

OPINIONS
OF THE
ATTORNEY GENERAL

OF THE
STATE OF WISCONSIN

VOLUME 63

January 1, 1974 through December 31, 1974

ROBERT W. WARREN
(January 1-October 8)

VICTOR A. MILLER
(October 8-November 25)

BRONSON C. LA FOLLETTE
(November 25-December 31)

ATTORNEYS GENERAL



MADISON, WISCONSIN
1974

1951

THE UNIVERSITY OF CHICAGO

DEPARTMENT OF CHEMISTRY

LABORATORY

RESEARCH REPORT

NO. 100

1951

BY

ROBERT H. COOPER



UNIVERSITY OF CHICAGO

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
STEPHENS 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. LaFOLLETTE, Madisonfrom Jan. 5, 1965, to Jan. 6, 1969
ROBERT W. WARREN, Green Bay.....from Jan. 6, 1969, to Oct. 8, 1974
VICTOR A. MILLER, Saint Nazianzfrom Oct. 8, 1974 to Nov. 25, 1974
BRONSON C. LaFOLLETTE, Madisonfrom Nov. 25, 1974 to

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DAVID J. HASE ⁵	Deputy Attorney General
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KEITH R. CLIFFORD ⁷	Executive Assistant
HOWARD J. KOOP ⁸	Executive Assistant
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THOMAS J. BALISTRERI.....	Assistant Attorney General
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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
GARY L. CARLSON*.....	Assistant Attorney General
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LEROY L. DALTON.....	Assistant Attorney General
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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
ROBERT B. McCONNELL.....	Assistant Attorney General
JAMES H. McDERMOTT.....	Assistant Attorney General
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¹Resigned October 8, 1974, to become United States Justice for the Eastern District of Wisconsin.

²Appointed October 9, 1974.

³Appointed November 25, 1974.

⁴Resigned October 9, 1974, to become United States District Attorney for the Western District of Wisconsin.

⁵Appointed November 25, 1974.

⁶Resigned October 8, 1974.

⁷Appointed October 14, 1974.

⁸Appointed December 9, 1974.

* Appointed in 1974.

** Resigned or retired in 1974.

OPINIONS

OF THE

ATTORNEY GENERAL

Volume 63

Weights And Measures; Licenses And Permits; Retail Class "B" beer and liquor licensed premises close at 1:00 a.m., Central Emergency Daylight Saving Time.

January 4, 1974.

FRANK A. MEYERS, Administrator
Department of Justice

You have asked my informal opinion regarding the effect of the congressional legislation entitled "Emergency Daylight Saving Time Energy Conservation Act of 1973" which becomes effective on January 6, 1974, and remains in effect until the last Sunday in April, 1975, on the closing hours of premises licensed for the retail sale of liquor and beer.

Sections 176.06 (3) and 66.054 (10) (a), Stats., mandate that premises in counties of less than 500,000 population for which retail Class "B" licenses have been issued must not remain open for sales between 1:00 a.m. and 8:00 a.m. (with certain exceptions not relevant

here), except during that part of each year for which the standard of time is advanced under sec. 175.095, Stats., during which period the closing hours shall be between 2:00 a.m. and 8:00 a.m.

Thus, the question posed becomes: Does the federal legislation advancing the standard of time for the entire nation have the effect of advancing the closing hours of such premises for which retail Class "B" licenses have been issued from 1:00 a.m. to 2:00 a.m. from January 6, 1974, until the last Sunday in April, 1975?

I conclude that this question should be answered in the negative.

Sections 176.06 (3) and 66.054 (10) (a), Stats., when read in conjunction with sec. 175.095, Stats., specifically indicate that the closing hours of such licensed premises will change from 1:00 a.m. to 2:00 a.m. only between the last Sunday in April and the last Sunday in October of each year.

It is my opinion that the effect of the federal bill is to change the standard of time in Wisconsin. After January 6, 1974, all time in Wisconsin will be measured by that new standard and Wisconsin will be operating on Central Emergency Daylight Saving Time.

Our Supreme Court had before it the question of the effect of a congressional change in the standard of time on local time in Wisconsin in *State v. Badolati* (1942), 241 Wis. 496, 6 N.W. 2d 220. In 1942, Congress had enacted the so-called National War-Time Bill which advanced all standard time in the nation one hour. The defendant in the case had allowed his licensed premises to remain open until 1:55 a.m. Central War-Time. He claimed that the closing hours were governed by Central Standard Time, the standard of time previously established for Wisconsin, and he had therefore remained opened only until 12:55 a.m. and had not violated the closing hours statute.

The court disagreed, stating: "It is clear to us that the State of Wisconsin has geared its time to Central Standard Time as established by Congress, and that as Congress changes Central Standard Time, our statutory standard of time also changes." (*Id.* at p. 500).

This change of the standard of time should not be construed to be an advance of our standard of time pursuant to sec. 175.095, Stats.

I therefore conclude that premises in counties of less than 500,000 population for which retail Class "B" beer licenses have been issued must remain closed between 1:00 a.m. and 8:00 a.m., Central Emergency Daylight Saving Time.

I further conclude that premises in counties of less than 500,000 population for which retail Class "B" liquor licenses have been issued must not remain open for sales between 1:00 a.m. and 8:00 a.m., Central Emergency Daylight Saving Time.

RWW:JM

Taxation; 1973 Senate Bill 36, which creates sec. 70.985, providing for a tax on all known commercially feasible low-grade iron ore reserve deposits in Wisconsin, would appear to violate the uniformity of taxation provisions of Art. VIII, sec. 1, Wis. Const., and therefore would probably be declared unconstitutional if enacted.

January 8, 1974.

THE HONORABLE, THE SENATE
Legislature

By Senate Resolution 24 you have requested my opinion on the constitutionality of 1973 Senate Bill 36.

That bill would impose an annual ten dollar per acre tax on commercially feasible low-grade iron ore reserve deposits in this state unless the owner of the deposits mined at least fifty thousand tons of crude ore during the previous calendar year. Failure to pay or late payment would result in penalty and interest under sec. 70.96 (1), Stats., and if the tax remains unpaid for three years, the ore deposit rights automatically revert to the surface owner, or if the surface owner owns the deposits, the Department of Revenue must initiate tax sales proceedings. A landowner may be relieved of tax liability by granting a ten-year option for the purchase of mineral rights to the state.

An opinion with respect to a prior proposal relative to taxing mineral rights was requested of this office in 1965. That opinion indicated that that proposed legislation, 1965 Senate Bill 334, was unconstitutional. 54 OAG 144. Although 1973 Senate Bill 36 is substantially different from that prior proposal, it appears to me that some of the same constitutional infirmities which were noted by my predecessor in 1965 Senate Bill 334 are also to be found in 1973 Senate Bill 36. While the matter is not entirely free from doubt, it is my opinion that 1973 Senate Bill 36 violates the uniformity of taxation provisions of Art. VIII, sec. 1, Wis. Const.

Article VIII, sec. 1, Wis. Const., provides, so far as relevant to this opinion:

“The rule of taxation shall be uniform ... Taxes shall be levied upon such property with such classifications as to forests and minerals including or separate or severed from the land, as the legislature shall prescribe. ...”

The first question that must be answered when considering whether or not the legislative imposition of a particular tax would violate the uniformity of taxation provisions of Art. VIII, sec. 1, is whether or not the tax in question is a property tax or an excise tax. If the tax in question is an excise tax, it would not be subject to those constitutional provisions since they apply only to direct taxes on property. *Chicago & N.W.R. Co. v. The State* (1906), 128 Wis. 553, 108 N.W. 557.

The bill under consideration designates the tax imposed by the bill as an “excise tax.” However, that designation is not conclusive. As the Supreme Court of Wisconsin has stated:

“The legislature cannot by its mere designation change the nature of the tax. Whatever the designation in the act may be, it is for the court to determine the nature and effect of the tax and uphold it or void it according as its nature and effect as determined may require.” *State ex rel. Froedtert G. & M. Co. v. Tax Comm.* (1936), 221 Wis. 225, 233, 265 N.W. 672.

Therefore, we must look beyond the designation made by the bill itself in order to determine whether the tax in question is a property tax or an excise tax.

While it is often difficult to distinguish between an excise tax and a tax on property, 51 Am. Jur., *Taxation*, secs. 30, 34, the Supreme Court of Wisconsin has laid down guidelines for making such a determination. In *Chicago & N.W.R. Co. v. The State, supra*, it defined property taxes as follows:

“... the term ‘taxes on property,’ as used in the organic law, means taxes on things tangible or intangible, as distinguished from taxation on the right to use or transfer things, or on the proceeds of business in which the use of things is essential, and that is because such meaning is the common, ordinary meaning and so the one which, nothing appearing to the contrary, it must be presumed was intended in framing the constitutional provision.” 128 Wis. at 591.

The definition of an excise tax was set forth in *State ex rel. Froedtert G. & M. Co. v. Tax Commission, supra*. There it was said that excise taxes are taxes “laid upon the manufacture, sale, or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges.” 221 Wis. at 232.

Under those definitions, the tax in question appears to be a tax on property, not an excise tax. The bill provides for a “tax of \$10 per acre on all known commercially feasible low-grade iron ore reserve deposits located within the state.” That tax is a tax on tangible things. It clearly is not a tax on the manufacture, sale, or consumption of commodities or on licenses to pursue certain occupations, or on corporate privileges. Therefore, I must conclude that the tax imposed by the proposed legislation under consideration is a property tax.

Having concluded that the tax in question is a property tax and thus subject to the uniformity of taxation provisions of Art. VIII, sec. 1, Wis. Const., I believe that the bill under consideration may violate those provisions in two ways.

First, while Art. VIII, sec. 1, authorizes the legislature to make classifications as to forest and mineral-bearing land for tax purposes, I have some doubt as to whether that constitutional provision was meant to authorize the subclassification of mineral-bearing lands that is attempted in the bill under consideration.

The bill makes several subclassifications of land bearing low-grade iron ore. First, the bill differentiates between "commercially feasible" low-grade iron ore deposits and low-grade iron ore deposits which do not fall into that classification. The tax is only imposed on the former.

The bill further establishes a sub-subclassification which stretches the constitutional concept of "classifications as to ... minerals" even further. The bill excepts from taxation that class of commercially feasible low-grade iron ore reserve deposits "owned by or leased to a person or corporation, including a wholly owned subsidiary, who extracted 50,000 or more tons of crude ore in the state during the previous calendar year." This classification goes beyond a classification based on the nature or character of the mineral or the land and looks instead to the nature or character of the owner or lessor of the property. My predecessor's comments with respect to 1965 Senate Bill 334 are equally applicable to the present legislation:

"Certainly the amendment to Art. VIII, sec. 1, empowers the legislature to make classification as to forests and minerals for tax purposes. The classification made by this bill, however, is not of forests or minerals but of the nature of the title thereto." 54 OAG 144, at 147.

There is a real question as to whether or not the provision in Art. VIII, sec. 1, Wis. Const., permitting separate classifications of minerals and mineral-bearing lands for tax purposes was meant to allow classifications based on the character of the owners of the minerals or mineral-bearing lands rather than on the character of the minerals or mineral-bearing land itself.

The subclassifications set forth in the bill under consideration seem to be stretching the exception provided for classifications of forests and minerals in Art. VIII, sec. 1, Wis. Const., beyond its intended limits. If so, then the bill under consideration would violate Art. VIII, sec. 1, Wis. Const., since any classifications of property for tax purposes not specifically sanctioned by Art. VIII, sec. 1, Wis. Const., would violate the uniformity of taxation requirements of that constitutional provision. See *Gottlieb v. Milwaukee* (1967), 33 Wis. 2d 408, 147 N.W. 2d 633. However, it is possible that the subclassifications provided by the bill may withstand judicial scrutiny as to their constitutionality in view of the presumption of

constitutionality accorded to statutes, especially tax measures. See *Simanco, Inc. v. Department of Revenue* (1973), 57 Wis. 2d 47, 203 N.W. 2d 648.

The second way in which I believe that the bill under consideration may violate the provisions of Art. VIII, sec. 1, Wis. Const., is that it imposes a tax which is not uniform.

Article VIII, sec. 1, Wis. Const., provides that "the rule of taxation shall be uniform." It further provides that the legislature may prescribe classifications as to forests and minerals. While the Supreme Court of this state has never had occasion to pass on the question, it is my opinion that the requirement of uniformity of taxation still applies within the permitted classifications. If so, then the bill under consideration violates that requirement.

Uniformity of taxation under Art. VIII, sec. 1, Wis. Const., requires that there be substantial uniformity of rate based on value. *Beals v. State* (1909), 139 Wis. 544, 557, 121 N.W. 347. The Supreme Court of Wisconsin has struck down as unconstitutional property taxes which fail to comply with that requirement. In *Plymouth v. Elsner* (1965), 28 Wis. 2d 102, 135 N.W. 2d 799, the Supreme Court was confronted with a flat tax imposed without regard to value. The municipal ordinance involved in that case imposed a tax of \$.50 per month on all residential properties having electrical service meters. The court indicated that the uniformity clause contained in Art. VIII, sec. 1, Wis. Const., required practical equality of taxation based on value. The court concluded that the tax under consideration in that case violated the constitutional requirement of uniformity because all residential properties having electrical service meters were taxed \$.50 per month regardless of value.

The tax imposed under 1973 Senate Bill 36 is \$10 per acre. It is similar to that imposed in the *Elsner* case in that it fails to take into account the value of the taxed property. Thus, the tax under consideration clearly fails to comply with the requirements of uniformity of taxation.

Therefore, if the tax imposed by 1973 Senate Bill 36 is held to be a tax on property as it clearly appears to be, and if my opinion that the rule of uniformity of taxation still applies within the classifications

prescribed by the legislature as to forests and minerals is correct, then the proposed legislation if enacted into law would be declared unconstitutional since it would violate the uniformity of taxation provision of Art. VIII, sec. 1, Wis. Const.

RWW:DJB

Schools And School Districts; Education; Because of lack of statutory authority, speech therapists may not supply services to students attending therapy sessions in parochial school buildings.

January 17, 1974.

DR. BARBARA THOMPSON, *State Superintendent*
Department of Public Instruction

In your letter of October 2, 1973, you asked my opinion on the following:

“May a school district send a speech therapist employed and supervised by such school district to a private parochial school to supply services as a speech therapist to private school students attending therapy sessions in the parochial school building?”

Unfortunately, the answer is “no.” There must be statutory authority for any such program. In my opinion, the provisions of sec. 120.12 or sec. 120.13, Stats., dealing with school board powers and duties do not provide for any such program, nor may the power to implement and operate such a program be reasonably implied from these or other sections of the statute.

In addition, you have asked whether my answer would be different where only private school students were so served in a space in a parochial school rented by the school district on a nominal basis. The answer is again “no” for the reasons stated above. In addition, such an arrangement is suspect as being in violation of the establishment clause of the First Amendment. In *Lemon v. Kurtzman* (1971), 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed. 2d 745, the United States Supreme Court held that a scheme, whereby the public school systems were

authorized to rent space from parochial schools was, under the circumstances, a fostering of "an excessive government entanglement with religion."

In addition, you have asked that my answer be considered in light of sec. 115.85 (2) (d), Stats., as created by sec. 5 of ch. 89, Laws of 1973.

Section 115.76 (3) (e), Stats., created by sec. 5 of ch. 89, Laws of 1973, provides that children with speech or language disability are children "with exceptional educational needs" and hence subject to the provisions of ch. 89. Section 115.85 (2) provides for several alternative resources where children having exceptional educational needs may be educated. Section 115.85 (2) (d) provides that after the public programs have been found inappropriate "... the school board may ... contract with a private special education service whose governing board, faculty, student body and teachings are not chosen or determined by any religious organization or for any sectarian purpose." In my opinion, the factual situation which you have related is not within the purview of this or any other section of ch. 89. In the first place, it does not appear that the public programs have been exhausted so as to make necessary the use of private programs. In addition, the school involved in your question is a parochial school and apparently does not meet the definition of the "private educational service" described in sec. 115.85 (2) (d). It is my further opinion that powers may not be implied from ch. 89 so as to permit a speech therapist to render, in a private parochial school, service to children attending such school, whether the space be rented by the public school district or not.

The rigidity of the doctrine regarding separation of church and state begins to soften and become more flexible as the service at issue moves from educational toward health and welfare. Speech therapy services, related to health as they are, might well be permissible if the legislature had seen fit to authorize them. The legislature has not taken such action.

RWW:JWC

Towns; Revisor Of Statutes; For purposes of sec. 70.67 (2), Stats., the town board is the governing body of the town.

January 21, 1974.

JAMES J. BURKE

Revisor of Statutes

Pursuant to sec. 35.20, Stats., the Revisor of Statutes supervises an edition designated "Wisconsin Town Law Forms" concerning suitable forms for use in the administration of certain laws.

The suggested form provided for use with sec. 70.67 (2), Stats., provides:

"70.67 (2) Exemption from bond.

"The town meeting of the town of _____, under s. 70.67 (2) of the statutes, hereby ordains that the treasurer of said town is exempted from giving the bond specified in said section; and

"That said town hereby obligates itself to pay (in case its treasurer fails so to do) all state and county taxes which he is required to pay to the county treasurer.

"Town of _____, County of _____.

"I, _____, as clerk of said town, do hereby certify that the foregoing is a true, correct and complete copy of an ordinance adopted at the annual town meeting held on the _____ day of _____, 19____.

[Signature of town clerk]"

You inquire whether the form should refer to the "town board" rather than the "town meeting" since sec. 70.67 (2), Stats., refers to the "governing body" of the municipality.

Section 70.67 (1) and (2), Stats., provides in material part:

"70.67 Municipal treasurer's bond; substitute for. (1) The treasurer of each town, city or village shall, unless exempted under subsection (2), execute and deliver to the county treasurer a bond, with sureties, to be approved, in case of a town

treasurer, by the chairman of the town, and in case of a city or village treasurer by the county treasurer, conditioned for the faithful performance of the duties of his office and that he will account for and pay over according to law all taxes of any kind which shall come into his hands and which he is required to pay to the county treasurer. ...

“(2) The treasurer of any municipality shall not be required to give such bond if the governing body thereof shall by ordinance obligate such municipality to pay, in case the treasurer thereof shall fail so to do, all taxes of any kind required by law to be paid by such treasurer to the county treasurer. Such governing body is authorized to so obligate such municipality. If the governing body of the municipality has adopted an ordinance as specified in this subsection, it may demand from its treasurer, in addition to the official bond required of all municipal treasurers, a fidelity or surety bond in an amount and upon such terms as may be determined by the governing body. Such bond shall run to the town or village board or the city council, as the case may be, and shall be delivered to the clerk of the municipality. A certified copy of such ordinance filed with the county treasurer shall be accepted by him in lieu of the bond required by subsection (1). Such ordinance shall remain in effect until a certified copy of its repeal shall be filed with the county clerk and the county treasurer. The official bond executed pursuant to section 19.01, required of municipal treasurers, shall extend to and include the liability incurred by any town, city or village whose governing board shall adopt and certify to the county treasurer an ordinance in accordance with this subsection.”

I am of the opinion that the form should refer to the town board as that is the day-to-day governing body, whereas the town meeting is essentially a legislative body.

This conclusion is supported by an analysis of the statute and by references to the definition of governing body in other statutes relating to towns. I find no definition of governing body in ch. 70 of the statutes. It is noted that where cities or villages are concerned, sec. 70.67 (2), Stats., in effect permits the city council or village board to exempt the treasurer from the bond requirements of sec.

70.67 (1) without referral to the electors. Towns have only those powers which are granted by statute or which are necessarily implied. These limited governing powers are divided between the town meeting, which consists of all electors in the town, and the town board. In general the town meeting exercises essentially legislative powers, within limits delegated by the legislature. The town board exercises administrative and legislative powers as delegated by the legislature and, in some cases, by the town meeting.

In *Town of Akan v. Kanable* (1963), 18 Wis. 2d 615, 119 N.W. 2d 419, it was stated that the bond under sec. 70.67 (1) runs to the county treasurer but that under sub. (2) the *town as a corporate body* may by ordinance guarantee payment, but that under this method the town has no security from defalcations of its treasurer. However, sub. (2) also authorizes an additional bond to run to the town if such town passes an ordinance obligating the town for its treasurer's defalcations. The case does not, however, determine whether the town meeting or the town board must pass such ordinance.

Section 60.48, Stats., provides that a town treasurer must give bond for the whole amount of money estimated to come into his hands during his term. The section was amended in 1971 to provide an exception that in towns where the town board is authorized to exercise village powers, the amount of such bond shall be set by the town board. I consider it noteworthy that the legislature did not provide that the amount of the bond should be set by the town meeting. It can, therefore, be argued by analogy that where the legislature provides for an exception to the bond requirement in sec. 70.67, the town board, at least in towns with village powers, is the governing body referred to. The town board also acts as the board of audit and has a duty to examine and audit the accounts of each town officer. I am of the opinion that the legislature intended that the town board have authority under sec. 70.67 (2) whether or not it has been authorized to exercise village powers.

With respect to publication of legal notices, sec. 985.01 (5), Stats., provides that:

“... ‘governing body’ [has] the meaning in s. 345.05 (1) (b) with reference to such municipality.”

Section 345.05 (1) (b), Stats., relating to civil and criminal liability, defines “governing body” as “the town board with reference to towns.”

With respect to elections, sec. 5.02 (9) (b) provides that “governing body” means the “town board.”

With respect to navigable waters, sec. 30.01 (2) provides that “governing body” of a town means “the town board.”

With respect to retirement benefits, sec. 41.02 (29) provides that “governing body” means “the town board in towns.”

With respect to promotion of industry, sec. 66.521 (2) (d) provides:

“(d) ‘Governing body’ means the board, council or other body in which the legislative powers of the municipality are vested.”

With respect to special improvement bonds, sec. 66.54 (1) (b) provides:

“(b) ‘Governing body’ means the body or board vested by statute with the power to levy special assessments for public improvements.”

With respect to regional planning commissions, sec. 66.945 (1) provides “governing body” means “the town, village or county board or the legislative body of a city.”

With respect to municipal borrowing, sec. 67.01 (3) provides in part:

“(3) ‘Governing body’ includes a town or county board, the legislative body of a city or village ...”

With respect to municipal power districts, sec. 198.01 (3) defines “governing body” to mean “in the case of any town or village, the town or village board ...”

RWW:RJV

Indigent; Public Defenders; The power to appoint counsel for an indigent defendant vested by sec. 970.02 (6), Stats., in a judge cannot be transferred to a non-stock, nonprofit corporation operating as a public defender's office.

January 21, 1974.

ROBERT P. RUSSELL, *Corporation Counsel*
Milwaukee County

You request my opinion on this question: may the duty of a judge to appoint counsel for an indigent defendant at his initial appearance be transferred to a non-judicial body, such as a public defender's office?

Such duty (and concomitant power) are conferred by the portion of sec. 970.02 (6), Stats., which reads:

“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. ...”

It is my opinion that the transfer of such duty and power (hereinafter called “power,” for purposes of brevity) cannot lawfully be effected under any circumstances, including circumstances wherein the judge in question would consent to such a transfer under a law specifically authorizing him to do so.

Your above-stated request arises out of a proposed public defender plan for Milwaukee County which would, among other things, provide in effect that a non-stock, nonprofit corporation would take over, without their consent, and without any law in existence specifically authorizing such a “take-over,” the power of Milwaukee County judges to appoint counsel for indigent defendants under the above-quoted provision of sec. 970.02 (6), Stats. Under such plan, it would be the corporation above-mentioned which would be given the responsibility to provide representation to all indigent defendants, with private counsel to be appointed by such corporation to represent the indigent defendant in any instance in which a staff attorney of such corporation was not available. Under such a system, the above-

mentioned power of Milwaukee County judges would obviously have been transferred from them to the above-described corporation.

Such a transfer of the power in question would be manifestly unlawful, in my opinion. That power now resides, by virtue of sec. 970.02 (6), Stats., in judges before whom indigent defendants make their initial appearances. It is a power exclusively theirs. For reasons set forth below, I believe it must remain so; but even if they could be stripped of such power, such a development could plainly come about only through legislation enacted by the legislature of Wisconsin, and not by virtue of mere adoption of the proposed public defender plan for Milwaukee County above mentioned. The County Board of Milwaukee County, acting to adopt such a plan, whether in concert with judges of such county or otherwise, obviously cannot erase from our statutes the power conferred on the judges of this state, including the judges of Milwaukee County, to appoint counsel for an indigent defendant upon his initial appearance, unless he waives his right to such counsel.

