, and, while it can be argued that its provision might be applicable to mergers if there were no other applicable general statutes specifically relating to merger, it cannot be said to be inconsistent with a recently enacted general statute which expressly provides for merger. It does not appear that there are other specific provisions in ch. 190, Stats., which would limit the effect of merger if sec. 180.685, Stats., were used. See 47 OAG 264.

RWW:RJV

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*Marriage Laws—Age Of Majority Law*—A male person under 18 years of age is of nonmarriageable age, which law was not affected by the age of majority law.

October 12, 1972.

PAUL M. NEWCOMB, *Corporation Counsel*  
*Sauk County*

You have requested my opinion whether the recent age of majority enactment which amended sec. 245.02 (2), Stats., relating to marriageable age, now permits a male under the age of 18 to marry.

The legislative history of ch. 245, of the Wisconsin Statutes, clearly reveals that a male person under the age of 18 is prohibited from entering into a marriage contract in this state.

The age of majority law, ch. 213, Laws of 1971, effective March 23, 1972, reduced the marriageable age for a male without parental consent from 21 years to 18 years. The pertinent statute, sec. 245.02, Stats., reads as follows:

“(1) Every male person who has obtained the full age of 18 years and every female person who has obtained the full age of 16 years shall be capable in law of contracting marriage if otherwise competent.

“(2) If either of the contracting parties is under the age of 18 years if male, or between the ages of 16 and 18 years if a female, no license shall be issued without the consent of his or her parents . . .”

Before the enactment of the age of majority law, subsec. (2) read in part as follows:

“If either of the contracting parties is under the age of 21 years if male, or between the age of 16 and 18 if female, no license shall be issued without the consent of his or her parents . . .”

As will be observed, an ambiguity was created in subsec. (2) by substituting the word 18 years for 21 years. However, subsec. (1) was left intact, and it clearly indicates that the marriageable age for males is 18. This is a minimum standard. Furthermore, a review of the legislative history of the chapter firmly supports this interpretation.

The Family Code was created by ch. 595, Laws of 1959, effective January 1, 1960. Many substantive changes were made in ch. 245, Stats., relating to marriage. Marriage requirements were strengthened to avoid unstable marriages. See notes printed on Bill 151, A. (1959), which was enacted into law as the Family Code. The opening section of the Family Code reads as follows:

“245.001 TITLE, INTENT AND CONSTRUCTION OF CHAPTERS 245 to 248.

(1) TITLE. Chapter 245 to 248 may be cited as “The Family Code.”

(2) INTENT. It is the intent of chs. 245 to 248 to promote the stability and best interests of marriage and the family. Marriage is the institution that is the foundation of the family and of society. Its stability is basic to morality and civilization, and of vital interest to society and the state. The consequences of the marriage contract are more significant to society than those of other contracts, and the public interest must be taken into

account always. The seriousness of marriage makes adequate premarital counseling and education for family living highly desirable and courses thereon are urged upon all persons contemplating marriage. The impairment or dissolution of the marriage relation generally results in injury to the public wholly apart from the effect upon the parties immediately concerned.

(3) CONSTRUCTION. Chapters 245 to 248 shall be liberally construed to effect the objectives of sub. (2).”

The Family Code was drafted by a committee which served under the auspices of the State Legislative Council. The committee reviewed, among other things, and recommended the appeal of ch. 8, Laws of 1953, which permitted a male under the age of 18 to marry with judicial consent in order to prevent a child from being born out of wedlock. That 1953 law, as created by said ch. 8, reads as follows:

#### “CHAPTER 8.

AN ACT TO amend 245.02 and 245.16 of the statutes, relating to the marriageable age of consent.

SECTION 1. 245.02 of the statutes is amended to read:

245.02 Every male person who shall have attained the full age of 18 years *or who has obtained the permission of the county judge as provided in s. 245.16* and every female who shall have attained the full age of 15 years shall be capable in law of contracting marriage if otherwise competent.

SECTION 2. 245.16 of the statutes is amended to read:

245.16 No license shall be issued if either of the contracting parties be under the marriageable age of consent as established by \* \* \* *s.245.02, except that a male under the age of 18 may lawfully contract to marry and obtain a marriage license if he first obtains the written permission of the county judge of his county, who shall grant such permission only if he finds that the marriage will prevent a child fathered by applicant from being born out of wedlock.* If either of the contracting parties be between the age of 18 years and 21 years if a male, and between the age of 15 years and 18 years if a female, no license shall be issued without the consent of his or her parents or guardian, or of

the parent having the actual care, custody and control of said party or parties, given before the county clerk under oath, or certified under the hand of such parents or guardian as aforesaid, and properly verified by affidavit before a notary public or other official authorized by law to take affidavits, which certificate shall be filed of record in the office of said county clerk and entered by him on the marriage license docket before issuing said license; provided, that if there be no guardian or parent having the actual care, custody and control of said party or parties, then the judge of the court having probate jurisdiction in the county where the application is pending may, after hearing, upon proper cause shown, make an order allowing the marriage of said party or parties."

The changes from existing prior law are shown in the text by the italicized language, or by asterisks to denote language deleted.

When the recommendations of the study committee were presented to the Legislative Council, however, the latter body declined to approve the repeal of the foregoing provision, and so it was incorporated into the Code Bill, No. 151, A., as new section 245.02 (3) of the Statutes reading as follows:

"(3) A male under the age of 18 may lawfully contract to marry and obtain a marriage license if he first procures the written permission of the county judge of his county, who may in his discretion grant such permission only if he finds that the marriage will prevent a child fathered by the applicant from being born or raised out of wedlock."

The above-quoted section thus became part of the Family Code as initially enacted, but it was then repealed by the legislature on October 1, 1961, by ch. 505, Laws of 1961. Since that repeal, the marriageable age of a male in Wisconsin has been 18 years. If the legislature intended the marriageable age to be otherwise, there were many years in which it could have changed the policy.

The purpose of the new adulthood law is to lower the age of majority from 21 years to 18 years and thereby give greater responsibility to this particular age group. The new law changed ch. 245 to permit a male who attained the age of 18 to marry

without first obtaining parental consent. There is no evidence that the legislature intended to reduce the marriageable age of a male person.

Accordingly, I am of the opinion that the minimum marriageable age for male persons in this state is 18 years as reflected by the clear unequivocal language of subsec. (1), sec. 245.02, Stats. The recently enacted age of majority law was not intended to change nor did it change this basic requirement.

RWW:WLJ

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*Elections—Vacancy in Public Office*—The statutory county committee may appoint a successor to a winning candidate who has filed a declination to take office.

October 12, 1972.

W. PATRICK DONLIN, *District Attorney*

*Price County*

You ask my opinion concerning whether a vacancy can be filled for candidate for the office of clerk of courts under a somewhat peculiar set of circumstances.

After the September primary, and after the usual canvass, the winning candidate for this office filed a written declination in accordance with sec. 8.35 (1), Stats. Thereafter, a vacancy existed relative to this nomination unless and until the name of another candidate could be duly certified for the November ballot.

Section 8.35 (2), Stats., provides that, if a vacancy occurs after nomination due to declination, death or any other cause, the vacancy may be filled by the proper political party or committee for all partisan offices. Section 7.38 (3) (a), Stats., similarly provides that, whenever a vacancy occurs after a primary due to declination, death or any other cause, the vacancy may be filled by the nominee's party committee. This subsection furthers

provides that the committee's chairman and secretary shall file with the proper official a certificate containing certain information set forth therein.

The present problem arises because of apparent conflict or inconsistency in two statutes. First, sec. 7.38 (3) (b), Stats., provides that the certificate to which reference is made above shall be filed within four days of the date of the vacancy. However, sec. 8.17 (5) (b), Stats., provides that county statutory committee of each political party shall not meet until at least five days after the September primary canvass and that the committee chairman shall call the first meeting of the county committee within two days after the canvass by giving at least five days written notice to each member.

If the winning candidate files his or her declination immediately after the completion of the canvass, the vacancy thereby created technically must be filled within four days under sec. 7.38 (3) (b), Stats. However, sec. 8.17 (5) (b), Stats., apparently has the effect of barring the county committee's meeting until at least five days after the completion of the canvass. The facts which you have presented fall precisely within this seemingly irreconcilable position.

However, it is my opinion that, when a vacancy occurs less than five days after the canvass, the four-day requirement under sec. 7.38 (3), Stats., logically must be waived so that the county committee is permitted to exercise its right to appoint a successor to the winning candidate who filed the declination. It appears that the legislature did not anticipate that these circumstances would arise when it established these seemingly contradictory time limitations.

The only other interpretation that has any merit whatsoever is that the statutory committee might be impliedly required to schedule a special meeting separate from that anticipated by sec. 8.17 (5) (b), Stats. It is my opinion, however, that such an interpretation would impose upon the statutory committee an obligation not set forth within the statutes and an obligation in direct conflict with the singular meeting and notice requirements of sec. 8.17 (5), Stats.

Moreover, our election laws are designed to give effect to the will of electors. Section 5.01 (1), Stats. It is obvious that a write-in campaign could be conducted by the political party in question by county committee's openly endorsing a particular candidate. However, unless an error has been made which more clearly would preclude inclusion of a candidate's name on the November ballot, the law favors the giving of a choice to the electors so that their will can be ascertained.

Therefore, it is my opinion that the statutory county committee was entitled to name a successor to the candidate who filed the written declination under the peculiar circumstances recited above.

RWW:DPJ

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*Court Costs—Traffic Cases*—Court costs in traffic cases under ch. 278, Laws of 1971, discussed.

October 18, 1972.

EDWIN M. WILKIE, *Court Administrator*

I have been asked to give my opinion as to what clerk's fees and suit taxes are applicable to traffic regulation cases under the new traffic court procedure enacted by the legislature in ch. 278, Laws of 1971.

#### SUIT TAX IN CRIMINAL CASES

The first question is whether suit tax is applicable to traffic violations which are punishable as crimes. It is my opinion that suit tax is not applicable in such criminal traffic cases. Article VII, sec. 18, Wis. Const., reads as follows:

“Suit tax. SECTION 18. The legislature shall impose a tax on all civil suits commenced or prosecuted in the municipal, inferior or circuit courts, which shall constitute a fund to be applied toward the payment of the salary of judges.

In response to this mandate, the legislature has imposed suit tax in civil cases. Title XXV of the statutes is entitled "Procedure in Civil Actions." Chapter 271, Stats., is a part of that title. Section 271.21 (1), Stats., reads:

"(1) In each civil action, special proceeding, except probate proceedings, and cognovit judgment in the circuit or county court, excluding all matters brought into the probate branches, a suit tax of \$11 shall be paid at the time the action is commenced, except that:

"(a) In actions by small claim type procedure, the suit tax is \$2.50.

"(b) In forfeiture actions in county court, the tax is \$3."

Thus, it appears that suit tax is applicable to civil cases only. It should also be kept in mind that suit tax is initially paid by the plaintiff in an action. This is particularly inapplicable to criminal actions where the plaintiff is always the state. This office has previously expressed the opinion that suit tax is not applicable to the state as plaintiff because the state does not pay taxes to itself. 27 OAG 84 (1938); 55 OAG 57 (1966).

The question has now come up again because of a recent amendment to sec. 271.21 (2), Stats. Prior to such amendment, that statute read:

"(2) An additional suit tax of \$2 shall be collected from defendants in all actions for violations of traffic regulations enacted under s. 349.06, and shall be paid into the state treasury."

