

OPINIONS
OF THE
ATTORNEY GENERAL

OF THE
STATE OF WISCONSIN

VOLUME 62

January 1, 1973 through December 31, 1973

ROBERT W. WARREN
Attorney General



MADISON, WISCONSIN
1973

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

ROBERT W. WARREN.....	Attorney General
DAVID C. MEBANE.....	Deputy Attorney General
DANIEL P. HANLEY, Jr.	Executive Assistant
WILLIAM H. WILKER.....	Administrator, Legal Services Division
JAMES P. ALTMAN.....	Assistant Attorney General
JOHN E. ARMSTRONG.....	Assistant Attorney General
THOMAS J. BALISTRERI.....	Assistant Attorney General
RICHARD E. BARRETT.....	Assistant Attorney General
DAVID J. BECKER.....	Assistant Attorney General
CHARLES A. BLECK.....	Assistant Attorney General
MARY V. BOWMAN.....	Assistant Attorney General
RICHARD J. BOYD.....	Assistant Attorney General
BETTY R. BROWN.....	Assistant Attorney General
WILLIAM D. BUSSEY.....	Assistant Attorney General
JOHN W. CALHOUN.....	Assistant Attorney General
BRUCE A. CRAIG.....	Assistant Attorney General
LEROY L. DALTON.....	Assistant Attorney General
STEVEN M. EPSTEIN.....	Assistant Attorney General
GEORGE L. FREDERICK.....	Assistant Attorney General
PAUL J. GOSSENS.....	Assistant Attorney General
DOUGLAS J. HAAG.....	Assistant Attorney General
HAROLD L. HARLOWE.....	Assistant Attorney General
ALBERT O. HARRIMAN.....	Assistant Attorney General
CHARLES D. HOORNSTRA.....	Assistant Attorney General
ALLAN P. HUBBARD.....	Assistant Attorney General
JAMES D. JEFFRIES.....	Assistant Attorney General
DONALD P. JOHNS.....	Assistant Attorney General
GRANT C. JOHNSON.....	Assistant Attorney General
WARD L. JOHNSON.....	Assistant Attorney General
MICHAEL R. KLOS.....	Assistant Attorney General
JOHN E. KOFRON.....	Assistant Attorney General
CHARLES R. LARSEN.....	Assistant Attorney General
ALAN M. LEE.....	Assistant Attorney General
HAROLD J. LESSNER.....	Assistant Attorney General
PRISCILLA R. MACDOUGALL.....	Assistant Attorney General
ROBERT D. MARTINSON.....	Assistant Attorney General
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JAMES C. MCKAY, Jr.	Assistant Attorney General
DANIEL A. MILAN.....	Assistant Attorney General
ROY G. MITA.....	Assistant Attorney General
STEPHEN L. MORGAN.....	Assistant Attorney General
JOHN C. MURPHY.....	Assistant Attorney General
LOWELL E. NASS.....	Assistant Attorney General
DAVID W. NEEB.....	Assistant Attorney General
STEPHEN J. NICKS.....	Assistant Attorney General
MICHAEL E. PERINO.....	Assistant Attorney General

PETER A. PESHEK	Assistant Attorney General
JAMES H. PETERSEN	Assistant Attorney General
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
DONALD W. SMITH	Assistant Attorney General
MARK E. SMITH	Assistant Attorney General
STEPHEN M. SOBOTA	Assistant Attorney General
ANDREW L. SOMERS	Assistant Attorney General
BENJAMIN SOUTHWICK	Assistant Attorney General
MARVIN I. STRAWN	Assistant Attorney General
SVERRE O. TINGLUM	Assistant Attorney General
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RICHARD A. VICTOR	Assistant Attorney General
STEVEN B. WICKLAND	Assistant Attorney General
CHRISTINE WISEMAN	Assistant Attorney General
WILLIAM C. WOLFORD	Assistant Attorney General
E. WESTON WOOD	Assistant Attorney General
E. GORDON YOUNG	Assistant Attorney General
MICHAEL L. ZALESKI	Assistant Attorney General

Preface

The requirements to be observed by district attorneys and county corporation counsels when requesting an opinion of the Attorney General are given below.

The guidelines were stated in the foreward to XXXI OAG:

“* * * The following requirements should be observed:

“1. The request should fully state the question upon which an opinion is desired.

“2. The request should set forth the district attorney’s conclusion upon any question presented and should set forth as well the reasoning upon which his conclusion is based.

“3. The request should set forth all statutory provisions in point and should contain an analysis of all text and case authorities upon which the district attorney relies in support of his conclusion. If there are any case or text authorities pointing the other way, they should be stated as well.

“4. An opinion should not be requested in any case unless the district attorney, after having given the problem careful consideration, is unable to arrive at an answer which he considers to be satisfactory. A request should not be submitted to this office simply because someone wishes it submitted, and the district attorney should refuse to submit a request if he is satisfied that he knows the correct answer to the question submitted.

“5. No request should be submitted which does not concern the duties of the district attorney. It is the function of the attorney general to advise the district attorney with respect to the duties of his office. This function includes advising the district attorney in those cases where he is called upon to act or advise. There is no requirement, however, that district attorneys advise town officers, school district officials, etc., and accordingly questions of that character should not be relayed to the attorney general through the district attorney.”

These requirements are long standing and are based upon applicable law and practical considerations. See X OAG 1014, XI OAG 242, and the foreward to XXVIII OAG.

In addition, the following are requirements which have been developed since these earlier opinions. For ease of future reference,

these additional requirements are numbered successively to those listed above:

6. The request for an opinion should fully state the facts giving rise to the question presented.

7. An opinion normally should not be requested on an issue that is the subject of current or reasonably imminent litigation. Presumably, the answer to the issue will be furnished by the court's decision and opinions of the Attorney General should not be utilized for the purpose of briefing current litigation.

8. Requests need not specify whether a formal or an informal opinion is desired. These terms merely indicate the manner in which the opinion request is processed within the Department of Justice.

9. Opinions on matters involving the exercise of legislative or executive judgment or discretion should not be requested.

10. Normally, opinions on constitutional questions will be furnished only to the Governor or to either branch of the Legislature.

11. All of the foregoing requirements or statements are subject to exception where the circumstances warrant.

OPINIONS

OF THE

ATTORNEY GENERAL

Volume 62

Auditor—University—Classified audit fee structure may be established by University Regents using age for classification purposes.

January 8, 1973.

BOARD OF REGENTS OF THE
University of Wisconsin System

Your December 8, 1972, resolution adopts a revised audit policy for the University of Wisconsin System and solicits my opinion regarding the policy's legality.

The new policy permits Wisconsin residents under age 65 to audit any credit course "at a cost of 50% of that fee charged a Wisconsin resident who would take that course at the particular Unit for credit," and eliminates audit fees entirely for Wisconsin residents "over 65 years of age." I am given to understand that the objectives of the new policy are to promote a wider utilization of existing and available university resources by making them more accessible to potential auditors. A survey of all university campuses indicates

that, in general, residents have not availed themselves of auditing opportunities in great numbers, and that the number of auditors over the age of 65 is very small. The fiscal impact of the new policy will apparently be negligible.

I believe authority for adoption of the new policy exists under the legislature's grant of "all the powers necessary or convenient to accomplish the objects and perform the duties prescribed by law [for the University] * * *" (s. 36.03 (1), Stats.).

Among the duties "prescribed by law" is the broad mandate to "enact laws for the government of the university in all its branches" (s. 36.06 (1), Stats.). As construed by the Wisconsin Supreme Court, this mandate is comparable to the last clause of U. S. Const., Art. I, Sec. 8, which gives the congress power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." So construed, the statute empowers the regents "* * * to choose the means which in their judgment are necessary or convenient, provided only they are calculated to accomplish the objects sought by the charter and within the scope of the general powers granted, and not in conflict with the statute. * * *" *State ex rel. Priest v. Regents* (1882), 54 Wis. 159, 169-170, 11 N.W. 472.

Having initially observed that the Board of Regents has no powers except as conferred upon it by statute, the court in *Priest, supra*, nevertheless found that—despite the absence of express statutory authorization—the Board possessed implied power to exact fees from students for admission, instruction and incidental university expenses, except as expressly limited by statute.

No statute today establishes a legislative policy expressly limiting the power of the regents to fix fees to be exacted (if at all) from resident auditors. The only statute which supersedes the authority of the regents in the establishment of student fees is sec. 36.16, Stats., which fixes a minimum non-resident tuition fee, but in all other respects leaves the fee structure to the discretion of the Board.

Some concern may be occasioned by the provisions of sec. 36.16 (1) (c), Stats., which, in addition to establishing a minimum non-resident tuition fee, provides that the Board "* * * may prescribe special rates of tuition for professional and graduate courses and for

teaching extra studies, and for students in the university extension, and summer session divisions. * * *” Such language could conceivably foster the notion that the legislature has thus “pre-empted” the area of fee-setting, or has by such enumeration excluded “special rates of tuition” in programs other than those specifically mentioned. In my opinion, however, no such conclusion is warranted; while the language of the statute is permissive, there is evinced no “absence of belief in the previous existence of the power” to fix fees. *State ex rel. Priest v. Regents, supra*, 54 Wis. at 168-169.

Furthermore, if it were to be assumed that such legislative grants negated the existence of all other implied powers, the Board would be stripped of virtually “all the powers necessary or convenient” (sec. 36.03 (1), Stats.), to govern the university.

It cannot be assumed that the legislature has intended, by ch. 36 of the Statutes, to exclude by silence all powers not specifically conferred therein. As the Court said in the *Priest* case, *supra*, “It would be altogether impracticable to prescribe by statute the numerous and varying duties of [the Board].” 54 Wis. at 166.

I am likewise satisfied that the Board possesses the authority (although not expressly conferred by any statute) to adopt the classified fee structure described in the policy resolution, using the age of the auditor as the sole means of classification. The policy seeks to further the university’s educational objectives by making existing university resources more readily accessible to a class of persons who, upon passing age 65, generally find themselves with lower incomes and more leisure time. The classification appears to be relevant to the Board’s legitimate objective, and for that reason is not in excess of the Board’s powers. *Adams v. Perry* (1871), 43 N.Y. 487, apparently the only American case touching this subject, said of an academy board having general powers similar to those granted in ch. 36:

“* * * the board may fix, and establish such rates therefor as a whole, or for any particular study as shall be in their judgment for the best interests of the institution, and may in their discretion, remit to any particular student, *or class of students*, the whole, or any part of these charges. This is within the power of all the colleges and academies of the State having charters like the one in question. * * *” (43 N.Y. at 495) (Emphasis supplied)

I find no constitutional infirmity in the proposed classification. While the audit policy discriminates between classes of persons, classification in and of itself is not forbidden by the Fourteenth Amendment's guarantee of "equal protection." If a classification rests upon some reasonable basis, and is relevant to a valid state objective, it is not offensive to the Constitution, even if it "is not made with mathematical nicety, or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co.* (1911), 220 U.S. 61, 78, 55 L.ed. 369, 31 S.Ct. 337, 340. Furthermore, a classification will not be set aside "if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland* (1961), 366 U.S. 420, 426, 6 L.ed. 2d 393, 81 S.Ct. 1101, 1105.

As I have previously noted in this opinion, the classification made in the audit policy appears to be reasonable and non-invidious, and is relevant to a valid university objective. The fact that age is used as the sole means of classification presents no constitutional obstacle; see *Jacobson v. Lenhart* (1964), 30 Ill. 2d 225, 195 N.E. 2d 638; *People v. Pyle* (1960), 360 Mich. 249, 103 N.W. 2d 597; *State ex rel. Slatton v. Boles* (1963), 147 W. Va. 674, 130 S.E. 2d 192; *Universal Film Exchanges, Inc. v. City of Chicago* (N.D. Ill. 1968), 288 F.Supp. 286.

I conclude, therefore, that adoption of the revised audit policy is not in excess of the Board's powers, and that the policy itself does not deny equal protection of the laws.

RWW:SOT

University—Travel Expense—Trust Funds—University cannot accept trust funds which are for unlawful purpose and expenditure of trust funds must comply with special and general laws.

January 11, 1973.

JOE E. NUSBAUM, *Secretary*
Department of Administration

You state that the University of Wisconsin submitted to your office for audit and payment a claim for travel expense incurred by

an individual who traveled from Indonesia to Wisconsin for an employment interview. In addition, a claim for reimbursement was also presented for the prospective employee's wife who accompanied her husband.

Based on your interpretation of the law, the claim for the applicant's employment interview expense was approved and paid. The claim for the expenses of the applicant's wife has not been paid because it is your view that neither the law nor the rule relating to employment interview expense permits such payment. University of Wisconsin officials contend, however, that the expenses of the applicant's wife may be paid from the President's Special Trust Fund which is composed of certain unrestricted gifts made to the University of Wisconsin and is to be used in accordance with guidelines approved by the Business and Finance Committee of the Regents. You state that the term unrestricted gift apparently means one which the donor did not limit to some particular use, but evidently intended to be used for general University purposes.

Paragraph (2) of current guidelines provides:

"2) The Committee approved the following guidelines for the operation of the President's Special Fund (Trust):

"Expenditures from this fund shall be solely for the purpose of University-related activities.

1. Tuition for special students
2. Unique expenditures for educational purposes, including aid to individual students
3. Expenditures of a minor nature for University relations
4. Expenditures for which commitments have been made but budgeted funds are not available
5. Expenses incidental to unusual situations
6. Expenses arising from unforeseen and unprogrammed occasions
7. Expenses adding a Presidential dimension to academic and cultural programs
8. Other expenses approved specifically by the Business and Finance Committee of the Regents

“Contributions of \$10,000 or less to the Regents or the President which are *unrestricted* shall be added to this fund. Contributions in excess of \$10,000 shall be considered individually.

“In addition to the contributions, the investment earnings shall become available as increments to the fund.”

You state that University of Wisconsin officials maintain that under the provisions of sec. 36.065 (1), Stats., the use made of any gift, whether restricted or unrestricted, is legal and valid despite any other provisions of the statutes which may be in conflict therewith.

The Department of Administration’s position in this matter has been that restricted gifts may be expended in accordance with the expressed wishes of the donor if such use does not conflict with any specific statutory provision, or would not result in a completely absurd expenditure, but that the expenditures of unrestricted gifts, i.e., gifts for general university purposes, are subject to the laws and conditions applied to state expenditures in general.

Your first two questions, as renumbered, are:

“1. Are the provisions of section 20.916(2) and the rules adopted in connection therewith limited to paying employment interview expenses for a prospective employe only, or can it be extended, by rule or otherwise, to include payment of expenses for an employment candidate’s wife or some other person associated with the prospective employe?

“2. Do the rules of the Director of the Bureau of Personnel (Department of Administration) relating to employment interview expenses apply to faculty positions, or are they limited to positions in the classified service only?”

I am of the opinion that insofar as reimbursement to the *applicant* is concerned, reimbursement for actual and necessary travel expenses incurred in connection with oral examination and employment interviews is permissible only with respect to those personal to the applicant and payment to the applicant cannot include payment of expenses for travel expenses of the applicant’s wife or some other person associated with the prospective employe.

I am of the opinion that the rules of the Director of the Bureau of Personnel implementing sec. 20.916 (2), Stats., apply to applicants

for positions in the classified and unclassified divisions of the civil service and therefore apply to faculty positions at the University of Wisconsin.

The other subsections of sec. 20.916, Stats., are applicable to all state officers and employes and there is no shown legislative intent that subsection (2) or the rules promulgated thereunder should be limited to employes in the classified service.

Section 16.03 (6), Stats., requires the Director of the Bureau of Personnel to promulgate rules for the effective operation of secs. 16.01 - 16.38, Stats. Section 16.08, Stats., divides the civil service into the unclassified service and the classified service. It is noted that under sec. 16.08 (8), Stats., the Director shall audit the payrolls of the classified and unclassified service, as necessary, to carry out the provisions of the subchapter. Many of the provisions of secs. 16.01 - 16.38, Stats., are applicable to the unclassified service. In 52 OAG 78 (1963) it was stated that the provision of sec. 16.275, now sec. 16.30, Stats., relating to holidays, office hours for *offices* and standard work week were generally applicable to both classified and unclassified personnel. Also see discussion in 55 OAG 91 (1966).

In implementation of sec. 20.916 (2), as contained in the 1969 Statutes, the Director promulgated the following rule:

“Pers 5.15 Employment interview travel expenses. As provided by subsection 20.916 (2), Wis. Stats., an applicant who is eligible for selection for employment may be reimbursed for all or part of his actual and necessary travel expenses incurred in connection with an employment interview by the employing department provided:

- (1) The position is of a professional or technical nature, and
- (2) A critical shortage exists of persons eligible for selection, and
- (3) Prior authorization for such reimbursement has been obtained from the director.”

Pursuant to sec. 20.916 (2), Stats., as amended by ch. 270, Laws of 1972, the above rule was superseded effective November 1, 1972, by:

“Pers 5.13 Reimbursement for applicant’s travel expenses. As provided by section 20.916 (2), Wis. Stats., an applicant may be

reimbursed for all or part of his or her actual, reasonable and necessary travel expenses consistent with the applicable provisions of section 20.916, Wis. Stats., and any regulations prescribed thereunder, which are incurred in connection with reporting for an oral examination or employment interview by the employing agency, provided the director, upon request of the appointing authority, determines that reimbursement for expenses is a necessary part of the effective recruitment process and prior authorization for such reimbursement has been given to each applicant to be reimbursed before the expenses are incurred.”

With the possible exception of legislators, secs. 20.916 and 16.535, Stats., are the only *statutes* relating to reimbursement for travel expenses of state officers and employes, both classified and unclassified, and applicants for state positions.

Section 20.917, Stats., does provide for reimbursement to employes of expenses necessarily incurred as moving expenses and it is noted that the legislature expressly provided “for transporting himself and the immediate members of his family to his new place of residence.”

If the legislature had intended a similar provision to apply to sec. 20.916 (2), Stats., it would have so provided by express language.

Section 20.916 (6), Stats., provides:

“(6) Payment for unauthorized travel prohibited. The payment of travel expenses not authorized *by statute* is prohibited. Any unauthorized payment made shall be recoverable as for debt from the person to whom made.” (Emphasis added)

I construe this provision as prohibiting payment of travel expenses, except as provided by statute, to apply to state officers, employes and applicants for state positions. For reasons hereinafter stated I am of the opinion that it does not prohibit the payment of travel expenses *to persons other than applicants, state officers or employes*, where authorized by the University of Wisconsin Regents acting under authority of sec. 36.065, Stats., where express provisions of a trust permit such payment or where unrestricted gift funds are involved and the Regents in their discretion determine that payment is for the benefit and advantage of the university.

Your further questions as renumbered are:

"3. May the University of Wisconsin Board of Regents accept a gift, the purpose of which at the time of acceptance is known to be in conflict with other statutes?

"4. May unrestricted gifts be used for paying expenses of a prospective employe's wife who accompanies her husband on a trip made for purposes of an employment interview?

"5. If your answer to question 4 is yes, are there any limitations or restrictions on the use of funds received as gifts, or may they be expended without regard to any other statutory provisions except those relating specifically to gifts and grants?"

With respect to your third question I am of the opinion that the Board of Regents does not have authority to accept a gift or trust, the purpose of which at the time of acceptance is known to be in conflict with other statutes in the sense that the purpose is unlawful. If the unlawful portion is separable, however, it will not invalidate the entire gift or trust and the same may be accepted and shall be deemed legal under sec. 36.065 (1), Stats.

In 54 Am. Jur. *Trusts* §21 p. 38 it is stated:

"* * * the rule of the modern law is that where the purpose of a trust is to circumvent a statutory provision or is to defeat public policy, it is void and of no effect. A fortiori, criminality of purpose voids a trust. In other words, a trust must have lawful subject matter."

At §24, p. 39 of the same text it is stated that partial invalidity of one or more portions of the terms of a trust does not invalidate the trust if the invalid provisions are not material, are separable and not inconsistent with the trustor's paramount intention.

The state treasurer has custody of all gifts, grants, bequests and devises in the form of cash and securities. Sec. 20.907 (2), Stats. Sections 20.906, 36.03 and 36.10, Stats., require all moneys collected or received by any person for or in behalf of the University of Wisconsin to be deposited in the state treasury. Section 36.03, Stats., provides that moneys can only be paid out upon warrant of the Department of Administration "as provided by law." Sections 20.285 (1) (a) and (w) appropriate to the University all moneys

received as trust fund income under sec. 36.03, and all moneys available for university trust fund operations pursuant to sec. 36.03, Stats.

Section 20.285 (1) (k), Stats., appropriates to the University:

“(k) *Gifts and donations.* All moneys received from gifts, grants, bequests and devises, to carry out the purposes for which made and received.”

All gifts, grants, bequests and devises received by the regents, the president or any officer of the university for the benefit or advantage of the university under secs. 36.03, 36.065, Stats., become the property of the state. As stated in 26 OAG 626, 628, 629 (1937):

“Immediately upon the acceptance of the trust, * * * the board of regents became a trustee of the fund and the beneficial interest vested in the people of the state of Wisconsin—in other words, the beneficial interest became the property of the state. As in the case of other property of the state, no use may be made of it other than such as is specifically authorized by the statutes.”

In *Will of Gabel* (1954), 267 Wis. 208, 211, 212, 64 N.W. 2d 853, it is stated:

“A trustee must execute the trust according to law although the will confers the broadest discretionary powers.”

Section 20.907, Stats., is the general statute applicable to gifts and grants to the state and its agencies. Section 36.065, Stats., is a special statute governing gifts and grants to the University of Wisconsin and subsection (1) provides:

“(1) All gifts, grants, bequests and devises *for the benefit or advantage* of the university or any of its departments, colleges, schools, halls, observatories or institutions, or to provide any means of instruction, illustration or knowledge in connection therewith, whether made to trustees or otherwise, shall be legal and valid and shall be executed and enforced according to the provisions of the instrument making the same, *including all provisions and directions in any such instrument for accumulation of the income of any fund or rents and profits of any real estate without being subject to the limitations and restrictions provided by law in other cases*; but no such accumulation shall be allowed to produce a fund

more than 20 times as great as that originally given. When such gifts, grants, bequests or devises include common stocks or other investments which are not authorized by ch. 320, the regents *are authorized to continue to hold such common stocks or other investments and to exchange, invest or reinvest the funds in such gift, grant, bequest or devise in similar types of investments without being subject to the limitations and restrictions provided by law in other cases.* Except as otherwise provided in this section, the regents may invest not to exceed 75 per cent of trust funds held and administered by them in common stocks, the limitation of 50 per cent in s. 320.01 (2) to the contrary notwithstanding.” (Emphasis added)

The language emphasized above also appears in almost identical form in sec. 20.907 (1), Stats.

I am of the opinion that the phrase “without being subject to the limitations and restrictions provided by law in other cases” applies only to the holding, exchanging, investment and reinvestment of such funds and does not go to the execution of the trust by the Regents. Execution of the trust, whether restricted or unrestricted funds are involved, must be in a lawful manner not in conflict with other express statutes.

Our Supreme Court has stated that gifts to the university can only be made for, and used for, lawful and legitimate purposes. Gifts made for unlawful purposes “*would not be for the benefit of the university.*”

Glendale Development v. Board of Regents (1960), 12 Wis. 2d 120, 139, 106 N.W. 2d 430, cert. denied 81 S.Ct. 1652, 366 U.S. 931, 6 L.ed. 2d 389.

In *Glendale* the court stated at pp. 138, 139:

“There is no doubt but that the anonymous donors of the money to the Board of Regents desired that it should be used by the Board of Regents in any legitimate manner and in its discretion, so long as it was for the benefit of the university.

“There can be no doubt that the donors by the terms of their gift and later by their consent desired the Board of Regents to use its discretion as to how the money was to be spent so long as it was for

the benefit of the work of the university. Counsel argues that any and all fantastic and illegitimate enterprises might be fostered. Likewise, it must be written into this gift, that the donors intended only lawful and legitimate enterprises—others would not be for the benefit of the university.

“While the funds were public funds in a general sense, they were funds earmarked for such purposes as the Board of Regents, in its discretion, deemed proper, so long as they were for the benefit of the university.

“Many gifts are given to the university for various purposes and are earmarked for the same. Of course, they are public funds belonging to the public in a general sense, but certainly are to be used for the purposes given. Here the purposes were placed in the discretion of the Regents. The Regents of the university receive many gifts from corporations and individuals, to be used for a given purpose. All such gifts when accepted must be used in the manner provided by the articles of donation.”

In answer to your fourth question I am of the opinion that unrestricted gifts may not be used to reimburse an *applicant* for expenses incurred by his wife in accompanying her husband on a trip made for the purpose of interviewing for a state position since sec. 20.916 (1), Stats., and the rules promulgated thereunder provide for reimbursement for job applicants and I construe sec. 29.916 (6), Stats., as prohibiting the payment of travel expenses *to state officers, employes or applicants* except as authorized by statute. I am of the further opinion, however, that payment of such travel expenses could be made *to the wife*, if she were in fact requested to accompany her husband for the job interview by the appointing authority, where the Regents in their discretion determine that payment is for the benefit and advantage of the university.

With respect to your fifth question the following additional guidelines may be helpful.

In the execution of their trust responsibilities, where there is an express trust instrument, the Regents are required to execute according to the provisions of the instrument only to the extent that they can do so without violating any prohibitory statute. They must

comply with general or special statutes relating to the expenditure, accounting, and auditing of university and state funds.

You refer to a grant made by the "X" publishing company to a department at the university for the use of a professor in the preparation of a book. In part the grant states:

"[X] is making this grant under the condition that it can be dispersed without regard to the fiscal procedures and policies of the University of Wisconsin or of the State of Wisconsin. [Prof. X] is to use the grant at his own discretion."

The university accepted the fund and treated it as unrestricted. If the grant was valid, under sec. 36.065 (1), Stats., which makes all gifts, etc. "legal and valid," the condition was illegal and unenforceable. Any gifts or grants must be subject to the fiscal procedures and policies of the university and the state. The donor, without the consent of the Regents, cannot place total discretionary power over use of a grant in a given professor. Discretion, within reasonable and lawful limits, is in the Regents but may be delegated.

You also enclose guidelines for Ford Foundation grants and direct my attention to travel allowance regulations which specify
** * * The Foundation traveler is reimbursed at the rate of twelve cents per mile which includes charges for tolls and parking."

Where a state employe, faculty member, or officer is involved, this provision may conflict with state statutes as sec. 20.916 (4) (a) specifies a rate of 10 cents for the first 400 miles and 7 cents for each mile thereafter and the rules promulgated thereunder permit reimbursement for parking charges. In view of sec. 20.916 (6), Stats., reimbursement of state employes, faculty members or officers should be made at the rates specified in sec. 20.916, Stats.

On the other hand the Ford Foundation guidelines permit reimbursement for meals for guests of the Foundation. Such expenses are not necessarily travel expenses of a state employe, faculty member or state officer, are neither provided for nor prohibited by sec. 20.916, Stats., and could be paid from Ford Foundation grants when approved by the university.

In general, where unrestricted trust funds are involved, the Regents may authorize their expenditure with broad discretion as

long as the purpose is lawful and for a legitimate purpose and for the benefit of the university. Subsections (2) and (3) of sec. 36.065, Stats., outline areas in which the Regents may exercise their discretion. In exercising their discretion they must use their best judgment for the benefit of the university, cannot expend money for purposes expressly prohibited by statute and must comply with general or special statutes relating to the expenditure, accounting, and auditing of university and state funds.

Whereas the Regents may delegate their discretion in the expenditure of unrestricted funds, such delegation must be reasonable. It is submitted that certain of the guidelines referred to above, especially those items 3, 4, 5, 6, 7 are so broad that they do not set forth any standard and do not therefore constitute a valid delegation. If expenditures are to be considered in these areas, they should be specifically approved by the entire board until a more meaningful set of guidelines is approved and issued by the entire board.

RWW:RJV

County Executives—Elections—The county board may create office of county executive and make resolution contingent upon referendum of electorate.

January 19, 1973.

WILLIS J. ZICK, Corporation Counsel
Waukesha County

You state that a resolution is pending before the county board of supervisors which would establish the position of county executive in Waukesha County pursuant to sec. 59.032 (1), Stats., with the first election to take place at the spring election in 1974.

An amendment to that resolution would make its implementation contingent upon the approval of the voters of Waukesha County at the April, 1973 election.

You inquire whether the county board has power to provide for such referendum.

Section 59.032 (1), Stats., provides:

“59.032 County executive in other counties. (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).”

Under the statute the county board has power to create the office of county executive. The statute provides an alternate method, by petition and referendum by the electors of the county.

The safest way for the county to proceed would be for the county board to create the office by resolution without condition. The alternative would be to await petition by the electors or to encourage such petition. It is presumed that the statute providing for direct legislation in this special instance is constitutional and one circuit court has so held.

It can be argued that since the legislature has provided these two methods of creating the office, that no variation would be permitted.

It is generally recognized that counties have only such powers as are specifically granted by statute or necessarily implied. Section 59.07 (67), Stats., permits county boards to authorize advisory referendums on public construction questions and sec. 59.69 (3), Stats., authorizes a referendum on county fairs. Insofar as strictly advisory referendums are concerned, it can be argued that under the “*expressio unius*” canon of construction, that the county board is without power to authorize referendums on other subjects for advisory purposes.

The referendum in question would not be advisory but would be the conditional element which would determine whether the resolution establishing the office of county executive would become effective.

Previous attorneys general have stated that while the county board cannot delegate the power to legislate, a resolution or ordinance which it can legally pass may be contingent upon the result of a referendum.

20 OAG 276

21 OAG 308,310

21 OAG 317

22 OAG 287, 288

Also see *State ex rel. Van Alstine v. Frear* (1910), 142 Wis. 320, 324, 325, 125 N.W. 961.

State ex rel. Broughton v. Zimmerman (1952), 261 Wis. 398, 413, 414, 52 N.W. 2d 903.

The people do not in effect legislate where the county board has provided a full and complete ordinance or resolution contingent upon referendum. This is to be distinguished from attempts by the legislature to grant law-making power to the county electorate to initiate or repeal ordinances which was held improper under the constitutional provisions in *Mead v. Dane County* (1914), 155 Wis. 632, 145 N.W. 239, and *Marshall v. Dane County* (1940), 236 Wis. 57, 59, 294 N.W. 496.

While I am of the opinion that the county board probably has power to make its resolution creating the office of county executive contingent upon the result of a referendum, I suggest that the better procedure would be for the board to itself fully act with respect to this important matter.

RWW:RJV

Criminal Law—Trespass—The intentional entering of an outbuilding without the consent of some person lawfully upon the premises whereon it is situate, under circumstances tending to create or provoke a breach of the peace, where such outbuilding is accessory to a main house and within the curtilage, is a violation of sec. 943.14, Stats., since “dwelling,” as employed therein, has its common law meaning of “the cluster of buildings in which a man

with his family resides," extending to "such outbuildings as are within the curtilage."

January 23, 1973.

W. PATRICK DONLIN, *District Attorney*
Price County

You request my opinion "as to whether a trespass to an outbuilding, unauthorized and without the consent of any person lawfully upon the premises which would fit the other requirements of 943.14, would be a violation thereof."

In connection with such request, you have advised me as follows:

"Situations have recently developed wherein persons have, without authorization, entered outbuildings in various localities and have not entered the dwelling house of the property owner. Such entry has been without the consent of the owner of the property."

In giving you my opinion on the above-stated question, I am assuming that when you refer to the trespass therein described as one "which would fit the other requirements of 943.14," you mean that it is a trespass occurring, in the language of sec. 943.14, Stats., "under circumstances tending to create or provoke a breach of the peace." I am further assuming that when you refer to an "outbuilding" in such question, you are employing such word in its ordinary sense, namely, a building "separate from but accessory to a main house * * *" See Webster's Third New International Dictionary, p. 1601.

Making the above-stated assumptions, it is my opinion that the "trespass to an outbuilding" taking place under the circumstances you describe would be a violation of sec. 943.14, Stats. Such opinion is based on my belief that the word "dwelling," as employed in sec. 943.14, Stats., has its common law meaning hereinafter shown.

The word "dwelling," appearing in sec. 943.14, Stats., is not defined therein, or elsewhere in our statutes. In the absence of such definition, there is a degree of ambiguity in the use of such word in sec. 943.14, Stats. "The term [dwelling] is not free from ambiguity, but is one of multiple meaning." (Bracketed material mine; 28 C.J.S. *Dwelling or Dwelling House* at p. 599.) With "dwelling," in

its use in question, having an ambiguous meaning, a construction of sec. 943.14, Stats., with reference to the principles of the common law in force at the time of its passage (1955) is required. See 82 C.J.S. *Statutes*, sec. 363. See also *State ex rel. Schwenker v. District Court* (1932), 206 Wis. 600, 604, wherein the Court said: "Statutes should be construed as far as possible in harmony * * * with the common law." As a word having a "definite and settled meaning at common law," the word "dwelling" in sec. 943.14, Stats., is "presumed to be employed in the same [common law] sense, and will be so construed unless an intent to the contrary clearly appears." (Bracketed material mine; 82 C.J.S., *Statutes*, sec. 363) Nothing in sec. 943.14, Stats., clearly shows an intent on the part of the Legislature that "dwelling," as used therein, should have a meaning other than its common law meaning. At common law, it meant "the cluster of buildings in which a man with his family resides," extending to "such outbuildings as are within the curtilage."¹ See *United Carbon Company v. Conn.* (1961), Ky., 351 S.W. 2d 189, 190. See also *Italian-American Building and Loan Ass'n v. Russo* (1942), 28 A. 2d 196, 198, 132 N.J. Eq. 319; *People v. Silverman* (1959), 183 N.Y.S. 2d 700, 702; Hales's Pleas to the Crown, Vol. 1, p. 557; Perkins on Criminal Law, 2d Ed., pp. 203, 204; and 43 A.L.R. 2d 831, *et seq.* Art. XIV, sec. 13, Wisconsin Constitution, reads: "Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature." The above-mentioned meaning of the word "dwelling" was clearly a part of the common law, reasonably applicable to the "situation and government" of Wisconsin when the Constitution of this state was adopted. See *Coburn v. Harvey* (1864), 18 Wis. *148, *149; *Huber v. Merkel* (1903), 117 Wis. 355, 365. In my judgment, such meaning was therefore a part of the common law in force in the territory of Wisconsin at the time the Wisconsin Constitution was adopted, and was not inconsistent therewith. It therefore became a part of the law of this State, and so remains, since it has not been "altered or suspended by the legislature."

¹As to what constitutes an outbuilding within the "curtilage," in the enlarged sense applicable to the customs of America, as distinguished from those of England, see 43 A.L.R. 2d, pp. 834, 837-838.

In sum, then, it is my opinion that the term "dwelling" used in sec. 943.14, Stats., has the common law meaning above shown, and therefore the trespass you describe in your question would be a violation of sec. 943.14, Stats.

Several matters warrant brief comment before closing this opinion. {

First, it is worthy of note that no reported Wisconsin case has dealt with the meaning of "dwelling," as used in statutes such as sec. 943.14, Stats., dealing with so-called "offenses against the habitation." It would appear that only in *Trible v. Tower Insurance Co.* (1968), 43 Wis. 2d 172, 186, has the Wisconsin Supreme Court dealt with the meaning of "dwelling," and then not in the context of a criminal statute, but in the context of an insurance policy. (The Court has dealt with the term "dwelling house" on several occasions, but that is a term distinct from "dwelling," and easily subject to a much narrower interpretation).

Second, the fact that a trespass under sec. 943.14, Stats., must be "under circumstances tending to create or provoke a breach of the peace" does not indicate that "dwelling," as used in such statute, is employed in its narrowest sense, to indicate only a building usually occupied by persons lodging therein at night. See 28 C.J.S. *Dwelling or Dwelling House* at pp. 600, 601. A "breach of the peace" is a term covering a variety of conduct. See Vol. 5A, Words and Phrases, Perm. Ed., p. 297 *et seq.*; 11 C.J.S., *Breach of the Peace*, secs. 1-6, inc. Among other things, a breach of the peace involves conduct calculated to put one in fear of bodily harm, and disturbing that quiet and repose which constitute, essentially, the comfort and rest of social life. See *State v. Thompson* (1951-Vt.), 84 A. 2d 594, 595. It involves an act "likely to put a person of ordinary firmness" in a state of fear of bodily harm. *Ibid.* Plainly, such an act can easily take place, not only in that part of a dwelling which provides night lodging for the occupants thereof, but in an outbuilding separate from but accessory to the "main house" containing the sleeping quarters, and within the curtilage.

Third, the fact that sec. 943.14, Stats., provides that its violator must be one who, *inter alia*, "intentionally enters the dwelling of another *without the consent of some person lawfully upon the premises*" (Emphasis mine) does not give rise, in my judgment, to

an implication that “dwelling” can and does mean, in the context of sec. 943.14, Stats., only a house containing sleeping quarters, where occupants thereof might ordinarily be found. “Premises,” it has been said, is a word of “broad and varied meaning,” with such meaning dependent on the circumstances in which such word is used, and to be determined by its context. See *State v. Myers* (1941-Mo.), 147 S.W. 2d 444, 447; *Gibbons v. Brandt* (1948-7 C.A.), 170 F. 2d 385, 387. As used in sec. 943.14, Stats., “premises” would seem to mean not only buildings, but the lands on which they are situate; and so used, I believe that such word creates no implication that “dwelling” is employed in sec. 943.14, Stats., in a sense more restrictive than its common law meaning.

Fourth, if and when you are compelled to decide whether a given outbuilding comes within the compass of the word “dwelling,” as used in sec. 943.14, Stats., I would suggest that you consult the excellent annotation, referred to hereinabove, found in 43 A.L.R. 2d 831 *et seq.*

RWW:JHM

Retirement Fund—Trust Funds—Public Administrators—are public officials and, therefore, includible as “employees” under the Federal-State Social Security coverage agreement. Public administrators may be properly excluded by act of the legislature from future coverage under the Wisconsin Retirement Fund and State Group Life Insurance.

January 25, 1973.

CLYDE M. SULLIVAN, *Secretary*

Department of Employee Trust Funds

You request my opinion on a number of questions concerning the effect of ch. 310, Laws of 1971, on the statutes relating to administration of the Wisconsin Retirement Fund, Public Employees Social Security Fund and the Municipal Group Life Insurance Program.

Under sec. 253.25 of the Wisconsin Statutes, prior to repeal and recreation by ch. 310, Laws of 1971, public administrators were generally considered by your Department to be county officials and eligible for participation in the above-stated benefit programs if they met the other statutory criteria. Chapter 310, however, established the status of public administrators to be that of independent contractors. New subsection 253.25 (4) as created in sec. 3 of ch. 310 reads:

“(4) STATUS. The public administrator and acting public administrator, except when an assistant district attorney, shall be deemed independent contractors retained by the department of revenue and not employes of the county or state.”

Your first question, and the basis therefor, is stated in your letter as follows:

“1. In most counties (those having ‘absolute’ Social Security coverage) virtually every ‘employee’ is required to participate in the Federal Social Security program, regardless of the amount of time worked or the amount of compensation received. The Social Security Act defines ‘employee’ to include all officers of a state or political subdivision. Thus if a public administrator is a public officer, we must question whether s. 253.25 (4) is competent to set aside what is already a matter of statute and agreement between the State of Wisconsin and the Federal Department of Health, Education and Welfare. (The State, in such agreement, and under the statutes, has bound itself to all provisions of the Social Security Act and regulations adopted pursuant thereto.)”

Coverage of state and local governments under the Social Security Act is voluntary and accomplished only by agreement of the State of Wisconsin with the U.S. Secretary of Health, Education and Welfare. The State of Wisconsin, by agreement with the federal government, contracts to buy social security protection for the employes it brings under the agreement. 42 U.S.C. §418.

The agreement between the state and U.S. Secretary of Health, Education and Welfare provides as to coverage:

“(4) (B) Services Covered. This agreement includes all services performed by individuals as employes of the State and as employes

of those political subdivisions listed in the appendix attached hereto, except:"

The exceptions in the portion of paragraph (4) (B) quoted above are not material in light of paragraph 4 (B) (7), which reads:

"(7) Effective April 1, 1966, the only exclusions covering positions not under a retirement system (including any retirement system created by ch. 155 or ch. 201 of the Wisconsin Laws of 1937 as amended) which shall be in effect under this federal-state agreement shall be those exclusions which are mandatory under federal law (i.e., those provided in (B) 2 through (B) 5 of said agreement) and the exclusion provided by (B) 6 of said agreement as amended by Modification No. 146. This provision is applicable to such positions of employes of the state and of all political subdivisions of the state already covered or hereafter to be covered under said agreement."

This section of the federal-state agreement is implemented from the state end by sec. 40.41 (5), Stats., which reads:

"(5) Effective April 1, 1966, with the exception of the exclusions under sub. (10) the only exclusions covering positions not under a retirement system which shall be in effect under the state-federal agreement pursuant to action taken under sub. (1) shall be those exclusions which are mandatory under federal regulations."

Municipalities, therefore, have authority under sec. 40.41 (1), Stats., to elect only "absolute coverage" of employes. The only alternative coverage is that required for all employes included under the Wisconsin Retirement Fund under subsection (2) of sec. 40.41. Section 40.41 reads in material part:

"40.41 Coverage. (1) Each public agency other than the state may determine to be included under OASDHI through the adoption of a resolution by the governing body thereof with respect to the coverage groups specified in such resolution, which shall also state the effective date of coverage.

"(2) * * * all participating municipalities which have acted pursuant to s. 41.05 to be included under the Wisconsin retirement fund are included when the participating employes thereof are eligible, * * *."

As of August 1, 1971, 54 counties in Wisconsin had taken action to provide "absolute coverage" while the remaining 17 counties provided social security coverage through participation in the Wisconsin Retirement Fund. (Milwaukee County is not a participating employer in the Wisconsin Retirement Fund.)

By sec. 3 of ch. 310, Laws of 1971, the legislature declared that public administrators were thereafter to be "deemed independent contractors." Independent contractors are excluded from coverage in the Wisconsin Retirement Fund by sec. 41.02 (12) (e), Stats. That such exclusion from the fund was clearly intended by the legislature is apparent from the following note to 1971 Senate Bill 471 which became ch. 310, Laws of 1971:

"Sub. (4) is new. Its purpose is to clarify the status of the public administrator and acting public administrator as independent contractors retained by the department of revenue and not as government employees. They will thus not be subject to or qualify for such employe-connected obligations and programs as the following: withholding of state income tax, workmen's compensation, retirement fund programs and group health, accident or life insurance programs."

It is, therefore, my opinion that in those counties, where participation in Social Security is based solely upon participation in the Wisconsin Retirement Fund, ch. 310, Laws of 1971, has by ending the participation of public administrators in the Retirement Fund, effectively ended their social security coverage as county employes. The situation is different, however, in those counties which have elected "absolute coverage" of employes, for in these counties all employes are covered (except mandatory exclusions under the Social Security Act), regardless of eligibility for the retirement fund.

Chapter 310, Laws of 1971, establishes public administrators as independent contractors. The federal-state agreement at part (A) (2) defines "employee" as:

"(2) The term 'employee' means an employee as defined in section 210 (k) of the Social Security Act and shall include an officer of the State or of a political subdivision thereof."

The Handbook for State Social Security Administrators of the U.S. Department of Health, Education and Welfare provides the following statement applicable to determination of who is a public officer, at sec. 272:

“272. Public Officer.—An officer of a State or political subdivision is an employee by statutory definition. Generally, the statutory authority establishing the position describes the occupant of a position as a public officer if, in fact, that is his status. Indicative of such status are provisions that the individual has tenure in his position and that he takes an oath of office. Generally, a public officer exercises some part of the sovereign power of the State or political subdivision. (A notary public and a juror perform the functions of a public office but are not public officers.)”

The basis for determining whether an individual is a public officer is set forth in *Martin v. Smith* (1941), 239 Wis. 314, 1 N.W. 2d 163. The court therein stated at page 332:

“ ‘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.’ ”

The position of public administrator as created by legislative act requires taking of the official oath and filing of a bond. Section 3 of ch. 310, Laws of 1971. Public administrator is a permanent office even though any individual holding such office serves only “until his successor has been appointed.” See *Burton v. State Appeal Board* (1968), 38 Wis. 2d 294, 302, 156 N.W. 2d 386. Some of the duties of the public administrator are set forth in the following sections of the statutes created by ch. 310, Laws of 1971:

As of August 1, 1971, 54 counties in Wisconsin had taken action to provide "absolute coverage" while the remaining 17 counties provided social security coverage through participation in the Wisconsin Retirement Fund. (Milwaukee County is not a participating employer in the Wisconsin Retirement Fund.)

By sec. 3 of ch. 310, Laws of 1971, the legislature declared that public administrators were thereafter to be "deemed independent contractors." Independent contractors are excluded from coverage in the Wisconsin Retirement Fund by sec. 41.02 (12) (e), Stats. That such exclusion from the fund was clearly intended by the legislature is apparent from the following note to 1971 Senate Bill 471 which became ch. 310, Laws of 1971:

"Sub. (4) is new. Its purpose is to clarify the status of the public administrator and acting public administrator as independent contractors retained by the department of revenue and not as government employes. They will thus not be subject to or qualify for such employe-connected obligations and programs as the following: withholding of state income tax, workmen's compensation, retirement fund programs and group health, accident or life insurance programs."

It is, therefore, my opinion that in those counties, where participation in Social Security is based solely upon participation in the Wisconsin Retirement Fund, ch. 310, Laws of 1971, has by ending the participation of public administrators in the Retirement Fund, effectively ended their social security coverage as county employes. The situation is different, however, in those counties which have elected "absolute coverage" of employes, for in these counties all employes are covered (except mandatory exclusions under the Social Security Act), regardless of eligibility for the retirement fund.

Chapter 310, Laws of 1971, establishes public administrators as independent contractors. The federal-state agreement at part (A) (2) defines "employee" as:

"(2) The term 'employee' means an employee as defined in section 210 (k) of the Social Security Act and shall include an officer of the State or of a political subdivision thereof."

While the determination of who is an officer of a state or political subdivision is determined under state law, the determination of who is an "employee" is determined under Federal law. The Handbook for State Social Security Administrators of the U.S. Department of Health, Education and Welfare reads in applicable part at sec. 267:

"267. Definition of Employee.—Who is an employee under the common-law rules or Federal Statutory definition is determined in accordance with the provisions of the Social Security Act and the applicable regulations. Who is an officer of a State or political subdivision and therefore an employee is determined by the State law provisions.

"Under the Social Security Act, the term employee includes:

"(a) An individual who, under the usual common-law rules applicable in determining an employer-employee relationship, has the status of an employee; and

"(b) An individual who is an employee under the statutory definition in §210 (j) of the Act. These definitions include an officer of a corporation as well as certain agent drivers, salesmen, and homeworkers. Generally, these definitions are not applicable to State and local governments; and

"(c) An officer of a State or political subdivision."

For purposes of the federal-state agreement, designation of public administrators as "independent contractors" is not sufficient to exclude them from coverage if in fact they are "employees." 20 C.F.R. 404.1004 (2) reads:

"(2) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like."

The Social Security Commissioner was requested by the State of Oklahoma to issue a ruling on whether motor license agents appointed by the Oklahoma Tax Commission, pursuant to statutory authority, were state employees. The Oklahoma legislature enacted a law specifically providing that "such agents be self-employed

independent contractors." The Commissioner held that such agents were employes of the state notwithstanding the state law designating them as independent contractors. The administrator stated at page 147 of such ruling (SSR 68-23 C.B. 1968, p. 145):

"The statutory provisions cited above clearly indicate that motor license agents in Oklahoma are subject to the direction and control of the State through the Tax Commission, and that the Commission either exercises or reserves the right to exercise such direction and control by means of instructions issued to them. The agents are removable at the will of the Tax Commissioner; they are required to furnish and file bonds, and must perform all duties required of them by the Commission. Under the facts recited, motor license agents in Oklahoma, *held* employees of the State within the meaning of section 210 (j) of the Social Security Act. The fact that they are designated in the State law as self-employed independent contractors under the supervision of the State Tax Commission does not change this result."

More recently, the Commissioner was asked by the State of Missouri for a ruling as to whether fee-paid public administrators were employes and, therefore, whether their income therefrom constituted covered wages under the applicable federal-state agreement. S.S.R. 72-36. The Commission held that the subject public administrators were public officers and, therefore, employes whose income constituted covered wages. The Commissioner concluded his ruling with these words:

"The provisions of the State's agreement, and the definitions contained therein, were not changed in any way by H.B. 635 since the State would have no authority after entering into an agreement to later redefine its scope by unilateral action or in a manner which would contravene the definitions as set forth in the agreement."

It should be here noted that although the legislature in ch. 310, Laws of 1971, declared public administrators to be independent contractors and not employes, it did not state therein that such administrators were not public officials. There is also a notable absence in the explanatory note to subsec. (4), previously quoted, of any reference to social security deductions.

The Handbook for State Social Security Administrators of the U.S. Department of Health, Education and Welfare provides the following statement applicable to determination of who is a public officer, at sec. 272:

“272. Public Officer.—An officer of a State or political subdivision is an employee by statutory definition. Generally, the statutory authority establishing the position describes the occupant of a position as a public officer if, in fact, that is his status. Indicative of such status are provisions that the individual has tenure in his position and that he takes an oath of office. Generally, a public officer exercises some part of the sovereign power of the State or political subdivision. (A notary public and a juror perform the functions of a public office but are not public officers.)”

The basis for determining whether an individual is a public officer is set forth in *Martin v. Smith* (1941), 239 Wis. 314, 1 N.W. 2d 163. The court therein stated at page 332:

“ ‘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.’ ”

The position of public administrator as created by legislative act requires taking of the official oath and filing of a bond. Section 3 of ch. 310, Laws of 1971. Public administrator is a permanent office even though any individual holding such office serves only “until his successor has been appointed.” See *Burton v. State Appeal Board* (1968), 38 Wis. 2d 294, 302, 156 N.W. 2d 386. Some of the duties of the public administrator are set forth in the following sections of the statutes created by ch. 310, Laws of 1971:

“72.23 (2) **INTEREST MAY BE WAIVED.** The department, authorized public administrator or county court may waive interest on any additional tax arising from the discovery of property which was omitted in the original determination of tax. This subsection applies only where due diligence has been exercised in marshaling the assets.”

“**72.25 RELEASE OR TRANSFER OF LIEN.** Until this tax is paid it is a lien upon the property transferred except:

“(1) When the department or authorized public administrator is satisfied that collection of the tax will not be jeopardized, either may release this lien on all or part of real property. A duly executed release of the lien may be recorded with the register of deeds of the county in which the property is located. The recording fee shall be the same as for the recording of a mortgage satisfaction.

“* * *

“**72.31 PUBLIC ADMINISTRATOR. (1) GENERAL DUTIES.** The public administrator shall represent the department and shall:

“* * *

“(b) Appear for and act in behalf of the county and state with regard to the determination of tax.

“* * *

“(3) **AUTHORITY WHICH THE DEPARTMENT MAY DELEGATE; PROCEDURE.** (a) Authority. A public administrator may grant closing certificates, lien waivers or both, in all no-tax cases. In its discretion the department may delegate this authority in tax cases where the total value of property transferred by reason of a death or in contemplation of death does not exceed \$50,000.”

The above duties involve an exercise of the sovereign power of the state free from the control of a superior power. Public administrators are, therefore, public officers under the guidelines of *Martin v. Smith, supra*.

The question remains as to whether public administrators are county or state officers for social security purposes. In *State ex rel.*

Sheets v. Fay (1972), 54 Wis. 2d 642, 649, 196 N.W. 2d 651, the court determined that family court commissioners were county appointed officials for Wisconsin retirement fund purposes. Determinative of such status were the factors cited in the following excerpt from page 649:

“A number of factors and specific statutory provisions go onto the scales in determining whether plaintiff is a county or state ‘employee’ under the retirement fund act. To begin with, sec. 247.13 (1), Stats. provides the position of family court commissioner, formerly divorce counsel, is created ‘in each county of the state’ and ‘for such county.’ The appointment is to be made annually by ‘the circuit and county judges in and for such county.’ However, the position ‘may be placed under a county civil service system by resolution of the county board.’ In counties having a population of less than 500,000, the county board ‘. . . shall by resolution provide an annual salary for the family court commissioner. . . .’ (Sec. 247.17.) The county board ‘. . . may also by resolution prescribe such other duties to be performed by him not in conflict with his duties as family court commissioner.’ (Sec. 247.17.) Where the county board establishes the family court commissioner’s salary, pays it, and may prescribe additional duties to be performed by him, and where the position is established in each county and ‘for such county,’ we find the proof overwhelmingly requiring a finding that the family court commissioner of Racine county was a county employee, rather than a state employee, under the retirement act and retirement act purposes.”

Public administrators are appointed by “each judge of a court having probate jurisdiction under sec. 856.01,” invariably all county courts. “In counties of over 200,000, an assistant district attorney may be appointed public administrator.” Section 253.25 (1), Stats. (1971). In the event of an assistant district attorney so serving, the fees are paid to the county. Section 72.31 (4) (c), Stats. (1971). A county court may appoint an acting public administrator for a specific case if the public administrator is not available or not qualified to act. Section 253.25 (2), Stats. (1971). The public administrator represents both the State Department of Revenue and the county. Section 72.31 (1) (b), Stats. (1971). Fees are paid “by the county treasurer out of inheritance tax funds in his possession upon order of the county court.” Section 72.31 (4) (b), Stats.

(1971). While public administrators are paid fees set by the statutes, the county court may allow additional fees in cases of unusual difficulty.

There is in my opinion sufficient indication that public administrators should be considered county officers for purposes of the Federal-State Social Security agreement. Such appointed officials are appointed by and serve at the pleasure of the county judges. Section 253.25 (1), Stats. (1971). County judges are county officials. *State ex rel. Sachtjen v. Festge* (1964), 25 Wis. 2d 128, 130 N.W. 2d 457. While public administrators exercise some of the sovereign powers of the state, they are primarily local officers under the control of the county judge. Such public administrators are therefore subject to social security deductions under the Federal-State agreement in the manner as county officers.

Secondly, you question whether a public administrator "in the exercise of his public responsibilities can be excluded from retirement participation." The intent of the legislature to remove public administrators from eligibility for the retirement fund is clearly set forth in a note to 1971 Senate Bill 471 which became ch. 310, Laws of 1971. The note which follows sec. 3 of such bill reads in part:

"They will thus not be subject to or qualify for such employee-connected obligations and programs as the following:
* * * retirement fund programs and group health, accident or life insurance programs."

Whatever right public administrators formerly under the Wisconsin Retirement Fund could arguably have to maintenance of such coverage, regardless of sec. 253.25 (4), Stats. (1971), would be based upon the prohibition against impairment of contract of sec. 12, Art. I of the Wisconsin Constitution.

In *State Teachers' Retirement Board v. Giessel* (1960), 12 Wis. 2d 5, 106 N.W. 2d 301, the court held that teachers had contractual rights in the retirement system and, therefore, the legislature could not use earnings of the State Teachers' Retirement System to pay a part of the cost of a study of public employes retirement systems. The court said at pages 9 and 10:

“The nature of the state teachers’ retirement system and the rights of the members thereof have been the subject of four prior decisions of this court: *State ex rel. Dudgeon v. Levitan* (1923), 181 Wis. 326, 193 N.W. 499; *State ex rel. O’Neil v. Blied* (1925), 188 Wis. 442, 206 N.W. 213; *State ex rel. Stafford v. State Annuity & Investment Board* (1935), 219 Wis. 31, 261 N.W. 718; *State ex rel. Thomson v. Giessel* (1952), 262 Wis. 51, 53 N.W. (2d) 726. The result of these decisions is that the teachers have a contractual relationship with the state and a vested right in the state teachers’ retirement system. The contractual right and vested interest of the teachers in the retirement system are not disputed by the appellant, but it is argued the right of the teachers is not such as would exclude payment of the charge for the governor’s study commission out of the earnings of the state teachers’ retirement fund. It is argued that the plaintiff board is required to pay out funds according to law and appropriations from the earnings of the fund have been made by law each year, and therefore there is no vested right in the gross earnings of the fund. We do not agree. The teacher’s right, based on contract, extends to the retirement system. The earnings on investments, part of which represent contributions made by the teachers and part contributed by the state under the contract with them, constitute assets of the system. The reserve for contingencies set up by the board is a part of the system.”

While I am aware of no case wherein the court has had the occasion to rule on the question of the contractual relationship of members of the Wisconsin Retirement Fund, the essential features of the teachers’ fund are similar to the degree that I consider the reasoning of the *Giessel* case as quoted just above to be persuasive in similar situations. The Wisconsin Retirement Fund and the State Teachers’ Retirement System were both created as joint contributory, money-purchase systems. In both cases the contributions by the participants and municipalities are held in trust for members of the funds. Secs. 41.02 (1) (a) and 42.22 (5), Stats. Most features essential to the subject question are similar. I conclude, therefore, that members of the Wisconsin Retirement Fund have contractual and vested rights in their fund as it exists on the day of their retirement similar to those which the court has determined to be vested in teachers.

This does not mean that the legislature is without the power to delete persons presently covered from future coverage in the Wisconsin Retirement Fund and from group life insurance by changing the position from that of public officer or employe to that of independent contractor or by specifically deleting a group from coverage. The former member of the funds is entitled to whatever benefits were vested during the period that the applicable legislation required or permitted his participation. These benefits based upon past service are not taken from public administrators by ch. 310, Laws of 1971, although such public administrators are precluded from future participation in the funds. I see no constitutional proscription which precludes the legislature from removing the public administrator group from the Wisconsin Retirement Fund.

RWW:WMS

Licenses and Permits—Intoxicating Liquors—Upon a second or subsequent conviction of drunk driving within five years of a previous conviction for the same offense, the court may not waive, under sec. 345.60, Stats., the revocation of operating privileges by the Division of Motor Vehicles as required by sec. 343.31 (1) (b), Stats.

January 31, 1973.

JAMES R. SCHIPPER, *District Attorney*
Vernon County

You have asked whether a court under sec. 345.60, Stats., may waive the revocation of the operating privilege when a person is convicted of operating under the influence of an intoxicant a second or subsequent time within a five-year period. It is my opinion that this cannot be done.

I have discussed this in a previous opinion, a copy of which is enclosed. Section 345.60 (1), Stats., provides that a court may order a convicted person to attend traffic safety school, in addition to or in lieu of other penalties. I think this clearly refers to other penalties imposed by the court. For a first offense of driving while

intoxicated, the penalty now is a forfeiture of up to \$200. See sec. 346.65 (2), Stats., as amended by ch. 278, Laws of 1971. Also, the court is required to revoke the operating privilege for not less than 90 days nor more than six months. See sec. 343.30 (1q), Stats. These penalties, imposed by the court, are the ones which can be waived by the court when ordering the defendant to attend traffic safety school under sec. 345.60, Stats.

However, at the present time, a second or subsequent offense of driving while intoxicated is criminal and punishable by imprisonment of not less than five days nor more than one year. A fine of up to \$500 may also be imposed by the court. See sec. 346.65 (2), Stats., as amended by ch. 278, Laws of 1971. These penalties may be waived by the court in ordering the defendant to attend traffic safety school under sec. 345.60, Stats. The court is not required to revoke the operating privilege for such second or subsequent offense, although the court has this discretionary power under sec. 343.30 (1), Stats. However, sec. 343.31 (1) (b), Stats., imposes upon Division of Motor Vehicles the mandatory duty to revoke the operating privilege for one full year for such second or subsequent conviction of driving while intoxicated. The convicting court has no authority to waive this revocation or to interfere with the performance of the duty of the Division of Motor Vehicles in this respect. Of course, the order of revocation entered by the Division of Motor Vehicles would be subject to judicial review in circuit court as provided by ch. 227, Stats.

It is, therefore, my opinion that sec. 345.60, Stats., authorizes the convicting court to waive only a revocation by the court, and that such court cannot waive the revocation ordered by the Division of Motor Vehicles under sec. 343.31, Stats.

RWW:AOH

Inheritance Tax—Register in Probate—Section 253.34 (1) (a), Stats., dealing with filing fees was not amended by ch. 310, Laws of 1971, which amended inheritance tax rules on survivorship interests.

February 14, 1973.

GERALD L. ENGELDINGER, *Corporation Counsel*
Winnebago County

You state:

"I have received a request from Mr. Roger Thomas, Winnebago County Register in Probate, for an opinion concerning the filing fee collectible by him in survivorship proceedings pursuant to Wis. Stats., Sec. 253.34, in light of recent Wisconsin legislative action creating Wis. Stats., Sec. 72.12(6).

"Chapter 72, Wisconsin Statutes, was recreated by Chapter 310, Laws of 1971, State of Wisconsin. As a result of this act, except for a few indicated exceptions, inheritance tax applies to the full value of property transferred in a survivorship proceedings. This is a substantial departure from prior statutory provisions relating to the valuation of property transferred in such proceedings.

"Sec. 253.34(1)(a), in the last paragraph, indicates the fees to be paid in survivorship proceedings shall be based on the value of the property passing to the survivors. What then is the value of the property passing to the survivors? If only the value of the decedent's property interest passes to survivors, how can inheritance tax be based on the full value of the property transferred rather than the decedent's interest? Is it possible to have a different value on property passing to survivors for purpose of determining fees under Sec. 253.34 than the value which is subject to inheritance tax under Chapter 72?

"My research has not produced answers to the foregoing questions. I believe, however, that the answers to these questions are of state-wide concern and, therefore, am requesting that the Attorney General's Office render an opinion in this regard. As I understand, there is not uniformity amongst the counties concerning fees charged by Registers in Probate in these survivorship proceedings."

In substance, you are asking: Does the 1971 Legislature's enactment of ch. 310, which among other things repealed sec. 72.01 (6), Wis. Stats., and created sec. 72.12 (6), Wis. Stats., altering the basis for imposition of inheritance tax on joint or survivorship

interests in property, have the effect of amending sec. 253.34 (1) (a), Wis. Stats., which deals with filing fees collected by the register in probate in probate matters, especially fees in survivorship proceedings?

The answer is no.

Section 253.34 (1) (a), Wis. Stats., has not been amended. It provides, in part:

“. . . The fees fixed in this paragraph shall also be paid in survivorship proceedings and in such survivorship proceedings the value shall be based on the value of the property passing to the survivors.”

The law does not favor repeal or amendment of a statute by implication if the two statutes involved can be reconciled. *Jicha v. Karns* (1968), 39 Wis. 2d 676, 680, 159 N.W. 2d 691.

These statutes can be reconciled. The new sec. 72.12 (6), Stats., specifically changed the rules (which were previously set out in sec. 72.01 (6), Stats.) for the imposition of inheritance tax on transfer of survivorship interests. There is no indication of any legislative intent to change other statutory rules; for example, those dealing with the characteristics of joint tenancy and what legal interest in property passes to the survivors upon the death of a joint tenant. This is controlled by sec. 700.17 (2), Stats., which now provides:

“Each of 2 or more joint tenants has an equal interest in the whole property for the duration of the tenancy, *irrespective of unequal contributions at its creation*. On the death of one of 2 joint tenants, the survivor becomes the sole owner; on the death of one of 3 or more joint tenants, the survivors are joint tenants of the entire interest.” (Emphasized language added by ch. 66, Laws of 1971.)

Indeed, if further evidence is needed, the 1971 amendment to sec. 700.17 (2), Stats., is persuasive that there was no legislative intent to conform the rules as to ownership and descent of survivorship interests to the rules for inheritance tax imposition on these interests.

Accordingly, you are advised that ch. 310, Laws of 1971, which repealed sec. 72.01 (6), Stats., and replaced it with sec. 72.12 (6), Stats., and dealt with imposition of inheritance tax on survivorship

interests in property, did not operate to amend sec. 253.34 (1) (a), Stats., dealing with probate filing fees.

RWW:JEA

County Judge—Salaries and Wages—A county judge's resignation is effective when successor qualifies. Judicial Code's only sanction is censure.

February 23, 1973.

CHARLES P. SMITH

State Treasurer

In your letter of January 8, 1973, you state as follows:

“On July 27, 1972, I refused to authorize for payment a check for Dane County Judge Russell J. Mittelstadt. My reason for doing so was that, in my opinion, Judge Mittelstadt was not entitled to payment after he filed his nomination papers for partisan political office on July 11, 1972. My authority for this action is from Rule 3 of the Wisconsin *Code of Judicial Ethics* which states:

“ ‘A judge shall not become a candidate for a federal, state, or local non-judicial elective office without first resigning his judgeship.’

“It is my opinion that Judge Mittelstadt, on July 11, 1972 became a candidate for a non-judicial elective office and thereby effectively resigned his judgeship.

“It is my understanding that on July 31, 1972 Judge Mittelstadt formally resigned his judicial position. It is also my understanding, according to Edwin M. Wilkie, Administrative Director of Courts, that the *Code of Judicial Ethics* has the ‘effect of law’. This makes my position quite clear, although Mr. Wilkie, in a letter dated August 2, 1972, states that, ‘It is my view that you are mistaken in your assumption, without apparent legal consultation, that a breach of *Code of Judicial Ethics* operates as a resignation from judicial office.’

"Subsequent to my withholding the July check 'due' Judge Mittelstadt, because of an oversight in the Bureau of Finance, Judge Mittelstadt did receive a check for the month of August, 1972. In a letter to him on September 13, 1972 I told him that, 'I had previously stated that I felt you were entitled to compensation through July 11th plus accrued annual leave. You had previously stated that you were taking the month of August as earned vacation time. Therefore, I will consider the check you just received as just compensation for that time.'

"Regarding the above, there is an unresolved question as to whether or not elected officials are subject to statutory provisions relating to vacation, sick leave, etc. However, as a matter of practice and tradition, they have not observed the law in this respect, and consequently upon termination, have been paid only through the date of termination.

"Therefore, I am requesting you to render a formal opinion regarding:

"1) Entitlement of Judge Mittelstadt to judicial salary after July 11, 1972; and

"2) Entitlement of Judge Mittelstadt to accrued annual leave after his effective date of resignation whether it be July 11, 1972 or July 31, 1972."

In my opinion, former Judge Mittelstadt is entitled to his salary continuously to the effective date of his resignation.

County courts are statutory courts. The constitution did not create them nor require the legislature to do so. *State ex rel. Sachtjen v. Festge* (1964), 25 Wis. 2d 128, 143.

Vacancies in public office, including county office, are governed by sec. 17.03, Wis. Stats. Among other events causing vacancies are resignations and removals. Sec. 17.03 (2) and (3), Stats. A county judge may be removed from office by address of both houses of the legislature. Sec. 17.09 (4), Stats. Also, an office is deemed vacant "On the happening of any other event which is declared by any special provision of law to create a vacancy." Sec. 17.03 (10), Stats.

I find no "special provision of law" applicable here. Your reliance upon the Wisconsin Code of Judicial Ethics is misplaced.

In the Appendix to Vol. 2, Wis. Stats. 1971, pages 18-22, there appears a "Code of Judicial Ethics as filed November 14, 1967." At 36 Wis. 2d, 252-262a, there appears a matter entitled, "In re Promulgation of a Code of Judicial Ethics." At 52 Wis. 2d, vii-xi, there further appears, "In the Matter of the Promulgation of the Code of Judicial Ethics" effective January 1, 1972. In the last cited reference, in a footnote to page ix, the Wisconsin Supreme Court noted that the sanctions of removal or suspension required constitutional amendment. There has been no amendment to the Wisconsin Constitution affecting these sanctions. Therefore, the only sanction imposable upon a judge, as such, who violates these rules is reprimand or censure. Even if the more severe sanctions were available, this code provides for notice by service of a verified complaint, an opportunity to answer and have a public hearing, appearance personally and by counsel and other safeguards. Because of the circumstances under which you have acted, I deem it necessary to emphasize that the withholding of this judicial officer's salary would not have been justified, even if the sanction of removal were imposable, unless and until all of the procedures called for in the Code had been exhausted and removal ordered by the Supreme Court.

In the absence of extraordinary circumstances, a fiscal officer who contemplates impoundment of the salary of a duly elected public official, who claims to be still holding his office, should seek and obtain competent legal advice on the matter before taking such action.

As I have indicated, former Judge Mittelstadt continued to hold office until the effective date of his resignation and accordingly is entitled to salary through that date. In ascertaining that effective date, I invite your attention to sec. 253.06, Stats., which provides that the term of office of a county judge is six years and "until his successor is elected and qualifies." I also invite your attention to sec. 17.01 (13), Stats., which provides that resignations shall take effect "in the case of an officer whose term of office continues by law until his successor is chosen and qualifies, upon the qualification of his successor; * * *." The law abhors vacancies in public office and courts generally indulge in a strong presumption against a legislative intent to create such a condition. See 67 C.J.S. *Officers*, §50a, page 207. Thus, it is my opinion that the effective date of the

resignation of former Judge Mittelstadt is the date his successor qualified for that office, and that former Judge Mittelstadt is entitled to the compensation attached to that office up to the date his successor qualified.