In my opinion, it is completely immaterial whether the Milwaukee judges assent to or oppose (as they apparently do) the transfer of the power in question by the mode above-indicated, because such transfer would be no more licit with their consent than it would be without it.

In closing this opinion, I think it advisable to state that in my judgment the power to appoint counsel for an indigent in a criminal case is a judicial power, which cannot lawfully be vested, by statute or in any other manner, in a non-judicial person or entity, as, e.g., the corporation here involved. In my opinion, the power to appoint counsel for an indigent defendant conferred upon judges under sec. 970.02 (6), Stats., is but a codification of a power inherently judicial in nature, and long recognized as such in this state. See *Carpenter v. County of Dane* (1859), 9 Wis. 249. For this reason, it is my opinion that were a statute to be enacted vesting such power in a non-judicial person or entity or permitting judges to transfer such power to such person or entity, it would be invalid as violative of Art. VII, sec. 2, Wis. Const., which provides that the judicial power of this state "shall be vested in a supreme court, circuit courts, and courts of probate," and, by legislation, in municipal courts to the extent deemed

necessary, and in "inferior courts in the several counties, cities, villages or towns ..."

RWW:JHM:RJV

Teachers Retirement Fund; Schools And School Districts; School boards have authority to contract with teachers to provide for an increment or sum in addition to the regular salary in return for the teacher choosing an early retirement option.

January 28, 1974.

*DR. BARBARA THOMPSON, State Superintendent
Department of Public Instruction*

Your predecessor requested my opinion on two questions regarding the authority of school boards to pay increased salary increments in consideration for early retirement of teachers. The questions are:

"1. Does a school board unilaterally have the authority to provide for an early retirement policy by which a teacher is given an increment or sum in addition to the regular contract amount in return for choosing an early retirement option?

"2. Would a school board be authorized in the same situation described in Question 1 when the provision for early retirement is included in the collective bargaining agreement negotiated by the board and teachers?"

Section 118.21, Stats., requires school boards to contract in writing with teachers. Such section states in part:

"118.21 Teacher contracts. (1) The school board shall contract in writing with qualified teachers. ... Such contract, in addition to fixing the teacher's wage, may provide for compensating the teacher for necessary travel expense in going to and from the school house at a rate not to exceed 6 cents per mile. ...

"(3) School boards may provide in the contracts of teachers of agricultural and homemaking courses for payment out of

school district funds for services performed outside the school district and connected with the performance of their regular teaching duties, and for travel expenses connected with such services.

“(4) School boards may give to any teacher, without deduction from his wages, the whole or part of any time spent by him in attending a teachers’ educational convention, upon the teacher’s filing with the school district clerk a certificate of attendance at the convention, signed by the person or secretary of the association conducting the convention.”

Subchapter IV of ch. 111, Stats., establishes the right of municipal employes and employers to confer and negotiate concerning “wages, hours and conditions of employment” and to reduce such negotiations to a binding contract. Subsection 111.70 (2), Stats., provides:

“(2) RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection ...”

Collective bargaining is defined in sec. 111.70 (1) (d), Stats., as:

“(d) ‘Collective bargaining’ means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employes, to meet and confer at reasonable times, in good faith, with respect to *wages, hours and conditions of employment* with the intention of reaching an agreement, or to resolve questions arising under such an agreement. ...” (Emphasis added.)

By virtue of the definitions contained in sec. 111.70 (1) (a) and (b), Stats., defining municipal employer and municipal employe, sec. 111.70, Stats., is applicable to teachers and school boards.

Though the payment contemplated in your question may not, under a strict construction of sec. 111.70 (1) (d), Stats., fit under the heading of wages, it is part of the wage structure and surely is one of the “conditions of employment.” Additionally, retirement plans are proper subjects for bargaining under sec. 111.70, Stats., within the

broad interpretation of “wages, hours and conditions of employment” referred to in *Muskego-Norway C.S.J.S.D. No. 9 v. WERB* (1967), 35 Wis. 2d 540, 151 N.W. 2d 617 and *Joint School District No. 8 v. Wisconsin E. R. Board* (1967), 37 Wis. 2d 483 155 N.W. 2d 78. The court in both of these cases held that a broad interpretation of such terms is warranted and that other sections of the statutes should, insofar as possible, harmonize with sec. 111.70, Stats.

Since, therefore, a school board has the duty under sec. 118.21, Stats., to “contract in writing with qualified teachers” and since the statutes do not prohibit bargaining for early retirement policy, the school board is not acting unilaterally in providing for an early retirement policy. The question more properly stated would ask whether a school board has the power to negotiate and enter into a contract covering the subject of early retirement provisions when dealing with the teacher (1) as an individual or (2) as a member of a bargaining unit. In my view, the school board has authority in both instances to contract regarding early retirement including giving the teacher an additional increment in return for early retirement.

The court in *Joint School District No. 8, supra*, clearly stated that there were items included in the term “wages, hours and conditions of employment” already specifically determined by statute and therefore not proper subjects of negotiation. At p. 492 the court said:

“These items determined by statute, of course, cannot be changed by negotiation. But what is left to the school boards in respect to the school calendar is subject to compulsory discussion and negotiation. As stated in *Norwalk Teachers’ Asso. v. Board of Education* (1951), 138 Conn. 269, 277, 83 Atl. 2d 482, ‘... the plaintiff may organize and bargain collectively for the pay and working conditions which it may be in the power of the board of education to grant.’”

I conclude therefore, that the court in the above case provided the precedent that the phrase “wages, hours and conditions of employment” should be broadly construed with the result that the payments contemplated should be included as a proper subject for bargaining unless prohibited by statute.

The rule is that school statutes prevail over general employe statutes in instances where both cannot be given effect or

harmonized. *Board of Education v. WERC* (1971), 52 Wis. 2d 625, 640, 191 N.W. 2d 242. Sections 118.21, 118.22 and 121.17, Stats., do not prohibit the subject payments, nor am I aware of any other section of the statute which may be construed to constitute such a prohibition. In construing the application of sec. 111.70, Stats., the Supreme Court has held (1) That in the absence of a statutory prohibition, precluding a municipality from entering into an agreement to arbitrate grievances, and having, pursuant to sec. 111.70 entered into such an agreement, a municipality was required to abide by its agreement to arbitrate grievances. *Local 1226 v. Rhinelander* (1967), 35 Wis. 2d 209, 151 N.W. 2d 30, (2) Notwithstanding certain requirements of the school calendar set by statute, what is left to the school boards in respect to such calendar was a proper subject of negotiation. *Joint School District No. 8 v. Wisconsin E. R. Board, supra*, and (3) Whether educational conventions are to be considered in-service or school days and the compensation for such days are within the definition of wages, hours and conditions of employment, *Board of Education v. WERC, supra*.

Sections 118.21 and 118.22, Stats., provide specific authority for school boards to contract with teachers as to wages, travel expenses, payment for services rendered outside the school district and payment during attendance at conventions. I find no express authorization anywhere in the statutes to make the type of payment which is the subject of your inquiry. Apparently, however, the legislature has construed "wages" as used in sec. 118.21, Stats., to include more than just the monetary payment for the teachers work. Section 121.17 (1) (c) 1, Stats., requires that the contract between the school board and the teacher contain specific provisions for leave of absence due to sickness in order to qualify the school district for state aids. Section 118.21, Stats., however, makes no reference to sick leave.

In *State ex rel. Manitowoc v. Police Pension Bd.* (1973), 56 Wis. 2d 602, 203 N.W. 2d 74, the court construed the terms "salary" and "compensation" as used in sec. 62.13, Stats. The question before the court was whether the term "monthly compensation" included insurance premiums and pension contribution made by the employer. The court stated at p. 612a:

“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.”

Conversely in the instant situation there is no indication of legislative intent to mandate a restrictive definition of the term “wages.” “Wages” is defined in Webster’s Third New International Dictionary at p. 2568 in part as:

“A pledge or payment of usu. monetary remuneration by an employer esp. for labor or services usu. according to contract and on an hourly, daily or piecework basis and often including bonuses, commissions, and amounts paid by the employer for insurance, pension, hospitalization and other benefits; ...”

There seems to be little rationale for a restrictive construction of the use of the term wages in sec. 118.21, Stats.

I, therefore, conclude on the basis of the above discussion that school boards have authority to include in contracts with teachers an increment in return for choosing early retirement. Such authority exists regardless of whether the contract is or is not the result of collective bargaining.

RWW:WMS

Weights And Measures; Licenses And Permits; Automobiles And Motor Vehicles; Section 343.30 (ln), Stats., does not apply to violations of sec. 346.57 (4) (hm), Stats., created by ch. 157, Laws of 1973.

January 29, 1974

NORMAN M. CLAPP, Secretary
Department of Transportation

Section 346.57 (4) (h), Stats., establishes speed limits as follows:

“In the absence of any other fixed limits or the posting of limits as required or authorized by law, 55 miles per hour during hours of darkness and 65 miles per hour at other times.”

Section 343.30 (1n), Stats., reads in part:

“A court shall suspend the operating privilege of a person for a period of 15 days upon such person’s conviction by the court of exceeding the speed limit as established by s. 346.57 (4) (h) or a higher speed limit established under s. 349.11 (2) (a), by 20 or more miles per hour. ...”

Thus, any person who violates the speed limits set by sec. 346.57 (4) (h), Stats., by 20 or more miles per hour is subject to a mandatory 15-day suspension of driving privileges.

However, by ch. 157, Laws of 1973, the legislature created sec. 346.57 (4) (hm), Stats., reading as follows:

“Notwithstanding par. (h), during an energy emergency, in the absence of any other fixed limits or the posting of limits as required or authorized by law, 55 miles per hour.”

This new law remains in effect until the Governor declares an end to the energy emergency or until July 1, 1975, whichever occurs first. Ch. 157, sec. 15, Laws of 1973. Subsection (h) is not repealed, but subsec. (hm) is applicable during the energy emergency.

Your question is whether a person who exceeds the speed limit set by subsec. (hm) by 20 or more miles per hour is subject to the mandatory 15-day suspension provided by sec. 343.30 (1n). It is my opinion that this question must be answered in the negative.

The effect of subsec. (h) is to permit legal speeds of 55 miles per hour at night and 65 miles per hour during the day. Since it has not been repealed, it could be enforced during the energy emergency. Traffic officers could continue to issue citations for violations thereof, and persons convicted of violating this statute by 20 or more

miles per hour would be subject to the 15-day suspension provided by sec. 343.30 (1n). However, new subsec. (hm) provides that notwithstanding subsec. (h), the legal maximum speed shall be 55 miles per hour in the absence of other fixed or posted limits. The effect of this statute is to permit maximum speeds of 55 miles per hour during the energy emergency. Thus, a speed of 60 miles per hour in the daytime, for example, is no longer permitted.

You suggest that subsec. (hm) suspends the 55/65 miles per hour limit of subsec. (h), and substitutes therefor a flat 55 miles per hour limit. I think it is more accurate to say that subsec. (hm) reduces the maximum permissible speed to 55 miles per hour. While the practical effect of this is to substitute a 55 miles per hour daytime limit for the prior 65 miles per hour daytime limit, new subsec. (hm) does not supersede subsec. (h) to such an extent that we would be justified in reading subsec. (hm) into the provisions of sec. 343.30 (1n) as a substitute for or in addition to the reference to subsec. (h) therein.

It is likely that the legislature would have made the 15-day suspension provisions of sec. 343.30 (1n) applicable to violations of subsec. (hm) if this problem had been called to their attention. However, it failed to make the statutory changes necessary to accomplish this. This appears to have been a mere oversight on its part. However, it is my opinion that it would not be proper to attempt to correct this oversight by resorting to statutory construction. The correction should instead be made by the legislature. A brief addition to either sec. 343.30 (1n), or preferably to new subsec. (hm) would accomplish this.

It should be kept in mind that we are here construing sec. 343.30 (1n), a license revocation statute. The rules governing the construction of statutes generally have been applied to the construction of statutes providing for the revocation or suspension of licenses to operate motor vehicles. 60 C.J.S., *Motor Vehicles*, sec. 164.1, p. 821; *Rogers v. Wagstaff* (Utah 1951), 232 P. 2d 766, 26 A.L.R. 2d 1316. In construing a statute, we must ascertain the legislative intention as disclosed by the language of the statute in relation to its scope, history, context, subject matter, and the object intended to be remedied or accomplished. *Scanlon v. Menasha* (1962), 16 Wis. 2d 437, 442, 114 N.W. 2d 791. Construction of any

statute consists in giving the words a meaning which renders it effectual to accomplish the purpose or fulfill the intent which it plainly discloses. *State ex rel. Mueller v. School District Board* (1932), 208 Wis. 257, 260, 242 N.W. 574. I cannot conclude that the statutes here involved plainly disclose an intention to substitute (hm) for (h) in sec. 343.30 (1n). In *Application of Duveneck* (1961), 13 Wis. 2d 88, 92, 108 N.W. 2d 113, the court said:

“... We cannot, under the guise of liberal construction, supply something that is not provided in the statute ...”

Also, in *State ex rel. Young v. Maresch* (1937), 225 Wis. 225, 237, 238, 273 N.W. 225, the court said:

“We cannot amend the statute by inserting words therein which were omitted by the revision of 1923. If there is a defect in the statute, it is not the province of this court to correct it. That must be done by the legislature. ...”

You point out that the creation of subsec. (hm), instead of the repeal and recreation of subsec. (h), was based upon a drafting consideration, rather than on an intent to exempt speeders from the mandatory suspension provisions of sec. 343.30 (1n). You also point out that the purpose of ch. 157, Laws of 1973, is to provide authority to state government to implement that national program to conserve scarce energy resources, and that mandatory suspension in cases of speeding 20 miles or more over the new 55 mile speed limit would assist in the implementation of the national program to conserve scarce energy resources. You also call attention to sec. 343.30 (1), Stats., which provides for discretionary suspension of operating privileges for any period.

It is my opinion that these considerations do not authorize us to read sec. 343.30 (1n) as if (hm) had been substituted for (h) therein. This would take legislative action. Until the legislature is able to take action to rectify this situation, it would be appropriate for the courts to consider ordering a 15-day discretionary suspension under sec. 343.30 (1), in situations where they would ordinarily be ordering a 15-day mandatory suspension under sec. 343.30 (1n).

RWW:AOH

County Judge; Elections; Legislation; Sections 489m, 490m and 561 (8), ch. 90, Laws of 1973, may provide for and implement a legislative appointment to the office of county judge contrary to the provisions of Art. VII, sec. 2 and Art. XIII, sec. 10, Wis. Const.

February 6, 1974.

KARL J. GOETHEL, *District Attorney*
Pepin County

You request my opinion concerning the constitutionality of the recent legislation enacted as part of ch. 90, Laws of 1973, which provides for the combination of Pepin and Buffalo Counties for the purpose of electing one county judge to serve both counties. The law further provides that the county judge of Buffalo County will also serve as county judge for Pepin County from July 31, 1974 (the date the present Pepin County judge must retire, as required by sec. 41.11 (3), Stats., by virtue of reaching mandatory retirement age) until the commencement of the first term of office of a judge elected for the combined counties, in January, 1978.

You advise that the term for which the current Pepin County judge was elected was to expire in January, 1975. But for the purported effect of the questioned enactments by the 1973 Legislature, an election would be held pursuant to statute in the spring of 1974 to elect a judge for Pepin County for a term of six years commencing January, 1975. See secs. 5.60 (1) and 253.06, Stats.

Sections 489m, 490m and 561 (8), ch. 90, Laws of 1973, provide as follows:

“SECTION 489m. 253.05 (1m) of the statutes is created to read:

“253.05 (1m) Pepin and Buffalo counties shall be combined into one district for the purpose of electing a county judge to serve and preside in both the county court of Pepin county and the county court of Buffalo county.

“SECTION 490m. 253.08 (3m) of the statutes is created to read:

“253.08 (3m) BUFFALO AND PEPIN COUNTY COURTS. The judge and court reporter for the Pepin and Buffalo county courts shall be reimbursed, one-half by each county, for the actual and necessary expenses incurred by them in the discharge of their judicial and reportorial duties, respectively, away from the county seat of the county of their residence but within the district specified in s. 253.05 (4).

“SECTION 561. Effective dates.

“(8) BUFFALO AND PEPIN COUNTY COURT CHANGES. The treatment of sections 253.05 (1m) and 253.08 (3m) of the statutes by this act shall take effect August 1, 1974, and the first election to fill the judgeship created by those sections shall be held at the spring election in 1977. *After August 1, 1974, and prior to the commencement of the term of the judge elected at such election, the judge of the Buffalo county court shall serve and preside in both the county court of Pepin county and the county court of Buffalo county.*” (Emphasis added.)

The manner in which these provisions of ch. 90, Laws of 1973, affect the terms of office of the Pepin and Buffalo County courts may arguably be viewed in a number of different ways. The legislation can be considered as having extended the current term of office of Pepin County judge beyond its normal termination date, in January, 1975, until January, 1978; or, it can be interpreted as providing for a termination of the term of the Pepin County judge on July 31, 1974, and the creation of a new term for that office beginning August 1, 1974, and ending in January, 1978; or the law may be treated as having created a joint Buffalo-Pepin County judgeship effective August 1, 1974. Regardless of which was intended by the legislature, however, the law appears to provide for a legislative appointment of the Buffalo County judge to another county judgeship, in the interim between the mandatory retirement of the present Pepin County judge, on July 31, 1974, and the commencement of the term of the

first judge to be elected to a joint Buffalo-Pepin County judgeship, in January, 1978. Such a legislative appointment to the office of county judge would probably be held by the courts to be contrary to the provisions of Art. VII, sec. 2 and Art. XIII, sec. 10, Wis. Const.

Article VII, sec. 2, Wis. Const., provides in part as follows:

“... *the legislature shall provide as well for the election of judges of the municipal courts as of the judges of inferior courts, by the qualified electors of the respective jurisdictions. The term of office of the judges of the said municipal and inferior courts shall not be longer than that of the judges of the circuit courts.*” (Emphasis added.)

Article XIII, sec. 10, Wis. Const., provides as follows:

“The legislature may declare the cases in which any office shall be deemed vacant, and also the manner of filling the vacancy, where no provision is made for that purpose in this constitution.”

Although county courts are created under the general authority of Art. VII, sec. 2, Wis. Const., the Constitution neither created county courts nor required the legislature to do so; as statutory courts, therefore, the legislature possesses broad powers to create, alter or abolish such courts. *State ex rel. Sachtjen v. Festge* (1964), 25 Wis. 2d 128, 143, 130 N.W. 2d 457. Likewise, “The question as to whether several counties are to be served by a single judge is a matter of legislative policy, not of constitutional mandate,” *Pamanet v. State* (1971), 49 Wis. 2d 501, 505, 182 N.W. 2d 459, and in the absence of constitutional provisions, “it is generally considered that the legislature has an inherent power to establish and change the territorial ambits of jurisdiction.” 20 Am. Jur. 2d, *Courts*, sec. 22, p. 403. However, where provisions of law have the effect of depriving the electors of a county of a free choice of candidates, they have been found to be unconstitutional. *State ex rel. Pierce v. Kundert* (1958), 4 Wis. 2d 392, 90 N.W. 2d 628.

While the prescribing of laws for the election or appointment to an office is a legislative function, that function does not include the power of making the appointment itself. *State ex rel. Dithmar v. Bunnell* (1907), 131 Wis. 198, 215, 110 N.W. 177. Likewise, the power entrusted in the legislature by Art. XIII, sec. 10, Wis. Const.,

does not include authority to declare a particular office vacant, by direct act. *State ex rel. Attorney General v. Messmore* (1861), 14 Wis. 177, 194. Therefore, it follows rather naturally that under the provisions of Art. VII, sec. 2, Wis. Const., in the absence of some proper legislative implementation of Art. XIII, sec. 10, Wis. Const., an attempt to provide for the selection of a county judge otherwise than by an election by the qualified electors of the jurisdiction to be served is void. *State ex rel. Reynolds v. Sande* (1931), 205 Wis. 495, 500, 238 N.W. 504.

The above provisions of ch. 90, Laws of 1973, were apparently intended to preclude the application of the statutes which would otherwise automatically provide for a spring 1974 judicial election to fill the office of Pepin County judge for a six-year term beginning in January, 1975. By these provisions the legislature also presumably intended to create the office of county judge for a joint Buffalo-Pepin County court district, and appoint the county judge of Buffalo County to such office. Viewed in this manner these provisions would purport to effect a termination of the office of county judge of Pepin County, as well as perhaps Buffalo County, as of August 1, 1974, and provide for what would be, in effect, a legislative appointment to the joint judicial office of doubtful constitutionality.

While it is also arguable that the legislature in enacting the subject provisions of ch. 90, Laws of 1973, may not have intended to provide for a joint Buffalo-Pepin County judgeship effective August 1, 1974, but rather may conceivably have only intended to effect either an extension of the term of the present Pepin County judge or the creation of a new term for such office as of that date, even such an interpretation presumably would not save such provisions from constitutional infirmity under Art. VII, sec. 2, Wis. Const.

While a term of office not fixed by the Constitution may be shortened, leaving the power of the electorate unimpaired to fill the office anew, if the office is to be continued, *State v. Douglas* (1870), 26 Wis. 428, 7 Am. Rep. 87, "... the continuance of a person in office by legislative interference, beyond the specific term for which he was elected or appointed, is equivalent to a new appointment to the office, and void if the office be one that the legislature cannot fill by direct appointment or election." *O'Connor v. City of Fond du Lac* (1901), 109 Wis. 253, 268, 85 N.W. 327. A county judgeship is obviously an

office which the legislature cannot fill "by direct appointment or election."

Furthermore, if the subject legislation were viewed as lengthening the present term of the Pepin County judgeship, it could also be considered as an unconstitutional extension of the current six-year term of the Pepin County judge in violation of that portion of Art. VII, sec. 2, Wis. Const., which limits the term of office of the judges of inferior courts to that of judges of the circuit courts. Since the term of office for circuit court judges is six years, the legislature obviously lacks the power to prescribe a term of office for a county court for a period longer than six years. 26 OAG 163 (1937).

It is therefore my opinion that a court might hold that the legislature lacks the power to appoint the Buffalo County judge sitting as of August 1, 1974, to also "serve and preside" as Pepin County judge, from that date until a judge elected from both counties to a joint Buffalo-Pepin County judgeship takes office in January, 1978, on the basis that such a legislative appointment violates the provisions of Art. VII, sec. 2 and Art. XIII, sec. 10, Wis. Const. However, although I express some doubt as to the constitutionality of the legislation in question, such does not relieve the public officials immediately involved from complying with such legislation until the matter has been resolved in some judicial forum.

RWW:JCM

Judges; Legislation; Supreme Court; 1971 Enrolled Joint Resolution 26 includes two propositions which may be submitted to the electors as one amendment to the Wisconsin Constitution.

February 15, 1974.

THE HONORABLE, THE ASSEMBLY
Legislature

Assembly Resolution 37 (1973) requests my opinion whether 1971 Enrolled Joint Resolution 26 proposes two amendments to Art. VII, sec. 13, Wis. Const., which would require submission to the

people in a manner so that the people could vote for or against such amendments separately.

I am of the opinion that it does not and that the propositions contained therein may be submitted to the people as one amendment.

Article XII, sec. 1, Wis. Const., sets forth the procedure for amending the Constitution. It provides, among other things, "That if more than one amendment be submitted, they shall be submitted in such manner that the people may vote for or against such amendments separately."

It is within the discretion of the legislature to submit several distinct propositions to the people "as one amendment" if they relate to the same subject, are all designed to accomplish one purpose, and will not force the electors to vote for something they disapprove of in order to approve of something they favor.