Chapter 278, Laws of 1971, amended this statute by striking out the words "enacted under s. 349.06." This was done to make it clear that the \$2 suit tax is now applicable to civil forfeiture traffic violations under state statute as well as local ordinances. Previously, state traffic violations were all criminal and only local ordinance traffic violations were civil. The big change accomplished by ch. 278, Laws of 1971, is to make most state traffic violations punishable as civil forfeitures. The above change in sec. 271.21 (2), Stats., makes it clear that the \$2 suit tax is payable in both state and local civil forfeiture actions. I find no reason to conclude that by this change the legislature intended to make this \$2 suit tax applicable to criminal traffic violations.

It has been suggested that the words "traffic regulations" used in sec. 271.21 (2), Stats., as amended, are broad enough to include criminal as well as civil traffic regulations. It is pointed out that the legislature did not by this amendment qualify the meaning of this statute by adding the words "as defined by sec. 345.20 (1) (a), Stats.," after the words "traffic regulations." This latter statute reads:

"(1) DEFINITIONS. In ss. 345.20 to 345.53:

"(a) 'Traffic regulation' means a provision of chs. 341 to 349 for which the penalty for violation is a forfeiture, or an ordinance enacted in accordance with s. 349.06."

Under this definition, the words "traffic regulation" include only civil forfeiture violations under state law or local ordinance. They do not include criminal traffic violations under state law. It is also pointed out that this definition applies only to the construction of these words where they are used in sec. 345.20 to 345.53, Stats. Thus, such definition is not strictly applicable to such words used in sec. 271.21 (2), Stats. However, the failure to amend this statute, as above described, appears to be an oversight. Since, as above explained, suit tax has never been applicable to criminal cases, I conclude that the legislature used the words "traffic regulations" in sec. 271.21 (2), Stats., in the same sense as these words are defined in sec. 345.20 (1) (a), Stats. Therefore, it is my opinion that the \$2 suit tax is not applicable to violations of criminal traffic regulations.

### SUIT TAX IN CIVIL CASES

Another question is whether the \$3 suit tax in forfeiture actions in county court under sec. 271.21 (1) (b), Stats., is applicable to violations of state civil forfeiture traffic regulations. Here again, the state is the plaintiff, and the principle that the state does not pay taxes to itself would seem to be applicable unless the contrary can be inferred from other statutes. As to a municipality as plaintiff in a civil forfeiture action under a local ordinance, sec. 271.21 (3), Stats., reads:

"(3) A municipality need not advance the suit tax but shall be exempt from payment of such tax until the defendant pays costs pursuant to s. 299.25."

A similar provision is found in sec. 299.08, Stats. Thus, it is clear that a municipal plaintiff does not advance suit tax but the defendant pays this tax when judgment is entered against him. It appears to be an oversight that the legislature did not amend these two statutes to provide that both the state and municipality do not advance suit tax but the defendant pays the tax when judgment is entered. I conclude that this was what the legislature intended.

I reach this conclusion because one of the major purposes of the new traffic procedure law was to make such procedures uniform and, so far as possible, treat all violators alike. It would not be uniform that a violator under a local ordinance would pay suit tax and a violator under the state civil forfeiture law would not. Clearly, this language is broad enough to authorize the collection of the \$2 suit tax from defendants in state traffic forfeiture cases.

However, this still leaves the question whether the \$3 suit tax required by sec. 271.21 (1) (b), Stats., may be collected from defendants in state traffic forfeiture cases. While it is not abundantly clear, I conclude that this can be done. Section 271.21 (2), Stats., as amended, now reads:

“(2) An additional suit tax of \$2 shall be collected from defendants in all actions for violations of traffic regulations and shall be paid into the state treasury.”

The use of the word “additional” in this statute only makes sense if the above-mentioned \$3 suit tax is also collected. While this is a slightly strained construction, I think it is the only logical conclusion to reach in view of the clear purpose of the legislature to make the law operate uniformly and to treat all violators alike so far as possible.

#### CLERK'S FEE

Another question relates to clerk's fees. Section 299.01 (2), Stats., provides that civil forfeiture actions in county court follow small claims type procedure. In such actions, sec. 299.08, Stats., provides a clerk's fee of \$2.

Clerk's fees are governed by sec. 59.42 (1) (a) and (e), Stats., in criminal traffic cases. In no contest cases, the clerk's fee is \$6 plus an additional fee of \$3. As previously discussed, there is no suit tax in criminal cases.

### MUNICIPAL COURT CASES

Procedure in municipal court is governed by ch. 300, Stats. Section 300.20 (1), Stats., provides that the fees of the municipal justice are the same as clerk's fees under sec. 288.195 (1), Stats. The latter statute provides a clerk's fee of \$2, but this statute has been changed by adding the words "except under ss. 345.20 to 345.53." Thus, the \$2 fee is not chargeable in traffic ordinance cases in municipal court.

A further question has been raised as to what fees are chargeable when the county court hears a town, city or village ordinance traffic case. Section 253.11 (2), Stats., provides that the county court shall have jurisdiction to hear such cases where the municipality has no municipal justice or where the case is transferred from the municipal justice pursuant to sec. 300.055, Stats. Fees in such cases in county court would be the same as for other ordinance violation cases heard in county court.

### SUMMARY

The following schedule shows the fees and suit taxes chargeable in each of the various types of traffic cases.

#### CIVIL FORFEITURE CASES UNDER STATE STATUTE AND LOCAL ORDINANCE IN COUNTY COURT

Clerk's fee	\$2	.....	sec. 299.08, Stats.
Suit tax	\$3	.....	sec. 271.21 (1) (b), Stats.
Suit tax	\$2	.....	sec. 271.21 (2), Stats.
Total	\$7		

#### CRIMINAL TRAFFIC CASES UNDER STATE STATUTE

Clerk's fee			
(no contest)	\$6	.....	sec. 59.42 (1) (a), Stats.
Additional fee	\$3	.....	sec. 49.42 (1) (e), Stats.
Total	\$9		

MUNICIPAL COURT — ORDINANCE VIOLATIONS

\$2 fee not chargeable in

traffic cases ..... secs. 300.20 and 288.195 (1), Stats.  
 No suit tax..... sec. 271.21, Stats.  
 not applicable to municipal court

JURY TRIAL IN COUNTY COURT — CIVIL FORFEITURE ACTION

6 man jury \$12 ..... sec. 345.43 (1) (b), Stats.  
 Clerks' fees \$ 8 ..... secs. 299.08 and 299.21 (3) (b), Stats.  
 Suit tax \$11..... secs.299.21 (3) (b) and 271.21 (1), Stats.  
 Suit tax \$ 2 ..... sec. 271.21 (2), Stats.  
 Total \$33

12 man jury \$24 ..... sec. 345.43 (1) (b), Stats.  
 Clerks' fees \$ 8..... secs.299.08 and 299.21 (3) (b), Stats.  
 Suit tax \$11..... secs. 299.21 (3) (b) and 271.21 (1), Stats.  
 Suit tax \$ 2 ..... sec. 271.21 (2), Stats.  
 Total \$45

Additional questions under ch. 278, Laws of 1971, will be treated in separate opinions.

RWW:AOH

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*Deposit Schedule-Board Of County Judges*-Judges may not reduce the amounts of the deposit schedule established pursuant to sec. 345.26 (2) (a), Stats.

October 25, 1972.

F. E. VAN SICKLE, *District Attorney*  
*Barron County*

You have asked my opinion whether a group of judges, who feel that the deposit schedule established by the state board of county judges pursuant to sec. 345.26 (2) (a), Stats., is too high for some offenses, may change such schedule to show lesser amounts of deposit before such schedule is furnished to traffic officers. It is my opinion that this cannot be done.

The above-cited statute reads:

“(2) (a) The basic amount of the deposit for the alleged violation of a traffic regulation shall be determined in accordance with a deposit schedule which the board of county judges shall establish. Annually, the board shall review and may revise the schedule.”

Section 345.23 (2) (a), Stats., provides that an officer must release an arrested person when he makes a deposit under sec. 345.26, Stats. There is no authority for anyone other than the board of county judges to establish or revise the schedule. While sec. 345.23 (1), Stats., authorizes a traffic officer to release an arrested person without requiring him to make a deposit, where such officer does require a deposit, there is no authority for him to require a deposit in an amount less than prescribed in the schedule. Officials authorized by sec. 345.26 (1) (a), Stats., to receive a deposit are not authorized to receive deposits in amounts less than prescribed by such schedule.

The reason for this is readily apparent. Before the enactment of ch. 278, Laws of 1971, the amounts required to be deposited varied from one county to another throughout the state. Arrested persons found that, for the same offense in two different counties, the amounts would be different. This was regarded as unfair and it was this very situation which the new law was designed to eliminate. It was felt that the only fair way was to have the amounts of deposit uniform throughout the state. This purpose would be defeated by the proposal you have advanced.

We understand that other persons have also voiced the opinion that the deposit schedule is too high in some respects. On page one of the deposit schedule is a statement inviting suggestions for correction or modification. A study of the schedule has already revealed that a few statutory violations have been left out. Also, there is at least one statutory violation included in the schedule which has been repealed. These will be called to the board's attention. I recommend that all interested persons send their suggestions for change to the Board of County Judges in care of the Court Administrator's Office, 18 East, State Capitol,

Madison, Wisconsin. While the board is required to review the schedule annually, there is no reason why it cannot reconsider more often than that.

RWW:AOH

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*County Elective Officers-Compensation*-County board may not establish a step-salary program for elective officials based upon experience or longevity.

October 25, 1972.

RICHARD B. MCCONNELL, *District Attorney*

*Waukesha County*

You request my opinion whether a county board may establish a step-salary program for an elected official such as the district attorney to provide, for example: no experience, \$16,500; two years as district attorney, \$17,500; four years as district attorney, \$19,000; etc.

I am of the opinion that it cannot.

Section 59.15 (1) (a), Stats., provides:

“(1) ELECTIVE OFFICIALS. (a) The board shall, prior to the earliest time for filing nomination papers for an 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 expenses 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."

The compensation is established for the office. The officer holding the office is entitled to the compensation provided for the office as an incident of the office. *Schultz v. Milwaukee County* (1947), 250 Wis. 18, 22, 26 N.W. 2d 260.

At p. 21 of *Schultz* the court stated:

"\* \* \* While it is true that the county board has the right to establish the salary for that office, it is clear that an unreasonable exercise of that power resulting in a reduction of the salary way below a fair minimum, if permitted, would amount to an abolishment of the office. This a county board would have no right to do. The portion of sec. 59.15 (1), italicized above, provides that the power of the county board extends to establishing the compensation for services. The test of reasonableness must be gauged by the duties prescribed by law, not weighted with a possible but uncertain change by legislative action. The term of office cannot be divided. It is not a matter of contractual relation."

At p. 22 of *Schultz* the court stated:

"The statutes then existing, excluding of course the ordinance of May, 1942, furnished the authoritative rule fixing the terms governing the respondent's position and relation to the office. They protected him against being deprived of the salary incident to his office during the term for which he was elected. \* \* \*"

In *Feavel v. Appleton* (1940), 234 Wis. 483, 488-490, 291 N.W. 830, the court reviewed the public policy behind sec. 59.15 (1) (a), Stats., and stated in part:

"\* \* \* In *Hull v. Winnebago County*, 54 Wis. 291, 293, 11 N.W. 486, it was said:

"It is quite clear that the statute contemplates that the power shall be exercised at *a period remote from the time when such officers were to be chosen, in order to prevent the influence of partisan bias or personal feeling on the part of members of the*

*board in fixing the salary. And, furthermore, it was probably deemed desirable that candidates for office should know precisely what compensation was attached to the office. \* \* \** ”

Under present statutes, the board can encourage experienced officers to run for reelection and highly qualified and experienced aspirants to run for office by establishing salaries as required by sec. 59.15 (1), Stats., which are reasonably gauged to the duties prescribed by law for the office and the responsibilities incident thereto. Section 59.15 (1) (a), Stats., prohibits decrease in the salary of such officer during *the officer's term*. A county could reward an experienced incumbent by increasing his salary during his term as is permitted under present sec. 66.197, Stats., where the statute is applicable.