The office of county judge is an elective county office. See sec. 17.09 (4), Stats. You refer to no specific statute governing "vacation, sick leave, etc." for county officers and I am aware of none. Absent such a statute, the use or nonuse of such "leave" by county officers is a matter beyond the scope of this opinion.

RWW:JEA

Police—Workmen's Compensation—A state traffic patrol officer should not except in extreme emergencies be impressed for service as part of a *posse comitatus* pursuant to sec. 59.24 (1), Stats. Where duly impressed he is entitled to workmen's compensation, if injured, from the county or municipality but would not be entitled to regular pay from the state and probably would not be entitled to workmen's compensation from the state.

February 23, 1973.

NORMAN M. CLAPP, *Secretary*
Department of Transportation

You request my opinion on five questions which relate to the status of a state traffic patrol officer who is impressed for duty as part of a *posse comitatus* by a sheriff under the provisions of sec. 59.24 (1), Stats.

At length discussion of *posse comitatus* status as it relates to state traffic patrol officers appears in 45 OAG 152 (1956), 47 OAG 209 (1958), 56 OAG 96 (1967), 60 OAG 320 (1971), and opinion to the district attorney for Outagamie County dated February 22, 1972.

When a state traffic officer "assists" local enforcement officers pursuant to sec. 110.07 (2), Stats., he acts in cooperation with and not subservient to local officers. His orders, if any be needed, should

come from his superior state authority. When his assistance is required by the sheriff or constable under proper call for proper purpose pursuant to sec. 59.24 (1), Stats., he must respond, not because he is a state traffic officer, *but as a citizen* and is subject to the reasonable orders of the officer summoning his aid. 47 OAG 209, 212-214, 56 OAG 96, 99.

An individual impressed for service under sec. 59.24 (1), Stats., is performing a duty required of *a citizen*. Section 946.40, Stats., provides a criminal penalty for whoever without reasonable excuse refuses or fails *upon command* to aid a peace officer. He is for such purposes clothed with the immunities and rights of a deputy. If injured in performing such duty, the citizen is entitled to workmen's compensation from the county or municipality on whose behalf he was called. *Kagel v. Brugger* (1963), 19 Wis. 2d 1, 6, 119 N.W. 2d 394.

I am not aware of any case which holds that such citizen would be entitled to any compensation for such services. Article VI, sec. 4, Wis. Const., provides that a county shall never be made responsible for the acts of the sheriff. In 45 OAG 152, 157 (1956), it was stated that a county could not be liable for damage to a vehicle of a citizen commandeered by a sheriff or deputy sheriff.

For the purposes of this opinion *it is assumed that the individual has been duly impressed*, by the sheriff of the county in which the individual officer is at that time located, *for proper purposes other than those he is required to perform* by reason of secs. 22.165, and 110.07, Stats. See 56 OAG 96, 102 (1967).

"1. Is the traffic officer to be considered on duty as an employe of the Wisconsin State Traffic Patrol during the time that he is impressed?"

I am of the opinion that the individual may not be considered to be on duty as an employe of the state traffic patrol.

"2. If question 1 or any portion thereof is answered in the affirmative, is the trooper entitled to receive his usual pay from the State of Wisconsin for duty performed while he acted in an impressed status?"

A state employe would not be entitled to his usual pay as a state trooper during the period of impressed service. A citizen duly impressed must usually lay aside his other work and serve and has no right to look to his regular employer for compensation for periods he serves when impressed by a sheriff. Resort to *posse comitatus* should be made only in cases of great emergency. Citizens should not be requested to serve for more than extremely short periods of time. There is a question whether on-duty peace officers should be requested to lay aside their official duties except in the most urgent situations. *McFarland v. Village of Carlton* (Minn. 1932), 245 N.W. 631. The legislature has provided in secs. 66.305, 66.315, Stats., for mutual aid among law enforcement agencies and has provided for responsibilities of pay in such cases. State traffic patrol personnel are not covered by these sections.

In 47 OAG 209, 213 (1958), it is stated:

“In the latter two cases the persons summoned had no authority to act as peace officers by virtue of their original status. They were clothed with the authority accorded a peace officer by the law only because they were summoned by an officer. Thus, here, in the case assumed, a state traffic patrol officer has no authority to act by virtue of his original status, but acquires authority pursuant to the summons for assistance by a peace officer. He therefore acts for the municipality employing the officer who summoned him and is its employe. Hence he does not retain his original status as a state traffic patrol officer under sec. 110.07(2). Note that sec. 66.315(1) and (2), which specifically provides for compensation, wage and other benefits for peace officers of towns, cities, villages and counties when commandeered for service outside their municipality, *does not include the state traffic patrol.*” (Emphasis added)

While it can be argued that sec. 66.305 (1), Stats., in referring to “any law enforcement agency” would include the state traffic patrol, the legislative history of the bill creating sec. 66.305 (1), Stats., does not show a legislative intent to include such agency. Such inclusion would also be contrary to the long standing legislative intent of limiting the jurisdiction of state traffic patrol officers to activities on or near the highways. If included in sec. 66.305 (1), Stats., a local agency could, with acquiescence of state traffic patrol supervisors, and without resort to *posse comitatus*,

clothe such state traffic officers with powers in the suppression and control of general crime to the extent of the subject matter and geographical jurisdictional limits of the requesting agency. I do not believe that the legislature so intended.

Chapter 105, Laws of 1967, which created sec. 66.305, Stats., also created sec. 59.24 (2) to provide:

“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.”

Section 66.305 (1), Stats., expressly refers to county law enforcement agencies as provided in sec. 59.24 (2).

No reference is made to state traffic patrol officers. Statutes of general application do not apply to the state unless the state or its agencies are specifically mentioned or inclusion is necessarily implied.

Chapter 105, Laws of 1967, also amended sec. 66.315, Stats., to add “sheriff, deputy sheriff” or other peace officer of the “county” to the list of peace officers and governmental units to which the statute applied.

The legislature is presumed to have been aware of the opinion in 47 OAG 209, 213, which stated that sec. 66.315 (1) and (2) did not include the state traffic patrol. It is noteworthy that the legislature did not include state traffic patrol officers or the state specifically when adding peace officers and governmental units to which sec. 66.315 (1) and (2) were to apply.

It would be proper for you to advise sheriffs, chiefs of police and other peace officers that requests for emergency aid should be made to appropriate local officials under secs. 66.305 and 66.315, Stats., and, if you desire, that it is the policy of the state traffic patrol that state traffic officers be not called upon to serve under sec. 59.24 (1), Stats., except for short periods in extremely urgent cases. In any case where a state traffic patrol officer is impressed, he should, at the earliest possible time, contact his supervisors so that arrangements can be made for his return to assigned duties.

“3. Should he be paid by the State of Wisconsin for duty performed while in an impressed status where the particular county involved has compensated the state traffic officer for his services?”

The answer to this question is “no.” See discussion above.

“4. Is the state traffic officer covered by the provisions of the Wisconsin Workmen’s Compensation Act should he be injured during the performance of duties while in an impressed status?”

Such individual would be entitled to workmen’s compensation from the county or municipality on whose behalf he was called. *Kagel v. Brugger, supra*, p. 6. He might also in special circumstances be entitled to workmen’s compensation benefits from the state if it was determined that he was performing a service growing out of and incidental to his employment by the state. *Butler v. Industrial Commission* (1953), 265 Wis. 380, 61 N.W. 2d 490.

“5. Is the state traffic officer so impressed eligible for hazardous duty benefits under the provisions of Sec. 16.31, Wis. Stats., in any of the above situations?”

The answer to your question is “probably not.” Section 16.31, Stats., as amended by ch. 270, Laws of 1971, provides for continuation of pay without deduction for sick leave or vacation leave credits where certain state employes, including state traffic patrol officers, are injured “while in the performance of his duties,” and other special circumstances exist. See sec. 16.31 (3) (b), Stats. It is doubtful whether a state traffic officer so impressed would be considered to be in the performance of his duties as required by statute.

RWW:RJV

Funds—Public Works—State debt financing of relocation payments under sec. 32.19, Stats., is permissible under the State Constitution.

February 23, 1973.

PAUL L. BROWN, *Director, Bureau of Facilities Management*
Department of Administration

You have requested my opinion as to whether the authority of sec. 518 (1) (k), ch. 125, Laws of 1971, may be exercised under Art. VIII, sec. 7, Wis. Const.

Section 518 of ch. 125, Laws of 1971, is the enumerated or authorized state building program and subsection (1) (k) provides:

“Relocation assistance.
 Projects financed by borrowing.
 General fund supported.
 Relocation assistance \$ 1,000,000
 Total general fund supported
 bonding authority \$ 1,000,000”

Section 7 (2) (a) of Art. VIII, Wis. Const., provides:

“(a) The state may contract public debt and pledges to the payment thereof its full faith, credit and taxing power to acquire, construct, develop, extend, enlarge or improve land, waters, property, highways, buildings, equipment or facilities for public purposes.”

The question presented is whether the payment of relocation costs or benefits constitutes, within the meaning of the above quoted constitutional language, the acquiring, constructing, developing, extending, enlarging or improving land, waters, property, highways, buildings, equipment or facilities for public purposes.¹

¹Before considering the constitutional question, it was felt necessary to consider whether legislation exists to support such debt financing. Appropriate authority was found in reviewing sec. 518, ch. 125, Laws of 1971, subsecs. (ca), (d), (h), (k); sec. 20.866 (2) (z), Stats., and sec. 20.710 (3) (b), Stats. Although necessary legislation exists, it is unfortunate it exists in such a confused manner. It is my personal view that this state of confusion and difficulty will worsen in the future and become unbearable if a more direct and straight forward legislative approach is not devised.

Under the language of sec. 32.19, Stats., it is apparent that the legislature inexorably related relocation benefits to the acquisition of land. The decision in *State ex rel. Bowman v. Barczak* (1966), 34 Wis. 2d 57, 148 N.W. 2d 683, makes it clear however, that the final

authority, as to the validity of legislative conclusions, rests with the court. Any question as to legislative propriety in requiring the payment of relocation assistance benefits, under sec. 32.19, Stats., in the acquiring of lands, has been largely settled by the decision in *Luber v. Milwaukee County* (1969), 47 Wis. 2d 271, 177 N.W. 2d 380. The *Luber* decision concluded that payment for rental loss under sec. 32.19 (4), Stats., was proper under the "just compensation" clause of Art. I, sec. 13, Wis. Const.

Accordingly, it is my opinion that relocation assistance payments are a valid and direct cost of acquiring land. Further, as relocation assistance payments or benefits are a legitimate cost of acquisition, the cost of such payments may be debt financed under the constitutional language previously quoted and particularly that language which reads:

"The state may contract public debt . . . to acquire . . . land . . ."

In considering the question at hand, it seems appropriate to include a caveat as to the nature of state debt financing under sec. 7 (2) (a) of Art. VIII, Wis. Const.

The drafters of the constitutional amendment were well aware of the intent of the legislature to eliminate the system of [state] debt financing through the private, nonstock, nonprofit building corporations. These corporations had been employed to finance state capital expenditures such as the acquisition of lands, the construction of highways, bridges and buildings.²

²As an example of statutory authority for the financing of such capital expenditures, see sec. 36.06, Stats. In a memo to this office, written by a private law firm actively engaged in advising the legislature on the Amendment, it was stated thus: "Debt is permitted for certain stated purposes, all of which are capital in nature and are basically the same as the purposes for which the building corporations now incur debt."

The legislative history behind the enactment of the constitutional amendment allowing state debt shows that it was the intent to restrict debt financing to capital expenditures or in other words, to have the state assume the capital funding operations of the building corporations.

When the question, as to whether the state constitution should be amended, was submitted to the people, an explanatory statement was given under sec. 10.01 (1) (c), Stats. This statement made it clear that the proposed constitutional amendment would preclude future financing of public improvements through the numerous state building corporations. The question as submitted to the people for ratification of the proposed amendment, was similarly worded.³

³Assembly Jt. Res. 1, Laws of 1969.

It was the intent of the legislature, which intent was conveyed to the citizens of this state, that the amendment in question be used for the purpose of funding capital expenditures as distinct from operating expenditures. Accordingly, whenever new debt funding proposals are suggested, care should be exercised to insure that such proposals are for capital expenditures.

RWW:CAB

Law Enforcement—Minors—Confidential Reports—Identification records should be made by local law enforcement agencies of juveniles arrested or taken into custody pursuant to sec. 165.83 (2), Stats., for confidential reporting to the Department of Justice.

February 27, 1973.

GERALD K. ANDERSON, *District Attorney*
Waupaca County

Deputy Assistant District Attorney Terry Rebholz has requested my opinion whether the identification, records and statistics required by sec. 165.83, Stats., should be made and kept for juveniles.

It is my opinion that they should.

Section 165.83 (2), Stats., requires the Law Enforcement Services Division of the Department of Justice to obtain and file fingerprints, descriptions, photographs, and other available identifying data on "persons" who have been arrested or taken into

custody in this state for violation of offenses set forth in subsection (2) (a). Local law enforcement agencies are to cooperate and assist in the establishment of a state system of criminal identification by reason of sec. 165.83 (2) (h) and sec. 165.84, Stats. The latter section requires local law enforcement agencies to secure the information referred to in sec. 165.83 (2), Stats., from each "person" arrested or taken into custody and to report the same to the Department of Justice.

As used in these statutes, the words "person" or "persons" include human beings above and below the age of 18 years. Secs. 48.02 (3) and 990.01 (1), (20), (26), Stats.

The local law enforcement agency and the Law Enforcement Services Division should keep such records separate from records of persons 18 or older and should otherwise comply with the provisions of sec. 48.26 (1) and (2), Stats., which provide:

"(1) Peace officers' records of children shall be kept separate from records of persons 18 or older and shall not be open to inspection or their contents disclosed except by order of the court. This subsection shall not apply to the representatives of newspapers or other reporters of news who wish to obtain information for the purpose of reporting news without revealing the identity of the child involved or to the confidential exchange of information between the police and officials of the school attended by the child or other law enforcement or social welfare agencies or to children 16 or older who are transferred to the criminal courts.

"(2) Juvenile court records shall be entered in books or deposited in files kept for that purpose only. They shall not be open to inspection or their contents disclosed except by order of the court."

The exchange of such information between the local law enforcement agency and the Law Enforcement Services Division is permitted under the "confidential exchange of information" exception in sec. 48.26, Stats. Without order of the court, the records are closed to inspection by the public except as the provisions of sec. 48.26, Stats., permit.

It is my opinion that sec. 48.26, Stats., would not prohibit the local agency or the Law Enforcement Services Division from utilizing the information contained therein in reporting statistical

information to the public which does not disclose the identity of the child or children involved.

RWW:RJV

Salaries and Wages—Labor—Sections 104.01 to 104.12, Stats., inclusive, known as the minimum wage law, do not apply to the state or its political subdivisions as employers.

February 27, 1973.

PHILIP E. LERMAN, *Chairman*

Department of Industry, Labor and Human Relations

You have asked whether I share the opinion of my predecessor, reported at 8 OAG 747 (1919), that the state minimum wage law does not apply to the state or its political subdivisions. This is to advise you that I agree with that opinion.

The minimum wage statutes at the time of that opinion did not specifically include units of government within the definition of an "employer" subject to the law. The same is true under the present definition. Section 104.01 (1), Wis. Stats., provides:

"The term 'employer' shall mean and include every person, firm or corporation, agent, manager, representative, contractor, subcontractor or principal, or other person having control or direction of any person employed at any labor or responsible directly or indirectly for the wages of another."

Other statutes relating to employer-employee relations do specifically include units of government as subject to their provisions. Examples are: safe-place, sec. 101.01 (3); workmen's compensation, sec. 102.04 (1) (a); unemployment compensation, sec. 108.02 (4) (a); and employment relations, secs. 111.70 (1) (a) and 111.80, Stats. In addition, I note that Wisconsin's prevailing wage law in certain public construction is specific as to which units of government are subject to its terms. Sections 66.293 (3) (b), 103.49 (1) and 103.50 (1), Stats.

The older rule was that general statutes which do not, "either expressly or by necessary implication," refer to the state or a municipal corporation do not bind these governmental units. *State v. Milwaukee* (1911), 145 Wis. 131, 135, 129 N.W. 1101. Also see *Sandberg v. State* (1902), 113 Wis. 578, 589, 89 N.W. 504; *Milwaukee v. McGregor* (1909), 140 Wis. 35, 37, 121 N.W. 642; *Sullivan v. School District* (1923), 179 Wis. 502, 507, 191 N.W. 1020; *Necedah Mfg. Corp. v. Juneau County* (1932), 206 Wis. 316, 322, 237 N.W. 277.

More recent decisions have tightened the rule to be that statutes of general application "do not apply to the state unless the state is explicitly included by appropriate language." *State ex rel. Martin v. Reis* (1939), 230 Wis. 683, 687, 284 N.W. 580. See also *Sehlin v. State* (1950), 256 Wis. 495, 500, 41 N.W. 2d 596; *Konrad v. State* (1958), 4 Wis. 2d 532, 538-539, 91 N.W. 2d 203; *Kenosha v. State* (1967), 35 Wis. 2d 317, 323, 151 N.W. 2d 36. See also 82 C.J.S., Statutes, §317.

This general rule of construction must yield, however, to overriding federal interests. *Plumbers Local 298 v. County of Door* (1959), 359 U.S. 354, 359, 79 S.Ct. 844, 847, 3 L.ed. 2d 872, reversing *Door County v. Plumbers Local 298* (1958), 4 Wis. 2d 142, 89 N.W. 2d 920. I have not found any federal law which overturns this construction as applied to the minimum wage law.

In fact, the recent decision of the United States Supreme Court in *United Federation of Postal Clerks v. Blount* (1971), 404 U.S. 802, 92 S.Ct. 80, 30 L.ed. 2d. 38, supports the right of the government to exclude public employes from the benefits of the minimum wage law. In that decision, the Supreme Court affirmed without opinion a lower court holding, (D.C. D.C. 1971), 325 F.Supp. 879, 883, that it is not an Equal Protection violation to deny federal public employes the right to strike while allowing employes in private industry the right to strike. The right to strike is of statutory origin, and is not a constitutional right. In the area of economics and social welfare the state may make a classification which results in some inequality if the classification has "some" reasonable basis. *Dandridge v. Williams* (1970), 397 U.S. 471, 485, 90 S.Ct. 1153, 25 L.ed. 2d 491. This principle applies to Wisconsin's minimum wage law because the right to a minimum wage is not

such a "fundamental right" as to require a stricter standard of review. *Bastardo v. Warren* (W.D. Wis. 1971), 332 F. Supp. 501, 503. Thus, since the government has the power to deny public employes the right to strike, and since the right to a minimum wage is not more sacrosanct than the right to strike, it follows that public employes can constitutionally be denied the benefits of the minimum wage law.

I conclude that the minimum wage law is not applicable to the state or its political subdivisions as employers within the meaning of sec. 104.01 (1), Stats. While it may be urged that employes of government are entitled equitably to protection in respect to minimum wages, absent any conflict with federal law or constitutional principles the matter is one of policy for the legislature.

RWW:CDH

Taxation—Mill rate limitations on local taxing authorities provided in secs. 60.18 (1), 61.46 (1), 62.12 (4) and 65.07 (1) (a) and (f), Wis. Stats., apply to assessed values which do not exceed full values.

March 5, 1973.

EDWARD A. WIEGNER, *Secretary*
Department of Revenue

You have requested my opinion "on whether the mill rate limitations imposed on the levying of property taxes by towns, villages and cities by secs. 60.18 (1), 61.46 (1), 62.12 (4) and 65.07 (1) of the Statutes apply to local assessed values or to full values."

It is my opinion that these mill rate limitations apply to local assessed values which do not exceed full values.

It is a matter of common knowledge that in nearly every municipality in the State of Wisconsin property is assessed for tax purposes based upon a valuation lower than its full value.

As early as 1862 the Supreme Court of the State of Wisconsin recognized the practice when it observed in *Dean v. Gleason* (1862), 16 Wis. 1, at p. 18:

“It is further objected that the assessors, before making their lists, agreed to follow the assessment roll of the previous year, in which property was rated at about one-third of its value. It is a notorious fact that this has been the common practice of the assessors in this state; and that property has usually been assessed in tax lists at less than half of the value at which it would generally be estimated. . . .”

The first bulletin of the Wisconsin Tax Commission dated January, 1921, published financial statistics of Wisconsin municipalities. In explaining a table attached to the bulletin, the Tax Commission stated:

“The first column to the right shows 1920 assessed value of all property in each city according to the latest reports of assessors of income. The ratio of assessed to true value (second column) is based on the true value of 1919—one year.”

In *Peninsular Power Co. v. Wisconsin Tax Commission* (1928), 195 Wis. 231, 218 N.W. 371, the court said at p. 235:

“While the law requires local assessors to assess the property of their respective assessment districts at its true cash value, it has long been a matter of common knowledge that they do not do so. . . .”

And at p. 236:

“. . . But the law really proceeds on the theory that the assessor may not be faithful to the mandate of the statute in assessing property at its full cash value, and the assessor of incomes is required to test the assessment of the various assessors in his district. . . .”

The assessor's oath is found in sec. 70.49, Wis. Stats., and recognizes that property is not assessed at full value in view of the following language incorporated into the oath:

“. . . that the valuations of real and personal property as set down by us (or as corrected by the board of assessors in cities of the 1st class) in said roll have been made impartially according to our

best skill and judgment and are the just and equitable valuations of such property at a per cent level of fair market value; . . ."

It is somewhat paradoxical that ch. 433, Laws of 1969, which amended the assessor's oath by adding the phrase, "at a . . . per cent level of fair market value," also provided in sec. 1 as part of its "Statement of Policy and Purposes" in the creation of a state-wide county tax assessor system, the following: "(2) That all property should be assessed at full market value." The legislature thus recognized within the terms of one act the practical reality that locally assessed property valuations were a percentage of full value, although the desired intent was to assess property at 100 percent of full value.

Although it was not originally intended, the terms "assessed values" and "full values" have acquired different meanings. "Assessed valued" are those values as of May 1 of each year placed by local assessors upon all taxable general property located within their various taxing districts. Assessed values are not likely to represent the full values of these properties. "Full values" represent the actual market values, and are determined by the Department of Revenue each year under sec. 70.57, Wis. Stats. That section had its origin in sec. 4 of ch. 130 of the Laws of 1868 which created a State Board of Assessment and directed it, *inter alia*, to determine the relative value of all taxable property in each county, which valuation was required to "be the full value according to their best judgment."

Assessment ratios are determined for each town, village and city by dividing their assessed values by their full values. Assessment ratios indicate the average percentages of full values at which all taxable general property was valued by local assessors for property tax purposes. These ratios vary substantially, ranging from lows of around 20 percent to a few highs which exceed 100 percent, as reported in the "Town, Village and City Taxes—1971" publication of the Wisconsin Department of Revenue. The reported 1971 assessment ratio for the entire State was 60.56 percent.

Over the years the legislature has required local assessors to assess real property "at the full value which could ordinarily be obtained therefore at private sale," as presently set forth in sec. 70.32, Wis. Stats. Similarly, sec. 70.34, Wis. Stats., requires that "all articles of personal property shall, as far as practicable, be

valued by the assessor upon actual view at their true cash value; . . . ” Sections 70.32 and 70.34 find their origins in secs. 16 and 18, ch. 130, General Laws of 1868. Section 16 required that real property shall be valued “at the full value which could ordinarily be obtained therefor at private sale.” Section 18 relates to the assessment of personal property, and the first reference to personal property being assessed at its “true cash value” is found in sec. 1 of ch. 106 of the General Laws of 1869.

Thus, for over 100 years the statutes have provided that real property be assessed at “full value” and personal property be assessed at “true cash value”, terms which are synonymous. In *State ex rel. Baker Mfg. Co. v. Evansville* (1952), 261 Wis. 599, 53 N.W. 2d 795, the court, after referring to the language in secs. 70.32 and 70.34, Wis. Stats., said at pages 608 and 609:

“ . . . In each class of property they presuppose a value at which a willing buyer and a willing seller would deal. . . . In our view the command of sec. 1, art. VIII of the Wisconsin constitution, requires uniformity of taxation, according to value, of real and personal property without distinction. The methods of determining true, current value necessarily differ in the absence of significant sales, but when once the true value is arrived at, each dollar’s worth of one sort of property is liable for exactly the same tax as a dollar’s worth of any other sort of property, and to assess real property at a different fraction of the value than personalty is error. . . . ”

The *Baker* case, *supra*, is particularly significant for saying at p. 609:

“ . . . The statute and the assessor’s oath contemplate the assessor’s valuation will be 100 per cent of such theoretical sale price, but no taxpayer can be considered aggrieved by discrimination if the assessment is some fraction of such value, applied uniformly to all property ”

Thus, although the court has acknowledged the legislative intent that assessed value should be 100 percent of full value, the practice of assessed value being a uniform fraction of full value has been condoned, at least to the extent of not violating the uniformity clause of Art. VIII, sec. 1, of the Wisconsin Constitution.

The Wisconsin Supreme Court has never addressed itself to the question of whether assessed value must be 100 percent of full value for mill rate limitation purposes.

The practice of placing an assessed value at only a fraction of full value developed probably because of the psychological effect upon taxpayers created by low valuations. Taxpayers seem to be more concerned about valuations than rates, although there is a growing awareness of the latter as taxpayers become better informed. Contrary to most other forms of taxation, property tax rates are variable within certain limitations. Often an assessor's task was made easier simply by leaving valuations virtually untouched, and adjusting the rate upwards to obtain the needed revenues. It is interesting to note that one of the few periods during which assessment ratios were closer to 100 percent of full value was during the depression years of the 1930's when assessed valuations were left virtually untouched while the fair market value of property was declining.

An examination of the four sections of the statute to which your inquiry makes specific reference discloses that the limitations imposed by the legislature are based upon assessed values.

Section 60.18 (1), Wis. Stats., provides for a limitation not to exceed "one per cent of the assessed valuation of such town." Limitation language upon town assessing authority relating to a percentage of assessed valuation appeared early in sec. 776 of the 1898 Revised Statutes.

Section 61.46 (1), Wis. Stats., provides for a limitation not to exceed "two per centum of the *assessed valuation* of such property." Limitation language upon village assessing authority relating to a percentage of assessed valuation appeared early in sec. 914 of the 1878 Revised Statutes.

Section 62.12 (4), Wis. Stats., provides for limitations upon cities not of the first class not to exceed designated percentages "of the *assessed value* of the real and personal property in the city." Limitation language upon the assessing authority of cities not of the first class relating to a percentage of assessed value appeared early in ch. 199, Laws of 1895.

Sections 65.07 (1) (a) and (f), Wis. Stats., provide for limitations upon the assessing authority of the City of Milwaukee not to exceed designated percentages of the assessed valuation of the taxable property in the city. These limitations had their origin in sec. 2 of ch. 33, Laws of 1921, and in ch. 581, Laws of 1921.

Accordingly, the legislature has consistently provided over a number of years for the mill rate limitations to be applied to assessed values and assessed valuations. Your concern is whether these mill rate limitations applying to assessed values and assessed valuations apply to the actual assessed values as determined at the local level or to full values, such as those which are determined by the Wisconsin Department of Revenue under sec. 70.57, Wis. Stats., and those few municipalities which may be assessing at 100 percent of full value.

An observation concerning a somewhat analogous situation is appropriate at this point.

In 1955, Art. XI, sec. 3 of the Wisconsin Constitution was amended so that the limitation on indebtedness of school districts and cities authorized to issue bonds for school purposes was required to be based on the value of taxable property in such school district or city as equalized for State purposes.

After the 1955 amendment the relevant phrase of this section, with the new language underscored, reads:

“. . . No county, city, town, village, school district, or other municipal corporation shall be allowed to become indebted in any manner or for any purpose to any amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained, other than for school districts, by the last assessment for state and county taxes previous to the incurring of such indebtedness and for school districts by the value of such property as equalized for state purposes: except that for any city which is authorized to issue bonds for school purposes the total indebtedness of such city shall not

exceed in the aggregate eight per centum of the value of such property as equalized for state purposes; the manner and method of determining such equalization for state purposes to be provided by the legislature. . . ."

The question put to the voters was:

"Shall section 3 of article XI of the constitution be amended so that the limitation or the indebtedness of school districts and cities authorized to issue bonds for school purposes shall be based on the value of the taxable property in such school district or city as equalized for state purposes rather than on the local assessed value of such property, such method of determining equalized value for state purposes to be provided by the legislature?"

The constitutional limitation imposed by the phrase "last assessment for state and county taxes previous to the incurring of such indebtedness" was interpreted by the Wisconsin Supreme Court in *State ex rel. Marinette, T. & W. R. Co. v. Tomahawk Common Council* (1897), 96 Wis. 73, 91, 92, 93, 71 N.W. 86, as follows:

". . . We think, therefore, that by the 'last assessment for state and county taxes previous to the incurring of the indebtedness' is intended the last assessment in the municipality, as equalized by its board of review, next before the time fixed for the completion of the road and the delivery of the bonds. The record does not give this date, but as the road was to be completed by December 1, 1895, it is a fair inference from the pleadings and finding that it was completed by that time. The assessment intended by the constitutional provision is the assessment of the town, city, or village, as equalized by its board of review, made for the purposes of general taxation, and there is no other assessment, within the meaning of this provision, 'for state and county taxes.' The so-called 'state assessment' is made on the third Monday of May, before the local assessments are made, and 'from all the sources of information accessible to the board, as a means of apportioning state taxes between the several counties.' A valuation of the property in the several counties is thus arrived at R. S. sec. 1069. At the annual meeting of the county board in November, the local assessments, having been completed in the meantime, with statistical statements, are laid before the county board, and it is then 'to determine and

assess the *relative* value of all the taxable property in each town, city, and village,' as a means of apportioning the state and county taxes between such towns, cities and villages; but the taxes therein are computed and extended upon the local assessments, as determined by the local assessors and boards of review. The object of the provision, by which resort is to be had to the 'last assessment for county and state taxes,' is to prevent a resort to special assessments, which the legislature might authorize for the purposes contemplated in the amendment only, and as a safeguard against possible evasion of its true intent and purpose. There is no assessment distinctively made for county taxes, nor any distinctively made for state taxes, in any other sense than has been stated; and to hold that there are such would be to render the provision indefinite and uncertain as to which so-called 'assessment' was intended. The last assessment of the town, city, or village as fixed by the local board of review, upon which county and state taxes may be extended, as well as local taxes, is clearly the assessment intended."

The court reaffirmed this interpretation in *School District v. First Wisconsin Co.* (1925), 187 Wis. 150, 152, 203 N.W. 2d 939. The court in that case held that the words "equalized assessment" referred to in sec. 67.04 (1), Stats., meant the assessment as fixed, corrected or equalized by the local board of review. The wording of that section was amended by ch. 157, Laws of 1963, so that the reference to the value of taxable property in a municipality for municipal borrowing purposes referred "to such value as equalized for state purposes" instead of "to such value according to the last assessment thereof for state and county taxes."

Thus, for municipal borrowing purposes, the limitation has been changed from what amounts to "assessed value" to what amounts to "full value."

Although the wording is somewhat different, it is difficult to distinguish "assessed value" from "last assessment for state and county taxes." It is likewise difficult to distinguish "full value" from "value as equalized for state purposes," particularly in view of the wording of sec. 70.57 (1), Wis. Stats., which requires the state to value all property at "full value according to its best judgment."

The last session of the legislature supplied additional evidence of the continuing differences in the meanings of "assessed value" and

“full value.” Although this legislation was not enacted into law, it is significant that sections 74 through 78 of 1971 Assembly Bill 1477 (the proposed Budget Review Bill) proposed that property tax rate limitations be applied to full value rather than assessed value. Similar language was found in Assembly Substitute Amendment 2 to Assembly Bill 1477. The final Budget Review Bill, Assembly Bill 1610, which was adopted as ch. 215, Laws of 1971, did not include these proposed changes. The “Section by Section Summary of Assembly Bill 1477, Assembly Substitute Amendment 2 to Assembly Bill 1477, and Assembly Bill 1610,” prepared by the Wisconsin Legislative Fiscal Bureau, dated March 8, 1972, stated at pages 44-45:

“3. Property Tax Mill Rate Limits

“a. AB1477—Sections 74-78 change the mill rate limit in cities and villages on taxes for municipal purposes as follows:

“1. The village limit is changed from 2% of assessed value to 16 mills on the full value of taxable property.

“2. The city limit is changed from 3.5% of assessed value to 16 mills on the full value of taxable property.

“3. The Milwaukee limit is changed from 11 mills on assessed value to 16 mills on full value, but the 16 mill limit is more inclusive in coverage.

Debt service and school costs are excluded from the new limits, which become effective January 1, 1973.

“b. Assem. Sub. Amend. 2—Sections 74-78 changed to provide, in addition to the above, for the exclusion of municipal retirement program costs from the 16 mill tax rate limit for municipal purposes and allow municipalities above the 16 mill limit for municipal tax purposes in 1972 to maintain their 1972 tax rate for municipal purposes as their limit.

“c. AB1610—Provisions included, but the 8 mill limit on cities for taxes levied for school purposes is deleted.”

In the Senate, 1971 Senate Bill 14 proposed that the following sentence be included as a part of sec. 70.32 (1), Wis. Stats.:

“Full value of each parcel of real property shall be entered upon the assessment roll and no fraction, ratio or proportion of such full value shall be deemed to satisfy this requirement.”

and that this sentence be included as a part of sec. 70.34, Wis. Stats.:

“True cash value of all personalty shall be entered upon the assessment roll and no fraction, ratio or proportion of such true cash value shall be deemed to satisfy this requirement.”

In conclusion, it is my opinion that the mill rate limitations in secs. 60.18 (1), 61.46 (1), 62.12 (4) and 65.07 (1) (a) and (f), Wis. Stats., apply to assessed values which do not exceed full values. Nothing would prevent local assessing authorities from increasing their effective mill rate limitations by valuing their taxable property at 100 percent of full value, as the statutory scheme originally intended. Any concern over this conclusion placing a stricter limitation upon local assessing authorities than was originally intended by the legislature is countered by the observation that such a concern is easily removed if local assessing authorities would make property assessment valuations equal to full values, as was also originally intended by the legislature. Those towns, villages and cities which may find themselves at the limits of their taxing authorities should not be heard to complain that the statutory mill rate limitations are preventing them from raising additional needed revenues when their assessed values are being entered on their local assessment rolls at less than 100 percent of full values.

RWW:APH

Compatibility—Regulation and Licensing, Department of—A member of a licensing board is not, as a matter of law, precluded from holding membership in or acting as an officer of a private professional society or association.

March 5, 1973.

LILLIAN M. QUINN, *Deputy Secretary*
Department of Regulation and Licensing

You request my opinion whether the public office held by a member of a board which licenses and regulates a particular profession and the position of an officer in a private professional association organized to advance the interests of the regulated profession are incompatible so as to preclude one person from holding both positions at the same time.

Your inquiry does not raise a question as to incompatibility of offices. Strictly speaking the doctrine of incompatibility applies only where two or more *public offices* are concerned.

As stated in 58 OAG 247:

“Public offices may be made incompatible by statute or they may be incompatible according to well-settled principles of common law. In some instances, offices which appear to be incompatible because of a possible conflict of duties or power of one over the other as to appointment, supervision, and pay, may be designated as compatible by statute.

“Public policy requires, that an office holder discharge his duties with undivided loyalty, therefore, in general terms, two offices are incompatible if there is a conflict of interest or duties, so that the incumbent of one office cannot discharge with fidelity and propriety the duties of both. Incompatibility is not simply a physical impossibility to discharge the duties of both offices at the same time, but is an inconsistency in the functions of the two offices. This might arise, for example, where one office is subordinate to the other, or where a contrariety and antagonism would result in the attempt by one person to discharge faithfully and impartially the duties of both.”

A person cannot be a public officer, however chosen, unless there is devolved upon him by law the exercise of some portion of the sovereign power of the state in the exercise of which the public has a concern, and such powers and duties must be performed independently and without the control of a superior authority other than the law.

Martin v. Smith (1941), 239 Wis. 314, 1 N.W. 2d 163

Barton v. State Appeals Board (1968), 38 Wis. 2d 294, 301, 156 N.W. 2d 386

63 Am. Jur. 2d, Public Officers and Employees §3, pp. 627, 628.

A member of a licensing board would in most cases be a public officer. An officer or director of a private non-profit professional association would not be a public officer. There may be special circumstances, such as in the case of the State Bar of Wisconsin, where a professional association does exist as a state agency. See sec. 257.25, Stats., 48 OAG 30 (1959). Your department has no program responsibilities with respect to the licensing or supervision of attorneys.

By reason of sec. 15.40, Stats., your department does have *limited* program responsibilities with respect to some fourteen examining boards or licensing agencies set forth in sec. 15.401, Stats. However, just as questions relating to compatibility of public officers should refer to specific offices so that a detailed comparison of the statutes involved and respective duties of the offices can be made, questions relating to conflicts of interest and qualifications for office should be framed to restrict inquiry to the offices or positions particularly involved.

You direct our attention to the following statements of general law in 63 Am. Jur. 2d, Public Offices and Employees:

“It is the duty of public officers to refrain from outside activities which interfere with the proper discharge of their duties. Within reasonable limits * * * the legislature has power to ascertain and declare what activities are inconsistent with the proper performance of public duties.” §280, p. 794.

“A public officer has an undivided duty to the public whom he serves, and is not permitted to place himself in a position which will subject him to conflicting duties or expose him to the temptation of acting in any manner other than in the best interests of the public.” §281, p. 794.

You also cite *State ex rel. Wis. Bd. of Architects and Professional Engineers v. T.V. Engineers of Kenosha, Inc.* (1966), 30 Wis. 2d 434, 438, 141 N.W. 2d 235 which states:

“This statute [sec. 101.31] 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.”

While the above statements of law are applicable to conflict of interest and eligibility for public office questions, they do not necessarily support your apparent feeling of irreconcilable conflict between duties as officer on a licensing board and duties as officer of a private professional society.

Your letter states:

“The role of the private professional society or association in the regulating function is ambiguous and has been seen by some, as opposed to the best interests of the public, especially those attempts at the establishment of unduly restrictive experience and educational requirements in the licensing procedure and at incorporating into administrative rules, certain standards and particular interests of the private society or association.”

The legislature has not expressly provided that officers of private professional societies or associations are ineligible to serve on examining boards. Section 946.13, Stats., does prohibit public officers from having a private pecuniary interest in certain contracts and may be applicable in some situations. In case of such conflict the public officer may be able to avoid violation of the statute by abstention. A public officer may be able to avoid other conflicts not expressly prohibited by law in the same manner. He could, of course, resign from either office if a serious conflict arose. As a public officer, his primary duty is always to the public; however, it is often a question of fact as to what the public interest is, and the professional interest of the public officer may in many cases be compatible with the public interest.

The interest of a given professional society in promoting the interests of its trade or profession may be concurrent or compatible with the duty of an examining board as expressed in sec. 15.08 (6) which provides:

“15.08 (6) IMPROVEMENT OF THE PROFESSION. In addition to any other duties vested in it by law, each examining board shall foster the standards of education or training pertaining to its own trade or profession, not only in relation of the trade or profession to the interest of the individual or to organized business enterprise, but also in relation to government and to the general welfare. Each examining board shall endeavor, both within and

outside its own trade or profession, to bring about a better understanding of the relationship of the particular trade or profession to the general welfare of this state.”

The legislature has required that all or a majority of the members of most examining boards be licensed thereunder. See sec. 15.405, Stats.

Conduct adverse to the public interest may be arbitrary and capricious and result in actions subject to reversal by court review; however under present law it would not cause a vacancy in office nor compel removal by the appointing authority for cause. See secs. 17.07 (2), 17.16 Stats. Questions of ethics may also be involved where a member of a licensing board also serves as an officer of a private professional society. In most cases it should raise no greater conflict where the member of the licensing board is an officer of a private professional society than where he is merely a member of a private professional society. Membership in professional societies is encouraged by the legislature through tax benefits and, in some cases, special statutes. See secs. 148.01, 148.02, 447.11, 447.12, Stats. In case of the State Bar, membership is compulsory. Sec. 256.25, Stats.

In general it can be said that, absent specific statutes, matters of qualifications for members of examining boards are for the appointing authority and legislature, where its advice and consent is required. Such authorities could make inquiry of nominees or potential nominees of all areas of potential conflicts of interest including membership in or offices held in a private professional society.

I am of the opinion that a member of a licensing board is not, as a matter of law, precluded from holding membership in or acting as an officer of a private professional society or association.

RWW:RV

County Board—Indigent—A county board supervisor risks violations of sec. 946.13, Stats., where he is appointed counsel for indigent defendants and fees exceed \$2,000 per annum.

March 12, 1973.

RAY A. SUNDET, *Corporation Counsel*
La Crosse County

You have requested my opinion with respect to possible conflict under sec. 946.13, Wis. Stats., where a county board supervisor is appointed to represent indigent defendants and annual remuneration for such services exceeds \$2,000.00.

I am of the opinion that there is probable violation of sec. 946.13, Stats., in such case.

An attorney appointed to represent an indigent is probably an independent contractor rather than a county employe; and the provisions of sec. 59.03 (3), Stats., which provide that no county officer or employe is eligible to the office of supervisor, would not apply.

In 28 OAG 58 (1939), it was stated that under then sec. 348.28, Stats., a county supervisor could not perform dental services for indigents where the services were approved in advance by the welfare department and the bill for services was ultimately paid out of the children's aid fund which in part was created by the appropriations by the county board.

Section 348.28, Stats. (1937), was more strict than present sec. 946.13, Stats., and the annual monetary exemption was much smaller.

Compensation of counsel for indigents is provided for pursuant to secs. 256.49 and 967.06, Stats. The court appoints the attorney and fixes his compensation. "The certificate of the clerk shall be sufficient warrant to the county treasurer to make such payment." The court determines the reasonableness. *State v. Kenney* (1964), 24 Wis. 2d 172, 128 N.W. 2d 450. The county is liable for such fees. *State v. Welter* (1963), 19 Wis. 2d 599, 120 N.W. 2d 671.

The county board has the ultimate responsibility of appropriating the necessary funds. If the fund in the budget approved by the county board is not sufficient, the board would have to augment it. It is also noted that sec. 256.66, Stats., provides discretion in the county board as to whether there shall be attempted recovery of legal fees paid for indigent defendants. There

is a possible conflict as between the attorney's duty to his client and his duty to the county on such an issue.

If the county supervisor were to vote on such measures, there would be probable violation of sec. 946.13 (1) (a), Stats., and possible violation of sec. 946.13 (1) (b), Stats., where the amounts of the contracts exceeded \$2,000.00 in any one year.

In *Heffernen v. City of Green Bay* (1954), 266 Wis. 534, 542, 64 N.W. 2d 216, it was held that it was immaterial that the officer abstained from voting on the contract in question.

In 52 OAG 367, 370 (1963), it was stated that since adoption of the new criminal code, abstention from voting may avoid violation of sec. 946.13 (1) (b), Stats., but it is questionable whether it would avoid violation of sec. 946.13 (1) (a), Stats., if the other elements could be proven.

RWW:RJV

Forests—Condemnation—County lands are not subject to condemnation by a town absent express statutory authority authorizing such condemnation.

March 16, 1973.

DANIEL J. MIRON, *District Attorney*
Marinette County

You have requested my opinion as to whether a town board in laying out a highway under sec. 80.02 or sec. 80.13, Wis. Stats., may acquire by condemnation county lands entered under sec. 77.13 (1) (1961), Stats. This section provided, prior to its repeal in 1963, that:

“Any county which has title to any lands eligible to registration as forest crop lands shall be deemed an owner as this term is used in this chapter and may register and withdraw such lands under the provisions of this chapter in the same manner and on the same basis as other owners, except that any such county shall not be required to pay the acreage share prescribed in section 77.04 and the real estate

tax prescribed in section 77.10 (2) on any of its lands registered as forest crop lands.”

Section 28.11 (2), Stats., provides:

“ ‘County forests’ include all county lands entered under and participating under ch. 77 on October 2, 1963, and all county lands designated as county forests by the county board or the forestry committee and entered under the county forest law and designated as ‘county forest lands’ or ‘county special-use lands’ as hereinafter provided.”

The registration of county lands, as forest crop lands under former sec. 77.13, Stats., did not affect their status as county lands. Accordingly, it appears that your question is basically whether the town board has the power to acquire by condemnation any county land.

Section 32.03 (1), Stats., provides in part:

“The general power of condemnation conferred in this chapter does not extend to property owned by the state, a municipality, public board or commission, nor to the condemnation by a railroad, public utility or electric co-operative of the property of either a railroad, public utility or electric co-operative unless such power is specifically conferred by law”

In 30 OAG 266 (1941), the opinion was expressed, by implication, that the term “municipality,” as used in sec. 32.03 (1), Stats., includes within its meaning counties as used in sec. 32.02 (1), Stats. In *State ex rel. Schneider v. Midland I.&F. Corp.* (1935), 219 Wis. 161, 262 N.W. 711, the court was concerned with an entirely different subject matter, but held the term “municipality” to be sufficiently broad to include counties. In 47 OAG 270 (1958), this office expressed the opinion that the term “municipality,” as used in sec. 32.03 (1), Stats., includes a county. In this same opinion, the conclusion was reached that under sec. 32.03 (1), Stats., a city of the fourth class may not condemn county property for a city sewage disposal plant. Following this opinion, the legislature in ch. 639, Laws of 1959, repealed and recreated ch. 32, Stats., without changing the provisions of sec. 32.03 (1), Stats. Under this circumstance, the opinion of this office is entitled to considerable

weight. *Wisconsin Valley Imp. Co. v. Public Serv. Comm.* (1959), 9 Wis. 2d 606, 101 N.W. 2d 798.

The opinion expressed in 47 OAG 270, was based, in part, on *Chicago & N. W. R. Co. v. Racine* (1929), 200 Wis. 170, 227 N.W. 859. In this case, the city of Racine was attempting to condemn the land of a railroad company. The court held on page 173:

“The appellant relies principally upon the general proposition that land devoted to one public purpose may not be condemned for another public purpose in absence of express statutory authority therefor, and urges that there is no statute in Wisconsin conferring power on cities to take railway property for street purposes. This is too broad a statement of the rule. A more correct statement is that a city may not condemn such property unless there be express statutory authority or such authority appears by necessary implication, and the rule is subject to the further modification that such property may be taken if it can be taken without destroying or materially impairing the use of the property for the existing public use. 20 Corp. Jur. pp. 611, 612; 13 Ruling Case Law, p. 44. Under our statute the power exists by necessary implication; and here the company’s use of the property will not be destroyed or very much interfered with. The general power of cities to condemn land is expressed by sec. 32.02 (1). *Sec. 32.03 names the kinds of property expressly excluded from condemnation* by cities, and does not name railroad property. Just as naming the kinds of property that may not be taken by towns for road purposes by necessary implication renders all other kinds of property subject to be so taken, as said in *Smith v. Gould*, 59 Wis. 631, 643, 18 N.W. 457, so here, by necessary implication, railroad property may be so taken by a city. . . .” (Emphasis supplied)

Accordingly, I am of the opinion that absent express statutory authority to the contrary, a town may not condemn county land.

RWW:CAB

Veterans—In making housing loans under sec. 45.352, Stats., the department may rely on fixed standards as to the applicant’s needs.

When applications on hand exceed available funds, loans should be made to the most needy applicants.

March 21, 1973.

JOHN R. MOSES, *Secretary*
Department of Veterans Affairs

You have requested my opinion as to whether your Department under sec. 45.352 (2) (b), Wis. Stats. (1969), may continue to make housing loans on the basis of certain predetermined standards as to need until such time as the housing loan fund is exhausted or whether you are required to institute progressively stringent need requirements in advance of the anticipated exhaustion of funds.

Section 45.352 (2) (b), Stats., provides in part:

“* * * If the department determines that the applications for loans exceed the funds available, the department shall give priority to the most necessitous cases and take all action necessary to spread the available funds among the maximum possible number of veterans.”

Section 45.352 (2) (a), Stats. (1969), provides that such loans are available to any veteran who establishes his qualifications and right to such a loan under the section. The broad language of sec. 45.352 (2) (a), Stats., would seem to imply that such loans are available to veterans regardless of their financial resources or position, and this would seem to be especially true when one considers that the statutory standards set forth in sec. 45.352 (4), Stats. (1969), do not contain any criterion as to need.

It is a general principle of law that clear and unambiguous statutes are not subject to interpretation, and the language in such statutes must be given its ordinary and accepted meaning. *City of West Allis v. Rainey* (1967), 36 Wis. 2d 489, 153 N.W. 2d 514.

Accordingly before one may engage in interpretation of a statute, it is necessary to determine whether the language is reasonably capable of different meanings.

In my opinion, the section is ambiguous for the previously discussed statutory language, as to the granting of loans, is subject to the condition set forth in sec. 45.352 (2) (a), Stats., which

requires the department to give "due regard to the conditions and requirements of the applicant." This language could reasonably be construed to include the financial condition or needs of the applicant. Then too, the phrase "most necessitous cases" as contained in sec. 45.352 (2) (b), Stats. (1969), would seem to imply a condition of need in all cases and when applications exceed funds, comparative need is to be the standard. If the section were to be interpreted without regard to need in the making of loans, then the term "most" would be redundant. Statutes are to be construed so as to give force and effect to every word if at all possible, *Garfield v. United States* (1969), 297 F.Supp. 891.

It is my understanding that for a considerable period the department has in its administration of sec. 45.352, Stats. (1969), given consideration to the financial situation or need of the applicant. Administrative interpretation is entitled to great weight, *State v. Fischer* (1962), 17 Wis. 2d 141.

You now ask whether it is necessary under the law to anticipate exhaustion of the loan fund and to apply the standard of "most necessitous cases" prior to the time when applications exceed the fund. From a practical view it is possible to anticipate exhaustion of the loan fund. It would, however, seem to me to be impossible to anticipate the "most necessitous cases."

The preceding discussion expressed the opinion that it was proper to consider the financial status or needs of the applicant in the administration of the loan fund. This opinion is consistent with the express language of sec. 45.352 (2) (b), Stats. (1969), which requires consideration of the "most necessitous cases" only when applications exceed the fund.

Under subsection (3) applications are made to the department. The language of subsection (2) (b) is express and to the point in providing that when applications exceed the loan fund consideration is to be given to the "most necessitous cases." If the legislature had intended the department act in anticipation of a shortage, it would not have limited consideration of the "most necessitous cases" to that point in time when applications on hand exceed available funds.

In 40 OAG 302 reference was made to the administration of sec. 45.352 (2) (b), Stats. The issue discussed was not the identical question presently under consideration.

Notwithstanding the remarks in 40 OAG 302 it is my opinion under sec. 45.352, Stats., the housing loan must be administered on the basis of fixed standards of need until such time as applications actually on hand exceed the funds available. The department has the responsibility to determine when applications actually exceed the fund. When this determination is made by the department, the department is obligated by sec. 45.352 (2) (b), Stats. (1969), to compare the respective needs of the applicants and to administer the fund on the basis of the "most necessitous cases."

RWW:CAB

*Workmen's Compensation—Employer and Employee—*Payment of the "supplemental benefit" of sec. 102.44 (1), Wis. Stats., as created by ch. 148, Laws of 1971, is not precluded to former state employes by Art. IV, sec. 26 of the Wisconsin Constitution. The "second injury fund" is not impressed with a constructive trust which prevents its use for payment of such "supplemental benefits."

March 29, 1973.

JOE E. NUSBAUM, *Secretary*
Department of Administration

You request my opinion on two questions regarding sec. 102.44 (1), Stats., created by ch. 148, Laws of 1971. Such section provides a "supplemental benefit" to individuals receiving workmen's compensation benefits for total disability resulting from injury occurring prior to February 1, 1970.

New sec. 102.44 (1), Stats., reads in material part:

"102.44 (1) Notwithstanding any other provision of this chapter, every employe who is receiving workmen's compensation under this chapter for a total disability resulting from an injury which occurred prior to February 1, 1970, shall receive supplemental

benefits which shall be payable in the first instance by the employer or his insurance carrier. These supplemental benefits shall be paid only for weeks of disability occurring after the effective date of this subsection (1971) and shall continue during the period of such total disability subsequent to that date.

“* * *

“* * *

“(c) The employer or insurance carrier paying the supplemental benefits required under this subsection shall be entitled to reimbursement for each such case from the fund established by s. 102.59, commencing one year from the date of the first such payment and annually thereafter while such payments continue. Claims for such reimbursement shall be approved by the department.”

You state your first question as follows:

“We request your opinion as to whether or not the supplemental benefit provided for under s. 102.44 (1) is in conflict with Article IV, Section 26, of the Wisconsin Constitution.”

Article IV, sec. 26, Wis. Const., reads in part:

“The legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract entered into; * * *.”

The principal question is whether the “supplemental benefits” under sec. 102.44 (1), Stats., is “compensation” within the meaning of this constitutional provision in those instances when supplemental benefits might become payable to “any public officer, agent, servant or contractor.” The answer to this question depends largely on the purpose of the “supplemental benefits” since the constitutional prohibition only strikes down extra compensation for the rendition of services or the performance of a contract.

An examination of sec. 102.44 (1), Stats., reveals that the “supplemental benefits” are in the nature of workmen’s compensation payments for total disability. The Wisconsin Supreme Court has specifically held that the liability of an employer to an employe under the Workmen’s Compensation Act is

not contractual in nature. In *Val Blatz Brewing Co. v. Industrial Comm.* (1930), 201 Wis. 474, 478, 230 N.W. 622, the court stated:

“Liability under the workmen’s compensation act is, strictly speaking, neither tortious nor contractual in its nature. It is an obligation imposed by law which arises out of the status created by the employment. The liability arises out of the law itself, rather than out of the contract of the parties. The law operates upon the status and attaches certain rights and obligations to that status. The relationship of employer and employee has its origin in the contract of employment; but when that relationship is created by the contract, the respective rights and liabilities with reference to compensation depend upon the provisions of the law, not upon the contract of the parties. The fundamental idea upon which liability is imposed is that an injury to an employee, like damage to a machine, is a burden that should be borne by the product of the industry and ultimately paid by those who consume this product.”

It can be seen from this quote that the court has made a clear distinction between employer-employee liability under the Workmen’s Compensation Act and employer-employee liability under the express or implied terms of an employment contract. In the court’s mind, workmen’s compensation liability was statutorily created and was based upon police power.

The distinction between liability under the Workmen’s Compensation Law and contractual liability under a contract of employment has been maintained consistently by the court ever since the first major test case involving workmen’s compensation, *Borgnis v. Falk Co.* (1911), 147 Wis. 327, 366, 133 N.W. 209.

In *Anderson v. Miller Scrap Iron Co.* (1919), 169 Wis. 106, 170 N.W. 295, the court’s extensively discussed this distinction. The court stated:

“* * * It is true that the liability imposed by the act grows out of and is incidental to a relationship based upon contract, but that does not make it contractual any more than it made the [tort] liability of the employer at common law contractual, for that, too, was a liability which grew out of and was incidental to a like relationship. If, as is said in some cases, . . . the liability of the employer under the law is a contract obligation, then the rights and

liabilities of the parties would always be referable to the law in force at the time the contract of employment was entered into. *Such is not the case. Borgnis v. Falk Co.* 147 Wis. 327, 366, 133 N.W. 209. . . . In the case last cited it is said: 'Acceptance of the act, whether made expressly or impliedly, as permitted by the act, made its provisions a part of these contracts of employment;'. . . . If this be true, the law is not subject to amendment as against existing contracts in any respect which would impair the contract within the meaning of that term as used in the constitution. Such construction is to be avoided in the interest of a simple and correct administration of the law, and should not be adopted unless the clearly expressed legislative intent excludes other construction.

"The liability of the employer under the act is not tortious and is not contractual in the sense that it should be considered as a covenant or part of the contract, but it is purely statutory. . . . He may elect not to come under the law, but when he does elect to come under it his liabilities are not subject to modification by contract between himself and his employee. It is the law, not the contract, which prescribes the conditions and the rate of compensation. . . .

"* * *

*"The liability of the employer under the act being statutory, the act enters into and becomes a part of every contract, not as a covenant thereof, but to the extent that the law of the land is a part of every contract Just as the law of negotiable instruments is a part of every promissory note to the extent that the rights and liabilities of the parties thereto must be determined with reference to the law of the place where the promissory note is made, executed, and delivered, so the rights and liabilities of every employer and employee who enter into a contract of employment within this state must be determined with reference to the workmen's compensation act. * * *"* (Emphasis added) 169 Wis. at 113-115.

It follows from the foregoing Wisconsin cases that benefits paid to an employe under the Workmen's Compensation Act are not paid because of any contractual obligation of the employer. Rather, they are based upon a statutorily created liability. Because the employe's right to receive workmen's compensation benefits if he is injured is statutory, rather than contractual, the workmen's compensation

benefits are not payment (compensation) for services rendered by the employe under his contract of employment.

In addition it should be pointed out that workmen's compensation benefits are not paid for past services rendered but to compensate for the loss of future employment by reason of disability.

"His disability reaches into the future not the past; his loss must be thought of in terms of its impact on probable future earnings . . ." (See Larsen, Workmen's Compensation, Vol. 2, sec. 60.12)

Although there is some language in *State ex rel. Thomson v. Giessel* (1952), 262 Wis. 51, 53 N.W. 2d 726, that might suggest a contrary conclusion, the cases are clearly distinguishable. The subject matter in *Giessel* was retirement benefits for services previously performed which is substantially different than workmen's compensation benefits for the loss of future employment. As a result, the *Giessel* case is not applicable here.

Since the State of Wisconsin is treated as an employer in the same manner as private employers under sec. 102.03 (1) (c) (2), Stats., the above analysis of workmen's compensation laws are clearly applicable to the State. It is therefore my opinion that payment of the "supplemental benefits" under sec. 102.44 (1), Stats., is not precluded to state public officers and employes by Art. IV, sec. 26 of the Wisconsin Constitution.

You additionally question whether the fund established under sec. 102.59, Stats., is in the nature of a trust for the benefit of second injury disability cases and, therefore, whether such fund can be diverted for the purpose of raising disability benefits.

There is no showing of intent in sec. 102.59, Stats., to create an express trust nor is the requisite language present to create such a trust. Our concern then is limited to whether a constructive trust is in effect created by sec. 102.59, Stats. The standards and rationale behind express and constructive trusts are covered in *Milwaukee v. Firemen Relief Asso.* (1967), 34 Wis. 2d 350, 149 N.W. 2d 589, in these words at page 360:

“ ‘An express trust is one which comes into being because a person having the power to create it expresses an intent to have the trust arise and goes through the requisite formalities.’ Bogert, Law of Trusts (hornbook series, 4th Ed. 1963), p. 13, sec. 8.

“Lacking expressed intent and formalities, no express trust was created by the 1885 law.

“If there is no express trust, then the association must be asserting a constructive trust created by the 1885 law. A constructive trust is not really a trust in the usual sense, but rather the generic name for an aggregate grouping of particular fact situations upon which equity will impose liability to prevent unjust enrichment and unfairness.

“ ‘Constructive trusts are created by courts of equity whenever the title to property is found in one who in fairness ought not to be allowed to retain it. . . .’ ”

The “second injury fund” was created by the legislature for the following purpose as stated in footnote 75, page 66 of the Department of Industry, Labor and Human Relations pamphlet entitled “Workmen’s Compensation Act of Wisconsin”:

“This subsection has a two-fold purpose: First to eliminate any incentive for discrimination against the employe who has serious previous disability when he comes to seek re-employment because of the employer’s fear, real or otherwise, that the loss of another member may subject him to very large indemnities on the ground that such loss would cause total or near total disability; second, to secure to the employe sustaining the loss or total impairment of a second member such amount of indemnity as the seriousness of the combined disabilities calls for.

“Direct liability of the employer in case of the loss of the second member is made the same as for the loss of the first member, and the injured employe’s rights are conserved by orders drawn on the fund for the balance of his indemnity. Primary liability of the employer for payment of \$1,500 to the fund is insurable.”

While subsection (3) appropriates to the department all moneys paid into the state treasury under sec. 102.29, Stats., subsection (4) requires the commission to “set aside in the state treasury suitable

reserves to carry to maturity the liability for special additional indemnity in each case, and for any contingent death benefit.”

It, therefore, appears that vested rights of those sustaining injury which qualifies under sec. 102.59, Stats., prior to the effective date of ch. 148, Laws of 1971, are adequately protected by the requirement of subsection (4). Since there is no indication of legislative intent to curtail the benefit available under sec. 102.59, we may assume that there is a surplus in such “second injury fund” available for appropriation by the legislature. Lacking any showing of any inequity toward those who are presently benefiting under sec. 102.59, Stats., I find no ground upon which a court of equity would impress a constructive trust.

It is, therefore, my opinion that the “second injury fund” created by sec. 102.59, Stats., is not impressed with a constructive trust which precludes diversion of such fund for the purpose of raising disability benefits under ch. 148, Laws of 1971.

RWW:JDJ

Contracts—Education—1971 Assembly Bill 1577 would violate the establishment clause of the First Amendment to the United States Constitution and sec. 18 of Art. I of the Wisconsin Constitution. Guidelines to possibly avoid constitutional objection to CESA service contracts with private schools discussed.

April 5, 1973.

WILLIAM C. KAHL, *State Superintendent*
Department of Public Instruction

In your letter of November 17, 1972, you requested my opinion with respect to legislation regarding the constitutionality of 1971 Assembly Bill 1577. This bill concerns the duties of Boards of Control of Cooperative Educational Service Agencies as provided in sec. 116.03 (3), Wis. Stats. You have indicated orally to a member of my staff that the Legislative Council is presently considering similar legislation and that the question is one of statewide concern.

Boards of Control of a Cooperative Educational Service Agency (CESA) presently are authorized to approve service contracts with school districts, counties and other Cooperative Educational Service Agencies. The legislation proposed would provide that CESA Boards of Control would have the authority to:

“Approve service contracts with school districts, counties, other cooperative educational service agencies, other public educational institutions, private educational institutions, and cities, villages and towns. . . .”

Your specific question is “whether service contracts between CESAs and church-related schools authorized under such legislation would be a contravention of sec. 18 of Art. I of the Wisconsin Constitution and the establishment clause of the First Amendment to the United States Constitution.”

The answer to your question must be based on the clear understanding of the statutory implementation of the CESAs and the method by which they function.

Section 116.01, Stats., provides:

“116.01 Purpose. The organization of school districts in Wisconsin is such that the legislature recognizes the need for a service unit between the local school district and the state superintendent. The co-operative educational service agencies created under subch. II of ch. 39, 1963, stats., are designed to serve educational needs in all areas of Wisconsin and as a convenience for school districts in co-operatively providing to teachers, students, school boards, administrators and others, special educational services including, without limitation because of enumeration, such programs as research, special student classes, data collection, processing and dissemination, in-service programs and liaison between the state and local school districts.”

Under the provisions of subch. II of ch. 39, 1963, Stats., 19 CESA districts encompassing all school districts in the State of Wisconsin were created.

Sections 116.02 and 116.03, Stats., provide that each CESA be governed by a Board of Control consisting of one member from the School Board of each of the school districts comprising the CESA.

The Board of Control among other things must hire an agency coordinator. Section 116.04 provides:

“116.04 Agency co-ordinator. The agency co-ordinator shall be responsible for co-ordinating the services, securing the participation of the individual school districts, county boards and other co-operative educational service agencies and implementing the policies of the board of control.”

State aid is furnished to each CESA. In this connection sec. 116.08, Stats., provides in part:

“116.08 State aid. (1) Annually, there shall be paid not exceeding \$29,000 to each agency for the maintenance and operation of the office of the board of control and agency co-ordinator. No state aid may be paid unless the agency submits by August 1 an annual report which includes a detailed certified statement of its expenses for the prior year to the state superintendent, and such statement reveals that the state aid was expended as provided by this section. In no case may the state aid exceed the actual expenditures for the prior year as certified in such statement.

“ . . .

“(4) Whenever an agency performs any service or function under this title by contract with a county board or any agency thereof, with a school board or with a county handicapped children's education board, the contract may authorize the agency to make claim for and receive the state aid for performing the service or function. The agency shall transmit a certified copy of the contract containing the authority to collect state aid to the department. When an agency receives such state aid, it shall pay over or credit the amount of state aid received to the proper county or agency thereof, school district or county handicapped children's education board for which the service or function was performed according to the contract therefor.”

CESAs provide two general types of service. The first type involves personnel hired by CESA to perform services contracted for by individual school district members of the individual CESA. The terms of these contracts generally provide that the school district will pay the CESA for the pro rata time used by the CESA

personnel servicing the district. The expenses incurred by some of these programs are partially reimbursed by state aid which is credited to the school district. Some of the programs for which there is reimbursement by state aid are: school social worker, speech therapist, school psychologist and local vocational, educational coordinator.

Some programs for which there is no state reimbursement to the local school district are audio-visual director, television consultant, elementary and secondary directors, nurses, guidance counselors and teachers of science, art, driver education, music and so forth.

The second general type of service rendered may be termed non-personnel service. This includes such programs as data processing and cooperative purchasing. Some CESAs make a flat charge to the school districts to defray some expenses incurred in rendering these services. The costs which are not recovered in this manner are charged to the administration expenses of the individual CESAs. The cost of administering the individual CESAs is funded by state aid pursuant to the provisions of sec. 116.08, Stats.

The effect of the proposed legislation would be to make any type of service being rendered now or to be rendered in the future available without limitation to private schools as well as public schools. The term private schools includes parochial schools.

It is my opinion that such legislation without any limitation as to the type of service or a requirement that the private schools reimburse the CESAs for the entire cost of service would certainly violate the establishment clause of the First Amendment to the United States Constitution and Art. I, sec. 18 of the Wisconsin Constitution. The establishment clause of the First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion . . ."

The Supreme Court having concluded that among those rights included in the Fourteenth Amendment are those encompassed by the First Amendment, the establishment clause is therefore a limitation on the sovereign power of the states.

In *Lemon v. Kurtzman* (1971), 403 U.S. 602, 609, 611, 91 S.Ct. 2105, 29 L.ed. 2d 745, 754, the United States Supreme Court had before it a Pennsylvania Statute which authorized the State

Superintendent of Public Instruction "to 'purchase' specified 'secular educational services' from nonpublic schools. Under contracts authorized by the statute the state directly reimburses nonpublic schools for their actual expenditure. A school seeking reimbursement must maintain prescribed accounting procedures that identify the 'separate' cost of secular educational services." The court in its opinion pointed out that in the analysis of a problem in the area of the establishment clause three tests have been developed:

"* * * First the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 US 236, 243, 20 L.Ed. 2d 1060, 1065, 88 SCt 1923 (1968); finally the statute must not foster 'an excessive government entanglement with religion.' . . ." *Walz v. Tax Commission*, 397 U.S. 664, 668, 25 L.ed. 2d 697, 701, 90 S.Ct. 1409 (1970), *Lemon, supra* at 612, 29 L.ed. 2d at 755.

The court concluded that the cumulative impact of the relationship created by the statutes involved excessive entanglement between the government and religion. The court in distinguishing the Pennsylvania statute and the *Everson* and *Allen* cases noted that the Pennsylvania Statute had the defect of providing state aid directly to church-related schools. In the *Everson* and *Allen* cases state aid was provided to the student and his parents. *Board of Education v. Allen* (1968), 392 U.S. 236, 243-244, 88 S.Ct. 1923, 20 L.ed. 2d 1060; *Everson v. Board of Education* (1947), 330 U.S. 1, 18, 67 S.Ct. 504, 91 L.ed. 2d 711.

Under the proposed legislation without any restriction as to the content of the contract it is quite possible to have an arrangement that would clearly fail all three of the tests developed in *Lemon, supra*.

It is therefore my opinion that the statute as it now stands clearly authorizes arrangements between parochial and public school agencies which would violate the establishment clause of the United States Constitution.

It is also clear that the legislation violates Art. I, sec. 18 of the Wisconsin Constitution. Sec. 18 provides in part, ". . . nor shall . . . any preference be given by law to any religious establishments

or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.” In *State ex rel. Reynolds v. Nusbaum* (1961), 17 Wis. 2d 148, 165, 115 N.W. 2d 535, the court reaffirmed the previous holding of the court that religious or theological seminaries as used in sec. 18 includes primary and secondary schools as they exist today. In addition the court stated “. . . we deem that the First amendment provision, . . . ‘respecting an establishment of religion,’ lends itself to more flexibility of interpretation than the provision contained in the last clause of sec. 18, art. 1 of the Wisconsin constitution.” Clearly the legislation would permit expenditure of public funds “for the benefit of religious societies, or religious or theological seminaries.”