The State ex rel. Hudd v. Timme (1882), 54 Wis. 318, 336, 11 N.W. 785

State ex rel. Thomson v. Zimmerman (1953), 264 Wis. 644, 60 N.W. 2d 416

48 OAG 188, 50 OAG 65, 54 OAG 13, 58 OAG 194.

1971 Enrolled Joint Resolution 26 provides in part:

"Resolved by the senate, the assembly concurring, That article VII, section 13 of the constitution be amended to read:

~~"(Article IV) Section 13. Any judge of the supreme or circuit court may be removed from office by address of both houses of the legislature, if two thirds of all members elected to each house concur therein, but no removal shall be made by virtue of this section unless the judge complained of shall have been served with a copy of the charges against him, as the ground of address, and shall have had an opportunity of being heard in his defense. On the question of removal, the ayes and noes shall be entered on the journals. Justices of the supreme court and all judges are subject to suspension or removal for cause or for disability by the supreme court in accordance with~~

law and with procedural rules promulgated by the court. The office of the justice or judge is vacant on entry of the order for removal."

It would abolish the procedure of removal of supreme and circuit court judges by address of both houses of the legislature and would create power in the supreme court to suspend or remove *any* justice or judge for cause or disability and provide that such office is vacant upon entry of the order for removal.

The repeal of the present address provision and the creation of the new power could be accomplished by separate amendments. Both propositions, however, relate to the same subject, the removal of justices and judges, and tend to effect and carry out one general object or purpose. While separate submission could not result in absurdity or in disastrous results to the machinery of government, I am not persuaded that single submission would force electors to vote for something they disapprove in order to approve something they favor.

RWW:RJV

Nursing Homes; Nursing homes operated by religious or fraternal orders, whose policies restrict admittance thereto to members thereof, are not exempt from the provisions of sec. 146.30, Stats., and rules adopted pursuant thereto, unless they come within the provisions contained in subsec. (12m) of said statute.

February 19, 1974.

GEORGE H. HANDY, M.D., *State Health Officer*
Department of Health and Social Services

You have requested my opinion as to whether nursing homes owned or operated by religious or fraternal orders, whose policies

restrict admittance thereto to members thereof, are exempt from the provisions of sec. 146.30, Stats., and rules adopted pursuant thereto.

A review of sec. 146.30, Stats., and the department's rules adopted pursuant thereto, discloses that the only exemption concerned therewith is contained in subsec. (12m) of the aforementioned section of the statutes. It reads:

“(12m) EXCEPTION FOR CHURCHES OPPOSED TO MEDICAL TREATMENT. Nothing in this section shall be so construed as to give authority to supervise or regulate or control the remedial care or treatment of individual patients who are adherents of any well recognized church or religious denomination which subscribes to the act of healing by prayer and the principles of which are opposed to medical treatment and who are resident in any home or institution operated by a member or members, or by an association or corporation composed of members of such well recognized church or religious denomination; provided, that such home or institution admits only adherents of such church or denomination and is so designated; nor shall the existence of any of the above conditions alone militate against the licensing of such a home or institution; and provided, further, that such home or institution shall comply with all rules and regulations relating to sanitation and safety of the premises and be subject to inspection thereof. Nothing herein contained shall modify or repeal any laws, rules and regulations governing the control of communicable diseases.”

It is therefore my opinion, that unless the particular home or institution falls within the provisions contained in said subsection, nursing homes owned or operated by religious or fraternal orders, whose policies restrict admittance thereto to members thereof, are not exempt from the provisions of sec. 146.30, Stats., and rules adopted pursuant thereto.

RWW:GBS

Categorical Aids; Section 49.50 (10), Stats., sanctions the use of a self-declaration application system for the AFDC program as to economic eligibility. Other factors of eligibility must be verified through a home visit, investigation and report as required by sec. 49.19 (2), (3), Stats., before assistance may be granted.

February 19, 1974.

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

You inquire whether sec. 49.50 (10), Stats., created by ch. 90, Laws of 1973, mandates a self-declaration application method in the Aid to Families with Dependent Children (AFDC) Program.

The answer to your question is "no." Section 49.50 (10), Stats., is a general statute relating to eligibility for all of the categorical aids in ch. 49. AFDC eligibility is specifically controlled by sec. 49.19 (2), (3), Stats., which requires investigation and report. It is a well-recognized standard of statutory construction that when both a general statute and a specific statute relate to the same subject matter, the specific statute controls. *Estate of Kirsh* (1954), 269 Wis. 32, 68 N.W. 2d 435; *Estate of Zeller* (1967), 39 Wis. 2d 695, 159 N.W. 2d 599.

Section 49.50 (10), Stats., reads as follows:

"(10) ELIGIBILITY VERIFICATION. (a) Any person applying for public assistance shall provide proof of his social security number, the agency granting assistance shall verify his application declaration for assistance.

"(b) In no case shall failure to provide a social security number be grounds for denial of eligibility if eligibility for assistance otherwise exists.

"(c) The agency shall grant temporary eligibility for assistance pending verification under par. (a) if, on the basis of the self-declaration application, eligibility appears to exist."

The foregoing statute generally sanctions the use of the self-declaration applications in the categorical aid programs. As you

know, this system has been used on an experimental basis to enable a county administrating a categorical aid program to comply with a federal rule which requires that an individual must be given an opportunity to apply for assistance without delay. 45 C.F.R. sec. 206.10 (a) (1). Compliance with the federal rule has proven very difficult in large counties where there have been voluminous applications on given occasions. A more efficient system was needed to process applications in such instances. The self-declaration concept streamlined procedures by avoiding time consuming face-to-face interviews. Eligibility for a categorical aid is determined on the basis of the four corners of the application form rather than upon a full investigation. This concept has been compared to income tax auditing procedures with respect to tax refunds.

While sec. 49.50 (10), Stats., sanctions the use of the self-declaration application system, *with respect to the adult categorical aid programs, it can have but limited use in the AFDC program.* Section 49.19 (2) and (3) (a), Stats., requires more than mere ascertainment of eligibility from the four corners of the application. These sections read as follows:

“(2) A prompt investigation of the circumstances of the child shall be made (which shall include a visit to its home) before granting aid. A report upon such investigation shall be made in writing and become a part of the record in the case. Every applicant shall be promptly notified in writing of the disposition of his application. Aid shall be furnished with reasonable promptness to any eligible individual.

“(3) (a) After the investigation and report and a finding of eligibility, aid as defined in sub. (1) shall be granted by the county welfare department as the best interest of the child requires. No such aid shall be furnished any person for any period during which he is receiving old-age assistance, aid to the blind or aid to totally and permanently disabled persons.”

The foregoing statute specifically applies to the AFDC category. Section 49.50 (10), Stats., applies to all categorical aids. It is a rule of construction that where a general statutory provision is repugnant to a special provision covering the same subject, the special provision takes precedent over the general. *March v. Voorsanger* (1945), 248 Wis. 225, 21 N.W. 2d 275. Moreover, repeal by implication is not

avored. An earlier act will be considered to remain in force unless it is so manifestly inconsistent to the later act that they cannot reasonably stand together. *Pattermann v. Whitewater* (1966), 32 Wis. 2d 350, 745 N.W. 2d 705; *Jicka v. Karns* (1967), 39 Wis. 2d 676, 759 N.W. 2d 691.

From the foregoing, I conclude that sec. 49.50 (10), Stats., relating to all categorical aid programs under ch. 49, sanctions the use of the self-declaration application system for the AFDC program to a very limited extent. Economic eligibility need not be verified, but other factors of eligibility, such as number of children in the home, ages, absence of spouse, etc., must be ascertained through a home visit, investigation and report as required under sec. 49.19 (2) and (3), Stats., before assistance may be granted.

RWW:WLJ

Zoning; Foster Homes; Foster homes owned, operated or contracted for by the Department of Health and Social Services or a county agency are immune from local zoning ordinances. Foster homes owned, operated or contracted for by licensed child welfare agencies are not immune. All family operated foster homes are subject to local zoning. Municipal foster home licensing ordinances are unenforceable. Zoning ordinances utilizing definitions of "family" to restrict the number of unrelated persons who may live in a single family dwelling are of questionable constitutionality.

February 19, 1974

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

You have requested my opinion on four questions regarding a continuing conflict between municipal zoning and the authority of the Department of Health and Social Services to carry out a group foster home program.

The Children's Code, ch. 48, Stats., vests the Department of Health and Social Services (hereinafter, the Department) with extensive authority to regulate and facilitate foster care. The

Department may itself maintain foster homes pursuant to sec. 48.52, Stats., or license others to do so. Section 48.62, Stats., requires that all foster homes be licensed. A license may be obtained from the Department, a county agency, or a licensed (private) child welfare agency. But all licenses are issued pursuant to rules prescribed by the Department under sec. 48.67, Stats. Moreover, the Department may inspect for and take action against standard violations irrespective of the source of a license. Sec. 48.74, Stats.

Although the term "group foster home" does not appear in ch. 48, Stats., the Department defines such a home as a foster home for which an exception has been made pursuant to sec. 48.64 (3), Stats., with respect to the number of unrelated children that may be placed in it. Making exceptions is governed by rules promulgated pursuant to sec. 48.67, Stats. [7 Wis. Adm. Code section PW-CY 40.62 (2) (g)]

As I understand it, the group foster home program involves the Department simply making systematic exceptions for up to eight unrelated children in a single facility. Presumably, the program is designed to better utilize (i.e., place more children in) highly successful family operated and agency operated homes.

Group facilities, like foster homes generally, are of two basic types. First, there is the family group foster home in which a married couple or single person make their own home available for the care of five to eight children. The second type of facility is the agency-operated group foster home which is owned, operated or contracted for by the agency. The agency either employs married couples or single individuals to staff the home.

The purpose of foster home placement is, of course, to provide shelter and care for children in an environment that approximates a family setting. In keeping with that purpose, it is evidently essential that foster homes be located in normal residential neighborhoods. The group foster home program is being thwarted, however, by local zoning ordinances which, if applicable, restrict them to areas zoned for boarding house, hotel, or commercial use. Such areas are generally inappropriate for foster homes.

In this context, you ask the following four questions:

“1. Given the strong State Statutory Policy mandating appropriate care and rehabilitation for children to what extent may local zoning ordinances restrict the establishment of these group foster homes in particular residential use districts of counties, cities, towns, and villages?”

“2. May a municipality require a group foster home to obtain a license or use permit issued by the municipality in addition to a State license issued pursuant to Chapter 48?”

“3. Do family group foster homes and agency-operated group foster homes both come within the same category for purposes of determining the residential nature of the home and its compliance with the residential nature and characteristics of particular residential use districts?”

“4. Can the Definition of Family in zoning ordinances of counties, cities, towns, and villages, be written in such a way as to exclude group foster homes of eight or less foster children?”

Questions One and Three

It is a well-established principle that the state and its agencies are not subject to general statutes or municipal ordinances unless a statute specifically provides otherwise. *Milwaukee v. McGregor* (1909), 140 Wis. 35, 121 N.W. 642; *State v. Milwaukee* (1918), 145 Wis. 131, 129 N.W. 1101; *Fulton v. State Annuity & Inv. Board* (1931), 204 Wis. 355, 236 N.W. 120; *State ex rel. Martin v. Reis* (1939), 230 Wis. 683, 284 N.W. 580; *Kenosha v. State* (1966), 35 Wis. 2d 317, 151 N.W. 2d 36. In my opinion, the zoning enabling statutes (e.g., secs. 59.97, 60.74, and 62.23 (7), Stats.) fall within the “general statute” category of the above rule. Moreover, the zoning regulations made possible by the enabling statutes are, of course, general municipal ordinances.

In *Milwaukee v. McGregor*, *supra*, the Supreme Court held that a building being constructed by the State Board of Normal School Regents for public use was immune from the city of Milwaukee’s building code. In so holding, the court enunciated the classic sovereignty theory:

“... the people of the state, in their sovereign capacity, except as restrained by some constitutional limitation, ... is [sic] as

exempt from mere general or local laws as the king was of old in the exercise of his sovereign prerogatives ..." 140 Wis. at 37.

The court also alluded to what is sometimes called the "statutory theory" of state immunity from local police powers:

"... express authority to a state agency to do a particular thing in a particular way supersedes any local or general regulation conflicting therewith. ..." 140 Wis. at 37.

One commentator asserts that in the majority of jurisdictions, where a state agency can find authority in a statute to do a certain act, and the act results in a conflict with local zoning, the courts hold the zoning ordinances inapplicable. Wolff, *The Inapplicability Of Municipal Zoning Ordinances To Governmental Land Uses*, 19 Syr. L. Rev. 698 (1968).

In *Green County v. Monroe* (1958), 3 Wis. 2d 196, 87 N.W. 2d 827, the sole issue was whether the county was subject to city zoning ordinances in locating and constructing a county jail. The trial court relied on *McGregor, supra*, in holding the county exempt from the city's zoning ordinances. In affirming the lower court, the Supreme Court applied the following general rules:

" 'Zoning restrictions cannot apply to the state or any of its agencies vested with the right of eminent domain in the use of land for public purposes.' 8 McQuillin, *Mun. Corp.* (3d ed.), p. 43, sec. 25.15.

" 'Most of the courts to which the question has been submitted, appear to have decreed that unless a different intention is *clearly* manifested, states, municipalities, the federal government, and other public subdivisions, are *not* to be bound by the requirements of a zoning ordinance, especially where the proposed use is not within a "nuisance" classification and where the buildings are used for "governmental" and not merely for "proprietary" uses.'" [Metzenbaum, 2 *Law of Zoning* (2d ed.)]. 3 Wis. 2d 198-199.

Accordingly, the court held:

“... The general words of the statutes conferring zoning powers on cities cannot be construed to include the state, or in this instance the county, when in conflict with special statutes governing the location and construction of a county jail.” 3 Wis. 2d at 202.

Green County, supra, is cited in the 1965 revision of 8 McQuillin, *Mun. Corp.* (3rd), for the following proposition:

“Municipal zoning regulations or restrictions usually do not apply to the state or any of its subdivisions or agencies, unless the legislature has clearly manifested a contrary intent. Thus, properties and the uses thereof may be immune or exempt from the operation of municipal zoning regulations where owned or controlled by counties ...” Sec. 25.15 at 45.

In applying the general rule of state immunity from local police power to the group foster home program, I conclude that it does not extend to all group foster homes. Only facilities owned, operated or contracted for by the Department or a county agency are immune from local zoning by virtue of state immunity. Homes owned, operated or contracted for by private child welfare agencies licensed by the Department are not immune. Furthermore, all privately owned family operated homes are subject to local zoning.

A home owned, operated or contracted for by the Department or a county is, in essence, a state institution. Privately owned facilities, although subject to the licensing requirement and extensive state regulation, cannot by virtue of being licensed be considered state institutions. A license is merely a right or a permission granted by some competent authority to carry on a business or to do an act which, without such license, would be illegal. 53 C.J.S. *Licenses*, sec. 1, p. 445. Issuance of a license to private individuals allowing them to care for foster children in their home cannot be construed as a franchise or agency agreement vesting the licensee with sovereign prerogatives. See *State ex rel. Fairchild v. Wisconsin Auto Trades Assn.* (1949), 254 Wis. 398, 37 N.W. 2d 98.

It must be noted, however, that the legislature recently narrowed the scope of state immunity somewhat by amending sec. 13.48 (13), Stats., making new construction of state facilities subject to local zoning. Ch. 90, sec. 2, Laws of 1973. Consequently, local zoning

would apply to the construction of any new foster home facilities by the Department or a county agency.

Question Two

The general rule with respect to conflicts between municipal and state licensing is stated in 51 Am. Jur. 2d *Licenses And Permits*, sec. 100, at 97.

“Municipal corporations may not enact ordinances that infringe on the spirit of a state law or that are repugnant to the general policy of the state. And it has often been stated that a municipality may not forbid what the state legislature has expressly licensed, authorized, or permitted. In determining whether the provisions of a municipal ordinance conflict with the statute covering the same subject, the test is whether the ordinance prohibits an act that the statute permits, or permits an act that the statute prohibits. ...”

Further, 51 Am. Jur. 2d *Licenses And Permits*, sec. 20, p. 27, states:

“... where the state has not evidenced an intent to occupy a particular licensing field completely, inferior political units may, to some extent, enact and enforce their own legislation in the field ...”

In *Johnston v. Sheboygan* (1966), 30 Wis. 2d 179, 140 N.W. 2d 247, the issue presented was whether a local food retailing licensing ordinance was inapplicable to bakeries because bakeries were licensed by the state. The court upheld the ordinance, but noted:

“... 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.” [Citing *Milwaukee v. Childs Co.* (1928), 195 Wis. 48, 217 N.W. 703.] 30 Wis. 2d at 184.

Section 48.62, Stats., precludes municipalities from licensing foster homes. The state has completely preempted the field of foster home licensing. See *Hartford Union High School v. Hartford* (1971), 51 Wis. 2d 591, 187 N.W. 2d 849. Accordingly, I conclude that municipal foster home licensing ordinances are unenforceable. Moreover, other municipal licensing ordinances with the effect of

prohibiting group foster homes would conflict with ch. 48, and therefore would be invalid to the extent they prohibited such homes under *Johnston, supra*.

Question Four

If an ordinance speaks only in terms of restricting single family dwellings to "families," there is authority for the proposition that the term "family" alone does not necessarily imply blood relationship. *Missionaries of La Salette v. Whitefish Bay* (1954), 276 Wis. 609, 66 N.W. 2d 627. But many zoning ordinances include what I refer to as "restrictive definitions" of "family" that limit nonrelated occupancy of single family dwellings. As will be developed below, such ordinances are susceptible to constitutional attack, but it is possible that some would be upheld even though they have the effect of excluding group foster homes from certain use districts. Consequently, the unavoidable answer to this question is "yes."

The United States Supreme Court upheld local zoning as a valid exercise of a state's police power in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926), rejecting the argument that zoning restrictions constitute a deprivation of property without due process of law. The court stated, however, that zoning ordinances may not be "... clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." 272 U.S. at 395. In addition to the requirement that zoning ordinances satisfy due process as enunciated by *Euclid, supra*, they may not discriminate in violation of the equal protection clause of the Fourteenth Amendment. While some inequities may be tolerated, *Williamson v. Lee Optical Co.*, 48 U.S. 438, 75 S.Ct. 461, 90 L.Ed. 563 (1955), a law which might otherwise be upheld as a valid exercise of police power will be struck down where it classifies on the basis of impermissible criteria. *Reitman v. Mulkey*, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed. 2d 830 (1967).

Restrictive definitions of "family" for zoning purposes have been successfully attacked as being unreasonable in terms of the *Euclid* test in a number of jurisdictions. See *City of Des Plaines v. Trottnr*, 34 Ill. 2d 432, 216 N.E. 2d 116 (1966); *Gabe Collins Realty, Inc. v. City of Margate City*, 112 N.J. Super. 341, 271 A. 2d 430 (1970); *Kirsch Holding Company v. Borough of Manasquan*, 59 N.J. 241, 281 A. 2d 513 (1971). Moreover, definitions establishing the

number of unrelated persons that may live in the same dwelling have been successfully attacked as denials of equal protection (in that the number of related persons living in a single dwelling is not regulated) and, as undue infringements on such fundamental rights as freedom of association and the right to privacy. *Boraas v. Village of Belle Terre*, 476 F. 2d 806 (1973). It is important to note, however, that identical arguments have failed in different factual circumstances. *Newark v. Johnson*, 70 N.J. Super. 381, 175 A. 2d 500 (1961). [Following *Newark*, New Jersey enacted a statute exempting foster homes from local zoning.] *Palo Alto Tenants Union v. Morgan*, 321 F.Supp. 908 (N.D. Cal. 1970).

Our legislature has delegated extensive zoning authority to cities (sec. 62.23 (7), Stats.), counties (sec. 59.97, Stats.), and to towns under certain circumstances (sec. 60.74, Stats.). The delegation of authority to cities, albeit the most extensive, is substantially similar to the authority granted counties and towns. Subsection (7) of sec. 62.23 provides in part:

“(7) ZONING. (a) *Grant of power.* For the purpose of promoting health, safety, morals or the general welfare of the community, the council may by ordinance regulate and restrict ... the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes ...

“(b) *Districts.* For any and all of said purposes the council may divide the city into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this section; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration or use of buildings, structures or land ...

“(c) *Purposes in view.* Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; ... to promote health and the general welfare; ... to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. ...”

Pursuant to these provisions, many municipalities have created districts restricted to single family dwellings. Often such ordinances define "family" and/or "single family dwelling" in terms of the number of unrelated persons that may live in the same dwelling.

For such ordinances the question becomes: (1) whether there is a reasonable nexus between limiting nonrelated occupancy of single family dwellings and the zoning purposes set out in subsec. (7) of sec. 62.23, Stats.; and, (2) whether a restrictive definition of "family" is an appropriate means to carry out the zoning objective if it is reasonable.

Although the above questions can only be definitely answered by litigating specific ordinances, generally speaking, the breadth of impact of restrictive definitions of "family" suggests serious constitutional vulnerability. As stated in *Boraas, supra*:

"Even if the Belle Terre ordinance could conceivably have a legitimate zoning objective, the classification established may well be vulnerable as too sweeping, excessive and over-inclusive. See *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 281 A. 2d 513 (1971); cf. *Developments in the Law-Equal Protection*, 82 Harv. L. Rev. 1065, 1082-1087 (1969). For instance, if it were aimed at maintaining population density at the level of traditional family units, it would not limit the number of unrelated occupants to two (2) persons per one-family dwelling, which admittedly is smaller than the size of the average family. Assuming such a purpose, a more permissive ordinance would suffice. Furthermore, such an objective could be achieved more rationally and without discrimination against unrelated groups by regulation of the number of bedrooms in a dwelling structure, by restriction of the ratio of persons to bedrooms, or simply by limitation of occupancy to a single housekeeping unit." 476 F. 2d 817.

Boraas was heavily relied upon by the United States District Court for the Eastern District of Wisconsin in its recent decision of *Timberlake v. Village of Shorewood*, 369 F.Supp. 456, (No. 72-C-664 decided January 8, 1974) which held the following restrictive definition of "family" in Shorewood's zoning ordinance to be in violation of the Equal Protection Clause of the Fourteenth Amendment:

“ ‘FAMILY shall mean an individual, or 2 or more persons related by blood, marriage or legal adoption, or a group of not more than 3 persons who need not be related by blood, marriage or legal adoption, living together in a dwelling unit; *included within the definition of a family shall be children placed with a family in a dwelling unit under the provisions of Ch. 48 Wis. Stats., whereby a foster home license is issued, provided that the number of children shall not exceed 4, unless all are in the relationship to each other of brother or sister.*” (Emphasis supplied.)

As in *Boraas*, the court ruled that the definition was not supported by any rational basis consistent with traditional zoning concepts and that there are less onerous means to achieve legitimate zoning objectives.

The effect of such ordinances on privately-owned family operated foster homes presents a prime example of an overly broad means to accomplish a questionable end. But since the language and impact of such definitions vary from municipality to municipality, their propriety may only be determined by the courts on a case by case basis. Accordingly, I cannot opine that such definitions may never legitimately preclude foster homes from certain use districts.

In summary, it is my opinion that foster homes owned, operated, or contracted for by the Department or a county agency are immune from local zoning ordinances by virtue of state immunity. Privately-owned foster homes and foster homes owned, operated or contracted for by licensed child welfare agencies do not enjoy state immunity. Municipal foster home licensing ordinances are unenforceable. Zoning ordinances utilizing definitions of “family” to restrict the number of unrelated persons who may live in a single family dwelling are of questionable constitutionality.

RWW:WHW

Conflict Of Interest; Elections; Alderman and police officer husband could continue to hold offices as long as alderman does not violate sec. 946.13 (1), Stats., with respect to police officer's contract.

February 22, 1974.

BRUCE E. SCHROEDER, *District Attorney*
Kenosha County

You state that the wife of a city police officer is contemplating running for election to the city council of the same city. You further indicate that compensation of police officers in the city is agreed upon by contract between the city acting through its council and the police officers' association through collective bargaining. Whereas police officers are appointed by the Chief of Police with approval of the Police and Fire Commission, compensation is fixed by the council. Sec. 62.13 (4), (7), Stats.

You are concerned with the provisions of sec. 946.13, Stats., as they relate to the following questions:

1. May an alderman take any role in the negotiation and/or ratification of a contract with a group of municipal employes, which contract includes benefits in excess of \$2,000 per year to the alderman's spouse?
2. If the answer to question No. 1 is negative, may such alderman and her spouse continue to hold office if the alderman does not participate *in any fashion* in the negotiation and/or ratification of any agreement between the city and the police officer's bargaining unit?