RWW:RJV

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*Lotteries-Donation Bingo*-The element of “consideration” may be present in many forms for prosecutorial purposes in a ch. 945, Stats., violation.

October 28, 1972.

DONALD R. ZUIDMULDER, *District Attorney*

*Brown County*

You have requested my opinion regarding the following question:

“Is ‘donation bingo’ in violation of Chapter 945, Wisconsin Statutes, where bingo is played in its normal manner with ‘chance’ and ‘prize’ present but without prior ‘consideration’, except that after the completion of each game and the awarding of the prize, a ‘donation’ is taken?”

Pertinent provisions of ch. 945, Stats., affecting your question include the following:

“945.01 Definitions relating to gambling. (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. (Emphasis supplied.)

“(b) 1. ‘Consideration’ in this subsection means anything which is a commercial or financial advantage to the promoter or a disadvantage to any participant. \* \* \*

“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.

“945.03 Commercial gambling. Whoever intentionally does any of the following is engaged in commercial gambling and may be fined not more than \$5,000 or imprisoned not more than one year or both.

“(4) Conducts a lottery where both the consideration and the prize are money, or with intent to conduct such a lottery, possesses facilities to do so; \* \* \*”

It is conceded that in Wisconsin a lottery requires three elements: “prize,” “chance” and “consideration.” Chapter 945, Wisconsin Statutes; *State ex rel. Cowie v. La Crosse Theaters Co.* (1939), 232 Wis. 153, 286 N.W. 707; *State ex rel. Trampe v. Multerer* (1940), 234 Wis. 50, 289 N.W. 600; *State ex rel. Regez v. Blumer* (1940), 236 Wis. 129, 294 N.W. 491; *Kayden Industries, Inc. v. Murphy* (1966), 34 Wis. 2d 718, 150 N.W. 2d 447. In viewing games, schemes, and plans involving prize, chance and consideration, the legislature, the courts, and the Attorney General of Wisconsin have traditionally taken a restrictive view in condemning them as lotteries prohibited by the Constitution. Specifically, the courts and the Attorney General of Wisconsin have determined in case after case that “consideration” in its many forms have been present for lottery prosecutions.

“Consideration” can be present in a lottery situation in overt to camouflaged forms. Certainly where direct required remuneration is essential to participate in a contest, “consideration” is present.

*Trampe, supra*, presented a situation where two patriotic and charitable organizations conducted games of bingo where the participants were *required* to pay an admission price for entrance to the hall where the bingo games were played. The admission price entitled a patron to a bingo card which gave him the opportunity to play a fixed number of games. The court, in addressing itself to the fact that charitable and patriotic purposes for conducting bingo games offers no redeeming legal excuse, makes reference that "consideration" was present pursuant to the admission price which included one bingo card. The court's reaction that the "charitable and patriotic" argument was without merit emphasized this state's strong declaration of public policy against lotteries as prohibited in the Wisconsin Constitution.

Some promoters allow more flexibility to participants in how they will enter the contests with "consideration" being offered by some but not all participants. *Cowie, supra*, is the landmark case in this regard. In *Cowie*, a "Bank Night" scheme allowed patrons to participate by buying an admission ticket to the theater or, alternatively, registering by writing one's name in the lobby without rendering an admission fee; however, one must be in the vicinity to win as only three minutes were allowed to claim the prize after the winning selection was made. The court found "consideration" present in what appears to be a two-fold situation: the increased patronage from the promotion and the money actually spent to purchase tickets by some participants—both an advantage to the promoter. The court acknowledged that, although the person drawing a winning number may not have paid consideration for his ticket, the theater receives consideration by the increased sales of tickets to others. The court stated at p. 158:

"\* \* \* Upon the question whether the additional sales induced by the offering of the prize constitutes a consideration, the courts are divided. The reason most generally given for holding the scheme a lottery is that the great number of those who purchase tickets for the chance of participating in the drawing, thus making the scheme profitable to the theater, furnish the consideration, although others are given chances free. Others base their ruling upon the fact, or at least place emphasis upon it, that furnishing free chances is only a means taken to

evade the point of necessary consideration, and thus save the scheme from being held a lottery. We agree with the majority of the courts and hold that the instant scheme constitutes a lottery. *Manifestly, a lottery is no less a lottery because the management of it gives away numbers entitling participation in the draw to some persons. \* \* \** (Emphasis supplied.)

*Stern v. Miner* (1941), 239 Wis. 41, 300 N.W. 738, provided another Bank Night scheme similar to *Cowie*. Participants could register for the contest both inside and outside the theater, and any person was allowed to register without payment of admission fees. In finding "consideration" for a lottery the court referred to *State ex rel. Cowie v. La Crosse Theaters*:

"What the court had in mind in the *La Crosse, supra*, was that as a matter of fact the purpose, intent, and almost inevitable tendency of such a scheme is to induce registrants to pay out money to participate in the drawing, rather than to see the entertainment, and that this constitutes the consideration for the lottery and condemns it as such. Many things may constitute the consideration for a contract. It is the fact that they are the intended consideration that imports them into a contract. What was held in the *La Crosse* case was that the contemplated consideration was increased attendance at bank nights for the purpose of the drawing, rather than to see the show. *This purpose and intent is evident from a consideration of the entire scheme.*" (Emphasis supplied.)

The court viewed the entire scheme in concluding monies paid for the entertainment, in fact, supported and contributed to the lottery drawing. Citing *Regez, supra*, the court also found "consideration" in the almost mandatory requirement of participant presence in the area of the theater in order to claim the prize in the allotted time.

43 OAG 324 (1954) also supports the contention that "consideration" is present even though all participants do not provide it. Piggly Wiggly Stores promoted bingo and provided entry blanks at their stores and "other business establishments" unconnected with the contest. The *Regez, supra*, rationale

provided "consideration" in customer traffic to Piggly Wiggly, and the court was not impressed by alternative unconnected sources for entry blanks, for:

"\* \* \* while it may slightly dilute the element of consideration, it clearly does not eliminate it. As a matter of law, the fact that some persons may obtain their chances without giving consideration to the promoter does not save a scheme from being held to be a lottery, so long as enough persons do give consideration to the sponsor to make the scheme profitable for him to operate." *State ex rel. Cowie v. La Crosse Theaters Co.*, (1939), 232 Wis. 153.

This opinion reiterates the proposition that "consideration" need not be absolute for all participants nor will the state be misled by not looking at the entire transaction of the scheme.

Likewise, terminology will not circumvent a promoter's true purpose in having a lottery. 28 OAG 303 (1949) provided a situation where a veteran's organization held a contest where it provided "donations will be accepted to help defray the expense incurred holding the contest." Anyone could enter without making a donation. The opinion held that "the fact that a name may be entered without a 'donation' does not necessarily eliminate the element of consideration." The rationale of *Cowie*, *supra*, was cited, and in addition, the opinion elaborated:

"In the case of *State ex rel. Regez v. Blumer* (1940), 236 Wis. 129, 132, the Supreme Court defined consideration as: 'a disadvantage to one party or an advantage to the other.' *I think it apparent that the scheme is intended to be profitable to the organization promoting the same or it would not be operated.*" (Emphasis supplied.)

In conclusion, the state of Wisconsin has long enforced its strict public policy against lotteries in violation of the Wisconsin Constitution and its statutes. "Consideration" has been found present in many forms for prosecutorial purposes. Although a "donation" contest situation is not "consideration per se" as contemplated in ch. 945, Stats., the surrounding circumstances of a contest's operation may dictate the presence of "consideration" for a lottery violation. The prosecutor must view the fact situation of each contest promotion to ascertain whether, in the

“donations” provide immediate “consideration” for the promoters in their operation, or whether the “donations” are separate, distinct and apart from the actual contest operation so as to negate the “consideration” element.

RWW:TAH

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*Reimbursement By State—County Mental Hospitals—Time for settling accounts for mental patients between counties and between the state and counties begins on April 1.*

November 3, 1972.

DENNIS J. FLYNN, *Corporation Counsel*  
*Racine County*

You request my opinion relating to an interpretation of state reimbursement statutes for county mental hospital facilities. You note that the state is obligated to reimburse a county facility for three classes of patients, namely, those without a legal settlement who are state-at-large charges, those with a legal settlement in Racine County, and those patients with a legal settlement in another county. You further indicate that a different reimbursement formula exists for each class of patients as provided under sec. 51.08 (2) (3) and (4), Stats. Your specific question is whether sec. 46.106 (3), Stats., creates an obligation on the part of the state to make reimbursement for patients who are state-at-large charges and patients with legal settlement in Racine County prior to April 1 following the close of the fiscal year on June 30.

You acknowledge that the time of reimbursement for patients who have a legal settlement in another county is on April 1 as provided under sec. 46.106 (2), Stats. You indicate that the reason for the delay in reimbursement as to this class of patients may be attributable to the fact that there is a set-off procedure. Charges in favor of Racine County are subject to a set-off in favor of other counties treating patients with a Racine County

settlement. However, you state that sec. 46.106 (2), Stats., does not address itself to reimbursement for patients in the other two classes.

I invite your attention to sec. 46.106 (3), Stats., which reads as follows:

“STATEMENT OF COUNTY CLAIMS. On July 1 in each year the officer in charge of each county charitable, curative, reformatory and penal institution shall prepare a statement of the amount due from the state to the county for the maintenance, care and treatment of inmates at public charge on forms supplied by the department. Such statement shall cover the preceding fiscal year and shall give the name of each inmate whose support is partly or wholly chargeable to the state, and his legal settlement, the number of weeks for which support is charged and the amount due to the county from the state, itemized as to board, clothing, dental, burial, surgical and transfer. Said statement shall be verified by the officer making it and certified by the trustees of the institution to the department, and a duplicate thereof shall be forwarded to the county clerk. The department shall credit the county with the amount due the county for any recovery of maintenance and shall certify said statement to the department of administration, *which shall pay the aggregate amount found due each county as provided in sub. (2).*” (Emphasis supplied.)

The pertinent portion of sub. (2) of sec. 46.106, Stats., relating to the time of payment reads:

“\* \* \* The department of administration shall make the first apportionment and payment on April 1, in each year, covering collections to and including March 22. The collections made after March 22 and through August 20 shall be apportioned and paid on September 1 following, and the final payment shall be made on December 1.”

Thus, from a literal standpoint, it is readily apparent that the time for settling accounts is April 1. The settling of accounts includes payment, set-off procedures between counties, and set-off procedures between counties and the state.