I do not intend to imply that it is constitutionally impossible to permit by statute the rendering of some service by CESAs to children attending private schools. Any such legislation, however, would have to consider the guidelines in *Lemon v. Kurtzman*. It would be well to note the limitations of the Wisconsin Constitution as they are defined in the recent case of *State ex rel. Warren v. Reuter* (1969), 44 Wis. 2d 201, 227, 170 N.W. (2d) 743. There the court wrote that it found nothing in *Nusbaum* inconsistent with the primary effect test. This test first announced in *Everson, supra*, holds that if the primary effect of the legislation is either to hinder or advance religion such legislation violates the establishment clause. In *Reuter, supra*, the court wrote at page 227:

“Granting that art. I, sec. 18 of the Wisconsin Constitution is more prohibitive than the first amendment of the federal constitution, it does not follow and we cannot read sec. 18 as being so prohibitive as not to encompass the primary-effect test. In the case before us, the primary effect of the legislation is not the advancement of religion but the advancement of the health of Wisconsin residents.”

Thus legislation which would provide for contracts between CESAs and private as well as public schools which would encompass services “advancing the health” of the school children might possibly negate the constitutional objections raised in the *State ex rel. Reynolds v. Nusbaum* and *Lemon* cases.

Those concerned with drafting legislation in this area would do well to consider the guidelines developed by the Wisconsin Supreme Court in *State ex rel. Warren v. Nusbaum* (1971), 55 Wis. 2d 316. In this case the court held that a state statute granting financial aid to Marquette University Dental School violated both the State and Federal Constitutions. The court noted, however, that more careful drafting of the statute could cure these constitutional infirmities. Of additional interest are two recent cases, *Committee for Public Education and Religious Liberty, et al. v. Nyquist, et al.* (1972), 350 F.Supp. 655 and *Wolman, et al. v. Essex, et al.* (1972), 342 F.Supp. 399. The *Nyquist* case was decided by a three-judge panel of the Federal Court of the Eastern District of New York. The court held in this case that income tax credits for parents of certain classes of children attending private schools did not violate the First Amendment of the United States Constitution. On the other hand, in *Wolman* case a three-judge panel of the Federal District Court in Ohio held that a similar plan did violate the United States Constitution. Consideration of the statutes involved in these cases as well as the reasoning of the respective decisions may be of help in the drafting of legislation in this area.

In any event it is suggested that any legislation of this kind be drawn in a more restrictive manner than the 1971 Assembly Bill 1577. The legislation should also carry a proviso that the Attorney General seek a test as to the validity of the legislation. This procedure seems more desirable in this important legislative field than to request that the Attorney General determine by opinions on each CESA contract with a private school what the holding of the Wisconsin and/or the United States Supreme Court might be with respect to the establishment clause of the United States Constitution and Art. I, sec. 8 of the Wisconsin Constitution.

RWW:JWC

County Clerk—Ordinances—Section 59.09 (1), Stats., discussed in reference to requirement that county clerks must publish county ordinances and distribute copies to town clerks.

April 10, 1973.

TERRY REBHOLZ, *Assistant District Attorney*
Waupaca County

You request my opinion in reference to a number of questions relating to the publication and distribution of county ordinances under the provisions of sec. 59.09, Wis. Stats.

You first inquire whether the failure of the county clerk to distribute copies of past ordinances to town clerks, as required by sec. 59.09 (1), Wis. Stats., has had the effect of rendering such enactments invalid.

Section 59.09 (1), Wis. Stats., provides as follows:

“59.09 Publication of ordinances and proceedings. (1) Whenever any county board passes any ordinance under this chapter the county clerk shall immediately publish it as a class I notice, under ch. 985; and such clerk shall procure and distribute copies of such paper to the several town clerks, who shall file the same in their respective offices.”

The Wisconsin Supreme Court in interpreting an early version of sec. 59.09 (1), Stats., held that although the publication of a law enacted by a county board is mandatory, the further statutory requirement directing the distribution of newspapers containing such publication was only directory. *State ex rel. Hawes v. Pierce* (1874), 35 Wis. 93. Thus, the court concluded that the action of a board of supervisors will not be rendered inoperative and void solely by virtue of the subsequent omission or neglect on the part of their clerk to obtain and transmit copies of such newspapers to the various town clerks in accordance with said statute. The *Pierce* case remains the controlling case law to date relating to the failure of a county clerk to distribute copies of ordinances pursuant to sec. 59.09 (1), Stats.

You next inquire whether the county clerk must now forward copies of orders, ordinances or determinations where there has been a failure to distribute such to the town clerks in the past.

It is not easy to lay down any general rule as to what a county clerk should do when faced with the fact that there has been a past failure to forward papers in accordance with sec. 59.09 (1), Stats.

The current clerk probably has a continuing duty to rectify any omissions in this regard which may be attributable to him. However, I cannot conclude that the current county clerk has a duty to search out and identify those instances where copies of orders, ordinances or determinations have not been forwarded in accordance with law by his predecessors in office over all the years, then ascertain which of such enactments are currently viable and then procure or make copies of the same for transmittal to town clerks. On the other hand, if there has been a general failure to forward copies of laws in the past and the county maintains a codification of current county ordinances, it certainly would be in keeping with the purpose of sec. 59.09 (1), Stats., for the county clerk to forward a copy of such codification to the various town clerks. In fact, under such circumstances, the town could probably require such a codification to be forwarded.

You next asked whether sec. 59.09 (1) requires that the county clerk forward the entire actual newspaper in which the published ordinance appears to all town clerks.

Compliance with the literal meaning of the provisions of sec. 59.09 (1), Stats., would require that the clerk forward a copy of the entire newspaper in which the published ordinance appeared to all the town clerks in his county. However, considering the directory nature of that portion of the statute which relates to distribution to town clerks, it is probable that a court would consider distribution of the page of the newspaper on which the publication appears to constitute substantial compliance with the statute, if the page contained at least the minimal information indicating the name of the paper, the date of its issuance and the page number of the paper upon which the publication appears. I would hesitate to suggest that anything less than the distribution of such pages would be held to be substantial compliance with the statute. In addition, the statute contains no suggestion that the county clerk may exercise any discretion as to which ordinances he will distribute to which towns. In my opinion, he would fail to comply with the statute if he failed to distribute copies of all published ordinances to all town clerks in the county. In addition, the county clerk must be selective in reference to the papers that he forwards to the town clerks, i.e., he cannot comply with the statute by simply paying for a subscription to the

newspaper used for the county's legal publications and having the newspaper publisher send all copies of the paper to the town clerks.

Finally, you inquire whether the county clerk may publish ordinances in any newspaper qualified under the provisions of sec. 985.03, Wis. Stats.

Chapter 985, Wis. Stats., which relates to the publication of legal notices, does not require that your county designate a newspaper as its official newspaper. Section 985.05, Stats., however, does authorize the county board of a county to designate a newspaper published or having general circulation in the county (and otherwise eligible under sec. 985.03) as "its official newspaper." Therefore, if your county has designated an official newspaper, then, all legal notices, including county ordinances, must be published in such newspaper unless otherwise specifically required by law. Section 945.05 (2), Stats. On the other hand, if your county has not designated an official newspaper, your county clerk need only assure himself that the newspaper he utilizes meets the qualifications set forth in sec. 985.03, Stats., and complies with the provisions of sec. 985.02 (1), Stats., which provides as follows:

"985.02 Method of notification. (1) Except as otherwise provided by law, a legal notice shall be published in a newspaper likely to give notice in the area or to the person affected. Whenever the law requires publication in a newspaper published in a designated municipality or area and no newspaper is published therein publication shall be made in a newspaper likely to give notice."

RWW:JCM

Contracts—Fire—A city probably can contract with a county to provide fire protection to a county institution located outside of boundaries of said city.

April 26, 1973.

HOMER C. MITTELSTADT, *Corporation Counsel*
Eau Claire County

You have requested my opinion on certain questions relating to contracts for fire protection, insurance coverage for reimbursement for fire losses and liability for fire protection services in connection with the Eau Claire County Hospital, located in the Town of Union, Eau Claire County.

You advise that about 1955, the Board of Trustees of the Eau Claire County Hospital entered into a written agreement with the City of Eau Claire whereby the city agreed that it would provide fire protection to the County Hospital at an agreed upon rate of compensation. Eau Claire County apparently has elected to insure its property against fire under the State Insurance Fund as authorized by sec. 210.04 (1), Wis. Stats. This insurance includes a policy covering the Eau Claire County Hospital, which contains a provision which would cover certain liability, assumed by contract or agreement, for fire department charges made by a city responding to a fire call where the property involved is not located within the limits of such city. Although the Town of Union apparently does maintain a fire department, the additional fire protection available from the City of Eau Claire was apparently felt necessary because it was felt the town fire protection was not adequate to protect the institution. Finally, you indicate that in 1971 incidental fire calls to the County Hospital as well as a major fire requiring extensive fire-fighting services from the Eau Claire Fire Department resulted in a billing to the County Hospital of approximately \$9,000. The insurance coverage provided by the State Insurance Fund for the Eau Claire County Hospital for 1971 includes fire call insurance to the limits of \$1,800.

Based on the foregoing facts, you inquire as follows:

"1. May the Eau Claire County Hospital contract for fire protection service with the City of Eau Claire? This question presumes that the Town of Union is not made a party to the agreement."

This question should really be considered in two parts. First, what is the legal authority of the City of Eau Claire to contract to provide fire protection services outside of its municipal boundaries? Secondly, what legal authority does the Board of Trustees for the Eau Claire County Hospital have to obligate the county to pay for future fire protection services, from municipalities other than the

town in which the county facility is located, based on the board's judgment that the fire protection services provided by the town are inadequate?

As a preliminary matter, I should first point out that sec. 60.29, Wis. Stats., sets forth the powers which a town board "is empowered and required" to exercise. Subsections (18) and (20) of sec. 60.29, Stats., provide an almost infinite variety of arrangements by which a town may provide fire protection for property located therein. These arrangements include the creation of a fire department for the town or a part thereof, a joint fire department, agreements between a town and a firemen's association to provide fire protection for the town, agreements between various governmental entities for providing for the establishment and maintenance of a joint volunteer fire department, etc. These statutes generally provide that the towns involved are initially responsible for the cost of adequate fire protection, though such costs may normally be reimbursed by taxation. In addition, sec. 60.29 (18m), Stats., provides that a town is liable for services of any fire department requested to fight fire in the town where it has failed to provide for a fire department and fire-fighting apparatus and equipment for extinguishing fires in the town. This provision of the law is apparently not involved here, inasmuch as it appears that the Town of Union does provide fire-fighting services, and the above-described contract is apparently utilized to augment and supplement fire protection to the County Hospital.

In light of the fact that the above provisions of sec. 60.29, Stats., provide a number of instances where the statutes specifically authorize towns to contract with cities or villages for fire protection services, it may be argued that such statutes establish limitations on the extent to which cities may contract to provide fire-fighting services outside of their municipal boundaries. However, this would not appear to be a completely accurate conclusion. It would certainly appear appropriate, for instance, for municipalities to enter into mutual aid fire protection pacts, under the inter-governmental cooperation provisions of sec. 66.30 (2), Stats. Also, it is noted that sec. 59.07 (11), Stats., authorizes the county board to join with municipalities in cooperative arrangements as provided by sec. 66.30, Stats. However, even though sec. 59.07 (36), Stats., authorizes counties to establish fire departments, such a mutual

assistance pact, under sec. 66.30, Stats., is not indicated by the fact situation you pose. Likewise, although it can hardly be doubted that a county may take whatever reasonable steps it feels appropriate to augment the fire protection services provided by the municipality in which its institutions are located, the service which it contracts to receive must be one which at the same time the performing municipality is entitled to render. 48 OAG 231 (1959).

A general statement of the authority of municipalities to provide fire-fighting assistance beyond their corporate limits is set forth in 16 McQuillin, *Municipal Corporations* (1972 Revised Volume), §45.05a, at 579, as follows:

“Operation of the municipal fire department is a governmental function which, without express statutory or charter authorization, may not be conducted extraterritorially. While a municipality has power to procure fire protection from an outside source, its contract to furnish fire protection beyond its own limits has been held void because ultra vires. There may be implied municipal power, however, to respond to occasional outside alarms, when in the discretion of the council such action subserves the municipal welfare.”

It may be that our Wisconsin Supreme Court would hold that a municipality may provide fire protection service to a governmental institution with a highly concentrated population, such as a hospital, which, although not located within the municipality, lies in the proximity of the boundaries of such municipality. Support for such a conclusion might rest in part on a showing that the existence of the institution affects the economic well-being of the municipality, that many residents of the municipality are employed and housed at such institution, and that the rendition of such service otherwise contributes to the safety and welfare of the city. Legal support for such a position is found in *City of Pueblo v. Flanders* (1950), 122 Colo. 571, 225 P. 2d 832, which quotes a Wisconsin case for the proposition that city officers, in their discretion, may authorize the use of a city's fire equipment and firemen for the purpose of extinguishment of fires in territory and districts outside the corporate limits of the city. In the *Pueblo* case, at 225 P. 2d 836, the following is stated:

“*City of Burlington v. Industrial Commission*, 195 Wis. 536, 218 N.W. 816, 817, was an action concerning the right to compensation of a volunteer fireman. The commission contended that the city had no power to pay an employee to assist in furnishing fire department service outside its limits. In Wisconsin all cities were then placed under a general charter law which no longer enumerated their powers, but gave a general grant of all powers permissible under the Constitution, except as otherwise specifically provided by the legislature. The fire department had been accustomed to attend fires outside the city when directed by the chief, to the knowledge of the city authorities, and it was held, ‘that the city of Burlington was acting within its powers to promote its general welfare, peace, good order, and prosperity, and its common council was acting within its powers, in providing for fire service to adjacent farmers and citizens outside the city limits, under the clause, “for its commercial benefit,” and in protecting its safety and welfare.’ The city of Pueblo is a charter city with equally broad powers.”

Assuming that our Supreme Court would apply the reasoning set forth in the *Burlington* case to the contract situation you describe, the question still remains as to the legal authority of the Board of Trustees to contract with the city.

Section 59.07 (1) places broad power in the county board to acquire, control, maintain and operate county property. Likewise, sec. 59.07 (2) (b), Stats., indicates that the county board has the power to “Provide fire and casualty insurance for all county property.” Finally, sec. 59.07 (5), Stats., provides that the county board shall represent the county and have the *management* of the business and concerns of the county in cases *where no other provision is made*. In the latter regard, sec. 46.18 (1), Stats., provides that the county hospital shall be *managed* by a board of trustees, appointed by ballot of the county board, and subject to regulations approved by the county board. Under sec. 46.18 (11), Stats., the county board provides annual appropriations for the operation and maintenance of the hospital. Finally, I note that sec. 46.18 (6), Stats., authorizes the trustees to sue and defend in the name of the county any cause for action involving the interest of said institution.

The foregoing statutes leave a rather ambiguous picture as to the relationship between the county board and the Board of Trustees when it comes to the execution of a contract such as you describe. Had the county board executed such contract or had the county board directed the Board of Trustees to enter into such an agreement, the situation would have been more easily resolved. As pointed out in 46 OAG 9 at 11:

“What may be included in management is difficult of precise definition. As pointed out in 39 O.A.G. 330, the management is subject to regulation in any event. It was there recognized, however, that in absence of specific action by the county board, the normal procedure for repair of buildings ‘would be for the county board to make the appropriation and the trustees to make the expenditure.’ See, also, 21 O.A.G. 919, 20 O.A.G. 130 and 12 O.A.G. 26. Similarly, it was indicated in 3 O.A.G. 448 that after the county board fixed the amount of insurance to be purchased on institutional property, it might delegate to the trustees authority to make the purchase.”

However, regardless of the status of the Board of Trustees to enter into the subject contract with the city in the first instance, I suspect that there are many facts not related in your letter which would have a bearing on the enforceability of the contract nevertheless. For instance, it is quite possible that the county board was fully aware of the actions of the Board of Trustees in entering into the contract herein and that it has fully acquiesced therein. I suspect it could be shown that the county board was aware that it was authorizing the appropriation of funds for the payment of services under the fire protection agreement.

Based on the foregoing, I conclude that it is arguable that the City of Eau Claire and the Board of Trustees of the Eau Claire County Hospital may contract for fire protection service for said hospital. However, even if such contract is subject to question because executed by the Board of Trustees instead of the county board, the county board may have effectively ratified the fire protection agreement by a consistent practice of appropriating funds for such fire protection service for a period exceeding 15 years to the present.

You next inquire as follows:

“2. May the Eau Claire County Hospital enter into a contractual arrangement with the State Insurance Fund to provide insurance coverage to reimburse the County Hospital for the fire protection provided by agreement with the City of Eau Claire?”

As pointed out in my response to your first question, sec. 59.07 (2) (b), Stats., states that the county board shall provide fire insurance for all county property. Therefore, changes in the contractual arrangement between Eau Claire County and the state as to insurance on county buildings, other than those arrangements which are automatically required by statute or ministerial in nature, should be made directly by the county board, unless the board has taken some action which indicates that the Board of Trustees is to act as its agent in this regard.

You next inquire as follows:

“3. Understanding that all fire calls are made directly from the Eau Claire County Hospital to the Fire Department, can the Town of Union be made liable for any fire protection expenses between the City of Eau Claire and the County Hospital that are not covered by the State Insurance Fund?”

The Town of Union apparently has made no contract with any other city, village, town, voluntary or other fire-fighting organization to provide fire protection service within its boundaries. It is also my understanding that the town does in fact maintain a fire department and fire-fighting apparatus and equipment for extinguishing fires within the town. Under those circumstances, I am unaware of any basis on which the Town of Union can be made liable for any fire protection expenses arising under the agreement involving the City of Eau Claire and the County Hospital, whether or not those costs may be covered by the State Insurance Fund.

Finally, you inquire as follows:

“4. In the event that the Town of Union provides fire protection services to the Eau Claire County Hospital are they able to tax the real and personal property of the Eau Claire County Hospital to pay for these services?”

Although sec. 60.29 contains certain provisions which would authorize a town to levy a tax upon real and personal property for

the purpose of reimbursing the town for the cost of fire protection, a county hospital would be exempt from general property taxes, under the provisions of sec. 70.11 (2), Stats. Although there are other sections in Chapter 70 which impose special taxes upon real estate otherwise exempt because of its public status, I find no statute which would impose a special tax upon a county hospital to pay for fire protection services. It is, therefore, my opinion that the Town of Union could not tax the real and personal property of the Eau Claire County Hospital to pay for fire protection services it provides to the hospital.

RWW:JCM

County Board—Counties under 500,000 do not have authority to create a county department of administration by resolution.

April 26, 1973.

GLENN L. HENRY, *Corporation Counsel*
Dane County

You inquire whether the Dane County Board of Supervisors has the authority to create a County Department of Administration by resolution. You state that the purpose of Resolution 117, now under consideration, "is to place as many as possible of the service type positions in the county under one administrative head."

County boards have only such legislative powers as are conferred upon them by statute, expressly or by clear implication. *Dodge County v. Kaiser* (1943), 243 Wis. 551, 557; *Maier v. Racine County* (1957), 1 Wis. 2d 384. Therefore, in the absence of statutory direction, a county board will normally have no power to create a county department of administration.

You suggest that such authority may be provided by a broad reading of sec. 59.07 (5), Stats.

Section 59.07 (5), Stats., provides that:

"General powers of board.

“* * *

“(5) GENERAL AUTHORITY. Represent the county, have the management of the business and concerns of the county in all cases where no other provision is made, apportion and levy taxes and appropriate money to carry into effect any of its powers and duties.”

Section 59.07 (5), Stats., does not specifically provide for the creation of a county department of administration. Indeed, the only specific statute which considers the creation of such departments is sec. 59.07 (48), Stats., created by ch. 143, Laws of 1967. This provision empowers counties having a population of 500,000 or more to create a department of administration. This recent legislation suggests that the legislature deemed such a provision necessary before such a county could validly create this particular administrative unit. This is, in my opinion, a clear indication that sec. 59.07 (5), Stats., does not contemplate the kind of sophisticated reorganization of county government Dane County is considering in Resolution 117.

This result is supported by the fact that the recently introduced 1973 Senate Bill 27, specifically proposes the addition of “department” to those existing administrative entities that counties are empowered to create under sec. 59.15 (2) (b), Stats. The purpose of this bill, introduced by the Legislative Council on January 4, 1973, is to greatly expand the legislative powers of the county board. It is a product of extensive study on the part of the council staff into the scope of existing county board powers. See Research Bulletin 72-7, published by the Legislative Council on June 27, 1972. The fact that such specific legislation is deemed necessary by the Council after such careful study is certainly consistent with the conclusion that counties having a population under 500,000 are felt to presently lack authority to create a department of administration.

In view of the above it is my opinion that Dane County does not have the authority to create a department of administration by resolution of the county board.

RWW:JCM

Witnesses—Police—Where it is duty of county traffic officer to prosecute or assist in prosecution of county traffic offense he is not entitled to witness fees but may be paid additional compensation where duty takes place outside regular working hours.

May 10, 1973.

GERALD K. ANDERSON, *District Attorney*
Waupaca County

Deputy District Attorney Terry Rebholz has requested my opinion on a number of questions involving the legality of payment of witness fees to county traffic officers.

Mr. Rebholz has done substantial research with respect to the questions submitted, and I am in general agreement with the conclusions which he has reached.

The answers to most of the questions raised can be determined by applying the general principles set forth in the lengthy opinion reported in 56 OAG 171 (1967).

The general rule is that where it is the duty of the officer to prosecute and act as a witness or to assist in the prosecution, he is not entitled to witness fees.

This does not mean that the officer is not entitled to any compensation from the county for the period he is required to attend court in the prosecution of a case or where he assists in the prosecution in the regimentation of evidence. Where he is on duty, it is presumed that his regular pay is sufficient compensation. As stated in 56 OAG 171, 176 (1967):

“* * * If court appearances are required outside the officer’s *regular* hours of duty the municipal unit should consider the advisability of additional payment if the law permits, or compensatory time off.” (Emphasis added.)

Such matters are proper to consider in negotiations establishing the compensation for the various positions.

You inquire whether a traffic officer is entitled to witness fees, taxable in a case, where a county traffic offense is involved where:

“1. The officer was on duty at the time of the arrest, but was only assisting (ie, running the radar or breathalyzer, helping control the defendant or even just to move defendant’s vehicle) the officer who was issuing the citation.

“2. The officer gained the information while on duty as a traffic officer, and is still a traffic officer on the trial date, and the trial time is:

“a. on his day off or vacation (so that he will be off duty at the time and date of trial);

“b. on a day when he is to work as a traffic officer, but not when he is on duty as a traffic officer;

“c. on a date and time at which he is to be working as a traffic officer (so that he will be on duty as to the date and time of trial).”

It is my opinion that the officer is not entitled to taxable witness fees in the above situations. The county job specifications should deal with the duty to testify or to assist even in so-called “off-duty” hours, and the compensation plan should provide additional compensation for such duties when they take place outside *regular* working hours or should provide that the stated compensation is for all required services.

You state that all traffic officers are not qualified breathalyzer operators and that it is necessary in some cases to call on qualified officers during “off-duty” hours.

I am of the opinion that when such officers are called to operate the breathalyzer that they are in an on-duty status.

“1. Can or must the off duty officer be paid for this time—either a set fee (as a \$5 witness fee) or an hourly rate?

“2. Can, must or should the officer be paid mileage to and from his home to the place of the test if he uses his own private vehicle?

“3. If a fee can be assessed in the above situations, can the fee be assessed — either as a witness fee or hourly rate — against the losing party?”

A person cannot qualify for a witness fee unless he is subpoenaed or testifies.

I am of the opinion that such officer is not entitled to witness fees. When called to duty he may or may not be entitled to additional compensation or to mileage depending upon the job specifications and compensation plan in existence at the time. As stated earlier, these are proper subjects for negotiation when the compensation plan is established. The county board has power to make adjustments as to compensation and out-of-pocket expenses under sec. 59.15 (2)(c)(3), Stats.

RWW:RJV

Transportation—Schools and School Districts—Students living less than two miles from school may not be transported by the school board at parental expense.

May 10, 1973.

WILLIAM C. KAHL, *State Superintendent*
Department of Public Instruction

In your letter of November 27, 1972, you asked two questions relating to the transportation of children to and from schools. In your first question you ask:

“When a school district provides transportation to and from the district schools for its students residing over 2 miles from school and refuses to transport children living less than 2 miles from school, even though the route may be hazardous, may the district board provide for transportation in district owned buses if the parents are willing to pay the school district for such service?”

It is my opinion that school boards may not provide for transportation of children to and from school under the circumstances related in your question.

Section 121.54 (2), Stats., requires that every school board shall provide transportation to and from school for all pupils who reside more than two miles from the school. An exception is made to this requirement by sec. 121.54 (1) which gives cities an option to

furnish transportation to children attending school within the city. In commenting on this section, our supreme court wrote:

“We do note the statutory guideline that ‘there shall be reasonable uniformity in the transportation furnished . . . pupils whether they attend public or private schools.’ (Section 121.54 (1), Stats.) . . .” (*State ex rel. Vanko v. Kahl*, 52 Wis. 2d 206, 217.)

If the school board were to permit parents to pay for transportation of children living less than two miles from the school, it would clearly create an additional class of children to be transported by the board, a class not authorized by the legislature.

In *Cartwright v. Sharpe* (1968), 40 Wis. 2d 494, the court held that the statutory classifications of children to be transported were reasonable, clear and unambiguous and the court refused in effect to create another class of children to be transported noting that to do so would be to engage in judicial legislation which the court refrained from doing.

The legislature, thus having denominated various classes of children to be transported, the school boards are without authority to create an additional class of children living less than two miles from school who may be transported by the school board at parental expense.

In your second question you state:

“This office has also been asked by several districts throughout the state whether a municipality within a school district may provide for transportation for students residing in that municipality less than 2 miles from school where the school district only provides transportation 2 miles and over? Although the state superintendent is interested in ways and means of transportation of school children it is felt that this question is properly one for legal counsel of the municipality interested in providing such transportation as spelled out in previous legal advice given this office in 39 OAG 41.”

I agree with the statement in your letter of November 27, 1972, that this question is properly one to be answered by counsel for the towns involved and that in accordance with 39 OAG 41, requests for my opinion should be confined to questions involving your powers or duties “when a present necessity for action is combined with an

ambiguity in the law requiring clarification by interpretation or construction.” (See caption 39 OAG 41).

RWW:JWC

Public Officials—Vocational, Technical and Adult Education, Board of— Where statute provides that a public officer serves at pleasure but is appointed for a term, such public officer may be summarily dismissed during the term.

May 11, 1973.

VICTOR MOYER, *Corporation Counsel*
Rock County

You ask if members of a Board of a Vocational, Technical and Adult Education District may be summarily removed and where the Board was initially appointed by the Chairmen of the County Boards of the two counties making up the district, must both Chairmen agree as to the dismissal or the dismissal be made by one of the Chairmen.

It is my opinion that the dismissal of the board members may be summary and need not be for cause.

As you stated in your letter, the leading case in Wisconsin regarding dismissal of public officers is *Ekern v. McGovern* (1913), 154 Wis. 157. In that case the statute under consideration provided that any officer who was “. . . appointed by the governor by and with the advice of the senate or by the legislature with the concurrence of the governor may, for official misconduct, habitual or willful neglect of duty, be removed by the governor *upon satisfactory proof*, at any time during the recess of the legislature.” (*Ekern v. McGovern*, 154 Wis. 157, 164.)

The relevant statutes involving the answer to your question are sec. 17.13(1),

“17.13. Removal of village, town, school district and vocational officers.

“* * *

“(1) APPOINTIVE OFFICERS. Any appointive village, town, school district and vocational, technical and adult education district officer, by the officer or body that appointed him, *at pleasure*. Removal of any such officer by a body shall be by a majority vote of all the members thereof.” (Emphasis added.)

and sec. 38.08 (1) (a), (b) and (2).

“38.08 Composition and organization of district board. (1) (a) A district board shall administer the district and shall be composed of 7 members who are residents of the district, including 2 employers who have power to employ and discharge, 2 employes who do not have power to employ or discharge, 2 additional members and a school district administrator of a school district which lies within the district. The school district administrator shall be appointed by the other 6 members.

“(b) District board members shall take office on July 1 and shall serve 6-year terms, except that the school district administrator shall serve a 2-year term.

“(2) Members of a district board shall serve until their successors are appointed and qualified. A vacancy shall be filled for the unexpired term by a majority vote of the remaining members of the district board.”

In *State ex rel. Pieritz v. Hartwig* (1930), 201 Wis. 450, the court wrote quoting *Ekern* at page 452:

“ ‘It is conceded, in all the cases, that where a fixed term is assigned to the office, the appointing power has no absolute power of removal. . . . At common law in all cases *except where an office is held absolutely at pleasure*, an officer could be removed only for cause and after a hearing.’ . . . One might call the roll of all the highest courts of the country which have dealt with the subject in support of the foregoing. It is no exaggeration to say . . . that there is practical unanimity in the adjudications in this country in respect to the matter.’ *Ekern v. McGovern*, 154 Wis. 157, 244, 142 N.W. 595.

“In the absence of a clear expression of legislative intention to change this well established rule of the common law, it must be assumed that the legislature intended to confine the power of removal at pleasure to those cases where there was an absence of both confirmation by the common council and a fixed term of office. We find no such clear expression of a legislative intent in sub. (1) (c) of sec. 17.12 of the Statutes.” (Emphasis added.)

And again in *Ekern* at pages 243, 244 the court wrote:

“ . . . [W]e must distinguish between an office held subject to summary right of removal for cause satisfactory to the removal officer or tribunal, and an office having incidents of a fixed term, but subject to be terminated for due cause, or some particular cause, required to be established by proof. Due process of law in the one case may not require a common-law hearing, while it does in the other; that being supposed to have been in contemplation of the lawmaking power as an absolute requirement of the common law and to be regarded as read into the statutes in the absence of any express indication to the contrary or something equivalent thereto.”

In *London v. City of Franklin, et al.* (1904), 80 S.W. 514, the court, when faced with statutes providing for summary removal of officers appointed for a definite term, wrote at pages 514, 515:

“ . . . The marshal, assessor, treasurer, clerk and city attorney shall be appointed for a term of two years by the city council, but may be removed at the pleasure of the city council.’ Section 3622 also provides: ‘Any vacancies occurring in any of the offices provided for in this chapter shall be filled by appointment of the city council.’ These sections are part of the act regulating cities of the fifth class, to which Franklin belongs. . . . It is insisted for appellant that under the constitutional provision officers of cities and towns may be only removed for cause, and that section 3619 of the statute, above quoted, must be construed to refer only to removals for cause, or, if not so construed, is unconstitutional. The language of the statute is that the officers named may be removed at the pleasure of the city council. These words have a well-defined legal meaning. The right to remove at pleasure is an entirely different thing from the right to remove for cause. To hold that the statute only authorizes the council to remove for cause would be to deny the words used by the Legislature their ordinary meaning.

This cannot be done . . . their appointees during the term hold at their pleasure. In other words, their appointments are subject to the pleasure of the council, but expire in any event after two years. . . .”

This appears to be the general rule. See *Collison v. State* (1938), 2 A. 2d 97, 119 A.L.R. 1422, 1438. In the annotation cited appears the following significant comment:

“The authorities generally support the rule that, in the absence of a constitutional provision prescribing the manner of removing the officer in question, or requiring that there be cause as a condition of such removal, a statute specifying the number of years for which an officer shall hold office, and expressly providing that he may be removed without cause, authorizes his summary removal at any time within the designated term.”

It is my opinion therefore that despite the appointment of the board for a term of years, the legislature clearly intended to permit their removal at the pleasure of the appointing authority. Since the office is held absolutely at pleasure, a hearing is ordinarily not required for such removal. However, the exercise of the power of removal must not be an abuse of discretion. (See cases cited at 4A Words and Phrases 392.)

RWW:JWC

Weight Limitations—Forests—Section 348.15 (3) (b) 2 and (5r), Stats., discussed.

May 16, 1973.

NORMAN M. CLAPP, *Secretary*
Department of Transportation

You have asked my opinion as to the interpretation of certain statutes relating to the weighing of motor vehicles transporting peeled or unpeeled forest products cut crosswise. Section 348.15 (2), Stats., sets forth maximum allowable weights for motor vehicles. Section 348.15 (3), Stats., sets forth certain tolerances which are

allowable, for enforcement purposes only, above these maximum weights. In this respect, sec. 348.15 (3) (b) 2, Stats., provides that no summons or complaint shall be issued unless:

“The gross weight imposed on the highway by the wheels of any one axle exceeds 21,500 pounds or, for 2 axles less than seven feet apart, 35,000 pounds or, for groups of 3 or more consecutive axles more than 9 feet apart, a weight of 4,000 pounds more than is shown in par. (c) or permitted under par. (d) when transporting peeled or unpeeled forest products cut crosswise. This section shall not apply to the national system of interstate and defense highways.”

This statute provides certain greater weight tolerances where the vehicle is transporting peeled or unpeeled forest products cut crosswise.

Section 348.15 (5), Stats., sets forth the methods to be followed in weighing vehicles on scales which have been tested as there specified. Section 348.15 (5r), Stats., reads:

“Irrespective of sub. (5), in determining overweight under sub. (3) (b) 2 the results of weighing by means of portable scales shall be admissible as evidence, but the operator may request reweighing on a certified stationary scale. Portable scales shall be checked by weighing in comparison to certified stationary scales within 10 days immediately prior to any weighing operation. In all cases where a vehicle is weighed on a certified stationary scale, axles less than 6 feet apart shall be weighed as one unit.”

Your first question is whether the last sentence of this section, relating to weighing axles less than 6 feet apart as one unit, applies only to determining overweight under sec. 348.15 (3) (b) 2, Stats. The answer is “yes.”

The language of subsec. (5r) states that it is to be used in “determining overweight under sub. (3) (b) 2.” This is clear and unambiguous. By this language, subsec. (5r) is limited to this one purpose. No other purpose is specified by subsec. (5r). Also, this statute provides that it is to be applied “irrespective of sub. (5).” This clearly means that the weighing methods of subsec. (5) are not mandatory when the officer is using portable scales under subsec. (5r).

Subsection (5r) further specifies that the “results of weighing by means of portable scales shall be admissible as evidence.” This clearly means that the state can prove its case by offering this evidence. Of course, the weight of this evidence is for the trier of fact to decide, but this does not affect its admissibility. Subsection (5r) further specifies that “the operator [of the vehicle] may request reweighing on a certified stationary scale.” This is obviously to provide a check on the accuracy of the portable scale. However, this provision in no way affects the admissibility of the results of the weighing on the portable scale.

The next provision of subsec. (5r) is that portable scales shall be checked by weighing in comparison to certified stationary scales within 10 days immediately prior to any weighing operation on the portable scales. This is obviously to insure their accuracy. The last sentence of subsec. (5r) provides that in “all cases where a vehicle is weighed on a certified stationary scale, axles less than 6 feet apart shall be weighed as one unit.” Weighing such axles only as one unit would make it impossible to determine on such stationary scale the separate weight of each axle.

Attorneys for the Wisconsin Motor Carriers Association have argued that this last sentence of subsec. (5r) applies to all cases regardless of the nature of the property being transported, and that this last sentence is not limited in application to the weighing of vehicles hauling the forest products specified in subsec. (3) (b) 2. Under such an interpretation, it would be impossible to determine single axle weights in any case where such axles are less than 6 feet apart, regardless of the commodity hauled. Thus, truckers could overload such single axles without penalty, because the single axle weight limitations could not be enforced against them. The answer to this contention is that if the legislature had intended this restriction to apply to all weighing operations, regardless of the property being transported, they would have placed such restriction in subsec. (5) which does apply to all weighing operations regardless of commodity hauled.

Even though this provision was not placed in subsec. (5), but was instead placed in subsec. (5r), these attorneys continue to argue that it has the same effect as if it had been placed in subsec. (5), because it contains the words “in all cases.” If this were correct, this would

have the effect of repealing, by implication, the single axle weight restrictions provided in sec. 348.15, Stats., in all cases where axles are less than 6 feet apart. Since repeal by implication is not favored, *State v. Dairyland Power Cooperative* (1971), 52 Wis. 2d 45, 51, 187 N.W. 2d 878, I conclude that the legislature never intended such result.

Clearly, the weighing limitation found in the last sentence of subsec. (5r) applies only to the weighing of axles less than 6 feet apart, where the vehicle is hauling the forest products specified in subsec. (3) (b) 2, and where the weighing operation is conducted on a certified stationary scale. This limitation is not applicable to weighing on portable scales. This language merely makes it impossible for the trucker, whose vehicle has been weighed on portable scales, to have the advantage of reweighing the single axles on a stationary scale to double check the weights previously determined on the single axles by the portable scales. This lack of ability to recheck the single axle weights, previously determined on the portable scale, in no way interferes with the admissibility in evidence of the results of such single axle weighing on the portable scale. Subsection (5r) makes it abundantly clear that "the results of weighing by means of portable scales shall be admissible as evidence." There is no reason to assume that subsequent reweighing on stationary scales is in any way a condition to the admissibility of the evidence obtained by weighing on portable scales.

You are, therefore, advised that where a vehicle is transporting peeled or unpeeled forest products cut crosswise, your law enforcement officers may weigh single axles less than 6 feet apart on portable scales, which have been tested for accuracy within 10 days prior to such weighing, and that evidence thereby obtained is admissible to prove a charge of single axle overweight.

In connection with the writing of this opinion, we have been asked by the Wisconsin Motor Carriers Association to consider the briefs filed with the County Court of Portage County in a case titled *State v. Consolidated Freightways Corp.* There the motor vehicle involved consisted of a truck tractor and semitrailer, having a total of five axles. The length of the stationary scale platform in relation to the distances between the various axles was such that the second of the five axles could not be weighed alone. However, axles 2 and 3

were weighed together and axle 3 was weighed alone. Then the weight of axle 3 was subtracted from the total weight of axles 2 and 3 to give the weight of axle 2. The trucker was charged with an overweight on axle 2. Axles 2 and 3 were less than 6 feet apart. The defendant moved to dismiss the charge because of the last sentence of sec. 348.15 (5r), Stats., which provides that such axles shall be weighed as one unit. It was argued that, since such axles must be weighed together, the charge of overweight on axle 2 must be dismissed because its weight was determined by subtracting the weight of axle 3 from the weight of axles 2 and 3 weighed together. We are informed that the court denied the motion. We agree with the court in this respect. We see no reason why the weight of axle 2 could not be arrived at by this method. The only question is whether this constitutes "good weighing technique" as prescribed by sec. 348.15 (5), Stats. Even if the court ruled that this method of obtaining the evidence of the weight of axle 2 was not in compliance with sec. 348.15 (5r), Stats., such evidence is still admissible, and may not be excluded, because no constitutional right was violated. *Ware v. State* (1930), 201 Wis. 425, 230 N.W. 80; *State v. Hochman* (1957), 2 Wis. 2d 410, 86 N.W. 2d 446. Any objection to such evidence would go only to its weight and not to its admissibility.

Your second question reads:

"Is the definition of 'peeled or unpeeled forest products cut crosswise' limited to products derived from the first action at the stumpage?"

In this respect, you have furnished the following background information:

"As to definition, the words 'peeled or unpeeled forest products cut crosswise' were included in an omnibus bill introduced into the 1959 legislature by the Motor Vehicle Department to eliminate confusion caused by the terms 'manufactured forest products' and 'unmanufactured forest products'. During discussion in preparation of the bill by department personnel it was agreed that the term 'unmanufactured forest products' was limited to those products derived from the first action at the stumpage, specifically cutting necessary to fell the tree, cutting it crosswise into transportable lengths, and peeling the logs where necessary. Any further action on

the logs produced a manufactured product. This bill became Chapter 542, Laws of 1959, and included the change of wordage as indicated above. Since that time enforcement action by this department has been based on that interpretation.

“Defense attorneys have been successful in convincing some courts that other forms of forest products which we consider as ‘manufactured’ should be included in the term ‘peeled or unpeeled forest products cut crosswise’. Examples of this are wood chips, rough lumber, ties, slabs, etc. Other courts have not accepted this interpretation, ruling that such products are not included in this category. . . .”

From this explanation, it is apparent that your question is whether the words “peeled or unpeeled forest products cut crosswise” are limited to forest products which are cut at the stump, trimmed of branches, cut crosswise into transportable lengths, and peeled where necessary. It is my opinion that this question must be answered in the affirmative, and that any further processing of this forest product raw material such as by cutting it into wood chips, or sawing it lengthwise into boards, ties, or slabs constitutes partial manufacture of such raw material. The products so produced are not included within the the words “peeled or unpeeled forest products cut crosswise.”

I reach this conclusion for the following reasons. The provisions of sec. 348.15 (3) (b) 2, Stats., specify a greater allowable weight when transporting such forest products than is allowed under sec. 348.15 (3) (b), Stats., when transporting other products generally. Thus, the former section constitutes a special exception from the more stringent requirements of the latter section which is the general provision. An exception must be strictly construed. One claiming the benefit of an exception must show that he comes within it. All doubts must be resolved in favor of the general provision and against the granting of the exception. Thus where an exception is ambiguous, any doubt must be resolved against the person claiming the exception. In 82 C.J.S. *Statutes*, 382, Pages 891-893, the law is stated as follows:

“Exceptions, in a statute, as a general rule, should be strictly construed, and, at the same time, exceptions should be reasonably construed; they extend only as far as their language fairly warrants.

And all doubts should be resolved in favor of the general provision rather than the exception. A person claiming the benefit of the exception must establish that he comes within it. . . .”

This rule is applicable even in criminal cases. In 22A C.J.S. *Criminal Law*, s. 572, pages 316-317, it is said:

“In general, accused has the burden of proving, as a matter of defense, that he is within an exception in the statute creating the offense, at least, where such exception is not part of the enacting clause, but is a proviso thereto, or is in fact not part of the description of the offense, as where the exception is not part of the crime but operates to prevent the act otherwise included in the statute from being a crime. Accordingly, the prosecution owes no duty to prove that accused is not within the exception. . . .”

You also state that since this language, relating to “peeled and unpeeled forest products cut crosswise,” was introduced into the statute by ch. 542, Laws of 1959, enforcement action by your department has been based upon your interpretation that this language applies only to forest products derived from the first action at the stumpage as explained above. This constitutes administrative construction of the statute. In a long line of cases, the Supreme Court of this state has held that long continued administrative construction of a statute, by the state agency charged with enforcement thereof, is entitled to great weight when a court is required to construe the statute. *Chevrolet Division, G.M.C. v. Industrial Comm.* (1966), 31 Wis. 2d 481, 488, 143 N.W. 2d 532.

From sec. 348.15 (3) (b) 2, Stats., it is apparent that the legislature intended to allow certain excess weight limitations to truckers transporting certain forest products from the forest to the sawmill, papermill, or railroad siding. Since pulp logs are peeled in the forest before being transported to the paper mill, it was necessary to allow that much processing. Since trees must be cut down, the branches trimmed off, and the trunks cut into transportable lengths, it was necessary to allow that much processing. In this respect, the key words are “cut crosswise.” This means cut crosswise at the stump and into transportable lengths, but no further. Obviously, further cutting lengthwise into boards, timbers, ties, or slabs, or grinding into wood chips constitutes further processing of the raw material beyond the “cut crosswise”

stage. "Cut crosswise" means crosswise and no more. Any further processing beyond the "cut crosswise" stage, deprives the trucker of the special excess weight limitations provided under sec. 348.15 (3) (b) 2, Stats.

RWW:AOH

Hotels, Boarding Houses and Restaurants—Industry, Labor and Human Relations, Department of—The Department of Industry, Labor and Human Relations may inspect those parts of boarding homes designed for three or more persons where employes work or those used by the public, but not interiors of private dwellings. It has no authority to license or register boarding homes nor to charge an inspection fee based upon number of beds or rooms.

May 16, 1973.

PHILIP E. LERMAN, *Chairman*

Department of Industry, Labor and Human Relations

You have asked for my opinion on whether your department may require annual registration, licensing and inspection of boarding homes under existing rule-making authority, and whether it can charge a per bed or per room licensing and inspection fee. It is assumed herein that the department will receive federal approval of its plan for continued enforcement of statutes and rules applicable to places of employment.

Your department's authority is stated in ch. 101, Wis. Stats. The basic jurisdiction is over employment, places of employment and public buildings. Section 101.01 (2), Stats.

Under secs. 101.01 (2) (h) and 101.02 (15) (a), Stats., your department has jurisdiction over that portion of the boarding house open to the public and where employes work, if the building is used by three or more tenants.

Section 101.01 (2) (h), Stats., reads:

"The term 'public building' as used in ss. 101.01 to 101.2 means and includes any structure, including exterior parts of such building,

such as a porch, exterior platform or steps providing means of ingress or egress, used in whole or in part as a place of resort, assemblage, lodging, trade, traffic, occupancy, or use by the public or by 3 or more tenants.”

You have not defined or described “boarding homes” in your opinion request. Nor has your department defined “boarding homes” in the definition section of the Wisconsin Administrative Code. Section Ind 51.04, Wis. Adm. Code. However, the scope of Ind 54.001, Wis. Adm. Code, includes some boarding homes.

Section Ind 54.001, Wis. Adm. Code, reads:

“This classification includes all factories and workshops (including all places where manual labor is employed), office buildings, telegraph and telephone offices, mercantile establishments where commodities are bought or sold, taverns, warehouses, railroad stations, exhibition buildings, and places where not more than 100 persons assemble for recreation, entertainment, worship, or dining purposes.”

“Boarding house” is defined as a house at which persons are boarded. The verb “board” is defined as: to provide with regular meals and often also lodging, usually for compensation. Webster’s Seventh New Collegiate Dictionary.

The term “boarding homes” defined for lien purposes appears in sec. 289.43 (1) (a), Stats:

“ ‘Boarding house’ includes a house or building where regular meals are generally furnished or served to three or more persons at a stipulated amount for definite periods of one month or less.”

In 56 OAG 36 (1967) we find that dwelling units of row houses are private dwellings excepted from regular fire inspections. Church rectories are not within your jurisdiction under the term “public building.” 56 OAG 37 (1967). See also 59 OAG 35 (1970); *Rogers v. Oconomowoc* (1964), 24 Wis. 2d 308, 315-316, 128 N.W. 2d 640.

Your department has authority to inspect that portion of boarding homes where employees work or where the public or frequenters enter. Your department has authority to inspect prior to occupancy the entire building, if it is designed to accommodate three or more tenants. Section 101.02 (15) (g), Stats., authorizes

inspection of the premises of employers or owners for the health, safety and welfare of employes, frequenters, the public or tenants. Subsections 101.14 (1) (b) and (2) (b), Stats., however, exclude from fire inspections the interior of private dwellings.

Your department does not have the authority to require annual registration or licensing of boarding homes nor to charge a per bed or per room licensing and inspection fee. Section 101.19 (1), Stats., enumerates what your department may certify or register, but a boarding home is not listed. Section 101.19 (2), Stats., provides for collection of fees for inspections necessary to determine whether the structure was constructed in accordance with approved plans. There is no provision for collecting any fees for other types of inspections.

It will require legislation to permit your department to completely, and without reservation, inspect boarding homes, to charge inspection fees and to license and collect annual registration fees.

RWW:RGM

Trust Funds—Students—University—Student loan funds established by gift under sec. 36.065 for the benefit of students are trust funds.

May 24, 1973.

J. S. HOLT, *Acting Secretary*

Board of Regents of the University of Wisconsin System

In your letter of March 5, 1973, you indicate that the Legislative Audit Bureau reported to the Governor their belief that the student loan funds established by gifts and administered by the student loan offices are trust funds rather than program revenue funds.

In asking my opinion as to whether student loan funds established by gifts are trust or program revenue funds, you are referring to student loan funds designated by the donor and established by gifts received under the authority of sec. 36.065, Stats., which allows the University to receive gifts for the benefit of

various classes of students at the University. Presumably, the funds received by the University as a result of such gifts would also create income in the form of interest and dividends, depending upon the type of investment. The question, therefore, is whether these funds and the income therefrom should be classified under a trust category or as program revenue.

Our Supreme Court, in *Sutherland v. Pierner* (1946), 249 Wis. 462, 24 N.W. 2d 883, pointed out that there are three principal elements of a trust, as follows:

“(1) a trustee, who holds the trust property and is subject to equitable duties to deal with it for the benefit of another; (2) a beneficiary, to whom the trustee owes equitable duties to deal with the trust property for his benefit; (3) trust property, which is held by the trustee for the beneficiary. * * *”

It appears that we have all the necessary elements of a trust, since under the provisions of sec. 36.065 gifts may be received by the named officials as trustees, the beneficiaries in this case are the students who benefit from the loans, and of course the trust property, the money, is held by the University for the benefit of the students who are eligible to borrow the money.

There may be situations, however, where the terms of a gift do not set up a trust but merely provide for the gift to be given to the University for the benefit of a particular function of the University itself. In such case, no trust would be created for the benefit of another. See *Estate of Silverthorn: Trustees of the Grand Lodge of Free and Accepted Masons of Wisconsin, Appellants, v. Cunningham and others, Defendants: The State, Respondent* (1957), 274 Wis. 453, 80 N.W. 2d 430. You can understand, therefore, that the terms of the gifts would determine whether a trust is created.

I must conclude, however, that here, where the hypothetical fact situation is stated so that we have the trustee, a beneficiary, and trust property, we are dealing with trust funds rather than program

revenue funds. *Estate of Steck* (1957), 275 Wis. 290, 81 N.W. 2d 729.

RWW:LLD

Zoning—Words and Phrases—A self-created or self-imposed hardship does not constitute an “unnecessary hardship” for which a county zoning board of adjustment may grant a variance, under the provisions of sec. 59.99 (7)(c), Wis. Stats.

May 24, 1973.

FRANKLIN J. SCHMIEDER, *District Attorney*
Calumet County

You have asked whether a person who has proceeded to construct a building without a building permit and, further, has failed to comply with setback line zoning provisions may now apply to the board of adjustment for a variance.

In the factual circumstances presented by this inquiry, such a person is not normally prohibited from seeking relief; however, the circumstances may preclude the board of appeals from granting a variance.

Section 59.99 (7) (a) and (c), Stats., provide that the county zoning board of adjustment shall have the power:

“(a) To hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by an administrative official in the enforcement of section 59.97 or of any ordinance adopted pursuant thereto.

* * *

“(c) To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.”

The powers granted to the board are virtually the same as those which exist under zoning statutes which relate to cities. Section 62.23 (7)(e) 7, Stats.

The question as to whether a self-created hardship affords a basis for the board of zoning appeals to grant a variance under sec. 62.23 (7), Stats., has been considered by the Wisconsin Supreme Court in *State ex rel. Markdale Corp. v. Bd. of Appeals* (1965), 27 Wis. 2d 154, 133 N.W. 2d 795. A simplification of the facts in that decision show that a building was constructed by Cities Service in violation of zoning ordinances in that no valid building permit was ever issued for its construction. After the building was completed, Cities Service applied to the board of appeals for a variance to permit drive-through access to the building in an area zoned as a parking district. The board of appeals granted the variance and an appeal was taken from that decision. The Supreme Court, noting that the issue before them was one of first impression, pointed out the settled nature of the rule among other legal authorities.

“* * * However, the authorities are practically unanimous to the effect that a hardship which has been self-created by the act of the property owner does not qualify as a hardship from which a board of appeals can grant relief by granting a variance.” (Citations omitted.) *Markdale Corp., supra*, at p. 158-159.

The Wisconsin Supreme Court, in approving the majority rule, cited the Connecticut case of *Misuk v. Zoning Board of Appeals* (1952), 138 Conn. 477, 86 A. 2d 180, as being directly on point. In that decision, the property owners started construction without a required building permit. They then obtained a variance from the board of appeals and continued with construction in disregard of an appeal from the variance. The Connecticut court held that the variance could not be sustained on the ground of hardship because the hardship was occasioned *solely* by the property owners' reckless conduct. See also *Application of Julian* (1960), 53 Del. 175, 167 A. 2d 21.

In passing on the case before it, our Supreme Court said, at page 163:

“For the reasons stated, we determine that the evidence establishes beyond dispute that the hardship relied upon for

granting the variance was self-created. Therefore, under the cited authorities it was beyond the power of the board to grant the variance because of hardship.”

Thus, it follows that a person who proceeds in violation of applicable zoning regulations in reckless disregard for the law may have to accept whatever results the law prescribes.

However, *Markdale Corp. v. Bd. of Appeals, supra*, does not preclude the granting of a variance on grounds of hardship. Indeed, such a result would be contrary to the expressed legislative grant in sec. 59.99 (7) (c), Stats. The court in discussing when relief may be granted for hardship quoted approvingly from *Booe v. Zoning Board of Appeals* (1964), 151 Conn. 681, 202 A. 2d 245, 246, at page 162:

“ We have repeatedly held that the hardship which justifies a board of appeals in granting a variance must be one which originates in the zoning ordinance. * * * ”

Moreover, the court in considering the power of appeal boards to grant variances approved a definition of “unnecessary hardship” appearing in 74 *Harvard L. Rev.* (1961), 1396, 1401, in a note entitled “Zoning Variances”:

“Since the main purpose of allowing variances is to prevent land from being rendered useless, ‘unnecessary hardship’ can best be defined as a situation where in the absence of a variance no feasible use can be made of the land.” *Markdale Corp., supra*, at page 163.

The fact that a property owner may have violated a provision of a zoning ordinance does not oust the board of appeals from its jurisdiction to determine whether an alleged hardship is an “unnecessary hardship” within the meaning of sec. 59.99 (7) (c), Stats. Since the board of adjustment is authorized by sec. 59.99 (7), Stats., to make findings and determinations on such matters in an appropriate case, denial of a proper and timely appeal or request for a hearing on such a matter, even by one apparently in reckless disregard of zoning regulations, might constitute a denial of due process. However, as previously pointed out, if the hardship itself is self-created in the sense that it arises solely because of the failure of the party to comply with the law, such hardship forms no valid basis for the board to grant relief. Of course, whether a particular decision

actually did in fact lack any valid foundation, for the reasons herein discussed, would be for the courts upon review, under the provisions of sec. 59.99 (10)(11)(12) and (13), Stats.

RWW:JCM

Public Welfare—County Board—The County Board of Public Welfare rather than the County Board of Supervisors has the authority to appoint a county welfare director.

May 31, 1973.

WILLIAM E. CHASE, *District Attorney*
Ashland County

You ask whether the County Board of Supervisors or the County Board of Public Welfare has the power of appointment relating to the position of a county welfare director. You note that under sec. 46.22 (2) (b), Stats., it seems quite clear that the County Board of Public Welfare has the duty, and therefore the authority to appoint a county director. It is my opinion that this statute is determinative of the matter.

The County Board of Public Welfare, although created by the County Board of Supervisors, becomes an independent agent in certain matters. In *Kenosha County C.H. Local v. Kenosha County* (1966), 30 Wis. 2d 279, 140 N.W. 2d 277, the court referred to the limited power of the County Board over the Welfare Board when at page 282 it stated:

“When section 59.15 and section 46.22 are read together it seems evident that the authority and duty to determine wages and functions of employes has been vested by the legislature in the County Department of Public Welfare and not in the County Board of Supervisors.”

While it may seem to be peculiar that a County Welfare Board has more authority than the Board of Supervisors in personnel matters, it must be remembered that the function of the County Welfare Department is to administer the federally funded

categorical aid programs. These programs are subject to the rules and regulations of a merit system under the Department of Health and Social Services in accordance with sec. 49.50 (2)-(5), Stats. Thus, the responsibility in these matters lies with the County Board of Public Welfare rather than the County Board of Supervisors for purposes of greater uniformity. As the court said in the *Kenosha* case, supra, 30 Wis. 2d at 283:

“ . . . The state is obligated to meet certain standards in regard to federally supported welfare programs. While such programs are administered on a county basis, they are subject to a statewide plan of which federal approval is required.”

Based on the foregoing, it is quite clear that sec. 46.22 (2) (b), Stats., prescribing that the County Board of Public Welfare shall “Appoint a county director of public welfare subject to the provisions of s. 49.50 (2) (5) . . .” means literally what it says. The Welfare Board has the stated authority. Moreover, its authority is not subject to review of the County Board of Supervisors for the reasons set forth by the Supreme Court in the *Kenosha* case.

I should mention that ch. 145, Laws of 1971, has given county boards some authority to establish salary levels of county welfare personnel. It should be noted that this authority concerns salary levels, however, rather than powers of appointment.

RWW:WLJ

Pollution—Assembly Bill 128 which is designed to create a system of state discharge permits congruent with the National Pollutant Discharge Elimination System created by the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500) cannot be amended to tie deadlines under the state law to the availability of federal financial assistance for municipalities without violating the Federal Act.

June 5, 1973.

THE HONORABLE, THE SENATE

By Senate Resolution 22, you have requested my opinion on certain questions involving Assembly Bill 128. Assembly Bill 128, which has been adopted by the Assembly and is now under consideration in the Senate, is designed to create a system of state enforcement against discharges of pollutants to waters of the state which directly parallels and is congruent with the federal water pollution control program set up under the Federal Water Pollution Control Act Amendments of 1972, (P.L. 92-500). Section 402 of that Act creates a National Pollutant Discharge Elimination System (NPDES) under which the federal Environmental Protection Agency (EPA) is to administer a system of permits for all discharges of pollutants to waters of the United States. Section 402 (b), however, provides that the system of discharge permits can be administered by the states themselves, provided they fulfill certain conditions, including a statement from the attorney general of the state to the effect that the laws of the state provide adequate authority to carry out a program that will meet all the requirements of sec. 402. Assembly Bill 128 is expressly designed to meet all those requirements.

Your resolution refers specifically to the declaration of goals and policy contained in sec. 101 of the Federal Water Pollution Control Act Amendments of 1972 (hereinafter referred to as the "federal act") and, specifically, to sec. 101 (a) (4) which states that:

"It is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;"

In light of that stated goal, you ask the following questions regarding an amendment to Assembly Bill 128 which would link federal financial assistance to required construction projects under the proposed state permit program:

"1. Can the availability of federal funds be tied to required construction projects as a state law or as a condition of a discharge permit without violating the 1972 Federal Water Pollution Control Act [sic] (P.L. 92-500)?

"2. Can the availability of federal funds effectively be tied to required construction projects in any other way without violating the 1972 Federal Water Pollution Control Act [sic] (P.L. 92-500)?"

It is my opinion that the answer to both questions is no.

Without going into great detail on the NPDES discharge system, it can be basically stated that the system, as it relates to publicly owned waste treatment works, sets certain minimum standards for discharges, and certain time limits for achieving those standards. EPA cannot approve a state discharge permit program unless state law provides for minimum standards and time limits that are at least as stringent as those enacted by, or promulgated under, the federal act. Sec. 402 (b), Federal Act. Assembly Bill 128 is designed to authorize the Department of Natural Resources to carry out a program to enforce such standards and time limits.

An amendment to Assembly Bill 128 tying its requirements to the availability of federal funds would have the effect of tolling or extending time limits under state law beyond those established by the federal act. This is because the federal act contains no express language guaranteeing that federal financial assistance will be made available to each and every publicly owned waste treatment works within the time limits established under the federal act. Section 101 (a) (4) of the act, quoted earlier, constitutes a declaration of goals and policy, but does not in itself expressly or impliedly guarantee the availability of funding within the prescribed time limits, nor do I find any such guarantee elsewhere within the act. It is entirely possible that the appropriation for federal financial assistance provided for within the act will be insufficient to provide assistance to each and every public sewage treatment works. Furthermore, even if the appropriation is sufficient, there is currently some question as to whether the entire amount of the appropriation will be expended by EPA.

Absent a guarantee within the federal act that federal financial assistance would be made available prior to the deadlines set forth in the act, it is clear that the tying of time limits under state law to the availability of federal funds would create the distinct possibility that deadlines under state law would be extended past the deadlines in the federal act. That being the case, it would not be possible for me to certify that state law, as it would be constituted upon the enactment of Assembly Bill 128 with the proposed amendment,

provides adequate legal authority to carry out a program required under sec. 402 of the federal act.

RWW:SMS

County Board—Indigent—Appointment of counsel for indigent involves a public contract.

June 6, 1973.

VICTOR MOYER, *Corporation Counsel*
Rock County

You have requested that this office review the opinion to the Corporation Counsel for LaCrosse County dated March 12, 1973, which stated that there is a probable violation of sec. 946.13, Stats., where a county board supervisor is appointed to represent indigent defendants and the annual remuneration for such services exceeds \$2,000.

The opinion has been reviewed in light of the questions you have raised. I find no reason why the conclusion reached therein should be modified. Final resolution of the question can only be made in a case brought in a proper court. This may arise in an attempted prosecution, or in a declaratory judgment action brought by an interested party.

You inquire whether, if complaint were made, the district attorney would retain prosecutorial discretion in such matter similar to that which he has in other criminal cases.

The answer to this question is in the affirmative. Such discretion cannot be abused, however. The question of abuse might be raised if a district attorney would refuse to prosecute a fellow member of the bar, who was also a county board supervisor and who had some power with respect to the establishment of the compensation of the district attorney, solely because he was a fellow member of the bar and county supervisor.

I am of the opinion that a contract is involved where an attorney agrees to represent an indigent defendant. I am of the further

opinion that it is a public contract within the meaning of sec. 946.13, Stats. The attorney accepting the appointment from the court is one of the contracting parties. The person charged, and the public, are the beneficiaries. It really does not matter whether the judge, the county or the state are the other parties to the agreement. Note that sec. 946.13 (2) (a), Stats., excepts contracts in which a single public officer or employe is privately interested which do not involve receipts and disbursements *by the state or its political subdivision* aggregating more than \$2,000 in any year. As stated in the opinion of March 12, 1973, the county is liable for such fees and the county board has the ultimate responsibility of appropriating the necessary funds. As stated in *Carpenter v. County of Dane, infra*, this would be true even if there were no statute such as secs. 256.49 and 967.06, Stats.

Long before there was a statute providing for the appointment of counsel for indigents which provided compensation to be paid by the county, our Supreme Court held that it was the duty of circuit courts to appoint and "employ" counsel on their behalf and that it was the duty of the county to provide compensation therefor as an incident to the administration of criminal law. *Carpenter v. County of Dane*, 9 Wis. *249; *State v. Kenney* (1964), 24 Wis. 2d 172, 181, 128 N.W. 2d 450.

While it is a duty of a member of the bar to accept appointments to defend indigent persons charged with crimes, such attorney can and has a duty to decline such employment if he has a substantial conflict. Courts should avoid appointments of attorneys who have potential conflicts. See *Karlin v. State* (1970), 47 Wis. 2d 452, 177 N.W. 2d 318.

An attorney who is also a county board supervisor accepts such appointment at his peril. The ethical and potential violation of criminal statutes is primarily his personal concern. We cannot advise him as to the actions he should take, such as withdrawal from a case when he approaches the \$2,000 maximum annual figure, or disinvolvement from partnership agreements, to avoid conflicts.

RWW:RJV

Public Welfare—Aid—Section 49.19 (6), Stats., which provides that an AFDC mother may be required to do remunerative work has not been affected by amendments to the Work Incentive Program, nor does it violate equal protection provisions of the Fourteenth Amendment.

June 6, 1973.

HUMPHREY J. LYNCH, *District Attorney*

Dane County

You have raised two questions relating to Aid to Families with Dependent Children (AFDC). Your questions specifically concern sec. 49.19 (6), Stats., which provides that an AFDC mother may be required, under certain circumstances, to seek gainful employment.

Your first question, whether the Talmadge Amendment to the Work Incentive Program (WIN) has any effect on the validity of sec. 49.19 (6), Stats., must be answered negatively. The statute in question provides as follows:

“The county agency may require the mother to do such remunerative work as in its judgment she can do without detriment to her health or the neglect of her children or her home; and may prescribe the hours during which the mother may work outside of her home.”

In *Stacy v. Ashland County Department of Public Welfare* (1967), 39 Wis. 2d 595, 159 N.W. 2d 630, it was argued that sec. 49.19 (6), Stats., is contrary to the purposes of the Social Security Act in that it does not allow the mother of dependent children to remain in the home. The court found that the application of the “employable mother” doctrine under the circumstances of the *Stacy* case was not necessarily antagonistic to the purpose of AFDC Program. It is to be noted that the constitutionality of sec. 49.19 (6), Stats., was assailed by the appellants on the ground that it lacked clearly definable standards. The court declined to consider this issue since no evidence had been presented and ruled upon by the court below. The court concluded that because the appellant was without adequate cause in refusing to accept employment, her grant of aid to families with dependent children was properly suspended.

The meaning of sec. 49.19 (6), Stats., as interpreted by the court in the *Stacy* case, *supra*, has not been substantially affected by the 1971 Talmadge Amendment (P.L. 92-223 approved December 28, 1971) to the WIN program.

The WIN program was designed to provide opportunities to AFDC recipients to enter productive employment or training under the Secretary of Labor. When such recipients refuse to participate in the training or work project the Talmadge Amendment requires a hearing plus counseling thereafter. The Act, as amended, is silent as to whether a termination of AFDC benefits is permissible in the event the methods specified are unproductive. Since the Act does not prohibit the termination of benefits, it would appear that such action by the county agency, after all methods fail, is in accord with the purposes of the WIN program.

The state of Georgia has an employable mother regulation under its state plan for AFDC similar to that of Wisconsin. In *Anderson v. Burson* (1968 DC GA), 300 F.Supp. 401, a federal district court concluded that Georgia's regulation did not violate any of plaintiff's constitutional or statutory rights because, it said, there was no federally protected right of a mother to refuse employment.

Your second question is whether sec. 49.19 (6), Stats., denies equal protection to female parents as guaranteed by the Fourteenth Amendment to the United States Constitution.

In *King v. Smith* (1968), 392 U.S. 309, 88 S.Ct. 2128, the court noted that the 74th Congress intended to protect a specialized group of children when the AFDC law was originally enacted. That group of children, it said, were members of families without a breadwinner, wage earner or father. To describe the sort of breadwinner that it had in mind, Congress employed the word, "parent." 392 U.S. 329.

Since male parents are regarded as the family breadwinners, deprivation of financial support of a child usually results from absence, death or incapacitation of the male parent rather than the female parent. Where an able-bodied and employable father refused to work, a District of Columbia court held that his children were not dependent in terms of the AFDC program. *Trull v. District of Columbia Department of Public Welfare* (1970), 268 Atl. 2d 859.

Moreover, where a father refused to accept day care services to enable him to go to work, an Arizona court found him to be ineligible for AFDC benefits. *Graham v. Shaffer* (1972), 498 Pa. 2d 571.

The foregoing cases suggest that there is no eligibility for AFDC where the male parent refuses to work. Under these circumstances deprivation of support is caused by the failure to work. It is not occasioned by death, absence or incapacitation of the breadwinner in terms of basic eligibility requirements under sec. 49.19 (1), Stats. Accordingly, I am of the opinion that there is no factual basis which invokes the Equal Protection Clause.

RWW:WLJ

Criminal Law—The “silent auction” is not a lottery because the element of “prize” is not present.

June 25, 1973.

ROBERT RUSCH, *District Attorney*
Taylor County

You have requested my opinion as to the legality under the Wisconsin lottery laws concerning the conduct of a “silent auction.” You describe a “silent auction” as follows:

An item of value, for example, a pie, is displayed to a gathering of people who have purchased admission for the alleged purpose of playing cards. After most of the people in attendance have played cards some of them remain to participate in the so-called “silent auction” at which an item of value, for example a homemade pie, is displayed to the gathering; anyone may submit a written bid for the pie. The winner is determined on the basis of the highest amount bid.

It is the rule in Wisconsin that a lottery requires three elements: “prize,” “chance,” and “consideration.” Section 945.01 (2) (a), Wis. Stats. (1971); *State ex rel. Cowie v. La Crosse Theatres Co.* (1939), 232 Wis. 153, 286 N.W. 707; *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. If all three of these elements are present, then the enterprise in question constitutes a lottery, which is unlawful regardless of the purpose for which it is conducted. *State ex rel. Trampe v. Multerer* (1940), 234 Wis. 50. However, if any one of the above elements is not present, then the enterprise is not a lottery.

With respect to the “silent auction” which you describe, I am of the opinion that it is not a lottery because, though the elements of “chance” and “consideration” are present, the element of “prize” is not present.

“Consideration” is defined by sec. 945.01 (2) (b) of the Wisconsin Statutes, as “anything which is a commercial or financial advantage to the promoter or a disadvantage to any participant.” From this definition it is clear that “consideration” is present in the “silent auction.”