Section 946.13 (1) and (3), Stats., provides:

"946.13 *Private interest in public contract prohibited.* (1)
Any public officer or public employe who does any of the following may be fined not more than \$500 or imprisoned not more than one year or both:

"(a) In his private capacity, negotiates or bids for or enters into a contract in which he has a private pecuniary interest, direct or indirect, if at the same time he is authorized or required by law to participate in his capacity as such officer or employe in the making of that contract or to perform in regard to that contract some official function requiring the exercise of discretion on his part; or

“(b) In his capacity as such officer or employe, participates in the making of a contract in which he has a private pecuniary interest, direct or indirect, or performs in regard to that contract some function requiring the exercise of discretion on his part.

“***

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

Subsection (2) contains certain exceptions not material here. One of the exceptions applies to contracts which do not exceed \$2,000, in the aggregate, a year. A police officer's contract would in nearly all cases exceed that amount.

I am of the opinion that the answer to your first question is “no.” The answer to your second question is “yes” provided, in addition, that she does not in any way act for herself in a private capacity or as her husband's agent with respect to bidding for or entering into such contract.

We are concerned with a conflict of interest rather than a compatibility of offices question. I am of the opinion that the offices of alderman and city police officer are incompatible on the basis of common law rules. In the present instance, however, the offices would be held by different persons. There is no statute which prohibits the spouse of a city officer from serving in a separate official capacity for the city. Where spouses do serve in separate offices, special care must be exercised by both to avoid violation of sec. 946.13, Stats., which prohibits certain private interests in public contracts and makes contracts entered into in violation of the statute invalid.

I affirm the analysis of the statute made in 52 OAG 367, 371 (1963). The conclusion there reached is applicable here.

A violation of sec. 946.13 (1), Stats., would result if the council member participated in making the contract, either privately as her husband's agent or publicly as a member of the council, *unless* the situation is such that she receives no benefit, direct or indirect, from her husband's earnings. The council member would violate the statute also if she were to perform in regard to the contract, either

before or after its execution, some official function requiring the exercise of discretion on her part.

RWW:RJV

Judges; Legislation; Supreme Court; Supplemental opinion OAG 9-74, published February 15, 1974.

February 27, 1974.

THE HONORABLE, THE ASSEMBLY
Legislature

Assembly Resolution 37 (1973) requested my opinion on certain questions relating to 1971 Enrolled Joint Resolution 26, hereinafter sometimes referred to as Resolution 26. I responded on February 15, 1974 (OAG 9-74), to the effect that Resolution 26 may be submitted to the people for vote as one amendment.

Further comment appears appropriate at this time in order to clarify certain matters not referred to in my February 15 opinion. While these additional comments do not materially alter my prior opinion, hopefully they will serve as further guidance to the Legislature.

The first specific question contained in Assembly Resolution 37 reads:

“Did 1971 Enrolled Joint Resolution 26 propose 2 amendments to Section 13 of Article VII, the first being the abolition of the procedure for removal of judges by address of the legislature, and the second being the creation of the power in the supreme court to suspend or remove judges for cause or disability?”

In my opinion, the 1971 Legislature proposed one amendment comprised of two propositions or amendments properly considered as one. The two propositions are (1) the abolition of removal of judges by legislative process, and (2) the creation of the authority of the court to remove or suspend judges. In other words, the language evinces an intent to substitute one method of removal for another, which, in my opinion, constitutes a single amendment.

The suggestion that 1971 Enrolled Joint Resolution 26 proposed two amendments is, in my opinion, without merit. The form and language of the Resolution does not support such an intent. To attempt to treat the Resolution as proposing two amendments, could produce unreasonable, if not absurd results, clearly not a legislative intentment. For example, if this were treated as two amendments, it could result in (1) the absence of any authority for removal of justices or judges or (2) dual authority. Neither of these results could reasonably have been intended.

The second question contained in Assembly Resolution 37 reads:

“If 1971 Enrolled Joint Resolution 26 proposed 2 amendments, may each proposed amendment be submitted to the 1973 legislature for second consideration in a separate joint resolution?”

As I have already noted, the 1971 Legislature appears to have treated Resolution 26 as a single amendment. Therefore, the 1973 Legislature may not now treat Resolution 26 differently and propose two amendments. In other words, the current Legislature must accept the package as referred to it by the previous Legislature. See Art. XII, sec. 1, Wis. Const.

Questions three and four of 1973 Assembly Resolution 37 read:

“3. If 1971 Enrolled Joint Resolution 26 proposed 2 amendments, and if both such amendments are approved by the 1973 legislature in the precise form as previously proposed, whether in a single joint resolution or in 2 separate joint resolutions, would Section 1 of Article XII require that the proposed amendments be separated into 2 ballot issues in order to allow the electorate to vote for or against such amendments separately?”

“4. If 1971 Enrolled Joint Resolution 26 proposed 2 amendments, and if one of such amendments is approved by the 1973 legislature in the precise form as proposed in 1971 Enrolled Joint Resolution 26 but the other amendment is not so approved, may the approved amendment be submitted to the electorate for ratification?”

Since the 1971 Legislature treated the two propositions as one amendment, the substitution of one method of removal for another,

the 1973 Legislature must also treat the matter as one amendment and submit it to the voters as a single amendment.

RWW:WHW

Corporations; Insurance; Commissioner of Insurance may not permit WPS, a nonprofit plan, to be organized into a stock insurance company under ch. 611. Sections 148.01 (1), 148.01 (3), 148.03, 148.03 (1), 148.03 (2), 200.26 (4), 201.045, 204.31 (3m), and 611.71 through 611.78, Stats., discussed.

March 1, 1974.

STANLEY C. DUROSE

Commissioner of Insurance

The Wisconsin Physicians Service, a division of the State Medical Society of Wisconsin, a licensed, nonprofit service plan, has applied to you, as Commissioner of Insurance, for permission to be reorganized into a stock insurance corporation organized under ch. 611, Stats. You have requested my opinion as to whether you may lawfully permit such a proposed reorganization.

The State Medical Society of Wisconsin (hereafter State Society) exists by virtue of sec. 148.01 (1), Stats., which provides:

“(1) The state medical society of Wisconsin is continued with the general powers of a corporation. It may from time to time adopt, alter and enforce constitution, by-laws and regulations for admission and expulsion of members, election of officers, and management.”

The Wisconsin Physicians Service (hereafter WPS) is a “nonprofit plan” which owes its existence to sec. 148.03, Stats., which provides, in part:

“148.03 Nonprofit plans for sickness care. (1) The state society, or a county society in manner approved by the state society, shall have the power to establish in the state or in any county or counties therein, a nonprofit plan or plans for the sickness care of indigents and low income groups, and others,

through contracts with public officials, and with physicians and others, and by the use of contributions, cooperative funds, and other means, ...”

“(2) Such plans shall be governed by ss. 200.26 and 204.31 (3m) and by no other law relating to insurance unless such law is referred to in ss. 200.26 and 204.31 (3m) and no law hereafter (1969) enacted shall apply to such plans unless they are expressly designated therein or refer to such organizations as are responsible for the operation of such plans.” (Emphasis added.)

Section 204.31 (3m), Stats., deals with the construction of accident and sickness insurance policies and is not relevant here.

Section 200.26 (4), Stats., provides:

“(4) **SUBJECT TO INSURANCE LAWS FOR CERTAIN PURPOSES.** Such organizations and their agents, plans and contracts are subject to s. 201.045 relating to licensing, ch. 207 relating to unfair methods of competition and unfair or deceptive acts or practices, s. 209.04 (11) relating to agents, ch. 601 relating to the administration of the insurance laws, ch. 620 relating to investments, and to ch. 645 relating to delinquency proceedings, to the same extent and in the same manner as if such organizations were domestic insurance corporations. Such organizations are also subject to s. 201.18 (1) relating to premium reserves except that where risks are written for more than one month and the premium or fee is paid on a monthly basis, the reserve shall be computed at 50% of the monthly premium or fee received each month.”

Section 201.045, Stats., provides in part:

“This section applies to all insurers incorporated or organized under any law of this state except ch. 611, and to nonprofit service plans as defined by s. 200.26.

“***

“The commissioner shall issue to any insurer or plan subject to this section a certificate of authority authorizing it to transact the business of insurance in this state if he is satisfied that it has met all requirements of law and that its methods and practices

and the character and value of its assets will adequately safeguard the interests of its insureds and the public in this state. ...”

WPS has no independent legal existence. As its name indicates, it is merely a division of the State Society. It is merely a “plan” or activity which the legislature specifically empowered the State Society to “establish.”

The expressed purpose of the State Society in the proposed transfer of WPS to a new stock insurance corporation is to place the insurance activities of the State Society into a separate corporate entity, thereby separating such insurance function from the primary medical functions of the State Society. It is proposed that the new corporation would be licensed under sec. 201.04 (4), Stats., for the purpose of writing disability insurance. This is the statutory subsection under which commercial insurers writing the equivalent coverages of WPS' sickness care plans are licensed.

For almost 100 years the Wisconsin statutes have provided in effect that the State Society “is continued with the general powers of a corporation.” Chapter 58, sec. 1431, Revised Statutes of Wisconsin, 1878; sec. 148.01 (1), Stats. 1971.

The existence of the State Society relates back to an act of the legislature when Wisconsin was still a territory. In 1841, the territorial legislature granted the State Society a charter which provided in part: “Said estate shall be applied exclusively for the promotion of medical science.” Sec. 1, ch. 2, Bill 53, Laws of 1841. In 1849, the legislature said: “The medical society of the territory of Wisconsin is hereby continued.” Ch. 27, Laws of 1849.

At the time of the territorial legislative act and continuing until 1897 (ch. 264, Laws of 1897) the regulation of the practice of medicine was to a significant extent delegated by the legislature to the State Society and county medical societies. These societies were authorized to examine students, grant diplomas and generally set standards for the practice of medicine. During this period of time the only statutes which dealt with prohibiting the practice of medicine by unauthorized persons were statutes which prohibited fees for medical testimony unless the witness had received a diploma from some incorporated medical society or college, and prohibiting one's holding

himself out as a doctor unless he had a diploma from an incorporated medical society or college or unless he was a member of the State Society or a county society legally organized in the state.

Even in more recent decades the legislature has continued to deal with the State Society specially and favorably.

Prior to 1935 the statute applicable to the State Society was substantially sec. 148.01, Stats., which provided:

“148.01 State society. (1) The state medical society of Wisconsin is continued with the general powers of a corporation. It may from time to time adopt, alter and enforce constitution, by-laws and regulations for admission and expulsion of members, election of officers, and management.

“(2) A member expelled from a county medical society may appeal to the state society, whose decision shall be final.”

By ch. 350, Laws of 1935, a subsection (3) was added to sec. 148.01. This subsection provided:

“The state society, or a county society, in manner approved by the state society, may undertake and *coordinate all sickness care of indigents and low income groups*, through contracts with public officials, and with physicians and others, and by the use of contributions, co-operative funds and other means, provided only that free choice of physician within such contract shall be retained and that responsibility of physician to patient and all other contract and tort relationships with patients shall remain as though the dealings were direct between physician and patient.” (Emphasis added.)

Chapter 494, Laws of 1945, amended sec. 148.01 (3) so that it read:

“(3) (a) The state society, or a county society in manner approved by the state society, shall have the power to establish in the state or in any county or counties therein, a nonprofit plan or plans for the sickness care of indigents and low income groups, *and others*, through contracts with public officials, and with physicians and others, and by the use of contributions, cooperative funds, and other means, provided only that free choice of physicians within such contracts shall be retained and

that responsibility of physicians to patient and all other contract and tort relationships with patient shall remain as though the dealings were direct between physician and patient. Any person covered by or insured under such plan shall be free to choose for sickness care any medical or osteopathic physician licensed to practice in Wisconsin who has agreed to abide by such plan according to its terms and no such physician or osteopath shall be required to participate exclusively in any such plan.

“(b) Such plan shall be exempt from the state insurance laws except those provisions relating to nondiscriminatory rates contained in section 201.53, investments contained in section 201.25 and premium reserves contained in section 201.18 (1).”

“(c) The society shall file with the commissioner of insurance a written declaration defining the organization and structure of the proposed sickness care plan and its area of operations and shall file any amendments or changes thereto. There shall also be filed with the commissioner specimen copies of all contracts with the insured and with the participating physicians and surgeons and the form of such contracts must be approved by the commissioner.”

“(d) The provisions of section 148.01 (3) (c) shall not apply to any plan nor to any revisions thereof in existence on July 26, 1945, nor to any contracts for the care of the indigent, nor shall any provision of chapter 148 be construed to apply to any corporation, association or organization not a body corporate under said chapter.” (Emphasis added.)

Chapter 602, Laws of 1959, repealed sec. 148.01 (3) (b) to (d), renumbered sec. 148.01 (3) (a) to be 148.03 (1) and created sec. 148.03 (2) to read as follows:

“Such plans shall be governed by the provisions of s. 200.26 and by no other law relating to insurance unless such law is referred to in s. 200.26 and no law hereinafter (1959) enacted shall apply to such plans unless they are expressly designated therein or refer to such organizations as are responsible for the operation of such plans.”

Also, in ch. 602, Laws of 1959, the legislature created sec. 200.03 (18) and 200.26 which dealt with nonprofit service plans. In the

newly created section 200.26 (1) the word “organization” as used in this section is defined as meaning “any society, organization or corporation, operating a plan of sickness care as permitted by ch. 148 ...; but when any such plan is operated by any division or agency of any such society, organization or corporation then the term ‘organization’ means only such division or agency.” Also in the then newly created sec. 200.26 (9) there was a provision that “In the event of dissolution of any such organization, the distribution of its assets shall be made as provided for in ch. 181.”

Section 200.26 (9), Stats., providing for the dissolution of any such nonprofit service plan remained in the statutes until 1967 when by ch. 89, Laws of 1967, the legislature created ch. 645, the “Insurers Rehabilitation and Liquidation Act” which repealed sec. 200.26 (9) and the newly created sec. 645.02 (5) made nonprofit service plans, such as WPS, subject to ch. 645, Stats.

The State Society, however, claims that as a nonstock corporation it has all the general powers of a corporation as set forth in ch. 181, Stats. It asserts that secs. 181.04 (6) and (15), taken together, make it plain that the State Society has the power to organize another corporation and to hold its shares. Further authority for this is claimed to be found in sec. 181.49 (2), Stats., which deals with the right of a nonprofit corporation to sell, exchange, or otherwise dispose of all or substantially all of the property and assets of a corporation on such terms and conditions, and for such consideration as may be authorized. The State Society maintains that the language in sec. 148.03 (1), Stats., which empowers the State Society “to establish in the state ... a nonprofit plan or plans for ... sickness care ...” is not really a limitation upon the State Society’s corporate powers except insofar as it relates to any plan established by the State Society under that subsection, and then only to the effect that such a plan must be “nonprofit” and organized in the state. In other words, the State Society maintains that even without the existence of the enabling language in sec. 148.03 (1), Stats., it has, under its general corporate powers derived from sec. 148.01 (1), Stats., and ch. 181, Stats., the ability to organize another corporation, including a domestic stock insurance corporation under ch. 611, Stats.

That the legislature intended the State Society to have all the powers of a ch. 181 corporation is difficult to maintain in view of the

legislature's history of special legislation for the State Society. More specifically, what was the necessity of the legislature's providing, as it did in 1959, that "in the event of dissolution ... the distribution of its assets shall be made as provided for in ch. 181" if the State Society was already governed by ch. 181? Ch. 602, Laws of 1959.

As set forth above, the legislature has gone to considerable effort to enact special laws dealing with the State Society and WPS, not only with respect to conferring power but also with specific exemption from insurance regulatory law.

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 authorize them. *Village of Brown Deer v. Milwaukee* (1962), 16 Wis. 2d 206, 213, 114 N.W. 2d 493.

The legislature has seen fit to treat "nonprofit plans" differently from other insurance corporations with respect to regulating their activities and operations. Corporate reorganization is merely one of the areas in which the legislature has treated these plans differently.

This is an area of public policy which is the domain of the legislature. If this corporation is to be permitted to make a major alteration in the character and scope of such a significant aspect of its operations, then this should be done only pursuant to specific legislative authority.

It is my opinion that the statutes under consideration do not contemplate that a "nonprofit plan" such as WPS is subject to the provisions of ch. 611, or more specifically, subject to the provisions dealing with corporate reorganization found in secs. 611.71 through 611.78, Stats.

Therefore, it is my conclusion that you, as Commissioner of Insurance, may not lawfully permit WPS to be reorganized into a stock insurance company under ch. 611, Stats.

RWW:JEA

Counties; A probate registrar is an official of the county court, and secs. 256.22 and 59.40, Stats., would prohibit an attorney who serves as probate registrar from practicing law in county court.

March 1, 1974.

ROBERT W. DEAN, *County Judge*
Marathon County

You state that you have appointed a licensed and practicing attorney to serve as Probate Registrar under the provisions of sec. 865.065, Stats., created by ch. 39, Laws of 1973. He is paid on an hourly basis and handles duties as Probate Registrar at the offices of the Probate Court. You have advised him that he cannot act as attorney in any informal probate and that if a member of his firm has an informal probate, it will be necessary for him to withdraw as Probate Registrar in that matter.

You inquire whether the provisions of sec. 256.22, Stats., would prohibit him from continuing to practice law in other than informal matters in Probate Court.

I am of the opinion that such other practice would be prohibited by the provisions of sec. 256.22, Stats.

Section 256.22 (1), Stats., has been stated to be applicable to the court personnel of a probate court, including the register in probate. See 55 OAG 6 (1966). Section 865.065 (1), Stats., refers to the probate registrar as an "official of the court." In a broad sense, where the county judge does not act as probate registrar, the latter official is a clerk of the court and sec. 59.40, Stats., may apply.

Section 59.40, Stats., provides:

"Not to act as attorney. No person acting as clerk of any circuit or county court in this state shall be allowed to practice as attorney or solicitor in the court in which he is acting as clerk; nor shall he be eligible to the office of municipal justice during the time he holds the office of such clerk."

I am enclosing a copy of an opinion to County Judge M. A. Eberlein which discusses the relationship of the probate registrar to the court.

RWW:RJV

Clerk Of Courts; Section 59.42 (14), Stats., would not permit clerk of courts to temporarily invest money being held pending court appearance and trial in connection with traffic and municipal ordinance violations.

March 6, 1974.

LARRY L. JESKE, *Corporation Counsel*
Oconto County

You have requested my opinion whether the Clerk of Courts may invest money being held pending court appearance and trial in connection with traffic and municipal ordinance violations.

It is my opinion that he cannot. The funds are specifically identifiable to an account. The payor is identifiable and would be entitled to a return of the funds at the time of court appearance in most cases.

Section 59.42 (14), Stats., is a specific statute relating to the temporary investment of funds in the hands of the Clerk of Courts, was created by ch. 43, Laws of 1969, and provides:

“(14) INVESTMENT OF FUNDS NOT IDENTIFIABLE. The clerk may invest any funds paid into his office and which are being held for repayment, but which are not specifically identifiable to any account because of their necessary intermingling with related transactions. Such investments shall be made in suitably protected accounts in the same manner as a trustee would be required to invest funds held in trust, and all income that may accrue shall be paid into the county general fund.”

The language used is difficult, but it appears that it was intended to cover situations where a sum of money is deposited with the court

for custodial purposes pending determination of the right to the funds deposited or to a portion thereof. See sec. 59.89 (1), Stats., as to disposition of unclaimed funds.

Property held in connection with property settlement sales in divorce cases may in some cases qualify for investment where right to ownership has not been determined and where there are conflicting claims.

In view of secs. 59.73 (3), 59.395 (5), 59.15 (1) (b), and other statutes relating to the prompt payment of funds to the county treasurer, there would not be sizable funds available for investment by the clerk from sources other than trust funds, the ownership of which is not specifically identifiable because of their "necessary intermingling with related transactions."

RWW:RJV

Counties; Zoning; Section 59.971, Stats., authorizes counties to zone lands located within 300 feet of an artificial ditch that is navigable in fact.

March 6, 1974.

RICHARD C. KELLY, District Attorney
Juneau County

You have asked my opinion regarding the applicability of sec. 59.971, Stats., the shoreland zoning statute, to drainage ditches. Specifically, you ask:

"I. Under Section 59.971, Stats., can a county zone lands within 300 feet from a drainage ditch or to the landward side of the floodplain of the ditch, whichever distance is greater? In giving your opinion you can assume that the ditches carry enough water to be classified as navigable - i.e. capable of floating any boat, skiff or canoe of the shallowest draft used for recreational purposes.

"II. Should a distinction be drawn between navigable drainage ditches that originally were navigable streams before

ditching, navigable drainage ditches that originally were non-navigable streams before ditching and navigable drainage ditches that had no previous stream history?"

You have concluded that the first question should be answered "Yes" and the second question should be answered "No." I agree with your conclusions.

Your questions involve secs. 59.971 and 144.26, Stats., the relevant portions of which are quoted 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.

"144.26 Navigable waters protection law.

"(2) In this section, unless the context clearly requires otherwise:

"(d) 'Navigable water' or 'navigable waters' means Lake Superior, Lake Michigan, all natural inland lakes within Wisconsin and all streams, ponds, sloughs, flowages and other waters within the territorial limits of this state, including the Wisconsin portion of boundary waters, which are navigable under the laws of this state."

The facts giving rise to this request are stated by you as follows:

"The little Yellow Drainage District, which is located in Juneau County, contains a large number of drainage ditches which empty into the Yellow and Wisconsin Rivers. A few of

these ditches carry enough water to be labeled 'navigable'. Recently, a gentleman purchased real estate on such a drainage ditch and now wishes to install a septic system within 300 feet of the ditch."

Your legal analysis of the above-quoted statutes, as applied to these facts, is stated in your letter as follows:

"Are said ditches 'navigable' within the meaning of Section 146.26(2)(d)? The key words in Section 146.26(2)(d) are 'other waters'. The words 'other waters' are broad enough to include water running in a drainage ditch.

"The statute (section 146.26(2)(d)) restricts the definition to 'natural inland lakes' thereby excluding artificial inland lakes. However, the legislature did not include the word natural in listing stream, ponds, sloughs, flowages and other waters. Presumably, the legislature did not intend to exclude artificial streams, a good term to describe the drainage ditches in question, from the definition of 'navigable waters'.

"Interpreting the statute to allow counties to include navigable drainage ditches in the County Shoreland and Flood Plain Zoning is consistent with the stated purposes of the statute to further the maintenance of safe and healthful conditions and prevent and control water pollution. To accomplish these purposes, no valid distinction can be drawn between natural and artificial streams, that carry sufficient water to be classified as navigable and that drain into larger bodies of water such as the Yellow and Wisconsin Rivers."

I agree with your analysis, and find it entirely consistent with Wisconsin cases that I have analyzed.

As early as 1882, the Wisconsin Supreme Court held that artificial waterways which are connected to a navigable stream or lake would take on the same legal characteristics as a natural navigable stream:

"... Whether such is the law in all cases or not, it would seem that an artificial watercourse may be made under such circumstances as to confer all such rights as a riparian owner would have had in the case of a natural stream. ..." *Weatherby v. Meiklejohn, et al.* (1882), 56 Wis. 73, 77, 13 N.W. 697.

The court held similarly in *Lathrop v. Racine* (1903), 119 Wis. 461, 466, 97 N.W. 192. In 55 OAG 61, my predecessor stated the opinion that the state's duty to preserve the public trust in navigable waters extends to bodies of water that were artificially produced. 55 OAG at 68. And the Wisconsin Supreme Court recently held that the legislature, in enacting secs. 59.971 and 144.26, Stats., was carrying out its duties under the public trust in navigable waters. *Just v. Marinette County* (1972), 56 Wis. 2d 7, 18, 201 N.W. 2d 761.

It is, therefore, my opinion that counties can zone lands, pursuant to sec. 59.971, Stats., within 300 feet of a drainage ditch that is navigable under the laws of the State of Wisconsin. A drainage ditch that carries enough water to float a boat, skiff or canoe of the shallowest draft used for recreational purposes would be navigable under Wisconsin law. *Diana Shooting Club v. Husting* (1914), 156 Wis. 261, 271, 145 N.W. 816.