As you have noted, a set-off procedure between counties is provided for under sec. 46.106 (2), Stats. A fair reading of that subsection also provides for a set-off procedure between the counties and the state. The pertinent portion of the subsection reads:

“\* \* \* On July 1 in each year the department shall prepare a statement of the amounts due from the several counties to the state for the maintenance, care and treatment of inmates at public charge in state and county charitable, curative, reformatory and penal institutions for the preceding fiscal year \* \* \*”

As previously quoted above, the subsection concludes with the directive that the time of apportionment and payment is April 1. While it can be argued from an equitable standpoint, that a county is entitled to reimbursement before April 1, the argument that the state is entitled to reimbursement from the counties before that date applies with equal force. Equity, of course, follows the law. A court of equity has no right to say that shall not be done which a valid statute authorizes to be done. *Olson v. Curran* (1909), 137 Wis. 380, 383, 119 N.W. 101. The statute in this matter directs that the time for payment and apportionment between the state and the county and between counties relative to institutionalized persons is April 1. No earlier date is provided. Payment and apportionment as used in sec. 46.106 (2), Stats., includes set-off procedures and reimbursement as contemplated by the entire statute. As stated in *State ex rel. Morse v. Christianson* (1952), 262 Wis. 262, 266, 55 N.W. 2d 20:

“\* \* \* We feel that the act should be studied in its entirety and that an ordinary, common-sense meaning should be given to the various sections and to the words used therein and make them effective to carry out the general plan.”

Accordingly, I am of the opinion that sec. 46.106 (3), Stats., does not create an obligation on the part of the state to make reimbursement for mental patients prior to April 1 following the close of the fiscal year on June 30.

RWW:WLJ

*Nursing Homes—Reimbursement Rates*—Discussion of liability of members of Nursing Home Appeals Board retroactive adjustment in nursing home rates under ch. 215, Laws of 1971.

November 6, 1972.

RICHARD DELAP, *Chairman*

*Nursing Home Appeals Board*

You have asked two questions relative to the function of the newly created Nursing Home Appeals Board. As noted in your opinion request, the Board was established in accordance with sec. 63r of ch. 215, Laws of 1971, which, *inter alia*, sets forth a reimbursement formula for providers of nursing home care. The Nursing Home Appeals Board is charged with a statutory duty under sec. 49.45 (6m) (h), Stats., to review such reimbursement rates to nursing homes. That portion of the enactment which is pertinent to both of your questions in this matter reads as follows:

“The appeal board shall review petitions from nursing homes providing Title XIX, state skilled, limited and personal care, for modifications to any reimbursement rate under this subsection for new homes. Upon the findings and recommendations of the appeal board, the secretary of health and social services shall grant such modifications, which may exceed maximums under this section but may not exceed any applicable federal maximums. The board may, upon the presentation of facts, recommend modifications of a home’s care rate where demonstrated substantial inequities exist including those resulting from the following, without limitation because of enumeration:

- “1. Wages, salaries and related benefit costs.
- “2. Historical capital construction costs.
- “3. Exceptional care factors.”

First, you ask what legal liability may be incurred by the Board, more particularly, what individual liability may result to the Board members on actions taken by the Board in performing the statutory function in granting or failing to grant modifications of nursing home reimbursement rates upon petition of individual nursing homes.

It is readily apparent from an analysis of the statutory function of the Board that its sole duty involves that of decision-making at the administrative level. This is what is known as a quasi-judicial duty. It involves the exercise of judgment and discretion.

The law has always shielded public officers who are charged with such duties. This principle of immunity has a deep root in the common law. It is found asserted in the earliest judicial records and it has been steadily maintained by an undisturbed current of decisions. *Fath v. Koeppel* (1888), 72 Wis. 289, 39 N.W. 535. High public purpose is involved. As stated in *Wasserman v. Kenosha* (1935), 217 Wis. 223, 226, 258 N.W. 857:

“ \* \* \* such rule applies to all officers in the performance of judicial or *quasi*-judicial duties, to judges from the highest to the lowest, to jurors, and to all public officers whatever name they may bear; and further, in substance, that if it were otherwise, officers, however conscientious and correct in their official life, would be constantly in danger of having their actions challenged in court by disappointed persons, and that independence necessary to the judicial function seriously interfered with. To avoid that danger, judicial officers, high or low, such officers strictly so called and those *quasi*-judicial as well, and all in the performance of duties of a judicial nature, within their jurisdiction, have complete immunity from actions for damages on account of their official acts.’ ”

The *Wasserman* decision is the basic law in this state. Essentially, it has not been modified. Rather, it has been cited with approval in *Bendorf v. Darlington* (1966), 31 Wis. 2d 570, 578, 143 N.W. 2d 449. It can be argued that some changes in the immunity rule have been made in traffic situations where accidents have occurred or where there has been an invasion of private property rights. However, these decisions are not of concern for our purposes. As stated in *Raisanen v. Milwaukee* (1966), 35 Wis. 2d 504, 512, 151 N.W. 2d 129:

“ Lawfully authorized planning by governmental bodies has a unique character deserving of special treatment as regards the extent to which it may give rise to tort liability. It is proper and necessary to hold municipalities and the State liable for injuries arising out of the day-by-day operations of government—for

instance, the garden variety injury resulting from the negligent maintenance of a highway—but to submit to a jury the reasonableness of the lawfully authorized deliberations of executive bodies presents a different question. \* \* \* to accept a jury's verdict as to the reasonableness and safety of a plan of governmental services and prefer it over the judgment of the governmental body which originally considered and passed on the matter would be to obstruct normal governmental operations and to place in inexpert hands what the Legislature has seen fit to entrust to experts. Acceptance of this conclusion, far from effecting revival of the ancient shibboleth that "the king can do no wrong", serves only to give expression to the important and continuing need to preserve the pattern of distribution of governmental functions prescribed by constitution and statute.' "

Many lawsuits today are brought in federal district court pursuant to 42 U.S.C. sec. 1983, under the Civil Rights Act. Most of these cases involve injunctive or declaratory relief rather than monetary damages. Suits for monetary damages under the Civil Rights Act against a board, commission or agency have been dismissed because such bodies are not regarded as "persons" under the Act. This includes, among others, a parole board in *U.S. ex rel. Pope v. Williams* (E.D. Pa. 1971), 326 F. Supp. 279; a school board in *Guelich v. Mounds View Independent Public School District No. 621* (D. Minn. 1972), 334 F. Supp. 1276; a parole board in *Williams v. Craven* (C.D. Cal. 1967), 273 F. Supp. 649; a board of police commissioners in *Schackman v. Arnebergh* (C.D. Cal. 1966), 258 F. Supp. 983.

The same considerations are involved in suits against individual board members on the theory that, when individuals are acting in their official capacities, they are mere extensions of the agency, and, therefore, are not persons within the meaning of the Act. *Bennett v. Gravelle* (D. Md. 1971), 323 F. Supp. 203; *Conway v. Alfred I. DuPont School District* (D. Del. 1971), 333 F. Supp. 1217.

The United States Supreme Court has recognized the immunity of governmental officials, other than judges, who are involved in a quasi-judicial function in their official capacities. *Pierson v. Ray* (1967), 386 U.S. 547.

Thus, based on the foregoing, it is to be observed that, while the Nursing Home Appeals Board does not enjoy the complete immunity of judges and legislators, it does enjoy substantial immunity which compares favorably to complete immunity under the Civil Rights Act.

Section 165.25 (6), Stats., requires the Attorney General at the request of a department head and approval by the Governor to appear for and defend state officers and employes in tort actions. Section 270.58 (1), Stats., provides that the state shall pay judgments taken against state officers and employes pertaining to carrying out their duties when the court or jury finds that they acted in good faith.

I believe the foregoing, in general terms, delineates civil liability possibilities from an immunity standpoint. If there are specific questions to be answered, the Board may be assured of my complete cooperation in these matters. I have not attempted to cover liability under the criminal statutes involving acts such as bribery or misconduct. The principle of immunity has no applicability, of course, to violations of the criminal law.

Your second question is stated as follows: "What restraints does Chapter 215 establish for the board in granting retroactive adjustments in nursing home reimbursement rates? Since the law deals with rates established on or before November 5, 1971, it has been our interpretation that no adjustments could be made to nursing home rates prior to that date, but that adjustments could be made retroactively back to November 5, 1971. We would appreciate an opinion on the question of whether the board can make retroactive adjustments to November 5, or prior to November 5th."

I am of the opinion that the Board has no authority to make retroactive adjustments prior to March 31, 1972. As previously noted, sec. 63r of the amended budget bill, ch. 215, Laws of 1971, created sec. 49.45 (6m), Stats. Paragraph (a) of the statute sets forth a new formula for nursing home reimbursement. Paragraph (h) of the statute sets forth the authority of the Board to review petitions for modifications to reimbursement "under this

subsection for such homes.” Accordingly, the answer to your question is controlled by the date on which the new formula became law.

Section 63r of ch. 215, Laws of 1971, was published on March 30, 1972. It became law on March 31, 1972, the day following publication as provided by sec. 990.05, Stats., which reads:

“\* \* \* Every law or act which does not expressly prescribe the time when it takes effect shall take effect on the day after its publication.”

It should be noted that sec. 151 of the amended budget bill, relating to effective dates of various provisions thereof, contains no reference to sec. 63r. Thus, the various statutes created by sec. 63r became effective on March 31, 1972.

The function of the Board is to apply the new formula in rate review determinations. The new formula came into existence as valid law on March 31, 1972. If the legislature intended the new formula to have an earlier effective date, it would have simply provided such a date. It might have used November 5, 1971, the effective date of the budget bill on nursing home reimbursement, or July 1, 1971, the beginning of the present biennium, or even July 1, 1966, the beginning of reimbursement to nursing homes under the Medicaid program. It did not. To speculate as to the effective date of an act is not consonant with well-established canons of construction reiterated by the Wisconsin Supreme Court in *Department of Revenue v. Dziubek* (1970), 45 Wis. 2d 499 at p. 505 as follows:

“ ‘ “An amendatory statute, like other legislative acts, takes effect only from its passage, and will not be construed as retroactive or as applying to prior facts or transactions, or to pending proceedings, *unless a contrary intention is expressly stated or necessarily implied.*” ’ ” (Emphasis supplied)

Your second question apparently stems from language used in sec. 149m (1) (b) of ch. 215, Laws of 1971, which reads:

“Until such time as section 49.45 (6m) is implemented, reimbursement rates to nursing homes shall be at the rate in effect prior to November 5, 1971. Upon implementation of the formula on July 1, 1972, retroactive adjustments shall be made in accordance with the new formula.”

The first sentence, by clear implication, abolished a flat-rate formula effective from November 5, 1971, to March 31, 1972. The flat-rate formula was established under the budget bill, ch. 125, Laws of 1971, creating sec. 49.45 (6m), Stats. The budget bill became effective November 5, 1971. Prior to that date, a cost-plus reimbursement formula had been established by the department pursuant to sec. 49.45 (11) (a) (1), Stats., 1969, and its predecessors dating back to the advent of the Medicaid program effective July 1, 1966. It should be clear that the date, November 5, 1971, describes a rate. It does not prescribe a time for the new formula to go into effect. It might be noted that the Department of Health and Social Services has already made retroactive adjustments to nursing home rates for the period from November 5, 1971, to March 31, 1972, in accordance with the first sentence of the above-cited paragraph.

The second sentence of the above-cited paragraph does not establish an effective date for the new formula. It merely recognizes that the new formula described by sec. 49.45 (6m), Stats., is in need of implementation by the department. Such implementation will take time as indicated in paragraph (a) of sec. 149m (1) (a), ch. 215, Laws of 1971, which reads:

“The department of health and social services shall develop the rules and procedures necessary to implement the reimbursement system contained in sec. 49.45 (6m) of the statutes, including the departmentally established guidelines under sections 49.18 (1) (b), 49.19 (1) (c), 49.20 (2) and 49.61 (1m), shall take effect upon approval of the joint committee on finance, but no later than July 1, 1972.”