The element of “chance” is also present. In order to win the bidding on an item in the “silent auction,” a participant must take into account both what he is willing to pay for the item and what others are willing to pay. Since the auction is “silent” the participant has no way of knowing for certain what other participants are willing to pay. This uncertainty constitutes the element of “chance” present in the enterprise. As Mr. Justice Holmes has stated, “[w]hat a man does not know and cannot find out is chance as to him, and is recognized as chance by the law.” *Dillingham v. McLaughlin* (1924), 264 U.S. 370, 373.

Though it may be thought that there is some skill—in the nature of a business judgment—involved in estimating what a particular item is worth and what others are willing to pay for it, there is obviously a large amount of guesswork involved. Guessing contests, even though they may involve some skill, are now almost uniformly held games of chance. 38 OAG 511, 512 (1949) and 37 OAG 126, 129 (1948), citing 34 Am. Jur. 656 and *National Conference on Legalizing Lotteries v. Farley* (App. D.C. 1938), 76 F. 2d 861, 863-4. Moreover, sec. 945.01 (2) (a) of the Wisconsin Statutes, defines “lottery” as 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). Thus, any skill involved in the bidding cannot be viewed as negating the element of "chance" noted above.

In my opinion, however, the element of "prize" is not present in the "silent auction" that you have described. The high bidder on a particular item presumably is not *given* the item. Rather, he must pay the price which he has bid in order to receive it. In determining whether the high bidder has received a prize, both the value of the item and the purchase price must be considered. If the purchase price is arrived at in a manner designed to create a fair exchange of money for goods, I think it correct to view the value of the item received as being offset by the price paid, so that no "prize" is received by the purchaser. Since the secret bidding employed in the "silent auction" is a widely-recognized method of arriving at fair items of exchange, the items exchanged in such an enterprise should not be viewed as "prizes."

In summary, the "silent auction" contains the elements of "consideration" and "chance" necessary to constitute a lottery, but lacks the element of "prize." It does not, therefore, constitute a lottery under the Wisconsin lottery statutes.

RWW:WB

Peddlers—Licenses and Permits—Employes of a Church Directory photography company who engage in transient sales activity not directly supervised by a Transient Merchant licensee present at the location of the sales activity must be licensed as "Transient Merchants" under 440.85, Stats.

June 28, 1973.

LILLIAN M. QUINN, *Deputy Secretary*
Department of Regulation and Licensing

You have requested my opinion as to which employes of a particular company engaged in the Church Directory photography business in Wisconsin are required to be licensed as "Transient Merchants" pursuant to sec. 440.85, Wis. Stats.

You indicate that the company has taken out Transient Merchant licenses in the name of one of its officers as an "Absentee Licensee" and in the name of its State Manager as a "Resident Manager Licensee." This State Manager has provided me with further information regarding the company's method of operation. It is he who makes the initial contact with churches to interest them in the company's program and if a church desires a directory, he trains volunteer workers who then schedule appointments for church members to appear for photography. He also does the layout for the directory and provides general supervision of the entire operation, including the handling of problems with production or unsatisfied customers. After the schedule for photography is set, a company photographer visits the church and photographs the church members. The photographer does not attempt to sell anything or to collect any money. Some time after the photographs are taken, other company employes visit the church to show the church members their pictures which are generally not yet color-corrected. Church members are asked to select a picture of their family to appear in the directory and every family whose picture does appear receives a free directory. These previewer employes also show a price list for family portraits to the church members and solicit orders for the same. It is through these family portrait purchases that the company receives its revenue. If the member wishes to purchase portraits, he may pay the employe in full at that time or can pay the employe a deposit and send the balance to the company in seven days or pay the balance COD.

"Transient Merchant" is defined as follows in sec. 440.85 (1), Stats.:

"(1) A transient merchant is one who engages in the sale of merchandise at any place in this state temporarily, and who does not intend to become and does not become a permanent merchant of such place. No person shall engage in the business of transient merchant without a license authorizing him to do so. For purposes of this section, sale of merchandise includes a sale in which the personal services rendered upon or in connection with such merchandise constitutes the greatest part of value for the price received, but does not include a farm auction sale conducted by or for a resident farmer of her personal property used on the farm or

the sale of produce or other perishable products at retail or wholesale by a resident of this state.”

Section 440.86, Stats., states as follows:

“But one person shall carry on business under the terms of any license provided for in this subchapter and no person shall conduct business under the same license as copartners, agents or otherwise. . . .”

The question for consideration is whether the company employes who work as photographers and previewers are required to be licensed as “Transient Merchants,” under sec. 440.85, Stats. In an opinion issued to the Commissioner of the Motor Vehicle Department in 1952, this office discussed whether employes of a Transient Merchant Licensee were required to be licensed under secs. 129.05 and 129.06 of the statutes. 41 OAG 4. The language of these two provisions, upon which the present secs. 440.85 and 440.86 are based, was virtually identical to that of the present provisions. In discussing this question, the opinion stated:

“Sec. 129.06 . . . suggests that under some circumstances an employe of a transient merchant licensee might be required to obtain a license himself. Certainly the phrase ‘as copartners, agents or otherwise’ is broad enough to include an employe. I am of the opinion that the controlling factor here is whether or not the employe ‘carries on’ or ‘conducts’ the business. If the employe is in fact the resident manager for an absentee licensee, he is then conducting the business and is required to be licensed. If, however, he is a sales clerk working under the supervision and at least part time in the presence of the licensee, he is not carrying on or conducting the business. Thus it would be possible for a transient merchant to have a number of stands or outlets on one ground or in one municipality and operate them through employes under his direct supervision without being required to secure a transient merchant’s license for each of his employes.” 41 OAG 4, 6.

It is an elementary rule of statutory construction that statutes must be construed with reference to the objects sought to be accomplished. Undoubtedly, one of the primary objects behind the transient merchant licensing requirement was to prevent fraud and false representation in the sale of merchandise by individuals who

are not as directly amenable to those legal and social restraints which must necessarily influence the business conduct of a merchant having a fixed place of business and depending for his patronage on a single community. This object is evidenced by sec. 440.88, Stats., which allows for revocation of a license upon conviction of the licensee for fraud or false representation or imposition in the sale of merchandise.

From the description of the company's operations provided me, it appears that the sole function of the photographer employes is to take photographs. They neither solicit orders nor collect money. Nor would licensing these photographers as "Transient Merchants" further the licensing requirement's object of providing protection against fraud and false representation. It is therefore my opinion that the company's photographer employes are not engaged in the sale of merchandise so as to require licensing as "Transient Merchants" under sec. 440.85, Stats.

The previewer employes, on the other hand, apparently both solicit orders and collect money from church members. Their sales activity is not always directly supervised by the Resident Manager or other licensee present at the location of that sales activity. Licensing such employes would provide protection against fraud and false representation consistent with the object of the licensing requirements. It is therefore my opinion that these previewer employes are "carrying on" or "conducting" the business of a "Transient Merchant" so as to require licensing under sec. 440.85, Stats.

RWW:WCW

Coroner—Accidents—Where accident occurs in one county and victim is transported to another county, and death occurs there, Coroner where death occurs has duty to immediately report death to Coroner of county where crime, injury or event occurred, and Coroner of latter county has authority to investigate and duty to hold inquest if he deems it necessary or if directed by district attorney of his county.

July 3, 1973.

JOHN J. McWILLIAMS, *District Attorney*
Lafayette County

You have requested me to interpret sec. 979.20 (1), Stats. You indicate that in numerous cases persons injured in automobile accidents in Lafayette County are transported to a Green County hospital. In some cases the person dies at the scene of the accident, in others en route, and in other cases after arrival in the hospital. You state that the Green County Coroner has taken the position that, where accident victims are transported into Green County from another county and death subsequently occurs, the duty of investigation is on the Coroner of the county where the accident took place. This may require that the Lafayette County Coroner go to Green County to investigate the death.

You inquire whether the Coroner for Green County has a duty to investigate the death of a person injured in an automobile accident in Lafayette County who is transported to Green County and dies in Green County.

I am of the opinion that he does not have a duty to fully investigate but must report the death to the Coroner of the county where the injury occurred.

The historical powers of Coroner are set forth in *Schultz v. Milwaukee County* (1949), 245 Wis. 111, 13 N.W. 2d 580.

Under present statutes the primary duty of a Coroner is to hold inquests when directed by the district attorney, or on his own motion, when "there is reason to believe that murder, manslaughter, homicide resulting from negligent control of vicious animal, homicide by reckless conduct, homicide by negligent use of vehicle or firearm, or homicide by intoxicated user of vehicle or firearm may have been committed, or that death may have been due to self-murder or unexplained or suspicious circumstances, and venue of such offense is in his county * * *." Sec. 979.01. (Emphasis supplied)

The statutes contemplate that the Coroner of the county in which venue of the offense or event lies has authority to investigate to determine the necessity of taking inquest, sec. 979.14, Stats., and

may require an autopsy to be conducted at any place within this state. Sec. 979.121, Stats. Section 979.20 (3), Stats., also indicates that a Coroner has authority to investigate deaths resulting from suspicious circumstances and in fact all which are reportable under sec. 979.20 (1), Stats.

While there is authority to investigate, there is no specific statute setting forth a duty to investigate in cases where the district attorney has not directed the Coroner to hold an inquest. Such determination, absent direction to hold an inquest, is left to the discretion of the Coroner of the county in which the crime, injury or event occurred. 32 OAG 277 (1943). If necessary the Coroner can go into another county for investigative purposes, including view of the body.

The Coroner of a county in which the death took place also has duties by statute. See sec. 979.19, Stats.

His duty under sec. 979.20 (1), Stats., is to report a death immediately to the Coroner or medical examiner of the county where the crime, injury or event took place. Any further investigation or inquest is the duty of the Coroner of the county in which the crime, injury or event occurred.

Section 979.20 (1), Stats., provides:

“979.20 Reporting deaths required; penalty; taking specimens by coroner. (1) All physicians, authorities of hospitals, sanatoriums, institutions (public and private), convalescent homes, authorities of any institution of a like nature, and other persons having knowledge of the death of any person who has died under any of the following circumstances, shall immediately report such death to the sheriff, police chief, or *coroner of the county wherein such death took place*, and the sheriff or police chief shall, immediately upon notification, notify the coroner or, in counties having a population of 500,000 or more, the medical examiner and the coroner or medical examiner of the county where death took place, *if the crime, injury or event occurred in another county, shall report such death immediately to the coroner or medical examiner of that county*: (Emphasis supplied).

“(a) All deaths in which there are unexplained, unusual or suspicious circumstances.

“(b) All homicides.

“(c) All suicides.

“(d) All deaths following an abortion.

“(e) All deaths due to poisoning, whether homicidal, suicidal or accidental.

“(f) All deaths following accidents, whether the injury is or is not the primary cause of death.

“(g) When there was no physician, or accredited practitioner of a bona fide religious denomination relying upon prayer or spiritual means for healing in attendance within 30 days preceding death.

“(h) When a physician refuses to sign the death certificate.”

RWW:RJV

Waters—Fish and Game—When a criminal action is brought for a violation of ch. 94, Stats., prohibiting deposit of pesticides in public waters of the state, such proceeding is not barred by a civil action to recover the statutory value of fish killed by such pesticides.

July 3, 1973.

DANIEL L. LAROCQUE, *District Attorney*
Marathon County

You have requested my opinion concerning a contemplated criminal prosecution for a violation of sec. AG 29.12 (3) of the Wisconsin Administrative Code. You have advised that the Department of Natural Resources contemplates such prosecution for a violation of this section which prohibits persons from depositing pesticides in public waters of the State. Specifically, you asked whether subsec. 3 of sec. 29.65 of the Wisconsin Statutes, is a bar to a criminal prosecution for that offense.

It is my opinion that a prosecution for violation of sec. AG 29.12 (3), Wis. Adm. Code, is not barred by a civil action commenced pursuant to authority given by sec. 29.65, Stats.

In the recent case of *Department of Natural Resources v. Clintonville* (1971), 53 Wis. 2d 1, 191 N.W. 2d 866, the Supreme Court had occasion to consider the legislative intent of sec. 29.65, Stats. In that case, a fish kill resulted from the lowering of the level of the pond created by a mill dam on the Pigeon River which runs through the City of Clintonville. The Department of Natural Resources had not given its prior approval to the lowering of that pond as required by sec. 31.02, Stats. The question before the court was whether a violation of that statutory section constituted the type of "unlawful" action contemplated by sec. 29.65 (1), Stats. The court held that it did not. In attempting to arrive at the legislative intent of that section, the court referred to the scope, history, context, subject matter, the purpose or object to be accomplished, and the caption of the act passed by the legislature. On page 10 the court said:

"We agree with the view expressed in the brief of the *amicus curiae* that although all the express violations of the provisions of ch. 29, Stats., are remedied by the imposition of criminal penalties, some cases may not be susceptible to adequate treatment by the criminal penalties when the amount of damage or injury to the fish or wildlife is extensive. . . . For such cases especially, sub. (3) of sec. 29.65 provides an alternative adequate civil remedy and if used bars criminal prosecution and conversely, if criminal prosecution is used, it is an alternative for a civil action for the 'same offense.' The concept of the 'same offense' and alternative remedies indicate the civil remedy which was added to the chapter after the criminal penalties were in existence *is coextensive with the expressed criminal provisions.* . . ." (Emphasis supplied)

On page 11 of that same case, the court held:

"As we view sec. 29.65, Stats., it liquidates the amount of damages *for acts expressly prohibited by ch. 29 and has no application to any cause of action at common law for an intentional or negligent tort.* Since sec. 29.65 provides for a civil action *only for criminal acts expressly prohibited in ch. 29,* we do not reach the question of the sufficiency of the proof of the scope of authority of alderman Hangartner in lowering the dam. . . ." (Emphasis supplied)

Section AG 29.12 (3), Wis. Adm. Code, was enacted pursuant to the authority of sec. 94.69 (9), Stats., authorizing the Department of Agriculture to adopt a rule governing the use of pesticides, including their formulations, and to determine the time and methods of application and other conditions of use. A violation of that section of the Wisconsin Administrative Code is not punishable by any authority in ch. 29, but rather is punishable under the provisions of sec. 94.71 (1), Stats. A prosecution for a violation of that administrative code section is not barred by a civil action brought pursuant to the authority of sec. 29.65, Stats., to recover the statutory damages provided therein for killing of fish. This is true even though the fish were killed as a consequence of the spilling of pesticides into a trout stream which may also constitute a violation of sec. 29.29, Stats. A prosecution for a violation of 29.29 is barred by the civil action commenced under 29.65. See sec. 29.65 (3), Wis. Stats.

The term "same offense" is not unknown to the law. That term has most frequently been construed in connection with Art. I, sec. 8 of the Wisconsin Constitution, which states in part, "and no person for the same offense shall be put twice in jeopardy of punishment." The same phrase appears in the United States Constitution in the Fifth Amendment where it says in part, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." An examination of the annotations under these two constitutional provisions quickly discloses that prosecutions under both secs. 29.29 and 94.69, Stats., would be permissible since different elements must be proven in each case. It is not unusual that prosecutions for violation of more than one statute arise from a single occurrence or chain of events, and such prosecutions enjoy statutory sanction in Wisconsin. See sec. 939.65, Wis. Stats. It is my opinion that only the ch. 29 violations would be barred by the civil action commenced pursuant to sec. 29.65, Stats.

RWW:RBM

Indigent—Public Defenders—Power to appoint counsel for indigent defendant vested by sec. 970.02 (6), in judge cannot be transferred without the consent of such judge to a non-stock, non-

profit corporation operating as a public defender's office absent specific legislation or rule promulgated by the supreme court.

July 10, 1973.

ROBERT P. RUSSELL, *Corporation Counsel*
Milwaukee County

You request my opinion whether the power to appoint counsel for an indigent defendant, vested by sec. 970.02 (6), Stats., in the judge of the court in which an indigent defendant is to be tried, can be transferred without the consent of such judge to a non-stock, non-profit corporation operating as a public defender's office absent specific legislation granting such authority.

I am of the opinion that it cannot be so transferred. I am of the further opinion that under present statutes any public defender's plan must have the approval of the judges of courts of record in each county.

The plan proposed by the Wisconsin Council of Criminal Justice for Milwaukee County would provide that a non-stock, non-profit corporation would be given the responsibility to provide representation to all indigent defendants and that where a staff attorney was not available private counsel would be appointed by the corporation.

Since we have a specific statute dealing with the appointment of counsel for indigent defendants which vests power in the judges of the several courts, we need not be here concerned with whether the supreme court or the legislature could provide that some other department of state or county government or some non-governmental entity could exercise the power of appointment at state or county expense. In sec. 257.23, Stats., the legislature has recognized the right of the supreme court to appoint counsel for indigents outside the office of the state public defender.

An indigent defendant has a constitutional right to representation by competent counsel. Appointment of counsel for indigent defendants is a matter of statewide concern and the legislature has provided a scheme therefor. It is, in my opinion, not a matter of a local, legislative and administrative character which

could be conferred by the legislature upon the boards of supervisors of the several counties under Art. IV, sec. 22, Wis. Const.

Section 970.02 (6), Stats., provides in material part:

“(6) The judge shall in all cases where required by the U.S. or Wisconsin constitution appoint counsel for defendants who are financially unable to employ counsel, unless waived, at the initial appearance. The judges of courts of record in each county shall establish procedures for the appointment of counsel in that county; * * *”

Long before there was a statute providing for the appointment of counsel for indigents which provided compensation to be paid by the county, our supreme court held that it was the *duty of circuit courts to appoint and “employ” counsel* on their behalf and that it was the duty of the county to provide compensation therefor as an incident to the administration of criminal law. *Carpenter v. County of Dane*, 9 Wis. *249; *State v. Kenney* (1964), 24 Wis. 2d 172, 181, 128 N.W. 2d 450.

In *Peters v. State* (1971), 50 Wis. 2d 682, 687, 184 N.W. 2d 826, the supreme court emphasized the duty and discretion *in the court* with respect to the appointment of counsel for an indigent defendant.

“* * * This matter was considered in Wisconsin as early as *Baker v. State* (1893), 86 Wis. 474, 476, 56 N.W. 1088. In an addendum note to the *Baker* opinion, the court stated:

“ ‘ . . . He may have whatever counsel he chooses to retain, and may refuse to accept the services of any counsel he does not want, but if he would be defended at the expense of the county he must accept the services of any reputable attorney the court, in its discretion, sees fit to appoint to perform that duty.’

“The *Baker* rule was reaffirmed very recently in the case of *State v. Johnson*, ante, p. 280, 184 N.W. 2d 107:

“ ‘ . . . In this state an indigent defendant is entitled to competent counsel, but not necessarily counsel of his own choosing. He cannot select and he cannot discharge the court-appointed attorney, *nor can he insist upon replacement counsel being appointed*. He can request the court to name a different attorney,

but the decision is for the court to make. . . .' (Emphasis supplied)."

RWW:RJV

Outdoor Recreation Act—ORAP funds may be used for the planting of trees and shrubs along state highways and to mark scenic easements as part of the state's beautification and outdoor recreation programs.

July 12, 1973.

B. J. MULLEN, *Director, Bureau of Right of Way*

Department of Transportation

You have requested the opinion of this office on two questions relative to the use of ORAP funds. Specifically, you have asked whether such funds may be used for the planting of trees and shrubs for the beautification of state highways and whether such funds may be used to mark scenic easements for maintenance purposes.

Section 20.866 (2) (tp), Stats., authorizes state debt for recreational facilities and appropriates such debt funds or proceeds to the Department of Natural Resources. The expenditure of these state debt proceeds are subject to the provisions of secs. 23.30 and 23.31, Stats. Particularly relevant to this discussion is sec. 23.30 (1), Stats., which reads:

"Outdoor recreation program. (1) PURPOSE. The purpose of this section is to promote, encourage, coordinate and implement a comprehensive long-range plan to acquire, maintain and develop for public use those areas of the state best adapted to the development of a comprehensive system of state and local outdoor recreation facilities and services in all fields, including, without limitation because of enumeration, parks, forests, camping grounds, fishing and hunting grounds, related historical sites, highway scenic easements and local recreation programs, except spectator sports, and to facilitate and encourage the fullest public use thereof."

As can be seen from the above-quoted language, the purposes of this program are exceedingly broad and specifically include highway scenic easements.

Therefore, in my opinion, such funds may be properly used for the necessary marking of highway scenic easements.

The use of such funds for highway beautification by the planting of trees and shrubs is not as clear under sec. 23.30 (1), Stats. However, as stated previously, the subsection in question is exceedingly broad and specifically states that the program is not to be limited by the enumerated purposes.

Highway facilities are the keystone of the state's outdoor recreational program, and without such facilities the outdoor recreational program would not, for practical purposes, exist. It seems to me that highway facilities are absolutely essential to the success of the program and must be considered as a direct and integral part of the outdoor recreational program. Certainly, highway beautification immeasurably adds to the public's use and enjoyment of the outdoor recreational facilities.

Accordingly, I am of the opinion that under sec. 23.30, Stats., it would be proper for the Department of Natural Resources to consider the use of those funds appropriated by sec. 20.866 (2) (tp), Stats., for highway beautification.

RWW:CAB

Regional Planning—Constitutional Law—Representation provisions of sec. 66.945 (3), Wis. Stats., do not violate the equal protection clause.

July 12, 1973.

ALDWIN H. SEEFELDT, *Corporation Counsel*
Washington County

You ask whether the representation provisions of sec. 66.945 (3), Stats., for regional planning commissions in Wisconsin violate the

constitutional requirements of equal protection as enunciated in various recent court decisions.

It is my opinion that sec. 66.945 (3), Stats., is constitutional.

The answer to your inquiry depends upon whether or not the functions of the commission are such that its members must be selected by proportional representation.

Section 66.945, Stats., sets forth the functions of a regional planning commission created pursuant thereto. Section 66.945 (8) (a) specifies:

“FUNCTIONS, GENERAL AND SPECIAL. The regional planning commission may conduct all types of research studies, collect and analyze data, prepare maps, charts and tables, and conduct all necessary studies for the accomplishment of its other duties; it may make plans for the physical, social and economic development of the region, and may adopt by resolution any plan or the portion of any plan so prepared as its official recommendation for the development of the region; it may publicize and advertise its purposes, objectives and findings, and may distribute reports thereon; it may provide advisory services on regional planning problems to the local government units within the region and to other public and private agencies in matters relative to its functions and objectives, and may act as a co-ordinating agency for programs and activities of such local units and agencies as they relate to its objectives. All public officials shall, upon request, furnish to the regional planning commission, within a reasonable time, such available information as it requires for its work. In general, the regional planning commission shall have all powers necessary to enable it to perform its functions and promote regional planning. The functions of the regional planning commission shall be solely advisory to the local governments and local government officials comprising the region.”

No provision for the popular election of members of a commission is made in sec. 66.945. Procedures for appointing such members are enumerated in sec. 66.945 (3).

The issues raised by your question are very similar to those addressed in 59 OAG 79 (1970): whether the legislature may constitutionally provide for the appointment of members of

vocational school boards and whether the one man, one vote principle should apply in any way to such appointments. We advised that the appointment of the board members under sec. 41.155 (5) (c), Wis. Stats. (1967), was constitutionally permissible and that the one man, one vote principle was inapplicable.

Subsequently, two courts also assessed the validity of the statute and arrived at similar conclusions. *Village of West Milwaukee v. Area Board of Vocational, Technical and Adult Education* (1971), 51 Wis. 2d 356, 187 N.W. 2d 387, appeal dismissed, 404 U.S. 981, 30 L.ed. 2d 364, 92 S.Ct. 452; *Egan v. Wisconsin State Board of Vocational, Technical and Adult Education*, 332 F. Supp. 964 (E.D. Wis. 1971).

59 OAG 79 (1970) and the above two court decisions relied substantially on *Sailors v. Kent Board of Education* (1967), 387 U.S. 105, 18 L.ed. 2d 650, 87 S.Ct. 1549, in which the United States Supreme Court upheld the validity of a county school board whose members were appointed. The court held:

“We find no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means rather than by an election.” 387 U.S. at p. 108.

The regional planning commissions created pursuant to sec. 66.945, Stats. (1971), are delegated far less power than the county school boards discussed in *Sailors, supra*. The functions of a regional planning commission are only advisory:

“. . . The functions of the regional planning commission shall be solely advisory to the local governments and local government officials comprising the region.” Section 66.945 (8) (a).

Further, the planning commission may not levy taxes, but is confined by sec. 66.945 (14), Wis. Stats. (1971), to limited assessments against local governments within the region it serves. Without question, therefore, the regional planning commissions must be considered nonlegislative, administrative bodies whose members, according to *Sailors*, need not be elected.

The one man, one vote principle first enunciated by the Supreme Court in *Reynolds v. Sims* (1964), 377 U.S. 533, 12 L.ed. 2d 506, 84 S.Ct. 1362, reh. den., 379 U.S. 870, 13 L.ed. 2d 76, 85 S.Ct. 12, is thus inapplicable here. In *Saliers*, the court held:

“ . . . Since the choice of members of the county school board did not involve an election and since none was required for these nonlegislative officers, the principle of ‘one man, one vote’ has no relevancy.” 387 U.S. at p. 111.

Further, in *Hadley v. Junior College District* (1970), 397 U.S. 50, 25 L.ed. 2d 45, 90 S.Ct. 791, the court held:

“ . . . where a State chooses to select members of an official body by appointment rather than election, and that choice does not itself offend the Constitution, the fact that each official does not ‘represent’ the same number of people does not deny those people equal protection of the laws. . . .” 397 U.S. at p. 58.

For these reasons, I conclude that sec. 66.945 (3), Stats. (1971), is not inconsistent with constitutional equal protection requirements.

RWW:PM

County Board—Zoning—Municipalities—A town board, granted village powers under sec. 60.18 (12), Stats., is not required to petition its county board prior to adopting a town zoning ordinance. Sec. 60.74 (1) (am) and (7), Stats. However, where the county has adopted a zoning ordinance under sec. 59.97, Stats., such town zoning ordinance will not become effective and cannot be enforced unless and until the county takes positive action approving such town ordinance.

July 16, 1973.

CHARLES A. POLLEX, *District Attorney*
Adams County

You have asked whether a town board, which is granted village powers by resolution pursuant to sec. 60.18 (12), Stats., must petition a county board in accordance with sec. 60.74 (1) (am),

Stats., prior to adopting a town zoning ordinance. In the event sec. 60.74 (1) (am), Stats., does require such petition, you further inquire whether the enforceability of a town zoning ordinance is affected by the failure of such a town to so petition the county board.

Section 60.74 (1) (a), Stats., authorizes towns to enact zoning ordinances in counties which have not adopted a county zoning ordinance pursuant to sec. 59.97, Stats. Section 60.74 (1) (am), Stats., further provides in part as follows:

“(am) A town board may not proceed as provided in this section unless it petitions the county board, at any regular or special meeting to adopt a county zoning ordinance as provided by s. 59.97. * * *”

However, sec. 60.74 (7), Stats., provides that:

“Town boards granted village powers by resolution adopted pursuant to section 60.18 (12) shall have power to adopt town zoning ordinances in the manner provided in section 61.35 notwithstanding any provision of this section or section 60.75 * * *.”

Subsection (7) of sec. 60.74, Stats., appears fully dispositive of your first question. It is a clear grant of authority which is intended to control over the remaining provisions of the section. Hence, your first question must be answered in the negative.

Although my answer to your first question renders your second inquiry moot, it should be pointed out that towns adopting zoning ordinances under sec. 60.74 (7), Stats., are subject to the following limitations, set forth in the latter subsection:

“* * * provided, however, that in counties which have adopted a zoning ordinance under section 59.97 the exercise of the power to adopt a town zoning ordinance shall be subject to approval by a referendum vote of the electors of the town held at the time of any regular annual town meeting. Any zoning ordinance adopted by a town board and any amendment thereof under this subsection shall be subject to the approval of the county board in counties having a county zoning ordinance.”

Under this statutory language, it is clear that where the county has adopted a zoning ordinance under sec. 59.97, Stats., a zoning

ordinance adopted by one of its towns, under sec. 60.74 (7), Stats., will not become effective and cannot be enforced unless and until the county board of such county takes positive action approving such town zoning ordinance.

RWW:JCM

Bonds—Business Development, Department of—Corporations—Industrial development revenue bonding under sec. 66.521, Stats., is not available for a project for a new automobile showroom, warehouse, and repair facility of a retail automobile dealership.

July 18, 1973.

WILLIAM C. KIDD, *Secretary*
Department of Business Development

You have asked for my opinion as to whether industrial development revenue bonding under sec. 66.521, Stats., is available for a project for a new automobile showroom, warehouse, and repair facility of a retail automobile dealership in Milwaukee.

Your inquiry is prompted by a desire to fulfill your responsibilities under sec. 560.01, Stats., to “foster the growth and diversification of the economy of the state” and to “provide assistance to commercial, industrial and recreational development and expansion,” among other things.

The real question, as you have indicated, is whether sec. 66.521, Stats., encompasses businesses which are primarily retail and commercial in their nature, such as the proposed project.

It is my opinion that industrial development revenue bonding under sec. 66.521, Stats., is not available for projects such as the one proposed.

Section 66.521 (3) (b), Stats., limits the authority of municipalities to issue revenue bonds for *industrial* projects. It provides:

“(3) * * * Any municipality may:

“* * *

“(b) Borrow money and issue revenue bonds to finance the costs of the acquisition, equipping, purchase, construction, reconstruction or remodeling of *industrial* projects and the improvement of sites.” (Emphasis supplied)

The statutory definition of “project” is broad enough so that it could be interpreted to encompass an automobile dealership within its terms. Under sec. 66.521 (2) (b), Stats., the term “project” refers to “any revenue producing enterprise . . . engaged in the . . . warehousing, storing or distributing of any products of . . . manufacture.” However, the term “industrial” is not defined under the statute. Webster’s Seventh New Collegiate Dictionary distinguishes the synonyms for the term “business” on page 113. “Commerce” and “trade” are defined to “imply the exchange and transportation of commodities.” On the other hand, “industry” is defined to apply to “the producing of commodities, esp. by manufacturing or processing, on so large a scale that capital and labor are significantly involved.” Accordingly, the warehousing, storing or distributing projects authorized by statute appear to be limited to those directly related to industrial endeavors and not to retail and commercial enterprises. In other words, only an *industrial* warehouse, storage or distribution center would be authorized under the statute.

In adopting the industrial development revenue bond law, the legislative findings in sec. 66.521 (1), Stats., found and declared that *industries* located in this state have been induced to move or expand their operations outside of Wisconsin to the detriment of this state. The legislature found and declared that this has resulted in the loss or reduction of tax revenues and an increase in unemployment.

The legislature then went on to declare that it is “the policy of this state to promote the right to gainful employment, business opportunities and general welfare of the inhabitants thereof and to preserve and enhance the tax base by authorizing municipalities to acquire *industrial buildings*. * * *”

Thus, the legislature looked upon *industry* as the best means to promote statewide employment and to enhance the state’s tax base. There was no legislative finding that there was a similar loss of retail

enterprises to other states resulting in a similar loss of employment or tax revenues, nor is there any evidence to that effect. Nor is there evidence that the purposes of the statute could be best achieved by retail enterprises.

Industry provides employment and enhances the tax revenues for the state and its municipalities. It serves as the base from which a sustained program of economic improvement can be launched. The influx of industrial jobs into a community coincides with the interests of merchants, bankers, lawyers, doctors, and others who benefit from the presence of industry.

The recruitment of industry, in the minds of the legislature, is the most promising means of upgrading employment and incomes to advance the general welfare of this state and its communities. This in turn will produce a broader and stronger tax base to generate essential revenues.

Unlike industry, which is more mobile and free to locate in various parts of the nation, retail enterprises generally are locally oriented and depend upon local demands. This observation, of course, would not apply to national and regional offices of large commercial and retail enterprises. However, most retail establishments locate on the basis of proximity to the market, and generally would not locate outside Wisconsin when the market is within the state. On the other hand, the marketplace of an industrial enterprise usually extends beyond the borders of the state. The presence of industry in Wisconsin stimulates the economic growth of the state, and to the extent the state can attract industries to locate in Wisconsin, the state can grow on the basis of demands generated in the national marketplace.

The public purpose is best achieved by making the statute available to *industrial* enterprises, and the legislature has so declared.

Recently the Wisconsin Supreme Court upheld the constitutionality of sec. 66.521, Stats., in its decision in *State ex rel. Hammermill Paper Co., et al. v. La Plante* (1973), 58 Wis. 2d 32, 205 N.W. 2d 784.

One of the questions answered by the Court was:

“8. Does the limitation of the benefits of sec. 66.521, Stats., to ‘industrial enterprises’ deny to nonindustrial enterprises the equal protection of laws under sec. 1, art. 1 of the Wisconsin Constitution and the fourteenth amendment of the United States Constitution?”

In concluding there was no denial of equal protection the court said:

“All enterprises within the definition of ‘project’ are treated the same pursuant to sec. 66.521, Stats. The legislature specifically found that it was the ‘industry’ located in this state that was being induced to move their operations. To ease this economic drain upon the state, the legislature determined it was necessary to promote industrial enterprises. It cannot be said that the legislature’s classification in sec. 66.521 is either irrational or arbitrary. Section 66.521 does not contradict the equal protection clauses of either the Wisconsin or United States Constitutions.”

It is my opinion that industrial development revenue bonding under sec. 66.521, Stats., is not available for projects such as the one proposed which is for a retail enterprise.

RWW:APH

Bills and Bidders—Contracts—Where a governmental entity determines that an apparent low bidder is entitled to relief from an erroneous bid under sec. 66.29 (5), Wis. Stats., the bidder should be allowed to correct his bid. Normally, if the bid is otherwise in order and still remains the low bid after the adjustment necessary to correct the mistake, the bid should be accepted. It is questionable whether any actionable claim for damages would survive a determination that a bidder was entitled to relief from his erroneous bid under the provisions of sec. 66.29 (5), Wis. Stats.

July 19, 1973.

LAWRENCE R. NASH, *Corporation Counsel*
Wood County

You have requested my opinion concerning two questions which have arisen, under sec. 66.29 (5), Stats., in the course of the letting of a contract by Wood County for the erection of a new county hospital. Your questions are based on the following facts:

Upon opening the bids, the county hospital building committee found that the apparent low plumbing bidder was Towne, Inc., with a base bid of \$233,733. However, the next day Towne, Inc., advised the county, by letter, that its bid was in error and that there was a transposition of figures, in that Towne, Inc., had intended to bid \$323,733 rather than the \$233,733. Towne, Inc., requested that it be relieved of its bid and that its 5% bid bond in the sum of \$11,686 be released. The county nevertheless tendered the contract to Towne, Inc., in the sum of \$233,733, which Towne, Inc., refused to sign. The plumbing contract was then apparently awarded to the next low bidder. The conditions under which bids were submitted contained a provision requiring that the bids be firm for a specific period of time.

Section 66.29 (5), Stats., provides as follows:

“(5) CORRECTIONS OF ERRORS IN BIDS. Whenever any person shall submit a bid or proposal for the performance of public work under any public contract to be let by the municipality, board, public body or officer thereof, who shall claim mistake, omission or error in preparing his bid, the said person shall, before the bids are opened, make known the fact that he has made an error, omission or mistake, and in such case his bid shall be returned to him unopened and the said person shall not be entitled to bid upon the contract at hand unless the same is readvertised and relet upon such advertisement. In case any such person shall make an error or omission or mistake and shall discover the same after the bids are opened, he shall immediately and without delay give written notice and make known the fact of such mistake, omission or error which has been committed and submit to the municipality, board, public body or officers thereof, clear and satisfactory evidence of such mistake, omission or error and that the same was not caused by any careless act or omission on his part in the exercise of ordinary care in examining the plans, specifications, and conforming with the provisions of this section, and in case of forfeiture, shall not be entitled to recover the moneys or certified check forfeited as

liquidated damages unless he shall prove before a court of competent jurisdiction in an action brought for the recovery of the amount forfeited, that in making the mistake, error or omission he was free from carelessness, negligence or inexcusable neglect.”

Based on the foregoing fact situation and the provisions of sec. 66.29 (5), Stats., you first inquire as follows:

“Does Wood County have the discretion to compromise and settle or relieve a bidder from an erroneous bid if the county by inquiry determines the mistake, error or omission is the type for which relief should be granted, or is the statute mandatory so as to require a bidder to make such proof ‘before a court of competent jurisdiction in an action brought for the recovery of the amount forfeited?’ ”

In the absence of statute, bids normally cannot be changed in substance after presentation and bid opening. McQuillin, *Mun. Corp.* (3rd Ed.), §29.68, p. 407. Although sec. 66.29 (5), Stats., provides some relief from the effect of mistakes made by bidders, it makes no provision for the negotiation or compromise of an erroneous low bid. Therefore, the options normally open to a county, under said statute and the specific circumstances you describe, are: to grant relief to the apparent low bidder if he satisfies the requirements of sec. 66.29 (5), by allowing him to correct his bid; to declare a bid bond forfeiture and sue for damages, if the apparent low bidder refuses to perform at the corrected figure or fails to meet the requirements of sec. 66.29 (5) which would allow a correction, and refuses to perform; or to reject all bids and readvertise for bids.

The statutory language now found in sec. 66.29 (5), Stats., was first enacted by ch. 395, Laws of 1933. It appears that the provision may have been a legislative response to *Gavahan v. Village of Shorewood* (1930), 200 Wis. 429, 432, 228 N.W. 497, where the court had held as follows:

“We are of the opinion that when a bidder who has made a mistake in his computations or mistakenly omitted items from consideration in making his estimates in good faith asks to withdraw his bid for correction before the bids are opened, he is entitled to withdraw it; and that if in such case the municipality

refuses to allow him to withdraw it, he is entitled to recover his deposit. It may be that such a rule will allow dishonest bidders to claim mistake when there is none in fact. And it will require re-advertisement where there is only one bid, if the bidder does not file a corrected bid. But the city is in no worse position than it would be had no bid been filed at all, and here there were other bids so re-advertisement would not have been necessary. . . .”

The newly enacted sec. 66.29, Stats., laid to rest the basic question as to the legal rights and responsibilities of a bidder who discovered his error *prior* to bid opening, i.e., the bid “shall be returned to him unopened” and he may not correct his bid or further participate in the bidding unless the contract is readvertised and relet. Under such circumstances, of course, it is not known or important whether the bidder’s error, omission or mistake was or was not free from carelessness, negligence or inexcusable neglect.

Questions still existed, however, as to the options available when a bidder discovered his error *after* bid opening. These questions were at least partially answered by *Krasin v. Village of Almond* (1940), 233 Wis. 513, 290 N.W. 152, 126 A.L.R. 832. In that case the total bid on the final-estimate sheet had been “misread” from an adding machine tape, because a worn ribbon in the machine made a “6” appear to be “0.” Applying the provisions of sec. 66.29 (5), Stats., the court concluded that the village should have excused such mistake and allowed a correction of the bid, stating, at p. 517:

“Sub. (5) is headed ‘Corrections of errors in bids.’ This heading manifestly contemplates that corrections of errors may be made in proper cases, and this would seem to imply that a bid when properly corrected may stand as a bid. Under this concept of the purpose of the statute, the village should under the facts found by the trial court, which are well supported by the evidence, have permitted substitution of the correct amount in the bid.”

At p. 518:

“The statute next provides that a bidder making a mistake in his bid shall submit ‘clear and satisfactory evidence’ of such mistake and that it was not caused by his carelessness ‘in examining the plans, specifications, and conforming with the provisions of this section.’ * * * In showing just how his mistake occurred the

plaintiff showed that it did not result from any carelessness in examining the plans and specifications or in conforming to the statute as thus far stated. The trial court considered, and so do we, that the plaintiff fully complied with the statute up to this point.”

And finally, at p. 519:

“* * * The trial court manifestly considered such neglect of the plaintiff as was involved, if any, as excusable, and the facts as stated preceding the opinion support that conclusion, if ever neglect may be excusable, as the statute manifestly contemplates it may be.”

It is apparent from *Krasin* that if an apparent low bidder, who discovers his error after bids are opened, gives proper notice of his mistake and submits “clear and satisfactory evidence of such mistake and that it was not caused by his carelessness in examining the plans, specifications, and conforming with the provisions of [sec. 66.29],” the governmental entity requesting the bids should allow the bidder to correct his bid. Normally, if the bid is otherwise in order and still remains the low bid after the adjustment necessary to correct the mistake, the bid should be accepted.

On the other hand, if the governmental entity requesting the bids is not satisfied that the notice and other submittals of an apparent low bidder support a claim of mistake under sec. 66.29 (5), Stats., such bidder’s bid bond should be declared forfeit. Likewise, assuming that the period of time during which bids are to remain firm has not expired, if a successful low bidder refuses to perform on the basis of his corrected bid, his bid bond should be declared forfeit.

You further inquire as follows:

“If it be determined that a bidder is entitled to relief from a bid pursuant to Section 66.29 (5) would the county still be entitled to damages to the extent it could prove reasonable and necessary expense incurred by the county resulting from the erroneous bid?”

Assuming, as your question does, that it is determined that a bidder is entitled to relief from his erroneous bid under the provisions of sec. 66.29 (5), Stats., in the absence of any facts in addition to those presented here, it is questionable whether any basis for an actionable claim for damages would survive such a

determination. As stated in McQuillin, *Mun. Corp.* (3rd Ed), §29.82, at p. 444-445:

“§29.82. Mistake as affecting obligation of bidder. If there is an honest mistake in the bid on the part of the contractor, due to clerical errors, not intended to mislead the municipality or any other bidder, and the errors were known to the municipal officers before the contract was awarded, a bidder refusing to accept the contract who is sued for the difference between the price of his bid and the sum paid by the municipality for carrying out the contract may set up the error as a defense. . . .”

More specifically, if the county concluded that Towne, Inc., was entitled to relief from its erroneous bid and therefore that the bid should be corrected to read “323,733, I fail to discern what damages would exist, unless such corrected bid would still be the low bid and Towne, Inc., would refuse to perform even at the corrected figure. You advise, however, that at the corrected figure Towne, Inc.’s bid would no longer be the low bid. Under such circumstances, presumably, the contract would not even be offered to the company.

RWW:JCM

Circuit Judge—Retirement Systems—Milwaukee County Board is not authorized by ch. 405, Laws of 1965, to change the provisions of the Milwaukee County Employees’ Retirement System so as to provide a pension payable to circuit court judges based on the salary paid by the state.

July 26, 1973.

ROBERT P. RUSSELL, *Corporation Counsel*
Milwaukee County

You request my opinion on the following question:

“May the Milwaukee County Board under the authority granted to it by Chapter 405, Laws of 1965, change the provisions of the Milwaukee County Employees’ Retirement System so as to provide a pension payable to circuit court judges based not only on the salary

supplement paid by Milwaukee County, but also on the salary paid by the State?"

Chapter 405, Laws of 1965, reads in part:

"(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, * * *"

Milwaukee County was thereby granted home rule authority to change the provisions of the Milwaukee County Retirement System. Such authority was granted under Art. IV, sec. 22, Wis. Const., which provides:

"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."

Additionally however, ch. 77, Laws of 1945, specifically provided for inclusion of state employes in the Milwaukee County system to the extent of the compensation paid by the county. Such chapter reads in part:

"* * * provided that an employe of the state who is a member of a state pension system but who receives part of his compensation from the county shall be entitled to membership in the retirement system and to receive the benefits thereof but only to the extent of the amount of compensation so paid by the county * * *"

You have stated your interpretation of the apparent conflict between this general grant of home rule power and the specific direction as to how state employes are to be included as follows:

"While the above law gives broad powers to make changes which may be necessary or desirable for the continued operation of the

system, we do not believe that it authorizes the County to remove limitations previously established by the legislature upon membership in the system.

“The introductory paragraph of the pension system determines the class or classes of persons eligible for membership in the system. There is no indication that the legislature in granting home rule powers intended to authorize the County to enlarge the class of persons for whose benefit the system was established. For example, we do not believe that the legislature intended the home rule powers to permit the County to admit state employes who do not receive part of their compensation from the County, or persons who perform services for the County on a contractual basis, but are not County employes, or employes of the federal government who receive part of their compensation from the County, or medical personnel not employed by the County but performing services at the County institutions. If the County may not enlarge the class of persons eligible for membership, it may not remove the limitations placed upon a particular class of persons by the legislature.”

I agree with your analysis both under the reasoning given and for the additional reason that compensation of circuit judges is probably a matter of state-wide and not of local concern.

Three sections of the Wisconsin Constitution bear directly upon the setting of compensation of circuit judges. Such sections are:

Sec. 7, art. VII: “* * * Every circuit judge shall * * * receive such compensation as the legislature shall prescribe.”

Sec. 10, art. VII: “Each of the judges of the supreme and circuit courts shall receive a salary, * * * they shall receive no fees of office, or other compensation than their salary. * * *”

Sec. 26, art. IV: “* * * nor shall the compensation of any public officer be increased or diminished during his term of office. * * *”

Sections 252.016 (2) and 252.071 (1), Stats., authorize counties to supplement the salary of the subject circuit judges. This fails to support an argument that compensation of such judges is a matter of local concern. In *Petition of Breidenbach* (1934), 214 Wis. 54, 252 N.W. 366, the court held that a statute authorizing Milwaukee

County to supplement the salary of circuit judges by \$1000 per annum was a valid option law. The court stated at pages 62 and 63:

“In the light of these established principles it must be held that while here, as in the *Oliver Case*, there is ground for a ‘verbal argument’ that this section constitutes an attempt improperly to vest legislative power in the county board, it is in fact and in substance merely a legislative recognition of changing conditions in Milwaukee county justifying increased compensation to judges of the circuit court, to be paid out of the county treasury, and that it was intended to vest in the county board merely an option to adopt the law. The amount, manner, and source of payment of the additional amount are prescribed. So are the terms of office to which the increase may apply. It is true that the section does not involve much detail, and this, together with its form, gives some color to the argument that the whole law consists of nothing more than an authority to pay increased salary. But the section does completely dispose of such detail as is involved in the matter of judicial salaries. Its simplicity is due to the fact that the subject matter does not call for elaborate treatment, and not to an intention to leave to the county board any discretion other than the option to adopt its provisions.”

In *Muench v. Public Service Commission* (1952), 261 Wis. 492, 55 N.W. 2d 40, the court indicated that, as used in Art. IV, sec. 22, Wis. Const., the word “local” modifies “legislative character” and therefore includes only matters which primarily affect the people of the locality in contrast to matters of state-wide concern. Circuit judges are state officers. *State ex rel. Sullivan v. Boos* (1963), 23 Wis. 2d 98, 126 N.W. 2d 579. The question under Art. IV, sec. 22 then is whether the retirement benefits of circuit judges in Milwaukee County are a matter of state-wide concern and as such not delegable to Milwaukee County. There is the local interest here of home rule of the Milwaukee County retirement system and the state-wide interest of substantial uniformity of benefits of circuit judges. The “paramount interest” test of *Muench v. Public Service Commission*, *supra*, is applicable to this situation. Such test is set forth on pages 515f-515g as follows:

“As to some subjects of legislative action it is possible to say that they are exclusively of state-wide concern, while others may be

fairly classified as entirely of local character, affecting only the interests of the people in a particular locality of the state. *However, as to many subjects of legislative action it is not possible to fit them exclusively into one or the other of these two categories.* The right to fish and hunt, or to enjoy scenic beauty, as an incident to the right to navigate the navigable waters of this state (which is the subject of legislative action in the instant case) is an example of a type of legislation which affects the interests of the people of the entire state, as well as those of a particular county. * * *

“It would therefore seem that the test which ought to be applied in determining the validity of delegation of legislative power in such a case is that of paramount interest.” (Emphasis added)

Substantial equality in treatment of retirement contributions from salaries of circuit judges throughout the state has been established by the legislature. Section 252.071 (1), provides for contributions into the Wisconsin Retirement Fund based upon supplemental salaries paid to circuit judges of counties other than Milwaukee. Such section, of course, excludes Milwaukee Circuit Judges since ch. 201, Laws of 1937, as amended provides for participation in the Milwaukee Retirement Fund on the basis of the Milwaukee County portion of the judges' salary.

It is my opinion, based upon the above discussion, that Milwaukee County is not empowered by ch. 405, Laws of 1965, to provide a pension to circuit judges based upon the salary paid by the state. Compensation of circuit judges is in my view a matter of state-wide concern and the legislature has therefore not delegated general authority over this aspect of the compensation of such state officers.

RWW:WMS

*Nursing Homes—Health and Social Services, Department of—Hospitals—*The Department of Health and Social Services through its Board does not have statutory authority to adopt a rule requiring approval of nursing home and hospital construction on the basis of need.

July 26, 1973.

TRUMAN Q. McNULTY, *Chairman,*
Board of Health and Social Services
WILBUR J. SCHMIDT, *Secretary,*
Department of Health and Social Services

You have requested my opinion as to whether the Department of Health and Social Services through its Board has the legal authority to adopt an emergency rule pursuant to sec. 227.027, Stats., which would require a review as to "need" of nursing home and hospital construction.

At the outset, it should be observed that a rule providing for approval by the Department of Health and Social Services of proposed construction on the basis of need for such construction would curtail the operations of a private industry. Clearly, the effect of such a rule would result in the regulation of competition by establishing a monopoly in existing health care facilities.

The primary authority of the Department relating to the construction of nursing homes and hospitals is found in chs. 146 and 140 respectively. Section 146.30 reads as follows:

"(2) STANDARDS. The department may develop, establish and enforce standards (a) for the care, treatment, health, safety, welfare and comfort of patients in nursing homes and (b) for the construction, general hygiene, maintenance and operation of nursing homes, which, in the light of advancing knowledge, will promote safe and adequate accommodation, care and treatment of such patients in nursing homes; and promulgate and enforce rules consistent with this section."

Section 140.27, Stats., relating to hospitals reads as follows:

"RULES AND STANDARDS. (1) The department shall promulgate, adopt, amend and enforce such rules and standards for hospitals for the construction, maintenance and operation of the hospitals deemed necessary to provide safe and adequate care and treatment of the patients in the hospitals and to protect the health and safety of the patients and employees; and nothing contained herein shall pertain to a person licensed to practice medicine and surgery or dentistry. The building codes and construction standards

of the department of industry, labor and human relations shall apply to all hospitals and the department may adopt additional construction codes and standards for hospitals, provided they are not lower than the requirements of the department of industry, labor and human relations. Except for the construction codes and standards of the department of industry, labor and human relations and except as provided in s. 140.29 (3), the department shall be the sole agency to adopt and enforce rules and standards pertaining to hospitals.”

Both statutes cited above relate to the physical aspects of construction of nursing homes and hospitals. Such facilities are subject to standards in terms of adequacy in design, structure and equipment for the protection of patients. Nothing in these statutes suggest that the Department has authority to regulate competition in the health care industry. If the plan of a proposed facility meets the qualitative standards of the department, approval of such construction is mandatory. A showing of “need” is not required nor contemplated. Quality cannot be equated with quantity. A statute designed for a particular purpose cannot be used for a wholly different purpose. *Nekoosa-Edwards P. Co. v. Public Serv. Comm.* (1959), 8 Wis. 2d 582, 99 N.W. 2d 821.

Under its police power, the legislature has the authority to regulate levels of competition in those industries where the public interest is vitally affected. Section 221.01 (5), Stats., provides that an applicant for a bank charter must show a need for further banking. Section 195.45, Stats., provides that an applicant for a license as a common carrier must show public convenience and necessity. The same is true with regard to expansion of public utilities under sec. 196.49 (4), Stats. However, no comparable language can be found in the statutes relating to health care facilities.

The authority of a department must spring from legislative enactments. This is a fundamental aspect of representative government. For that reason, the courts have repeatedly held that a department or an agency has only such powers as can be found within the four corners of the statutes creating it. *Union Indemnity Co. v. Smith* (1925), 187 Wis. 528, 205 N.W. 492; *United Parcel Service v. Public Service Comm.* (1942), 240 Wis. 603, 4 N.W. 2d

138. Agency rules which go beyond legislative authorization are void. *American Brass Co. v. State Board of Health* (1944), 245 Wis. 440, 15 N.W. 2d 27; *Muench v. Public Service Commission* (1952), 261 Wis. 492, 53 N.W. 2d 514. The power granted to an agency may not be enlarged or limited by it. *Clintonville Transfer Line v. Public Service Comm.* (1951), 258 Wis. 570, 46 N.W. 2d 741. An administrative agency has only such powers as are expressly granted by statutes or necessarily implied and its administrative rules must be in accord with statutory policy. *Josam Mfg. Co. v. State Board of Health* (1965), 26 Wis. 2d 587, 133 N.W. 2d 301.

The primary statutes delegating authority to the Department of Health and Social Services cannot be rationally construed as providing a basis for regulating competition in the building of private health care facilities. In absence of such an enactment, the department cannot unilaterally decide on behalf of the people of the State of Wisconsin what is in the best interest of the public. Clearly this is a legislative determination.

Any rule, whether adopted on an emergency basis or otherwise, which attempts to regulate competition in the private health facility industry transcends the scope of departmental authority. Such a rule would be null and void.

RWW:WLJ

*Chiropodists—Medical Examiners, State Board of—*Podiatrists may administer injections, perform and interpret laboratory work such as blood counts, and write prescriptions in connection with treatment of the feet without violating the Medical Practice Act.

August 1, 1973.

THOS. W. TORMEY, JR., *Secretary*
Medical Examining Board

You have requested my opinion on three questions concerning the practice of podiatry under current regulations licensing such

practice. You ask whether a podiatry registrant is permitted to administer injections other than local anesthesia; whether he can perform and interpret laboratory work such as blood counts; and whether he can write prescriptions. Some background information would appear to be helpful.

Section 448.02, Wis. Stats., prohibits the practice of medicine, surgery, or osteopathy, or any other system of treating the sick without a license or certificate from the Medical Examining Board. There is no statutory definition of "practice of medicine and surgery" but one of my predecessors has interpreted that such practice should be construed "according to common and approved usage." 29 OAG 149 (1940). In 70 C.J.S., *Physicians and Surgeons*, §15(b), it is stated at p. 867:

"A person holding a license or certificate to practice medicine and surgery, * * * generally, has unlimited authority to prescribe for and treat the sick * * *, practice the profession in all its branches, and use any method or system of treatment or healing he may choose, * * *."

Therefore, sec. 448.02, Stats., authorizes a person licensed to practice medicine and surgery to provide treatment of any human ailment or infirmity by any method. On the other hand, it has been held a podiatrist is not a licensed physician and surgeon in Wisconsin. *State Medical Society v. Manson* (1964), 24 Wis. 2d 402, 129 N.W. 2d 231. Implicit in the opinion is the view that a "physician" is an individual holding an unlimited license to practice medicine and surgery in all its various aspects, while a "podiatrist" refers to a person whose practice of medicine is limited in scope to treatment of the feet. In support of this view the court quoted with approval from *Medical Care v. Chiropody Association* (1956), 141 W. Va. 741, 93 S.E. 2d 38, in which precisely the same issue was considered. In considering a statute similar in essence to sec. 448.10, Stats., the West Virginia court gave the following construction of the practice of chiropody under that statute:

"* * * it is manifest that a duly licensed chiropodist may not practice medicine and surgery except within the limits expressly imposed by the statute. * * *" *Medical Care v. Chiropody Association*, supra, p. 42.

A careful examination of sec. 448.10, Stats., is necessary to delineate the scope of the practice of podiatry.

Section 448.10 (1), Stats., provides:

“The practice of podiatry is the diagnosis or mechanical, medical or surgical treatment, or treatment by the use of drugs, of the feet, but does not include amputations other than digits of the foot or the use of a general anesthetic unless administered by or under the direction of a person licensed to practice medicine and surgery. Diagnosis or treatment shall include no portion of the body above the feet except that the diagnosis and treatment shall include the tendons and muscles of the lower leg insofar as they shall be involved in the conditions of the feet.”

This section expressly forecloses a podiatrist from performing amputations, other than toes, or administering a general anesthetic. It also limits the area of treatment to the feet except that diagnosis and treatment shall include “the tendons and muscles of the lower leg insofar as they shall be involved in the conditions of the feet.” On the other hand, the section also expressly provides that the practice of podiatry is the “diagnosis or mechanical, medical or surgical treatment, or treatment by the use of drugs, of the feet.”

“Diagnosis” is “the art or act of identifying a disease from its signs and symptoms; investigation or analysis of the cause or nature of a condition * * *.” *Webster’s New Collegiate Dictionary*, 7th Ed., 1967. “Treatment” is “The means employed in effecting the cure of disease; the management of disease or of diseased patients.” *Gould’s Medical Dictionary*, 5th Ed.

The term “treat the sick” is defined in sec. 445.01 (1) (a), Stats., in pertinent part:

“ ‘Treat the sick’ means to examine into the fact, condition or cause of human health or disease, or to treat, operate, prescribe or advise for the same, * * *.”

Section 445.02, Stats., expressly provides that a person shall not “treat the sick” as defined in sec. 445.01 (1) (a), Stats., unless he has a certificate of registration in the basic sciences. Chapter 445 does not expressly exclude podiatry registrants from its requirements nor does ch. 448 explicitly require a podiatrist to obtain a certificate of

registration in the basic sciences. However, sec. 448.12, Stats., provides for special examination of podiatry applicants in most of the same "basic sciences" listed in sec. 445.01 (1) (c). See 31 OAG 389 (1942). Since a podiatrist does "treat the sick" as to ailments of the feet, it must be assumed that the examination provided for in sec. 448.12, Stats., is considered to be an adequate substitute for the basic sciences examination.

The first specific question you ask regarding the practice of podiatry is whether podiatrists are permitted to administer injections other than local anesthesia. Your question requires a construction of the word "treatment" as used in sec. 448.10, Stats. Podiatrists may treat by the use of drugs, medicine or surgery. It would appear to be clear that if the means employed by the podiatrist to cure or manage a disease within the proper bounds of his practice includes the injection of drugs or medicine, he may administer injections without violating the limits of his practice.

This is not to imply that a podiatrist is licensed to administer all injections; on the contrary, it is conceivable that some injections are outside the scope of the practice of podiatry.

The second question concerns whether a podiatrist can perform and *interpret* laboratory work such as blood counts.

In 39 OAG 10 (1950) there was presented a similar question. The question asked was whether the performance of tests *inter alia* "platelet count, bleeding and coagulation times, clot retraction, * * * blood sugar, blood P.N., * * * blood typing (for Landsteimer groups), RH typing, anti-RH titre, * * *" constitute the practice of medicine in violation of the Medical Practice Act. In holding that the performance of these tests by a medical technician did not constitute the practice of medicine, the opinion precluded any *diagnosis* by a medical technician.

In the present instance, diagnosis or interpretation is authorized by sec. 448.10, Stats.; and it is my opinion that a podiatrist can perform and interpret laboratory work such as blood counts necessary to the treatment of the human foot.

Finally, we must consider whether a podiatrist can write prescriptions.

A prescription is defined as “* * * a statement, usually written, of the medicine or remedy to be used by patients, and the manner of using them * * * a prescribed remedy.” 70 C.J.S., *Physicians and Surgeons*, §1, at page 816. And whether a podiatrist is permitted to write prescriptions depends on whether he is licensed to “prescribe.” This term has been held to embrace the general object of attempting to cure, remedy or alleviate; a broader meaning than merely prescribing medicine. *In re Will of Bruendl* (1899), 102 Wis. 45, 78 N.W. 169; *City of Racine v. Woiteshek* (1947), 251 Wis. 404, 29 N.W. 2d 752. As stated above, the podiatrist is authorized to “prescribe,” limited of course to treatment of the feet. Clearly then, since a licensed podiatrist is authorized to “prescribe” treatment of the feet, it follows that he may write a prescription for medicine in the normal scope of such practice.

RWW:LLD

Corporations—Articles of Incorporation—Section 180.47, Stats., cannot accurately be viewed as correcting, waiving or curing non-compliance with the statutory conditions governing the initial incorporation of a business, which are required to precede the issuance of a certificate of incorporation under sec. 180.46, Stats., since sec. 180.47, Stats., clearly authorizes the state to assert such non-compliance for the purpose of cancelling or revoking the certificate of incorporation. The Attorney General should be advised of any instances where certificates of incorporation are erroneously issued so that the state may assert such non-compliance for the purpose of cancelling or revoking such certificates. Although sec. 180.47, Stats., does not apply to erroneously issued certificates of amendment, appropriate action should be taken to cancel or revoke any such certificates.

August 1, 1973.

ROBERT C. ZIMMERMAN

Secretary of State

You request my opinion on several questions relating to the effect of the improper issuance of certificates of incorporation, under the provisions of secs. 180.46 and 180.47, Wis. Stats.

Section 180.46, Stats., provides as follows:

“Filing and recording of articles of incorporation. Duplicate originals of the articles of incorporation shall be filed in the office of the secretary of state, and recorded in the office of the register of deeds of the county in which the initial registered office of the corporation is located, and upon leaving such duplicate original for record, the legal existence of such corporation shall begin. Upon receipt of the certificate of such register of deeds that such duplicate original has been recorded, the secretary of state shall issue a certificate of incorporation. Certified duplicate original articles or copies certified by a register of deeds or the secretary of state of articles of incorporation may also be recorded in other counties than the county in which the initial registered office of the corporation is located.”

You advise that you recently have become aware of several instances where certificates of incorporation have been issued by your office, even though the certificate of recording forwarded to your office by a register of deeds disclosed that the duplicate original of the articles of incorporation was filed with the register of deeds of a county *other than* “the county in which the initial registered office of the corporation is located.” The issuance of a certificate of incorporation by your office under such circumstances is clearly contrary to the provisions of sec. 180.46, Stats. In *Bergeron v. Hobbs* (1897), 96 Wis. 641, 71 N.W. 1056, our Supreme Court, construing statutory language similar to that contained in sec. 180.46, Stats., pointed to the critical nature of the statutory requirements for filing corporate documents, as follows, at page 643:

“* * * It cannot be doubted that the filing of the proper papers in the proper office is made, by the statute, a condition precedent to the vesting of corporate powers. * * * The statute is plain and easy of observance. Valuable rights and exemption from personal liability are to be secured by its observance. It is no undue severity to require its strict observance. The defendants had not observed it, and had not secured corporate powers.”

The court went on to hold that since the defendants did not act under color of right they were neither a corporation *de jure* nor *de facto*, and were liable to the plaintiff as partners. The general sense of this early case law is today reflected in the provisions of sec. 180.86 (4), Stats., which provides:

“No such document shall be effective until an original or copy, with the certificate of the secretary of state attached, has been recorded in the office of the register of deeds in each county in which such document is required to be recorded. A document shall, for the purposes of this chapter, be deemed to be recorded when such document has been left for record in the proper office and all required fees paid.”

You further advise, however, that it has been asserted that in light of the provisions of sec. 180.47, Stats., the issuance of a certificate of incorporation by your office under the general circumstances you have described, has the effect of correcting such faulty recording. Since you entertain some doubt concerning the validity of such conclusion, you request my opinion regarding the effect of your issuance of certificates of incorporation in cases where the articles of incorporation have only been recorded in a county other than the proper county.

Section 180.47, Stats., reads as follows:

“Effect of issuance of certificate of incorporation. The certificate of incorporation issued pursuant to section 180.46 shall be conclusive evidence that all conditions precedent required to be performed by the incorporators have been complied with and that the corporation has been incorporated under this chapter, except as against this state in a proceeding to cancel or revoke the certificate of incorporation.”

Section 180.47, Stats., is of fairly recent origin, having been enacted as part of an overall revision of Wisconsin business corporation law, ch. 731, Laws of 1951. This revision in turn relied heavily on a model business corporation act drafted by the Committee on Corporate Laws of the American Bar Association's Section on Corporation, Banking and Business Law and published in Vol. VI, No. 1 (Nov. 1950) of *The Business Lawyer*. 22 West's Wis. Stats. Ann., p. XXVII. The legislative council committee

notes, which accompanied the text of sec. 180.47 in bill form, indicated that the then proposed statute had no counterpart in the 1949 statutes. It is obvious, however, that but for the one modification, concerning when corporate existence begins, made necessary by the provisions of sec. 180.46, sec. 180.47 was based on sec. 50 of the 1950 model act, which provided:

“Upon the issuance of the certificate of incorporation, the corporate existence shall begin, and such certificate of incorporation shall be conclusive evidence . . . [etc., same as present sec. 180.47].”

Under the terms of the model section, *de jure* incorporation is complete upon issuance of the certificate of incorporation, except as against the state, and problems of estoppel and *de facto* corporations are eliminated. *Robertson v. Long* (D.C. Ct. App. 1964), 197 A. 2d 443, 447; *Western Machine Works v. Edwards M. & T. Corp.* (Ind. 1945), 63 N.E. 2d 535, 538, see also Model Bus. Corp. Act Ann. 2d, sec. 56, par. 2, p. 205. Because of the differences in language between the model code provision and secs. 180.46 and 180.47, Stats., it is somewhat difficult to conclude with complete assurance that our court would necessarily reach the same conclusion, at least as to corporate status. However, it is my opinion that the effect of sec. 180.47, Stats., is to provide all parties which obtain a certificate of incorporation from the Secretary of State, even under the circumstances you describe, with unassailable *de jure* status as Wisconsin corporations, except as against the state.

Further, it is also my opinion that sec. 180.47, Stats., cannot accurately be viewed as correcting, waiving or curing non-compliance with the statutory conditions governing the initial incorporation of a business, which are required to precede the issuance of a certificate of incorporation under sec. 180.46, Stats., since sec. 180.47, Stats., clearly authorizes the state to assert such non-compliance for the purpose of cancelling or revoking the certificate of incorporation.

Long prior to the enactment of sec. 180.47, Stats., it was generally recognized that the state should be in the position to challenge a corporate identity assumed contrary to law. In *Slocum v. Head* (1900), 105 Wis. 431, 81 N.W. 673, for instance, in concluding that a faulty incorporation attempt resulted in a *de facto*

corporation, the court approved the following statement of the law, at p. 435:

“ ‘ . . . If the corporation had been challenged by the state, its exercise of corporate powers would have been enjoined; but where persons act in good faith, and suppose they are members of a valid corporation, and transact business as such, and the corporate existence is not challenged by the state, they cannot be held liable as individuals. . . . ’ ”

Chapter 286, Stats., likewise presently provides a number of remedies against corporations because of violations of laws relating to corporations, including sec. 286.36, Stats., which reads:

“286.36 Action to annul charter, by whom and for what cause. An action may be brought in the name of the state, on leave granted by the supreme court upon cause shown, for the purpose of vacating the charter of any corporation of this state, except a municipal corporation, and except as provided in section 286.46, whenever such corporation offends against any law by or under which it was created, altered or renewed; or violates any law by which it shall forfeit its charter by abuse of its powers; or forfeits its privileges or franchises by failure to exercise its powers; or does or omits any act which amounts to a surrender of its corporate rights, privileges or franchises; or exercises franchises or privileges not conferred upon it by law.”

Note that sec. 180.769 (1) (b) and (c), Stats., also provides for involuntary dissolution of a corporation in an action commenced by the attorney general, when it is established that the corporation's certificate was procured through fraud or when it is established that “The corporation has continued to exceed or abuse the authority conferred upon it” For reference purposes, see also 268.02 (3), Stats., which authorizes the attorney general to institute injunction proceedings regarding corporate activity in certain instances.

In the event certificates of incorporation are issued by your office contrary to the provisions of sec. 180.46, Stats., such instances should be referred to the attention of this office together with specific facts and circumstances, so that appropriate action may be undertaken by our office.

Finally, you advise that occasionally your office may inadvertently issue a certificate of amendment to articles of incorporation, even though the recording certificate of a register of deeds indicates recording in the wrong county. You inquire as to the effect of your certificate of amendment under such circumstances.

Section 180.54, Stats., simply provides:

“Filing and recording articles of amendment. The articles of amendment shall be filed and recorded, and upon receipt of the certificate of the register of deeds, the secretary of state shall issue a certificate of amendment.”

This statute contains no language similar to that set forth in reference to articles of incorporation, in sec. 180.47, Stats., and the latter statute would not be applicable since it deals solely with initial incorporation and with the basic questions of corporate existence and corporate status. Therefore, the provisions of sec. 180.86 (4), Stats., previously quoted, appear fully dispositive of the question you raise. That statute provides that articles of amendment do not become effective until recorded in the proper Register of Deeds' office.

While the presumption of regularity which normally attaches to the acts of public officials would undoubtedly attach to the certificate of amendment issued by your office, the lack of prior and proper recording of the articles of amendment would rebut any such presumption. As in the case of erroneously issued certificates of incorporation, however, appropriate action should be taken to cancel or revoke improperly issued certificates of amendment.