RWW:SMS

Contracts; The Department of Transportation may make a reevaluation of a bidder's prior qualification or reject the lowest bid on the ground of irresponsibility of the successful bidder, but, in both instances, notice and an opportunity for hearing on such reevaluation must be given to the contractor.

March 14, 1974.

NORMAN M. CLAPP, *Secretary*
Department of Transportation

You have requested my opinion on the following question:

“... whether the Department of Transportation has authority under its standard specifications and the law to disqualify firms and individuals as bidders and subcontractors prior to conviction on bid rigging and similar charges under Section 133.01 (1) and (3), Stats., or the Sherman Act, 15 U.S.C. 1.”

You note in your letter that sec. 102.12 of the Standard Specifications of the Division of Highways, provides, in part:

“Developments subsequent to establishment of bidder’s competency and qualifications which, in the opinion of the Division of Highways would reasonably be construed as affecting the responsibility of the bidder.”

Apparently, the firms in question have for a considerable period of time been recognized by your department as being competent and responsible. Accordingly, action at this time can perhaps be best described as a reevaluation of their prior prequalification. In other words, if your department were to take action at this time, such action would be tantamount to a revocation of their qualification on the ground of lack of integrity.

The answer to your question is yes, but only after a hearing and provided there is an appropriate finding supporting such action.

Under sec. 84.06, Stats., the Commission is required to award contracts to the “lowest competent and responsible bidder as determined by the highway commission.”

Such words as “competent” and “responsible” are generally construed to include consideration of honesty and integrity. In 10 *McQuillin Mun. Corp.*, sec. 29.73, it is stated in part:

“... “The lowest responsible bidder” ... must be held to imply skill, judgment and integrity necessary to the faithful performance of the contract, as well as sufficient financial resources and ability.’ So, too, if the material required is such that the bidder has no right to its use on account of it being patented, his bid may be rejected under a requirement to let the contract to the ‘lowest responsible’ bidder.

“Concerning the inquiry, how the responsibility is to be determined, ‘the authorities speak with practically one voice,’ namely, that the officers in whom the power is vested ‘must determine the fact, and such determination cannot be set aside unless the action of the tribunal is arbitrary, oppressive or fraudulent. The determination of the question of who is the lowest responsible bidder does not rest in the exercise of an arbitrary and unlimited discretion, but upon a bona fide judgment, based upon facts tending to support the determination.’ This view has in general been supported by the authorities. The determination of the municipal officials

concerning the lowest responsible bidder will not be disturbed by the courts, unless it is an arbitrary, unreasonable misuse of discretion. When the officers have exercised their discretion in the award of the contract, the presumption obtains that such action was regular and lawful, and such presumption can be overcome only by proof that the officers acted without justification or fraudulently.”

Although it is implicit within the context of your letter that you do not intend to base any such consideration on the mere fact of indictment alone, it nevertheless seems appropriate to briefly discuss the fact of indictment in relation to the question of “responsible” bidder.

An indictment is nothing more than an accusation of wrongdoing. *State v. Lawler* (1936), 221 Wis. 423, 267 N.W. 65. An indictment returned by a grand jury does not change the presumption of innocence. *State v. Lawler, supra*, at p. 430. It would clearly be inappropriate for a state agency to disqualify a bidder on the ground of being under indictment. The state agency must make a finding that is supported by independent evidence that the bidder lacks responsibility and integrity.

The determination of responsibility or lack of responsibility by the Commission, under the particular circumstance of the present situation, must be by hearing.

The Fourteenth Amendment of the United States Constitution provides in part:

“... nor shall any State deprive any person of life, liberty or property, without due process of law; ...”

Falling within the protection of the “due process clause” are such matters as: the right to engage in any of the common occupations of life, *Larkin v. Bruce* (E.D. Wis. 1972), 352 F. Supp. 1077; the right to receive statutory welfare benefits, *Goldbert v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (1970); discharge from public employment, *Slochower v. Board of Education*, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1955); and the right to one’s standing in the community or his reputation, *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972).

By analogy, many of the above protected rights are involved in the present situation. For example, disqualification would certainly affect reputation and place severe restrictions on the right to engage in an occupation.

Accordingly, I am of the opinion that consideration of disqualification at this time on the ground of lack of responsibility would, under the due process clause of the United States Constitution, require a hearing. This opinion is consistent with somewhat recent decisions which considered the awarding of contracts to one other than the lowest bidder.

In *Housing Authority of Opelousas, La. v. Pittman Const. Co.* (5th Cir., 1959), 264 F. 2d 695, the court stated at pp. 703 and 704:

“This case can be sliced down to the Board’s deciding that the low bidder was not a responsible bidder—without giving the low bidder a fair chance to disprove the charges or irresponsibility. By any reasonable standards, such action offends one’s sense of fair play and is an arbitrary abuse of discretion inconsistent with the letter and the spirit of the Louisiana Public Works Law.”

“In arriving at our conclusions we are not unmindful of the limitations inherent in administrative action of a public body. The members of the Board of the Opelousas Housing Authority are laymen. We do not expect such a Board to conduct FBI investigations, hold elaborate hearings, adhere to legal rules of evidence, and function as a judicial body. Members of public boards, however, have as well developed bumps of fairness and reasonableness as judges. In the light of what fair-minded, reasonable laymen would do, we think that before a Board disqualifies the lowest bidder as not responsible, the lowest bidder has the right to be heard and the Board has the duty to listen on the subject of responsibility. In this case the Board’s failure to recognize the bidder’s right to be heard prior to Board action on the charges presented at the June 6 meeting and the Board’s failure to listen when it was given an opportunity to listen were an abuse of discretion.”

In *City of Inglewood-L.A. Cty. Civ. Ctr. A. v. Superior Ct.* (1972), 500 P. 2d 601, 103 Cal. Rptr. 689, the court, at p. 607, stated:

“We hold that prior to awarding a public works contract to other than the lowest bidder, a public body must notify the low monetary bidder of any evidence reflecting upon his responsibility received from others or adduced as a result of independent investigation, afford him an opportunity to rebut such adverse evidence, and permit him to present evidence that he is qualified to perform the contract. We do not believe, however, that due process compels a quasi-judicial proceeding prior to rejection of the low monetary bidder as a nonresponsible bidder.”

Also, see *Sellitto v. Cedar Grove Tp.* (1944), 132 N.J.L. 29, 38 A. 2d 185; *M. A. Stephen Const. Co. v. Borough of Rumson* (1971), 117 N.J. Super. 431, 285 A. 2d 55.

I find little relevant distinction between disqualification of a prospective bidder on the ground of lack of honesty and rejection of the lowest bid or successful bidder on the same ground. Accordingly, I have not attempted to discuss any such elusive distinctions. The net result in either case is the same, damage to reputation and severe restriction on the right to engage in an occupation.

The Department of Transportation, under sec. 84.06, Stats., and its own bidding specifications may and perhaps should make a reevaluation of the responsibility of the firms in question. Such reevaluation would, however, require a hearing or an opportunity for a hearing.

RWW:CAB

Pollution; The definition of “air quality” contained in State Amendment 2 to 1973 Senate Bill 40 is adequate to comply with the federal Clean Air Act of 1970 (P.L. 91-604) as recently construed in federal court decisions.

The definition of “existing ambient air quality” as it is contained in Senate Amendment 2 to 1973 Senate Bill 40 may be in conflict

with any base line reference date for existing air quality which may be adopted under the Clean Air Act of 1970 as recently construed in federal court decisions.

March 26, 1974.

WILLIAM P. NUGENT, *Chief Clerk*
Senate

You have forwarded to me 1973 Senate Resolution No. 25, requesting my opinion on Senate Amendment 2 to 1973 Senate Bill 40. The resolution recites that:

“Whereas, the 1970 clean air act (P.L. 91-604) pertains in part to national air quality standards; and

“Whereas, the environmental protection agency is apparently prohibited from approving any state air pollution plan that would allow a lower standard of air purity in any area than presently exists there; and

“Whereas, the senate will soon consider state amendment 2 to 1973 senate bill 40 which would define and apply the phrases ‘air quality’ and ‘existing ambient air quality’ in the context of a state air pollution plan; and

“Whereas, it is not known whether senate amendment 2 to 1973 senate bill 40 would comply with the mandates of the federal clean air act (P.L. 91-604) in light of the June 11, 1973, per curiam decision by the U.S. supreme court in the case of *Robert W. Fri, petitioner, v. Sierra Club*, which affirmed a lower court holding that state air pollution plans must now allow a lower standard of purity in any area than presently exists there. ...”

and asks the following questions:

“1. Are the definitions and applications of the phrases ‘air quality’ and ‘existing ambient air quality’ adequate to comply with the federal clean air act (P.L. 91-604) as recently construed in federal court decisions?

“2. Can the definitions and applications of the phrases ‘air quality’ and ‘existing ambient air quality’ be stated in any other

way to better ensure compliance with the federal clean air act (P.L. 91-604)?"

The United States Supreme Court, in the above-mentioned decision, affirmed on a four-to-four vote the decision in *Sierra Club v. Ruckelshaus* (D.C. D.C. 1972), 344 F. Supp. 253, 4 ERC 1205. That case held that the federal Clean Air Act of 1970, P.L. 91-604, 42 U.S.C. 1857, *et seq.* (hereinafter referred to as "Clean Air Act"), prohibits states from submitting air pollution control implementation plans pursuant to sec. 110 of the Clean Air Act which allow degradation of existing clean air areas. It appears that the decision in *Sierra Club v. Ruckelshaus, supra*, constitutes the law as it exists and will exist in the near future.

1973 Senate Bill 40 would grant certain additional authority to the Department of Natural Resources to aid the Department in carrying out its basic air pollution regulation functions under secs. 144.30 to 144.42, Stats., and 144.54, Stats. Senate Amendment 2 to Senate Bill 40 would create several additional sections defining "air quality" and "existing ambient air quality," prohibiting the degradation of existing ambient air quality by the operation of an air contaminant source, and also prohibiting construction of any sources which would degrade existing ambient air quality.

The Clean Air Act of 1970 requires the Federal Environmental Protection Administration to establish certain nationwide air quality standards and to enforce the same. The Act intends, however, that such standards be enforced by the states themselves under approved implementation plans. Such plans may be a combination of express statutory provisions and administrative rule provisions adopted pursuant to statutory authority, as is the implementation plan in Wisconsin. Senate Amendment 2 would have the effect of amending the existing statutory provisions to prohibit the construction or operation of air contaminant sources which would degrade existing ambient air quality. As such, the amendment appears to be consistent with the holding in *Sierra Club v. Ruckelshaus, supra*, which prohibits state implementation plans from permitting degradation of existing clean air areas.

Your question, however, relates more directly to the definitions of two phrases as they appear within Senate Substitute Amendment 2. Your question can only be answered by comparing existing federal

laws, and federal regulations adopted pursuant thereto, to determine if there is any inconsistency between the proposed definitions and any definitions that may be contained in the federal laws and regulations.

The phrase "air quality" is defined in Senate Amendment 2 as follows:

"... 'air quality' means scientifically determined and expressed ranges of air conditions ranging from greater to lesser air purity which may be expressed in terms of physical qualities, concentration and duration of contamination and which take into account individual contaminants, the cumulative effect of individual contaminants, atmospheric conditions, geographic location and all other facts bearing on the quality of a given ambient air mass."

I have examined the applicable federal Clean Air Act and regulations adopted pursuant thereto and have found no express definition of the phrase "air quality." However, the phrase is defined by implication through its use in sec. 108 of the Clean Air Act which requires the Administrator of the federal Environmental Protection Administration (EPA) to issue air quality criteria for certain pollutants which, by themselves or in combination with other factors, may affect public health or welfare. Thus, by implication, the phrase "air quality" can be said to be defined in the Clean Air Act as the presence or absence of pollutants in the air.

I can see no inconsistency between that implied definition of the phrase "air quality" and the definition of "air quality" contained in Senate Amendment 2. Although the latter definition refers expressly to particular factors bearing on air quality, such factors are also considered under the Clean Air Act and the regulations adopted pursuant thereto. The proposed state definition would be construed broadly because it uses broad generic language in a statute that is remedial in nature. Furthermore, the operative language of the definition is "scientifically determined in expressed ranges of air conditions ranging from greater to lesser air purity," which appears to be consistent with the definition that may be implied from the Clean Air Act.

The definition of "existing ambient air quality" as it appears in Senate Amendment 2 also lacks an express counterpart in the federal

Clean Air Act and regulations adopted pursuant thereto. The phrase "ambient air" contained within that definition has been defined with identical language in both state and federal regulations applicable under state law and the Clean Air Act. Section NR 154.01 (5), Wis. Adm. Code; 40 CFR, Part 50, sec. 50.1 (e), 36 FR 22384.

I do see some potential conflict between the definition of "existing ambient air quality," as it appears in Senate Amendment 2 to Senate Bill 40, and the Clean Air Act as it has been construed in the previously mentioned federal court decisions. This is because the definition contained in Senate Amendment 2 would define "existing ambient air quality" as of a date to occur after the effective date of enactment of the law. Under the federal court decisions, the prohibition against degradation of existing air quality has yet to be related to any specific date, but such a date will have to be set in order to establish a base line for carrying out the prohibition against degradation. Such base line date under the federal act could be established as far back as the date of commencement of *Sierra Club v. Ruckelshaus*, *supra*, or even as early as the date of adoption of the Clean Air Act Amendments of 1970 (P.L. 91-604). In any event, it is unlikely that the base line date for existing air quality under the federal act would be the same as that which would be required to be set under the definition contained in Senate Amendment 2 to Senate Bill 40. To the extent that they will probably differ significantly, this constitutes a clear potential conflict between the definition of "existing ambient air quality" in the proposed amendment to state law and the definition of "existing air quality" as it may be defined in cases interpreting the Clean Air Act.

Thus, your first question may be answered that the definitions and applications of the phrase "air quality" contained in Senate Amendment 2 is adequate to comply with the federal Clean Air Act as recently construed in federal court decisions, but that the definition of "existing ambient air quality" may not be adequate.

Your second question is whether said definition contained in Senate Amendment 2 to Senate Bill 40 can be stated in any other way to better insure compliance with the federal Clean Air Act. As I have previously determined that the definition of "air quality" under that amendment is adequate, it would be inappropriate for me to suggest any different language. However, with respect to the definition of

“existing ambient air quality” as it is contained in Senate Amendment 2, I would advise that the definition be altered to refer to the air quality that existed when the Department of Natural Resources developed its original implementation plan. I suggest this because portions of the implementation plan which have already been approved by the Environmental Protection Administration would presumably be adequate to support an acceptable nondegradation standard.

RWW:SMS

Counties; Zoning: County shoreland zoning of unincorporated areas adopted pursuant to sec. 59.971, Stats., is not superseded by municipal extraterritorial zoning under sec. 62.23 (7a).

Sections 59.971, 62.23 (7), 62.23 (7a) and 144.26 discussed.

Municipal extraterritorial zoning within shorelands is effective insofar as it is consistent with, or more restrictive than, the county shoreland zoning regulations.

March 27, 1974.

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

You have requested my opinion with respect to whether unincorporated lands within 300 feet of a stream or 1000 feet of a lake or flowage which is also within the extraterritorial zoning jurisdiction of cities or villages as set forth in sec. 62.23 (7a), Stats., are under the zoning jurisdiction of the county pursuant to sec. 59.971 (1), Stats., (shoreland zoning) or the adjacent city or village pursuant to sec. 62.23 (7a), Stats.

The two pertinent parts of the statutes provide as follows:

“62.23 (7a) EXTRATERRITORIAL ZONING. The governing body of any city which has created a city plan commission under sub. (1) and has adopted a zoning ordinance under sub. (7) may exercise extraterritorial zoning power as set forth in this subsection. Insofar as applicable the provisions of

sub. (7) (a), (b), (c), (ea) and (h) shall apply to extraterritorial zoning ordinances enacted under this subsection. This subsection shall also apply to the governing body of any village.

“(a) Extraterritorial zoning jurisdiction means the unincorporated area within 3 miles of the corporate limits of a first, second or third class city, or 1 1/2 miles of a fourth class city or a village. Wherever extraterritorial zoning jurisdictions overlap, the provisions of s. 66.32 shall apply and any subsequent alteration of the corporate limits of the city by annexation, detachment or consolidation proceedings shall not affect the dividing line as initially determined under s. 66.32. The governing body of the city shall specify by resolution the description of the area to be zoned within its extraterritorial zoning jurisdiction sufficiently accurate to determine its location and such area shall be contiguous to the city. ...”

“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.

“(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.

“(b) If an existing town ordinance relating to shorelands is more restrictive than an ordinance later enacted under this section affecting the same shorelands, it continues as a town ordinance in all respects to the extent of the greater restrictions, but not otherwise.

“(c) Ordinances enacted under this section shall accord and be consistent with any comprehensive zoning plan or general zoning ordinance applicable to the enacting counties, so far as practicable.

“***

“(5) An ordinance enacted under this section supersedes all provisions of an ordinance enacted under s. 59.97 that relate to shorelands.”

The legislature has expressly adopted a statewide policy that all the navigable waters of the state shall be protected from degradation through regulation of the adjacent shoreland. Sec. 144.26, Stats., (Navigable Waters Protection Law). Sections 144.26 and 59.971, Stats., set forth that policy, and contain certain provisions and procedures whereby that policy is to be carried out. The policy is to be implemented primarily through local zoning, sanitary and subdivision regulations.

The local units of government authorized to enact and administer such regulation are counties, under sec. 59.971, Stats., and cities and villages, under sec. 62.23 (7), Stats. Section 144.26 (2) (c), Stats., specifically refers to the latter two municipality categories in the statutory definition of “regulations.”

Section 62.23 (7a) is *not* mentioned in sec. 144.26, Stats. Its omission, coupled with the specific inclusion of secs. 62.23 (7) and 59.971, leads to the inference that extraterritorial zoning is not covered under the Navigable Waters Protection Act. If extraterritorial zoning were to *supersede* county shoreland zoning in areas where they both are applicable, the effect would be to make shoreland zoning inapplicable in areas up to three miles wide adjacent to incorporated cities and villages. Ordinary observation would quickly lead one to conclude that these are the very areas where shoreland regulation is more needed because of the almost universal worsening of water quality in navigable waters adjacent to urban or urbanizing areas. To exempt such areas from the public policies and regulations set forth in sec. 144.26, Stats., clearly would be contrary to the intent of the legislature, which is to protect all navigable waters of the state through either *county shoreland zoning* or *municipal zoning*. One must conclude, then, that the legislature

did not intend municipal extraterritorial zoning to *supersede* county shoreland zoning.

An examination of the structure of sec. 62.23 (7a), Stats., supports the conclusion that municipal extraterritorial zoning was not intended to supersede county shoreland zoning in areas where both are applicable. Extraterritorial zoning takes two forms under sec. 62.23 (7a):

1. Interim "freeze" zoning under sub. (b), which continues existing land uses and zoning regulations. On its face, the interim zoning would continue any county shoreland zoning then in effect rather than supersede it.

2. Permanent extraterritorial zoning under sub. (c), which requires approval of a 6-man joint committee composed of three representatives of the municipality and three representatives of the town to be zoned.

Permanent extraterritorial zoning requires the approval of one or more town representatives in the 6-man joint committee. County shoreland zoning, on the other hand, specifically eliminates the necessity of obtaining local town or town board approval before the zoning becomes effective in towns. Sec. 59.971 (2) (a), Stats. Ordinarily, county zoning does not become effective within towns until the county secures the approval of the local town board. See sec. 59.97 (5) (c), Stats. One must assume that the legislature would not have removed the requirement of town board approval if it had not determined that such an exemption was necessary for the success of a uniform statewide program of shoreland regulation and navigable waters protection. Thus, extraterritorial zoning cannot supersede county shoreland zoning in areas where applicable, because the effect would be to return control to the town under sec. 62.23 (7a), Stats., that had been expressly removed by sec. 59.971 (2) (a), Stats.

The purpose of extraterritorial zoning was discussed and approved in *Walworth County v. Elkhorn* (1965), 27 Wis. 2d 30, 37, 38, 133 N.W. 2d 257, where the court stated that:

"Our rapidly expanding population and the tendency of the greater portion of our people to live in urban areas cause most cities from time to time to extend their city limits into adjacent areas by annexation. Usually such annexations are preceded by

the building of homes in adjacent agricultural areas by persons whose employment is in the city. Many of these adjacent areas are often spoiled as future first-class residence districts because of objectionable commercial or industrial developments that have taken place in the absence of zoning. These undoubtedly are the reasons which prompted the legislature to enact sec. 62.23 (7a), Stats. We hold that this act providing for extraterritorial zoning is a reasonable and valid exercise of the police power.”

Although the purposes of these two zoning laws are distinct, they are not necessarily contradictory. The purpose of shoreland zoning is the protection of navigable waters from the dangers of uncontrolled development of shorelands; likewise, the purpose of extraterritorial zoning is to protect municipalities from the financial and social costs of uncontrolled development, and to promote planned, orderly growth. In each instance, the legislature has found it necessary to alter the ordinary balance of powers among local units of government, and to place additional power in the local unit of government deemed to have the greatest interest in achieving the public purpose. Even though the legislature has made no express provision for the situations where these two zoning jurisdictions overlap, as was done in the case of overlapping extraterritorial jurisdictions (see sec. 66.32, Stats.), the statutes must be interpreted in a manner consistent with each other, and to give effect to both if at all possible.

I have already stated that, in order to effectuate the purposes of shoreland zoning, one must conclude that the legislature did not intend municipal extraterritorial zoning to supersede county shoreland zoning in areas where they overlap. In other words, the legislature intended the counties to have the primary responsibility for protection of navigable waters through shoreland regulations in all unincorporated areas of the county. The question remains, however, whether municipalities have the power under extraterritorial zoning to adopt regulations regarding shorelands which are more restrictive than those adopted by a county under sec. 59.971, Stats.

In the *Walworth County* case, the Supreme Court decided that municipal extraterritorial zoning laws would be effective without the

consent of a county, even when the county had adopted its own zoning ordinance. *Walworth County v. Elkhorn, supra*, at pp. 34-37. The court based its decision on the finding that:

“... the framers of the bill ... probably concluded that the objective of the statute to give cities and villages some control over the haphazard development of adjacent areas might be vitiated if the final decision in the matter were to rest with county boards.” 27 Wis. 2d at p. 36.

If one were to determine that cities and villages have no jurisdiction to adopt more restrictive regulations extraterritorially within shorelands, the effect would be to nullify the legislative determination under sec. 62.23 (7a) that the county boards should not have the final control over the development of areas adjacent to incorporated municipalities. The shoreland areas that would thereby be excluded from municipal control are by their very nature, of major importance in any municipal comprehensive plan. It must be concluded, therefore, that a determination that cities and villages have no power to zone shorelands within their extraterritorial jurisdiction would be contrary to the intent of the legislature as expressed in sec. 62.23 (7a).

It is my opinion, therefore, that, in order to effectuate the equally important public purposes of secs. 59.971, 62.23 (7a) and 144.26, Stats., and to interpret these statutes in a manner consistent with each other, one must conclude that municipal extraterritorial zoning does not supersede county shoreland zoning within shorelands, but municipal extraterritorial zoning within shorelands is also effective insofar as it is consistent with, or more restrictive than, the county shoreland zoning ordinance.

RWW:SMS

Notary Public; Public Officials; Criminal Law; A convicted felon who has been restored to his civil rights, pursuant to sec. 57.078, Stats., is barred from the office of notary public, by Art. XIII, sec. 3, Wis. Const., unless he has been pardoned.

The certificate provided for by sec. 57.078 may be issued by other than the Department of Health and Social Services. The serving of the sentence is what restores the person's civil rights, and the certificate merely evinces the serving of the sentence.

March 27, 1974.

ROBERT C. ZIMMERMAN
Secretary of State

You ask opinions on three questions:

(1) If a convicted felon has served his sentence and received a certificate attesting to that fact, pursuant to sec. 57.078, Stats., is he in the same position as a convicted felon who has been pardoned by the Governor, with regard to having the good moral character required to qualify for a commission as notary public, under sec. 137.01 (1) (b) and (h), Stats.?

(2) Is the Department of Health and Social Services, Division of Corrections, the only agency with authority to issue such a certificate?

(3) Is serving the term of imprisonment adequate to restore civil rights?

Your questions will be discussed seriatim.

I.