Thus, it is apparent that the legislature was concerned with the time between the date of the enactment authorizing the new formula and the date of implementation which was to occur some time later. The term “retroactive adjustments” as used in the second sentence of paragraph (b), supra, when interpreted

contextually, means from the date of implementation to the effective date of the new formula. The effective date of the new formula is, of course, March 31, 1972, as previously established.

Accordingly, I find no ambiguity in paragraph (b) of sec. 149m, ch. 215, Laws of 1971, when it is construed in its entirety along with other statutes *in pari materia*, that is, statutes relating to the same subject matter. The provisions relating to nursing home reimbursement are definitive and complete. To select a date other than March 31, 1972, for retroactive reimbursement is to supply an intention and then give the statute effect according to such supplied intention. This is not construction, but rather it is legislation. 2 Lewis's Sutherland, Stat. Constr., 2d ed., sec. 366.

RWW:WLJ

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*Policemen—Arrest Powers*—City policeman is law enforcement officer within sec. 968.07, Stats., and traffic officer within sec. 345.22, Stats.

November 6, 1972.

CHARLES A. POLLEX, *District Attorney*  
*Adams County*

You request my opinion on a number of questions relating to the arrest powers of a city policeman.

1. Is a city policeman a law enforcement officer within the meaning of sec. 968.07, Wis. Stats., which is concerned with arrest powers?

I am of the opinion that he is. See definition of "law enforcement officer" in secs. 165.85 (2) (c), 967.02 (5), Stats.

2. Can a city policeman who is on duty and working within the city limits arrest, without a warrant, where he observes a crime or violation of the motor vehicle code occur outside the city limits?

The question is too broad to permit a yes or no answer. The violation would occur outside the jurisdiction of the officer. As a citizen he would have power to arrest if the violation were a felony or was a misdemeanor in the nature of a breach of the peace which threatens the public security. *Radloff v. National Food Stores* (1963), 20 Wis. 2d 224, 123 N.W. 2d 570; *Keenan v. State* (1858), 8 Wis 132.

Police in a city have such powers and duties as constables *within their municipality* and such additional powers as set forth in sec. 62.09 (13), Stats.

They have limited power to act beyond municipal boundaries by reason of secs. 66.305, 66.31 and 66.315, Stats. Because of the strict territorial limits on their powers, they are frequently deputized by the sheriff on a cooperative basis so that they may at all times act throughout the county if necessary.

For further discussion of jurisdictional questions, see opinion to the District Attorney for Outagamie County, dated February 22, 1972, attached; and, for discussion of general principles of arrest without warrant, see 45 OAG 289 (1956).

Section 968.07 (11) (d), Stats., permits a law enforcement officer to arrest a person without a warrant when he has reasonable grounds "to believe that the person is committing or has committed a crime."

The 1971 Legislature enacted ch. 278, Laws of 1971, governing traffic regulations. While some violations amount to crimes, others are punishable only by a forfeiture and do not constitute crime. Chapter 278 created sec. 345.22, Stats., to provide:

"A person may be arrested without a warrant for the violation of a traffic regulation if the traffic officer has reasonable grounds to believe that the person is violating or has violated a traffic regulation."

I am of the opinion that a city policeman is a traffic officer, within the limits of his municipality, as that term is used in sec. 345.22, Stats., and defined in sec. 340.01 (70), Stats.

The "fresh pursuit" statute, sec. 66.31, Stats., contemplates that the violation for which the pursuit is necessary occurred within the limits of the officer's municipality.

I am of the opinion that a city or village police officer, not acting as a deputy sheriff, can make a lawful arrest for the violation of an ordinance of his municipality, for a misdemeanor or traffic regulation only within the limits of his municipality, except in cases of fresh pursuit which would permit arrest in an *adjoining* municipality.

In case of a felony, such officer is not limited to his own or adjoining municipalities where he is in fresh pursuit and the felony was attempted or committed in his presence. Such right to cross jurisdictional lines in order to arrest in case of a felony grows out of the common law. *Carson v. Pape* (1961), 15 Wis. 2d 300, 308, 112 N.W. 2d 693.

The basic jurisdiction of a city police officer to enforce state laws and ordinances of the city is limited to the city limits.

You are also concerned with the status of a city policeman who is "off duty."

Police officers have official status to exercise their statutory powers twenty-four hours a day, whether "on duty" or "off duty." Officers when "off duty" and not in uniform may need to take extra care to protect their own safety when enforcing laws and may have difficulty in showing the offender evidence of authority.

RWW:RJV

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*Private Detectives—Emergency Vehicles*—The vehicles of private detectives and police licensed under sec. 440.26, Stats., are not authorized emergency vehicles as defined in sec. 340.01 (3) (a), Stats.

November 7, 1972.

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

You ask whether persons licensed as private detectives or private detective agencies under sec. 440.26, Stats., may operate "authorized emergency vehicles" as that term is defined in sec. 340.01 (3) (a), Stats., using flashing red lights authorized by sec. 347.25, Stats. The answer is "no."

Section 440.26 (1), Stats., reads as follows:

"(1) LICENSE OR PERMIT REQUIRED. No person shall advertise, solicit or engage in the business of operating a private detective agency, or act as a private detective, investigator, special investigator, private policeman, private guard or private watchman, or act as a supplier of private police. private guards or private watchmen, or solicit business or perform any other type of service or investigation as a private detective, private policeman, private guard or private watchman, or receive any fees or compensation for acting as such, without first filing an application and the necessary bond or liability policy with the department and being issued a license or a permit to be a watchman or guard under this section. No person shall be so licensed unless he is over 25 years of age as principal or owner of an agency and over 21 years of age if an individual agent."

Section 347.25 (1), Stats., provides as follows:

"(1) An authorized emergency vehicle may be equipped with one or more flashing, oscillating or rotating red lights and shall be so equipped when the operator thereof is exercising the privileges granted by s. 346.03. Such lights shall be so designed and mounted as to be plainly visible and understandable from a distance of 500 feet both during normal sunlight and during hours of darkness. No operator of an authorized emergency vehicle shall use such warning lights except when responding to an emergency call or when in pursuit of an actual or suspected violator of the law, when responding to but not upon returning from a fire alarm or when necessarily parked on a highway in a position which is likely to be hazardous to traffic using the highway."

Section 340.01 (3) (a), Stats., provides:

"(3) 'Authorized emergency vehicle' means any of the following:

"(a) Police vehicles, whether publicly or privately owned;"

Nothing in these statutes authorizes persons licensed as private detectives or private detective agencies to operate such emergency vehicles equipped with flashing red lights. Section 340.01 (3) (a), Stats., provides that a police vehicle is an "authorized emergency vehicle" even where it is privately owned. While today most police vehicles are publicly owned, we think this statute refers to the situation which still exists in some smaller municipalities where certain public policemen still use personal cars in their work, just as conservation wardens did until a few years ago. This statute provides that such privately owned vehicles may be used as authorized emergency vehicles. This has no application to a vehicle owned and operated by a private detective, guard or private policeman. The words "privately owned" refer to the ownership of the vehicle but not to the private nature of the policeman or detective involved. Further support for this conclusion is found in sec. 346.03, Stats., which permits "authorized emergency vehicles" to exceed the speed limit, proceed through stop signs, and disregard certain other traffic regulations in emergencies. Nothing in these statutes indicates a legislative intent that private detectives and private police are to have these privileges.

It is my opinion that the vehicles of private detectives and other private guards and police are not "authorized emergency vehicles" and may not be equipped with and use flashing red lights.

Your next question is whether persons licensed under sec. 440.26, Stats., may incorporate into their badges or other identification devices the great seal or the coat of arms of the state of Wisconsin. Article XIII, sec. 4 of the Wisconsin Constitution, directs the legislature to provide for the great seal for this state, to be kept by the Secretary of State and used to authenticate certain official acts of the Governor. Section 14.45, Stats., provides that the great seal shall contain the coat of arms of the state. Section 1.07, Stats., provides for the coat of arms, and sec. 1.08, Stats., provides that the state flag shall contain the coat of arms. While sec. 946.06, Stats., places certain restrictions on the use of the state flag, I find no other statutory specifically regulating the private use of the state seal or coat of arms. It is my opinion that the great seal or the coat of arms may be used on

a private policeman's badge as long as no attempt is made to mislead others into believing that the wearer is actually a peace officer.

You also ask whether private detectives licensed under sec. 440.26, Stats., are restricted geographically as to areas in which they can operate. The license granted under sec. 440.26, Stats., is a state license, and does not authorize operations beyond the boundaries of the state. However, beyond this restriction, private detectives and private detective agencies licensed pursuant to this section are not restricted geographically. Section 440.26 (5), Stats., provides that certain employes of such agencies need not be licensed as private detectives, but must obtain watchman or guard permits from the local police chief. Such persons are limited to patrol work exclusively on certain designated private property.

RWW:AOH

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*Highway Commissioner—County Board*—Incumbent County supervisor must resign before county board may consider his appointment as highway commissioner.

November 13, 1972.

ROBERT J. RICHARDSON, *District Attorney*  
*Pierce County*

You advise that the Pierce County Board intends to elect a new highway commissioner at its Tuesday, November 14, 1972, regular meeting. One of the persons being considered for appointment to said position is an incumbent county supervisor currently serving a term of office which expires in 1974. Based on the foregoing fact situation, you inquire as follows:

“Can a County Board of Supervisors appoint an incumbent supervisor to the position of county highway commissioner during the term for which the supervisor was elected if the incumbent supervisor resigns his office as supervisor prior to his appointment

to the highway commissioner position, or in the alternative, if the county supervisor resigns his office prior to his assuming duties and receiving remuneration as county highway commissioner?"

Section 59.03 (3), Stats., provides:

"(3) COMPATIBILITY. No county officer or employe is eligible to the office of supervisor, but a supervisor may also be a member of a town board, the common council of his city or board of trustees of his village."

Section 66.11 (2) Stats., provides:

"ELIGIBILITY OF OTHER OFFICERS. Except as expressly authorized by statute, no member of a town, village, or county board, or city council shall, during the term for which he is elected, be eligible for any office or position which during such term has been created by, or the selection to which is vested in, such board or council, but such member shall be eligible for any elective office. The governing body may be represented on city or village boards and commissions where no additional remuneration is paid such representatives and may fix the tenure of such representatives notwithstanding any other statutory provision. This subsection shall not apply to a member of any such board or council who resigns from said board or council *before being appointed* to an office or position which was not created during his term in office." (Emphasis added)

As you point out in your letter, it is clear that sec. 59.03 (3) Stats., absolutely precludes a county supervisor from simultaneously serving as an officer or employe of the county. The question, therefore, arises as to the circumstances under which an incumbent county board supervisor may make himself eligible for an appointment to the highway commissioner's position. Those circumstances are specifically set forth in sec. 66.11 (2), Stats.

Section 66.11 (2), Stats., makes it clear that the disability to serve during the term for which the county supervisor is elected would be applicable if the position of county highway supervisor was created during the term for which the supervisor was elected. It was not. However, it is obvious that the selection of a new county commissioner arises during the term for which the

incumbent county supervisor is elected. Such being the case, before the incumbent county supervisor would be eligible for consideration for appointment as highway commissioner, it would be necessary for him to resign from the county board. See the last sentence of sec. 66.11 (2), Stats. As previously pointed out by our office in 55 OAG 260 (1966), an incumbent supervisor takes a risk in resigning his office before the board acts, since he cannot be assured of being selected to the office or position being filled.