RWW:JCM

Pollution—Fire—Assembly Bill 221, if enacted, would be superseded under Federal Clean Air Act of 1970.

August 1, 1973.

THOMAS S. HANSON, *Chief Clerk*
Wisconsin Assembly

You have recently forwarded to me Assembly Resolution No. 28 requesting my opinion as to whether Assembly Bill 221 (1973) is superseded by applicable federal air quality rules. Assembly Bill 221, if enacted, would authorize cities, villages and towns to burn wood within the confines of its own dumping or disposal grounds notwithstanding any law, or rule adopted pursuant to law, to the contrary. As such, it would repeal sec. NR 154.10 (1) (f), Wis. Adm. Code, which provides as follows:

“NR 154.10 Limitations on open burning. (1) Open burning is prohibited with the following exceptions:

“ . . .

“(f) Burning at rural or isolated solid waste disposal sites outside of the Southeast Wisconsin Intrastate AQCR that serve less than 2,500 people and are licensed to burn waste under section NR 151.18 of the solid waste disposal standards, or burning of special waste where permits are obtained from both the air pollution control section and the solid waste disposal section of the department.

“ . . .

“(h) Burning of trees, limbs, stumps, brush or weeds for clearing or maintenance of rights-of-ways outside of the Southeast Wisconsin Intrastate AQCR.

“(i) Burning of trees, wood, brush, or demolition materials (excluding asphaltic, or rubber materials) by such methods approved by the department.”

Under the above-quoted provisions of the Wisconsin Administrative Code, which were adopted by the Wisconsin Department of Natural Resources pursuant to ch. 144, Wis. Stats., the burning of wood at municipal dumps or disposal grounds is currently prohibited in the Southeast Wisconsin Intrastate Air Quality Control Region (AQCR),¹ unless it is done pursuant to a method approved by the Department.

¹The Southeast Wisconsin Intrastate AQCR is defined and described in sec. NR 155.02 (2) (b) 2., Wis. Adm. Code.

Section NR 154.10, Wis. Adm. Code, was adopted as part of a state implementation plan submitted to the Federal Environmental Protection Agency as required under sec. 110 (a) of the Federal Clean Air Act of 1970 (P.L. 91-604, 42 U.S.C. 1857 et. seq.), and was approved by the Administrator of the Environmental Protection Agency under sec. 110(a)(2).

Because sec. NR 154.10, Wis. Adm. Code, was adopted as an integral part of an approved state implementation plan, sec. 116 of the Federal Clean Air Act constitutes a direct limitation on the power of the state or its political subdivisions with respect to alterations or additions to that administrative regulation. The relevant parts of sec. 116 are as follows:

“. . . Nothing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; *except that if an emission standard or limitation is in effect under an applicable implementation plan . . . such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan. . . .*” [Emphasis added]

Section 116 demonstrates a clear Congressional intent to pre-empt state and local regulation *to the extent such regulation is less stringent* than that required under an approved state implementation plan. *Huron Portland Cement Co. v. City of Detroit* (1960), 362 U.S. 440, 4 L.Ed. 2d 852, 80 S.Ct. 813; *Washington v. General Motors* (1972), 406 U.S. 109, 31 L.Ed. 2d 727, 732, 92 S.Ct. 1456, 4 ERC 1007, 1009. Assuming the Clean Air Act of 1970 is constitutional, Congress has the authority to make such a law pre-empting the states under Art. VI of the United States Constitution, which provides that the Constitution and laws of the United States shall be the supreme law of the land. The question of federal pre-emption under the Clean Air Act of 1970 has already been before the United States Supreme Court in *Washington v. General Motors, supra*, where the court found pre-emption to exist under certain of its provisions. *Idem*.

The Clean Air Act also contains a provision to the effect that if any state consistently fails to enforce a requirement of an approved

implementation plan, the Environmental Protection Agency may, after thirty days' notice, take over the enforcement of that requirement within the state. Section 113, Clean Air Act of 1970.

Assembly Bill 221 is clearly less stringent than the requirements for burning wood under sec. NR 154.10, Wis. Adm. Code, which was adopted as part of Wisconsin's state implementation plan. I must therefore conclude that Assembly Bill 221, if enacted, would be superseded under the applicable provisions of the Clean Air Act of 1970.

RWW:SMS

Funds—Condemnation—The question of whether benefits and assistance provided by ch. 409, Laws of 1969, as amended by ch. 103, Laws of 1971, must be afforded an owner of property or his tenant where there is no threat of condemnation, but the property owner, aware that a public agency wants the property, voluntarily sells the property to the public agency requires an exercise of discretion based upon the facts of each transaction, however the property owner or his tenant to qualify must be displaced by the project and the expenditure of public funds must be for a public purpose.

August 3, 1973.

CHARLES M. HILL, SR., *Secretary*

Department of Local Affairs & Development

In your letter dated March 8, 1972, you asked two questions concerning ch. 409, Laws of 1969, as amended by ch. 103, Laws of 1971. In reply to your questions, where I have used the statute number, all comments will apply to the numbered statute as amended. The term condemnor as used in this opinion refers only to the fact that the public or quasi-public agency involved in the property transaction has the power of condemnation. It does not indicate that the use or threatened use of such power is involved in the transaction.

Your first question:

“Is a local governmental unit required under provision of Chapter 32, Wis. Stats., to pay relocation benefits and provide relocation services in those cases where the owner of the property to be acquired initiates negotiations for the acquisition?”

Section 32.19 (2) (c), Stats., defines displaced person:

“ ‘Displaced person’ means any person who moves from real property or who moves his personal property from real property on or after July 1, 1970, as a result of the acquisition of such real property, * * * or subsequent to the issuance of a jurisdictional offer under this chapter, for public purposes or, as the result of the acquisition for public purposes of other real property on which such person conducts a business or farm operation.”

This definition is important because, as will be shown, certain benefits of the act require that the beneficiary be a “displaced person.”

Section 32.19 (3) (a), through sec. 32.19 (3) (c), Stats., establishes certain benefits which shall accrue to “displaced persons.” The same observation is true in regard to sec. 32.19 (4) (b), Stats. Section 32.25 (1), Stats., is a prohibition against acquisition of property by a condemnor prior to filing and having approved a relocation payment and assistance service plan where the project will result in displacement of persons.

The only provision which does not specifically refer to a “displaced person” is sec. 32.19 (4) (a), Stats. This section provides for payment in excess of fair market value for certain owner-occupied dwellings. The recipient owner-occupant must have been such not less than 180 days prior to “initiation of negotiation.” The question presented is whether the owner-occupant must be a “displaced person.” The legislative intent is expressed in sec. 32.19 (1), Stats.

“The legislature declares that it is in the public interest that persons *displaced* by any public project be fairly compensated by payment for the property acquired and other losses hereinafter described and suffered as the result of programs designed for the benefit of the public as a whole; * * *” (Emphasis supplied.)

In construing an ambiguous statute, the Supreme Court has said that a declaration of legislative purpose is persuasive. *State ex rel. Harvey v. Morgan* (1966), 30 Wis. 2d 1, 10, 139 N.W. 2d 585. In addition, a nonprofit organization "if otherwise eligible" is defined in sec. 32.19 (4), Stats., as a "displaced owner."

The payments and benefits provided in ch. 409, Laws of 1969 as amended, constitute compensation for inconvenience and other losses rather than compensation for property acquired by the condemnor. Consequently, such payment and benefits fall outside of Constitutional just compensation. Section 32.19 (1), Stats. See *Cudahy Bros. Co. v. United States* (1946), 155 F. 2d 905. Such payments and benefits constitute an expenditure of public money and must be for a public purpose. *West Allis v. Milwaukee County* (1968), 39 Wis. 2d 356, 376, 159 N.W. 2d 36. Where a person is displaced by a public project, it is reasonable to say that such displacement was for a public purpose. On the other hand, where a person is displaced because of an intervening personal reason rather than as the result of a public project, it is doubtful that the expenditure of public money as provided in amended ch. 409, Laws of 1969, would be for a public purpose. In construing a statute, it is common policy to construe the statute in a manner which would protect its constitutionality. *Town of Madison v. City of Madison* (1955), 269 Wis. 609, 70 N.W. 2d 249. Consequently, I would construe sec. 32. 19 (4), Stats., as applying to a "displaced" owner-occupant.

Under normal situations, a sale to a condemnor is treated as a forced sale rather than a voluntary arms length transaction. This is because the seller is not free to absolutely refuse to sell or to demand an exorbitant price. 6 Nichols on Eminent Domain, §24.261 (1965) at pp. 94-97; accord: *Milwaukee v. Diller* (1927), 194 Wis. 376, 383-384, 216 N.W. 837; *Blick v. Ozaukee County* (1923), 180 Wis. 45, 46-47, 192 N.W. 380. Where, however, the property owner is free absolutely to refuse to sell or to demand an exorbitant price and such property owner attempts to enter into a sale of the property to a condemnor, the sale is a voluntary arms length transaction, not a forced sale. The property owner is not displaced by any action of the condemnor. Under such circumstances, it is reasonable to assume that the sale is as much for the benefit of the property owner as it is for the public. In the absence of other considerations, I am of the

opinion that ch. 32, Stats., does not require the payment of relocation benefits or the providing of relocation services in such a situation. In certain circumstances, however, the payment of such benefits or the provision of such services may in fact constitute a benefit to the public. An example would be a situation where payment of such benefits and the provision of such services would result in the acquisition of the property at a saving which might not be realized if it was necessary to wait until the condemnor found it necessary to resort to acquisition through power of eminent domain.

Where the condemnor is proceeding to acquire the property under secs. 32.05 or 32.06, Stats., the condemnor is authorized to negotiate with the property owner not only the fair market value for the property acquired but the benefits that the property owner may be entitled to under sec. 32.19, Stats. It would seem only reasonable that if the condemnor could negotiate for payment of such benefits when acquiring the property pursuant to a condemnation statute, the condemnor would also have the authority to include consideration of such benefits in his negotiations where the transaction is a willing seller-willing buyer sale.

Some confusion may be created by the use of the term "initiation of negotiations" as it appears in sec. 32.19 (4) (a), Stats. Section 990.01 (1), Stats., provides:

"GENERAL RULE. All words and phrases shall be construed according to common and proven usage; but technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning."

The term negotiation as used in sec. 32.05 (2a), Stats., is part of the condemnation procedure, is a valuable property right of the owner of private property and a jurisdictional prerequisite to the public acquisition of private property by exercise of eminent domain. *Wisconsin Town House Builders v. Madison* (1967), 37 Wis. 2d 44, 45, 154 N.W. 2d 232; *Connor v. Michigan Wisconsin Pipe Line Co.* (1962), 15 Wis. 2d 614, 624, 113 N.W. 2d 121; *Arrowhead Farms, Inc. v. Dodge County* (1963), 21 Wis. 2d 647, 651-652, 124 N.W. 2d 631. When the condemnor enters into negotiation as provided in sec. 32.05 (2a), Stats., the condemnor is establishing a jurisdictional step necessary to the acquisition of the property providing an agreed price cannot be achieved. Where a word or phrase in a statute is

definite in meaning in one case, and subject to two constructions in another, the clear and definite construction will prevail.

“. . . A general rule is that ‘the construction is to be on the entire statute; and where one part is susceptible indifferently of two constructions, and the language of another part is clear and definite, and is consistent with one of the two constructions of which the former part of the statute is susceptible, and is opposed to the other construction, then we are to adopt that construction which will render all clauses of the statute harmonious, rather than that other construction which will make one part contradictory to another.’ ” *Standard Oil Co. v. Industrial Commission* (1940), 234 Wis. 498, 501-502, 291 N.W. 826, [citing 2 Lewis’ Sutherland, *Statutory Construction* (2nd ed.), p. 700, §366].

As used in ch. 32, Stats., “negotiation” has a peculiar meaning in the law. See *Milwaukee v. Diller, supra*; 6 Nichols on Eminent Domain (1965), §24.261, pp. 94-97; *Osborne v. State* (1967, Dane Co. Cir. Crt. #125046). Consequently, the phrase “initiation of negotiation” as used in sec. 32.19 (4), Stats., must be construed to mean negotiation as authorized by sec. 32.05 (2a), Stats., or the attempt to arrive at an agreed price as provided in sec. 32.06 (2a), Stats.

The establishment of a master plan or the promulgation of an official map are exercises of the police power and do not constitute a taking for which just compensation must be paid.

“* * * it is a general rule that the planning or plotting of a public improvement does not amount to a taking of the affected property. [Authorities cited].” *City of Tucson v. Melnykovich* (1969), 457 P. 2d 307, 311; McQuillan, *Municipal Corporations*, sec. 32.31 (1971 Cum. Supp.), p. 33; *State ex rel. Evans v. James and others, Supervisors of Greenfield* (1854), 4 Wis. 408; *City of Miami v. Romer* (1954), 73 S. 2d 285, 286-287.

In the situation you have outlined in your letter, the property owner is aware of the county park commission’s plan to expand Carver Park. The county board’s resolution does not authorize the commission to acquire private property by eminent domain. In fact, the commission is only authorized to acquire property “offered by willing sellers.” Under those circumstances, it cannot be said that a

cloud of condemnation pervades the transaction. Consequently, there is no issue of Constitutional just compensation.

In order to qualify for statutory just compensation as provided by amended ch. 409, Laws of 1969, the property owner or tenant must be displaced by the project, and the expenditure of public money to provide the payments and services must be for a public purpose. The property owner who offers his property must be presumed to have an intervening personal reason for relocation, and as such would not be displaced by a public project, nor would his displacement be for a public purpose. A different set of facts might support an objective determination otherwise, but under the specific situation presented, amended ch. 409, Laws of 1969 benefits and assistance would not be legally required.

In reply to your second question which asks, "May a local governmental unit . . . avoid these payments and services by requiring the seller of property to deliver vacant property . . ." the exercise of objective discretion is called for. If the tenants are required by the property owner to remove themselves from the property for the reason that the property owner is intending to negotiate a sale of the property to the condemnor, there is a probability that the tenant would qualify as a displaced person. Each fact situation must be decided upon its own merits, however. If the tenants have moved of their own accord and the property owner has allowed the property to remain vacant, no one has been displaced by the project. By the same token, if the tenant at the time of entry into the property had entered into a contract with the property owner, whereby his tenancy would terminate upon sale of the property to the condemnor, there is a probability that the tenant would not qualify as a displaced person because the displacement was a condition of his contract. Once again objective discretion based upon the specific facts must be exercised in each case.

In answer to your third question, wherein you inquire about remedies available to the department to compel compliance with ch. 32, Stats., your attention is called to sec. 32.26 (3), Stats.

RWW:EGY

Implied Consent Law—Drunk Driving—Section 343.305, Stats., the Implied Consent Law, discussed.

August 10, 1973.

RICHARD B. MCCONNELL, *District Attorney*
Waukesha County

You have asked my opinion on a series of questions regarding the Implied Consent Law.

You ask that I confirm my previous opinion on the Implied Consent Law in 59 OAG 183 (1970). I have re-examined that opinion and conclude that it correctly states the law.

The basic issue underlying all of your questions is whether the Implied Consent Law has limited the rule announced in *Schmerber v. State of California* (1966), 384 U.S. 757, 16 L.ed. 2d 908, 86 S.Ct. 1826. In that case, the police took a blood sample in a medically satisfactory manner to determine intoxication. This was done without the consent of the accused. The court held this to be a lawful search which violated no constitutional right. Thus, the court would not exclude the evidence obtained. This is clearly the law apart from implied consent. The problem is that sec. 343.305 (2) (b), Stats., provides in part:

“If the person refuses the request of a traffic officer to submit to a chemical test, no test shall be given . . .”

It was apparently the intention of the legislature that at that point the police need make no further effort to obtain a test, but that the person would be punished for his refusal by the suspension of his operating privilege for 60 days, and the trial on the drunk driving charge would have to proceed without the test evidence.

If a person refused to take the test and the police proceeded to take a blood sample without his consent, this would violate the above quoted statute. However, if such person were under arrest and did not forcibly resist the taking of the blood sample, and probable cause existed for such a search, this would not violate any constitutional right, and the evidence so obtained could be used in court and would not be excluded. *Schmerber v. State of California*,

supra; *Ware v. State* (1930), 201 Wis. 425, 230 N.W. 80; *State v. Hochman* (1957), 2 Wis. 2d 410, 86 N.W. 2d 446.

A problem arises, however, where a person not only refuses to submit to the withdrawal of a blood sample but also puts up vigorous physical resistance to such withdrawal. In *Rochin v. California* (1952), 342 U.S. 165, 72 S.Ct. 205, 96 L.ed. 183, the police forced a suspect to submit to having his stomach pumped over his violent physical resistance. The court held that such conduct shocked the conscience and was so brutal and offensive that it did not comport with traditional ideas of fair play and decency. The court found that such conduct was offensive to due process. In *Breithaupt v. Abram* (1957), 352 U.S. 432, 77 S.Ct. 408, 1 L.ed. 448, a doctor withdrew a blood sample from an unconscious person, and the court said that they could see nothing comparable here to the facts in the *Rochin* case. The court held (352 U.S. 435-438):

“Basically the distinction rests on the fact that there is nothing ‘brutal’ or ‘offensive’ in the taking of a sample of blood when done, as in this case, under the protective eye of a physician. To be sure, the driver here was unconscious when the blood was taken, but the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right; and certainly the test as administered here would not be considered offensive by even the most delicate. Furthermore, due process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by that whole community sense of ‘decency and fairness’ that has been woven by common experience into the fabric of acceptable conduct. It is on this bedrock that this Court has established the concept of due process. The blood test procedure has become routine in our everyday life. It is a ritual for those going into the military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same, though a longer, routine in becoming blood donors. Likewise, we note that a majority of our States have either enacted statutes in some form authorizing tests of this nature or permit findings so obtained to be admitted in evidence. We therefore conclude that a blood test taken by a skilled technician is not such ‘conduct that shocks the conscience,’ *Rochin, supra*, 342 U.S. at page 172, 72 S.Ct. at page 209, nor such a method of obtaining evidence that it

offends a 'sense of justice,' *Brown v. Mississippi*, 1936, 297 U.S. 278, 285-286, 56 S.Ct. 461, 464-465, 80 L.Ed. 682. This is not to say that the indiscriminate taking of blood under different conditions or by those not competent to do so may not amount to such 'brutality' as would come under the *Rochin* rule. . . ."

In *Schmerber v. State of California*, *supra*, it was said in footnote 4 (384 U.S. 760):

"We 'cannot see that it should make any difference whether one states unequivocally that he objects or resorts to physical violence in protest or is in such condition that he is unable to protest.' *Breithaupt v. Abram*, 352 U.S., at 441, 77 S.Ct., at 413. (WARREN, C. J., dissenting). It would be a different case if the police initiated the violence, refused to respect a reasonable request to undergo a different form of testing, or responded to resistance with inappropriate force. Compare the discussion at Part IV, *infra*."

The constitutional objections to the taking of blood specimens are discussed in *1968 Alcohol and Highway Safety Report*, a study transmitted by the Secretary of the Department of Transportation to the Congress, in accordance with the requirements of section 204 of the Highway Safety Act of 1966, Public Law 89-564 (U.S. Government Printing Office, 1968), pages 114-117:

"In *Rochin v. California*, 342 U.S. 165 (1952), the Supreme Court held that the forcible use of a stomach pump, over the defendant's violent resistance, to extract narcotic pills was official conduct that 'shocked the conscience,' and therefore was unconstitutional under the Fourteenth Amendment Due Process Clause. Two later cases, *Breithaupt v. Abram*, 352 U.S. 432 (1957), and *Schmerber v. California*, 384 U.S. 757 (1966), held that the extraction of blood in a hospital for a chemical test for alcohol, which though unconsented to was not physically resisted by the defendant, was not unconstitutional under the *Rochin* rule. Thus, the *Rochin* doctrine seems to be limited to situations where the accused physically resists the extraction of bodily substances for chemical testing.

"Some complex and difficult questions could arise under this doctrine in the administering of chemical tests. In respect to blood tests, a complete spectrum of physical resistance, ranging from

'going limp' to all-out combat, could occur. It seems likely that the Supreme Court would not require the resistance to go very far before invoking *Rochin*, but it is hard to say whether simply declaring that one 'intends to physically resist' the test would be sufficient and if not, how much more than that would be required. The problem is not as likely to arise in connection with breath tests only because they require the active cooperation of the subject, and resistance at any level would probably render them impossible to administer."

From the foregoing, I conclude that the United States Supreme Court has not as yet squarely faced the question whether a blood sample may be withdrawn over the vigorous physical resistance of the person involved. It is possible that they would apply the *Rochin* principle to this situation.

However, the Implied Consent Law, and the requirements and restrictions there imposed regarding tests for intoxication, apply only in connection with a charge of driving under the influence of an intoxicant in violation of sec. 346.63 (1) (a), Stats. See sec. 343.305 (1), Stats. The Implied Consent Law would not apply to violations of other statutes such as secs. 346.63 (2), 940.08, 940.09, and 941.01 (1), Stats., relating to negligent homicide, or injury or death to another person by negligent operation of a vehicle while intoxicated.

It is my opinion that where the traffic officer charges only a violation of sec. 346.63 (1) (a), Stats., he is limited by the terms of the implied consent statute and may not insist on a test without the consent of the accused. However, if in addition to or in lieu of the drunk driving charge, the officer charges a violation of one of the other above-mentioned statutes, then he is not bound by the restrictions of the Implied Consent Law and, subject to the reservations above discussed, may proceed to have a test sample withdrawn against the will of the accused. This assumes, of course, that the accused is, in fact, under arrest and that probable cause exists for such search.

Your first question is:

"1. What, in general, are the respective rights and duties of the arresting officer in a drunken driving case after a citation has been issued and a demand has been made upon a physician at a licensed

hospital to take a blood sample for the purpose of determining blood alcohol level from the alleged driver of an automobile and involved in a fatal accident.

“a. Where the accused consents to the taking of the blood

“b. Where the accused refuses to agree to the taking of the blood

“c. Where the accused is unconscious and is not able to consent to the taking of blood”

•Where the accused consents, the blood sample may be taken. Where he does not consent, the sample should not be taken, unless there is a charge of a violation other than drunk driving. Where the accused is unconscious, the blood sample may be taken. *Breithaupt v. Abram, supra*, 59 OAG 185 (1970). In any case, there must be probable cause for an arrest and search.

Your second question is:

“2. In answering No. 1, are the provisions of sec. 343.305 (Implied Consent Law) binding in a fatal accident case where evidence is being sought to support a charge of negligent homicide, under sec. 940.08 or homicide by intoxicated use of the vehicle, sec. 940.09, or negligent homicide, sec. 941.01. In other words, can the fatal accident case be separated legally from the ordinary drunken driving case so as to make it possible for a law enforcement agency to legally demand the taking of a blood sample from a suspect without adhering strictly to the Implied Consent statute which on its face indicates that not only is the blood test ‘not to be the first test’ but that if the suspect refuses to submit to the taking of blood ‘there shall be no test.’ ”

As above discussed, the restrictions of the Implied Consent Law are not applicable to cases involving these charges. The warnings required by sec. 343.305 (2) (a), Stats., need not be given, and the provision that no test shall be given, if the person refuses the officer’s request for a test, is not applicable.

Your third question is:

“3. Does sec. 343.305 (5) (a) & (b) apply generally as to provide immunity to physicians and employes of hospitals acting at the direction of a physician for any civil or criminal liability for

negligence in the actual performance of the act of taking the blood sample. In other words, does sec. 343.305 (5) (b) apply to the demand for the taking of a blood sample by a non-consenting suspect, if that procedure can be followed apart from the Implied Consent Law to obtain evidence to support a charge of negligent homicide.”

Section 343.305 (5) (b), Stats., reads:

“No physician, or other person acting under the directions of a physician, withdrawing blood for the purpose of determining its alcoholic content, nor the employer of anyone withdrawing blood for such purpose, shall incur any civil or criminal liability for such act when requested by a traffic officer to perform it, except for civil liability for negligence in its performance.”

Clearly, the grant of immunity applies when the charge is, “driving under the influence of an intoxicant.” However, your further question is whether this statutory immunity applies to a physician or other person acting under the physician’s direction who withdraws blood for the purpose of determining its alcoholic content, when such evidence is to be used to support charges other than driving under the influence of an intoxicant in violation of sec. 346.63 (1) (a), Stats. For example, sec. 346.63 (2), Stats., provides that it is unlawful to cause injury to another person by the negligent operation of a vehicle while under the influence of an intoxicant. Also, sec. 940.09, Stats., punishes negligent operation of a vehicle while under the influence of an intoxicant causing the death of another person. Obviously, in such cases it is necessary and material to prove that the person was driving under the influence of an intoxicant. Section 885.235 (1), Stats., provides that, whenever it is necessary to prove such facts, evidence of the amount of alcohol in a person’s blood as shown by a chemical analysis of a sample of his blood is admissible on this issue. This statute also specifies how such chemical analysis shall be given effect to establish intoxication. Section 343.305 (6), Stats., also provides that the amount of alcohol in a person’s blood is admissible on the issue of intoxication and shall be given effect as set forth in sec. 885.235, Stats.

Section 343.305 (5) (b), Stats., quoted above, provides that no physician, or other person acting at his or her direction, who withdraws blood for the purpose of determining its alcoholic

content, shall incur any liability for such act when requested by a traffic officer to perform such act, except that he or she can be liable for negligence in the performance of the act of withdrawing the blood. The language of this immunity statute is fully broad enough to cover the withdrawal of a blood sample for use in any case where evidence of the alcoholic content of the blood is material and necessary. There is no reason to think that the legislature intended to give physicians and medical technicians this protection only in drunk driving cases. It seems clear that the legislature intended to give this protection to the physician or medical technician in any case where proof of the blood alcohol content is material. If this were not the case, how is the physician to know at the time a blood sample is taken what kind of a case it will be used in? Indeed, at the time the sample is taken, the police officer or even the district attorney may not yet have made up his mind what charge will be brought. To place upon the physician at this point in time the burden of determining what the charge is to be, so that he or she may know in advance whether this immunity statute applies, is unreasonable. The legislature could never have intended this.

It is, therefore, my opinion that this immunity statute applies in all cases where blood is withdrawn to determine its alcoholic content, and not just in cases involving driving under the influence in violation of sec. 346.63 (1) (a), Stats.

Your fourth question is:

“4. Does the language under sec. 345.305 [343.305] referred to in No. 3 make a condition precedent to the taking of blood that there be consent by the suspect and that another sample (either a urine or breathalyzer) be received first, and that a citation must be issued and the accused must be informed of his alternative right of refusal with the additional possible penalty. Does Schmerber v. California, 384 U.S. 757 govern the fatal accident case or in Wisconsin is Schmerber pre-empted by Implied Consent 343.305.”

The first sentence of this question is answered “yes,” except that blood may be taken from an unconscious person as a first test. The *Schmerber* rule does apply to the fatal accident case which is not limited by the Implied Consent Law. *Schmerber* is not pre-empted by the Implied Consent Law.

Your fifth question is:

“5. If the suspect is a juvenile under the age of 18 and consents to the taking of his blood, does this have to be joined in by his parents or guardian in order to be effective. If so, does it make a difference as to whether or not the suspect is 16 to 18 years or 18 to 21 years. In conjunction with this, can an unconscious minor be determined not to have withdrawn his consent under sec. 343.305, without the actual consent of his parents or guardian.”

The first two sentences of this question are answered “no”; the third is answered “yes.” This is because the consent is implied by law. Section 343.305 (1), Stats., provides that any person who operates a motor vehicle upon the public highway shall be deemed to have given consent to a chemical test. By operating a vehicle upon the highway, a person impliedly consents to such a test. This clearly applies to minors as well as to persons who have reached the age of majority. Where a minor driver subsequently submits to a test, he does so in obedience to this law. He does not need the consent of his parent or guardian for such obedience to the law.

Your sixth question is:

“6. Section 343.305 does not define what an ‘unconscious’ person is. Would the standard medical definition apply? Would a mentally deficient or otherwise incompetent person fall under the category of an ‘unconscious’ person under this section?”

The second sentence of this question is answered “yes.” Section 990.01 (1), Stats. The third sentence is answered “no.” However, such person might fall within the definition of “otherwise incapacitated.” See sec. 343.305 (1), Stats.

Your seventh question is:

“7. Can a person be so intoxicated so as to negate his ability to consent to the taking of blood, if in your opinion that is a condition precedent in a fatal accident case, or is the rationale of the Implied Consent Law that a person is determined to have given his consent when he commences to operate a motor vehicle upon the highway.”

The first part of your question is answered “no.” The second part is answered “yes.” The theory of the Implied Consent Law is that by driving upon the highway, a person impliedly consents that he will

submit to a test when requested by a traffic officer under the conditions laid down by that law. Repeatedly, persons accused of drunk driving have tried to excuse their refusal to submit to the test on the ground that they were too drunk at the time to know what they were doing. The courts have repeatedly ruled that drunkenness is no excuse for refusal. *Bush v. Bright* (1968), 71 Cal. Rptr. 123, 264 Cal. App. 2d 788; *Hazlett v. Motor Vehicle Dept., State Highway Com'n.* (1965), 195 Kan. 439, 407 P. 2d 551; *State, Department of Highways v. Normandin* (1969), 284 Minn. 24, 169 N.W. 2d 222; *Perryman v. State* (Dist. Ct. App., 1971), 242 So. 2d 762.

Your eighth question is:

“8. Is sec. 343.305, our Implied Consent Law, constitutional? Does it violate due process by requiring a specific class of persons to give up a portion of their constitutional rights in order to operate an automobile in this state.”

In two recent cases, the constitutionality of Implied Consent was upheld as against numerous constitutional challenges including due process. *Campbell v. Superior Court* (1971), 106 Ariz. 542, 479 P. 2d 685; *Craig v. Commonwealth, Dept. of Public Safety* (1971, Ky. App.), 471 S.W. 2d 11.

Your ninth question is:

“9. Would the refusal by a physician, a hospital administrator, and an employee acting under the direction of either to take a blood sample after a proper demand has been made by a police officer of a suspect drunken driver in a fatal accident case be the subject of prosecution under either 946.40 (refusing to aid an officer) or 946.41 (obstructing or resisting an officer), under any or all of the circumstances referred to above.”

Law enforcement officers have the power to require citizens to assist them where necessary. This power is referred to as the *posse comitatus*. In the exercise of this power, such officers may call for help from citizens to assist them in apprehending and arresting a suspect. An example of this is found in *Kagel v. Brugger* (1963), 19 Wis. 2d 1, 119 N.W. 2d 394. There a law enforcement officer directed a truck driver to place his large tractor-trailer vehicle across a road to create a roadblock to stop a suspect fleeing in an

automobile. The court held that such a truck driver could not be found negligent for doing what the officer directed him to do. The kind of assistance which traditionally can be required by an officer, under the *posse comitatus*, is physical help in finding, stopping, arresting, and conveying the suspect to a place of detention. No cases have been found indicating that such power extends beyond the demand for such physical assistance. Whether such power extends to and permits an officer to command a physician or other hospital technician to withdraw a blood sample is not at all clear. While a doctor or a lawyer, like any other citizen, could be ordered to assist an officer in making an arrest, it is not clear that such power extends to a demand for professional services from such a person.

In *Waukesha Memorial Hospital v. Baird* (1970), 45 Wis. 2d 629, 173 N.W. 2d 700, the court refused to answer, in a declaratory judgment action, this very question because the facts of the case were too shifting and nebulous. The court pointed out that courts have traditionally refused to delineate in advance precisely what constitutes a reasonable search and seizure, and stated that questions of the reasonableness of searches must find resolution in the facts and circumstances of each case. Similarly, I conclude that I should not attempt to express an opinion in the absence of a specific fact situation.

RWW:AOH

Parking—State Office Building—It is possible for the state to lease one of its parking facilities to an independent contractor upon a finding that an independent contractor can perform the service of operating and maintaining the parking facility more economically or more efficiently than the civil service system. Sec. 16.06, Wis. Stats.

August 10, 1973.

WAYNE F. MCGOWN, *Deputy Secretary*
Department of Administration

You have asked for my opinion on the following two inquiries related to the operation of a state-owned parking facility for the Milwaukee District Office Building:

“1. Are there any legal impediments preventing the leasing of the facility to other users during non-office hours.”

“2. Is there any impediment to the leasing of the facility on a total time basis with the franchise holder to maintain and operate the facility for the benefit of the state providing office-hour parking for state employees at a rate to be determined by the state?”

There is a valid public purpose served in providing parking spaces for state employees. To answer your first question, I am not aware of any problem created by the state obtaining additional revenues by offering the spaces to the general public during non-working hours once the primary purpose for the spaces has been satisfied.

Your second question requires a consideration of the extent to which the state may enter into private contracts for personal services.

In *State Compensation Insurance Fund v. Riley* (1937), 69 P. 2d 985, the Supreme Court of California said at page 989:

“* * * There undoubtedly is a field in which state agencies may enter into contracts with independent contractors. But the true test is * * * whether the services contracted for, whether temporary or permanent, are of such a nature that they could be performed by one selected under the provisions of civil service.”

In a later case, the Supreme Court of California held in *Burum v. State Compensation Insurance Fund* (1947), 184 P. 2d 505, that a state governmental agency could contract for services when they were of such a nature that they could not be performed satisfactorily by one selected under the civil service system.

Both California and Wisconsin have shared strong civil service laws over the years. The intent of Wisconsin’s civil service law is set forth in part in secs. 16.01 (1) and (2), Stats., which provide:

“16.01 Statement of policy. (1) It is the purpose of this subchapter to provide state agencies and institutions of higher

education with competent personnel which will furnish state services to its citizens as fairly, efficiently and effectively as possible.

“(2) It is the policy of the state to maintain a strong coordinated personnel management program and to assure that positions in the classified service are filled through methods which apply the merit principle, with adequate civil service safeguards. To these ends the bureau of personnel with advice and quasi-judicial assistance by the personnel board shall develop, improve and protect a state-wide personnel management program which assures that the state hires the best qualified persons available and bases the treatment of its employes upon the relative value of each employe’s services and his demonstrated competence and fitness.”

However, sec. 16.06, Stats., provides that:

“16.06 Contractual services. The department or its agents may contract for personal services which can be performed more economically or efficiently by such contract.”

This latter statute somewhat modifies the holdings of the California cases cited, but nevertheless still requires a condition precedent to the hiring of an independent contractor.

It would thus appear that a condition precedent to the leasing of the parking facility to an independent contractor would be an administrative finding by the Director of the State Bureau of Personnel that an independent contractor can perform the service of maintaining and operating the parking facility more economically or more efficiently than the civil service system. The reasons in support of such a finding should also be set forth. If such a finding cannot be made, the facility should be maintained and operated by persons employed under the civil service system.

There is something bothersome about a situation which allows an independent contractor to make an additional profit or to be in a more advantageous competitive position because his operating location is not subject to property taxation. An exemption is provided under sec. 70.11 (1), Stats., for property owned by the state. However, I am not aware of any constitutional impediment which would prevent such a result. This concern is somewhat alleviated by the assumption that competitive bidding for the

franchise will cause the benefit of the tax exemption to inure to the state rather than to the advantage of the successful bidder.

RWW:APH

Criminal Law—Illegality of Michigan lottery activities in Wisconsin discussed. Chapter 945, Stats.

August 20, 1973.

FRANK MEYERS, *Division of Criminal Investigation*
Department of Justice

You have requested my opinion on several questions involving the effect of ch. 945, Stats., on the State of Michigan state-wide lottery. The questions you have raised are: (1) May Michigan lottery tickets be sold in Wisconsin under any circumstances; (2) May Michigan lottery tickets be possessed in Wisconsin; (3) Could a Wisconsin resident legally purchase Michigan lottery tickets through the mail; and (4) May a Wisconsin resident legally win and receive a prize in the lottery when he is in Wisconsin at the time of the drawing.

Michigan, as well as several other states, is currently operating a state-wide lottery under the control and supervision of its government. In Michigan, the state-wide lottery is conducted in essence as follows: A participant purchases a 50¢ ticket from an official sales outlet in Michigan; this ticket has two sets of numbers in two separate boxes located in the lower right-hand corner of the ticket; "Weekly Winning Numbers" are published at various places in Michigan; participants in the lottery must compare their numbers with those published numbers; if the numbers in either of the boxes correspond to the published "Weekly Winning Numbers," the ticket holder is the winner of a \$25 prize; such a winner will turn in the winning ticket at a "Claim Center" and will receive a check for the \$25 prize by mail after signing his name, address and other information at the "Claim Center"; all weekly winners who win the \$25 receive a new number by mail and become eligible for a drawing for the \$1 million prize and lesser prizes; if the numbers in both boxes correspond exactly with both "Weekly

Winning Numbers,” the ticket holder is eligible for “The Super Drawing” which awards a grand prize of \$200,000 with other lessor prizes.

It is my opinion that the “Michigan Lottery” contains the elements of prize, chance and consideration, and is thus an illegal lottery under ch. 945, Stats., when any of the constituent elements of such a lottery takes place in the State of Wisconsin.

In Wisconsin, the word “lottery” is a generic term dealing with a variety of activity. As defined by sec. 945.01 (2) (a), Stats.: “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.” Thus a lottery, being defined as an “enterprise,” includes all the various devices, schemes, games, plans, etc.. wherein a participant has an opportunity to win a prize determined by chance and based upon a consideration. Furthermore, as will be discussed below, those persons who are involved in the promotion or operation of distributing a lottery to the public or who organize the lottery, give away the prize, sell or give away the tickets, or are otherwise involved in the management, control, direction, promotion or setting up of a lottery are guilty of a crime under ch. 945, Stats., if such activity or any constituent element of such activity takes place in the State of Wisconsin.

(1) MAY MICHIGAN LOTTERY TICKETS BE SOLD IN WISCONSIN UNDER ANY CIRCUMSTANCES?

The answer to this question is “No” as the sale of lottery tickets within the borders of this state is a violation of secs. 945.05 (1) (a), 945.02 (3) or 945.03 (4), Stats. Section 945.05 (1) (a) provides, in part, as follows:

“Whoever . . . transfers commercially or possesses with intent to transfer commercially . . . anything which he knows evidences, purports to evidence or is designed to evidence participation in a lottery. . . .”

The word “transfers” is defined by our Criminal Code in sec. 939.22 (40), and as defined, the word “transfers” would be synonymous with the word “sale.” Furthermore, the word “transfers” would encompass even a non-monetary exchange of a

Michigan lottery ticket. Whether a transfer of a Michigan lottery ticket is done "commercially" will depend upon the fact situation. Certainly, if the seller makes a profit from the sale of a lottery ticket, he has engaged in a commercial transfer. However, the word "commercially" should not be limited to monetary transfers. There may be non-monetary transfers which, according to the facts surrounding such a transfer, amount to a "commercial" benefit to the transferor.

The sale of Michigan lottery tickets within this state may also be a violation of sec. 945.03 (4) or sec. 945.02 (3). While these two sections are similar, sec. 945.03 (4) more aptly applies to your question because the consideration and prize of the Michigan lottery are money. However, my discussion of sec. 945.03 (4) would also be applicable to sec. 945.02 (3). Section 945.03 (4) reads, in part, as follows:

"Whoever intentionally does any of the following is engaged in commercial gambling . . . (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 my opinion that a person does "conduct a lottery" by the sale or dissemination of lottery tickets to the public. A lottery, such as the Michigan lottery, depends for its very existence upon the sale of tickets to the public. The State of Michigan, by the sale of tickets through its authorized agents, is conducting a lottery in that state by running an enterprise whereby individuals are given, for a consideration, an opportunity to win a prize awarded on the basis of chance. Similarly, an individual who sells lottery tickets in Wisconsin is also conducting a lottery, i.e., an enterprise whereby individuals are given, for a consideration, an opportunity to win a prize awarded on the basis of chance.

It is the public policy of this state as expressed by Art. IV, sec. 24, Wis. Const., and as expressed by the legislature, that lotteries are undesirable. While Art. IV, sec. 24 has been amended twice to allow for limited types of lotteries to be conducted in this state, the general anti-lottery prohibition remains as follows: "The legislature shall never authorize any lottery. . . ." Because of this strict constitutional anti-lottery stance, lotteries have traditionally been viewed restrictively by the courts, legislature and attorneys general.

Kayden Industries, Inc. v. Murphy (1967), 34 Wis. 2d 718, at 724, 150 N.W. 2d 447.

Since a “lottery” is deemed undesirable in this state, the presentation of a lottery by the sale of lottery tickets to the public is similarly odious. The sale or dissemination of lottery tickets to the Wisconsin public is such an integral part of a lottery that those who engage in such sales or transfers must be considered as conducting a lottery.

The legislative history of sec. 945.03 (4) supports my conclusion that the sale of lottery tickets was intended to be included under the statutory prohibition against conducting a lottery. Before the Criminal Code was finally revised in 1955, the following section expressly prohibited the sale of lottery tickets:

“Any person who shall sell, either for himself or for another person, or shall offer for sale, or shall have in his possession with intent to sell or offer for sale, or to exchange or negotiate, or shall in any wise aid or assist in selling, negotiating or disposing of a ticket in any such lottery, or a share of a ticket, or any such writing, certificate, bill, token or other device as is mentioned in section 348.01 shall be punished by fine not exceeding five hundred dollars.” [Section 348.02, Stats., 1953]

The revision of the Criminal Code began with Assembly Bill 100 in 1953. The Wisconsin Legislative Council prepared comments for each new section of the Code. In Volume V of the Legislative Council Reports of 1953, at page 155, a comment concerning the proposed subsec. 345.03 (4), now subsec. 945.03 (4), stated as follows:

“Subsection (4) restates provisions in four old statutes dealing with persons connected with running a lottery or policy game, which is a form of lottery. These provisions were found in 348.01 *Setting up or promoting lottery*, 348.02 *Selling tickets, etc.*, 348.03 *Advertising tickets*, and 348.171 *‘Policy’ shop; ‘policy’ game.*”

As this comment indicates, the sale of lottery tickets became prohibited by subsec. 345.03 (4), now subsec. 945.03 (4). These comments are an interpretive aid and have been cited several times by our Supreme Court including a citation in a case involving a lottery question, *Kayden Industries, supra*, at page 726.

You have brought to my attention the fact that the State of Michigan may soon be involved in the direct sale of lottery "tickets" to residents of Wisconsin. As you have indicated, apparently Michigan authorities intend to conduct such a sale to Wisconsin residents by the United States mail. However, such a proposal has not yet been finalized and I therefore cannot form an opinion as to the validity or invalidity of such a scheme at this time. It should be noted that Wisconsin prohibits the sale of lottery tickets within our borders. If Michigan or any of its political subdivisions, or any other state, does in fact sell lottery "tickets" within the borders of Wisconsin, such action may constitute a violation of Wisconsin criminal law. I do not intend to discuss the various constitutional provisions dealing with one state suing another state under the criminal law since Michigan has not yet embarked upon such a hazardous course.

(2) MAY MICHIGAN LOTTERY TICKETS BE LEGALLY POSSESSED IN WISCONSIN?

Generally, the mere possession of Michigan lottery tickets in Wisconsin is not unlawful under our statutes. Therefore, if a Wisconsin resident purchases lottery tickets in Michigan for his own private use and then returns to this state, he would not be violating any Wisconsin law by his possession of such tickets. However, there are situations where possession of such tickets could amount to criminal violations. For example, under sec. 945.05 (1) (a), the possession with intent to commercially transfer lottery tickets is prohibited. Furthermore, under secs. 945.02 (3) and 945.03 (4), it is unlawful to possess tickets with the intent to conduct a lottery.

(3) COULD A WISCONSIN RESIDENT LEGALLY PURCHASE MICHIGAN LOTTERY TICKETS THROUGH THE MAIL?

A Wisconsin resident would not be violating any Wisconsin law by purchasing Michigan lottery tickets through the mail if he intended to use these tickets for his own private use. However, the purchase by mail of a Michigan lottery ticket may be a violation of Title 18 of the United States Code, section 1302 which makes it illegal for anyone to send or deposit in the mail any check, draft, bill, money, postal note, or money order for the purchase of lottery

tickets. Also, if a Wisconsin resident was purchasing lottery tickets by the mails as a part of a scheme to transfer such tickets commercially or as part of a scheme to conduct a lottery, he might then be liable under secs. 945.05 (1) (a), 945.02 (3) or 945.03 (4).

Your question dealt primarily with those persons who would be participating in the Michigan lottery by mail. However those persons who sell such a ticket to Wisconsin residents might possibly be in violation of ch. 945 of the Wisconsin Statutes or Title 18 of the United States Code, section 1302 or Title 39 of the United States Code, section 3001.

(4) MAY A WISCONSIN RESIDENT LEGALLY WIN AND RECEIVE A PRIZE IN THE MICHIGAN LOTTERY WHEN HE IS IN WISCONSIN AT THE TIME OF THE DRAWING?

The answer to this question depends upon the construction of the forfeiture statute, sec. 945.10, Stats., which reads as follows:

“Anything of value received by any person as a prize in any lottery conducted in violation of this chapter shall be forfeited to the state and may be recovered in any proper action brought by the attorney general or any district attorney in the name and on behalf of the state.”

It is clear from the wording of this section that a lottery must have been “conducted in violation of this chapter . . .” before the State may begin forfeiture proceedings. A lottery is only conducted in violation of Wisconsin law when the State has subject matter jurisdiction over the offense. “It is elementary that a court may act only upon crimes committed within the territorial jurisdiction of the sovereignty seeking to try the offense.” *Hotzel v. Simmons* (1951), 258 Wis. 234, 240, 45 N.W. 2d 683. Statutorily, the jurisdiction of the State of Wisconsin over crime is set forth in sec. 939.03, Stats. If a lottery has been conducted so that there is sufficient contact with this state pursuant to sec. 939.03, then it can be said that the lottery has been conducted in violation of this chapter and the State may initiate a forfeiture proceeding.

RWW:SLM

Register of Deeds—Joint Tenants—Register of deeds is not authorized to collect and forward to the county court fees set forth in sec. 253.34 (1) (a), Stats., where sec. 867.045, Stats., is used for administrative joint tenancy termination for homes. Register of deeds can administer oath under sec. 867.045 (2) (b).

August 23, 1973.

RICHARD C. KELLY, *District Attorney*
Juneau County

You refer to sec. 867.045, Stats., created by ch. 41, Laws of 1973, which provides for administrative joint tenancy termination for homes, savings accounts, checking accounts and U.S. savings bonds. That chapter also creates sec. 59.57 (10m), Stats., which provides for a \$10 fee for the register of deeds "for recording certificates and preparing and mailing documents under s. 867.045."

You inquire whether the register of deeds is authorized to collect and forward to the county court any of the fees set forth in sec. 253.34 (1) (a), Stats., which relates to fees in probate and also provides:

"* * * The fees fixed in this paragraph shall also be paid in survivorship proceedings * * *."

I am of the opinion that he has no authority to collect such fees which are applicable to proceedings in the county court. Section 867.045 (3) does provide that the register of deeds shall mail copies of the application to the Wisconsin department of revenue, public administrator and county court for the county of residence of the decedent; however, these are for informational reasons. Section 867.045 (4) provides that upon recording of the original application as certified:

"The application shall constitute prima facie evidence of the facts recited and shall constitute the termination of such joint tenancy, all with the same force and effect as if issued by the probate branch of the county court * * * [but] shall not constitute evidence of payment of any inheritance tax which may be due * * *."

The proceedings with which the register of deeds is concerned under sec. 867.045, Stats., are not proceedings in county court.

It may be necessary for the survivors to go into county court for determination of inheritance tax purposes in connection with this or other property, and it would be for the register of probate to collect the appropriate fees under sec. 253.34 (1) (a), Stats., at that time.

You note that sec. 867.045 (2) (b), Stats., provides that the register of deeds shall complete "a statement at the foot of the application, declaring that the surviving joint tenant *appeared before him, and verified, under oath * * **" (Emphasis added.)

You inquire whether the register of deeds can administer such an oath.

I am of the opinion that he can. Statutes such as 887.01, 990.01 (24) (41), do not specifically include the register of deeds as an officer qualified to administer oaths. Such officer is, however, authorized under sec. 706.07 (2) (c), Stats., to take acknowledgments. Section 59.51 (15), Stats., does require that the register of deeds shall "Perform all other duties required of him by law." The clear implication of sec. 867.045 (2) (b), Stats., is that the register of deeds is to have the applicant appear before him and to have such applicant verify the application under oath, taken by such register of deeds.

You also inquire whether under certain circumstances an applicant could be held criminally or civilly liable under secs. 706.13 or 946.32, Stats., or whether a register of deeds could be civilly liable under sec. 706.13, Stats.

Under the limited facts stated, I have no opinion. I suggest that you further evaluate the possible circumstances and research the matter in compliance with the rules which apply to the submission of questions to this office, a copy of which is enclosed.

RWW:RJV

Medical Examiners, State Board of—Schools and School Districts—Medical school instructor serving without compensation is ineligible to serve on board of Medical Examiners.

August 23, 1973.

PATRICK J. LUCEY
Governor of Wisconsin

In your letter of July 24 you ask whether the term "instructor" as used in sec. 15.405 (7), Stats., includes persons teaching on a voluntary basis without compensation at a university medical school.

The statute in question relates to the eligibility of appointees to the Medical Examining Board and provides, in part:

"* * * No person may be appointed to the examining board who is an instructor, stockholder or member of, or financially interested in, any school, college or university having a medical department, or of any school of osteopathy. * * *"

The right to appointment to a public office is not an inherent or natural right, it is a privilege, and the legislature may impose such reasonable and uniform qualifications for office as the legislative wisdom dictates. 67 C.J.S., *Officers*, §11. Statutes often designate specific disqualifying factors and frequently legislative standards of incompatibility are adopted. For instance, many states have constitutional or statutory provisions prohibiting judges from holding any other office during the term for which they are elected. See *State v. McCarthy* (1949), 255 Wis. 234, 38 N.W. 2d 679.

As to offices created by the legislature, which it may abolish at will such as the Medical Examining Board, the legislature has the right to prescribe such qualifications as the nature of the particular office may reasonably require. *Fordyce v. State ex rel. Kelleher* (1902), 115 Wis. 608, 92 N.W. 430, and *State ex rel. Bloomer v. Canavan* (1914), 155 Wis. 398, 145 N.W. 44.

Accordingly, the question you present does not require a determination of the validity of the restrictions but rather whether an instructor who teaches on a voluntary basis without compensation is disqualified under the statute.

The statute in question is not without the need for construction. However, it is not the function of one construing a statute to add language or add exceptions. *State ex rel. U.S. F. & G. Co. v. Smith* (1924), 184 Wis. 309, 199 N.W. 954; *Ditsch v. Finn* (1934), 214

Wis. 305, 252 N.W. 562; *State ex rel. Reynolds v. Smith* (1964), 22 Wis. 2d 516, 126 N.W. 2d 215.

The most logical explanation of legislative intent in adopting the statute in question would seem to be that the legislature wanted to separate medical schools and the teaching aspect from the Medical Examining Board and the licensing functions. This is not surprising since the Medical Examining Board gives examinations to graduates of many medical schools. Prohibiting instructors or stockholders or anyone financially interested in a school, college, or university having a medical school from serving on the Board could obviate a possibility of conflict of interest when the candidates for licensure from that school are examined for licensure.

In achieving such purpose it would appear to be immaterial that an instructor is a volunteer serving without compensation. An examination of the statute itself does not reveal any intent to limit the prohibition to instructors who are paid a salary.

The inclusion of a prohibition against anyone having stockholder or financial interest in a school, college, or university having a medical department obviously was intended to prevent a conflict of interest as in the case of the instructor. That the legislature was creating a separate class, i.e., those with a "financial interest," is confirmed by the use of the disjunctive "or" indicating that the phrase is not descriptive of the word "instructor."

Accordingly, I must conclude that the legislature has clearly indicated that an instructor in a medical school, whether he be a volunteer or a paid employe, is not eligible to be appointed to the Medical Examining Board.

RWW:LLD

Votes and Voting—Elections—An elector with dyslexia may qualify for voter assistance under the provisions of sec. 6.82 (2) (a), Stats.

September 5, 1973.

THE HONORABLE, THE ASSEMBLY

By Resolution No. 25, you have asked my opinion as to whether a person who has dyslexia and needs help in voting must be aided as provided in subsecs. (2) (a) or (2) (b) of sec. 6.82, Wis. Stats.

Although the definitions of "dyslexia" found in the various medical dictionaries differ somewhat, the term is usually used to rather generally describe various degrees of impaired ability to read understandingly. The impairment is seen most commonly with central lesions and in many cases of minimal brain dysfunction. In a particular instance, the condition may only cause reading to be an unpleasant experience physically because attended with fatigue and disagreeable sensations; in other instances, the condition may be so serious that the person afflicted may have lost the ability to recognize or comprehend written or printed words and sentences. The latter condition is more accurately termed "alexia," i.e. word blindness. See definitions in *Blakiston's Gould Medical Dictionary* (3rd ed.), pp. 54, 473; *Hinsie and Campbell, Psychiatric Dictionary* (4th ed.), pp. 27, 239; *Doreand's Illustrated Medical Dictionary* (24th ed.), p. 457; *Stedman's Medical Dictionary* (21st ed.), pp. 48, 492.

Section 6.82 (2) (b), Stats., provides in part:

"(b) If the elector is totally blind or his vision is so impaired that he cannot read the ballot, he may be assisted * * *"

Since subsection (2) (b) relates solely to persons who are unable to see or whose eyesight is impaired, this statutory provision is clearly not applicable to persons who have dyslexia.

Section 6.82 (2) (a), Stats., provides:

"If an elector declares to the presiding election official that he cannot read or write, or that due to physical disability, he is unable to mark his ballot, he shall be informed that he may have assistance. When assistance is requested, 2 election officials shall be selected by the elector to assist him in marking his ballot. The 2 persons chosen to assist shall not be of the same political party. The selected officials shall certify on the back of the ballot that it was

marked with their assistance but shall not disclose to anyone how the elector voted." (Emphasis supplied.)

Whether a person with dyslexia may take advantage of the voter assistance provisions of sec. 6.82 (2) (a), Stats., will largely depend upon the extent to which his physical condition has impaired his ability to read understandingly. In my opinion, however, if because of such a condition, an otherwise qualified elector is unable to mark his ballot in a manner which expresses his intent, due to an inability to read the ballot understandingly, the election officials are under a duty to assist that elector under the provisions of subsection (2) (a). Under the provisions of sec. 6.82 (2) (c), Stats., if the presiding election official questions whether the elector is in fact so physically disabled by dyslexia, he may require the elector to make his declaration of disability under oath.

RWW:JCM

County Board—Regional Planning—Appointments to regional planning commissions on behalf of a county, under sec. 66.945 (3) (b), Stats., are made by the county board, unless the county has a county executive or a county administrator in which event such appointments are made by that county officer, under the authority set forth in either sec. 59.032 (2) (c) or sec. 59.033 (2) (c), Stats.

September 5, 1973.

GLENN L. HENRY, *Corporation Counsel*
Dane County

You have requested my opinion on the following question:

If the governing bodies of a majority of the local units in a single county regional planning commission's region, having in the aggregate at least half the population of the region, approve a resolution providing that the membership composition of the regional planning commission, in part, shall consist of five members of the county board, one each from established areas comprised of combinations of supervisory districts, do the local units have the authority, under sec. 66.945 (3) (b), Wis. Stats., or elsewhere, to

require that such a member of the commission be appointed by the members of the county board from the supervisory districts comprising the area from which the member must be selected or must such appointments be made by the county executive pursuant to sec. 59.032 (2) (c), Stats.?

The membership composition of regional planning commissions is regulated by the provisions of sec. 66.945 (3), Stats. Subsection (3) (b) provides in part as follows:

“(b) For any region which does not include a city of the first class, the membership composition of a regional planning commission shall be in accordance with resolutions approved by the governing bodies of a majority of the local units in the region, and these units shall have in the aggregate at least half the population of the region. . . .”

The remaining provisions of subsec. (3) establish specific membership compositions for commissions containing a city of the first class and for commissions where the local governmental units have failed to adopt resolutions under the authority contained in sec. 66.945 (3) (b), Stats. In these instances the statute specifically requires that members on the commission be appointed by the county board.

Section 59.032 (2) (c), Stats., provides:

“(2) DUTIES AND POWERS. The duties and powers of the county executive shall be, without restriction because of enumeration, to:

“* * *

“(c) Appoint the members of all boards and commissions where the law provides that such appointment shall be made by the county board or the chairman of the county board. All appointments to boards and commissions by the county executive shall be subject to the confirmation of the county board.”

Section 59.033 (2) (c), Stats., grants a similar power of appointment to county administrators.

Section 66.945 (3) (b), Stats., does not specifically state that appointments to a regional plan commission, under resolutions

adopted pursuant to that subsection, must be made by the governing bodies of the participating governmental units. However, when all the provisions of subsec. (3) are read together, such appears to be the most natural conclusion. Furthermore, where the legislature grants a power of appointment to a governmental entity without specifically indicating the agency which is to exercise such power, the legislature is presumed to have intended that the governing body would exercise the power. As stated in 3 McQuillin, *Municipal Corporations* (3d ed. rev.), p. 325, sec. 12.74:

“ . . . the general rule is often applied to appointments that ‘whenever a power is conferred upon a municipal corporation by the legislature, and no officer or person is expressly authorized to exercise such power, the common council of the municipality is the only authority which can exercise it. It is the general agent of the municipality.’ ”

Finally, in regard to the delegation of the power of appointment, I point out that, 3 McQuillin, *Municipal Corporations* (3d ed. rev.), p. 317, sec. 12.72 states:

“The rule that delegation or surrender of powers conferred on officers or departments is forbidden applies to the election or appointment of municipal officers and subordinates. . . .”

It was this general rule which formed the basis for the opinion reported in 15 OAG 461 (1926), which held that the power to appoint a county treasurer to fill a vacancy cannot be delegated by a county board to a committee composed of its own members. It was there stated, at pp. 464-465:

“It is clear that the appointment of a county treasurer involves discretion on the part of the appointing body, and is not a mere ministerial act. Consequently, the power is one which cannot be delegated to a committee. The county board is chosen by the people to represent the county and is charged with a public trust and with the faithful performance of its duties. The public is entitled to the judgment and discretion of each member of the county board in all matters where such elements enter into transactions on behalf of the county.”

Although sec. 66.945 (3) (b), Stats., allows local governmental units significant latitude in determining the “membership composition”

of the regional planning commissions of which they may be part, I find nothing in the statute which expressly or impliedly authorizes the governing bodies of such local governments to confer their power of appointment on some other public body or person.

In light of the foregoing, it is my opinion that appointments to a regional plan commission on behalf of a county, under sec. 66.945 (3) (b), Stats., must be made by the county board, unless the county has a county executive or a county administrator. If the county has a county executive or administrator, such appointments are made by that county officer, under the authority set forth in either sec. 59.032 (2) (c) or sec. 59.033 (2) (c), Stats.

RWW:JCM

Highways—The Highway Commission may properly engage in “hardship acquisitions” under sec. 84.09, Stats., without the filing of an environmental impact statement under either federal or state law but must in such instances comply with the requirements of secs. 84.09 and 32.25 (1), Stats.

September 11, 1973.

NORMAN M. CLAPP, *Secretary*
Department of Transportation

You have requested my opinion on the following questions:

“1. Can advance or hardship purchases be undertaken under any circumstances for highway improvement projects where an Environmental Impact Statement and/or a ‘4F’ Statement have not been completed and properly filed and accepted?

“2. Can advance or hardship purchases be undertaken under any circumstances for highway improvement projects where a complete relocation plan has not been filed and approved by the Wisconsin Department of Local Affairs and Development?”

Before discussing your questions, it is necessary to ask and answer the question of whether it is proper for the Highway

Commission to acquire property years in advance of anticipated construction.

As you so clearly state in your letter, highways are not conceived and constructed over night. These major state actions involve the expenditure of millions upon millions of dollars of public monies and must be given a great deal of deliberation. These deliberations and planning take years. It is my understanding that an official highway plan was adopted in 1966 and projects the state highway system up to the year 1990.

In the early stages of planning a particular highway, a corridor is selected which may rather extensively exceed in width the final highway. For example, in some instances, such corridors are a mile wide at specific points. Because of the extended period of time necessarily involved between the selection of the corridor and the full scale program of right of way acquisition, property owners within this initial corridor may face years of uncertainty as to whether their lands will be required for the highway either in whole or in part, or at all. This uncertainty causes the property owner difficulty in developing or improving his property and may even affect its marketability. Accordingly, property owners whose lands lie within a proposed or selected highway corridor may face years of uncertainty and possible economic hardship.

The Highway Commission finds itself in an incredible dilemma. Having the legal responsibility of providing a state highway system and being entrusted with the expenditure of great sums of public funds, the Commission cannot act arbitrarily or capriciously in locating state highways, but must act with the most deliberate care. At the same time, the state legislature has adopted the policy that our citizens have the right to be fully informed as to state action. This wide dissemination of information certainly affects marketability and contributes to the possible economic hardship of corridor property owners. Further, Congress in many of its conditions for federal aid has required that the public be kept fully informed on these projects. Thus, years in advance of actual construction, the property owner within the highway corridor finds himself in the state of limbo or confusion and possible economic hardship.

Before considering this matter further, it is important to consider the nature of this damage to the property owner. The State or Commission has not actually taken anything from the property owner, yet it may be that the property owner finds, so to speak, a cloud over his property brought about by the full, complete and public disclosure of the proposed state action. As mentioned previously, in most cases, if not in all cases, the initial highway corridor covers a greater area than will be needed or used in the actual construction. Accordingly, this cloud over any particular property owner within the corridor, is speculative.

The determination to locate a highway within a particular corridor is a legislative function, which function was delegated to the Commission by state law. *Aschwaubenon v. State Highway Comm.* (1961), 17 Wis. 2d 120, 115 N.W. 2d 498. In determining whether to build a particular highway and where to locate that highway, the Commission is not exercising the power of eminent domain, nor would it appear to be exercising the police power of the State. In my opinion, the exercise of legislative power does not constitute a taking under the law, even though damage may result to particular members of the public by such decision.¹ On balance, the interest of the general public far outweighs the damage to persons located within said corridor.

¹The Hon. John A. Decker, Circuit Judge, Milwaukee County, in a rather lengthy memorandum decision in *Howell Plaza, Inc. v. State Highway Commission*, denied the Commission's motion to dismiss the petition of Howell Plaza. The petitioner is a property owner located within a selected highway corridor and seeks inverse condemnation of its property after the Commission refused to purchase. While this decision casts some doubt on the above statement, it certainly adds considerable credence to the opinion that the Commission may properly engage in "hardship" acquisitions. This case is on appeal to the State Supreme Court.

There is, of course, nothing unique about this situation for it certainly would be unusual legislation or legislative action that would not result in affecting a particular class of the general public.

The Commission's legislative finding that a particular highway ought to be constructed sometime in the future and that it ought to be located within a defined or definable corridor, does not place any legal restriction on the sale or development of the property within that corridor. Yet such action may unavoidably restrict the marketability or development of the lands located within the

corridor. On the other hand, property owners within this corridor may find themselves immeasurably benefited from the proposed action. In any event, any property owner whose lands are eventually taken, will, through due process of law, ultimately receive just compensation.

It is not in the best interests of the State to have property owners within the corridor improve their lands, although they are legally free to do so. Under the obvious practical difficulties involved in planning for and eventually constructing the highway, the question arises as to what limits have been placed on the commission in the acquisition of the needed right-of-way.

Public funds are a public trust and certainly the law does not favor uneconomic use of public funds or of natural resources. The law should favor frugal use of both public funds and natural resources. It profits no one to allow development to proceed with knowledge that such development will be subject to the public bulldozer long before its economic or physical life has been fully utilized.

In construing statutes, absurd results are to be avoided, if at all possible. *In re Estate of Evans* (1965), 28 Wis. 2d 97, 135 N.W. 2d 832. The grossest absurdity is waste.

In this regard, we are primarily concerned with the interpretation of sec. 84.09 (1), Stats., the pertinent provisions of which read:

“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, roadside 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; and after establishment, layout and completion of such improvements, the highway commission may convey as hereinafter provided such lands thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such lands so as to protect such public works and improvements and their environs and to preserve the view, appearance, light, air and usefulness of such public works. Whenever the highway commission deems it necessary to acquire any such lands or interests therein for

any of such purposes, it shall so order and in such order or on a map or plat show the old and new locations and the lands and interests required, and shall file a copy of the order and map with the county clerk and county highway committee of each county in which such lands or interests are required. * * *

This section does not describe any time limitation on acquisitions. However, certain prerequisites are required, namely, that the Commission deems the acquisition necessary, i.e., a finding of necessity, an order for such acquisition, which order or accompanying plat must show the location and the lands or interests required and finally, that such order and plat or map shall be filed as provided in the statute.

Although I am not completely familiar with the practices of the Commission, it is my belief that in the case of isolated hardship acquisitions, the procedures concerning the order and plat may not be followed by the Commission. This is not to say that an order and plat could not be devised and filed that would completely satisfy the law.

It is my opinion that sec. 84.09 (1), does not place any restriction on the Commission as to when acquisitions may be commenced. Implied restrictions, as to when the Commission may commence acquiring right-of-way, are unwarranted and such restrictions would result in the extravagant use of public and private funds and natural resources.

The opinion that the Commission may acquire necessary right-of-way years in advance of anticipated construction is further supported by the Commission's practical administrative interpretation of sec. 84.09, Stats., which interpretation is entitled to great weight. *Milwaukee County v. Schmidt* (1971), 52 Wis. 2d 58, 187 N.W. 2d 777. However, even in the case of the "hardship" acquisitions, the procedures of sec. 84.09 (1), Stats., must be followed and that in the situation of a hardship acquisition, the Commission must be satisfied to a reasonable certainty that the particular lands being acquired within the corridor are, in fact, necessary for the public improvement. Further, that an order and possibly plat must be filed by the Commission that will satisfy the requirements of sec. 84.09 (1), Stats. I realize that the filing of an order and possibly a plat may compound the problem we are

discussing. However, it is my hope that with the services of this office, such instrument or instruments may be developed that will fully satisfy the law, and yet not unduly add to the existing problem.

You question whether it is proper for the Commission to acquire right-of-way prior to the filing and approval of an Environmental Impact Statement and/or a 4F Statement. In this respect, I assume that you are referring to the Federal requirements pertaining to an environmental impact statement.

This question and answer is, of course, restricted to hardship acquisitions and does not encompass the situation of when design approval has been given, in the situation of a federal-aid project, and the State is actively engaged in a full scale program of right-of-way acquisition. What we are concerned with is the rather isolated instance of where the property owner seeks out the Commission with an offer to sell his property and the Commission is convinced or reasonably certain that a hardship situation, in fact, exists.

The National Environmental Protection Act contains the following language:

“ . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official . . . ” (Sec. 102 (c))

In the case of the Federal Act, it is difficult to anticipate a situation where Federal funds would be used for hardship acquisitions. Such acquisitions are made, it is my understanding, prior to Federal design approval and would be undertaken only with State funds. As Federal funds would not be involved, the Federal Act obviously would not be involved. The Federal Act does not directly control State action and certainly does not control the expenditure of State monies.

Section 1.11 (2) (c), Stats., provides, in part:

“Include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the human environment, a detailed statement, substantially following the guidelines issued by the United States

council on environmental quality under P.L. 91-190, 42 U.S.C. 4331, by the responsible official * * *.”

The State Act, on the other hand, does, of course, control State action. However, the State Act is limited to “major actions significantly affecting the quality of the human environment, . . .” In my opinion, isolated changes in ownership from the private sector to public ownership does not constitute major actions affecting the quality of human environment.

Therefore, in answer to your first question, the National Environmental Protection Act does not in any way preclude the State from conducting hardship acquisitions.

Further, the State Environmental Protection Act does not, in my opinion, preclude such limited acquisitions.

Secondly, you question whether it is proper for the Commission to acquire right-of-way prior to the filing of a relocation assistance plan by the Commission and the approval of that plan by the Department of Local Affairs and Development.

Section 32.25 (1), Stats., provides, in part:

“ . . . no condemnor shall proceed with any property acquisition activities on any project which may involve acquisition of property and displacement of persons, business concerns or farm operations until the condemnor has filed in writing a relocation payment plan and relocation assistance service plan and had had both such plans approved in writing by the department of local affairs and development.” (Emphasis added.)