Article XIII, sec. 3, Wis. Const., provides:

“... No person convicted of any infamous crime in any court within the United States ... shall be eligible to any office of trust, profit or honor in this state.”

The position of notary public is such an office, *Maxwell v. Hartmann* (1881), 50 Wis. 660, 664-665, 8 N.W. 103. *Becker v.*

Green County (1922), 176 Wis. 120, 124, 184 N.W. 715, held that an infamous crime, within the meaning of Art. XIII, sec. 3, means a crime punishable by imprisonment in the state prison, which includes all felonies. In view of the constitutional provision and *Becker*, it is most doubtful that the legislature could absolve one from the disqualification for public office, resulting from a felony conviction. In any event, sec. 57.078, Stats., provides no basis for a contention that the legislature intended thereby to remove the convicted felon's disqualification for public office.

Section 57.078, Stats., provides:

“Every person who is convicted of crime obtains a restoration of his civil rights by serving out his term of imprisonment or otherwise satisfying his sentence. The certificate of the department or other responsible supervising agency that a convicted person has served his sentence or otherwise satisfied the judgment against him is evidence of that fact and that he is restored to his civil rights. ...”

The statute is concerned with the restoration of “civil rights,” a term not defined in the statute. The purpose of the statute, which was enacted by ch. 477, Laws of 1947, is described in a comment by the Interim Committee, 1947, as follows:

“The reason for 57.078 is quite obvious. Its constitutionality is asserted in a brief submitted to the committee by the revisor of statutes. The brief is printed in the May 1946 issue of the *Wisconsin Law Review*, Vol 1946, page 281. (Bill 256-S)”

The brief referred to in the above quotation contains no suggestion that the committee studying the matter was concerned with more than voting rights.

The brief comments, 1946 Wis. L. Rev. 288-289:

“... The clause ‘unless restored to civil rights’ as used in the constitution is generally understood to refer to the right to vote. Sometimes, although seldom, it may be understood to refer to eligibility to public office.”

Article III, sec. 2, Wis. Const., provides that a person convicted of treason or a felony shall not be qualified to vote “unless restored to

civil rights.” In the context there, civil rights certainly need mean no more than voting rights.

The legislature has distinguished between a pardon and a restoration of civil rights. Section 176.05 (9), Stats., denies a liquor license to one convicted of a felony unless the person “has been duly pardoned.” By contrast, sec. 66.053 (1) (b), Stats., denies a nonintoxicating beverage license to a convicted felon unless he “has been restored to civil rights.”

It is my conclusion that a convicted felon who has been restored to his civil rights, pursuant to sec. 57.078, but has not been pardoned is not eligible to hold the office of notary public, whereas a gubernatorial pardon—at least one on the ground of innocence—suffices to remove the disqualification.

II.

You ask whether the Department of Health and Social Services, Division of Corrections, is the only agency having authority to issue a certificate, under sec. 57.078. The statute expressly states that the certificate may be “of the department or other responsible agency ...” Since a convicted felon while serving his sentence may be in the custody of the local sheriff, not the department, the sheriff could be the person to certify as to the sentence having been served. Also, under sec. 973.11, Stats., persons on probation from courts in Milwaukee County may be in the custody of the probation department of such courts, in which case that department could issue the certificate.

III.

Lastly, you ask whether serving the term of imprisonment is adequate to restore the convicted felon to his civil rights. That is what sec. 57.078, Stats., expressly provides, by the first sentence. I see no ambiguity in the language nor any reason to question the clear meaning. The certificate merely provides evidence that the “convicted person has served his sentence or otherwise satisfied the judgment against him ...”

RWW:EWW

Revisor Of Statutes; It is within the discretionary power of the Revisor of Statutes whether to purchase and utilize the Federal Standards found in the Federal Register and attach state printed covers thereto in lieu of completely reprinting them in the standard format of the Wisconsin Administrative Code as authorized by secs. 227.024 (7) and 35.93 (1), Stats.

March 29, 1974.

JOHN C. ZINOS, *Commissioner*
Department of Industry, Labor and Human Relations

You have asked me whether it is feasible to purchase Federal Standards contained in the Federal Register from the U.S. Government Printing Office and attach state printed covers thereto in lieu of reprinting them in the standard format of the Wisconsin Administrative Code. It is your position that this method would be more efficient, produce less bulk, create less confusion, consume less time, provide uniform standards between states and save the taxpayer's money.

The Wisconsin Administrative Code is a loose-leaf, six by nine (6"x9") inch binder form book while the Federal Register is eight and one-half by eleven (8 1/2"x11") inch soft-cover bulletin form publication.

Section 227.024, Stats., provides for the preparation of rules for filing by your agency with the Revisor of Statutes. Subsection (3) provides:

“(3) Certified copies of rules filed shall be typed or duplicated on 8 1/2 by 11 inch paper. ... Forms which are filed need not comply with the specifications of this subsection.”

Your agency will have met the statutory requirement for filing of rules with the Revisor of Statutes by filing a certified copy of its adopted rules with the Secretary of State and Revisor of Statutes. (Sec. 227.023, Stats.)

Whether a particular method of printing, binding or distribution of these rules is feasible is within the discretionary powers of the Revisor of Statutes.

Section 227.024 (7), Stats., provides:

“(7) The revisor of statutes may, in order to preserve uniformity in the administrative code, change the title or numbering of any rules. If an agency desires to secure an advance commitment as to the title or numbering of proposed rules, it shall, for that purpose, submit a copy of such rules to the revisor of statutes prior to filing. Such copy shall indicate the titles and numbering desired by the agency. As soon as possible, thereafter, the revisor of statutes shall either approve the titles and numbering suggested by the agency or indicate the changes which he considers necessary in order to preserve uniformity in the code. If the title or numbering of a rule is so revised, the revisor of statutes shall make certain that the revised version is filed with the secretary of state.

“(8) The revisor of statutes shall furnish advice and assistance with respect to the form and mechanics of rule drafting whenever requested to do so by an agency.”

Section 227.025, Stats., provides:

“All rules and other materials which agencies are directed or authorized by this chapter to file with the revisor of statutes shall be published in the Wisconsin administrative code or register in the manner prescribed by s. 35.93.”

Section 35.93 (1), Stats., provides:

“35.93 Wisconsin administrative code and register. (1) The Wisconsin administrative code and register shall be printed in loose-leaf form and shall be hole-punched. The notice section of the register and new rules filed by an agency whose rules have not been compiled and printed pursuant to this section may be duplicated in some other form than printing if the department and revisor determine that it is administratively feasible to do so. The printing or other duplicating shall be handled by the department. It shall also determine the style of the hole-

punching and may purchase and sell at cost suitable binders for the code or parts thereof. The revisor shall supervise the arrangement of materials in the Wisconsin administrative code and register, including the numbering of pages and sections. No part of the Wisconsin administrative code or register may be printed until the revisor has approved the arrangement of materials and numbering of sections therein.”

The supreme court has held that the practical construction of a law by those charged with the task of applying it is of great weight and often decisive. See *State v. Johnson* (1925), 186 Wis. 59, 202 N.W. 319; *Trczyewski v. Milwaukee* (1961), 15 Wis. 2d 236, 240, 112 N.W. 2d 725; *Transport Oil Co. v. Cummings* (1972), 54 Wis. 2d 256, 267, 195 N.W. 2d 649.

The determination of whether it is feasible to purchase and utilize the inexpensive Federal Standards found in the Federal Register for the purpose of publication in lieu of complete reprinting or duplication in the uniform format of the Wisconsin Administrative Code is within the discretion to be exercised by the Revisor of Statutes.

RWW:RGM

Automobiles And Motor Vehicles; Flashing blue lights on police vehicles are prohibited by sec. 347.07 (2) (c), Stats.

March 29, 1974.

TOM RUSBOLDT, *District Attorney*
Manitowoc County

You have asked my opinion as to the legality of the use of blue flashing lights on police vehicles.

Section 347.07 (2) (c), Stats., reads:

“(2) Except as otherwise expressly authorized or required by this chapter, no person shall operate any vehicle or equipment on a highway which has displayed thereon:

“(c) Any flashing light.”

This statute prohibits any flashing light on a vehicle unless it is expressly authorized by ch. 347, Stats. Police vehicles are “authorized emergency vehicles” as defined by sec. 340.01 (3) (a), Stats. Section 347.25 (1), Stats., reads, in part:

“An authorized emergency vehicle may be equipped with one or more flashing, oscillating or rotating red lights and shall be so equipped when the operator thereof is exercising the privileges granted by s. 346.03. ...”

This statute authorizes flashing red lights on police vehicles. There is no statute expressly authorizing blue flashing lights on such vehicles.

It is, therefore, my opinion that flashing blue lights on police vehicles are prohibited by sec. 347.07 (2) (c), Stats.

RWW:AOH

Criminal Law; Stopping payment on checks used to pay for repairs to personal property--creation of a crime. The legislature did not create a crime or invoke criminal penalties in enacting sec. 289.41 (3), Stats., which renders stopping payment on a check used to pay for certain repairs to personal property “prima facie evidence of intent to defraud.” This section could operate to establish *prima facie* evidence of only one of the elements of the crime of theft defined in sec. 943.20 (1) (d), Stats.

April 1, 1974.

DONALD R. ZUIDMULDER, *District Attorney*
Brown County

You request my opinion concerning whether the legislature created a crime by invoking a criminal penalty when it enacted sec. 289.41 (3), Stats. (ch. 333, Laws of 1971), which makes stopping payment on a check used to pay for certain repairs to personal

property “*prima facie* evidence of intent to defraud.” Section 289.41 (3), Stats., provides:

“Insofar as the possessory right and lien of the person performing labor and services under this section are released, relinquished and lost by the removal of property upon which a lien has accrued, it is *prima facie* evidence of intent to defraud if upon the removal of such property, the person removing the property issues any check or other order for the payment of money in payment of the indebtedness secured by the lien, and thereafter stops payment on the check or order. This subsection does not apply when a check is stopped because the product is improperly repaired or improperly serviced and the product has been returned to the person performing the labor or services for proper repair or service.”

You further ask whether the theft statute, sec. 943.20, Stats., provides the “operational penalty” for violation of sec. 289.41 (3), Stats., since sec. 943.20 (1) (d), Stats., also contains the phrase “intent to defraud.” Section 943.20, Stats., provides in part:

“Theft. (1) Acts. Whoever does any of the following may be penalized as provided in sub. (3):

“***

“(d) Obtains title to property of another by intentionally deceiving him with a false representation which is known to be false, made with *intent to defraud*, and which does defraud the person to whom it is made. ‘False representation’ includes a promise made with intent not to perform it if it is a part of a false and fraudulent scheme.

“***

“(3) Penalties. Penalties for violation of this section shall be as follows:

“(a) If the value of the property does not exceed \$100, a fine of not more than \$200 or imprisonment for not more than 6 months or both.

“(b) If the value of the property exceeds \$100 but not \$2,500, a fine of not more than \$5,000 or imprisonment for not more than 5 years or both.

“(c) If the value of the property exceeds \$2,500, a fine of not more than \$10,000 or imprisonment for not more than 15 years or both.” (Emphasis added.)

It is my opinion that in enacting sec. 289.41 (3), Stats., the legislature did not create a crime and invoke a criminal penalty.

What constitutes a crime under the statutes is defined by sec. 939.12, Stats.:

“A crime is conduct which is prohibited by state law and punishable by fine or imprisonment or both. Conduct punishable only by a forfeiture is not a crime.”

Under this definition, the first essential ingredient of a crime is that certain conduct must be prohibited by state law. The conduct with which sec. 289.41 (3), concerns itself is the stopping payment of a check given in payment for repairs to personal property. This conduct is not labeled criminal, but merely made evidence of “intent to defraud.” No language in this section expressly prohibits this conduct. In fact, such a prohibition would be inconsistent with another section of the statutes. Section 404.403, Stats., in the Uniform Commercial Code, specifically establishes the right of drawers of checks to stop payment on any check. The section provides in part:

“Customer’s right to stop payment; burden of proof of loss.
(1) A customer may by order to his bank stop payment of any item payable for his account ...”

Furthermore, in light of sec. 401.104, Stats., establishing a policy against implicit repeal of any part of the code by subsequent legislation, it is doubtful if sec. 289.41 (3), Stats., should be construed to extinguish the right of drawers to stop payment on certain checks. Section 401.104, Stats., provides:

“Construction against implicit repeal. This code being a general act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by

subsequent legislation if such construction can reasonably be avoided.”

Section 289.41 (3), Stats., does not, therefore, render certain conduct (i.e., stopping payment on a check or note) “prohibited by state law.”

The second essential ingredient of a crime under sec. 939.12, Stats., is that certain conduct must be “punishable by fine or imprisonment or both.” Nowhere does sec. 289.41, Stats., make any mention of fine or imprisonment. The statute is absolutely silent on this point. It could appear that either of two other statutes could supply a penalty provision for stopping payment on a check contrary to sec. 289.41 (3), Stats.: sec. 939.61, Stats., entitled “Penalty when none expressed;” or, as you suggest, the theft statute, sec. 943.20, Stats. Nevertheless, upon closer examination, neither statute appears sufficient for this purpose.

Section 939.61, Stats., provides:

“Penalty when none expressed. Common-law penalties are abolished. Whenever a person is convicted of a crime for which no penalty is expressed, he may be fined not more than \$250 or imprisoned not more than one year in county jail.”

This section would only appear to apply where certain conduct had already been statutorily designated as criminal, that is prohibited and punishable, but where no particular punishment was specified. For example, sec. 939.61, Stats., would supply the penalty provision for a statute which itself designated certain conduct to be a misdemeanor, but which failed to prescribe the specific punishment. As the Wisconsin Supreme Court said in *State ex rel. Gaynon v. Krueger* (1966), 31 Wis. 2d 609, 617, 143 N.W. 2d 437, concerning a statute of this type:

“... When the sales tax was adopted in 1961 the failure to file a return and the filing of a false return for such tax was expressly provided to constitute a misdemeanor but no penalty or place of punishment was stated. Sec. 77.60 (6), Stats. In such cases, sec. 939.61 is applicable by necessary reference. ...”

Section 939.61 would appear incapable of rendering certain activity punishable in the absence of another statutory provision clearly designating such activity to be a crime.

Similarly, it does not appear that the theft statute, sec. 943.20, Stats., can furnish the penalty provision for sec. 289.41 (3), Stats. Section 943.20 (3) prescribes penalties "for violation of this section." Section 289.41 (3) establishes *prima facie* evidence of "intent to defraud," but mere intent to defraud does not constitute a violation of any section of sec. 943.20, Stats. Under sec. 943.20 (1) (d), "intent to defraud" is one element of the crime of theft. However, a successful prosecution for violation of sec. 943.20 (1) (d) would depend upon the establishment of all the other elements of the crime specified in that subsection, including: obtaining title to the property of another, intentional deception with false representations known to be false, and actual fraud. Section 289.41 (3), Stats., does not in any way pertain to these elements; evidence of their existence in a given case would have to be independently established. Thus, the mere establishment of "intent to defraud" through operation of sec. 289.41 (3), cannot, by itself, trigger the penalty provisions of sec. 943.20, Stats.

It is apparent from the foregoing analysis, that in enacting sec. 289.41 (3), the legislature did not create a crime. This interpretation of the statute is supported by at least two other factors; the rule of strict construction of penal statutes, and the statute's legislative history.

"It is a well-known canon of construction that a criminal statute must be strictly construed in favor of the accused. ..." *State v. Wrobel* (1964), 24 Wis. 2d 270, 275, 128 N.W. 2d 629.

One of the underpinnings of this canon is the constitutional void for vagueness doctrine. The Wisconsin Supreme Court recently succinctly stated this doctrine:

"The underlying principle of certainty in a criminal statute is that a person should not be held criminally responsible for conduct which he could not reasonably understand to be proscribed. ..." *State v. Vlahos* (1971), 50 Wis. 2d 609, 617, 184 N.W. 2d 817.

See also *Jones v. State* (1972), 55 Wis. 2d 742, 746, 200 N.W. 2d 587; and *State ex rel. Dinneen v. Larson* (1939), 231 Wis. 207, 217, 284 N.W. 21, *reh. den.*, 231 Wis. 217, 286 N.W. 41. Plainly, sec. 289.41 (3), Stats., does not provide reasonable notice that the conduct it describes could be criminal. The subsection does not contain any express prohibitions, nor any penalty provisions. It should not be construed, therefore, to permit criminal prosecution and conviction.

The legislative history of sec. 289.41 (3), Stats., further indicates that the legislature did not create a crime when it enacted this statute into law. The legislative drafting file shows that the initial draft of the law, 1971 Assembly Bill 545, was introduced by Representative Lewison at the request of the Wisconsin Automotive Trades Association. This draft (LRB-2609) proposed creation of the following statute:

“943.245 FRAUDULENT USE OF CHECKS TO OBTAIN MERCHANDISE. If any person, with intent not to pay valid charges, stops payment on a check issued as payment for merchandise purchased or repaired and if that merchandise was voluntarily released to him by the seller or repairman on the belief that the check would be paid, the person stopping payment is guilty of a misdemeanor and may be fined not more than \$1,000 or imprisoned not more than one year or both.”

This statute would have created a crime. It expressly prohibited certain conduct and imposed a penalty. Furthermore, the statute would have appear in the criminal code in ch. 943, which is entitled “Crimes Against Property.” It is evident that the legislature was perfectly aware of how to make stopping payment on certain checks a crime if it wished to. As finally enacted into law as sec. 289.41 (3), Stats., however, the statute is radically different from the initial draft of 1971 Assembly Bill 545. The section is not within the criminal code, contains no prohibitions, and imposes no penalties. This metamorphosis evidences a legislative intent to avoid the creation of a new crime. Further support for this interpretation of legislative intent may be derived through comparing sec. 289.41 (3), Stats., with sec. 289.16, Stats. Section 289.16 specifically provides that misappropriation of public improvement funds by contractors constitutes theft and is punishable under sec. 943.20. Quite plainly, if

the legislature had intended to make the mere stopping of payment on a check a crime, it would have similarly expressly referred to an existing criminal statute.

To summarize, based on the statutory definition of a crime, the rule of strict construction of penal statutes, and legislative history, it is my opinion that in enacting sec. 289.41 (3), the legislature did not create a crime and criminal penalties for the acts specified therein. The function of sec. 289.41 (3), through use of the words "prima facie evidence of intent to defraud," appears to be confined to the *prima facie* establishment of only one of the elements of the crime of theft defined in sec. 943.20 (1) (d), Stats.

RWW:PM

Public Buildings: While neither the United States Constitution nor the Wisconsin Constitution compels states to require that public buildings and seats of government be constructed and maintained as to be accessible to the physically handicapped, the Legislature has an affirmative duty to address this problem and assure equal access to all constituted classes of citizens, including the physically handicapped.

April 1, 1974.

THE HONORABLE, THE ASSEMBLY

Legislature

Resolution 32, 1973 session, although divided into five questions, can be summarized as inquiring whether the constitutional rights of the physically disabled are denied by the failure of the state to require buildings, both public and private as defined in sec. 101.01 (2) (a) and (h), Stats., to be so constructed and maintained as to be accessible to those whose mobility is limited because of such physical disability. The Resolution directs my attention to the federal and state constitutional rights of "reasonable access" to such premises, to the "equal protection of the laws" in respect to equal employment opportunities or otherwise, to "access to the seats of government," and to "travel and freedom of movement." In addition, the

Resolution inquires whether the state, other units of government, and the owners of other buildings have “an affirmative duty” to provide such disabled persons “with equal access to such buildings.”

I. THE CONSTITUTIONAL RIGHTS INVOLVED

The First Amendment to the United States Constitution provides:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

The Fourteenth Amendment to the United States Constitution, Section 1, provides:

“... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Article I, Section 1 of the Wisconsin Constitution, provides:

“All men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.”

Article I, Section 3 of the Wisconsin Constitution, provides:

“Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press. ...”

Article I, Section 4 of the Wisconsin Constitution, provides:

“The right of the people peaceably to assemble, to consult for the common good, and to petition the government, or any department thereof, shall never be abridged.”

The First Amendment to the United States Constitution applies to the states through the operation of the Fourteenth Amendment. See

Redrup v. New York (1967), 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed. 2d 515.

The right of "access" derives from the First Amendment. See *Cruz v. Beto* (1972), 405 U.S. 319, 321, 92 S.Ct. 1079, 31 L.Ed. 2d 263. The right of "access" is usually identified with the right to be heard. See *United Transportation Union v. State Bar of Michigan* (1971), 401 U.S. 576, 585, 91 S.Ct. 1076, 28 L.Ed. 2d 399; *Johnson v. Avery* (1969), 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed. 2d 718. The supreme court has, however, spoken of "access" in the sense of physical access to a public place. *Grayned v. City of Rockford* (1972), 408 U.S. 104, 92 S.Ct. 2294, 2304, 33 L.Ed. 2d 222. Such physical access to a public place for the purpose of exercising First Amendment rights cannot be broadly denied. *Grayned, supra*, 92 S.Ct. at 2304.

There is no constitutional right of access to private property, except where a private entity assumes the functions of a government, as in the case of the modern shopping center complex, *Food Employees v. Logan Valley Plaza* (1972), 391 U.S. 308, 319, 88 S.Ct. 1601, 20 L.Ed. 2d 603, and the company-owned town, *Marsh v. Alabama* (1946), 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265.

Thus, there is a First Amendment right to access to public properties, including seats of governments, but not to private properties with certain limited exceptions.

II. THE NATURE OF PROHIBITED STATE ACTION

The Fourteenth Amendment denies to states the power to "abridge" privileges and immunities, to "deprive" any person of life, liberty or property, and to "deny" any person the equal protection of the laws. These key words--"abridge," "deprive," and "deny"--are collectively defined as prohibited "state action."

At the outset it should be noted that the Fourteenth Amendment does not ban private discrimination however wrongful the conduct may be. *Shelley v. Kraemer* (1948), 334 U.S. 1, 13, 68 S.Ct. 836, 92 L.Ed. 1161. Private action is transformed into state action where state involvement is so significant that it commands the result. *Adickes v. S. H. Kress and Company* (1970), 398 U.S. 144, 170, 90 S.Ct. 1598, 26 L.Ed. 2d 142. Such a command occurs "by imposing sanctions or withholding benefits." *Adickes, supra*, 398 U.S. at 168.

Thus, private action is transformed into prohibited state action only where the state involvement *commands* the result or is of similar significance. In order for state activity in this area to be considered prohibited, existing legal precedent concludes that the connection must be proximate, not remote.

The Wisconsin Supreme Court has held that state action consists in affirmative conduct requiring or permitting the impairment. See *Ford v. Wisconsin Real Estate Examining Bd.* (1970), 48 Wis. 2d 91, 110-111, 179 N.W. 2d 786.

Thus, state action must affirmatively impair or discriminate albeit in a permissive manner. See also *Vanden Broek (Town of) v. Reitz* (1971), 53 Wis. 2d 87, 98, 191 N.W. 2d 913.

This concept may be expressed as a requirement of a proximate cause-effect relationship between the state action and the adverse impairment or discrimination.

III. APPLICATION TO RESOLUTION 32 OF THE CONSTITUTIONAL RIGHTS INVOLVED AND THE NATURE OF PROHIBITED STATE ACTION

The general principle involved is that the prohibited state action must bear a proximate cause or relationship with the particular activity or rights in question. This relationship has been expressed as "significant" or "affirmative" and, though it need not be direct, it must be other than remote.

Existing legal precedent would conclude that the condition of a physical disability which impedes the exercise of constitutional rights does not get its impetus from the state. This fact means that the requisite state action must be shown to be affirmative in the sense that it enforces, encourages or fosters the impairment or discrimination.

In the absence of a total denial of protected freedoms, in order for state action to be considered prohibited state action, the state action must be affirmative action that actually encourages or fosters the impairment of said protected freedoms.

The enactments and requirements envisioned by Resolution 32 are obviously desirable, if not absolutely essential. However, under the present case law, they are not constitutionally mandated.