RWW:JCM

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*Prevailing Wage—Hospitals*—As town, village may not donate funds to private corporation contracting for medical center, sec. 66.293, Stats., is inapplicable.

November 20, 1972.

PHILIP E. LERMAN, *Chairman,*  
*Department of Industry, Labor and Human Relations*

You have inquired whether under sec. 66.293 (3), Stats., a private, nonprofit corporation, which solicits bids and lets contracts for construction of a medical center to be financed by contributions from private individuals and businesses as well as by pledges of funds by towns and villages in the area to be served by the facility, is required before soliciting bids for the project to obtain from your department a certification of the prevailing wage rates applicable to the trades and occupations involved in the work.

In my opinion, the statute does not require a certification of prevailing wage rates for such project. Section 66.293, Stats., provides in pertinent part:

“(3) Every municipality, before soliciting bids on a contract for any project of public works except highway, street or bridge construction, shall apply to the department of industry, labor and human relations to ascertain the prevailing wage rate in all trades and occupations required in the work contemplated. The department of industry, labor and human relations shall

determine the prevailing wage rate for each trade or occupation pursuant to s. 103.49, shall make its determination within 30 days after receiving the request and shall file the same with the municipality applying therefor.\*\*\*”

From the facts recited, it is obvious that the medical center is not being contracted for by the municipalities. Nor does it appear from the stated facts that the private corporation is a sham device used as a subterfuge to avoid the prevailing wage certification provisions of the statute. Further, it is doubtful that the municipalities are authorized to purchase an interest in such facilities or to make donations to or investments in the corporation.

If the pledges or payments are unauthorized, there can be no valid municipal involvement and any contracts made are to be governed by the rules relating to private contracts. A wage rate determination is not required under sec. 66.293, Stats., for private contracts.

The duties and powers relating to disbursements of town funds are regulated by statute, and disbursement may be made only for purposes designated by statute. See 87 C.J.S., *Towns*, secs. 113,114. A town may appropriate funds to a private corporation or subscribe to its stock only when expressly authorized by statute. 87 C.J.S., *Towns*, sec. 115. As stated in *Pugnier v. Ramharter* (1957), 275 Wis. 70, 73-74, 81 N.W. 2d 38. 71 A.L.R. 2d 522:

“A town has only such powers as are conferred on it by statute or are necessarily implied therefrom. *Milton Junction v. Milton* (1953), 263 Wis. 367, 57 N.W. (2d) 186. The officers of a town have only such powers as are conferred upon them by statute. *Whitewater v. Richmond* (1931), 204 Wis. 388, 235 N.W. 773.

“Sec. 60.01, Stats., treats with the corporate powers of a town. Sec. 60.18 relates to the powers of a town meeting. Sec. 60.29 sets forth the powers of town boards. Nowhere in those provisions is authority granted to expend money from the town treasury for charitable purposes. We are obliged to hold that the causes promoted by the several respondents here are of a charitable nature, and that the contributions made by the appellant and the others from the town’s treasury for such purpose were beyond his,

their, or the town's powers. Such acts were clearly *ultra vires*: *Kircher v. Pederson* (1903), 117 Wis. 68, 93 N.W. 813; *Menasha Wooden Ware Co. v. Winter* (1915), 159 Wis. 437, 150 N.W. 526."

I am aware of no statute which expressly or impliedly authorizes towns to donate money to, or to become members of, a nonprofit corporation committed to building hospital facilities to service a county area.

Comparable restrictions on public expenditures apply to counties. See 48 OAG 267 (1959), 45 OAG 44 (1956), 37 OAG 100 (1948). Section 59.07 (96), Stats., enacted by ch. 48, Laws of 1971, effective June 23, 1971 (renumbered by ch. 211), states:

"COMPREHENSIVE HEALTH PLANNING. A county or combination of counties may engage in comprehensive health planning, and county boards may appropriate county funds to an area-wide agency for such planning, whether the organization to be utilized is a public agency or a private, nonprofit corporation."

This provision extends the authority of counties in providing for hospital needs. It does not, however, go so far as to empower the county to contribute to the construction of a private hospital but restricts the use of funds appropriated to planning activities. Thus, counties still are prohibited by implication from aiding financially private, nonprofit health care building projects.

Towns have not even been granted statutory authority to contribute to planning agencies. Allocation of the planning function to counties suggests the legislative intention to encourage resolution of health planning problems on a broad base.

Section 66.501, Stats., ch. 197, Laws of 1969, grants to cities and villages the power to convey land to or lease land to or from a nonprofit corporation concerned with construction of hospital facilities at terms and conditions determined to be in the public interest. The purpose of this statute is stated to be to promote the provision of adequate hospital facilities in the state. This statute, in the absence of any other dealing with municipal involvement with nonprofit corporations engaged in hospital construction, must be construed as delineating the extent of such involvement.

Cities and villages may grant or lease land to such corporations at nominal rates. The statute does not provide for money donations, investments or the purchase of memberships in such corporations. Towns and counties are not included in the extension of power granted by sec. 66.501, Stats., to aid in the private provision of hospital services. It is elementary law that the enumeration of powers which may be exercised by municipal corporations excludes such powers as are not enumerated. 56 Am. Jur. 2d *Municipal Corporations*, sec. 195.

It is my opinion, therefore, that towns and villages which pledge contributions to private hospital projects probably do so without authority of law. As *ultra vires* actions, these pledges would be unenforceable. See 87 C.J.S., *Towns*, sec. 107; C.J.S., *Municipal Corporations*, secs. 979, 1008; *Center Drainage Dist. v. Capital Indemnity Corp.* (1967), 33 Wis. 2d 294, 298, 147 N.W. 2d 245. Such payments made to the corporation probably would be recoverable. See 64 C.J.S., *Municipal Corporations*, sec. 1870; *Kiel v. Frank Shoe Mfg. Co.* (1944), 245 Wis. 292, 295, 299, 14 N.W. 2d 164, 152 A.L.R. 691; *Village of Courtland v. Courtland Electric Co.* (1927), 172 Minn. 392, 215 N.W. 673. Thus, the corporation here involved was and is essentially a private organization without valid municipal involvement. Any building contracts made by the corporation are private contracts not subject to the requirements of sec. 66.293, Stats.

If a municipality lawfully assists a private, nonprofit hospital construction project through a grant or lease of land under sec. 66.501, Stats., however, any building contract made by the private corporation would be subject to the prevailing wage rate determination provisions of sec. 66.293, Stats. See sec. 66.501 (5), Stats. This section indicates legislative concern that any hospital construction project which has authorized municipal involvement be subject to the law governing public works contracts.

It is assumed that the municipal funds involved are not being appropriated to construct the hospital as a memorial for veterans, and as authorized by secs. 45.05 and 45.055, Stats. No suggestion of such purpose is made in the facts set forth in the opinion request.

RWW:GS

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*University of Wisconsin—Steam Selling*—Steam may not be sold under sec. 197.20, Stats., to an association organized for religious purposes.

November 20, 1972.

ROBERT W. WINTER, JR., *Vice President*  
*University of Wisconsin System*

You have requested my opinion as to whether the University of Wisconsin at Eau Claire may sell steam to the Cooperative Campus Ministry.

It appeared from the correspondence that the Cooperative Campus Ministry Building is located on lands adjacent to the campus and it is proposed to run a line from their building to the state steam line to service the Cooperative Campus Ministry Building. The volume of steam used will be metered and paid for by the Cooperative.

Section 197.20, Stats., provides in part:

“Cities, counties, school district and nonprofit associations organized for public purposes are authorized to purchase steam from the state and the state may sell steam to cities, counties, school districts and nonprofit associations. \* \* \*”

It is implicit in the above statutory language that the state may only sell steam to nonprofit associations organized for public purposes.

The question presented is whether the Cooperative Campus Ministry is an association organized for a public purpose.

In *State ex el. Warren v. Reuter* (1969), 44 Wis. 2d 201, 213, public purpose was defined as:

“\* \* \* The court recognized 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. \* \* \*

Essentially, the term public purpose is synonymous with the term governmental service. Under the present circumstances, the providing of religious facilities, services, seminars and other such related matters by the Cooperative Campus Ministry cannot be considered a proper governmental function and accordingly cannot be considered a public purpose.

The University of Wisconsin, being a state agency, may only exercise those powers which are expressly given to it by the legislature or those powers which are necessarily implied to carry out the express powers. There does not appear to be any express statutory authority that would allow the selling of steam other than sec. 197.20, Stats., which section is inapplicable for the reason previously discussed. It would be improper, in my opinion, to imply such authority in this situation.

Accordingly, I am of the opinion that the University of Wisconsin may not sell steam to the Cooperative Campus Ministry for there is no express or implied authority to do so.

RWW:CAB

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*Sanitary District—Town Board*—A town board may restrict the authority of a town sanitary district to engage in one or more of the activities which are the purposes for which such districts may be created. When the town board order contains no limitation, the sanitary district created thereby may exercise all of the powers contained in ch. 60, Stats.

December 1, 1972.

L. P. VOIGT, *Secretary*

*Department of Natural Resources*

You have requested my opinion concerning the authority of a town sanitary district formed under chapter 60 of the statutes. Specifically, you inquire whether such district is limited in its authority pursuant to and by the terms of the petition and notice of hearing for its creation or whether it is limited only by the town board order creating such district.

The answer to your question is that the town board order creating the town sanitary district is the only instrument which determines the limits of the district's authority within the purview of ch. 60, Stats. In answering your question, I have considered the fact that, in the case of one such district, a petition and notice of hearing requesting the formation of a town sanitary district for a single purpose resulted in the issuance of a town board order creating a district "for the purpose of carrying out the provisions of secs. 60.30 to 60.316 inclusive. \* \* \*"

It is necessary to understand that the creation of a town sanitary district pursuant to the provisions of ch. 60, Stats., is a legislative function delegated to the town board. *Fort Howard Paper Co. v. Fox River Heights S. Dist.* (1947), 250 Wis. 145, 150, 26 N.W. 2d 661. This delegated power is set forth in sec. 60.303 (3), Stats., which states:

"Upon the hearing, if it shall appear to the town board after consideration of all objections, that the petition is signed by the requisite owners of real estate \* \* \*, and that the proposed work is necessary, and that the public health, comfort, convenience, necessity or public welfare will be promoted by the establishment of such district, and the property to be included in the district will be benefited by the establishment thereof, the town board, by formal order, shall declare its findings and shall establish the boundaries and shall declare the district organized and give it a corporate name by which in all proceedings it shall thereafter be known, and thereupon the district shall be a body corporate with the powers of a municipal corporation *for the purposes of carrying out the provisions of sections 60.30 to 60.309.*" (Emphasis supplied.)

In *Fort Howard Paper Co. v. Town Board* (1954), 266 Wis. 191, 63 N.W. 2d 122, the court held that the above-emphasized language did not prohibit the town board from restricting the

power of the district to engage in but one or some limited number of purposes for which such districts may be organized. The reverse would seem axiomatic. Once the district is determined necessary, it would appear to be a political matter as to whether such district should be given power to engage in all activities authorized by ch. 60, Stats., or whether it should be limited by the order to engage in but one or some limited number of such activities.