It is evident from reading the entire section that this law was drafted to fit the situation of a mass acquisition program and did not contemplate isolated hardship acquisitions over a period of years. Section 32.25, Stats., was enacted to alleviate many of the hardships resulting from public acquisition programs. This law constitutes what is generally referred to as remedial legislation. It is well accepted in this State that remedial statutes are to be liberally construed to suppress the evil and advance the remedy they were intended to effectuate. *Stone v. Inter-State Exchange* (1930), 200 Wis. 585, 229 N.W. 26. It would certainly be ironical if this remedial statute were to be applied so as to prevent hardship

acquisitions and eliminate the public and private benefits derived from such acquisitions.

The statute involved is extremely ambiguous and there is, in my opinion, question as to whether it is even applicable to the situation we are discussing. For example, it appears in the eminent domain chapter of the statutes and constantly employs the term condemnor. Yet, in the situation of hardship acquisitions, condemnation is certainly not contemplated. However, other language in the section is extremely broad and being a remedial statute, it must be liberally construed. The question of whether this statute is applicable to hardship acquisitions would best be answered by judicial determination.

I recently issued an opinion on this same general subject matter to Mr. Charles M. Hill, Sr., Secretary of the Department of Local Affairs and Development. A copy of this opinion, which is dated August 3, 1973, is enclosed. The August 3, 1973, opinion noted in part:

“. . . Section 32.25 (1), Stats., is a prohibition against acquisition of property by a condemnor prior to filing and having approved a relocation payment and assistance service plan where the project will result in displacement of persons.”

In the instant situation of hardship acquisitions, it is clear that the Commission has a project which involves or will involve property acquisition and which may involve displacement of persons and business concerns. Under such circumstances, sec. 32.25 (1), Stats., in my opinion, precludes even hardship acquisitions by the Commission prior to the filing and approval of the plan called for by this statute.

The opinion to Mr. Hill was mainly concerned with the question of eligibility for relocation assistance payments. The filing of a plan under sec. 32.25, Stats., is not in any way determinative of the question of eligibility for relocation assistance benefits. The August 3, 1973, opinion should be considered when questions concerning individual eligibility for relocation payments arise. For example, in that opinion, it was specifically noted:

“. . . On the other hand, where a person is displaced because of an intervening personal reason rather than as the result of a public

project, it is doubtful that the expenditure of public money as provided in amended ch. 409, Laws of 1969, would be for a public purpose. . . .”

The above language may have particular significance to certain hardship acquisitions.

I realize that this answer places a considerable burden on both the Commission and the Department of Local Affairs and Development, for at this early stage of the project, the exact location of the highway itself is not even fixed and the extent of displacement is purely speculative. However, this difficulty should not be allowed to frustrate the benefits that can be derived from hardship acquisitions.

I assume that the Highway Commission could prepare and submit a plan that is relevant and sufficiently detailed to fit the situation of hardship acquisitions and that the Department of Local Affairs and Development will recognize the situation for what it is and approve such a plan. It would be extremely unfortunate if the public, as well as private benefits derived from hardship acquisitions, are frustrated or denied by imposition of unreasonable requirements.

Therefore, in conclusion, the answer to your second question is that a plan should be filed by the Commission and approved by the Department prior to any property acquisition, but that such plan should be relevant to the existing circumstances.

RWW:CAB

Criminal Law—Law Enforcement—A bench warrant issued under sec. 968.09, Stats., may be directed to all law enforcement officers in the state without regard to whether the defendant is charged with violation of a state statute or county ordinance. The form of the warrant should be tailored to meet the form suggested by sec. 968.04(3)(a) 7., Stats.

September 14, 1973.

TERRY REBHOLZ, *Deputy Assistant District Attorney*
Waupaca County

You have asked for my advice on certain questions relative to the issuance, form, and usage of a bench warrant:

Your first question reads: "can a Bench Warrant be directed to any law enforcement officer in the State *or* must it be directed, as ours are, to the County officials only?" (Emphasis yours.)

Absent statutory authorization, an arrest may not be made under a warrant outside the territorial jurisdiction of the court or magistrate issuing the warrant. See 61 A.L.R. 377, "Territorial extent of power to arrest under a warrant."

Section 968.09(1), Stats., is silent regarding to whom a warrant may be directed. That section provides:

"When a defendant or a witness fails to appear before the court as required, or violates a term of his bond or his probation, if any, the court may issue a bench warrant for his arrest which shall direct that he be brought before the court without unreasonable delay. The court shall state on the record at the time of issuance of the bench warrant the reason therefor."

It is evident that other statutes must be examined in order to determine who may receive and execute bench warrants. Arrest statutes may be construed *in pari materia*. *State v. Klein* (1964), 25 Wis. 2d 394, 404, 130 N.W. 2d 816. It is reasonable to conclude that the officers who may be directed to execute other arrest warrants may also be directed to execute bench warrants.

The initial arrest warrant may be addressed to "any" law enforcement officer. Section 968.04(3)(a) 7., Stats. The warrant shall be directed to "all" law enforcement officers of the state and may be served anywhere in the state. Section 968.04(4)(a), Stats. Since a bench warrant has been treated as a process which runs throughout the state (22 C.J.S., *Criminal Law*, §404; *State v. Fabisinski* (1933), 152 So. 207, 211, 111 Fla. 454) the legislature must have intended the bench warrant to be directed to and executed by the same officers as in the case of original warrants.

It is my opinion, therefore, that a bench warrant may be directed to all law enforcement officers in the state and may be addressed to any law enforcement officer. I should add that which officer is addressed or directed to execute a warrant is of questionable importance. For a law enforcement officer may make an arrest although the warrant is not in his possession so long as it has been issued somewhere in this state. Sections 968.04(4)(c) and 968.07(1)(b), Stats.

Your second question reads: "Does the use of a Bench Warrant and to which law enforcement officers it is directed vary as to whether the defendant is charged with violating a State law or a County ordinance?"

Section 968.09 is silent on this question. The only distinction made in ch. 968 as to the nature of the offense for which the warrant is issued is in sec. 968.07, which provides:

"(1) A law enforcement officer may arrest a person when:

"(a) He has a warrant commanding that such person be arrested; or

"(b) He believes, on reasonable grounds, that a warrant for the person's arrest has been issued in this state; or

"(c) He believes, on reasonable grounds, that a felony warrant for the person's arrest has been issued in another state; or

"(d) There are reasonable grounds to believe that the person is committing or has committed a crime.

"* * *"

It should be noted, first, that "A law enforcement officer" may arrest under the enumerated grounds. The statute does not distinguish between particular officers who may arrest pursuant to warrants. Second, the arrests may be made by such officers on the basis of "a warrant." The statute does not distinguish between bench warrants and original warrants. Third, sec. 968.07(1)(b) specifically authorizes such officers to arrest under warrants "issued in this state," but such arrests under warrants issued in another state are restricted to felony warrants under sec. 968.07(1)(c). Thus, the only distinction as to geography concerns felony warrants issued in

another state. There is no distinction as to locus of origin of a warrant as between state laws and county ordinances.

In my opinion, therefore, neither the use of a bench warrant nor the law enforcement officer to whom it is directed is affected by whether the defendant is charged with a county or a state law violation. The legislative intent is that any warrant can be directed to any law enforcement officer in the state. See sec. 59.25(1), Stats.

Your third question reads: "Should there be a special type of Bench Warrant where a defendant in a traffic case fails to appear?"

In view of my opinion that sec. 968.04 must be examined to determine which officers may be directed to execute warrants, it follows that this same section must be adhered to closely with respect to the desired format of a bench warrant. The form set forth in sec. 968.04(3)(a) 7. cannot, of course, be followed literally. This basic structure, it is suggested, should be modified to reflect that the warrant is being issued in such a traffic forfeiture action, and it would be well to include a brief but appropriate recital of those circumstances authorizing issuance of such warrants in the particular traffic forfeiture action wherein it is needed.

Your fourth question reads: "If a special type of Bench Warrant is needed for failure to appear in certain cases, what is the recommended format?"

In response to this question, let me first of all say that I do not think it possible for me to prescribe forms of bench warrants which would constitute proper forms thereof for use in every conceivable case. Instead, let me direct your attention to the following language, relative to the form and contents of a bench warrant, appearing in 22 C.J.S., *Criminal Law*, §404:

"Statutory provisions as to the form and contents of bench warrants or other process after indictment should be complied with; but process will not be held invalid for mere irregularities. A bench warrant should state the fact of indictment and the offense. It is sufficient, however, if it recites the fact of indictment and describes the offense generally. It need be no more precise and accurate than is sufficient to apprise the prisoner of the charge against him."

With your letter to me of November 2, 1972, you enclosed a sample of the bench warrant you are presently using, and requested an opinion on its adequacy. Such bench warrant is directed to, "Sheriff, Waupaca County or any Peace Officer, Waupaca County" and it reads: "You are commanded to apprehend the above defendant, ———, and bring him before the Court forthwith. He failed to appear in Court on ——— (for first appearance) (for trial to the Court) (for jury trial)."

The form of this bench warrant appears adequate to me, although I would suggest that it be addressed to "any law enforcement officer."

RWW:CDH

Internal Improvement—Funds—Business Development, Department of—Chapter 108, Laws of 1973, contemplates the appropriation of public funds for a valid public purpose, not for works of internal improvement, and is constitutional.

September 14, 1973.

WILLIAM C. KIDD, *Secretary*
Department of Business Development

You ask for my opinion regarding the constitutionality of ch. 108, Laws of 1973. That act, among other things, establishes a small business investment company fund to be administered by the Department of Local Affairs and Development.

Section 1 of that act is the Statement of Policy:

"SECTION 1. *STATEMENT OF POLICY.* It is declared to be the policy of this state to improve and stimulate the state's economy in general and the small business segment thereof in particular by supporting the national policy embodied in the federal small business investment act of 1958, as amended, by establishing a program to stimulate and supplement the flow of private equity capital and long-term loan funds which small business concerns of this state need for the sound financing of their business operations

and for their growth, expansion and modernization. It is the intent of the legislature that this policy be carried out in such manner as to ensure the maximum participation of private financing sources.”

Section 4 of that act indicates that the state will be purchasing debentures of small business investment companies and making loans to small business investment companies subject to certain conditions. That section also states that the purposes of the small business investment company fund are to:

“* * * assist, promote, encourage, develop and advance the general prosperity and economic welfare of the people of this state and to improve their standard of living and to improve employment opportunities in the state by purchasing, either directly or in cooperation with banks or other lending institutions through agreements to participate on an immediate basis, of the debentures of small business investment companies; and to advance thereby the development of small business enterprises throughout the state as these are defined under the federal small business investment act of 1958. In carrying out such purposes and in exercising the powers granted by this section, the department shall be regarded as performing an essential governmental function.”

The principal constitutional question related to this act is whether the appropriation made thereunder is for a public purpose. The notion that public funds may be expended only for public purposes has been argued in challenges to legislative acts for more than 100 years. 1970 Wis. L. Rev. 1115.

“* * * no specific clause in the constitution establishes this doctrine; nevertheless the public-purpose doctrine is firmly accepted as a basic constitutional tenet. * * *”

State ex rel. Bowman v. Barczak (1967), 34 Wis. 2d 57, 62, 148 N.W.2d 683.

The broad scope of what may constitute a valid public purpose was discussed in 58 OAG 119 (1969).

The Wisconsin Supreme Court has given considerable weight to legislative declarations of public need and public purpose. In *Bowman, supra*, at page 69, the court said:

“In view of the legislative declaration as to public need and public purpose, sec. 59.071, Stats., is not unconstitutional upon its face. However, our decision cannot in any way be construed as containing an imprimatur of approval upon any actual performance by an industrial development corporation, and the respondents can glean but small comfort from this lawsuit. Nevertheless, the housekeeping expenditure involved in the case at bar and also the declaration of public purpose contained in the statute are entitled to our approval.

“We cannot at this point determine whether the corporations which may be created under this law will carry out the lofty purposes of the statute in a constitutional manner. The powers given to industrial development corporations under this enactment are so extensive that such a corporation might confer a direct benefit to a private industry with only a remote benefit to the general public; such action would be abhorrent to the constitution of Wisconsin even if it were deemed consistent with the statute. The possibility of operational illegality does not of itself condemn the legislation because, as noted earlier, we presume constitutionality, and the relator has not presented us with facts demonstrating that the instant expenditure is not for a valid public purpose under the statute.”

In a recent decision the Wisconsin Supreme Court discussed the public purpose doctrine at considerable length. The court reviewed the legislature's declaration of public need and public purpose of the statute under consideration. The stated purpose of that statute involved a promoting of gainful employment, business opportunities and enhancing the tax base by authorizing municipalities to acquire industrial buildings and to finance such acquisitions through the issuance of revenue bonds. The court said that although it was not bound by legislative expressions of public purpose, it “* * * will give great weight and afford very wide discretion * * *” to these declarations. The court referred to an earlier decision where it had upheld an industrial development law “* * * in light of the legislative declaration of public purpose and in the absence of operational facts demonstrating otherwise, * * *.” *State ex rel. Hammermill Paper Co. v. La Plante* (1973), 58 Wis. 2d 32, 50, 51, 205 N.W. 2d 784. There, as here, the avowed public purpose involved improving and stimulating the state's economy. I am not aware of any operational facts here that would contradict the

legislature's declared purpose. I conclude that ch. 108, Laws of 1973, is probably constitutional as evidencing a public purpose.

Even though I have assumed that the legislation in question probably serves a valid public purpose, some consideration should be given to the potential impact of Wis. Const., Art. VIII, sec. 10, which prohibits the state from being a party in carrying on any works of internal improvement. "Works of internal improvement" as used in the constitution has been defined as not merely the construction or improvement of channels of trade and commerce "but any kind of public works, except those used by and for the state in performance of its governmental functions such as a state capitol, state university, penitentiaries, reformatories, asylums, quarantine buildings, and the like, for the purposes of education, the prevention of crime, charity, the preservation of public health, furnishing accommodations for the transaction of public business by state officers, and other like recognized functions of state government." *State ex rel. LaFollette v. Reuter* (1966), 33 Wis. 2d 384, 401, 147 N. W. 2d 304.

In that same case, the court in approving language in an earlier case said:

" * * * It is true that some of the moneys which were paid out by the industrial commission, * * * which permitted reimbursement to the county or city of twenty-five percent of the labor cost of public works undertaken to provide for the unemployed, went into such public works, *but the primary purpose of the state was not to become a party to carrying on works of internal improvements, but to reimburse the counties and cities which had made work simply for the purpose of providing employment to the unemployed.*" (Emphasis supplied.) *Reuter, supra*, p. 402

Also, see *Herro v. Wisconsin Federal Surplus Property Development Corp.* (1969), 42 Wis. 2d 87, 109, 166 N.W. 2d 433.

As indicated above, the legislative declaration in ch. 108, Laws of 1973, that "the department shall be regarded as performing an essential governmental function" is entitled to weight. Nevertheless, a court would still consider the operational facts, especially those which might appear in conflict with the legislative declaration. See

58 OAG 119, 133 (1969), for a discussion on "governmental function."

Our Supreme Court's most recent consideration of the internal improvement restriction is found in *State ex rel. Warren v. Nusbaum* (1973), 59 Wis. 2d 391, 208 N.W. 2d 780, where at pages 435-438, the court said:

"The interpretation and application of the internal-improvement restriction of the constitution has always presented difficult questions for this court. While each decision has precedential value, the specific facts then under consideration cannot be ignored. Also, the internal improvement restriction of the constitution has produced several constitutional amendments.

"The language of art. VIII, sec. 10, was not intended by the framers of the constitution to prohibit encouragement of all internal improvements. *See State ex rel. Wisconsin Development Authority v. Dammann, supra*, pages 192, 193. In *State ex rel. Jones v. Froehlich* (1902), 115 Wis. 32, 91 N.W. 115, an effort was made to define the term 'internal improvement.' The intervening years have proved, if nothing else, that the application of an abstract definition of the term has proved difficult. An examination of the cases coming before this court over the last seventy years leads to the conclusion that both this court and the legislature have been cognizant of changing times and the ever-changing needs of the state and its people. These cases demonstrate that in considering the application of the internal improvement restriction at least two factors are considered: (1) The dominant governmental function, and (2) the inability of private capital to satisfy the need. * * *

"* * *

"Petitioners allege that the state is made a party to carrying on works of internal improvement because of the initial appropriation of \$250,000 to the Authority; sec. 234.15, Stats.; sec. 234.19; and also because sec. 234.30 provides that state agencies shall extend their cooperation to the Authority by providing personnel and facilities. We are of the opinion that underwriting the initial operating costs of the Authority and pledges of cooperation would not involve the state in the financing or construction of public housing; and that such activity on the part of the state constitutes

only the encouragement of such activity by others. *State ex rel. Wisconsin Development Authority v. Dammann, supra.*

“We have previously determined there is a valid public and state purpose for the enactment of ch. 234, and we now find and conclude the dominant purpose set forth in the enactment is a valid governmental function and that since private capital is unavailable, therefore, the proposal does not constitute an internal improvement prohibited by art. VIII, sec. 10, Wisconsin Constitution.”

Although the matter is not free from doubt, it is my opinion, especially in view of the strong presumption of constitutionality, that a court would probably declare ch. 108, Laws of 1973, constitutional.

RWW:JEA

Civil Defense—Workmen's Compensation—A disaster training exercise is covered employment for workmen's compensation purposes under sec. 22.16 (9) (d), Stats. Pursuant to that provision, a person remains the employe of his or her initial emergency government unit for the duration of an emergency government activity. Section 22.16 (9) (f), Stats., also construed.

September 17, 1973.

CHARLES M. HILL, SR., *Secretary*
Department of Local Affairs & Development

You ask my opinion on three questions regarding the workmen's compensation benefits provisions contained in sec. 22.16, Stats. The questions involve the situation where a disaster training exercise is being conducted in more than one county, rather than being confined within the boundaries of a single county.

A preliminary issue that should be discussed here is whether a disaster training exercise is covered employment for workmen's compensation purposes. In 46 OAG 298, 299 (1957), the Attorney General was of the opinion that training activities were covered employment for workmen's compensation purposes under the then-

existing civil defense statutes of this state. I am of that same opinion because of sec. 22.16 (9) (d), Stats., which now provides in part as follows:

“ . . . Any employment which is part of an emergency government program including but not restricted because of enumeration, test runs and other activities which have a training objective . . . and which grows out of, and is incidental to, such emergency government activity is covered employment.”

I.

Your first question is:

“1. Can a county be held liable for a just claim when it is other than the county in which the claimant is duly registered for a civil defense activity?”

Upon examining sec. 22.16 (9) (d), Stats., in its entirety, I conclude that the answer to this question is no. The basic scheme of that statute is to attach both employes and volunteer workers to specific emergency government units for purposes of workmen's compensation benefits.

“(d) Employes of municipal and county emergency government units are employes of the municipality or county to which the unit is attached for purposes of workmen's compensation benefits. . . . Volunteer emergency government workers are employes of the emergency government unit with whom duly registered in writing for purposes of workmen's compensation benefits. . . .”

The multi-county disaster training exercise that you envision is controlled by the following portion of sec. 22.16 (9) (d), Stats:

“ . . . An emergency government employee or volunteer who engages in emergency government activities upon order of any echelon in the emergency government organization other than that which carries his workmen's compensation coverage shall be eligible for the same benefits as though employed by the governmental unit employing him. . . .”

I construe this language to mean that a person remains the employe of his or her initial emergency government unit for the duration of an emergency government activity. For example,

assume that a volunteer worker registers in writing with Vernon County to participate in a disaster training exercise as an ambulance driver. If this volunteer worker was duly ordered to drive the ambulance into Richland County by the area emergency government head and subsequently sustained an injury in Richland County, he or she would then be eligible for workmen's compensation benefits from Vernon County, the initial employer.

I am aware that sec. 22.16 (9) (d), Stats., also contains the following provision:

“ . . . Members of an emergency government unit who are not acting as employes of a private employer during emergency government activities are employes of the emergency government unit for which acting. . . . ”

It could be argued under this language that in the hypothetical situation above the volunteer worker would be acting for Richland County and would therefore be Richland County's employe. I feel that such interpretation must be rejected under the rule that a statute should be construed to give effect to its leading idea and the whole brought into harmony therewith if reasonably practicable. *Pella Farmers Mut. Ins. Co. v. Hartland Richmond Town Ins. Co.* (1965), 26 Wis. 2d 29, 41, 132 N.W. 2d 225. It is my opinion that the leading idea of sec. 22.16 (9) (d), Stats., is to fix a person as the employe of his or her initial emergency government unit for the duration of an emergency government activity. This interpretation gives a needed certainty to the pre-planning of such disaster training exercises in that employes are readily identifiable for the purpose of securing workmen's compensation insurance. Further, since the employment relationship is based on contract, the employe who works temporarily for a special employer does not become the employe of the borrower without specific consent of the employe to accept the new master in place of the old. See 1A Larson, *Workmen's Compensation Law*, §48.10, p. 806 and *Hanz v. Industrial Comm.* (1959), 7 Wis. 2d 314, 318, 319, 96 N.W. 2d 533. As you know, under a Wisconsin workmen's compensation insurance policy, each employe constitutes a separate risk. Sec. 102.31 (2), Stats.

II.

Your second question is:

"2. Does such a claim carry the same Workmen's Compensation benefits for that (secondary) county for amounts payable in excess of \$1.00 per capita as for claims arising from a single county civil defense activity?"

Section 22.16 (9) (f), Stats., provides:

"(f) If the total liability for workmen's compensation benefits under par. (d), indemnification under par. (e) and loss from destruction of equipment under sub. (10), incurred in any calendar year exceeds \$1 per capita of the sponsor's population, the state shall reimburse the sponsor for the excess. Payment shall be made from the appropriation in s. 20.545 (1) (a) on certificate of the secretary."

In view of my answer to your first question, I feel that the best way to respond to this question is by way of a general consideration of this statute. This provision creates a secondary liability on the part of the state to reimburse for losses above a certain ceiling. For example, a sponsor with a population of 20,000 people would have to absorb \$20,000 worth of total liability in one calendar year. When its total liability for that year exceeds \$20,000, the state then must reimburse the sponsor for the excess.

Where the sponsor insures its liability for payment of workmen's compensation, the state would not be required to indemnify unless in any calendar year the insurance premium payable for coverage during that year, plus tort liability to third persons and equipment damage together exceed \$1 per capita of the sponsor's population.

The joint or combined operations of counties, towns and municipalities under the cooperation provisions of sec. 22.16 (8), Stats., may create joint liability for workmen's compensation benefits. See *Insurance Co. of N.A. v. ILHR Department* (1970), 45 Wis. 2d 361, 367, 173 N.W. 2d 192. Responsibility for reimbursement of such sponsor, of course, would be measured by the population of the combined unit.

III.

Your third question is:

“3. Can the same liability responsibility be applied if the activity is conducted jointly by cities?”

Since sec. 22.16, Stats., refers throughout to counties, towns and municipalities, the answer to this question is yes. The statute clearly contemplates that cities will be carrying out emergency government activities. The word “municipality” includes cities and villages. Sec. 990.01 (22), Stats.

In conclusion, by way of a *caveat*, I repeat what the Attorney General stated in 46 OAG 298, *supra* at 299:

“It should be noted, not only in connection with this question but also with the following ones, that the answers are given on a generalized basis. There is wide room for variance of circumstances in individual cases which might affect the answers in such cases. Workmen’s compensation is enforceable in disputed cases by procedure before the industrial commission. That commission has a considerable leeway for fact-finding. For example, the commission’s findings whether an injury occurred in the course of employment, so as to be compensable, are generally held to be conclusive where there is room for a difference of opinion.”

RWW:SS

Teachers—Teachers’ required deposits paid to retirement funds by the employer on behalf of the teachers are not to be used to determine the “final average compensation” under secs. 42.20 (26) (a) or 42.70 (2) (t), Stats.

September 17, 1973.

C. M. SULLIVAN, *Secretary*
Department of Employe Trust Funds

You request my opinion on several questions relating to provisions of the Wisconsin Statutes which authorize employers of teachers to pay all or part of the teachers’ required deposits to the applicable retirement fund.

Section 42.40 (8) and (9), Stats., relating to the State Teachers Retirement System, and sec. 42.80 (9), Stats., relating to the Milwaukee Teachers Retirement Fund, read in material part:

“42.40 (8) (a) Effective for compensation received after June 30, 1967, the state shall deposit, in lieu of an equal amount of the deposits required from each member under this section for teaching service in the classified service of the state, an amount equal to 2% of the compensation received for such teaching service. The amount to be deposited by the state under this subsection shall be increased on July 1, 1969, to 2-1/2%, on January 1, 1970, to 3% and on July 1, 1970, to 4% of the compensation received. Such deposit by the state shall be credited to the account of each such member and shall be available for all retirement system benefit purposes to the same extent as normal deposits which are deducted from the earnings of such member. * * *

“(b) Effective for compensation earned on and after November 5, 1971, the state shall deposit, in lieu of an equal amount of the deposits required from each member under any other paragraph of this section for teaching service in the unclassified service of the state, an amount equal to 4% of the compensation received. Such deposit by the state shall be credited to the account of each member in the state unclassified service and shall be available for all retirement fund benefit purposes to the same extent as normal deposits which are deducted from the earnings of each member.

“(9) Notwithstanding those provisions of s. 42.41 relating to the deduction and withholding from the compensation paid as a teacher of deposits required under this section, any employer may make all or any part of such deposits in behalf and for the benefit of any teacher. Such payments by the employer shall be available for retirement system benefit purposes to the same extent as required deposits which were deducted from the compensation of such member. This subsection shall not be construed as creating any contract between the employer and any member of the system or as granting any contractual right in any form to any member.”

“42.80 (9) Notwithstanding any other provision of this subchapter, the board of school directors in any such city may pay all or any part of the salary reservations required under this section. Such payments by the board of school directors shall be available

for all retirement fund purposes to the same extent as amounts which were reserved from the salary of the member. This paragraph shall not be construed as creating any contract between the board of school directors and any member of the fund or as granting any contractual right in any form to any member.”

Your first question “whether such amounts paid by an employer can or should be included for purposes of determining a teacher’s ‘final average compensation.’ ” “Final average compensation” is defined by sec. 42.20 (26) (a), Stats., for the State Teachers Retirement System and sec. 42.70 (2) (t), Stats., for the Milwaukee Teachers Retirement Fund in the following words:

“42.20 (26) * * *

“(a) ‘Final average compensation’ means the monthly rate of compensation obtained by dividing 1) the member’s *total compensation subject to required deposits* for the 5 fiscal years in which such compensation was the highest during the fiscal years preceding the June 30 nearest the date he ceased to be employed as a teacher in Wisconsin teaching by 2) 12 times the number of years of his creditable service for such 5 years. * * *” (Emphasis supplied)

“42.70 (2) * * *

“(t) ‘Final average compensation’ means the monthly rate of compensation obtained by dividing 1) the member’s *total compensation subject to required deposits* (including any compensation which would have been subject to required deposits if not exempted pursuant to s. 42.84 (4)) for the 5 fiscal years in which such compensation was the highest during the fiscal years preceding the June 30 nearest the date of termination of his membership teaching by 2) 12 times the number of years of his creditable service for such 5 years. * * *” (Emphasis supplied)

The answer to this question is dependent upon the definition of the term “total compensation subject to required deposits.” Sections 42.40 (1), (2) and (6), and 42.80 (6) (a) and (7) (a), Stats., specifically require that deposits be made on “all compensation received for teaching service.” “Compensation” as used in these sections is synonymous with “salary.” This is apparent from sec. 42.41, Stats., which reads:

“42.41 . . . (1) Every employer shall deduct and withhold from the compensation as a teacher paid by such employer to each teacher on each payroll for each payroll period such per cent of the compensation of each teacher, as such teacher is required to deposit under s. 42.40. * * *

“(2) Whenever deductions are made from compensation on any payroll the employer shall immediately send to the board a copy of such payroll in such form as approved by such board with a remittance payable to the order of the state treasurer for all deductions from the compensation of teachers on such payroll. * * *”

Section 42.80, Stats., specifies, concerning the Milwaukee Fund, that required deductions are “reserved from the salaries of such members.” I am aware of no legislative intent to treat the two systems differently in the respect of the basis for deductions.

The terms “compensation” and “salary” have been interpreted to be synonymous by our Supreme Court, most recently in *State ex rel. Manitowoc v. Police Pension Board* (1973), 56 Wis. 2d 602, 610, 611, 203 N.W. 2d 74. In this case, involving the police pension fund of Manitowoc established under sec. 62.13, Stats., the question was whether the term “monthly compensation” included employer contributions to the pension fund and health and life insurance. The court held at page 613 that monthly compensation, as used in sec. 62.13, Stats., meant monthly salary, in these words:

“We are convinced that at the time the legislature provided for a pension equal to one half of the officer’s monthly compensation, the legislature intended it to mean his monthly salary.

“If, in view of modern day employment inducements, fringe benefits such as insurance premiums, pension fund contributions and perhaps others are to be included in the formula for calculating pension benefits for police and firemen, the legislature, as a matter of desirable public policy, can so provide. The court cannot.”

It is, therefore, my opinion that teachers’ required deposits paid by the employer on behalf of the teachers are not to be used to determine the “final average compensation” under sec. 42.20 (26) (a) or 42.70 (2) (t), Stats. Under sec. 42.43, Stats., the employer is responsible for payment of required deposits to the board regardless

of whether they are or are not deducted from the teachers' compensation. See 19 OAG 131, 132. It appears, therefore, that even if the teachers' required contribution is made by the employer, the employer is only accountable to the Fund for deduction under sec. 42.41, Stats., based upon the teachers' compensation were the deduction to come out of his normal compensation. This interpretation is consistent with statutes specifically authorizing payments *in lieu of* required deposits. Section 42.40 (8), Stats., applying to classified teachers employed by the state provides for a state deposit *in lieu of* required deposits but does not increase the compensation received for determining the amount of the required deposit. Section 41.07 (2) (c), Stats., which applies to public employes other than teachers and state employes, provides for payment of required contributions and specifies that such payment by the municipality "shall be treated as though contributed by participating employes." Section 41.07 (2) (d), Stats., provides for a state deposit *in lieu of* required deposits but does not increase the earnings base upon which the deposit is based. I find no legislative intent to include in "final average compensation," employers' payments *in lieu of* required contributions.

Your next question is:

"Does the State Teachers Retirement Board or the Milwaukee Teachers Retirement Board have the legal authority to decide administratively that the employer-paid portion of the required employe contribution be subjected to retirement fund contributions so that the employer-paid portion may qualify for final average salary computations?"

Administrative agencies have only those powers given by the statutes. In *American Brass Co. v. State Board of Health* (1944), 245 Wis. 440, 448, 15 N.W. 2d 27, the court said that:

"* * * 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." (At page 448.)

Section 227.014 (2) (a), Stats., provides specific rulemaking authority as follows:

“(a) Each agency is authorized to adopt such rules interpreting the provisions of statutes enforced or administered by it as it considers to be necessary to effectuate the purpose of the statutes, *but such rules are not valid if they exceed the bounds of correct interpretation.*” (Emphasis supplied)

The various statutes discussed above specify that “total compensation” is subject to required deposits. Sections 42.40 (1) (2) and (6), and 42.80 (6) (a) and (7) (a), Stats. I find no legislative intent to support a rule that “total compensation” includes employer deposits made *in lieu of* required teacher deposits. It is, therefore, my opinion that the interpretation of the various statutes under your prior question precludes passage of a valid rule administratively deciding that the employer-paid portion is subject to retirement fund contributions.

Your last question is:

“Does an individual employe have the legal right to request that the employer-paid portion of the required employe contribution be subjected to retirement fund contributions so that the employer-paid portion may qualify for final average salary computations?”

The statutes previously discussed do not provide for any employe option of this type; consequently, there is no authority for such a request by the employe.

RWW:WMS

Municipalities—Nursing Homes—A village has power to own and operate a home for the aged, finance the same under secs. 66.066, 66.067, and lease facility to a nonprofit corporation but probably could not lease to a profit corporation for operation.

September 19, 1973.

JAMES R. KIMMEY, *Division of Health Policy and Planning*
Department of Administration

You requested my opinion whether a municipality can utilize its bonding authority for public utilities under sec. 66.066, Stats., to

finance construction of a home for the aged referred to in sec. 66.067, Stats., and lease the facility to a corporation organized for profit to operate.

Your specific inquiry is concerned with a proposed facility in a village, and this opinion is limited to powers of cities and villages. The latter municipal units of government have broad home-rule powers, whereas counties and towns have only such as are expressly given by statute or which are necessarily implied.

The first question is whether a village can own and operate a home for the aged. Reference to such facility in sec. 66.067, Stats., is not necessarily a grant of power to a village to own and operate such a facility. Section 66.067, Stats., is primarily a financing statute. It defines certain facilities, not common to all municipalities named, which may be considered public utilities for financing purposes so that the provisions of sec. 66.066, Stats., may be utilized. The various types of municipalities must find their power to engage in the construction and operation of the various facilities listed in other statutes, if they have limited powers, or in their general statutory powers which are reinforced by constitutional home-rule powers in the case of cities and villages.

Although I find no express statute which authorizes a village to own and operate a home for the aged, I am of the opinion that a village does have such power in view of Art. XI, sec. 3, Wis. Const., and secs. 61.34 and 66.067, Stats.

I am confident that a court would hold that ownership and operation of a home for the aged by a village would be for a public purpose and that public funds could be expanded and public debt incurred therefor.

Ownership and operation of a home for the aged by a village would probably be considered a proprietary rather than a governmental function. Wisconsin cases have recognized that valuable private benefits may be generated as the natural result of a legitimate public project and have approved sale of excess property or lease to private individuals when not needed for public use.

The crucial question under the public purpose doctrine is whether the return to the public is in sufficient degree so as to negate the

suspicion that a private benefit is foremost. *State ex rel. Bowman v. Barczak* (1967), 34 Wis. 2d 57, 71, 148 N.W. 2d 683.

In 58 OAG 179, 187 it was stated:

“There is a recognizable distinction, therefore, between cases where a public improvement is erected for ‘express or apparent’ private purposes or the public improvement is shown to be ‘wholly unnecessary,’ and cases where ‘the surplus is a mere incident’ to the public improvement and the public purpose it serves. *Kaukauna W.P. Co. v. Green Bay & M.C. Co.*, (1891) 142 U.S. 254, 35 L. Ed. 1004, 12 S.Ct. 173. See also *Bell v. Platteville*, (1888) 71 Wis. 139, 146, 36 N.W. 831, and *Stone v. Oconomowoc*, (1888) 71 Wis. 155, 36 N.W. 829.”

To sustain a public purpose, the advantage to the public must be direct and not merely incidental. The fact that a law or project may benefit certain individuals or one particular class of people more immediately than other individuals or classes does not necessarily deprive the law or project of its public purpose. *State ex rel. Warren v. Nusbaum* (1973), 59 Wis. 2d 391, 418.

In *Meier v. Madison* (1950), 257 Wis. 174, 181, 42 N.W. 2d 914, the court held that secs. 66.066 and 66.067, Stats., could be utilized by the City of Madison to finance Madison General Hospital, a city-owned facility, even though the hospital was to be operated by a nonprofit hospital association under a contract and long term lease.

It can be argued that since the court in *Meier* quoted from and relied upon *Eau Claire Dells Improvement Company v. City of Eau Claire* (1920), 172 Wis. 240, 252, 179 N.W. 2, which involved a long term lease of a city water utility to a corporation for profit, that a court would approve a contract providing for the operation of a village owned and financed home for the aged by a profit corporation.

A court would have to weigh the local situation in such case and balance the interests of the public against those which would accrue to private interests including the profit corporation which served as operator.

I am of the opinion that a court, absent special compelling circumstances, would not approve such an operation.

In McQuillin, *Municipal Corporations* (3rd Ed.), Vol. 2, §10.40, p. 849, it is stated that "delegation to a private corporation of operation of a city hospital" has been held unlawful, although other cases hold that lease to a nonprofit charitable corporation of a city hospital for operation and maintenance is valid where the contract contained provisions adequately protecting the public interest.

In the hospital area, the legislature has acted to provide that a city or village may lease "to a non-profit corporation, for terms not exceeding 40 years" municipally-owned hospital facilities. Sec. 66.501, Stats.

While the legislature has not expressly prohibited leasing to a profit corporation, the legislative intent is that, at least as to hospitals, operation should be by the municipal unit of government or by a nonprofit corporation. This intent is particularly important in view of the state-wide concern versus the local interest in the subject matter of hospitals and homes for the aged.

In conclusion, whereas I am of the opinion that a village could own and operate a home for the aged, finance the same under secs. 66.066, 66.067, and lease the facility to a nonprofit corporation if sufficient provisions were included to protect the public interest, I am of the opinion that a court probably would not sanction lease for operation by a profit corporation.

RWW:RJV

Criminal Law—Juvenile Court—Under the provisions of sec. 48.12, Stats., the Iron County juvenile court has jurisdiction of delinquency petitions based on violation of the Michigan criminal law by children who are residents of and present in Iron County.

September 19, 1973.

ALEX J. RAINERI, *District Attorney*
Iron County

Your recent letter sets forth the following fact situation: Three children, ages 14, 16 and 16, who reside in Iron County, Wisconsin, were apprehended in Gogebic County, Michigan, for the crime of

arson to a dwelling. They were in the company of two Michigan youths, ages 18 and 19. The dwelling involved was that of the principal of the school attended by the Michigan youths, who were angry at the principal because of problems in school. The three Wisconsin children were turned over to Iron County juvenile authorities and are presently in Iron County, Wisconsin. On the basis of this fact situation, you ask for my opinion on whether the juvenile court of Iron County has jurisdiction to entertain a petition alleging that the three Wisconsin children are delinquent on the basis of the act committed in the state of Michigan in contravention of its criminal law.

Prior to the amendment of sec. 48.12, Stats., by ch. 125, Laws of 1971, the answer to this inquiry would have been difficult. This is because sec. 48.12, 1969 Stats., provided:

“The juvenile court has exclusive jurisdiction * * * over any child who is alleged to be delinquent because:

“(1) He has violated *any state law* or any county, town, or municipal ordinance; or

“* * *” (Emphasis added.)

This grant of jurisdiction might reasonably have been interpreted to mean that there was jurisdiction only when the child was alleged to be delinquent because he violated a Wisconsin law or a county, town, or municipal ordinance.

The problem is clarified, however, by the present content of sec. 48.12, 1971 Stats. That section now provides:

“The juvenile court has exclusive jurisdiction * * * over any child:

“(1) Who is alleged to be delinquent because he has violated any federal criminal law, *criminal law of any state*, or any county, town or municipal ordinance that conforms in substance to the criminal law, or an order for supervision under s. 48.345; or

“* * *” (Emphasis added.)

The phrase “criminal law of any state” certainly includes the laws of the state of Michigan. In my opinion, therefore, the juvenile court of Iron County does have jurisdiction to entertain a petition

alleging that children, who are both residents of and present in Iron County, are delinquent in that they violated a criminal law of the state of Michigan.

This conclusion is reinforced by other content of ch. 48, Stats., including not only the intent of the chapter and the disposition provisions thereof, but also by sec. 48.16, Stats. The latter is on the subject of venue and provides that venue for a delinquency proceeding based on a violation of the criminal law is 1) in the county where the child resides *or* 2) the county where the child is present *or* 3) the county where the violation occurred. Under this section of the statutes it is clearly *not* required that the proceeding be held in the county where the criminal act occurred. In fact, prior to 1955, venue of a delinquency proceeding was exclusively in the county where the child resided or where he, his parent, guardian, or custodian were present. Section 48.01 (5) (a) and (am), 1953 Stats.

The question probably arises because if a "criminal prosecution" was involved that prosecution would have to be brought in Gogebic County, Michigan. This is required by the Sixth Amendment to the United States Constitution, as well as by provisions in the state constitutions and statutes. A delinquency proceeding, however, is not a "criminal prosecution," criminal procedures do not apply, and an adjudication of delinquency is neither a "conviction" nor is a child a "criminal" as a result thereof. See sec. 48.38, Stats., and such cases as *Winburn v. State* (1966), 32 Wis. 2d 152, 145 N.W. 2d 178; *Banas v. State* (1967), 34 Wis. 2d 468, 149 N.W. 2d 571; and *In re D.M.D. (a minor) v. State* (1972), 54 Wis. 2d 313, 195 N.W. 2d 594.

¹"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *."

Nothing in *In re Gault* (1967), 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed. 2d 527, *In re Winship* (1970), 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 2d 368, or other decisions of the United States Supreme Court changes a delinquency proceeding into a "criminal prosecution" even though an alleged juvenile delinquent does have

some of the same rights in a delinquency proceeding as does an accused in a criminal prosecution.

RWW:BRB

Zoning—Transportation, Department of—The jurisdiction of the Secretary of Transportation with respect to control over the erection of high structures is limited by the provisions contained in sec. 114.135 (7), Wis. Stats., to those structures that either extend to a height of more than 500 feet above the ground or surface of the water within one mile of the location of the object, or a height determined by the ratio of one foot vertical to 40 feet horizontal measured from the nearest boundary of the nearest public airport in the state. If a local zoning ordinance, rule or regulation permits the erection of structures, which exceed these heights, a conflict of jurisdiction would arise and the Secretary could invoke sec. 114.135 (9), Stats., to resolve the conflict.

September 19, 1973.

NORMAN M. CLAPP, *Secretary*
Department of Transportation

You have requested the opinion of this office with respect to the erection of communication towers in the vicinity of airports which complies with local zoning ordinances, but which either exceeds the height of 500 feet and lies within a mile of an airport, or the height of which exceeds the ratio of one foot vertical to 40 feet horizontal measured from the nearest boundary of the nearest public airport within the state. Your question specifically concerns the jurisdiction of the Secretary of Transportation over the erection of such structures.

The applicable subsections of sec. 114.135, Stats., read as follows:

“(6) PERMIT FOR ERECTION OF HIGH STRUCTURES REQUIRED. No person shall erect anywhere in this state any building, structure, tower or any other object the height of which exceeds the limitations set forth in sub. (7) without first filing an

application and procuring a permit from the secretary of transportation.

“(7) POWER TO CONTROL ERECTION OF HIGH STRUCTURES. For the purposes of sub. (6) the power and authority to control the erection of buildings, structures, towers and other objects by the secretary of transportation shall be limited to those objects that would either extend to a height of more than 500 feet above the ground or surface of the water within one mile of the location of the object, or above a height determined by the ratio of one foot vertical to 40 feet horizontal measured from the nearest boundary of the nearest public airport within the state; however, this power and authority shall not extend to objects of less than 150 feet in height above the ground or water level at the location of the object or to objects located within areas zoned under s. 114.136 or to objects located within areas zoned under s. 62.23 (7) where the zoning ordinance enacted under said subsection controls the height of structures.

“* * *

“(9) CONFLICTING AUTHORITY. Wherein conflicting jurisdiction arises over the control of the erection of a building, structure, tower or hazard between the secretary of transportation and any political subdivision of the state, the secretary of transportation may overrule rules and regulations adopted by any political subdivision under the laws of this state after a public hearing wherein all parties thereto have been given an opportunity to be heard.”

Section 114.136, Stats., authorizes municipalities (counties, cities, villages and towns) to protect the aerial approaches to airport sites by ordinance regulating and restricting the use, location and height of buildings and structures within three miles of the airport site. Subsection (2) (b) thereof, provides that the height of buildings or structures within three miles from the boundaries of the airport site shall not be restricted to a height above the level of the airport site, which is less than one-thirtieth of its distance from the boundary of the airport site in the case of Class I and II airports or one-fifteenth of its distance from the boundary of the airport in the case of Class III or larger airports. However, the height of buildings or structures within three miles of the site may be restricted to a

height of 150 feet above the lowest point on any planned runway. Section 62.23 (7), Stats., sets forth the granting of power to cities to enact zoning ordinances and the procedure to be followed.

Subsections (6) and (7) of sec. 114.135, Stats., require the procurement of a permit from the Secretary of Transportation for the erection of a tower of the vertical dimensions you describe. The sole exception is in cases where (1) the area in which the tower is located is zoned under sec. 114.136 or under sec. 62.23 (7), and (2) the tower in question is less than 150 feet in height above the land or water. Thus, unless the towers in question satisfy both of the aforementioned requirements, they are within the jurisdiction of the Secretary of Transportation.

Where the jurisdiction of the Secretary of Transportation in this area conflicts with the jurisdiction of any political subdivision of the state, subsec. (9) of sec. 114.135, Stats., provides the authority and procedure whereby the Secretary may overrule the rules and regulations of the political subdivision.

RWW:CAB

Taxation—Income tax lien is extinguished by tax deed under sec. 75.14, Stats., or by judgment under sec. 75.521.

October 10, 1973.

EDWARD A. WIEGNER, *Secretary*
Department of Revenue

You ask whether land acquired by a county under a tax deed and later conveyed to a third party by quitclaim deed remains subject to the lien of a delinquent income tax warrant filed three years before the quitclaim deed was executed.

The answer is, "No."

There are two procedures provided in ch. 75, Stats., by which a county may acquire title to tax delinquent lands—by tax deed issued pursuant to sec. 75.14 (1), Stats., or by judgment entered in a foreclosure in rem proceeding, pursuant to sec. 75.521 (8) or (13)

(b), Stats. Section 75.14 (1), Stats., provides that the deed shall vest in the county "an absolute estate in fee simple in such land subject, however, to all unpaid taxes and charges which are a lien thereon and to recorded restrictions and redemption as provided in this chapter * * *." Although the term, "unpaid taxes and charges," is not defined by the statute, it is reasonable to conclude from the subject matter and the subsequent sections covering the foreclosure in rem proceeding that the term is intended to include property taxes subsequent to the delinquent taxes giving rise to the tax deed—which would be a lien on the property, when the taxes were delinquent—and similar special assessments, but not to include taxes for which the property owner is personally liable and which are not automatically charges or liens upon the property. The above-quoted language has been in the statute, virtually unchanged, for many years. Section 1176, Rev. Stats. 1878.

The statute providing for the foreclosure in rem proceeding, adopted by ch. 340, Laws of 1947, was amended by ch. 177, Laws of 1949, to provide that the judgment shall vest in the county "an estate in fee simple absolute in such lands, subject, however, to all unpaid taxes and charges which are subsequent to the latest dated valid tax lien appearing on the list specified in subsection (3) (b) of this section and to recorded restrictions as provided by sec. 75.14 (4) and all persons, both natural and artificial, including the state of Wisconsin, * * * who may have had any right, title, interest, claim, lien or equity of redemption in such lands, are forever barred and foreclosed of such right, title, interest, claim, lien or equity of redemption. * * * Such judgment shall have the effect of the issuance of a tax deed or deeds and of judgment to bar former owners and quiet title thereon." Section 75.521 (8). Almost identical language appears in sec. 75.521 (13) (b). By that language it is clear that "unpaid taxes" do not include income taxes, since even liens held by the state are foreclosed by the foreclosure in rem proceeding. Furthermore, the language quoted from sec. 75.521 gives to the in rem judgment the effect of a tax deed and borrows heavily from the older tax deed statute, in seeking to describe that effect.

In 35 OAG 429 (1946), it was said:

“* * * The law is well settled that a valid tax deed cuts off all former titles and liens. Sec. 75.14 (1), Stats.; XX Op. Atty. Gen. 409; *Jarvis v. Peck*, 19 Wis. *74; *Cole v. Van Ostrand*, 131 Wis. 454, 465; *Doherty v. Rice*, 240 Wis. 389.”

Aberg v. Moe (1929), 198 Wis. 349, at 359, 224 N.W. 132, 226 N.W. 30, while not concerned with the effect of a tax deed, contains the following comment:

“* * * The entire property, including all interests in it, is assessed to the owner of the property as defined in the statute, and the right of every person claiming any interest in the property subordinate to the fee, whether under lease, contract, or otherwise, is extinguished if the property be sold in the exercise of the taxing power. * * *”

It is my conclusion that a quitclaim deed running from the county and based upon either a tax deed issued under sec. 75.14 or a judgment in favor of the county, pursuant to sec. 75.521 (8) or (13), Stats., operates to extinguish the lien of a delinquent income tax warrant issued against the former owner of the land conveyed.

RWW:EWW

Bonds—State Fair—Issuance of general obligation bonds to finance State Fair Park coliseum is authorized by statute and is not violative of the state constitution.

October 19, 1973.

PAUL L. BROWN, *Secretary*
State Building Commission

You have asked my opinion regarding the constitutionality of issuance of general obligation bonds to finance the building of a coliseum at State Fair Park. More specifically, you ask whether the bonding plan is constitutionally vulnerable in light of a December, 1972, decision of the Michigan Supreme Court invalidating bonds issued to finance the construction of a sports stadium in that state by the defendant county.

The Michigan decision, *Alan v. Wayne County* (1972), 388 Mich. 210, 200 N.W. 2d 628, turned on the Michigan court's conclusion that the bonds there questioned were in fact general obligation bonds, notwithstanding efforts to label them, for some purposes, as self-liquidating revenue bonds. Since the Wayne County Stadium Authority's power to issue bonds stemmed from Michigan's revenue bond act (P. A. 1933 No. 94; Mich. Comp. Laws (1970), s. 141.101, et seq.), which authorized only self-liquidating revenue bonds, the general obligation bonds were null as violative of constitutional provisions governing the creation of public debt.

The contemplated Wisconsin State Fair Park coliseum bonds are general obligation bonds, payment of which is guaranteed by a pledge of the full faith, credit and taxing power of the state. Article VIII, sec. 7, Wis. Const.; sec. 18.12, Stats. While it is anticipated that the facility will be self-amortizing, secs. 13.488 (7), 93.25 (1), Stats., there is no constitutional or statutory provision limiting the means of bond retirement to a facility's revenues, or even authorizing state "revenue bonds." (See, by way of contrast, sec. 66.521 (4) (a), Stats. (1971))

Creation of public debt (not an incident of the issuance of revenue bonds; see *State ex rel. Hammermill Paper Co. v. LaPlante* (1973), 58 Wis. 2d 32, 64, 205 N.W. 2d 784.) to "acquire, construct, develop, enlarge or improve facilities at State Fair Park" was specifically authorized by the legislature in sec. 518 of ch. 125, Laws of 1971, creating subsection 20.866 (2) (zz), Wis. Stats. (1971). While subheadings in both the session laws and in the statutes speak in terms of "self-amortizing supported bonding authority" and "self-amortizing facilities," there is, as previously mentioned, no provision for the issuance by the state or its agencies of any type of bond other than general obligation bonds.

Consequently, it is my opinion that the bonds contemplated in the constitutional and statutory provisions above cited are general obligation bonds which—assuming full compliance with all other

constitutional and statutory requirements not here pertinent—violate no provision of the Wisconsin Constitution.

RWW:SOT

Appropriations and Expenditures—Legislation—Governor's veto of one digit of a separable part of an appropriation bill constitutes an objection within the meaning of Art. V, sec. 10, Wis. Const., and the entire part is returned to the legislature for reconsideration.

October 23, 1973.

ERNEST C. KEPPLER, *Chairman*

Committee on Senate Organization

Section 149(n) of Assembly Bill 300, 1973, created four subsections of sec. 20.866 (2), Stats., which were unrelated except as to methods of funding. Subsection (us) provided:

“20.866 (2) (us) TRANSPORTATION; STATE TRUNK HIGHWAY IMPROVEMENTS. As a continuing appropriation from the capital improvement fund, the amounts in the schedule to construct, reconstruct and resurface state trunk highway facilities as provided by s. 84.51 (3). The state may contract public debt in an amount not to exceed \$25,000,000 for this purpose.”

The Governor crossed out the numeral “2” and marked the section “vetoed in part.” There is no question as to the Governor's intention. In his 18-page veto message dated August 2, 1973 (Assembly Journal, August 8, 1973, p. 2413), he stated that he had partially vetoed all except the “\$5 million portion of the bond authorization which has been retained” and set forth his reasons.

These facts prompt you to ask, on behalf of the Senate Committee on Organization, my opinion on the extent of the Governor's power under Art. V, sec. 10, Wis. Const., to approve appropriation bills in whole or in part.

Article V, sec. 10, Wis. Const., in material part, provides:

“* * * Appropriation bills may be approved in whole or in part by the Governor, and the part approved shall become law, and the part objected to shall be returned in the same manner as provided for other bills. * * *”

This provision confers upon the Governor the authority to *approve or reject*, in whole or in part, appropriation bills. It does not grant to the Governor the authority to *alter* a separable part of an appropriation bill. It is immaterial whether the alteration is accomplished by writing in a different figure as opposed to altering the figure established by the legislation by use of a slash or other mark.

The purpose of the partial veto power was described in *State ex rel. Martin v. Zimmerman* (1940), 233 Wis. 442, 447-448, 289 N.W. 662:

“* * * Its purpose was to prevent, if possible, the adoption of omnibus appropriation bills, logrolling, the practice of jumbling together in one act inconsistent subjects in order to force a passage by uniting minorities with different interests when the particular provisions could not pass on their separate merits, with riders of objectionable legislation attached to general appropriation bills in order to force the governor to veto the entire bill and thus stop the wheels of government or approve the obnoxious act. Very definite evils were inherent in the lawmaking processes in connection with appropriation measures. Both the legislature and the people deemed it advisable to confer power upon the governor *to approve* appropriation bills *in whole or in part*. * * *” (Emphasis added.)

The partial veto power can be exercised as to any separable part of an appropriation bill, but the remainder must constitute a complete and workable law. *State ex rel. Martin v. Zimmerman, supra*, p. 450 and *State ex rel. Finnegan v. Dammann* (1936), 220 Wis. 143, 146, 264 N.W. 622. The corollary is that the part objected to must constitute a complete and workable piece of legislation. If the “part objected to” does not constitute a workable law, it cannot “be returned in the same manner as provided for other bills.” In other words, the Governor has the power to object to part of an appropriation bill, but the legislature has the power, when the part rejected is returned, to consider whether it will override as to the

part rejected. The legislature must have a workable part in order to exercise this authority.

The portion of the appropriation bill under consideration involves bonding. Because the authority to bond must be absolutely free from doubt and because the legislature now is about to consider the parts of the budget bill objected to by the Governor, it is appropriate for me to advise the legislature on the effect of the Governor's action with respect to subsec. (us). Since the Governor lacks authority to alter a separable part of an appropriation bill and since it is clear the Governor did not approve this subsection, I conclude that the Governor has objected and that subsec. (us) of sec. 149(n) of Assembly Bill 300, 1973, must "be returned in the same manner as provided for other bills." In other words the entire 25 million bonding measure is returned to the legislature for reconsideration. Subsection (us) has not been approved, and therefore has not become law. Consequently, no bonding authority exists pursuant to the legislation under consideration. The legislature now may consider whether to override the Governor's partial veto or to submit to the Governor, in the form of a new and separate bill, a different level of bonding authority.

RWW:WHW

Articles of Incorporation—Corporations—Articles of incorporation which purport to allow informal corporate action by written consent of less than all parties entitled to vote are clearly inconsistent with the provisions of sec. 180.91, Stats., and are prohibited by ch. 180, Stats.

October 23, 1973.

ROBERT C. ZIMMERMAN
Secretary of State

You advise that your office has questioned the validity of certain provisions in the articles of incorporation of a corporation created under the Wisconsin Business Corporation Law, ch. 180, Stats., on the grounds that such provisions fail to conform with the statutory

requirements relating to informal corporate action, set forth in sec. 180.91, Stats. You have forwarded the text of the suspect provisions with a request for an opinion as to whether they are inconsistent with the provisions of that statute.

Section 180.91, Stats., provides as follows:

“180.91 Informal action by shareholders or directors. *Any action* required by the articles of incorporation or by-laws of any corporation or any provision of law to be taken at a meeting or any other action which may be taken at a meeting, *may be taken without a meeting if a consent in writing* setting forth the action so taken *shall be signed by all* of the shareholders, subscribers, directors or members of a committee thereof *entitled to vote with respect to the subject matter thereof*. Such consent shall have the same force and effect as a unanimous vote, and may be stated as such in any articles or document filed with the secretary of state under this chapter.” (Emphasis added.)

Those portions of the corporate articles which contain the provisions you question are designated as Art. 10 (a) (1), (2) and (3). Subparagraph (a) (1) is essentially an incorporation of the provisions of sec. 180.91, Stats., into the corporate articles, and as such need not concern us further. However, subparagraph (a) (2) purports to authorize informal corporate action by written consent of “a quorum of those entitled to vote,” and subparagraph (a) (3) attempts to make acceptance of that mode of informal corporate action an automatic incident of stock ownership, to the extent that “the laws of the state of incorporation do not specifically prohibit” such informal action.

It is my opinion, based on the general principles of law applicable to the subject of your inquiry and the legislative history and judicial interpretation of sec. 180.91, Stats., that the provisions of that statute are automatically included in the articles of incorporation of domestic corporations incorporated under ch. 180, Stats., whether or not any such corporation specifically inserts or implements those provisions in their articles, and that any provision in articles of incorporation which purports to allow informal corporate action by written consent of less than all parties entitled to vote is clearly inconsistent with the provisions of sec. 180.91, Stats., and are thus “specifically prohibited” by Wisconsin law. Therefore, in my

opinion, the above quoted corporate article is invalid under Wisconsin law insofar as it purports to authorize or implement informal corporate action by a quorum of those entitled to vote, contrary to the provisions of sec. 180.91, Stats.

Corporate articles may not be contrary to or inconsistent with the provisions of statutes, such as sec. 180.71, Stats., which become an essential part of the corporate charter by operation of law. As stated in 7 Fletcher, Cyc. Corp. (perm. ed.), pp. 776-779, sec. 3635:

“When a corporation is created or formed under a general corporation law, its charter consists of the law under which it is organized, and of the articles or certificate of incorporation adopted or issued in pursuance of the law, in so far as they are in compliance with and authorized by the law. In such case, there is impliedly written into the charter, as a constituent part thereof, every pertinent provision of the constitution and statutes of the corporation’s creation, and applicable provisions of the constitution and general laws of the state in force at the time the company is incorporated are as much a part of its charter as though expressly written therein.

* * *

“The articles or certificate do not alone constitute the charter, and determine the powers of the corporation, but they are to be taken in connection with the statute. The statute is controlling, and the articles or certificate are valid and effectual, not only in so far as they are not in conflict with the statute, but in so far as the powers therein claimed are authorized by the statute.”

This general statement of the law is capsulized in sec. 180.45 (2), Stats., which provides that:

“(2) It shall not be necessary to set forth in the articles of incorporation any of the corporate powers enumerated in this chapter. *The articles of incorporation may include additional provisions, not inconsistent with law, including any provision which under this chapter is required or permitted to be set forth in the bylaws.* * * *” (Emphasis added.)

In this regard, I note that shortly after the enactment of sec. 180.71, Stats., it was amended by ch. 399, Laws of 1953, to include specific reference to articles of incorporation,

“. . . for the purpose of making it clear that unanimous informal action is authorized by the section even though the articles or bylaws may provide only for action at a meeting.” Revision Committee Note, 1953 Bill 524-S.

It is therefore evident that from the outset the legislature intended the provisions of sec. 180.91, Stats., to control over provisions of articles of incorporation dealing with the same subject matter. This conclusion is supported by sec. 180.25 (3), Stats., which indicates, with respect to shareholder action, that the articles of incorporation shall control where the articles “require the vote or concurrence of the holders of a *greater* proportion of the shares” than required by ch. 180, Stats. (Emphasis added.) The obvious import of this provision is that the articles may not provide for a lower percentage.

As a general proposition, in the absence of a statute to the contrary, shareholders and their boards of directors are only authorized to take corporate action at a meeting of the shareholders or directors called and conducted according to law. 5 Fletcher, Cyc. Corp. (perm. ed.), pp. 3-4, sec. 1996; 2 Fletcher, Cyc. Corp. (perm. ed.), pp. 227-228, sec. 392. It was in obvious recognition of those general principles that the legislature adopted sec. 180.91, Stats., as part of an overall revision of the Wisconsin Business Corporation Law, by ch. 731, Laws of 1951, so as to provide for greater flexibility in the conduct of corporate affairs. This revision in turn relied heavily on a model business corporation act drafted by the Committee on Corporate Laws of the American Bar Association’s Section on Corporation, Banking and Business Law and published in Vol. VI, No. 1 (Nov. 1950) of *The Business Lawyer*. 22 West’s Wis. Stats., Ann., p. XXVII.

Although sec. 180.91, Laws of 1951, was obviously patterned after sec. 138 of the 1950 model act (Informal Action by Shareholders), the Wisconsin statute was drafted so as to authorize informal action by subscribers, directors or members of a committee, in addition to shareholders. Comparable counterparts of sec. 180.91, covering informal action by directors and shareholders are part of the present model code. See Model Bus. Corp. Act Ann.

2d, secs. 44 and 145. I note that Wisconsin has retained its unanimous approval requirement, even though a number of the many states which have patterned their statutes on the model code have provided for varying percentages for informal action. By making such unanimous consent a part of the statutory authority for informal corporate action under sec. 180.91, Stats., the legislature has obviously reserved to itself the authority to change the operative percentage vote necessary for informal action under the provisions of the statute or articles of incorporation adopted pursuant thereto.

Finally, the above opinion is supported by the decision of the Wisconsin Supreme Court in *Village of Brown Deer v. City of Milwaukee* (1962), 16 Wis. 2d 206, 114 N.W. 2d 493, *cert. denied* 371 U.S. 902, 83 S.Ct. 205, 9 L.ed. 2d 164, where the court held that, in deciding whether to perform the "political act" of signing an annexation petition, a corporation did not validly act in an informal manner because it failed to comply with sec. 180.91, Stats. In so concluding the court states the following, at pp. 213-214:

"Section 180.91, Stats., was adopted in order to permit informal action by the board of directors. Corporations owe their existence to the statutes. Those who would enjoy the benefits that attend the corporate form of operation are obliged to conduct their affairs in accordance with the laws which authorized them.

"The legislature having specified the means whereby corporations could function informally, it becomes incumbent upon the courts to enforce such legislative pronouncements. The legislature has said that the corporation could act informally, without a meeting, by obtaining the consent in writing of all of the directors. In our opinion, this pronouncement has pre-empted the field and prohibits corporations from acting informally without complying with sec. 180.91, Stats."

And at p. 215:

"There can be no doubt as to the rule in Wisconsin in view of the enactment of sec. 180.91, Stats., by the Wisconsin legislature. Fletcher also makes the following statement in his treatise at page 242, sec. 396, with respect to the effect of a statute permitting informal corporate action:

“ ‘Of course, a statute may authorize particular acts to be done by the directors acting otherwise than as a board and at a formal meeting. But where it is claimed that the statutes of the state permit the corporation to dispense with this eminently wise and just rule, the construction will be strictly against any such contention.’ ”

Although it is possible that the presence of apparent authority, estoppel or ratification might alter the legal effect of noncompliance with sec. 180.91, Stats., where a “business decision” rather than a “political determination” is involved, such doctrines are for the courts to apply as the individual facts of each case may dictate, and they do not affect the general statutory mandate of sec. 180.91, Stats., clearly prohibiting informal corporate action by less than unanimous written consent.

RWW:JCM

Public Administrator—Fees—Abolition of the office of public administrator, effective January 1, 1974, by ch. 90, Laws of 1973, requires that such officers submit their final reports and claims for fees as soon after 1973 as possible in order to obtain reimbursement without undue delay and complications.

October 24, 1973.

EDWARD A. WIEGNER, *Secretary*
Department of Revenue

You have requested my opinion as to how the public administrator may be compensated after 1973 for services performed before 1974, since ch. 90, Laws of 1973, abolishes the office of public administrator and makes other changes in the statutes providing for compensation for such officials, effective January 1, 1974.

The 1971 statutes require the public administrator to render monthly reports to the county court and your Department, showing the names of all estates in which inheritance tax determinations were made in the preceding calendar month, the amount of tax determined and the public administrator's claim for fees and require

the county treasurer to report to the Department by the tenth of each month, and at the same time to pay to the state all inheritance taxes collected during the preceding month, less credits, refunds and adjustments. The public administrator is to be paid by the county treasurer out of inheritance tax funds in his possession, upon order of the court. Sections 72.31 (4)(b) and 72.32, Stats. 1971.

The difficulty stems from the fact that the public administrator, in many cases, may not have time after December 31, 1973, to prepare the report to the court, obtain court approval of the requested fees and collect those fees from the county treasurer before the latter has to make his report and remittance of inheritance tax moneys to the state. The treasurer's January 10, 1974 payment to the state will be his final payment of inheritance tax funds, as the new sec. 72.22 (3) requires that inheritance taxes be paid directly to your Department after 1973.

You ask specifically whether the public administrators may be paid in 1974 under sec. 72.24 (2), Stats. 1971. Section 72.24 (1), Stats. 1971, provides that when "any amount has been paid in excess of the tax determined," the county treasurer shall "refund" the excess to the payor or other person entitled thereto out of inheritance tax funds in his possession." Subsection (2) then provides that the refund shall be made by the state treasurer if the county treasurer lacks sufficient inheritance tax funds. The latter subsection would not authorize payment of public administrator's fees from the state treasury in 1974.

Section 72.24, Stats. 1971, applies only to the "refund" of an "excess" tax, not to the payment of public administrator's fees. Also, the entire section is repealed and recreated, effective January 1, 1974, by ch. 90, Laws of 1973. As recreated, the section still provides for the refund of excess tax payments, from the state treasurer to the payor or other person entitled thereto. This cannot reasonably be stretched to cover payment of fees to public administrators.

Probably the best advice you can give to the public administrators and the county treasurers is to follow the requirements of the 1971 statutes so far as possible in winding up the December, 1973, business. If a public administrator can have his fees approved by the court and paid by the county treasurer before

the latter makes his January 10th report and remittance, there is no problem. This assumes that the county treasurer must make a report and remittance, for December, by January 10, 1974, even though the repeal of sec. 72.32, Stats. 1971, becomes effective January 1, 1974. It would be absurd to assume otherwise, however.

If the county treasurer delays his remittance to the state until after the 10th of a month, sec. 72.32, Stats. 1971, imposes a 10% per annum interest rate. Since no provision was made in ch. 90, Laws of 1973, for a more orderly winding up of the business of the public administrator, it behooves him, the county court and the county treasurer to make every reasonable effort to meet the deadline of January 10th. If that deadline is not met, either the county treasurer may be liable for the 10% interest for the period of delay—assuming he has been delinquent in forwarding funds to the state—or the public administrator may attempt collection of his fees by filing a claim, under sec. 16.007, Stats.

RWW:EWW

County Treasurer—Criminal Law—Treasurer, State—The entire amount of bail forfeited under sec. 969.13 (4) is to be retained by the county treasurer and no part thereof is to be paid to the state treasurer.

November 2, 1973.

WALTER F. McCANNA, *Deputy Secretary*
Department of Revenue

You have requested my opinion as to the disposition of bail forfeited under the terms of sec. 969.13 (4), Stats. That subsection directs that the proceeds of the judgment of forfeiture shall be paid to the county treasurer.

Your questions are:

“1. Does he [i.e., the county treasurer] pay the entire amount to the state treasurer since the statute states it is the result of a ‘judgement for the state’?”

"2. Does he retain the entire amount for the county as indicated in 41 O.A.G. 166 which pertained to Section 354.42, Statutes, as it then existed?

"3. Does he retain 10% of the amount for the county and remit the balance to the state treasurer in accordance with Section 59.20 (8), Statutes on the premise that is a penalty within the meaning of that section?"

As to your first question, whether payment must be made to the state because judgment is entered for the state, the answer is no. The supreme court has specifically held that the money recovered on a forfeited recognizance belongs to the county even though the action is brought in the name of the state. *The State v. Wettstein and others* (1885), 64 Wis. 234, 243, 25 N.W. 34.

As to your second question, whether the county treasurer retains the entire amount, the answer is yes. In *The State ex rel. Guenther, State Treasurer v. Miles, County Treasurer* (1881), 52 Wis. 488, 491, 9 N.W. 403, the court said:

"The statute provides that moneys collected on forfeited recognizances in criminal cases shall be paid into the county treasury. We are aware of no constitutional or statutory provision which requires the county treasurer to pay it over to the state treasurer. We conclude, therefore, that moneys collected from this source belong to the county."

The court expressly followed this holding in *Wettstein, supra*. Furthermore, this office has consistently opined that such moneys belong to the county. 1 OAG 190 (1913), 8 OAG 26 (1919), 10 OAG 314 (1921), and 41 OAG 166 (1952). Although the *Miles* reasoning may be subject to criticism for failing to treat a bail forfeiture as a "forfeiture" within the meaning of Art. X, sec. 2, Wis. Const., its holding is clear and therefore binding. See *State v. Yancey* (1966), 32 Wis. 2d 104, 109, 145 N.W. 2d 145. The holding has acquired additional weight in light of the court's own subsequent affirmation in *Wettstein, supra*, and the opinions issued by this office over the years. See *State ex rel. West Allis v. Dieringer* (1957), 275 Wis. 208, 219, 81 N.W. 533.