While these essential ingredients are not constitutionally mandated under the present case law, it is far more important to recognize that they *are not constitutionally prohibited*. The Wisconsin Legislature has already taken certain steps to aid the physically handicapped by empowering the Department of Industry, Labor and Human Relations with the authority to provide by rule minimum requirements to facilitate the use of public buildings by physically handicapped persons where such traffic might reasonably be expected by such persons. The Legislature now also requires a provision for reasonable ingress and egress by the physically handicapped to newly constructed public buildings (sec. 101.13, Stats.), and to require curb ramps at newly constructed city and village crosswalks (sec. 66.616, Stats.).

I believe that the Legislature has a fundamental duty to seriously consider exercising its discretion in this area and remove the various barriers that presently confront our handicapped citizens on a daily basis in existing public buildings and facilities throughout the state of Wisconsin.

There are today certain restrictions and burdens imposed upon physically disabled who, but for architectural barriers in public buildings and government buildings, could effectively pursue an occupation or profession. We should not, in light of our alleged modern-day social standards and awareness, allow the construction or maintenance of public buildings which are inaccessible to handicapped citizens. Government is and should be the social entity to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy means and goals.

While we have no direct authority from any recognized appellate court of last resort in this particular area, a recent enlightened decision of the United States District Court for the District of Columbia held that handicapped children constitute a class entitled to equal protection under the due process and equal protection clauses of the United States Constitution. *Mills v. Board of Education*, 348 F. Supp. 866 (DDC, 1972). In *Mills*, the court held that, so long as the District of Columbia had undertaken to provide a

system of publicly supported education for the children of the District, it must be made available to all children in equal terms. In extending and further applying this concept, a fortiori, the government's conduct of denying handicapped citizens as a class not just equal access to public buildings, but in most instances no appreciable access at all, while providing such access to other citizens, could be construed or interpreted as violative of the due process clause of the United States Constitution. Other lower courts have also suggested their support for this proposition, though not reaching the specific merits of any particular fact situation appreciably analogous to the content of Resolution 32.

While present legal precedent compels me to conclude that the Constitution does not demand such remedial measures, I am of the opinion that the Legislature has an affirmative duty to ensure equal access to public buildings, seats of government and other government buildings to all constituted classes of citizens, including the physically handicapped.

RWW:DCM

County Judge; Judges; Judges of the branches of County Court, rather than County Board of Judges, which is made up of both Circuit Court and County Court Judges, have power to assign specific types of cases to specific branches of the County Court, pursuant to sec. 253.18, Stats. Likewise, judges of the branches of Circuit Court have power to assign specific types of cases to specific branches of the Circuit Court, pursuant to sec. 252, Stats.

April 2, 1974.

GLENN L. HENRY, *Corporation Counsel*
Dane County

You request my opinion whether the provisions of sec. 257.37, Stats., take precedence over the provisions of sec. 253.18, Stats., so as to permit the County Board of Judges, comprised of all the circuit and county court judges in the county, to assign specific types of cases to specific branches of the county court.

It is my opinion that they do not. This opinion is limited to counties in excess of 200,000 and less than 500,000 population. While I am of the opinion that the County Board of Judges can recommend that specific types of cases be assigned to specific branches of the county court or to specific branches of the circuit court, final determination as to distribution and assignment of matters within the branches of the county court is for the joint determination of the judges presiding over the branches of such county court under sec. 253.18, Stats., and final determination as to distribution and assignment of matters within the branches of the circuit court is for the joint determination of the judges presiding over the branches of the circuit court under sec. 252.02, Stats.

Sections 252.02 and 253.18, Stats., are applicable to multi-branch courts and are specific statutes concerned with the distribution of work and assignment of cases among the branches of the respective courts. In material part they provide:

“252.02 Administration of work in multi-branch courts; grand jury. In circuits in which there are 2 or more branches, the judges may provide for the distribution of the work and assignment of cases among branches except that in the 2nd circuit, ...”

“253.18 Administration of work in multi-branch courts. In courts in which there are 2 or more branches, the judges may provide for the distribution of the work and assignment of cases among branches under the following rules:

“(1) Branch No. 1 shall be designated as the probate branch. In addition, the judges may designate by court rule particular branches to handle primarily specific types of cases, such as juvenile matters, domestic relations, criminal matters, traffic or small claims.

“***

“(3) Regardless of the name given to a particular branch or the type of cases assigned to it, the judge of that branch shall handle other matters assigned to him as time permits.

“(4) Whenever a branch is given a particular name by statute, all cases of the type described by the name of the branch

shall be assigned initially to that branch by the clerk and shall be reassigned to another branch only in the case of disqualification, illness or vacation of the judge or congestion or vacancy in the branch named by statute.”

Section 257.37, Stats., provides:

“257.37 County board of judges in populous counties. In counties having a population of 200,000 or more there is constituted a county board of judges to consist of all the judges of courts of record in such county. A circuit judge shall be chairman of such board. Such board shall have power by majority vote of all members to organize and to establish, modify and repeal rules, *not inconsistent with the statutes*, to provide for the orderly, efficient and expeditious handling of all matters within the jurisdiction of such courts.” (Emphasis added.)

Section 257.37, Stats., is not really a more recently enacted statute. Its predecessor was created as sec. 251.184 by ch. 315, Laws of 1959, the judicial reform act. It was applicable to counties over 500,000 only. No provision was made for chairman. It was made applicable to counties over 200,000 in 1961 and was amended to provide that a circuit judge shall be chairman of such board by ch. 495, Laws of 1961.

Chapter 315, Laws of 1959, also created sec. 252.017, which is essentially the same as present sec. 252.02, Stats., applicable to multi-branch circuit courts, and sec. 253.18, which is essentially the same as present sec. 253.18, Stats., except as to counties over 500,000, which is applicable to multi-branch county courts.

Since the forerunners of secs. 252.02, 253.18 and 257.37, Stats., were all created by the Judicial Reform Act of 1959, they must be construed as being compatible. I conclude that the provisions of secs. 252.02 and 253.18, Stats., which specifically give the judges of the respective courts powers with respect to distribution of workload and assignment of cases to various branches within statutory limits, take precedence over sec. 257.37, Stats., which is of a more general nature.

This conclusion is not altered by the fact that the legislature has created a statutory Board of County Judges in counties over 500,000,

but has not done so in other multi-branch counties. See sec. 257.33, Stats., created as sec. 253.185 by ch. 275, Laws of 1967.

With respect to your further question as to the duty of a county judge to accept cases assigned, please see sec. 253.18 (4) and (5), Stats.

RWW:RJV

Juvenile Court; The provisions of sec. 48.12, Stats., vest exclusive jurisdiction in the juvenile court over persons under 18 years of age who violate the provisions of secs. 66.054 (25) and 176.31, which impose criminal penalties on a person under 18 years of age who procures, possesses or consumes any intoxicant or who falsely represents his age for the purpose of procuring any intoxicant.

April 3, 1974.

BURLEIGH A. RANDOLPH, *District Attorney*
La Crosse County

You have requested my opinion as to the apparent conflict between sec. 48.12, and secs. 66.054 (25) and 176.31, Stats. The relevant portions of the statutory provisions under consideration are as follows:

Section 48.12, Stats., provides:

“The juvenile court has exclusive jurisdiction, except as provided in s. 48.17 and 48.18 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; ...”

Section 66.054 (25), Stats., provides

“Whoever falsely represents that he is at least 18 years of age for the purpose of asking for or receiving fermented malt beverages from a keeper of any place for the sale of fermented

malt beverages may be fined not more than \$100 or imprisoned not to exceed 10 days or both.”

Section 176.31, Stats., provides:

“(1) Whoever represents that he is of age for the purpose of asking for, or receiving, any intoxicating liquors from any keeper of any place for the sale of intoxicating liquors, except in cases authorized by law, may be fined not more than \$100 or imprisoned not to exceed 10 days, or both. ...

“(2) Any person under the age of 18 who procures, seeks to procure, knowingly possesses or who consumes in public any intoxicating liquor may be fined not more than \$100 or imprisoned not to exceed 10 days or both. ...”

In your letter you describe the problem you see in the above statutes as follows:

“The conflict, I believe, is apparent. On the one hand, Chapter 48 grants exclusive jurisdiction to the Juvenile Court. Additionally, Section 48.37 provides that no costs shall be assessed against, and no fines shall be imposed, on any child in the Juvenile Court. On the other hand, Chapter 66 and 176 provide for fine or imprisonment, or both, of persons who by the very nature of the statutes, must be under the age of 18.

“To me, this means that either the penalty sections of Chapters 66 and 176 pertaining to juveniles have no force and effect, or the exclusive jurisdiction granted under Chapter 48 does not extend to violations of Chapters 66 and 176.”

It is my opinion that the provisions of sec. 48.12 vest exclusive jurisdiction in the juvenile court over persons under 18 years of age who commit violations of state criminal laws, including violations of secs. 66.054 (25) and 176.31. Section 48.12 is clear and unequivocal on that point. The Supreme Court of Wisconsin has recognized that fact and has indicated that the provisions of sec. 48.12 deprive other courts of jurisdiction over persons under 18 who are charged with a crime. *Gibson v. State* (1970), 47 Wis. 2d 810, 815, 177 N.W. 2d 912. See also 46 OAG 204.

You are concerned that the position which I have adopted would lead to the conclusion that the penalty provisions of secs. 66.054 (25)

and 176.31 "have no force and effect." I do not believe that such a conclusion follows from that position. Those penalty provisions still have "force and effect" in three ways.

First, those penalty provisions are necessary to render the conduct proscribed by secs. 66.054 (25) and 176.31 an act of delinquency. A person under 18 is delinquent if he has violated any state "criminal law." In order for a violation of secs. 66.054 (25) and 176.31 to constitute a crime, it is necessary that such violation be punishable by fine or imprisonment or both. Section 939.12, Stats.

Second, the jurisdiction of the juvenile court over a person under 18 years of age but over 16 years of age may in certain cases be waived. Section 48.18, Stats. If such jurisdiction is waived with respect to a delinquency proceeding arising out of a violation of sec. 66.054 (25) or sec. 176.31, the penalty provisions of those sections would have full force and effect in the criminal court proceeding.

Third, the penalty provisions of secs. 66.054 (25) and 176.31 would also have full force and effect with respect to a person over 18 years of age who intentionally abids and abets the commission of a violation of those sections. Section 939.05, Stats.

It is anticipated that the argument might be made that since secs. 66.054 (25) and 176.31 are specific statutes and since they impliedly grant jurisdiction to a criminal court to impose a fine or imprisonment on persons who by the very nature of the statutes would normally be under the age of 18, those statutes should take precedence over sec. 48.12 which is a general statute vesting exclusive jurisdiction in the juvenile court over proceedings against persons under 18 years of age. It is true that a specific statute controls when a specific statute and a general statute relate to the same subject matter. *Kramer v. Hayward* (1973), 57 Wis. 2d 302, 311, 203 N.W. 2d 871. However, that rule only applies when the legislative intent is not otherwise clear from a reading of the statutes in question and when there is, in fact, an irreconcilable conflict between those statutes. *State v. Dairyland Power Cooperative* (1971), 52 Wis. 2d 45, 53, 187 N.W. 2d 878. I do not believe that those two conditions for the application of that rule are present in the situation under consideration.

The legislative intent in enacting sec. 48.12 is clear. It intended to grant exclusive jurisdiction to the juvenile court over all crimes committed by persons under 18 years of age, except as specifically provided by secs. 48.17 and 48.18. I find nothing in the specific provisions of secs. 66.054 (25) and 176.31 which would indicate any intent to abrogate the general jurisdictional language of sec. 48.12 in proceedings arising under those sections. Therefore, I believe that the legislative intent to vest jurisdiction in the juvenile court of proceedings brought under secs. 66.054 (25) and 176.31 against persons under 18 years of age is clear.

Furthermore, I do not find any irreconcilable conflict between the statutes under consideration. Any conflict which might exist between the statutes under consideration would not arise from the specific language of secs. 66.054 (25) and 176.31, but rather from the possible implications of that language. Conflicts arising by implication are not favored in the law. Cf. *State v. Dairyland Power Cooperative*, *supra*, 52 Wis. 2d at 51; *Milwaukee v. Leschke* (1973), 57 Wis. 2d 159, 164, 203 N.W. 2d 669. In interpreting statutes they must be construed, if possible, so as to avoid inconsistency and conflict. *Associated Hospital Service v. Milwaukee* (1961), 13 Wis. 2d 447, 463, 109 N.W. 2d 271. It is clear from the discussion earlier in this opinion that it is possible to give full effect to the jurisdictional provisions of sec. 48.12, and at the same time to give meaning and effect to the penalty provisions of secs. 66.054 (25) and 176.31. Therefore, I do not believe that any irreconcilable conflict exists between the statutes under consideration.

In summary, it is my opinion that the provisions of sec. 48.12, Stats., vest exclusive jurisdiction in the juvenile court over all violations of the state criminal law, including violations of secs. 66.054 (25) and 176.31, except as provided in secs. 48.17 and 48.18. For the reasons stated above, it is clear that this opinion does not deprive the penalty provisions of secs. 66.054 (25) and 176.31 of "force and effect."

RWW:DJB

Public Officials; Police; In general, sheriff, traffic officer or policeman who issues a uniform traffic citation where no warrant has been issued is not entitled to service or mileage fees for delivering citation.

April 8, 1974.

JERRY D. McCORMACK, *District Attorney*
Langlade County

You request my opinion whether a sheriff or a city policeman is entitled to service and mileage fees where such officer arrests a person for a traffic violation without a warrant under the provisions of sec. 345.22, Stats., or under sec. 968.07 (1) (d), Stats., where no summons or warrant has been issued, and where such officer issues a uniform traffic citation pursuant to secs. 345.23, 345.25 and 345.11, Stats.

I am of the opinion that no service or mileage fees can be charged with specific respect to issuance of the citation. This would not preclude such officer from claiming reimbursement for mileage for patrolling where his arrangement with the governmental unit permits reimbursement; however, such costs cannot be assessed against the violator if convicted or claimed from the governmental unit with respect to the specific case which may result from issuance of the citation. This opinion is not concerned with fees such officer might be entitled to where a person arrested for a criminal offense escapes from custody of the officer and pursuit is necessary. See secs. 59.28 (34) and 60.55 (14), Stats.

Public officers are only entitled to those fees which are provided by law. Section 946.12 (5), Stats., provides a criminal penalty for an officer who intentionally solicits or accepts fees which are greater or less than fixed by law. Section 345.55 (1), Stats., which is only indirectly in point, provides:

“(1) No traffic officer shall demand, solicit, receive or be paid any remuneration upon the basis of number of arrests made, convictions obtained or amount of fines collected.”

Section 59.28 (1), (2) (a), and (27), provides in part:

“59.28 Sheriff; fees. Every sheriff shall be entitled to receive the following fees in advance for his services providing the county board approves advance payment:

“(1) For serving a summons or any other process by which action shall be commenced, or writ or order of injunction or other order, and making a return thereon, for one defendant, \$2; for each additional defendant, \$1; for attempting to serve, one-half of the foregoing fees. In counties having a population of 500,000 or more, the full fee shall be charged for attempted service.

“(2) (a) Except in counties having a population of 500,000 or more, traveling in making service of any summons, writ or other process, except upon criminal warrants, 10 cents per mile for each mile actually traveled going and returning. The sheriff shall serve all process, orders and papers in any one action or proceeding which may then be in his hands for service, which can be served at the same time and upon all persons upon whom service is required who can be served in the same journey, and he shall be entitled to one mileage for the greatest distance actually traveled by him to make such service, and no more. ...

“***

“(27) Traveling to serve any criminal process for every mile actually traveled, ten cents per mile, whether in the county from which process issued or not, and actual and necessary disbursements for board and conveyance of prisoner.”

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

“(13) POLICE. (a) ... They shall collect the same fees allowed to constables for similar services.”

Section 60.55 (1) and (2), Stats., provides:

“60.55 Fees. Constables may receive the following fees:

“(1) For serving a summons or any other process by which action is commenced, or writ or other order, and making return thereon, for one defendant, \$2; for each additional defendant, \$1; for attempting to serve, one-half of the foregoing fees.

“(2) For traveling in making service of any process or to post any notice, 10 cents per mile for each mile actually traveled going and returning. The constable shall serve all papers in any action or proceeding which may then be in his hands for service, which can be served at the same time and upon all persons upon whom service is required who can be served in the same trip. He shall be entitled to one mileage payment for the greatest distance actually traveled by him in making such service or posting.”

At the time of issuance by the officer, a uniform traffic citation is neither “a summons or other process by which action shall be commenced.”

Under sec. 345.11 (2), Stats., the uniform traffic citation consists of four parts: “... a complaint, a report of conviction and abstract of court record for the department, a police record and report of action on the case and a traffic citation and stipulation of guilt. ...” Also see Wis. Adm. Code, MVD 21.

The traffic officer does not include an affidavit or certificate of service when he files the complaint copy of the citation in court.

Section 345.11 (5), provides that the uniform traffic citation:

“... shall be deemed adequate *process* to give the appropriate court jurisdiction over the subject matter of the offense *upon the filing with such court* of the uniform traffic complaint.”
(Emphasis added.)

As used in sec. 345.11 (5), Stats., the word “process” refers to invoking subject matter jurisdiction and not to acquiring personal jurisdiction. A traffic citation is only a notice. It does not function as a summons and does not compel a court appearance. Thus, it does not confer personal jurisdiction upon the court. The citation does not become “process” even in a limited sense until filing of the complaint with the court. A person who appears in court in response to a traffic citation appears voluntarily and by such an appearance submits to the jurisdiction of the court over his person. If he does not appear voluntarily, the court will issue a summons or a warrant and thus obtain personal jurisdiction.

An action to recover a forfeiture is a modern version of the old common law action of debt. It is proper to plead that the defendant is indebted to the plaintiff in a stated amount because of a violation of statute. It is a civil action as distinguished from a criminal action, or special proceeding as those terms are defined in secs. 260.02 and 260.03, Stats. Section 262.02 (1), Stats., provides that a civil action is commenced by service of a summons or original writ, and sec. 59.28 (1), Stats., specifies the fee the sheriff may charge for the service of a summons or other process. In *Zielica v. Worzalla* (1916), 162 Wis. 603, 608, 156 N.W. 623, the court said:

“... The circuit court summons is not a writ or process issued out of court, but simply a notice given to defendant by plaintiff.
...”

In *Westport v. Madison* (1945), 247 Wis. 326, 328-329, 19 N.W. 2d 309, the court said:

“... Our summons, while part of the process system, is but a notice of a proposed action and differs in nature and effect from a writ procured from a court ... In this state the primary purpose of the service is to give notice to defendant that an action has been commenced against him. ... Therefore, in Wisconsin the summons is not a writ issuing from a court ...”

In *Tarczynski v. Chicago, M., St. P. and P. R. Co.* (1952), 261 Wis. 149, 153-154, 52 N.W. 2d 396, the court concluded that the broader meaning of the word “process” includes a summons. Thus, it is clear that a civil action to recover a forfeiture is commenced by the service of a summons and not a writ issued by a court, and that a summons is now regarded as process.

In order to expedite the large volume of traffic cases, the legislature has simplified the complaint and eliminated the use of a summons at the initial stages of the proceeding. A violator is given a citation which is merely a notice to him to appear in court. It is not a notice that a civil action has been commenced against him, and it does not compel his appearance. If he does not then appear voluntarily, a summons or warrant will be issued to compel his appearance and obtain jurisdiction over his person. At this point, a civil action has been commenced against him. The legislature has further provided, in sec. 345.11 (5), Stats., that the use of the

uniform traffic citation and complaint, "... shall be deemed adequate process to give the appropriate court jurisdiction over the subject matter of the offense upon the filing with such court of the uniform traffic complaint." It is to be noted that this statute does not say that the use of the citation gives the court jurisdiction over the person of the defendant. If it did, then such citation might be regarded as process, because the function of process is to obtain jurisdiction of the person. The citation given to the motorist is not a summons because it does not comply with the requirements for a summons set forth in secs. 262.10 and 262.11, Stats., and it does not compel the person to appear in court. The citation is not a writ or other process issued by a court which would confer upon the court jurisdiction over the person of the defendant.

The complaint copy of the citation is filed with the court. This is only a pleading which charges the offense. Such complaint is not process because it does not confer personal jurisdiction upon the court. Similarly, the filing of the complaint with the court does not create subject matter jurisdiction in the court, for the reason that subject matter jurisdiction is created or conferred only by law.

In *Pillsbury v. State* (1966), 31 Wis. 2d 87, 94, 142 N.W. 2d 187, the court said:

"... jurisdiction of the subject matter is a power of a court to inquire into the charge of the crime, to apply the law, and to declare the punishment in the court of a judicial proceeding and is conferred by law. ..."

Section 345.30, Stats., confers, upon certain courts, subject matter jurisdiction over actions for violation of traffic regulations. The filing of the complaint with the court merely invokes the subject matter jurisdiction of the court created by law, but the court must then acquire personal jurisdiction before it can proceed further.

By sec. 345.11, Stats., the legislature has created a hybrid type of legal procedure designed to handle the large volume of traffic cases. The traffic officer writes out the citation in quadruplicate. He hands the citation copy to the violator. This merely tells the person that he has violated a certain law and fixes the court date. This is merely a notice and is signed by the arresting officer. It is not a summons, writ, process or pleading. It is not served upon the person. The

officer makes no certificate of service or return. The complaint copy is forwarded to the court where it is signed by the so-called "court officer" upon information and belief. This is not process. It is the pleading which charges the offense. Such a pleading does not confer or create either personal jurisdiction or subject matter jurisdiction.

The court already has subject matter jurisdiction by virtue of sec. 345.30, Stats. If the person appears in court and makes a general appearance, this act confers upon the court jurisdiction over his person. If he does not appear voluntarily and has not made a deposit, the court does not yet have personal jurisdiction over him. At that point, the court issues a warrant for his arrest, as provided by sec. 345.37 (1), Stats. His arrest on the warrant and appearance in court confer personal jurisdiction upon the court.

If he has made a deposit and fails to appear in court, sec. 345.37 (2), Stats., provides the citation may serve as the initial pleading, and he shall be deemed to have tendered a plea of no contest and to have submitted to a forfeiture plus costs. The effect of this is that by making the deposit and not showing up in court, the person has submitted to the personal jurisdiction of the court and the court may proceed to enter judgment.

In summary: Personal jurisdiction is acquired by the service of a summons or other process. The issuance of a traffic citation does not confer personal jurisdiction upon the court. If it did, there would be no need for the subsequent issuance of a warrant or, in some cases, a summons as provided by statute. Thus, a traffic citation is not a summons, writ, or other process, and the statutes providing fees for the service of summons or process are inapplicable. The language of sec. 345.11 (5), Stats., relating to adequate process to give the court subject matter jurisdiction, does not change these basic principles. What this language means is that the complaint copy of the citation is sufficient as a complaint to charge the offense. Thereafter, the court can proceed to adjudicate the matter when it acquires personal jurisdiction by voluntary appearance, or issuance of a warrant or summons, or as provided in sec. 345.37 (2), Stats., where a deposit has been made.

RWW:RJV:AH

Towns; Municipalities; If proper case were brought, a court would probably hold that sec. 60.19 (1), (am), and (c), Stats., violate the uniformity of town government constitutional requirement.

April 9, 1974.

THE HONORABLE, THE ASSEMBLY
Legislature

Assembly Resolution 39 (1973) requests my opinion whether a town may constitutionally increase the membership of the town board to five pursuant to sec. 60.19 (1) (a), (am), and (c), Stats.

Section 60.19 (1) (a), Stats., as amended by ch. 248, Laws of 1971, provides in part:

“60.19 Election of officers; special provisions. (1) (a) Biennially, in the odd-numbered years, at the annual town meeting each town shall elect the following officers: 3 supervisors except when the number of supervisors has been increased under par. (am), ...”

Section 60.19 (1) (am), Stats., as created by ch. 248, Laws of 1971, provides:

“(am) Any town board authorized to exercise village powers may, by ordinance, increase the number of supervisors to no more than 5. If the number of supervisors is increased to 4, the town shall elect 2 supervisors each year. If the number is increased to 5, the town shall elect 3 supervisors in odd-numbered years and 2 supervisors in even-numbered years.”

It will be noted that the provisions of sec. 60.19 (1) (am), Stats., apply to any town, regardless of population.