As pointed out in the *Fort Howard Paper Co. v. Town Board* case, (266 Wis. 191), by limiting the authority of each district to particular purposes, it is possible to create a multiplicity of such districts, each with its own authority to tax, impose special assessments and to borrow money. Whether such multiplicity of districts are to be authorized or not is within the sound discretion of the town board. In acting upon the petition, "it must be presumed that the town board acted upon sufficient evidence to sustain its findings. \* \* \*" *Fort Howard Paper Co. v. Fox River Heights S. Dist.*, 250 Wis. 145, 150.

Since the district was organized without any limitation on its authority in the town board order, it may exercise all those powers contained in the pertinent sections of ch. 60, Stats. An administrative agency may neither enlarge nor limit its own power. *Clintonville Transfer Line v. Public Service Comm.* (1945), 248 Wis. 59, 71, 21 N.W. 2d 5. No limit having been placed by the town board upon the activities in which the district may engage, it is authorized to construct, operate and maintain "a system or systems of waterworks, garbage or refuse disposal or sewerage, including sanitary sewers, surface sewers or storm water sewers, provide for sewage collection, provide chemical treatment of waters for the suppression of swimmers itch, algae and other nuisance-producing aquatic growths, or all of such improvements or any combination thereof necessary for the promotion of the public health, comfort, convenience or public welfare of such district. \* \* \*"Sec. 60.306, Stats.

In *Fort Howard Paper Co. v. Ashwaubenon* (1960), 9 Wis. 2d 329, 100 N.W. 2d 915, the court said at p. 332:

“Sanitary districts serve a vital public function. Facilities for the supply of water, for drainage and the disposal of sewage, garbage, and refuse, etc., promote and safeguard public health and comfort. Where population is concentrated such facilities and services are essential to the welfare of the public, and the town sanitary-district laws are designed to provide the people in such an area with the means to fulfil those needs. As such population centers expand and the surrounding areas change in character from rural to urban, the need for sanitary-district facilities correspondingly expands.”

In carrying out its assigned duties, the district commissioners shall determine what functions are “necessary” (absent an order issued by the Department of Natural Resources to the district pursuant to sec. 144.025, Stats.) for the promotion of the public health, etc. Such a determination is a legislative determination assigned to the commissioners when so authorized by the town board order. *In re City of Beloit* (1968), 37 Wis. 2d 637, 644, 155 N.W. 2d 633.

It is my conclusion that the sanitary district you have described would have authority to engage in any activity authorized by ch. 60, Stats., when in its sole discretion any such activity was necessary to promote the public health, comfort, convenience or public welfare of the district. It is the order of the town board, in conjunction with the provisions of ch. 60, Stats., that determine the authority of any town sanitary district.

RWW:RBM

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*County Welfare Personnel—Salary Levels*—Chapter 145, Laws of 1971, grants authority to county boards to establish the salary levels of county welfare personnel where authority to do so is properly delegated pursuant to rules established by the Department of Health and Social Services. The requirement that federal standards must be complied with imposes a limitation on this power.

December 4, 1972.

## THE HONORABLE, THE ASSEMBLY

By Assembly Resolution No. 50, you have requested my opinion "as to whether ch. 145, Laws of 1971, grants authority to county boards, where so requested by them to set salaries of county welfare department personnel."

By ch. 145, sec. 49.50 (5), Stats., was amended in the following manner to read:

~~"49.50 (5) COUNTY PERSONNEL SYSTEMS. In counties having a civil service system Pursuant to rules established under sub. (2), the department may where requested by the county shall delegate to the civil service agency in such that county responsibility for determining qualifications of applicants by merit examination, provided the standards of qualifications and examinations have been approved by the department and the department of administration. The personnel in such counties shall be exempt from such reexamination provided such personnel has qualified for present positions by examinations conducted pursuant to standards acceptable to the department, , without restriction because of enumeration, any or all of the department's authority under sub. (2) to establish and maintain personnel standards including salary levels."~~

Section 49.50 (2), Stats., provides:

"49.50 State supervision. (2) RULES AND REGULATIONS, MERIT SYSTEM. The department shall adopt rules and regulations, not in conflict with law, for the efficient administration of aid to the blind, old-age assistance, aid to families with dependent children and aid to totally and permanently disabled persons, in agreement with the requirement for federal aid, including the establishment and maintenance of personnel standards on a merit basis. The provisions of this section relating to personnel standards on a merit basis supersedeconsistent provisions of any law relating to county personnel; but this subsection shall not be construed to invalidate the provisions of s. 46.22 (6)."

Before this amendment was adopted, in an opinion reported in 59 OAG 126 (1970), we advised that under the then existing law any salary levels of welfare employes, fixed by the county board of supervisors, had to conform to the statewide standards established by the State Department of Health and Social Services and that the department could not delegate the development of compensation standards to counties having a civil service system. However, the setting of salaries for one group of county employes in accordance with state standards apparently produced many problems for counties, as it either forced all other employes not covered under the state imposed standards to be paid at the same rates, or required counties to have two separate pay rates in the county for the same work. The above amendment is obviously intended to eliminate such difficulties by giving requesting counties power to determine compensation and personnel standards largely independent of the department's approval. This interpretation is supported by the plain language of sec. 49.50 (5), Stats., as amended, and by the fact that the legislature deleted from the amendment as passed a provision in the bill as introduced (S.B. 298) which would have provided that any personnel standards and salary levels established by a county were required to be approved by the department.

Section 49.50 (5), Stats., does not give the requesting county a completely free hand, however. The state department's authority to set personnel standards and compensation levels is limited under sec. 49.50 (2), Stats., by the requirements for federal aid. When the department's authority is delegated to a county, the county's power would be similarly limited.

Federal law requires that, to receive federal welfare money, a plan governing the distribution and management of such aid must be established. More specifically, the plan must "provide such methods of administration \* \* \* including methods relating to the establishment and maintenance of personnel standards on a merit basis \* \* \* as are found by the Secretary (of Health, Education and Welfare) to be necessary for the proper and efficient operation of the plan, \* \* \*" 42 U.S.C.A. secs. 302, 602, 1202, 1382.

The HEW rules (revised in 1971) are contained in 45 C.F.R. 70, entitled "Standards For A Merit System Of Personnel Administration." These rules appear to be flexible in granting local units of government authority to administer the programs. Specifically, with respect to compensation, the rules provide:

"Sec. 70.8 Compensation.

"(a) A plan of compensation for all classes of positions will be established and maintained on a current basis. The plan will include salary rates adjusted to the responsibility and difficulty of the work and will take into account the prevailing compensation for comparable positions in the recruiting areas and in other agencies of the Government and other relevant factors. It will provide for salary advancement for full-time permanent employees based upon quality and length of service and for other salary adjustments.

"(b) Compensation in a *local agency* will be governed by a compensation plan which, at the option of the State, is established by: a local government and covers other local agencies; the State and covers local grant-aided agencies; or the State and covers the agency responsible for State administration of Federal grants." (Emphasis added)

Further, with respect to organization of a merit system, the rules provide:

"Sec. 70.3 Merit system organization.

"(a) Any one of a variety of types of merit system organizations covering substantially all employees in a State or local government would meet the requirements of this section if it adequately provides for impartial administration and the system and its administration are in substantial conformity with these standards. The system will be administered by a qualified merit system executive who may be responsible to the chief executive, a top level official, or a board or commission.

"\* \* \*

“(c) A local government may elect, at the option of the State, to cover grant-aided programs under a merit system serving other grant-aided agencies covered by the standards, such as a system serving State agencies, another city or county, or a group of local jurisdictions.”

Since sec. 49.50 (5), Stats., as amended by ch. 145, Laws of 1971, now clearly gives requesting counties the power to determine compensation and personnel standards for their county welfare agencies, largely independent of any approval of the Wisconsin Department of Health and Social Services, it is evident that the department should re-examine its rules to eliminate any provisions which would appear to conflict with the proper exercise of local authority over such matters. In this regard, I should point out that the current rules, set forth in PW-PA 10.03, Wis. Adm. Code, appear to be generally more restrictive than is required by the Federal Rules. I note, for instance, that rule PW-PA 10.3 (4) still purports to set “minimum salary levels” for key positions within a county agency, while 45 C.F.R. 70.8 (b) of the Federal Rules obviously permits the compensation plan in a local welfare department to be guided by compensation in other county agencies rather than by state imposed standards. Likewise, rule PW-PA 10.03 (5) provides for a limitation upon recruitment, although no similar requirement is set forth in present county civil service laws or the Federal Rules. See secs. 59.07 (20) and 63.01-63.17, Stats., and 45 C.F.R. 70.1 (c), which provides, in part, that:

“\* \* \* The Federal agencies are interested in the development and continued improvement of State and local merit systems but exercise *no* authority over the selection, tenure of office, or compensation of any individual employed in conformity with the provisions of such systems.” (Emphasis added)

Counties or any other units of government needing help in setting up and maintaining a merit system may receive advice from the Department of Health and Social Services pursuant to sec. 49.50 (6), Stats., and technical consultive assistance from HEW as provided under 45 C.F.R. 70.1 (f). If the rules and regulations of HEW are not substantially complied with, the federal grant money may be withheld. 42 U.S.C.A. secs. 304, 605, 715, 1204 and 1384.

RWW:JCM

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*Credit Unions—Retail Instalment Contracts*—Under ch. 193, Laws of 1971, a credit union is not obliged to secure a sales finance company license to purchase instalment contracts of its members, nor is an auto dealer subject to penalty if he sells such a contract to a credit union.

December 4, 1972.

WILLIAM H. HUGHES

*Commissioner of Credit Unions*

You inquire whether a credit union chartered under the laws of this state is required to secure a license as a sales finance company in order to acquire or purchase retail instalment contracts involving its members.

The answer to your question is “no.” Chapter 193, Laws of 1971, effective June 26, 1972, creating sec. 186.113 (7), Stats., specifically provides that a credit union may: “purchase or acquire conditional sales contracts or similar instruments executed by credit union members.” It should be noted that instalment contracts are equated with conditional sales contracts. Sec. 218.01 (1) (e), Stats.

Prior to the enactment of ch. 193, Laws of 1971, a credit union would have been obliged to secure a license as a sales finance company to engage in such transactions under sec. 218.01 (1) (d), Stats., which provides:

“ ‘Sales finance company’ means and includes any person, firm or corporation engaging in the business, in whole or in part, of acquiring by purchase or by loan on the security thereof, or otherwise, retail instalment contracts from retail sellers in this state, including any motor vehicle dealer who sells any motor vehicle on an instalment contract or acquires any retail instalment contracts in his retail sales of motor vehicles.”

The licensure requirements relating to a sales finance company do not apply to credit unions in view of the newly enacted statute which specifically provides that a credit union may purchase such contracts involving its members. It appears that the imposition of said licensure requirements upon credit unions would render newly created sec. 186.113 (7), Stats., a meaningless statute. It should not be presumed that a statute or any of its parts are superfluous. *Associated Hospital Services, Inc. v. Milwaukee* (1961), 13 Wis. 2d 447, 109 N.W. 2d 271; *Cook v. Industrial Commission* (1966), 31 Wis. 2d 32, 142 N.W. 2d 827. The legislature does not act in vain.