Your third question is whether sec. 59.20 (8), Stats., requires the county treasurer to retain only 10 percent of the forfeiture on the

premise that a forfeiture is a penalty within the meaning of that subsection. It is my opinion that the answer is no and that a forfeiture is not a penalty within the meaning of sec. 59.20 (8), Stats.

Section 59.20 (8), Stats., provides that the county treasurer shall:

“Retain 10% for fees in receiving and paying into the state treasury all moneys recieved by him for the state for fines and penalties, except that 50% of the state forfeitures, fines and penalties under chs. 341 to 349 shall be retained as fees * * *”

Miles held that a recognizance forfeiture is not a penalty within the meaning of sec. 715, subd. 5 R.S. 1878. This statutory construction is binding until reversed by the legislature. *State ex rel. Klinger & Schilling v. Baird* (1972) 56 Wis. 2d 460, 467-468, 202 N.W. 2d 31. *Miles* also held that a recognizance forfeiture is not a fine within the statutory sense. See *State ex rel. Comrs. of Pub. Lands v. Anderson* (1973), 56 Wis. 2d 666, 670, 203 N.W. 2d 84.

Moreover, a construction of sec. 59.20 (8) that “fines” or “penalties” includes “forfeitures” would violate two canons of statutory construction. First, statutes are to be construed so as to avoid an interpretation that would convict the legislature of surplusage. See *Associated Hospital Service v. Milwaukee* (1961), 13 Wis. 2d 447, 463, 109 N.W. 2d 271. If “fines” included “forfeitures” within the 10 percent formula of sec. 59.20 (8), it would have been surplusage to use the words “forfeitures” and “fines” within the 50 percent formula of that subsection.

Second, terms in a statute are deemed to be given the same meaning throughout. See 82 C.J.S. *Statutes* §348. Since “penalties” and “fines” refer to items other than “forfeitures” with respect to the 50 percent formula within sec. 59.20 (8), “penalties” and “fines” must refer to items other than “forfeitures” with respect to the 10 percent formula.

Therefore, in my opinion the entire amount of a forfeiture recovered under sec. 969.13 (4) is to be retained by the county treasurer.

RWW:CDH

Law Enforcement—Police—Whereas a deputy sheriff must be a resident of the county for which appointed, secs. 59.24 (2), 66.30, 66.305, and 66.315, Stats., would allow such deputy to serve in an adjacent county upon request for mutual assistance.

November 8, 1973.

F. E. VAN SICKLE, *District Attorney*
Barron County

You state that a group of Indians reside in Barron County on land which has been deeded to the United States Government. To improve law enforcement in the area, the sheriff of Barron County has recommended the appointment of a deputy sheriff representative of this minority group. He has been advised by the Wisconsin Council of Criminal Justice that assistance in funding would be available if there were only one deputy sheriff who would serve in both Barron County and in the adjoining county, Polk, which has a similar problem on relatively adjacent lands.

You inquire whether a resident of one county can be appointed by the respective sheriffs of Barron and Polk County to serve in both counties.

The answer to this question is in the negative.

The provisions of sec. 59.21 (1), Stats., were reviewed in 45 OAG 267 (1956). It was stated that a deputy sheriff must be a resident of the county for which appointed and that a duly appointed deputy sheriff may act anywhere in the county pursuant to authority of sec. 59.24, Stats., and other statutes, and in other counties within the limitations of sec. 59.25 and other applicable statutes.

There is a practical solution to the problem. If the deputy sheriff were to be paid by either county, cooperation of the sheriffs and

county boards of each county would be required. Section 59.15 (2), Stats., would be applicable, and sec. 59.21 (8) (a), Stats., would be applicable if the appointing county had a civil service system with respect to deputy sheriffs.

The sheriff of the county in which the suitable appointee resided could make the appointment and would have primary supervisory responsibility.

Since the opinion at 45 OAG 267 (1956) was written, sec. 59.24 (2), Stats., has been created to provide:

“* * *

“(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.”

Section 66.305, Stats., provides for mutual assistance of county law enforcement personnel, upon request, and sec. 66.315, Stats., provides for responsibilities for pay and other benefits while serving outside territorial limits of the county.

I question whether sec. 66.305 (1), Stats., would permit the sheriff of the non-appointing county to issue a continuing call to such deputy for mutual assistance. However, in view of modern law enforcement communications systems, the deputy could be in almost constant communication with the sheriff of the non-appointing county so that he could be issued a request for assistance whenever he or such sheriff deemed it necessary for him to serve in the adjacent county. Since funding assistance is contemplated, the counties may deem it provident to enter into an intergovernmental cooperation agreement under sec. 66.30, Stats.

RWW:RJV

Real Estate—Criminal Law—Taxation—Section 77.27, Stats., is violated when value is intentionally falsified on a Wisconsin Real Estate Transfer Return. Falsely declaring a transfer as a sale when it is in fact a gift does not constitute a violation of sec. 77.27, nor will it support the issuance of a false swearing complaint under sec. 946.32,

Stats., but it may constitute a gift tax avoidance in violation of sec. 72.86 (6), Stats.

November 13, 1973.

R. M. GONYO, *District Attorney*
Green Lake County

You have requested my opinion as to whether a false declaration on a Wisconsin Real Estate Transfer Return prepared pursuant to sec. 77.22, Stats., constitutes a violation of secs. 77.27 and/or 946.32, Stats. (1971).

As I understand the facts you provide, a grantee or his agent signed the required declaration on a Wisconsin Real Estate Transfer Return (Department of Revenue Form PE-500 R. 2-73) stating that a \$10,000 sale occurred, when in fact, no consideration passed between the parties. The requisite \$10 fee pursuant to sec. 77.22, Stats., was paid.

The declaration on Department of Revenue Form PE-500 R. 2-73, which the grantee or his agent must sign, reads as follows:

"I (we) declare under penalty of law, that this return (including any accompanying schedule) has been examined by me (us) and to the best of my (our) knowledge and belief, it is true, correct and complete."

It is my opinion that the "penalty of law" referred to in the above declaration is to be found primarily, albeit not exclusively, in sec. 77.27, Stats. The nature of the declaration will not support the issuance of a criminal complaint under the false swearing statute, sec. 946.32, Stats.

The Real Estate Transfer Fee statute, subch. II of ch. 77, Stats., sec. 77.21, *et seq.*, was enacted in 1969. Chapter 154, sec. 216m, Laws of 1969. The Department of Revenue advises that the law was designed to fulfill the informational void left by the repeal of the federal real estate documentary tax stamp system. The federal stamp system provided state departments of revenue with a readily available market index for equalizing assessments. When the federal stamp requirements were repealed in 1967, Wisconsin and other states began considering transfer tax systems to serve the same

purpose. Although a relatively small fee is assessed to defray administrative costs (10 cents for each \$100 of value transferred), the underlying purpose of the statute is to accumulate accurate sales information for equalization purposes. Consequently, sec. 77.27, Stats., provides:

“Any person who intentionally falsifies value on a return required to be filed under this subchapter may for each such offense be fined not more than \$1,000 or imprisoned in the county jail not more than one year, or both.”

The operative words of the above section are, of course, “. . . intentionally falsifies value . . .” Value is defined in subsec. (3) of sec. 77.21 as:

“ ‘Value’ means:

“(a) In the case of any conveyance not a gift, the amount of the full actual consideration paid therefor or to be paid, including the amount of any lien or liens thereon; and

“(b) In case of a gift, or any deed of nominal consideration or any exchange of properties, the estimated price the property would bring in an open market and under the then prevailing market conditions in a sale between a willing seller and a willing buyer, both conversant with the property and at prevailing general price levels.”

I read sec. 77.27 as being limited in purpose to guaranteeing the integrity of the information the Department of Revenue receives in terms of value transferred. It would not seem to apply to a situation where the grantee accurately stated the value transferred, but falsely identified the transfer as a sale.

The grantee’s declaration on the return is not limited, however, to the verity of the value of the transfer stated thereon. He declares that he has examined the form and to the best of his knowledge it is “. . . true, correct and complete.” This, of course, raises the issue of whether a return stating actual value but otherwise intentionally untrue constitutes a false swearing.

By definition, an essential element of common law false swearing is a willful oath or affirmation on a matter as to which a person could be legally sworn, administered by a person legally authorized to administer oaths. 70 C.J.S. *Perjury*, §3. In keeping with the

general definition, each of the subsections of Wisconsin's false swearing statute, sec. 946.32, Stats., defining various forms of false swearing, includes the words: ". . . under oath or affirmation . . ." By comparison, a declaration is normally defined as an unsworn or out of court assertion of fact. See 26 C.J.S. *Declarations*.

A 1932 Attorney General's opinion, although not precisely on point, discusses the distinction between a sworn oath or affirmation and a bare declaration. The opinion cites *United States v. Mallard*, 40 F. 151 (1889), as follows:

"The underlying principle evidently is that whenever the attention of the person who comes up to swear is called to the fact that the statement is not a mere asseveration, but must be sworn to, and, in recognition of this he is asked to do some corporal act, and does it, this is a statement under oath. . . ." (40 F. 151-152)

The declaration made on a Wisconsin Real Estate Transfer Return is not sworn to before an officer authorized to administer oaths. Therefore, it is not swearing within the ambit of sec. 946.32, Stats. Accordingly, I conclude that a false declaration on a Wisconsin Real Estate Transfer Return will not support a criminal complaint under sec. 946.32.

This is not to say, however, that the reprehensible act of intentionally making a false declaration on a required return need necessarily go unchallenged. The facts you provide suggest that the signatory's motive for falsely identifying the transfer as a sale may have been to avoid a gift tax assessment pursuant to subch. IV of ch. 72, Stats. Attempting to evade the gift tax is a criminal offense under sec. 72.86 (6). The language of that subsection seems to be broad enough to support a complaint based on an intentionally falsified Wisconsin Real Estate Transfer Return for purposes of gift tax avoidance.

RWW:CAB

Banking—Schools—Junior achievement bank would be a banking business within the meaning of sec. 224.02, Stats. and violates sec. 224.03, Stats.

November 21, 1973.

ERICH MILDENBERG, *Commissioner of Banking*

You have requested my opinion whether the establishment of a Junior Achievement Bank in various high schools in the state of Wisconsin would be unlawful banking business prohibited by sec. 224.03, Stats. The school banking program would be "chartered" by a parent non-profit Junior Achievement Corporation already in existence. The proposed Junior Achievement school bank would apparently pay salaries, operating expenses and divide up profits with shareholders. Under the proposals, the Junior Achievement school bank would either be an agent of the individual school depositors, or of the sponsoring state or national banks.

Section 224.03, Stats., states in part:

"It shall be unlawful for any person, copartnership, association, or corporation to do a banking business without having been regularly organized and chartered as a national bank, a state bank, a mutual savings bank, or a trust company bank."

The term "banking" is defined in part in sec. 224.02, Stats.:

"The soliciting, receiving, or accepting of money or its equivalent on deposit as a regular business by any person, copartnership, association, or corporation, shall be deemed to be doing a banking business * * *."

It is clear that the only business, and therefore the "regular business" of the Junior Achievement school bank would be that of banking transactions. While certain detailed descriptions of the proposed school banks are alluded to in your request, but not forwarded to this office, sufficient information exists to determine that such savings deposit and withdrawal activities constitute banking as a regular business. Even though there is an educational aspect in such school banks and other banking services are not offered, the conducting of even limited banking services such as savings deposits and withdrawals constitute performance of some banking functions and therefore subject it to banking regulations. *MacLaren v. State* (1910), 141 Wis. 577, 124 N.W. 667. Such banking activities on the part of an association or corporation which

is not organized or chartered as a national, state, mutual savings, or trust company bank would be unlawful under sec. 224.03, Stats.

The argument of the proponents of this school banking plan that it must be legal since it is being conducted in other jurisdictions without state regulation is not persuasive. The extent to which other states enforce their banking regulations has no effect on the implementation of Wisconsin's banking regulations.

Should the proposed Junior Achievement school banks operate as agents of the sponsoring state bank, with direct deposit relationship to such state bank, sec. 221.04 (1) (j), Stats., controlling branch banking, would also apply. It would seem prudent for nationally chartered banks to consider whether federal branch banking law similarly applies in their situation.

RWW:LEN

Labor—Industry, Labor and Human Relations, Department of—Under the Neighborhood Youth Corps program authorized by Title I-B of the Economic Opportunity Act of 1964 (42 U.S.C. §§2701-2994d), all enrollees of this federally sponsored and locally administered program are employees under the Wisconsin Child Labor Laws and, therefore, must be covered by suitable work permits unless exempt because of age or the nature of their activities. The Department of Industry, Labor and Human Relations does not have the authority to waive the permit fee even though this program is federally sponsored and largely financed by federal funds as the relationship of employer-employee still exists, there being no statutory exemption.

November 21, 1973.

PHILIP E. LERMAN, *Chairman*

Department of Industry, Labor and Human Relations

You have raised three questions concerning the applicability of secs. 103.64, 103.70 and 103.805 of our Child Labor Law to the Neighborhood Youth Corps (NYC) program which is authorized by Title I-B of the Economic Opportunity Act of 1964. 42 U.S.C.

§§2701-2994d. More specifically you ask the following three questions:

“(1) Whether being enrolled in the NYC program establishes an employe-employer relationship;

“(2) Whether work permits must be issued to the NYC as the employer;

“(3) Whether your department has the authority to waive the permit fee for such a federally sponsored program.”

The purpose of the NYC program is to provide work-training experience to poor youth between the ages of 14 and 21. Based upon past experience, these youth generally are placed in day care centers, hospitals and offices of various service agencies with the Manpower Administration of the Department of Labor formally contracting with public or private nonprofit organizations to sponsor, locally administer and operate NYC projects.

The program is 90 percent federally funded with the additional 10 percent coming from local matching funds. Approximately 85 to 90 percent of these funds are paid to enrollees who are voluntarily assigned to public or nonprofit private organizations for work experience and daily supervision. The remaining funds are used to (1) finance administrative project staff costs, (2) provide for counseling, (3) achieve testing and (4) provide general supportive services. The local 10 percent matching share is usually provided in kind such as in the form of supervision, space, equipment and similar expense factors. Included in all NYC contracts for the guidance of local sponsors are general and specific provisions and specifications which you have forwarded to me in the form of three separate attachments. Only the sponsor may enroll or terminate NYC enrollees. All projects are monitored and generally supervised by Manpower Administration field representatives from the Department of Labor. The sponsor reports monthly in writing to the Department of Labor concerning enrollments, terminations, financial expenditures, enrollee characteristics and other relevant data.

The local sponsors apparently pay the enrollees in the first instance because the sponsors are required to make all necessary deductions from checks issued. Thereafter the sponsors are

reimbursed by the Department of Labor for this payment of wages which, according to representatives of your Department, currently runs approximately \$1.65 per hour.

My office has been informed by the Chicago district office of the Department of Labor that the Department of Labor has established a distinction between “enrollees” in this program and “employees” and, therefore, claims that it will refuse to reimburse local sponsors for the cost of work permits. I feel that my opinion, however, must be based upon a combined reading of applicable Wisconsin law and the requirements of the NYC program. Furthermore, sec. A-45 of the Manpower Administration’s General Provisions for Cost-Reimbursement Type Contracts provides that the contractor “will comply with all applicable federal and state and local laws, rules, and regulations which deal with or relate to the employment of persons who perform work or are trained under this contract.”

It is my opinion that an employe-employer relationship does exist within the NYC program. This is true when the facts you have presented are applied to both (1) relevant Wisconsin Statutes and (2) a history of Wisconsin case law.

Section 103.64, Stats., provides that certain terms enumerated therein shall be construed, as used in secs. 103.64 to 103.82, as defined in sec. 101.01. The relevant definitions contained within sec. 101.01 clearly established an employe-employer relationship within the NYC program.

For example, the phrase “place of employment,” is construed to include every place where any industry, trade or business is carried on or where any process or operation directly or indirectly related to any industry, trade or business is carried on or where any person is employed by another for direct or indirect gain or profit. Sec. 101.01 (2) (a), Stats. Under subsec. (2) (c), an “employer” includes every person, firm, corporation, state, county, town, city, village, school district, sewer district, drainage district and other public or quasi-public corporations having control or custody of any employment, place of employment or of any employe. Subsection (2) (d) defines an “employe” as every person who may be required or directed by an employer, in consideration of direct or indirect gain or profit, to engage in any employment or to go or work or be at any time at any place of employment.

As you have described the NYC program, there can be no question that the locations at which the so-called work-training takes place fall within the definition of a place of employment. Moreover, the so-called enrollees within this program fit the definition of an employe because, in consideration of the wages paid, they are required or directed to engage in employment or at the very least to be at a place of employment, consistent with the terms of the program. Nothing would bar the organizations for whom the services are rendered from falling within the broad definition of an "employer" under sec. 101.01 (2) (c). Looking to the statutory definitions alone as applied to these facts, an employe-employer relationship does exist.

It repeatedly has been held by our court that the primary test for determining if an employe-employer relationship exists is whether the alleged employer has the right to control the details of the work. Subsidiary and secondary tests include (1) direct evidence of the exercise of the right to control, (2) the method of payment of compensation, (3) the furnishing of equipment or tools for the performance of the work and (4) the right to fire or terminate the relationship. See *Ace Refrigeration & H. Co. v. Industrial* (1966), 32 Wis. 2d 311, 315, 145 N.W. 2d 777, and cases cited therein.

From your explanation of the program and from an examination of the attachments, there can be no question concerning the presence of an employe-employer relationship. Although the sponsors are required to report periodically to the Department of Labor which monitors all projects, it is clear that such reports are based upon the sponsors' being in a position to control the details of the work to the extent that each sponsor knows and directs the day-to-day activity of each enrollee. The specifications to which reference was made earlier repeatedly state that it is the sponsors' duty to pay all wages and make all necessary deductions and the sponsors' sole right to terminate the relationship after meeting certain requirements of due process. As for the furnishing of equipment or tools for the performance of the work, there is no express provision that the enrollees provide their own tools and, therefore, it must be assumed that adequate tools or equipment are available at each work-training site. Considering all of the factors which must be weighed in determining whether an employer-employe relationship exists, I have no difficulty in finding such

relationship by statute and by case interpretation between the local sponsors and minors participating in the NYC program.

You next ask whether work permits should be issued. Section 102.70, Stats., provides that, except as otherwise provided, a minor under 18 years of age shall not be employed or permitted to work at any gainful employment or occupation unless he first obtains a work permit. Assuming that the enrollees in the NYC program do not fall within any of the exceptions, it is my opinion that all those under 18 years of age must be covered by an appropriate work permit. Prior to the enactment of ch. 271, Laws of 1971, each minor was required to pay for his or her own work permit. Section 36 of ch. 271, however, repealed and recreated sec. 102.805 to provide that the employer rather than the minor is responsible for payment of the fee. The minor may advance the fee provided that the employer reimburses him no later than the end of the first pay period.

Members of your staff have indicated that some organizations have resisted the purchase of work permits because the federal government has stated or implied that no reimbursement would be forthcoming. All of the materials which you have submitted clearly provide that each sponsoring organization must carry workmen's compensation insurance which carries with it the alternatives that all sponsors procure necessary work permits or subject themselves to liability for double compensation if any minor employe is injured pursuant to sec. 102.60 (1), Stats. If these terms are considered unacceptable, any prospective sponsor may refuse to participate in the program.

Finally you ask whether your department has the authority to waive the permit fee for such a federally sponsored program. I find no such authority under either state law or federal law nor within the voluminous materials which you have forwarded relating to this work-training program. The only reference to possible waiver or modification of permit requirements applies to golf caddies under sec. 103.79 (2), Stats. If the legislature had intended to extend such waiver or modification privilege beyond golf caddies, it easily could have done so by inserting additional language into existing statutes

or by anticipating possible favorable treatment for the NYC program if such had been the legislature's intent.

RWW:DPJ

Corporations—Public Records—Under sec. 180.833 (1) (k), Stats., the Secretary of State may require that foreign corporations file appropriate information and statements, for the purpose of assisting him in determining the accuracy of their reports indicating the proportion of their capital employed in the state. However, the Secretary of State may not treat such information and statements as a public record.

November 21, 1973.

ROBERT C. ZIMMERMAN

Secretary of State

You ask whether the Secretary of State can require entries 9 (a) through (f) of the Wisconsin Foreign Corporation Annual Report to be completed and treated as part of the public record required to be filed with your office, pursuant to sec. 180.833 (1) (k), Stats.

Section 180.833 (1) (k), Stats., requires that foreign corporations authorized to transact business in Wisconsin file an annual report setting forth:

*“The proportion of the capital represented in this state by its property located and business transacted therein during the preceding year. The proportion of capital employed in the state shall be computed by taking the gross business of the corporation in the state and adding the same to the value of its property located in the state. The sum so obtained shall be the numerator of a fraction of which the denominator shall consist of its total gross business of said year added to the value of its entire property. The fraction so obtained shall represent the proportion of the capital within the state. * * *”* (Emphasis added.)

Entries 9 (a) through (g) of the current Foreign Corporation Annual Report form read as follows:

“9. Computation of the proportion of capital represented in Wisconsin during the past year as of December 31 OR LAST FISCAL YEAR PRIOR THERETO.

“* * *

(a) Gross Business	\$	
(b) Plus Total Assests	\$	
(c) Total of line (a) and line (b)		\$
(d) Wisconsin Business	\$	
(e) Plus Wisconsin Assets	\$	
(f) Total of line (d) and line (e)		\$
(g) Divide line (f) by line (c)		
and enter percentage		%”

Section 180.833, Stats., requires that various items of information be submitted by a foreign corporation in its annual report, as a condition precedent to continued registration to conduct business in the state. Subsection (1) (k) of sec. 180.833, Stats., clearly directs a foreign corporation to set forth in its annual report “The proportion of the capital represented in this state * * *.” The remaining provisions merely enumerate the method of computation to be used in arriving at the “proportion,” i.e., the percentage, of capital employed within the state.

Pursuant to the direction of sec. 990.01 (1), Stats., to construe statutory terms in accordance with common and approved usage, I note Webster’s Seventh New Collegiate Dictionary (1967), defines proportion as “the relation of one part to another or to the whole.” Hence, interpreting this language of sec. 180.833 (1) (k), Stats., literally, as indeed it seems we must, it should be clear that the statute only requires the reporting of such “proportion” by a foreign corporation in its annual report. This conclusion is supported by the concluding portion of sec. 180.833 (1) (k), Stats., which reads as follows:

“* * * The secretary of state may demand, as a condition precedent to the filing of such report, such further information and statements as he may deem proper in order to determine the accuracy of the report submitted; *the additional information so obtained shall not be a public record; * * **” (Emphasis added.)

Under the authority granted to the Secretary of State by the above provision, it follows that the secretary may demand the information represented by the current entries appearing in 9 (a) through (f) of the annual report for the express purpose of checking the accuracy of the reported proportion of capital employed in the state by a foreign corporation; however, it is explicitly stated that such "additional information so obtained shall not be a public record."

Section 180.833 (1) (l), Stats., also suggests that the information required in question 9 (a) through (f) of the present annual report form is not a necessary part of the annual report. Subsection (1) (l) provides that the secretary of state may require:

"Such additional information as may be necessary or appropriate in order to enable the secretary of state to determine and assess the proper amount of fees payable by such foreign corporation."

For the purpose of computation of the proper annual fee, only the information appearing in entries 9 (h) and (i), relating to the value of issued shares, and the percentage set forth in (g), is directly utilized. Hence, it cannot be said that entries 9 (a) through (f), which contain a detailed enumeration of the various steps followed to obtain the ratio appearing in entry (g), is essential to the determination of the annual fee.

The foregoing construction of sec. 180.833 (1) (k), Stats., would appear to be consistent with the statutory treatment of domestic corporations by sec. 180.791, Stats., which sets forth the information required to be submitted in the annual report of a domestic corporation. The latter statute imposes no requirement upon a domestic corporation to report to the public the actual business transacted or assets employed in the state.

Finally, it is to be noted that although information concerning corporate assets and business income can be obtained from Department of Revenue income and franchise tax records; legislative policy, as manifested in sec. 71.11 (44), Stats., clearly indicates such information is available to the public only on a restricted basis.

Thus, in my opinion, the Secretary of State has the authority to require submittal of the information appearing in entries 9 (a)

through (f) of the Wisconsin Foreign Corporation Annual Report, for the purpose of checking the accuracy of the reported proportion of capital employed in the state by a foreign corporation, but such information may not be treated by the Secretary of State as a part of the public record.

RWW:JCM

Zoning—Flood Control—County floodplain zoning ordinances may be adopted under the authority of sec. 59.971, Stats. Such ordinances will not require the approval of town boards in order to become effective within the unincorporated areas of the county.

County floodplain zoning ordinances adopted by the Department of Natural Resources pursuant to sec. 87.30 do not need approval of the town boards in order to become effective within all unincorporated areas of the county.

November 28, 1973.

VICTOR MOYER, *Corporation Counsel*
Rock County

You have asked for my opinion as to whether a floodplain zoning ordinance that Rock County is considering adopting would require the approval of the townships in unincorporated areas under the provisions of sec. 59.97 (5) (c), Stats. Your letter states that:

“It is my opinion that the authority to do so emanates from Wis. Stats. 59.97 (4) and that Wis. Stats. 59.97 (5) (c) requires township approval before such an ordinance is effective in any town containing land affected by the ordinance. For this reason, our County Planning and Zoning Commission has been unable to guarantee that any floodplain zoning ordinance enacted by the county will be effective in all unincorporated areas of the county.

“Representatives of the Department of Natural Resources have verbally advised our Planning and Zoning Commission that township approval is not required and that if the county is unable to guarantee county wide effectiveness of such an ordinance, the

Department will proceed under Wis. Stats. 87.30 to enact an ordinance for the county.

“Your informal opinion is hereby requested as to whether or not the township approval provisions of 59.97 (5) (c) are applicable to a County Floodplain Zoning Ordinance.”

It is my opinion that town board approval is not required.

Section 87.30, Stats., requires all counties, cities or villages to adopt reasonable and effective floodplain zoning ordinances no later than January 1, 1968. If the required action is not taken, the statute empowers the Department of Natural Resources to adopt a floodplain zoning ordinance for the county, city or village. The statute further provides:

“. . . Failure of a county, city or village to adopt a flood plain zoning ordinance for an area where appreciable damage from floods is likely to occur or to adopt an ordinance which will result in a practical minimum of flood damage in an area shall be prima facie proof of the necessity for action specified herein by the department. . . .”

The department is also empowered to make a decision in writing of insufficiency for any floodplain zoning ordinance that is adopted and, upon such a decision, the department may adopt an ordinance superseding the local ordinance.

With respect to the applicability of an ordinance adopted by the department the statute states that:

“. . . Such flood plain determination and zoning ordinance shall be of the same effect as if adopted by the county, city or village. Thereafter it is the duty of the county, city, village and town officials to administer and enforce the ordinance in the same manner as if the county, city or village had adopted it. Flood plain determinations and zoning ordinances so adopted may be modified by the county, city or village concerned only with the written consent of the department except that nothing in this subsection shall be construed to prohibit a county, city, village or town from adopting a flood plain ordinance more restrictive than that adopted by the state. . . .”

In the above quoted section the legislature made no express provision requiring town board approval of county flood plain ordinances adopted by the Department of Natural Resources. Nor can the requirement of town board approval be necessarily implied from the statute in my opinion. Such an interpretation would be plainly contrary to the legislative intent of this section, whereby the legislature removed the discretion over the adoption of floodplain zoning from local units of government where such discretion has resulted in either inaction or insufficient protection. Furthermore, the legislature *expressly* provided that town officials have the duty to enforce such an ordinance adopted by the Department of Natural Resources in the same manner as if the county had adopted it, and expressly provided that towns have the authority to adopt a floodplain ordinance more restrictive than such an ordinance. This express mention of the town's authority and duties in sec. 87.30 (1), coupled with the absence of any express provision for town board approval of state adopted county ordinances, leads me to conclude, through application of the *exclusio* rule of statutory construction that, where the Department of Natural Resources adopts a floodplain zoning ordinance for a county pursuant to sec. 87.30, Stats., the approval of the local town boards is not required before that ordinance becomes effective within all unincorporated areas of the county.

Although sec. 87.30, Stats., plainly requires counties to adopt floodplain zoning ordinances, it does not expressly contain the necessary statutory authority for their adoption by the county, as opposed to adoption by the Department of Natural Resources. Thus, the statutory authority for the county adoption of a county floodplain zoning ordinance must be found elsewhere in the statutes. Section 87.30 (2), Stats., suggests one section where such authority may be found. It provides for the enforcement of floodplain zoning ordinances as follows:

“(2) ENFORCEMENT AND PENALTIES. Every structure, building, fill, or development placed or maintained within any flood plain in violation of a zoning ordinance adopted under this section, or s. 59.97, 61.35 or 62.23 is a public nuisance and the creation thereof may be enjoined and maintenance thereof may be abated by action at suit of any municipality, the state or any citizen thereof. Any person who places or maintains any structure, building, fill or

development within any flood plain in violation of a zoning ordinance adopted under this section, or s. 59.97, 61.35 or 62.23 may be fined not more than \$50 for each offense. Each day during which such violation exists is a separate offense.”

Section 59.97, Stats., is the statute dealing directly with the zoning authority of counties. Subsection (4) sets forth the extent of the zoning power that has been delegated to the counties. Subsection (4) (c) specifically grants the county’s authority to zone the areas in and along waterways:

“(c) The areas in and along or in or along natural watercourses, channels, streams and creeks in which trades or industries, filling or dumping, erection of structures and the location of buildings may be prohibited or restricted.”

This subsection grants counties the power to create special conservancy districts along waterways. *Just v. Marinette County* (1972), 56 Wis. 2d 7, 19, 201 N.W. 2d 761. First enacted by ch. 303, Laws of 1935, it predates the floodplain zoning requirement created under sec. 87.30. The latter was enacted as a part of the Water Quality Act in 1966 (ch. 614, Laws of 1965).

Subsection (4) (c), together with the general zoning powers provided elsewhere in sec. 59.97 (4), contained ample zoning authority for a county to enact the floodplain zoning ordinance required by sec. 87.30, Stats. It would appear, however, that if such an ordinance were enacted under the authority of sec. 59.97 (4), it would be subject to the requirements contained in sec. 59.97 (5) (c) that the ordinance receive approval of the local town board before it becomes effective within that town. The practical effect of such a requirement, however, could well be to make it virtually impossible for counties to adopt floodplain zoning ordinances within the statutory deadline, or otherwise, because such ordinances would have to satisfy both the local interests of each township and the statewide minimum standards promulgated by the Department of Natural Resources in Chapter NR 116, Wis. Adm. Code. This would mean in turn, that the Department of Natural Resources would have to adopt county floodplain zoning throughout the entire State, in order to assure that such zoning is in effect and meets the minimum standards prescribed by the Department of Natural Resources. Clearly, if the legislature had intended the Department

of Natural Resources to zone the floodplains of the entire State, it would have so provided in the first instance.

Section 59.97, Stats., is not, however, the only statute whereby counties are authorized to zone the floodplain of a river. Section 59.971, Stats., the shoreland zoning statute, also gives counties that authority. Subsection (1) of that statute provides as follows:

“59.971 Zoning of shorelands on navigable waters. (1) To effect the purposes of s. 144.26 and to promote the public health, safety and general welfare, counties may by ordinance enacted separately from ordinances pursuant to s. 59.97, zone all lands (referred to herein as shorelands) in their unincorporated areas within the following distances from the normal high-water elevation of navigable waters as defined in s. 144.26 (2) (d): 1,000 feet from a lake, pond or flowage; 300 feet from a river or stream *or to the landward side of the flood plain, whichever distance is greater.* If the navigable water is a glacial pothole lake, the distance shall be measured from the high watermark thereof.” (Emphasis added.)

Town board approval is not required under sec. 59.971 in order for the ordinance to become effective within a town. Subsection (2) (a) provides that:

“(2) (a) Except as otherwise specified, all provisions of s. 59.97 apply to ordinances and their amendments enacted under this section, but they shall not require approval or be subject to disapproval by any town or town board.”

There is a close relationship between shoreland zoning, required under secs. 59.971 and 144.26, Stats., and floodplain zoning, required under sec. 87.30. Both were enacted as a part of the Water Quality Act of 1966 (ch. 614, Laws of 1965). Both provide that the Department of Natural Resources can adopt ordinances for counties if they do not enact ordinances meeting minimum standards by January 1, 1968. Section 59.971 (6) states that:

“If any county does not adopt an ordinance by January 1, 1968, or if the department of natural resources, after notice and hearing, determines that a county has adopted an ordinance which fails to meet reasonable minimum standards in accomplishing the shoreland protection objectives of s. 144.26 (1), the department of

natural resources shall adopt such an ordinance. As far as possible, s. 87.30 shall apply to this subsection.”

Both statutes provide for statewide action under the police power to protect the public health, prevent pollution and to protect the public rights in our waterways. The validity of the shoreland zoning was upheld in *Just v. Marinette County, supra*. In that opinion, the Wisconsin Supreme Court impliedly approved floodplain zoning when it cited a Massachusetts case, *Turnpike Realty Co. v. Town of Dedham* (Mass. 1972), 284 N.E. 2d 891, which upheld a floodplain zoning ordinance, as being analogous to the facts in the *Just* case. 56 Wis. 2d at 22, 23. Finally, both secs. 87.30 and 59.971 evince a legislative intent that counties act quickly to adopt zoning ordinances to protect their shorelands and floodplains, without the inherent delay and incompleteness that results by requiring town board approval before the ordinances become effective within a town.

In summary, it is my opinion that a county may adopt a floodplain zoning ordinance as required by sec. 87.30, Stats., under the authority granted it in sec. 59.971, Stats., and, within the applicable limitations, under sec. 59.971, Stats. Town board approval is not required for a floodplain zoning ordinance to become effective in unincorporated areas within the county.

RWW:SMS

County Judge—Salaries and Wages—County board can reduce additional salary payable to county judge under sec. 253.07 (2), Stats., during term only to extent necessary to keep total salary of county judge, state, county and county addition, within the limits set forth in sec. 20.923 (3), Stats., created by ch. 90, Laws of 1973.

November 28, 1973.

JAMES M. LAPOINTE, *District Attorney*
Ozaukee County

You request my opinion whether the county board is prohibited from reducing the county supplement to a county judge's salary so as to be effective during his term.

I am of the opinion that a county board could only reduce the amount the county can pay under sec. 253.07 (2), Stats., which is *in addition* to the state portion and county portion of the salary provided under sec. 20.923 (2) and (3), Stats., as recreated by ch. 90, Laws of 1973, and sec. 253.07 (1), Stats., where the total of the three amounts exceeds the amounts specified in sec. 20.923 (3), Stats., recreated by ch. 90, Laws of 1973, and only to the extent that such additional salary exceeds the amounts set forth therein.

In *State ex rel. Sachtjen v. Festge* (1964), 25 Wis. 2d 128, 150, 130 N.W. 2d 457, it was stated:

“We conclude that notwithstanding the contribution by the state of a share of the basic salary of county judges, their office has not sufficiently changed in character from a local to a state office to bring county judges within the class of public officer to which sec. 26 of art. IV, Wis. Const., applies. It follows that the legislature is free to raise or lower the salary of county judges during their terms and to authorize the county boards to raise or lower, midterm, the supplemental salary paid by the county. To hold otherwise would be to apply a constitutional restriction on legislative power in a doubtful case.”

Since the *Sachtjen* case, Art. IV, sec. 26, Wis. Const., was amended in 1967, to permit circuit judges and supreme court justices to benefit from increases during their terms in special circumstances. The amendment does not include county judges.

Although sec. 20.923 (2), Stats., appears to classify county judges as “other elected state officials,” I am of the opinion that the legislature did not intend to make them public officials subject to Art. IV, sec. 26, Wis. Const., and thereby place them in a position less advantageous than that enjoyed by circuit judges and supreme court justices.

Section 20.923 (1) (a), Stats., as recreated, provides in part:

“20.923 Statutory salaries. * * * (1) Establishment of Executive Salary Groups. (a) * * * The salary-setting authority of

individual boards, commissions, elective and appointive officials elsewhere provided by law is subject to and limited by this section, and the salary rate for these positions upon appointment and subsequent thereto shall be set by the appointing authority pursuant to this section, unless the position is subject to article IV, section 26 of the state constitution.”

Section 20.923 (2), provides in part:

“(2) Constitutional Officers and Other Elected State Officials.
(a) The annual salary for each of the following positions shall be set at the midpoint of the assigned salary range for its respective executive salary group in effect at the time of taking the oath of office, except as provided in pars. (b) and (c) and shall become effective immediately for all incumbent constitutional and other elected state officials, subject to the provisions of Article IV, Section 26 of the Wisconsin Constitution and for any subsequently elected official who takes his oath of office following the effective date of this act (1973).

“ * * *

“3. County judge: executive salary group 2.”

Section 20.923 (3), provides:

“(3) CIRCUIT AND COUNTY JUDGES. The annual salary for any circuit or county judge, including county supplements paid pursuant to ss. 252.016 (2), 252.071 and 253.07 (2) shall not exceed \$33,500 for the period July 31, 1973, to December 31, 1974, and \$34,500 for the period January 1, 1975, to December 31, 1975.

Section 253.07 (2) as amended by ch. 90, Laws of 1973, provides:

“253.07 (2) The county may pay each county judge compensation in addition to that specified in s. 20.923, but such additional compensation shall be the same for each such judge.”

Section 59.15 (1) (a), Stats., requires the county board to establish the total annual compensation of elective officers paid in whole or in part from the county treasury prior to the earliest date for filing nomination papers. It also provides:

“* * * 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.”

Section 66.195, Stats., provides:

“66.195 Judicial salaries. The governing body of any county may during the term of office of a county judge whose salary is paid in whole or in part by such county, increase the salary of such county judge in such an amount as the governing body determines. The power granted by this subsection shall take effect notwithstanding any other provision of the law to the contrary, except that the exercise of this power shall be governed by s. 65.90 (5).”

Section 256.02 (4), Stats., provides:

“* * * (4) The county board is prohibited from reducing the salary or additional salary of a county or circuit judge for the term for which elected.”

As noted above, however, the authority of the county board to establish the salary of a county judge is limited by the provisions of sec. 20.923 (1), (2), (3), Stats., as created by ch. 90, Laws of 1973. The total annual salary must be within the limits of sec. 20.923 (3), Stats., for the periods stated. I construe the provision of sec. 20.923 (1), Stats., which provides that “* * * The salary-setting authority of individual boards, commissions, elective and appointive officials elsewhere provided by law *is subject to and limited by this section * * **” (Emphasis added.) as paramount to the language in secs. 59.15 (1) (a), and 256.02 (4), Stats., which prohibits reduction of the salary or additional salary of a county judge for the term for which elected where reduction is necessary to keep such salary within the limits set forth in sec. 20.923 (3), Stats.

The provisions of secs. 59.15 (1) (a) and 256.02 (4), Stats., however, prohibit the county from reducing the additional salary paid to a county judge pursuant to sec. 253.07 (2), Stats., where the state portion and county portion required by sec. 20.923 (1) (b), and (2) (a) 3 together with such additional amount heretofore

authorized do not exceed the limits set forth in sec. 20.923 (3), Stats.

RWW:RJV

District Attorney—Juvenile Court—The duties of the district attorney under secs. 48.04 (3) and 59.47 (11), Stats., relate only to appearing and assisting in juvenile court proceedings. Such duties normally do not include the performance of ministerial or clerical functions in drafting juvenile court petitions under sec. 48.20 (2), Stats.

November 30, 1973.

ALEX J. RAINERI, *District Attorney*

Iron County

You inquire whether the Wisconsin Statutes provide that the district attorney perform ministerial or clerical functions in connection with the drafting of petitions which invoke juvenile court jurisdiction under ch. 48, Stats.

Section 59.47 (11), Stats., requires the district attorney to "Perform any duties in connection with juvenile court proceedings as the juvenile court judge may request." Section 48.04 (3), Stats., provides that "The district attorney shall perform any duties in connection with court proceedings as the judge may request." These sections were created by secs. 7 and 20a, ch. 575, Laws of 1955. A 1955 Legislative Council Note states the following in reference to these enactments:

"This [59.47 (11)] is a new statutory provision although it appears to be the law at the present time. See, for example, 7 Ops. Atty. Gen. 625 (1918); 25 Ops. Atty. Gen. 549 (1936); 34 Ops. Atty. Gen. 337 (1945). Exactly the same provision appears in proposed s. 48.04, but since this section deals specifically with the duties of the district attorney it is desirable to repeat it here. [Bill 444-S]"

In 34 OAG 337 (1945), a predecessor, in addressing an inquiry as to the duty of a district attorney to participate in juvenile proceedings, concluded at page 340:

“. . . It is therefore the duty of the district attorney to participate in such proceedings if he has notice that they are pending. *The extent of his participation may be left to his good judgment, depending on the circumstances of each case.*” (Emphasis supplied).

In 57 OAG 122 (1968), my predecessor was asked whether sec. 51.02 (3), Stats., similar in directory substance to secs. 48.04 (3) and 59.47 (11), Stats., imposed the duty upon the district attorney to prepare and submit the application and process referred to in sec. 51.01 of the Mental Health Act. Section 51.02 (3), provided as follows:

“(3) DISTRICT ATTORNEY TO HELP. If requested by the judge, the district attorney shall assist in conducting proceedings under this chapter.”

That opinion, relying in part on the quoted portion of 34 OAG 337, *supra*, concluded that sec. 51.02 (3), Stats., did not impose any clerical and ministerial functions upon the district attorney’s office, and further indicated, at page 124:

“. . . Assistance in conducting the proceedings indicates that in some instances the court may desire that the district attorney examine witnesses, verify documents or other exhibits or have the benefit of the district attorney’s observations on the evidence. The clerical and ministerial duties remain where the statutes impose them.”

The Attorney General opinions referred to in the above-quoted legislative note are consistent with 57 OAG 122 and relate generally to the duty of the district attorney “to assist in such juvenile hearing[s]” or “*appear* in juvenile court proceedings.” More recently, in 60 OAG 449 (1971), secs. 48.04 (3) and 59.47 (11), Stats., have been likewise interpreted as vesting discretion in the juvenile court judge “to admit or exclude the *presence* of the district attorney in juvenile proceedings.” I conclude, therefore, that these sections do not of themselves impose on the district attorney the duty to perform the ministerial or clerical functions involved in the

drafting of petitions intended to invoke juvenile court jurisdiction under secs. 48.12 and 48.13, Stats.

However, in this instance, additional statutes must be considered in order to fully respond to your inquiry. Section 48.19, Stats., provides that where an investigation, based on information furnished the court, shows that a child is within the jurisdictional provisions of sec. 48.12 or 48.13, Stats., the court may "authorize" the filing of a petition under sec. 48.20, Stats. To "authorize" and to "permit" have been held to be synonymous. *State v. Laven* (1955), 270 Wis. 524, 529, 71 N.W. 2d 287. Section 48.20 (2), Stats., provides in part that the verified petition "shall be drafted by a suitable person designated by the court."

From a reading of secs. 48.19 and 48.20, Stats., it is apparent that the person authorized by the court to submit a juvenile court petition will normally be either the person whose firsthand knowledge or information concerning the circumstances originally engendered the investigation or some person who has acquired such knowledge or information in the course of the investigation required by the court. Normally, the district attorney will not be such a person. However, where the petition would be based on information initially imparted to the court by the district attorney, it is conceivable that the court might designate him as an appropriate person to draft the petition in that specific instance.

In 18 OAG 573 (1929), which interpreted sec. 48.06 (1), 1929 Stats., provisions of which are now incorporated into secs. 48.19 and 48.20, Stats., the following is stated at page 575:

"Under sec. 48.06 (1) it clearly appears that the juvenile court is the one to pass upon the question whether a petition shall be made charging a child with delinquency, etc. The district attorney should not make a petition to the court *if he has knowledge of the delinquency of the child* unless ordered or requested to do so by the juvenile court. The only step that a district attorney can take is to inform the court of the delinquency of the child. The information to the court is not an action, application or motion within contemplation of sec. 59.47, above quoted, so that it is very clear that it is not intended that the district attorney should appear in court in all cases where information is given to the court concerning the delinquency of children.

* * *

“In view of the fact that the proceeding against a child in the juvenile court is not to be considered a criminal proceeding or prosecution as clearly appears from sec. 48.07 (3), Stats., I believe the proper practice to be pursued is for the district attorney to *appear* in all juvenile proceedings before the juvenile court *after* a petition has been presented when the juvenile court requests the district attorney to appear and aid the court in disposing of the matter.” (Emphasis supplied).

Thus, the duties of the district attorney under secs. 48.04 (3) and 59.47 (11), Stats., relate only to appearing or assisting in juvenile court proceedings and do not normally include the performance of ministerial or clerical functions in connection with the drafting of juvenile court petitions.

RWW:JCM

Constitutional Law—Landlord and Tenant—State statutory enabling legislation is required to authorize enactment of typical rent control ordinances. Assembly Substitute Amendment 1 to 1973 Assembly Bill 95 deemed incomplete and constitutionally infirm.

December 3, 1973.

THE HONORABLE, THE ASSEMBLY

By Assembly Resolution No. 35, you have asked whether state enabling legislation is necessary to permit cities or villages to adopt rent control ordinances. In the event the answer to that question is in the affirmative, you inquire as to the constitutionality of Assembly Substitute Amendment 1 to 1973 Assembly Bill 95.

Assembly Substitute Amendment 1 to 1973 Assembly Bill 95 would create sec. 66.84 of the statutes, which would permit certain cities to create a rent control commission with statutory authority to employ legal counsel, hold hearings, make studies and investigations, make certain orders, establish reasonable regulations for the classification of structures and make determinations of

maximum rents providing for "fair and reasonable return to the landlord." Noteworthy, I might add, is the fact that the bill also provides for restraints on eviction of tenants by a landlord. The violation of the rent control and anti-eviction provisions of the proposed statute, or the commission regulations or orders issued pursuant thereto, constitute criminal offenses.

I will assume at the outset that a legal framework which includes restraints on the eviction of tenants by a landlord is essential to the effective functioning of a municipal rent control program. As pointed out in *Block v. Hirsh* (1921), 256 U.S. 135, 157-158, 41 S.Ct. 458, 65 L.Ed. 865:

" . . . The preference given to the tenant in possession is an almost necessary incident of the [rent control] policy and is traditional in English law. If the tenant remained subject to the landlord's power to evict, the attempt to limit the landlord's demands would fail."

In examining this question in light of the current law, I first note the broad grant of police powers contained in sec. 62.11 (5), Stats., which provides in part that:

"Except as elsewhere in the statutes specifically provided, the council shall have . . . power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language."

Further, sec. 62.04, Stats., which relates to construction of sec. 62.11 (5), Stats., requires that the section be liberally construed to promote the general welfare, peace, good order and prosperity of cities and their inhabitants. Similar provisions are set forth in reference to villages in sec. 61.34 (1) and (5), Stats.

Hence, it is well settled that a municipality acting under such a broad statutory delegation of authority may exercise that authority in the interest of the health, safety and welfare of the public, subject to the limitations that a local regulation may not directly conflict

with a state statute on the same subject; and, further, may not be unreasonable or arbitrary. *Johnston v. Sheboygan* (1966), 30 Wis.2d 179, 140 N.W.2d 247; *Milwaukee v. Piscuine* (1963) 18 Wis.2d 599, 119 N.W.2d 442; *Fox v. Racine* (1937), 225 Wis. 542, 275 N.W. 513.

The general question of whether a municipality has the authority to enact an ordinance providing for rent control, in the absence of state enabling legislation, was considered by a predecessor of this office and, in his opinion, a governing body of any city could, pursuant to the statutory authority granted by sec. 62.11 (5), Stats., validly enact ordinances fixing rental ceilings and imposing conditions upon terminations of tenancies, in the event of an emergency affecting the health, safety and welfare of the public. 39 OAG 407 (1950). The opinion, expressly assuming the existence of emergency conditions, was given some five months after the expiration of sec. 234.26, 1949 Stats., which had provided for rent control in certain designated areas as a result of rental housing shortage conditions arising subsequent to the Second World War. Meanwhile, the Korean conflict had broken out and in the absence of a state rent control statute, the question regarding municipal authority to provide necessary rent controls was raised.

For reasons more fully detailed later in this opinion, I cannot fully concur with my predecessor's opinion that local rent control provisions providing for restraints on eviction of tenants by a landlord would not conflict with state statutes. See 39 OAG, 410. In my opinion, such local ordinances would quite clearly conflict with state law and would therefore be illegal.

The weight of authority is that specific authorization from the state is necessary to vest a municipality with power to enact a rent control ordinance. See *Old Colony Gardens, Inc. v. City of Stamford* (1959), 147 Conn. 60, 156 A.2d 515; *Ambassador East v. City of Chicago* (1948), 399 Ill. 359, 77 N.E.2d 803; *City of Miami Beach v. Fleetwood Hotel, Inc.* (Fla. 1972), 261 So.2d 801; *Tietjens v. City of St. Louis* (1949), 359 Mo. 439, 222 S.W.2d 70; cf. *Marshal House, Inc. v. Rent Review and Grievance Board of Brookline* (1970), 357 Mass. 709, 260 N.E.2d 200; contra, see *Inganamort v. Borough of Fort Lee* (1973), 62 N.J. 521, 303 A.2d 298.

While these decisions have been based at least in part on a narrow reading of legislative grants to municipalities to act in the general welfare and on laws interpreted as restricting municipal powers to those specifically delegated or necessarily implied from specific delegation, some decisions denying such unauthorized local control are based on the conflict of such local rent control laws with the state laws regulating landlord and tenant relationship, particularly those state laws which relate to the eviction of tenants. *Heubeck v. City of Baltimore* (1954), 205 Md. 203, 107 A.2d 99, 103. See also *F.T.B. Corporation v. Goodman* (Ct. App. 1949), 300 N.Y. 140, 89 N.E.2d 865 and *City of Miami Beach, supra*. Contra, see *Warren v. City of Philadelphia* (1955), 382 Pa. 380, 115 A.2d 218 and *Inganamort, supra*.

In *Heubeck*, for instance, although the court quickly decided that Baltimore City had the power to enact rent control legislation, even in the absence of an enabling act, the court recognized the additional requirement that conditioned the exercise of this power, i.e., that such legislation not conflict with the constitution or public general law. In the latter regard, the court concluded that the local rent control ordinance under consideration was invalid because its anti-eviction provisions conflicted with state law by prohibiting an action permitted by public general law.

The question of an alleged conflict between a state statute and a municipal ordinance was before our Supreme Court in *Johnston v. Sheboygan, supra*, wherein the court in holding there was no direct conflict stated, at p. 184:

“ . . . While the statute regulates one operation of a bakery, the ordinance regulates another, and no direct conflict results. In *Milwaukee v. Childs Co.* (1928), 195 Wis. 148, 151, 217 N.W. 703, this court stated:

“ ‘ . . . municipalities may enact ordinances in the same field and on the same subject covered by state legislation where such ordinances do not conflict with, but rather complement, the state legislation.’

“ *La Crosse Rendering Works v. La Crosse* (1939), 231 Wis. 438, 455, 285 N.W. 393; *Fox v. Racine* (1937), 225 Wis. 542, 545, 275 N.W. 513.

“We recognize that the distinction that we make here is a narrow one. Nevertheless, it is a meaningful distinction, and our observing it is consistent with our responsibility to uphold the validity of an ordinance if there is any reasonable basis for so doing. *Milwaukee v. Hoffmann* (1965), 29 Wis. (2d) 193, 138 N.W. (2d) 223; *Odelberg v. Kenosha* (1963), 20 Wis. (2d) 346, 351, 122 N.W. (2d) 435; *Milwaukee v. Piscuine* (1963), 18 Wis. (2d) 599, 608, 119 N.W. (2d) 442.”

It is my opinion that no such narrow distinction as was recognized in the *Johnston* case would normally exist between the typical rent control ordinance containing eviction restraints and a number of current statutes regulating the landlord-tenant relationship. In my opinion, such ordinances would undoubtedly result in the prohibition of activities specifically permitted by such statutory enactments. In such instances, of course, the ordinance would clearly conflict with state law and would be invalid. See *Fox* case, *supra*.

For instance, let us assume that an ordinance enacted without state enabling legislation contained a provision, such as set forth in sec. 66.84 (6) (a) of the proposed bill, which prohibited eviction of a tenant from any housing accommodation with respect to which a maximum rent is in effect, unless certain specific grounds therein set forth were satisfied. It would be appropriate to compare such a provision with ch. 704 and certain sections of ch. 299, Stats., which also regulate and affect landlord and tenant rights. Section 704.23, Stats., applicable statewide, provides that where a tenant remains in possession without consent after termination of his tenancy, the landlord may “in every case” proceed “in any manner permitted by law” to remove him and collect damages. Section 704.05, Stats., similarly “governs the rights and duties of the landlord and tenant” by providing that with certain exceptions the tenant has exclusive possession of the premises “[u]ntil the expiration date specified in the lease, or the termination of a periodic tenancy or tenancy at will.” I note also apparent direct conflicts with sec. 704.19, Stats. (termination of periodic tenancy or tenancy at will by notice) and sec. 704.27, Stats., (tenant in possession without consent liable for “double rent”). Hence, assuming a municipality adopted an ordinance containing restraints on eviction similar to those in the

proposed bill, it is clear that there would be an impermissible direct conflict with existing state statutes.

Assuming, therefore, that state enabling legislation is necessary to avoid conflict with state statute, I will consider the constitutionality of the proposed bill.

Because significant limitations on the right of citizens to utilize and freely contract with reference to their property appears to be an inherent part of most rent control laws, they have been subject to examination under both federal and state constitutional provisions which prohibit laws which impair the obligation of contracts, deprive persons of their life, liberty or property without due process of law or take private property for public use without just compensation. Article I, sec. 10, Fifth and Fourteenth Amendments, U.S. Const.; Art. I, secs. 1, 12 and 13, Wis. Const.

In this regard, it is apparent from the case law that the initial and probably the only acceptable justification for broad rent control legislation has been a bona fide emergency. Assuming the existence of such a declared emergency, it has been held that Congress could meet it by a rent control statute which extended the right of a tenant to occupy rented property used as his residence beyond the expiration of his term, at his option, subject to regulation by a commission appointed by the act, so long as he paid the rent and performed the conditions as fixed by his lease, or as modified by the commission. *Block v. Hirsh* (1921), 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865, 16 A.L.R. 165. See also *City of Miami Beach, supra*, at p. 804, and 50 Am. Jur.2d, *Landlord and Tenant*, §1248, et seq.

On the other hand, such declaration must be supported by fact. In *Warren v. Philadelphia* (1956), 387 Pa. 362, 127 A.2d 703, for instance, the municipal ordinance providing for an extension of post-war rent controls had been reenacted pursuant to a legislative finding by the governing body that an emergency housing shortage still existed in that city; however, evidence adduced in court showed that the overall vacancy rate had increased nearly threefold over prior months to what was considered a normal level for that municipality. The court, therefore concluded, that the evidence clearly established that no emergency housing shortage existed in Philadelphia which could justify the rent control ordinance before

it. See also *Kress, Dunlap and Lane, Ltd. v. Downing*, 193 F.Supp. 874 (D.C.V.I. 1961).

Whether an express finding is necessary to sustain the validity of rent control laws enacted in Wisconsin is a question that can only be answered satisfactorily by the Wisconsin courts. However, it should be sufficient for the present for me to point out that all previous rent control statutes enacted in Wisconsin were predicated on the declaration of the existence of an emergency shortage of housing accommodations. I further note that the court in *Central Sav. Bank v. Logan* (1945), 184 Misc. 203, 54 NYS 2d 31, clearly states that "the legislature may interfere with contractual arrangements between landlord and tenant only because of the declaration of emergency, . . ." As an ancillary condition to the requirement that there be an emergency, such legislation must be temporary in nature. As stated in *Block, supra*, at 256 U.S. 157:

" . . . The regulation is put and justified only as a temporary measure. [citations] A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change."

I note that it has also been stated as a general proposition that municipal rent control enactments have been sustained as a temporary expedient only to meet housing emergencies. 6 McQuillin, *Municipal Corporations* (3rd ed.), §24.19, 7 McQuillin, *Municipal Corporations* (3rd ed.), §24.563d.

The legislation here considered does not contain any declaration of emergency. It does not purport to be temporary in nature. Nor does it suggest that any such finding or determination must be made by a city creating a rent control commission under its provisions. In my opinion, the absence of some declaration and characterization of the nature of the emergency which is thought to justify such legislation, together with the absence of such time limitation, would leave the courts without sufficient basis to sustain such an enactment as a constitutional exercise of the police power.

The lack of any declaration of legislative purpose and the absence of any legislative declaration of a temporary housing emergency, or requirement for such, in the instant proposed legislation makes it an incomplete bill and also makes it difficult to accurately determine

whether the various provisions of the bill bear a real and substantial relation to the objects sought to be attained. I note, for instance, that sec. 66.84 (2) of Substitute Amendment 1 to 1973 Assembly Bill 95 states: "Any city having a population of 150,000 or more may by ordinance establish a rent control commission as provided in this section."

The fact that a rent control law only applies to a limited number of governmental entities does not necessarily lead to the conclusion that such law violates the constitutional guarantee of equal protection of the law under the state and federal constitutions, *Wagner v. Newark* (1956), 42 NJS 193, 126 A.2d 71; *Marcus Brown Holding Co. v. Feldman* (1921), 256 U.S. 170, 41 S.Ct. 465, 65 L.Ed. 877. See also *Bittenhaus v. Johnston* (1896), 92 Wis. 588, 66 N.W. 805; *State ex rel. Lund v. Seramuc* (1955), 269 Wis. 1, 68 N.W.2d 570. However, in the absence of some legislative history or declaration to support such a classification, the legislation raises the question of denial of equal protection of the law to those rental property owners affected in cities having a population of more than 150,000 as well as to tenants in rental property located in heavily urbanized areas outside such cities. Although some differentiation may be justified in the case of temporary emergency legislation of the kind under consideration, something more is necessary than is present in the proposed bill to identify the uniqueness of such cities. For instance, it should be demonstrable that the emergency which gives rise to the need for such legislation is sufficiently peculiar to cities of the population identified so as to justify such a classification. This may prove difficult to demonstrate, if there are sizeable population concentrations within the state which equal or exceed that figure, yet not fall conveniently within the boundaries of any one city, village, town, or where the evils sought to be remedied by such legislation can be shown to exist to the same or greater extent in the greater metropolitan area of which such larger cities are but a part.

In *State ex rel. Milwaukee S. & I. Co. v. Railroad Commission of Wisconsin* (1921), 174 Wis. 458, 183 N.W. 687, our Supreme Court was presented with a challenge to the validity of ch. 16, Laws of 1920 Special Session, which was enacted to provide for rent control following World War I. That legislation applied to counties having a population of 250,000 and over and, in effect, was

applicable only to Milwaukee County. The Supreme Court, although recognizing that the legislature may make classifications of persons, occupations, or industries and select them for special regulation if there are reasonable and proper economic, political, or social reasons for doing so, pointed out at page 464:

“While this right to classify must be fully recognized it must nevertheless always be borne in mind that the equal protection of the laws is guaranteed, and that if any classification made in a statute seeking to regulate property and contract rights denies to one class rights and privileges which are granted to another under the same conditions and circumstances, it offends against the principle of equal protection of the law. . . .”

The court, in holding the enactment invalid, went on to say at page 465:

“ . . . The evils resulting therefrom, and which this legislation seeks to remedy, were incident to the conditions wherever they existed and were equally pernicious in their effects upon tenants everywhere. It is urged, however, that the legislative judgment in applying the law only to the class of landlords operating the business in thickly settled communities necessarily implies that the resultant evils were found to be a greater menace to the public welfare, health, and morals in such communities than in the sparsely settled districts of the state. But can it reasonably be said that such is the fact? Do the evils enumerated in the act in fact affect the public differently in counties having 250,000 population and over than in those having a lesser population? It is a matter of common knowledge that the oppressive exactions denounced by the act are as objectionable in their effects upon the public in the smaller cities of the state as in the larger ones and that the evil produced no different conditions in the county of Milwaukee than in other counties of the state. True, a larger number of persons were affected in Milwaukee county than in any other county, but this in no way caused a different economic, social, or political condition in this county than in any other county of the state where the evil existed. We find nothing in the conditions and characteristics affecting persons and property of landlords and tenants embraced in this act that distinguishes those in one county from those of any other county of the state in any respects germane to the purposes of this act.”

In my opinion, the classification based on a population level of 150,000 appears to suffer from a defect similar to that pointed out by our Supreme Court in 1921, at least under the present form of the proposed enactment.

It should be noted in passing that the post-World War II Wisconsin rent control legislation largely avoided the classification question. The provisions of the then sec. 234.26, Wis. Stats., enacted by ch. 442, Laws of 1947, and amended by ch. 614, Laws of 1947, were applicable only to housing accommodations regulated by the then federal rent control statute, "House and Rent Act of 1947," 50 U.S.C.A. App., sec. 1881, et seq. The subsequent repeal and recreation of sec. 234.26 by the Laws of 1949, chs. 33, 597, 598 and 643, provided for similar applicability and was a direct response to the provisions of the federal "Housing and Rent Act of 1949," extending rent control. Since the federal statute permitted rent decontrol in local areas where it was determined a housing shortage no longer existed, a classification challenge was not likely to arise under the ancillary Wisconsin Statute. The constitutionality of the federal rent control statute was upheld in *Woods v. Cloyd W. Miller Co.* (1948), 333 U.S. 138, 145, 68 S.Ct. 421, 92 L.Ed. 596, wherein the Supreme Court held there was no denial of equal protection. Similarly the validity of sec. 234.26, 1947 Stats., was upheld in *Meier v. Smith* (1948), 254 Wis. 70, 35 N.W.2d 452, where an alleged conflict between the eviction notice provisions of the federal and state statutes was before the court.

As noted previously, the violation of certain of the regulations and orders made by the rent control commission established under the authority of the proposed bill would constitute crimes. Under the rule set forth in *State ex rel. Keefe v. Schmeige* (1947), 251 Wis. 79, 28 N.W.2d 345, power may not be granted to local government to create crime since crime is an offense against the sovereign. However, *Keefe* does not apply where the determination has been made by the legislature that there should be a law, and has determined the general policy to be accomplished and that regulations or orders properly promulgated within the fixed limits of its authority should be enforceable by criminal sanctions. *Olson v. State Conservation Comm.* (1940), 235 Wis. 473, 293 N.W. 262. In general, the statutory guidelines set forth in the proposed bill appear sufficient for the enactment of such regulations and orders

by the proposed rent control commissions. However, the proposed bill also authorizes the governing body of the city to implement the statutory plan. This authority is set forth in sec. 66.84 (14), which provides:

“(14) APPLICABILITY. Any city enacting an ordinance pursuant to this section may make such ordinance applicable to any or all housing accommodations permitted by this section, and may also make the ordinance applicable only to accommodations constructed after the effective date of the ordinance.”

In my opinion, the delegated discretion to such cities to determine what housing accommodations would or would not be regulated would constitute an unauthorized legislative delegation of the power to create crime, since the cities rather than the state would effectively determine which housing accommodations would be subject to rent and eviction control and therefore which landlords would be subject to possible criminal sanctions. See *State ex rel. Keefe v. Schmiede* and *Olson v. State Conservation Comm., supra*.

In addition, that portion of subsection (14) which would allow cities to restrict the application of local rent control ordinances to housing accommodations constructed *after* the effective date of the local ordinance would authorize the establishment of an unreasonable classification and would therefore constitute a denial of equal protection of the law to those engaged in new construction of rental property. All classifications must be based upon substantial distinctions which make one class really different from another and must be germane to the purpose sought to be accomplished. *State ex rel. Ford Hopkins Co. v. Mayor* (1937), 226 Wis. 215, 222, 276 N.W. 311; *Cayo v. Milwaukee* (1969), 41 Wis.2d 643, 649-650, 165 N.W.2d 198. If the justification for rent control is that a critical shortage of housing exists, provisions such as this one, which tend to discourage the construction of new rental housing while at the same time leaving existing rental housing uncontrolled, would appear to lack any reasonable relationship to the purpose to be accomplished by rent control laws in general.

The subject bill also proposes, in sec. 66.84 (6) (b), to authorize a local rent control commission to issue a “certificate of eviction,” permitting a landlord to pursue his remedies at law, when certain conditions are met. Subparagraph (b) 4 provides that when such a

certificate is issued for the purpose of allowing the landlord to demolish old and construct new housing, the commission may also require the landlord to "pay stipends to the tenants in such amounts as the commission may determine to be reasonably necessary, which amounts may vary depending upon the size of the tenant's apartment and whether the tenant accepts relocation by the landlord." While under emergency conditions the courts have upheld the right of government to limit the right of the landlord to demolish his rental property unless he has assisted his tenants in obtaining other suitable housing at no greater rent, *Loab Estates v. Druhe* (1949), 30 NY 176, 90 N.E.2d 25, I find this statutory provision ambiguous, lacking in standards and easily susceptible to arbitrary implementation. I also note that it is unclear how the provisions of sec. 66.84 (6) (b) 4 would relate to the demolition of buildings or structures for purposes other than replacement rental housing. In my opinion, therefore, this provision would quite possibly be held to constitute an unconstitutional interference with private property rights.

I have pointed out a number of specific instances in which I feel Assembly Substitute Amendment 1 to 1973 Assembly Bill 95 is constitutionally infirm. However, as indicated previously, I consider the bill incomplete without some provision for a declaration of legislative necessity and some recognition of the temporary nature of such enactments. The existence and the nature of any such declaration would have a direct effect on whether its provisions would be found to be constitutional.

RWW:JCM

*Administrative Code—Industry, Labor and Human Relations, Department of—*The Department of Industry, Labor and Human Relations cannot enact a rule which would alter the common law rights and duties of adjoining landowners with respect to lateral support, although the department may specify thirty days as the minimum safety period in which an excavating owner must give notice to his neighbor of an intent to excavate.

December 4, 1973.

JOHN C. ZINOS, *Commissioner*

Department of Industry, Labor and Human Relations

You have requested my opinion concerning a proposed addition to the Wisconsin Administrative Code. The addition (hereafter "proposed rule") would be section Ind 53.27 and would provide as follows:

"PROTECTION OF ADJOINING PROPERTY. (1) Any person making or causing an excavation to be made to a depth of 12 feet or less, below the grade, shall protect the excavation so that the soil of adjoining property will not cave in or settle, but shall not be liable for the expense of underpinning or extending the foundation of buildings on adjoining properties where his excavation is not in excess of 12 feet in depth. Before commencing the excavation the person making or causing the excavation to be made shall notify in writing the owners of adjoining buildings not less than 30 days before such excavation is to be made and that the adjoining buildings should be protected. The owners of the adjoining property shall be given access to the excavation for the purpose of protecting such adjoining buildings.

"(2) Any person making or causing an excavation to be made exceeding 12 feet in depth below the grade shall protect the excavation so that the soil of adjoining property will not cave in or settle, and shall extend the foundation of any adjoining buildings below the depth of 12 feet below grade at his own expense. The owner(s) of the adjoining buildings shall extend the foundations of their buildings to a depth of 12 feet below grade at his own expense as provided in the preceding paragraph."

You ask whether the proposed rule would conflict with any statute and if it would otherwise be a valid enactment.

It is my opinion that the proposed rule does not conflict with any statute, but that it would not be valid to the extent it purports to change the common law of the rights and duties of adjoining landowners with respect to lateral support.

Under the common law, a property owner has the right to lateral support from his neighbor's property so long as the property owner's

land is in its natural condition. See *Schmidt v. Chapman* (1964), 26 Wis. 2d 11, 19, 131 N.W. 2d 689. The property owner cannot, however, by altering the natural condition of his land, deprive his neighbor of the privilege of using his own land as he might have done before. *Christensen v. Mann* (1925), 187 Wis. 567, 576, 204 N.W. 499, 41 ALR 1192.

A landowner has a duty to provide support for buildings on his land whenever the excavating owner exercises his right to excavate. See *Wahl v. Kelly* (1928), 194 Wis. 559, 563, 217 N.W. 307. The excavating owner has the duty to give notice to the adjoining owner of his intent to excavate. *Schmidt, supra*, 26 Wis. 2d at 20. The notice must be correct, complete, and in reasonable time to enable the adjoining owner to protect his property. *Drott Tractor Co. v. Kehrein* (1956), 275 Wis. 320, 324, 81 N.W. 2d 500.

Once the excavating owner has given proper notice of his intent to excavate, the duty shifts to the adjoining owner to protect his own buildings. The adjoining owner is liable to the excavating owner if the adjoining owner's failure to protect his buildings causes injury to the excavating owner. *Eggert v. Kullmann* (1931), 204 Wis. 60, 65, 234 N.W. 349; *Schmidt, supra*, 26 Wis. 2d at 22.