The purpose of ch. 193, Laws of 1971, was to establish "an office for the commissioner of credit unions to perform the regulating functions currently performed by the office of the commissioner of banking." When the legislature provided that credit unions could purchase conditional sales contracts or similar instruments executed by its members, it was contemplated that the regulatory phase of a credit union's activity in this respect would devolve upon the new commissioner of credit unions. To hold otherwise would, in effect, restore supervision of this activity to the commissioner of banks who issues and performs the regulatory function with regard to sales finance companies. Thus, an interpretation which would impose licensure requirements upon credit unions in this matter not only disregards newly created sec. 186.113 (7), Stats., but also is in contravention of the overall manifest intent of the legislature. The intent of the legislature is, of course, a controlling factor in the interpretation of a statute. *Safe Way Motor Coach Co. v. City of Two Rivers* (1949), 256 Wis. 35, 39 N.W. 2d 847; *State ex rel. Mitchell v. Superior Court of Dane County* (1961), 14 Wis. 2d 77, 109 N.W. 2d 522.

You also inquire whether an auto dealer who sells an instalment or conditional sales contract to a credit union is subject to a penalty as provided under sec. 218.01 (3) (a) 13, Stats.

As long as the sale by the auto dealer is made to the credit unions in which the obligor has membership, no penalty attaches to such acts of an auto dealer. Newly created sec. 186.113 (7), Stats., embraces all conditional sales contracts and similar

instruments without limitation as to subject matter. While an auto dealer may be penalized for selling instalment contracts to persons not licensed under ch. 218, Stats., the statute cannot be considered in a vacuum. *State ex rel. Ampco Metal, Inc. v. O'Neill* (1956), 273 Wis. 530, 78 N.W. 2d 921. Statutes relating to the same subject matter must be read together and harmonized. *Milwaukee v. Milwaukee County* (1965), 27 Wis. 2d 53, 133 N.W. 2d 393; *Pruitt v. State* (1962), 16 Wis. 2d 169, 114 N.W. 2d 148. Conflicts between different statutes, by implication or otherwise, are not favored and will not be held to exist if they may be otherwise reasonably construed. *Moran v. Quality Aluminum Casting Co.* (1967), 34 Wis. 2d 542, 150 N.W. 2d 137; *Ratsanen v. Milwaukee* (1967), 35 Wis. 2d 504, 151 N.W. 2d 129.

Accordingly, it is my opinion that a credit union chartered under the laws of this state has the same status as a sales finance company licensed under ch. 218, Stats., for the purpose of purchasing instalment or conditional sales contracts executed by its own members, and further that credit unions are exempt from licensure under ch. 218, Stats., when so engaged.

RWW:WLJ

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*Elections—Campaign Advertising—Voters violating sec. 12.64, Stats., may not be deprived of the right to vote, although penalties may follow.*

December 8, 1972.

DANIEL L. LAROCQUE, *District Attorney*  
*Marathon County*

In your letter of September 22, 1972, you request my interpretation of sec. 12.64, Stats., as it pertains to recent complaints arising in your area.

Section 12.64 (1), Stats., provides, in part, that no person shall solicit voters for any candidate or party or engage in any electioneering whatever on the day of any election within 100 feet

of any entrance to any building containing any polling place. You state that two types of complaints have been made under this prohibition. First, people carrying car tops or bumper stickers are parking their cars within 100 feet of the entrance to the polling place while they proceed to vote. Second, some persons wear pins designating support for a particular candidate within 100 feet of the entrance to the polling place, including the actual site at which they attempt to vote.

You have already noted in your letter that, in your opinion, a constitutional issue is involved. In fact, in *Mills.v. Alabama* (1966), 384 U.S. 214, 86 S.Ct. 1434, 16 L.ed. 2d 484, the court held that a similar statute which made it a crime to solicit any votes on election day could not be constitutionally enforced against a newspaper editor who published an editorial urging people to vote in favor of a particular form of government. However, the court stressed the unique place in our political history of freedom of the press and its critical importance in apprising voters of all sides of any issue. Extending somewhat the reasoning contained in *Mills*, this office ruled a few years ago that sec. 12.13, Stats., which prohibits the paying or incurring of any obligation for services to be performed on the day of any primary election, could not be constitutionally applied to ban publication or distribution of campaign advertising on election day. 55 OAG 133 (1966).

However, *Mills* does not completely void sec. 12.64, Stats. It merely indicates that it may be unconstitutionally applied. It is apparent that sec. 12.64, Stats., still possesses some constitutional validity if properly applied. The court noted (384 U.S. at 218):

“ \* \* \* We should point out at once that this question in no way involves the extent of a State's power to regulate conduct in and around the polls in order to maintain peace, order and decorum there.”

It is perhaps inappropriate and impossible to set forth in a letter such as this the proper place for the dividing line between constitutionally protected activity and activities that are not constitutionally protected in that they disturb the peace, order, or decorum of the voting process. This is a determination that must be made in the first instance by the local officials concerned. You

have already indicated an awareness of the problem, and, therefore, you are in a position to legally advise the proper officials of obvious guidelines within to assess each individual situation.

You also indicate that, where persons are found to be violating sec. 12.64 (1), Stat., election officials have refused to permit such persons the right to vote until they remove car tops, bumper stickers, or political buttons or pins, as the case may be. In my opinion, even though election officials may feel that a particular person is in violation of sec. 12.64 (1), Stats., this does not operate to result in the disenfranchisement of the alleged violator. In other words, the violator must be allowed to vote, and the election officials can report the alleged violation to the appropriate officials, including you. Criminal prosecution or penalties may follow, but the person may not be deprived of his right to vote.

RWW:DPJ

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*District Attorney—Family Court Commissioner*—Offices of district attorney and family court commissioner are separate but compatible in counties under 40,000. Incumbent entitled to separate salaries.

December 21, 1972.

CLEMENS V. HEDEEN, *District Attorney*  
*Door County*

You have requested my opinion on the following questions:

1. Can the County Board of Supervisors, in a county of less than 40,000 population, establish the office of District Attorney as a full-time position and provide by resolution that the District Attorney shall also act as Family Court Commissioner with no additional salary?
2. Does the County Board have power to independently provide that the person elected District Attorney shall also serve as Family Court Commissioner?

The answer to both questions is in the negative.

The only powers which the county board can exercise over the office of district attorney are those which have been delegated to the board by the legislature by express statute.

The district attorney in Wisconsin is a constitutional officer. Art. VI, sec. 4, Wis. Const. No provision in the Constitution provides what his duties are. In *Jessner v. State* (1930), 202 Wis. 184, 194, 195, 231 N.W. 634, the court suggested that the Constitution may have conferred on the district attorney those generally recognized duties and functions belonging to the office in this country at the time of the adoption of the Constitution. In *State ex rel. Kurkierewicz v. Cannon* (1969), 42 Wis. 2d 368, 378-380, 166 N.W. 2d 255, the court stated that the office of district attorney was not one of inherent powers, but is subject to the enactments of the legislature.

What is important here is that the legislature has provided, generally in sec. 59.47, Stats., and specifically in nearly one hundred other statutes, express duties for the officer. No statute imposes a duty on the district attorney to act as family court commissioner and no statute authorizes the county board to assign the duties of a family court commissioner to the district attorney.

In *Reichert v. Milwaukee County* (1914), 159 Wis. 25, 35, 150 N.W. 401, the court was discussing the powers of elective county officers which were prescribed by statute:

*“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)

Also see 52 OAG 349, 351 (1963).

Section 59.15 (2), Stats., does give the county board broad powers over county officers and employes including power to abolish, create, and re-establish certain offices which were created

*under* any statute by the board, and to transfer functions, duties and responsibilities to other agencies. I presently construe this as relating to optional offices created under a statute and not offices created by a statute. The statute, however, expressly excepts the exercise of such power as to *elective offices*, included under sec. 59.15 (1), Stats., supervisors and circuit judges.

District attorney is an elective office. It is a full-time office in the sense that the incumbent is an officer during every hour of his term and the duties and responsibilities imposed by the legislature, if diligently pursued, would occupy most or all of the time an officer could reasonably devote to the office even in lesser populated counties. Historically district attorneys have been permitted to practice law privately in smaller counties. This was almost a necessity in some cases in view of the low compensation provided by the county. In many instances, the district attorney acts for or in behalf of the state and is a state officer for some purposes. In recognition of the interest the state has in having qualified and experienced district attorneys in all counties, the legislature, in 1967, provided for a schedule of minimum salaries to be paid in the various classes of counties with reimbursement to the county by the state of a portion of the total salary paid. See sec. 59.475, Stats.

Section 59.475 (2) (3), Stats., uses the term "is permitted to practice law privately" and "is not permitted to practice law privately" rather than the terms "full-time" and "part-time".

The legislature has by implication delegated power to the county board to determine whether a district attorney shall be entitled to practice law in addition to his duties as district attorney. Such determination should be made under sec. 59.15 (1), Stats., when the board, prior to the earliest time for the circulation of nomination papers, establishes the total annual compensation to be paid for the office. Prospective candidates are entitled to know precisely what compensation is attached to the office. *Feavel v. Appleton* (1940), 234 Wis. 483, 488-490, 291 N.W. 830; *Schultz v. Milwaukee County* (1947), 250 Wis. 18, 22, 26 N.W. 2d 260.

If a board determines that the district attorney is not entitled to practice law privately, the compensation cannot be less than \$16,500 per year. The compensation is established *for the office*,

and the officer holding the office is entitled to the compensation provided as an incident of the office. *Schultz v. Milwaukee county* (1947), 250 Wis. 18, 22, 26 N.W. 2d 260.

By reason of express provision in sec. 59.15 (1), Stats., the compensation established cannot be reduced during the officer's term. Section 66.197, Stats., does presently permit increase in the salary of certain county elected officials during the term of such officer which would include a district attorney.

The office of court commissioner is judicial in nature. Art. VII. sec. 23, Wis. Const. The family court commissioner is a court commissioner with special statutory powers and duties. See secs. 247.13, 247.14, and 247.15, Stats. Section 247.13 (1), Stats., provides that the family court commissioner shall be appointed by the circuit and county judges in and for such county.

The office is created by a statute, rather than under a statute. Although it is not an elective office, I am of the opinion that the county board, acting under sec. 59.15 (2) (a) (b), Stats., does not have power to abolish, create or re-establish the office or to transfer the duties to some other county agency. The county board cannot appoint the officer as that function is vested by statute in the circuit and county judges in and for said county. Pursuant to Art. VII. Sec. 23, and Art. XIII, sec. 9, Wis. Const., the legislature has directed the manner of appointment. In 54 OAG 229, 233 (1965), which discusses the office of family court commissioner and sec. 59.15, Stats., it is stated:

"The county board does not have the power to repeal a statute\*\*\*."

Under sec. 247.17, Stats., in counties under 500,000 population, the county board *shall* by resolution provide an annual salary for the family court commissioner whether he is on a full- or parttime basis.

Section 59.49, Stats., provides in part:

" \* \* \* Nor shall the district attorney while in office be eligible to or hold any judicial office whatever, except as follows: Any district attorney of any county having a population of 40,000 or less may also be the family court commissioner for such county [with exceptions] \* \* \* "

This statute was amended after 48 OAG 296 (1959) stated that the offices were incompatible.

Whereas the offices are now compatible by statute, within limits, the offices are separate, have separate mandatory annual salaries and one is elective and one is appointive by the judiciary. Where an individual is serving in both capacities he is entitled to both salaries. 52 OAG 14 (1963)

You indicate that you intend to resign as family court commissioner and to continue as district attorney. It is my opinion that this action is permissible. If the county board has provided that the office of district attorney is fulltime in the sense that the incumbent is not permitted to practice law privately, you would still be entitled to the \$16,500 salary provided for the office as that is the minimum permitted under sec. 59.471 (3), Stats. The county is obligated to provide a separate salary for family court commissioner.

RWW:RJV

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