The excavating contractor is liable only for an injury due to his failure to exercise a reasonable degree of skill and care. *Schmidt, supra*, 26 Wis. 2d at 20-21.

Subsection (1) of the proposed rule merely reiterates the common law, except that it requires the excavating owner to give at least thirty days notice of his intent to excavate. Subsection (2), however, purports to change the common law. It requires the excavating owner, whenever the excavation exceeds twelve feet in depth, to bear the expense and responsibility of protecting the adjoining owner's buildings.

The question becomes whether the legislature has changed the common law or has empowered the department to do so. As you know, the powers of an agency must be found within the four corners of the statutes creating it. *Union Indemnity Co. v. Smith* (1925), 187 Wis. 528, 538, 205 N.W. 492. A rule must be in accord with the statutory policy. *Josam Mfg. Co. v. State Board of Health* (1965), 26 Wis. 2d 587, 601, 133 N.W. 2d 301.

Section 101.02 (15) (j), Stats., empowers the department:

“To ascertain, fix and order such reasonable standards, rules or regulations for the construction, repair and maintenance of places of employment and public buildings, as shall render them safe.”

The question becomes whether this statute empowers the department to adopt proposed Ind 53.27. A long standing rule of statutory construction is that statutes which do not clearly intend to change the common law should be strictly construed against having such an effect. See *Brown v. Loewenbach* (1935), 217 Wis. 379, 385, 258 N.W. 379. With respect to agency actions under safety statutes, the court said in *Verrette v. Chicago & N.W. Ry.* (1968), 40 Wis. 2d 20, 28, 161 N.W. 2d 264:

“ * * * the safe-place statutes are not to be extended so as to impose any duty beyond that imposed by the common law unless such statute clearly and beyond any reasonable doubt expresses such purpose by language that is clear, unambiguous and peremptory.’ ”

See also, *Grube v. Moths* (1972), 56 Wis. 2d 424, 437, 202 N.W. 2d 261.

In *Hickman v. Wellauer* (1919), 169 Wis. 18, 171 N.W. 635, the city of Milwaukee enacted an ordinance altering the common law of lateral support as to adjoining property owners. The ordinance shifted the burden of protecting buildings from the owner of the buildings to the excavating owner. The statutes empowered the city:

“To control and regulate the construction of buildings * * * and to prevent and prohibit the erection or maintenance of any insecure or unsafe buildings * * *.” 169 Wis. at 23.

The court held the ordinance ineffective to alter the common law rights and duties of adjoining landowners with respect to lateral support, 169 Wis. at 24:

“ * * * Such well-established property rights as are here involved between owners of adjacent lands cannot be taken away or substantially changed except by express declaration of the legislature, either by statute or by expressly delegating such a power to the common council.”

It is my opinion that sec. 101.02 (15) (j), Stats., does not empower the department to alter the common law rights and duties here involved with language that is clear and unambiguous beyond a reasonable doubt. Thus, under the canons of construction of statutes derogating from common law rights and duties, I conclude that the proposed rule is beyond the power of the department to enact to the extent that it would alter the common law as to the rights and duties of adjoining landowners with respect to lateral support.

In arriving at this conclusion, I also rely on the rule of construction that statutes are to be construed so as to make them constitutional. See *State ex rel. Husting v. Board of State Canvassers* (1914), 159 Wis. 216, 225, 150 N.W. 542. If sec. 101.02 (15) (j), Stats., were construed as empowering the department to choose whether to alter common law rights and duties, the statute would probably be unconstitutional, for the legislature cannot constitutionally delegate the discretion of determining whether there shall be a law and what it should be. See *State ex rel. Evjue v. Seyberth* (1960), 9 Wis. 2d 274, 285, 101 N.W. 2d 118. It is my opinion that choosing whether to alter common law rights and duties cannot be delegated to the department by the legislature.

For these reasons sec. 101.02 (15) (j), Stats., cannot be construed as altering the common law as to the rights and duties of adjoining landowners with respect to lateral support, nor can it be construed as authorizing the department to elect to do so.

The fact that the legislature has not changed the common law rights and duties does not preclude the department from enacting a safety regulation with respect to the exercise of those rights and duties. For example, under the safe-place statute, sec. 101.11, Stats., the legislature did not create a new cause of action but merely established a higher duty of care. *Baker v. McDel Corp.* (1971), 53 Wis. 2d 71, 79, 191 N.W. 2d 846. The violation of a department safety order establishes a violation of that duty of care. See *Presser v. Siesel Construction Co.* (1963), 19 Wis. 2d 54, 65, 119 N.W. 2d 405.

Therefore, pursuant to the department's powers to regulate safety in construction under sec. 101.02 (15) (j), Stats., and the safe-place statute, sec. 101.11, Stats., the department's proposed rule would be valid as determining what is a reasonably safe notice period to the

extent it requires an excavating owner to give at least thirty days' notice of his intent to excavate. The proposed rule would, of course, need to be restricted to those buildings included within the scope of secs. 101.02 (15) (j) and 101.11, Stats.

RWW:CDH

Zoning—Mobile Homes—The authority of a county to regulate house trailers or mobile homes under the county zoning authority set forth in sec. 59.97, Stats., and other zoning questions, discussed.

December 5, 1973.

CHARLES M. HILL, *Secretary*

Department of Local Affairs and Development

You have asked my opinion on several questions which have arisen in reference to county zoning of mobile homes in an agricultural district.

You first inquire whether a county zoning ordinance, adopted pursuant to sec. 59.97, Wis. Stats., is in effect within a town which has not adopted it affirmatively.

Section 59.97 (5) (c), Stats., specifically provides in part that:

“A county ordinance adopted as provided by this section *shall not be effective in any town until it has been approved by the town board.* * * *” (Emphasis supplied.)

Subsection (5) (c) of sec. 59.97, Stats., appears fully dispositive of your first question. This section establishes, as a condition precedent to a county zoning ordinance being operative in such town, requisite approval by the town board.

Your second question asks whether a town board has the authority to approve the county zoning ordinance in the face of a negative vote registered by the town electors, presumably at the annual town meeting or a special meeting called for the purpose of considering the adoption of the ordinance.

A town and its officers have only such powers as are conferred on them by statute or are necessarily implied therefrom. *Pugnier v. Ramharter* (1957), 275 Wis. 70, 81 N.W. 2d 38. Subsection (5) (c) of sec. 59.97, Stats., quoted above, clearly reposes the power to approve the county zoning ordinance exclusively with the town board. Thus, in the absence of controlling statutory authority providing for prior approval of such ordinance by the town electors, such approval rests only with the town board, and a negative vote registered by the town electors is of no legal significance.

Your third question relates to the validity of a county zoning ordinance provision which reads as follows:

“AGRICULTURAL DISTRICT. Use. In the Agricultural District no building or premises shall be used and no building shall hereafter be erected, moved, or structurally altered, unless otherwise provided in this ordinance, except for one or more of the following uses:

“* * *

“8. Not to exceed one house trailer or mobile home on any operating farm that has a full complement of farm buildings, when the occupant, or head of the occupant household of such trailer or mobile home is employed in connection with the farm operation; provided that no such trailer or mobile home shall be located closer to the highway than the farm residence.”

The Wisconsin Supreme Court applies the general presumption of constitutionality when judging whether comprehensive zoning ordinances are a valid exercise of the police power. *State ex rel. American Oil Co. v. Bessent* (1965), 27 Wis. 2d 537, 135 N.W. 2d 317. Even in that case, however, while sustaining the comprehensive zoning ordinance under consideration, the court was nevertheless also careful to point out that zoning classifications must satisfy the basic test of reasonableness, stating, at page 545:

“However, unreasonable classifications in zoning ordinances, whether comprehensive or not, and restrictions which are not reasonably germane to legitimate objectives or which prohibit a particular use of land ignoring its natural characteristics for such use or which are arbitrary have been held to be unconstitutional on

the facts presented. *Hobart v. Collier* (1958), 3 Wis. (2d) 182, 87 N.W. (2d) 868; [other citations omitted].”

Our court has in fact held zoning classifications to be unreasonable for ignoring the natural characteristics of the area, *Hobart v. Collier* (1958), 3 Wis. 2d 182, 87 N.W. 2d 868; for lack of substantial distinctions and no basis for different treatment, *Boerschinger v. Elkay Enterprises, Inc.* (1966), 32 Wis. 2d 168, 145 N.W. 2d 108; and for not being germane to the legislative purpose, *Caledonia v. Racine Limestone Co.* (1954), 266 Wis. 475, 63 N.W. 2d 697. The authority of a county to enact zoning ordinances pursuant to sec. 59.97, Stats., is therefore clearly subject to the constitutional limitation that the classification of uses permitted in a given district must be rational.

The question as to whether zoning may regulate trailer and mobile home use in an agricultural district, by requiring that such use be incidental to farm operations, apparently has not been presented to the Wisconsin courts. However, closely related questions have been passed on by courts in other jurisdictions and have been found to be based on rational distinctions.

In *Gardner v. Phillips* (1969), 59 Misc. 2d 934, 301 N.Y.S. 2d 332, for instance, a town zoning ordinance permitting mobile homes in a farm district, if occupied by “personnel engaged in the performance of duties connected solely and directly in the course of normal farm activity,” was challenged as being discriminatory against nonfarmers. In sustaining said provision as a valid exercise of the zoning authority, the following is stated, at page 335:

“* * * The Town Board has the unquestioned power to enact zoning laws respecting the use of property and such power is subject only to the constitutional limitation that it may not be exerted arbitrarily and unreasonably. * * * The proper tests for the validity of a Zoning Ordinance is whether the ordinance is based on a comprehensive and reasonable plan which considers the best interests of the entire area zoned. * * *

“Here the town could well have determined that permitting mobile homes to be occupied by personnel engaged in farm activity only, was in keeping with the orderly growth and development in the future and with the present needs and welfare of the entire township.

The regulations apply uniformly and give reasonable consideration to the character of the district. * * *

The Ohio Court of Appeals in *State v. Huffman* (1969), 20 Ohio App. 2d 263, 253 N.E. 2d 812, was likewise presented with a challenge concerning application of a township zoning ordinance, which in effect regulated the use of mobile homes on farms as a conditional use, contingent upon the occupant engaging in the performance of labor services on such farm. The court, in upholding the ordinance, rejected a contention that the zoning regulation bore no substantial relationship to public health, safety, or morals and exceeded the statutory grant of power to a town, stating that the power to zone, to classify property and to determine land-use policy was a legislative function and would not be interfered with by the courts unless such power was exercised in an arbitrary or unreasonable manner.

Thus, on the basis of the *Gardner* and *Huffman* decisions, it would seem permissible to conclude that the above quoted ordinance provision would probably be sustained as a valid exercise of zoning authority.

Your fourth question inquires as to the validity of a possible alternative provision to that set forth in question three. The alternative provision would read as follows:

“One mobile home only on the same parcel of land as an established farmstead, provided that the occupant of said mobile home must either be related to the owner or occupant of the farmstead or be employed in agricultural labor by the owner or occupant of the farmstead.”

The term “established farmstead” suffers from a certain intrinsic ambiguity. Conceivably, that term could refer to established farms that represent both operating and nonoperating agriculture entities. While a provision allowing a mobile home to be located only on an operating farm might well appear reasonable to the courts, I doubt that the courts would sustain a provision which also allowed mobile homes on nonoperating farms but not elsewhere in the district. Such a distinction is clearly difficult to justify on any reasonable grounds. Further, the alternate proposal introduces relationship or kinship as a basis for allowing a mobile home in an agricultural district. I fail

to appreciate any reasonable basis for allowing mobile homes of relatives on "established farmsteads" while at the same time refusing to allow mobile homes of relatives to be located on property used for other purposes. The arbitrary nature of such a provision appears even more pronounced when it is appreciated that the proposed ordinance provision is apparently operative regardless of how distant the relationship between the occupant of the mobile home and the owner or occupant of the farmstead.

These classifications obviously are not based upon substantial distinctions which make one class really different from another. Neither do such classes appear germane to the purposes of good zoning law. It is, therefore, my opinion that the above proposed alternate zoning provision would be vulnerable to attack as establishing arbitrary zoning classifications.

RWW:JCM

Corporations—Leases—Art. VIII, sec. 7 (2) (d), Wis. Const., does not preclude the state from entering into a lease with a nonprofit corporation or other entity furnishing facilities for governmental functions unless there is an attempt to use the lease as part of a scheme for the state to acquire title to or the use of a facility without utilizing state general obligation bonding.

December 11, 1973.

WAYNE F. MCGOWN, *Deputy Secretary*
Department of Administration

You have requested my opinion as to whether sec. 7 (2) (d) of Art. VIII, Wis. Const., precludes state agencies from entering into leases with *all* nonprofit corporations. The answer is in the negative.

Art. VIII, sec. 7 (2) (d), Wis. Const., provides:

“(d) No money shall be paid out of the treasury, with respect to any lease, sublease or other agreement entered into after January 1, 1971, to the Wisconsin State Agencies Building Corporation, Wisconsin State Colleges Building Corporation, Wisconsin State

Public Building Corporation, Wisconsin University Building Corporation or any similar entity existing or operating for similar purposes pursuant to which such nonprofit corporation or such other entity undertakes to finance or provide a facility for use or occupancy by the state or an agency, department or instrumentality thereof.”

This constitutional amendment became effective on April 1, 1969.

The intent of this provision was to eliminate all dummy building corporation type financing, as evidenced by the question submitted to the voters in connection with this amendment:

“Shall section 7 of article VIII of the constitution be amended to permit the state to contract public debt, * * * and eliminate reliance on the present method of financing such expenditures through leases with dummy building corporations? (NOTE: Adoption of this amendment would end the practice of borrowing through ‘dummy’ building corporations which, as of 12/1/67, had an outstanding indebtedness of \$382,511,869. Beginning 1/1/71 borrowing through state public building corporations would be unconstitutional, and all bonds issued for the state building program would be backed by the full faith and credit of the state.)” 1970 Wisconsin Blue Book, page 844.

In *State ex rel. Warren v. Nusbaum* (1973), 59 Wis. 2d 391, 208 N.W. 2d —, the Supreme Court commented upon this constitutional provision at pages 426-427 of its decision. On page 426 it said:

“* * * the amendment sought to eliminate certain indirect financing as carried on between ‘dummy’ corporations and the state. * * *”

And at page 427 it said:

“* * * The purpose of this section was to prevent the utilization of state money to liquidate the construction debts of nonprofit corporations established to provide facilities for the use or occupancy of the state. * * *”

“Art. VIII, sec. 7 (2) (d), Wisconsin Constitution, does not prevent all nonprofit organizations or corporations, established for a public purpose, from carrying on that purpose. It prohibits the type

of indirect financing for the purposes enunciated therein, as evidenced by the type of agreements that traditionally existed between the corporations specifically enumerated in sec. 7 (2) (d) and similar entities and the state. * * *

In my opinion this constitutional provision does not prohibit the state from entering into a lease with an entity which provides a facility for governmental functions when there is no attempt to use the lease as part of a scheme for the state to acquire title to or the use of such a facility through the circumvention of the constitutional and statutory requirements relating to the acquisition of a state facility through state bonding. It was intended that after January 1, 1971, a state facility would be acquired for use through state general obligation bonding rather than through a dummy building corporation scheme.

This constitutional provision prohibits paying money out of the state treasury to any nonprofit corporation or similar entity existing or operating for purposes similar to those of the four named dummy building corporations, whereby an "entity undertakes to finance or provide a facility for use or occupancy by the state or an agency, department or instrumentality thereof."

The term "similar entity" is not limited to nonprofit corporations, but includes other entities as well, such as unincorporated nonprofit associations, partnerships, joint ventures, etc., existing or operating "to finance or provide a facility for use or occupancy by the state * * *." If the legislature had intended to limit the prohibition to corporations only, it could have done so. But the legislature provided that the prohibition applied to the four named dummy building corporations "or any similar entity" rather than "or any similar corporation." Thus, the prohibition cannot be circumvented simply by utilizing an entity other than a nonprofit corporation.

The intent of the prohibition is to eliminate an arrangement, an example of which would be the typical sale and lease back scheme utilized by the dummy building corporations, which finances or provides a facility for use or occupancy by the state without utilizing state general obligation bonding.

In order to give definite advice concerning the applicability of this constitutional prohibition to a specific case it would be necessary to determine whether or not that particular entity which proposes to lease to a state agency has enumerated purposes set forth in its documents of organization contrary to the constitutional provision or by its actual operations shows that the constitutional intent is being circumvented. Therefore, in each transaction proposed it would be necessary to examine all facts and circumstances relating to each lease and entity involved and any evidence of circumvention of the constitutional intent would prohibit the state from entering into or continuing with such an arrangement.

RWW:APH

Anti-Secrecy—Open Meetings—In giving notice of public hearings held under sec. 13.56 (2), Stats., Legislative Committee for Review of Administrative Rules should concurrently employ the various forms of notice available which best fit the particular circumstances.

December 14, 1973.

JAMES J. BURKE

Revisor of Statutes

You advise that, pursuant to sec. 13.93 (2) (e), Stats., you serve as the secretary of the Legislative Joint Committee for Review of Administrative Rules. Section 13.56 (2), Stats., provides that this committee “. . . may hold public hearings to investigate complaints with respect to rules if it considers such complaints meritorious and worthy of attention and may, on the basis of the testimony received at such public hearings, suspend any rule complained of by the affirmative vote of at least 6 members. . . .” Since this statute is silent as to any notice requirement for such public hearings, you have requested my opinion as to what kind of notice of these hearings is required, both generally and in several

specific situations. Because of pending litigation, this opinion assumes, without actually considering the matter, that sec. 13.56, Stats., constitutes a valid delegation of legislative power.

Although sec. 13.56 (2), Stats., contains no specific notice requirement for the public hearings which may be held under that section, this does not necessarily mean that no notice of these hearings is necessary. The importance of public notice in a representative government is well recognized in this state. For example, notice was viewed as an integral part of the public meeting process by my predecessor in 54 OAG *i*. That opinion dealt with sec. 14.90, Stats., the anti-secrecy law, which has been renumbered sec. 66.77 by ch. 276, sec. 62, Laws of 1969. Subsection (2) of that law read in pertinent part:

“. . . all meetings of all state and local governing and administrative bodies, boards, commissions, committees and agencies . . ., unless otherwise expressly provided by law, shall be publicly held and open to all citizens at all times, except as hereinafter provided. . . .” Sec. 14.90 (2), Stats.

In discussing the anti-secrecy law, the opinion stated:

“. . . The question naturally arises whether a meeting, concerning which the public has received no notice and no information whatsoever, is publicly held and open to members of the public within the meaning of the statute.

“It is my opinion that a meeting is not publicly held if the public receives no notice of the meeting. A meeting secretly called, though ‘open to the public’, violates the spirit of the anti-secrecy law and is, in my opinion, a violation of the intent and purpose of the law.

“The statute does not specifically require that notice of a meeting be given. The statute does, however, impose a duty on the public agencies to make meetings public. This duty is not complied with by merely keeping the doors of the meeting room open. The spirit of the law requires the agency concerned to take some additional positive steps to inform the public of the fact that the meeting is being held in order to give members of the public a fair opportunity to attend.” 54 OAG, at *iii, iv*.

Advance notice would seem to be even more important to the public hearing process than to the public meeting process for without such advance public notice interested members of the public may have no fair opportunity to attend the hearing and to express their views. Such a result would be contradictory to the very purpose of a public hearing. As is stated in the committee note to sec. 227.021, Stats., which defines a specific notice procedure for public hearings held as part of an agency's rule-making process, ". . . Advance public notice is one of the essential characteristics of a public hearing. . . ." (W.S.A. 227.021). Because of the foregoing I believe that a hearing called by the Committee for Review of Administrative Rules under 13.56 (2) should be preceded by notice in order to be "public" within the meaning of that section.

You have inquired as to what kind of notice is proper for these hearings. You indicate that the committee has attempted to provide advance notice to the public but that there are problems with certain forms of notice. For instance, you believe the Administrative Register is not a satisfactory answer to giving notice because its issuance is often delayed, it is issued only once a month, and it goes to a limited mailing list. And although you feel the legislative hearing bulletins give better notice, they provide you no chance to check the notice's accuracy.

Of course no single form of giving notice of hearings is entirely satisfactory. In the absence of specific statutory notice requirements, the question to consider with regard to any particular public hearing held by the Committee would seem to be whether the form of notice was reasonable under all the circumstances. This will often have to be determined after the fact.

In order to ensure that notice to the public is adequate, however, I would suggest that you concurrently employ several of the notice forms utilized for other public hearings. For instance, notice can be published in the Administrative Register, as required for agency rule-making under sec. 227.021, Stats., if there is sufficient time. This can be supplemented by posting on legislative bulletin boards and by publication in legislative hearing bulletins, two forms of notice required for the committee hearings of each house under Assembly Rule 25 and Senate Rules 25 and 26. In addition, notice to representatives of the news media would seem to be an important

step toward ensuring that the general public is informed of any public hearing to be held. Finally, just as an administrative agency under sec. 227.021 (1) (c), Stats., is required to "Take such other steps as it deems necessary to convey effective notice to persons who are likely to have an interest in the proposed rule-making," I would suggest that the committee consider providing specific notice to those persons likely to have a particular interest in the rules in question. A list of such persons could undoubtedly be obtained from the agency which adopted the rules, since that agency should be aware of, at the very least, those parties who actually participated in the rule making process.

You also inquire about three specific fact situations which are as follows:

1. Assuming that you give notice of a public hearing before the committee by posting on the bulletin boards and by publication in the hearing bulletins and that the posted copies were correct but the notice in the hearing bulletin was not, can the committee proceed?

2. What kind of notice is required if the committee believes an emergency exists and does not feel it can wait the 8 or 9 days needed to have a notice published in the hearing bulletins?

3. What kind of notice is required if the committee wishes to hold a hearing at a time of year when no hearing bulletins are published because the legislature is not in session?

With regard to your first question, since there appears to be no specific requirement that notice of the hearing be published in the legislative hearing bulletin, an error in that published notice would not necessarily defeat the jurisdiction of the committee to suspend rules solely on the basis of testimony received at such a hearing. Whether such a hearing was "public" within the meaning of sec. 13.56 (2) would seem to depend on a determination as to whether the other forms of notice provided were sufficiently effective under the particular circumstances to apprise interested parties of the hearing in advance. It would, therefore, be advisable always to employ several forms of notice concurrently in order to minimize the possible effect of an error in any one particular form of notice.

With regard to the second and third situations you pose, your inability to use hearing bulletins would not prevent you from

employing such forms of notice as posting notice on the legislative bulletin boards, informing representatives of the news media of the hearing, and contacting parties having an obvious interest in the subject matter of the hearing. You might consider serving notice of the hearing on representatives of the news media and interested parties in the same manner as you serve notice of the hearing on the members of the committee.

In conclusion, I wish to reiterate that in the absence of a statute or committee rules setting out the notice procedures for public hearings held under sec. 13.56 (2), I cannot prescribe specific notice requirements for each set of circumstances which may occur. Whether the notice given in any particular situation is sufficient will often have to be judged after the fact. Obviously, no form of notice is completely adequate to ensure that all parties having a potential interest in the subject matter of the hearing will be timely advised. However, by tailoring the various forms of notice discussed herein to the particular circumstances of each hearing, and by using several forms concurrently, it is my opinion that the committee can take a significant step toward ensuring that its hearings are truly "public" within both the letter and spirit of the law.

RWW:WCW

Compensation—Housing—County may appropriate money to county housing authority under secs. 59.075, 66.40-66.404, Stats., but such authority is separate body politic and county cannot pay per diem or other compensation to commissioners. See 66.40 (5) (b).

December 19, 1973.

ROBERT RUSCH, *District Attorney*
Taylor County

You have requested my opinion whether commissioners of the Taylor County Housing Authority may be paid a per diem by Taylor County.

The answer to this question is in the negative.

Section 59.075 (1), Stats., provides:

“(1) Sections 66.40 to 66.404 shall apply to counties, except as otherwise provided in this section, or as clearly indicated otherwise by the context.”

A county board may create a county housing authority pursuant to secs. 66.40-66.404, Stats.

Section 66.40 (4), Stats., provides that when a housing authority is created, it is a body politic.

In 45 OAG 180 (1956) and 37 OAG 626 (1948), it was stated that once created, the authority was not an arm, department, or agency of the municipality which created it but is an independent entity separate and distinct from such municipality.

Section 66.404 (2), Stats., provides that the municipality or county can advance money to such housing authority for administrative expenses during the first year or appropriate money thereafter. Such funds may be treated as a donation or a loan as the municipality shall determine. Generally speaking, once received by the housing authority, such funds are beyond the control of the county and are to be used by the housing authority to pay its lawful obligations.

Sections 66.40 (5) (a), Stats., provides that the authority shall be governed by five commissioners, not more than two of which may be county officers.

Such commissioners, including county board members serving as such, are only permitted to be paid the amounts provided by law. Section 66.40 (5) (b), Stats., provides in part:

“* * * A commissioner shall receive no compensation for his services but he shall be entitled to the necessary expenses including traveling expenses incurred in the discharge of his duties.”

I construe that provision as prohibiting the authority or the county from paying any commissioner compensation in the form of per diem or salary for housing authority services.

The authority could pay such commissioners expense amounts actually incurred or a reasonable flat sum per month to cover all expenses. Per diem is compensation whereas reimbursement for

expenses is not. See *Geyso v. Cudahy* (1967), 34 Wis. 2d 476, 149 N.W. 2d 611.

RWW:RJV

Statutes—Legislation—The legislature intended that emergency rules, pursuant to sec. 227.027, Stats., would only have effect for 120 days. Therefore, an emergency rule may not be perpetuated by simply refiling it in accordance with subsec. (2) of sec. 227.027, before or after the 120 days provided in subsec. (1) lapse.

December 19, 1973.

JAMES J. BURKE

Revisor of Statutes

You have requested my opinion with respect to sec. 227.027, Stats., regarding emergency rules.

As I understand it, an administrative agency or department recently filed emergency rules with your office. The recently filed rules are identical to previously filed emergency rules due to expire on the date the second set was filed. The agency in question advised that the emergency situation that prompted the initial filing is ongoing and that normal rule making procedures would not be completed for a number of months.

The question you pose is twofold. First, does the language of sec. 227.027, Stats., preclude the agency from refiling emergency rules so as to maintain their effectiveness beyond the initial 120-day period provided for? Second, if not specifically prohibited, is maintaining the effectiveness of an emergency rule beyond 120 days contrary to legislative intent?

In my opinion, although extending the effectiveness of an emergency rule by refiling it in accordance with subsec. (2), is not clearly prohibited by the language of subsec. (1) of sec. 227.027, Stats., it is contrary to the legislative intent of the statute.

Unfortunately, we are without judicial guidance on the meaning of sec. 227.027, Stats. The section has not yet been subjected to

judicial interpretation. Consequently, we have only the language of the statute itself and its legislative history to guide us.

Subsection (1) of sec. 227.027, Stats., provides in its relevant part:

“. . . An emergency rule takes effect upon publication in the official state paper or on such later date as is specified in a statement published with the rule, *but remains in effect only for a period of 120 days.*” (Emphasis supplied.)

The emphasized phrase, in and of itself, does not clearly preclude extending the effectiveness of an emergency rule by simply refiling it in accordance with subsec. (2). But, the foreseeable consequence of interpreting the statute so as to allow refiling is that administrative agencies could completely avoid the normal notice, hearing, and publication requirements of ch. 227, simply by systematically refiling emergency rules. This cannot be what the legislature intended.

Section 227.027, Stats., was enacted as a part of the second phase of the development of Wisconsin's comprehensive administrative procedure law. Chapter 221, sec. 13, Laws of 1955. The first phase (ch. 375, Laws of 1943), was primarily devoted to establishing procedures for administrative contested case proceedings and judicial review thereof. Chapter 221, Laws of 1955, dealt with rule making. See Helstad, *New Law On Administrative Rule Making*, 1956 Wis. L. Rev. 407. The 1955 act was the product of extensive deliberations by a specially established Committee on Administrative Rule Making in conjunction with the Wisconsin Legislative Council.

The degree to which public participation should be guaranteed in rule making procedures posed a fundamental problem for the Committee. Despite the theoretical desirability of an unswerving hearing requirement, it was recognized that there would be situations where holding hearings in advance of a rule's effectiveness would be impracticable or contrary to public well-being. In seeking a means to reconcile the conflict between guaranteed public input and the practical difficulties of exigent circumstances, the Committee looked into the experience of other states. In *Legislative Council Committee On Administrative Rule Making—Staff*

Report on Public Participation in Rule Making, April 22, 1954, the following recommendation was made at page 14:

“ . . . Ohio and Virginia seek to induce compliance with notice and hearing procedures by providing that emergency rules may remain in effect for only a specified number of days unless notice and hearing procedures are complied with. This is perhaps the best type of provision if the aim is to prevent an administrative agency from using the emergency provision where no real emergency exists.”

This mechanism was eventually adopted by the Committee and incorporated into the bill recommended to the legislature. On page 29 of *Draft of Bill on Administrative Rule Making—Submitted by the Committee on Administrative Rule Making to the Wisconsin Legislative Council, December 28, 1954*, the following note appears after the language of proposed sec. 227.027 (identical to sec. 227.027 as finally enacted):

“NOTE. The requirement of notice and public hearing on rule making plus the delay of the effective date of a rule until the first day of the month following publication in the monthly register may, under certain circumstances, mean that 2 to 3 months will elapse from the time an agency commences formal rule-making proceedings until the rule can be put into effect. There are situations wherein rules must take effect without such delay. A relatively recent example was the department of agriculture’s rule restricting and regulating the shipment of hogs during a threatened epidemic of vesicular exanthema. This section therefore provides that emergency rules may take effect immediately upon their publication in the official state paper. This satisfies constitutional publication requirements and allows the rule to become effective without delay. Sub. (2) prescribes certain supplementary publicity procedures, but the validity of the rule is not dependent on compliance with these procedures. Emergency rules, however, remain in effect for a period of only 120 days. By the end of that period the agency will have had ample time to adopt a rule pursuant to regular rule-making procedures if such a rule is needed. This limitation on the effectiveness of an emergency rule should discourage the use of the emergency procedure to circumvent regular procedures, except in actual emergencies.”

I view this language as a clear expression of intent that the effectiveness of an emergency rule may not be extended beyond the initial 120-day effective period by simply refileing it pursuant to sec. 227.027 (2), Stats. The 120-day period was intended to afford an agency the requisite time to adopt rules pursuant to the normal procedures of ch. 227, if the agency perceives that what begins as an emergency presents the need for rules of lasting effect. Therefore, I conclude that an emergency rule may only have effect for 120 days.

RWW:CAB

Register in Probate—Filing fees provided in sec. 253.34 (1) (a), Stats., should be charged in informal probate proceedings authorized by ch. 865, Stats., created by ch. 39, Laws of 1973.

December 19, 1973.

M. G. EBERLEIN, *County Judge*
Shawano-Menominee County Court

You have requested my opinion whether the filing fees provided in sec. 253.34 (1) (a), Stats., can be charged in informal probate proceedings authorized by ch. 865, Stats., as created by ch. 39, Laws of 1973.

I am of the opinion that they should be charged and that the probate registrar should cooperate with the register of probate to see that they are collected.

Section 253.34 (1) (a), Stats., provides that the register of probate shall collect the prescribed fees:

“(a) *For filing a petition whereby any proceeding in estates of deceased persons is commenced * * *. Such fees shall be paid at the time of the filing of the inventory or other documents setting forth the value of the estate in such proceedings * * *. The fees * * * shall also be paid in survivorship proceedings * * *.*” (Emphasis added.)

It is my opinion that the fees are applicable to proceedings which are *within the jurisdiction of the county court*, whether they are

proceedings formally before the court, or whether they are before the probate registrar and only subject to latent or indirect supervision of the court.

In 58 OAG 12 (1969), it was stated that the fees were applicable to an *inter vivos* trust where a proceeding in county court was necessary to determine the inheritance tax on the interest passing.

In an opinion to the District Attorney for Juneau County dated August 23, 1973, it was stated that the register of deeds is not authorized to collect and forward to the county court any of the fees set forth in sec. 253.34 (1) (a), Stats., under sec. 867.045, Stats., created by ch. 41, Laws of 1973, since such proceedings were not in county court. It was stated that if it were necessary for the survivors to go into county court for special purposes, it would be for the register of probate to collect appropriate fees at that time. In enacting ch. 41, Laws of 1973, it should be noted that the legislature provided, by creation of sec. 59.57 (10m), Stats., for a \$10 fee for the register of deeds for recording certificates and preparing and mailing documents under sec. 867.045, Stats.

Chapter 865, Stats., as created by ch. 39, Laws of 1973, makes no reference to filing fees to be collected in informal administration of estates. However, in view of the special fee provision contained in sec. 59.57 (10m), Stats., applicable to administrative termination of joint tenancies, it would appear that the legislature contemplated that the costs of administration should be provided for in informal proceedings. The legislature must have considered it unnecessary to provide for a special fee payable to probate registrars under the belief that sec. 253.34 (1) (a), Stats., would apply to informal administration of estates which were processed by an officer of the county court.

The fees provided in sec. 253.34 (1) (a), Stats., are minimal with respect to small estates and are graduated as to increasingly larger estates. The costs of administering estates by informal proceedings will be substantial and payable out of the budget of the county court of which the probate registrar is an officer. The fees provided in sec. 253.34 (1) (a), Stats., may well be insufficient to cover such costs.

Section 253.34 (1) (a), Stats., does not restrict the applicability of the stated fees to *judicial proceedings* in the county court. I am

of the opinion that they are applicable to so-called "administrative proceedings" conducted under the supervision of the county court by an officer of such court.

Section 865.06 (1), Stats., provides that informal administration is commenced by an "application" which shall be verified and directed to the probate registrar *of the court*. I am of the opinion that such application is equivalent to a "petition" referred to in sec. 253.34 (1) (a), Stats., and even if it were not the latter section also makes the fees applicable to survivorship proceedings and informal administration could be considered such a proceeding.

Article VII, sec. 2, Wis. Const., vests the "judicial power of the state, both as to matters of law and equity * * * in a supreme court, circuit courts, courts of probate * * *" and provides that the legislature may establish inferior courts with limited civil and criminal jurisdiction. Article VII, sec. 14, Wis. Const., provides for a judge of probate in each county and that "the legislature shall have power to abolish the office of judge of probate * * * and to confer *probate powers upon such inferior courts* as may be established in said county."

I am of the opinion that by enactment of ch. 865, Stats., the legislature intended to confer probate powers of both judicial and incidental administrative nature on the county court to be performed in the ordinary case by the probate registrar who is an officer of that court, and that it did not intend to confer probate powers directly to the probate registrar independently of the county court. The Wisconsin Constitution appears to contemplate that probate powers are judicial in nature in essential part and hence could only be conferred in a court. They could not be conferred on an administrative official in view of the separation of powers doctrine.

Whereas sec. 865.01, Stats., does state that "Administrative action by the probate registrar is not action by the court," it defines "informal administration of estates" as "administration of decedents' estates, testate and intestate, without the exercise of *continuous supervision by the court*."

I construe acts of the probate administrator to be actions, not by the court, but *under the authority of the court* where such officer

acts in a probate matter which is within the jurisdiction of the county court. Such officer, as an officer of the court, can only perform those ministerial tasks specified by ch. 865, Stats., which are incidental to the judicial power as to probate which the legislature has conferred on the county courts pursuant to Art. VII, secs. 2, 14, Wis. Const.

A statute is to be construed, if possible, in a manner which will accomplish the legislative purpose and avoid construction which will render it unconstitutional. *In re City of Beloit* (1968), 37 Wis. 2d 637, 155 N.W. 2d 633.

Section 865.03 (1), Stats., states that "A formal proceeding in this chapter is a *judicial proceeding before the court* * * *. It is distinguished from an *administrative proceeding before the probate registrar*. * * *"

As noted above, application for informal administration shall be directed "to the probate registrar *of the court* * * *." Sec. 865.06 (1).

Section 865.065 (1), Stats., defines "probate registrar" as "* * * the *official of the court* designated to perform the functions of probate registrar. * * *" Such official is designated in writing "*by the court*." Note that the county judge may act as probate registrar.

Before the probate registrar may proceed he must determine, pursuant to sec. 865.07 (1) (b), that:

"(b) *The court* of the county in which the application is made *has jurisdiction* of the estate of the decedent." (Emphasis added.)

See sec. 253.10, Stats., as to jurisdiction of county courts in probate matters. Our supreme court has held that the county court of the proper county has exclusive jurisdiction as to probate matters. *Estate of Hertzfeld* (1960), 10 Wis. 2d 333, 102 N.W. 2d 838.

From a reading of all of the provisions of ch. 865, it is clear that the court has a latent power of supervision and that the supervisory power of the court can be invoked by the personal representative.

any interested person, or the probate registrar at any time. Secs. 865.03, 865.10, 865.12, 865.135, 863.35.

RWW:RJV

Savings and Loan Associations—Municipalities—Investments—Municipal funds may be invested in savings and loan associations to the extent permitted by sec. 219.05 (1), Stats.

December 19, 1973.

R.J. McMAHON, *Commissioner*
Office of the Commissioner of Savings and Loan

You have asked for my advice with respect to what, if any, effect ch. 34, Wis. Stats., which deals with public deposits, has upon sec. 219.05, Wis. Stats., which permits the investment of certain public funds in savings accounts in savings and loan associations doing business in this state in an amount not exceeding the maximum insurance coverage of these accounts by the federal savings and loan insurance corporation.

Section 219.05, Wis. Stats., provides:

“219.05 Investment in accounts insured by the federal savings and loan insurance corporation. (1) The investment by any credit unions; or the investment of funds of any state sinking fund, state school fund, firemen’s relief and pension fund, police pension fund, or other pension fund; or the investment by any savings and loan association; or by any federal savings and loan association; or by any administrative department, board, commissioner or officer of the state, authorized by law to make investments of funds in the custody or under the control of such department, board, commission or officer; or by any guardian, trustee or other fiduciary; or by any school district, vocational, technical and adult education district, drainage district, village, city, county or town, in savings accounts in savings and loan associations doing business in this state in an amount not exceeding the maximum insurance coverage of their accounts by the federal savings and loan insurance corporation as fixed by an act of congress; or in savings accounts in any other

institution within or without the state, to the extent to which such accounts now are, or may hereafter be, insured by the federal savings and loan insurance corporation, under acts of congress of the United States now in effect or which may hereafter be enacted is lawful.

“(2) The legality of such investment shall not be impugned, whether the person, firm, or corporation or association, board, or commission, making the same be foreign or domestic; or whether such investment be made from capital, reserves, or surplus; or whether made in a fiduciary or other capacity.” (Emphasis added.)

Section 34.01 (3), Stats., defines “public depositor” as “the state or any county, city, village, town, drainage district, power district, school district, sewer district, or any commission, committee, board or officer of any governmental subdivision of the state or any court of this state which deposits any moneys in a public depository.”

Section 34.05 (1), Stats., provides:

“34.05 Designation of public depositories. (1) The governing board of each public depositor shall, by resolution, certified copy of which shall be filed with the commissioner of banking, designate one or more banks, banking institutions, or trust companies, organized and doing business under the Wisconsin or United States laws, located in Wisconsin, which have been approved by the commissioner of banking as qualified to become public depositories, in which the treasurer of such governing board shall deposit all public moneys coming into his hands. A designation of a public depository by the governing board shall be a designation of such public depository for all treasurers of such governing board and for all public depositors for which each such treasurer shall act.”

Section 34.05 (3), Stats., provides:

“(3) Every treasurer shall deposit immediately upon receipt thereof the funds received by him by virtue of his office in the name of the municipality in the public depository or public depositories designated by the governing board.”

“Public depository” is defined in sec. 34.01 (2), Stats., as a “state bank, savings and trust company, mutual savings bank, or national bank in this state which receives or holds any public deposits.”

Therefore, a savings and loan association is not a "public depository" within the meaning of ch. 34.

Section 66.04 (2), Stats., provides:

"(2) INVESTMENTS. Any county, city, village, town, school district, drainage district, vocational, technical and adult education district, or other governing board as defined by s. 34.01 (4) may invest any of its funds, not immediately needed, in time deposits in any bank, savings bank or trust company which is authorized to transact business in this state, such time deposits maturing in not more than one year, or in bonds or securities issued or guaranteed as to principal and interest of the U. S. government, or of a commission, board or other instrumentality of the U. S. government, or bonds or securities of any county, city, drainage district, vocational, technical and adult education district, village, town or school district of this state, or in the case of a town, city or village in any bonds or securities issued under the authority of such municipality, whether the same create a general municipality liability or a liability of the property owners of such municipality for special improvements made therein, and may sell or hypothecate the same. Cemetery perpetual care funds, pension funds under s. 62.13 (9) or (10), or endowment funds including gifts where the principal is to be kept intact may also be invested under ch. 881."

It is also clear, therefore, that a savings and loan association is not a "bank, savings bank or trust company" within the meaning of sec. 66.04 (2), Stats.

With respect to counties, there are special statutory provisions in sec. 59.74 and sec. 59.75, Stats., which deal with the designation of depositories and the funds to be placed in depositories.

Statutes must be construed together and harmonized. *Pruitt v. State* (1962), 16 Wis. 2d 169, 114 N.W. 2d 148. Conflicts between statutes are not favored and will not be held to exist if they may otherwise be reasonably construed. *Raisanen v. City of Milwaukee* (1967), 35 Wis. 2d 504, 151 N.W. 2d 129.

I find no conflict between sec. 219.05 (1), Stats., and the other statutory provisions referred to above. Your question indicates primary concern as to whether the public funds of municipalities, such as counties, cities, towns and villages, may be invested in

savings and loan associations under sec. 219.05 (1), Stats. My conclusion is that such funds may properly be so invested in savings and loan associations to the extent permitted by that statute. This is largely a discretionary matter with the governing body of the municipality concerned. The statutes cited above dealing with public depositories, of course, must be complied with, but this does not necessarily prohibit the governing body, when sufficient funds are available for investment purposes, from taking advantage of the provisions of sec. 219.05 (1), Stats., whenever it determines that such an investment would be in the public interest. It probably deserves mentioning that there are other considerations affecting these governing bodies. The unnecessary accumulation of money in the public treasury is unjust to the people and it is against the policy of the law to raise taxes faster than they are likely to be needed. A governing body is not authorized to make levies to accumulate a fund for some project to be developed at some indefinite future time. Levies for such indefinite purposes are condemned for the reason that the unnecessary accumulation of money in the public treasury is unjust to the people, in that it deprives them of the use of their money for a period of time in that the accumulation of money in excess of needs furnishes a temptation to those in charge to expend public funds recklessly and more than is needed. *Immega v. Elkhorn* (1948), 253 Wis. 282, 288, 34 N.W. 2d 101. Nevertheless, it is probable that public funds are available for investment in most municipalities. Earmarked surplus funds, lawfully appropriated, are generally available for investment. Other funds not immediately needed are also available for investment. The legislature has provided that a municipality may invest any of its funds, not immediately needed, in certain types of investment. Included among these are the investments authorized by sec. 219.05 (1), Stats.

RWW:JEA

Plats and Platting—Discussion of the circumstances under which the statutory platting standards set forth in secs. 236.16 (1), (2) and (3) and 236.20 (4) (d), Stats., may be waived or varied, with specific reference to the approval of island subdivision plats.

December 20, 1973.

CHARLES M. HILL, SR., *Secretary*
Department of Local Affairs & Development

You advise that a number of questions have arisen in connection with your subdivision plat review responsibilities under ch. 236, Wis. Stats. These questions relate principally to certain provisions of secs. 236.16 and 236.20, Stats. The questions you pose will be discussed *seriatim*.

"1. Is Section 236.16 (2), Wisconsin Statutes, fully applicable to land subdivision plats located on islands?"

Section 236.16 (2), Stats., relates to minimum street widths and provides:

"All streets shall be of the width specified on the master plan or official map or of a width at least as great as that of the existing streets if there is no master plan or official map, but no full street shall be less than 60 feet wide unless otherwise permitted by local ordinance. Widths of town roads platted after January 1, 1966, shall, however, comply with minimum standards for town roads prescribed by s. 86.26. Streets or frontage roads auxiliary to and located on the side of a full street for service to the abutting property may not after January 1, 1966, be less than 49.5 feet wide."

In my opinion, the provisions of ch. 236, Stats., in their entirety, are applicable to the platting of land located on islands.

Section 236.01, Stats., provides:

"The purpose of this chapter is to regulate the subdivision of land to promote public health, safety and general welfare; to further the orderly layout and use of land; to prevent the overcrowding of land; to lessen congestion in the streets and highways; to provide for adequate light and air; to facilitate adequate provision for water, sewerage and other public requirements; to provide for proper ingress and egress; and to promote proper monumenting of land subdivided and conveyancing by accurate legal description. The approvals to be obtained by the subdivider as required in this chapter shall be based on requirements designed to accomplish the aforesaid purposes."

It is readily apparent that this manifestation of legislative purpose is directly applicable to land located on islands. Obviously, regulation of orderly layout and use, prevention of overcrowding, adequate provision for water and sanitation, provision for proper ingress and egress and accurate legal description, is just as essential on islands as elsewhere. In fact, it is probable that such regulation on islands is more important than where the water environment is not present, since aesthetic and environmental considerations that directly affect the inhabitants of an island will most likely directly and indirectly affect the public on the adjacent mainland as well.

Nor is it apparent that the legislature intended to exclude island subdivision plats from the provisions of ch. 236, Stats. Although sec. 236.03 (2) and (3), Stats., does expressly exclude certain plats and sales or exchanges of parcels of land from some or all of the provisions of ch. 236, there is no mention of excluding subdivision plats proposed on islands.

“II. Can the minimum street width requirements that are prescribed by Section 236.16 (2) be reduced by local ordinances for land subdivision plats located on islands?”

Section 236.16 (2), Stats., provides that all platted streets shall be at least 60 feet wide, unless otherwise permitted by “local ordinance.” In the case of town roads and certain auxiliary streets or frontage roads, the extent to which street width requirements may be regulated by local ordinance is further restricted. As pointed out later in my answer to your seventh question, the local ordinances referred to in the statute are those adopted by cities, villages or towns. The statute does not authorize reduction of the statutory minimum street widths by county ordinance.

Subject to these restrictions, the 60-foot minimum street width prescribed by the statute may be reduced by local ordinance in a number of different ways. For instance, an ordinance may contain a provision positively establishing one or more classes of streets and assigning specific widths, some presumably narrower than the statutory 60 feet, for each such class. On the other hand, the local ordinance may contain a provision which allows streets less than 60 feet as a special exception to the normal minimum only when certain conditions, specifically set forth in the ordinance, are found to be met. Another means by which the statutory street width

minimum may be reduced is through use of a variance provision in the local ordinance regulating street widths. However, such a provision must establish a standard for the granting of such variance. 8 McQuillin, *Mun. Corp.* (3rd Ed.), p. 521, sec. 25.161. For instance, the ordinance might specifically authorize some variance from the strict application of the normal minimum street width requirement in terms similar to those set forth in the statutes for the granting of zoning variances, e.g., where literal enforcement would result in practical difficulty or unnecessary hardship. Depending upon the complexity of the ordinances involved, there may, of course, be other means by which ordinances may reduce street widths below the standard minimum 60-foot width established by statute.

It appears that the variance provision has enjoyed popularity in both zoning and subdivision control ordinances as a means by which the 60-foot minimum street width of sec. 236.16 (2), Stats., is put aside. Because of its apparent widespread use, therefore, further comment concerning such variances seems appropriate.

Prior to the recent enactment of ch. 60, Laws of 1973, only the zoning board specifically designated by statute, rather than the governing body or its plan commission or committee, could validly grant zoning variances and special exceptions, at least in cities and villages. *State ex re. Skelly Oil Company v. Common Council, City of Delafield* (1973), 58 Wis. 2d 695, 207 N.W. 2d 585. Chapter 60, Laws of 1973, which became effective July 7, 1973, altered the law in this respect only to the extent that zoning special exceptions, *but not zoning variances*, now may also be granted by a governing body or its plan commission or committee, if such action is authorized by ordinance. Reading the *Skelly* case and ch. 60, Laws of 1973 together, therefore, it is apparent that any attempt to utilize a zoning variance would be ineffectual unless such variances were properly granted by a zoning board of appeals, in the case of cities and villages, or the zoning board of adjustment, in those counties and towns which have created such boards. Sections 59.99 (7) (c), 60.75 (4), 61.35 and 62.23 (7) (e) 7., Stats.

If the variance provision appears in a subdivision control ordinance, adopted pursuant to sec. 236.45, Stats., rather than a zoning ordinance, however, the statutory limitations pointed out in

the *Skelly* case do not appear to apply, and the governing body apparently may designate itself or its planning committee or commission as the agency to grant a variance to the street width requirements of the subdivision control ordinance and sec. 236.16 (2), Stats. In *City of Mequon v. Lake Estates Co.* (1971), 52 Wis. 2d 765, 190 N.W. 2d 912, for instance, the city ordinances provided that "where there has been a report and recommendation of the plan commission and where the common council found it inappropriate to literally apply the requirements of the ordinances, the council could, to effect substantial justice, waive or vary the provisions of the ordinances in respect to the approval of subdivisions." 52 Wis. 2d 769. Pointing out that sec. 236.45, Stats., grants municipalities a broad area of discretion in implementing subdivision control, the court stated, at p. 774:

"The general declaration of legislative intent appearing in sec. 236.45 (1) indicates that the purpose of the law is to permit a municipality to adopt regulations encouraging the most appropriate use of land throughout. Sec. 236.45 (2) (b) directs that any ordinance adopted by a municipality shall be liberally construed in favor of the municipality. This reserves to the city a broad area of discretion in implementing subdivision control provided that the ordinances it adopts are in accord with the general declaration of legislative intent and are not contrary, expressly or by implication, to the standards set up by the legislature. This is a grant of wide discretion which a municipality may exercise by ordinance or appropriate resolution."

The different treatment of the granting of variances under the subdivision law as opposed to that under the zoning law is perhaps explained in part by basic differences between zoning and planning recognized in the law. Comment on this difference is found in Yokley, *The Law of Subdivisions*, §39 at p. 81, and §15, at p. 35, where the following is stated:

"While in the zoning process, the work of the planning commission is advisory only in most jurisdictions, a different responsibility is vested in the planning commission with respect to subdivision control. Here the powers and duties of the planning commission are brought into play to a more definitive extent under statutory provisions that vest in the planning commission rather

broad power in the approval or disapproval of subdivision plans or plats.”

In Wisconsin, the increased reliance on planning agencies in reference to subdivision control is recognized in sec. 236.45 (2) (a), Stats., which limits the statutory delegation of power to enact subdivision control ordinances to municipalities and towns and to counties which have established planning agencies. Such reliance is also evident in sec. 236.10 (1) (b) 3 and (c), Stats., which authorizes a county planning agency to act for the county in approving plats under certain circumstances, and in sec. 236.10 (3), Stats., which provides:

“(3) The authority to approve or object to preliminary or final plats under this chapter may be delegated to a planning committee or commission of the approving governing body. Final plats dedicating streets, highways or other lands shall be approved by the governing body of the town or municipality in which such are located.”

“III. Is Section 236.20 (4) (d) fully applicable to land subdivision plats located on islands?”

Section 236.20 (4) (d), Stats., requires that:

“(d) Each lot within the plat must have access to a public or private street unless otherwise provided by local ordinance.”

Although it may be argued that there may be little need for any platted streets whatsoever on some smaller islands, this statute is just as applicable to island subdivisions as to subdivisions on the mainland. The statute requires land access as between lots, even though there may also be access to all lots by water. However, as is the case with certain of the statutory street widths established under sec. 236.16 (2), Stats., the law provides that the subdivider may be relieved from the strict application of the statutory requirements by local ordinance.

“IV. Can an approving authority by ordinance waive the requirements of Section 236.20 (4) (d) for street access to lots in land subdivision plats on islands?”

An approving authority may waive the requirements of sec. 236.20 (4) (d), Stats., under the same terms and conditions and

subject to the same limitations as discussed in reference to sec. 236.16 (2), Stats., under question two above.

“V. If the answers to questions II and IV are yes, then does inaction on the part of the approving authority, i.e., failure to act when a plat does not fully comply with Sections 236.16 (2) and 236.20 (4) (d) within the period granted by statute, automatically reduce the requirements of Sections 236.16 (2) and 236.20 (4) (d) under the variance and waiver provision of the subdivision ordinance? Or does it require affirmative action by the approving authority to implement such a variance?”

The head of the planning function in the Department of Local Affairs and Development is required by sec. 236.12 (2) (a), Stats., to review plats for compliance with secs. 236.16 and 236.20, Stats. Obviously, therefore, if a plat under consideration does not comply with secs. 236.16 (2) or 236.20 (4) (d), Stats., it should be objected to by your department within the time set forth in sec. 236.12 (3) or (6), Stats. However, under the terms of the latter statute, if your agency fails to act within that time it is “deemed” to have “no objection to the plat.” Likewise, if the local approving authority fails to act one way or the other on a plat within the time limitations set forth in sec. 236.11, Stats., such inaction is also deemed to constitute approval of such plat and certification of the plat by public authorities may be compelled if necessary. Yokley, *The Law of Subdivisions*, §55, p. 123; *State ex rel. James L. Callan, Inc. v. Barg* (1958), 3 Wis. 2d 488, 89 N.W. 2d 267; *State ex rel. Lozoff v. Board of Trustees of the Village of Hartland* (1972), 55 Wis. 2d 64, 197 N.W. 2d 798.

In the *Lozoff* case the village had asserted that the subject plat violated the official map, the village code and sec. 236.15, Stats. In sustaining the lower court ruling to the effect that failure of the village to take timely action constituted approval of such plat under sec. 236.11, Stats., the court likewise pointed out that a tardy objection by the county planning commission was also “of no effect” in light of the time limitations set forth in sec. 236.12 (3) and (6), Stats. In essence, the *Callan* and *Lozoff* decisions hold that silence on the part of objecting or approving authorities during the review process entitles a plat to approval despite later assertions that said plat fails to comply with some provision of law.

However, these decisions do not necessarily hold that your agency or a local approving authority is precluded from enforcing compliance with a law which an "approved" plat in fact violates. As pointed out by our Supreme Court, in quoting the trial court in *Callan*, at page 493:

" 'The approval of the plat under ch. 236 in no way authorizes the use of the land so subdivided which is contrary to existing zoning ordinances and any other pertinent municipal ordinances. By the provisions of sec. 236.13 of the Wisconsin statutes the approval is conditioned upon compliance with municipal ordinances.' "

In this regard I also point out that sec. 236.31 (2), Stats., provides in part that:

"(2) Any municipality, town, county or state agency with subdivision review authority may institute injunction or other appropriate action or proceeding to enjoin a violation of any provision of this chapter, ordinance or rule adopted pursuant to this chapter. Any such municipality, town or county may impose a forfeiture for violation of any such ordinance, . . ."

In the final analysis, whether the court would hold that a variance could be granted by other than affirmative action by the approving authority would probably depend on the exact circumstances existing in the case before the court. If, for instance, the plan commission recommended to the governing body approval of a plat which contained streets of a width which would require that a variance be granted by the commission or the governing body, the courts might well conclude that silence on the part of the governing body amounts to assent to such a variance. On the other hand, if the local ordinance authorized only the plan commission to grant such variance and the commission never received or acted upon the plat, silence by the governing body would probably not be held to amount to an implementation of such variance.

"VI. Does the answer to question V apply to all plats that are subject to the provisions of Chapter 236?"

The answer to this question is "yes."

"VII. Must all the approving authorities involved with a plat enact ordinances in order to vary the requirements of Sections

236.16 (1) and 236.20 (4) (d)? If not all, then which approving authorities must have such ordinances in order to effect reductions in these requirements?"

Section 236.16 (1), Stats., establishes minimum lot width and size requirements which vary depending upon whether the county involved has a population of 40,000 or more. The statute specifically authorizes reductions in these standards in the following terms:

" . . . In municipalities, towns and counties adopting subdivision control ordinances under s. 236.45, minimum lot width and area may be reduced to dimensions authorized under such ordinances if the lots are served by public sewers."

If a local governing body has not adopted a subdivision control ordinance under sec. 236.45, Stats., any regulation of lot width and size within subdivisions by that local unit of government, by zoning ordinance or otherwise, must conform at least to the minimum standards established by sec. 236.16 (1). However, if such governmental unit has not adopted any lot width and size regulations but shares overlapping plat approval authority over a particular area with another approving authority, such other approving authority may unilaterally reduce the statutory standards effective in such area by its subdivision control ordinance under the authority of sec. 236.16 (1), Stats. Of course, where more than one of the necessary approving authorities adopts an ordinance regulating lot width and size, whether by zoning or subdivision control ordinance, the plat must comply with the most restrictive requirements. Section 236.13 (4), Stats.

Section 236.20 (4) (d), Stats., presents a somewhat different situation. Both secs. 236.20 (4) (d) and 236.16 (2), Stats., establish certain minimum standards which can be made more or less restrictive by a "local ordinance." Unlike sec. 236.16 (1), Stats., such local ordinance need not be part of the comprehensive subdivision control ordinance otherwise authorized under sec. 236.45, Stats.

While a county may or may not be involved in the approval of subdivision plats within its boundaries, every subdivision of land in every county must at least be approved by a municipality (an incorporated city or village) or a town. It is my opinion that the

legislature was referring to these local governmental units, and not to counties, as being the only legal entities which could enact "local ordinances" varying the minimum platting standards under the limited authority set forth in secs. 236.16 (2) and 236.20 (4) (d), Stats.

This conclusion is supported by the 1955 *Report of the Wisconsin Legislative Council* (Vol. IV, Subdivision and Platting of Land) which recommended the adoption of the "local ordinance" language of sec. 236.16 (2) in the following terms:

"The committee also recommends the following changes which will increase the quality requirements for subdivision plats:

"* * *

"(b) A minimum street width is required. This provides that the streets must be 60 feet wide unless the local *municipality* or town by ordinance permits a lesser width. See §236.16 (2) of the proposed revision." (Emphasis added.)

The definition of "municipality" in the then proposed draft, and under present sec. 236.02 (3), Stats., includes only "an incorporated city or village."

Such conclusion is also consistent with sec. 236.29 (1), Stats., which provides that streets and other public uses "shall be held by the *town, city or village* in which such plat is situated in trust to and for such uses and purposes." (Emphasis added.)

It should be noted, however, that where a county has adopted a subdivision control ordinance under sec. 236.45, Stats., which is more restrictive than the provisions of secs. 236.16 (2) or 236.20 (4) (d), Stats., the county ordinance would prevail to the extent of any conflict. Section 236.13 (4), Stats.

Your eighth and ninth questions ask:

"VIII. Are the provisions of Section 236.16 (3) fully applicable to plats located on islands?"

"IX. Can the waiver provision of this section be used to vary the distances between public access points for plats located on islands?"

Section 236.16 (3), Stats., provides:

“(3) LAKE AND STREAM SHORE PLATS. All subdivisions abutting on a navigable lake or stream shall provide public access at least 60 feet wide providing access to the low watermark so that there will be public access, which is connected to existing public roads, at not more than one-half mile intervals as measured along the lake or stream shore except where greater intervals and wider access is agreed upon by the department of natural resources and the head of the planning function, and excluding shore areas where public parks or open-space streets or roads on either side of a stream are provided. No public access established under this chapter may be vacated except by circuit court action.”

As pointed out in my answer to your first question, the provisions of ch. 236, Stats., apply to the platting of land located on islands in the same manner as they apply to land located on the mainland. An island has “lake or stream shore” in the same sense as the mainland. I can conceive of no reason why the “waiver” provisions of sec. 236.16 (3), Stats., cannot be applied to island shoreland.

“X. Must the land provided for public access under Section 236.16 (3) be restricted to the shoreline, i.e., the island itself, or may public access be wholly or partly provided for on the mainland by agreement between the Department of Natural Resources and the head of the planning function?”

A subdivision is defined by sec. 236.02 (8), Stats., as being “a division of a lot, parcel or tract of land by the owner thereof.” The land from which the subdivision is made is therefore normally one whole continuous piece no part of which is separated from the rest by intervening land belonging to another. 52 OAG 411 (1963). The combination of two separate lots, parcels or tracts of land as suggested by your question would not conform to this statutory concept. The obvious intent of the statute is to provide access at some point within the subdivision. This object would not be accomplished by a public access located on the mainland across the lake from the island subdivision.

“XI. Under normal compliance with Section 236.16 (3) for plats located on islands, to what depth must the public access extend?”

Accepting the possibility that the island on which the subject subdivision is located is so small that it contains no existing public

roads and that no public roads are planned in the new subdivision, the 60-foot public access must at least extend from the low to the high watermark. 52 OAG 63, 65 (1963). On islands and elsewhere where public roads exist or are part of the proposed subdivision, the 60-foot public access must extend to a point of contact with such public road system.

“XII. What is meant in Section 236.16 (3) by the word ‘wider’ as used in ‘* * * except where greater intervals and wider access is agreed upon * * *?’ ”

Your question is presumably intended to seek clarification as to the extent to which discretion may be exercised by the head of the planning function under the quoted language of sec. 236.16 (3), Stats. Since the statute has established a standard for requiring public access, i.e., 60 feet per one-half mile, it is my opinion that where an interval greater than one-half mile is agreed upon, the width of the public access must also be increased sufficient to at least maintain the same ratio between interval and width as in the statutory standard. I understand that such opinion is consistent with the past administrative interpretation of this statutory provision by your department.

RWW:JCM

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POLICE

- Traffic Officers—A state traffic patrol officer should not except in extreme emergencies be impressed for service as part of a pursuant to sec. 59.24 (1), Stats. Where duly impressed he is entitled to workmen's compensation, if injured, from the county or municipality but would not be entitled to regular pay from the state and probably would not be entitled to workmen's compensation from the state. ----- 38

POLICE

- Witness Fees—Where it is duty of county traffic officer to prosecute or assist in prosecution of county traffic offense he is not entitled to witness fees but may be paid additional compensation where duty takes place outside regular working hours. ----- 93

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REGIONAL PLANNING

- Commission—Appointments to regional planning commissions on behalf of a county, under sec. 66.945 (3) (b), Stats., are made by the county board, unless the county has a county executive or a county administrator in which event such appointments are made by that county officer, under the authority set forth in either sec. 59.032 (2) (c) or sec. 59.033 (2) (c), Stats. ----- 197

REGIONAL PLANNING

- Commission—Representation provisions of sec. 66.945 (3), Stats., do not violate the equal protection clause.----- 136

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REGISTER IN PROBATE

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- Public Administrators—are public officials and, therefore, includible as “employees” under the Federal-State Social Security coverage agreement. Public administrators may be properly excluded by act of the legislature from future coverage under the Wisconsin Retirement Fund and State Group Life Insurance. ----- 20

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SALARIES AND WAGES

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SCHOOLS AND SCHOOL DISTRICTS

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TAXATION

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TAXATION

- Real Estate—Section 77.27, Stats., is violated when value is intentionally falsified on a Wisconsin Real Estate Transfer Return. Falsely declaring a transfer as a sale when it is in fact a gift does not constitute a violation of sec. 77.27, nor will it support the issuance of a false swearing complaint under sec. 946.32, Stats., but it may constitute a gift tax avoidance in violation of sec. 72.86 (6), Stats. ----- 251

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TRANSPORTATION, DEPARTMENT OF

Jurisdiction—The jurisdiction of the Secretary of Transportation with respect to control over the erection of high structures is limited by the provisions contained in sec. 114.135 (7), Stats., to those structures that either extend to a height of more than 500 feet above the ground or surface of the water within one mile of the location of the object, or a height determined by the ratio of one foot vertical to 40 feet horizontal measured from the nearest boundary of the nearest public airport in the state. If a local zoning ordinance, rule or regulation permits the erection of structures, which exceed these heights, a conflict of jurisdiction would arise and the Secretary could invoke sec. 114.135 (9), Stats., to resolve the conflict. ----- 232

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TRUST FUNDS

Public Administrators—are public officials and, therefore, includible as "employees" under the Federal-State Social Security coverage agreement. Public administrators may be properly excluded by act of the legislature from future coverage under the Wisconsin Retirement Fund and State Group Life Insurance. ----- 20

TRUST FUNDS

Student loan funds—established by gift under sec. 36.065, Stats., for the benefit of students are trust funds. ----- 109

TRUST FUNDS

- University—University cannot accept trust funds which are for unlawful purpose and expenditure of trust funds must comply with special and general laws.----- 4

UNIVERSITY

- Auditor—Classified audit fee structure may be established by University Regents using age for classification purposes.----- 1

UNIVERSITY

- under sec. 36.065, Stats., for the benefit of students are trust funds.----- 109

UNIVERSITY

- Trust Funds—University cannot accept trust funds which are for unlawful purpose and expenditure of trust funds must comply with special and general laws.----- 4

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VOCATIONAL, TECHNICAL AND ADULT EDUCATION, BOARD OF

- Removal From Office—Where statute provides that a public officer serves at pleasure but is appointed for a term, such public officer may be summarily dismissed during the term. ----- 97

VOTES AND VOTING

- Voter Assistance—An elector with dyslexia may qualify for voter assistance under the provisions of sec. 6.82(2)(a), Stats. ----- 195

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- Pesticides—When a criminal action is brought for a violation of ch. 94, Stats., prohibiting deposit of pesticides in public waters of the state, such proceeding is not barred by a civil action to recover the statutory value of fish killed by such pesticides.----- 130

WEIGHT LIMITATIONS

- Transportation Of Forest Products—Section 348.15(3)(b)2 and (5r), Stats., discussed. ----- 100

WITNESSES

Law Enforcement Officers—Where it is duty of county traffic officer to prosecute or assist in prosecution of county traffic offense he is not entitled to witness fees but may be paid additional compensation where duty takes place outside regular working hours. ----- 93

WORDS AND PHRASES

Dwelling—The intentional entering of an outbuilding without the consent of some person lawfully upon the premises whereon it is situate, under circumstances tending to create or provoke a breach of the peace, where such outbuilding is accessory to a main house and within the curtilage, is a violation of sec. 943.14, Stats., since “dwelling,” as employed therein, has its common law meaning of “the cluster of buildings in which a man with his family resides,” extending to “such outbuildings as are within the curtilage.” ----- 16

WORDS AND PHRASES

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WORDS AND PHRASES

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WORKMEN'S COMPENSATION

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WORKMEN'S COMPENSATION

Police—A state traffic patrol officer should not except in extreme emergencies be impressed for service as part of a pursuant to sec. 59.24 (1), Stats. Where duly impressed he is entitled to workmen's compensation, if injured, from the county or municipality but would not be entitled to regular pay from the state and probably would not be entitled to workmen's compensation from the state. ----- 38

WORKMEN'S COMPENSATION

- Supplemental Benefits—Payment of the “supplemental benefit” of sec. 102.44 (1), Stats., as created by ch. 148, Laws of 1971, is not precluded to former state employes by Art. IV, sec. 26, Wis. Const. The “second injury fund” is not impressed with a constructive trust which prevents its use for payment of such “supplemental benefits.”----- 69

ZONING

- Communication Towers—The jurisdiction of the Secretary of Transportation with respect to control over the erection of high structures is limited by the provisions contained in sec. 114.135 (7), Stats., to those structures that either extend to a height of more than 500 feet above the ground or surface of the water within one mile of the location of the object, or a height determined by the ratio of one foot vertical to 40 feet horizontal measured from the nearest boundary of the nearest public airport in the state. If a local zoning ordinance, rule or regulation permits the erection of structures, which exceed these heights, a conflict of jurisdiction would arise and the Secretary could invoke sec. 114.135 (9), Stats., to resolve the conflict. ----- 232

ZONING

- Counties—A town board, granted village powers under sec. 60.18 (12), Stats., is not required to petition its county board prior to adopting a town zoning ordinance. Sec. 60.74 (1) (am) and (7), Stats. However, where the county has adopted a zoning ordinance under sec. 59.97, Stats., such town zoning ordinance will not become effective and cannot be enforced unless and until the county takes positive action approving such town ordinance. ----- 139

ZONING

- County Floodplain Ordinances—County floodplain zoning ordinances may be adopted under the authority of sec. 59.971, Stats. Such ordinances will not require the approval of town boards in order to become effective within the unincorporated areas of the county. ----- 264

ZONING

- Hardship—A self-created or self-imposed hardship does not constitute an “unnecessary hardship” for which a county zoning board of adjustment may grant a variance, under the provisions of sec. 59.99 (7)(c), Stats.----- 111