Section 60.19 (1) (c), Stats., was an outgrowth of ch. 356, Laws of 1969, and originally applied to towns having a population in excess of 7,500. It was amended by ch. 155, Laws of 1971, to provide:

“(c) Increases or reductions in membership of town boards shall take effect from January 1 of the first odd-numbered year following the most recent federal decennial or special census,

but shall not be deemed to create any vacancy on a town board prior to the spring election. Commencing with the 1971 spring election or any spring election thereafter the town board of any town having a population of 2,500 or more may, subject to the authorization of the majority of the electors voting at an annual or special town meeting, consist of 5 supervisors elected at large. Three members shall constitute a quorum of 5-member town boards.”

It is noted that the population figure in (c) does not require towns over 2,500 to have a five-man board, but makes the adoption optional in such towns. Section 60.19 (1) (am), Stats., contains no population standard, is optional as to adoption, and permits town boards of four or five members.

Whereas the Constitution has been amended to delete the provision as to uniformity of county government, Art. IV, sec. 23, Wis. Const., still provides:

“The legislature shall establish but one system of town government, which shall be as nearly uniform as practicable ...”

State ex rel. Peck v. Riordan (1869), 24 Wis. 484, involved the constitutionality of a statute which provided for a county board of eight supervisors in a certain county which under the general statute would have only three. The court held the statute violated the “uniform as practicable” test of Art. IV, sec. 23, Wis. Const. At pp. 488-489 the court stated:

“... Now, certainly, the uniformity in the system is broken, when one county, comprising two assembly districts, has a board of supervisors consisting of eight members, and another county, of the same population, has a board of three. ... The uniformity of the system would seem to be as much broken by diversity in the number which should constitute the board in counties of the same population, as by diversity in the distribution of the powers which the board should execute. ... The constitution, then, has regard as well to uniformity in the system as to unity in the system; and wherever uniformity is practicable, it must be preserved. ...”

When the uniformity clause was applicable to counties, it was held that counties could be classified on the basis of population, providing

that there was reasonable basis for such treatment, and that limited changes could be made in county government where it is not practicable to carry on the usual government in a particular class of counties. Details of carrying out functions of county government could vary provided the system remained untouched. *State ex rel. Milwaukee County v. Boos* (1959), 8 Wis. 2d 215, 99 N.W. 2d 139; *State ex rel. Sonneborn v. Sylvester* (1965), 26 Wis. 2d 43, 132 N.W. 2d 249; *West Allis v. Milwaukee County* (1968), 39 Wis. 2d 356, 370, 371, 159 N.W. 2d 36.

It is submitted that the same rules are applicable to towns which are still governed by the uniformity clause of the Constitution.

An opinion by a former Attorney General which appears in 50 OAG 10 (1961) dealt with the uniformity provisions as to towns. It was there stated that the legislature could not authorize a town meeting to elect, at its option, either three or five town supervisors. It was further stated that diversity of the number of supervisors based on a classification of towns by population only might be violative of the constitutional provision if, in fact, three-supervisor government is workable and feasible in a large as well as a small town, or in a populous as well as a thinly-populated town.

Whereas there is a strong presumption as to the constitutionality of a duly-enacted statute, I am of the opinion that the court in a proper case would hold that sec. 60.19 (1), (am), and (c), Stats., violates the uniformity clause of the Constitution.

RWW:RJV

Drugs; Municipalities; Chapter 161, Stats., the Uniform Controlled Substances Act, precludes the enactment of municipal ordinances regulating the sale and possession of such "controlled substances" as marijuana.

April 11, 1974.

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

You advise that in studying the issues relating to the use of marijuana in Wisconsin the Controlled Substances Board within your department has learned that certain cities in the state have enacted local ordinances relating to the sale and possession of marijuana. In these municipalities offenders are apparently being prosecuted under such local ordinances rather than under the provisions of the Controlled Substances Act, ch. 161, Stats., which also regulates the possession and distribution of marijuana. Since it is believed that such local control carries with it a potential for adverse social and health consequences and a lack of uniformity of control, you request my opinion on the following question:

“What is the legal status of local ordinances which regulate the sale and possession of controlled substances in the light of the legislative policy stated in Chapter 161, Stats., and what is the authority of local units of government to enforce such ordinances?”

Unless it is concluded that ch. 161, Stats., is intended to provide for exclusive control of the sale, possession and use of marijuana and other drugs and substances or compounds thereof, at the state level of government, additional regulation by city ordinances which do not conflict with state law, would be well within the municipal police power of Wisconsin cities “to act ... for the government and good order of the city ... and for the health, safety, and welfare of the public ... by license, regulation, suppression ... fine ..., and other convenient means.” Sec. 62.11 (5), Stats. See also 7 McQuillin, *Municipal Corporations* (1968 Rev. Vol.), p. 79, sec. 24.240.

In considering whether the legislature intended to exclude the application of municipal police power over the same matters as treated by the Uniform Controlled Substances Act, consideration must be given to the nature of the legislative mandate, the structure of the governmental arm empowered to carry out the mandate, the specific legislation delegating the responsibility to the state agency, and the nature and comprehensiveness of the regulatory legislation. *Hartford Union High School v. Hartford* (1971), 51 Wis. 2d 591,

595, 187 N.W. 2d 849. In addressing your question it is also appropriate to consider whether ch. 161, Stats., was intended by the legislature to be construed as an enactment primarily of statewide concern for the purpose of providing uniform state level regulation and control of the sale, possession and use of marijuana and other drugs and substances or compounds thereof.

Both cities and villages possess significant powers to enact local legislation. Art. XI, sec. 3, Wis. Const., and secs. 61.34 (1) and 62.11 (5), Stats. However, the *constitutional* authority of cities only extends to local affairs and does not cover legislative enactments of statewide concern "... as shall with *uniformity* affect every city or every village. ..." (Emphasis added.) See *Plymouth v. Elsner* (1965), 28 Wis. 2d 102, 106, 135 N.W. 2d 799 and *Van Gilder v. Madison* (1936), 222 Wis. 58, 267 N.W. 25, 268 N.W. 108. Further, the determination of what constitute matters of "state-wide concern" or a "local affair" is primarily for the legislature based on considerations of public policy. "... In the event of a controversy between municipalities and the state therefore the court is required to make the ultimate determination.***" *Van Gilder, supra*, pp. 73-74. See also *Fond du Lac v. Empire* (1956), 273 Wis. 333, 337, 338, 77 N.W. 2d 699.

In addition, whether local legislation is precluded in reference to a particular subject also depends on whether the matter treated is considered to be *primarily* a local affair or one in which the statewide concern feature is *paramount*. *Muench v. Public Service Comm.*, (1952), 261 Wis. 492, 515j, 53 N.W. 2d 514; *State ex rel. Brelsford v. Retirement Board* (1968), 41 Wis. 2d 77, 86, 163 N.W. 2d 153. Where potential conflict between state and local rights exists, the court will engage in a balancing of interests to determine whether the state or the local interest is paramount. *State ex rel. Hammernill Paper Co. v. La Plante* (1973), 58 Wis. 2d 32, 59, 205 N.W. 2d 784.

Finally, we must be mindful that even though a matter may be one of general statewide interest, municipalities may have ample authority to legislate on the same general subject as long as the municipal regulation is not inconsistent or in conflict with the state law. *Hack v. Mineral Point* (1931), 203 Wis. 215, 221, 233 N.W. 82; *Fox v. Racine* (1937), 225 Wis. 542, 546, 275 N.W. 513; *Johnston v. Sheboygan* (1966), 30 Wis. 2d 179, 140 N.W. 2d 247;

Muench v. Public Service Comm. (1952), 261 Wis. 492, 53 N.W. 2d 514.

Chapter 161, Stats., is patterned closely after the model "Uniform Controlled Substances Act," which was promulgated by the National Conference of Commissioners on Uniform State Laws in 1970 to assist in the update and revision of state narcotic, marijuana, and dangerous drug laws. It creates a Controlled Substances Board to administer a coordinated and codified system of classifications for control purposes, establishes rule-making power in the Pharmacy Examining Board relating to the manufacture, distribution and dispensing of controlled substances, describes various prohibited activities relating to the possession, use and transfer of controlled substances, and establishes a variety of administrative and enforcement provisions which set forth a flexible, but detailed, mode of handling violations of the act, which requires the coordination of many state agencies, including the Departments of Justice, Health and Social Services and Public Instruction. In short, it is an impressively comprehensive piece of legislation.

Furthermore, the law is obviously intended as the framework for a unified, coordinated and cooperative attack on drug abuse at *all* levels of government within the state, and the uniform application of the law at all levels of government appears essential for the law to be effective. As stated by the National Conference in its prefatory note to the model act:

"This Uniform Act was drafted to achieve uniformity between the laws of the several States and those of the Federal government. It has been designed to complement the new Federal narcotic and dangerous drug legislation and provide an interlocking trellis of Federal and State law to enable government at all levels to control more effectively the drug abuse problem.

"... To assure the continued free movement of controlled substances between States, while at the same time securing such States against drug diversion from legitimate sources, it becomes critical to approach not only the control of illicit and

legitimate traffic in these substances at the national and international levels, but also to approach this problem at the State and local level on a uniform basis." Handbook of the National Conference of Commissioners on Uniform State Laws (1970), pp. 223-224.

It is immediately evident that the crux of ch. 161, Stats., and the key to its effectiveness as a law, lies in the manner in which those who engage in the abuse of controlled substances will be penalized. This is recognized in the declaration of legislative intent set forth in sec. 161.001, Stats., which indicates that the legislature appreciated "a need for differentiation among those who would violate" ch. 161, Stats. The statute further points out that this differentiation should take the form of the possibility of lengthy terms of imprisonment, sentencing designed to produce rehabilitation and provision for special treatment. See secs. 161.41, 161.42, 161.43, 161.46, 161.47, 161.475 and 161.48, Stats. For instance, sec. 161.47 (1), Stats., establishes a special procedure for handling certain first offenders which allows for a conditional discharge and dismissal, without adjudication of guilt, which is not considered a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime. On the other hand, sec. 161.48, Stats., provides for increased criminal penalties for second and subsequent offenses where a person was previously convicted under state or federal law. In addition, sec. 161.475, Stats., provides for the option of providing a treatment program and release from sentence.

It is quite evident from the foregoing that the ends sought to be accomplished by ch. 161, Stats., in differentiating between offenders is intended to be achieved through the uniform application of state law. Municipalities do not possess the same authority as the state to impose the range of penalties and options existing under ch. 161, Stats. For example, local government cannot create crime, and municipal ordinance enforcement is more normally restricted to the imposition of forfeiture. *State ex rel. Keefe v. Schmiede* (1947), 251 Wis. 79, 28 N.W. 2d 345. Quite clearly, the imposition of a forfeiture under municipal ordinances adopted by scattered municipalities, instead of the strict application of ch. 161, Stats., in all cases, would tend to defeat both the uniformity and the differentiation in application of the law desired by the legislature.

The suppression of crime has long been considered a matter of statewide concern. *Van Gilder v. Madison, supra*, pp. 75, 76. That the regulation of drugs is also essentially a matter of statewide concern is clearly recognized in the legislative finding in sec. 161.001, Stats., that "the abuse of controlled substances constitutes a serious problem for society." In fact, our state has already expressly recognized that the regulation of drugs (in the form of alcohol) is a matter of statewide concern. Secs. 66.054 (16) (a) and 176.44, Stats. However, while sec. 66.054 and ch. 176, Stats., both specifically authorize certain local regulation in regard to these specific drugs, ch. 161, Stats., makes no similar delegation of authority to enact local legislation.

Section 161.53, Stats., does indicate that "Violations of this chapter constitute nuisances under ch. 280," but such language makes no provision for the enactment of legislation in the form of local ordinances. In addition, sec. 161.44, Stats., provides:

"Penalties under other laws. Any penalty imposed for violation of this chapter is in addition to, and not in lieu of, any civil or administrative penalty or sanction otherwise authorized by law."

However, it is evident that the penalties or sanctions "otherwise authorized by law," which are preserved by sec. 161.44, Stats., refer to penalties or sanctions which are "authorized" by other statutory or statewide legislation rather than by ordinance. Volume 4A Words and Phrases, "Authorized by Law," pp. 627-629; Volume 5A Words and Phrases "By Law," p. 810-811.

In conclusion, then, the general policy considerations underlying the promulgation of the Uniform Drug Control Act and the direct legislative policy expressed in sec. 161.001, Stats., and implemented in the balance of ch. 161, Stats., make it apparent that the field of regulation of marijuana and other controlled substances has been clearly identified by the legislature as a matter primarily of statewide concern exclusively occupied by the state. It is my opinion that municipalities may not legislate in this field of regulation, and that ordinances attempting to regulate the sale and possession of controlled substances such as marijuana clearly constitute invalid local legislation in a matter of statewide concern inconsistent and in

conflict with ch. 161, Stats., and the legislative intent and public policy considerations upon which the chapter is based.

RWW:JCM

Weights And Measures; Licenses And Permits; Legislature has manifested intent that closing hour for premises for which retail Class "B" liquor and beer licenses have been issued in counties having less than 500,000 population advance from 1:00 a.m. to 2:00 a.m. from 1:00 a.m. on the last Sunday in April until 2:00 a.m. on the last Sunday in October of each year.

April 24, 1974.

WILLIAM N. BELTER, District Attorney
Waushara County

You have asked my opinion on the question of whether Wisconsin will go on so-called double daylight saving time as of 1:00 a.m. on the last Sunday in April, 1974.

The Congressional legislation entitled "Emergency Daylight Saving Time Energy Conservation Act of 1973" which became effective January 6, 1974, and remains in effect until the last Sunday in April, 1975, advanced the standard of time in Wisconsin one hour from Central Standard Time to Central Emergency Daylight Saving Time. See OAG 1-74.

Section 175.095, Stats., provides in subsection (2) that: "From 1:00 a.m. on the last Sunday in April until 2:00 a.m. on the last Sunday in October of each year, the standard of time in this state shall be one hour in advance of that prescribed in s. 175.09 (1)."

Section 175.09 (1), Stats., defines Central Standard Time.

Thus, the question posed becomes: does sec. 175.095 (2), Stats., operate to advance Wisconsin time yet another hour to double daylight time?

I conclude that this question should be answered in the negative.

The Uniform Time Act of 1966 enacted by Congress in 15 U.S.C. 260a (a) established a uniform daylight saving time in the United States from the last Sunday in April to the last Sunday in October of each year. Daylight saving time as defined therein is advancement of the standard time in each zone by one hour.

The express intent of Congress to occupy the field of time regulation is declared in 15 U.S.C. 260a (b) which states:

“It is hereby declared that it is the express intent of Congress by this section to supersede any and all laws of the States or political subdivisions thereof insofar as they may now or hereafter provide for advances in time or changeover dates different from those specified in this section.” (See also 15 U.S.C. 262)

The United States Supreme Court, discussing Federal preemption in *Cloverleaf Butter Company v. Patterson* (1942), 62 S.Ct. 491 at 496, 315 U.S. 148, 86 L.Ed. 754, stated that: “the role is clear that state action may be excluded by clear implication or inconsistency.”

I conclude that Congress has occupied and preempted the field of time regulation by its express statements of intent. The emergency legislation advanced Wisconsin time one hour ahead of standard time. Section 175.095 (2), Stats., may not therefore operate to advance the standard of time in Wisconsin an additional hour.

In your request you refer to my earlier opinion issued on January 4, 1974 as OAG 1-74. That opinion was directed at the effect of the Federal enactment on closing hours of premises for which retail class “B” liquor and beer licenses have been issued in counties having less than 500,000 population.

I therefore perceive the following additional question in your request: What is the status of the closing hours of such premises as of 1:00 a.m. on the last Sunday in April, 1974?

Sections 176.06 (3) and 66.054 (10) (a), Stats., specify in part that when our standard of time is advanced one hour pursuant to sec. 175.095 (2), Stats., the closing hours of such premises will advance from 1:00 a.m. to 2:00 a.m. during the months specified therein.

Study of various proposals concerning the extending of tavern closing hours to 2:00 a.m. reflects that the intent of the legislature

was the recognition by that body that tourism and recreation are prime industries in this state (e.g., see Senate Bill No. 105, S., introduced February 6, 1957, with alterations thereto). These industries are at peak operation during those months usually embraced by daylight savings time pursuant to sec. 175.095 (2), Stats. The closing hours were ultimately so extended to 2:00 a.m. by the legislature during those months by amendment of secs. 176.06 (3) and 66.054 (10) (a), Stats.

I therefore conclude that the legislature has manifested its intent that the closing hours of such licensed premises advance from 1:00 a.m. to 2:00 a.m. during the period of time expressed in sec. 175.095 (2), Stats.

RWW:JM

Counties; County Board; County Board of Supervisors in county over 500,000 can abolish County Park Commission created under sec. 27.02 (2), Stats., and transfer its functions to the County Board.

April 24, 1974.

THE HONORABLE, THE SENATE
Legislature

Senate Resolution 34 (1973) adopted March 29, 1974, requests my opinion whether the County Board of Supervisors of Milwaukee County can abolish the County Park Commission and transfer its functions to the County Board.

I am of the opinion that it can.

I am enclosing an opinion to the Corporation Counsel for Milwaukee County dated June 20, 1972, which appears in 61 OAG 287 (1972) which came to the same conclusion. That opinion was based on the provision in sec. 59.15 (2) (b), 1971 Stats. Whereas subsec. (b) was repealed by ch. 118, Laws of 1973, sec. 59.025 (3), Stats., as created by that act, and sec. 59.15 (2) (a), Stats., as amended thereby, would appear to grant the County Board greater authority than it had before with respect to such power.

RWW:RJV

County Treasurer; Land; Taxation; Section 75.07 (1), Stats., requiring publication of redemption notice prior to expiration of time to redeem lands sold for taxes, is directory only; and failure to include in such publication the name of the person to whom such taxes were assessed does not invalidate a subsequent tax deed.

April 25, 1974.

WILLIAM E. CHASE, *District Attorney*
Ashland County

In your letter of March 22, 1974, you indicate that Ashland County had taken title to certain real estate in the city of Ashland by means of three tax deeds, thereafter conveying the property to a private individual by quit claim deed. A question has been raised as to the validity of the tax deeds, in that the county treasurer had not published the name of the person to whom the involved taxes had been assessed, as required by sec. 75.07 (1), Stats., although the notice of application for the tax deeds under sec. 75.12 and the notice that such deeds had been taken were served as required by sec. 75.28 (2), Stats. You inquire whether the tax deeds were invalidated because of the omission to publish the name of the person to whom the taxes were assessed, under sec. 75.07 (1). This latter subsection provides:

“75.07 REDEMPTION NOTICES; PUBLICATION. (1)
Each county treasurer shall, at least 6 and not more than 10 months before the expiration of the time limited for redeeming lands sold as aforesaid, cause to be published as a class 2 notice, under ch. 985, in the county in which the lands are located, a list of all unredeemed lands, specifying each tract or lot, the name of the person to whom assessed, if any, and the amount of taxes, charges and interest, calculated to the last day of redemption, due on each parcel, together with a notice that unless such lands are redeemed on or before the day limited therefor, specifying the same, they will be conveyed to the purchaser. The county treasurer, for the purpose of such list, may condense such

descriptions when such condensed description will reasonably describe the premises.”

I agree with your conclusion that the subsection involved is directory only, and not mandatory. In addition to the authorities you cite, the case of *Allen v. Allen* (1902), 114 Wis. 615, 624, 625, 91 N.W. 218, expressly held that sec. 1170, Stats., now 75.07, was directory merely, and that a failure to comply therewith did not avoid or invalidate a tax deed subsequently taken.

To be noted is the fact that the person to whom the taxes were assessed -that is, the owner, if known to the assessor, or the occupant, under sec. 70.17 -could not be prejudiced by a failure to comply with sec. 70.07 (1), since a tax deed may not be taken unless written notice of the application therefor has first been served upon the owner or one of the owners of record of the land to be subjected to the deed, whereupon, such owner may yet redeem prior to taking of the tax deed, pursuant to sec. 75.12 (4), Stats.

Also to be noted is that this statute was originally enacted by ch. 22, sec. 16, Laws of 1859, and has been amended at various times since. However, our Supreme Court has consistently held that the statute is directory, rather than mandatory; and significantly, the Legislature has not since seen fit to amend the statute so as to destroy the validity of the prior pronouncements of the Supreme Court thereon. See *Hahn v. Walworth County* (1961), 14 Wis. 2d 147, 109 N.W. 2d 653.

Consequently, you are advised that the tax deeds here involved conveyed to Ashland County an absolute estate in fee simple; and that such deeds, assuming they had been duly witnessed and acknowledged, are presumptive evidence of the regularity of all the proceedings, from the valuation of the land by the assessor up to and including the execution of the deed, under sec. 75.14 (1), Stats. You are further advised that in my opinion, should the validity of any of these tax deeds be drawn in question, the courts would undoubtedly hold that since sec. 75.07 must be treated as directory only, none of such deeds would be held invalid for failure of the prior publication under sec. 75.07 (1) to state the name of the person to whom the taxes were assessed.

RWW:RDM

County Treasurer; Land; Taxation; In publishing redemption notices for tax delinquent lands under sec. 75.07 (1), Stats., County Treasurer is not authorized to omit the names of persons to whom such property was last assessed.

April 25, 1974.

JERRY D. McCORMACK, *District Attorney*
Langlade County

You request my opinion whether the County Treasurer, in publishing legal notices for redemption of tax delinquent lands under sec. 75.07 (1), Stats., is authorized to omit the names of the persons to whom such lands are assessed, if any.

I am of the opinion that he is not.

Section 75.07 (1), Stats., provides in material part:

“(1) Each county treasurer shall, at least 6 and not more than 10 months before the expiration of the time limited for redeeming lands sold as aforesaid, cause to be published as a class 2 notice, under ch. 985, in the county in which the lands are located, *a list of all unredeemed lands, specifying each tract or lot, the name of the person to whom assessed, if any, and the amount of taxes, charges and interest, calculated to the last day of redemption, due on each parcel*, together with a notice that unless such lands are redeemed on or before the day limited therefor, specifying the same, they will be conveyed to the purchaser. *The county treasurer, for the purpose of such list, may condense such descriptions when such condensed description will reasonably describe the premises.*” (Emphasis added.)

I am of the opinion that the condensed description permitted under the last sentence of the subsection refers to the legal description of the premises, i.e., the track or lot, and would not permit the County Treasurer to omit the name of the person to whom last assessed.

The purpose of the notice is to advise the owner, and any other persons who may be interested in the property, that real estate which

is tax delinquent will be conveyed to the tax sale purchaser unless redeemed on or before the day limited therefor. Whereas an owner may not be expected to recognize the legal description of all the parcels of property in which he has an interest, most owners are capable of readily recognizing their own names. Use of the name would enable other persons to alert the owner and would offer other advantages in aid of collection of the taxes and charges due.

On this day, I have issued an opinion, addressed to District Attorney Chase, Ashland County, to the effect that, since the name publication requirement of sec. 75.07 (1), Stats., is directory rather than mandatory, the failure to publish the name of the delinquent record owner did not, on that account only, invalidate a subsequent tax deed on the property involved. However, the directory nature of the legislative provision does not permit the County Treasurer to ignore the direction of sec. 75.07 (1), Stats. Indeed, the doubts raised concerning the Ashland tax deed demonstrate the desirability of complying with the name publication requirement.

RWW:RJV

Implied Consent Law; Law Enforcement; Method by which a law enforcement agency may provide two tests for blood alcohol content under sec. 343.305 (1), Stats., discussed. The agency is not required to actually own or physically possess the testing devices.

April 25, 1974.

JOHN R. WAGNER, *District Attorney*
Grant County

You have directed my attention to sec. 343.305 (1), Stats., the implied consent law, which provides that a person who drives a motor vehicle upon the highway shall be deemed to have given his consent to a chemical test of his breath, blood, or urine for the purpose of determining the alcohol content of his blood under certain conditions. This section reads, in part:

“... The law enforcement agency by which the officer is employed shall be prepared to administer 2 of the aforesaid 3

tests and may designate which of the aforesaid tests shall be administered. ...”

You ask what is necessary to meet this requirement, and more specifically, whether each law enforcement agency must have its own equipment, or at least have such equipment available, within its own territorial jurisdiction.

There are approximately 1,900 cities, villages, towns, and counties in this state. See the 1970 Blue Book, p. 701. The records of the Division of Law Enforcement Services of the Wisconsin Department of Justice show that there are approximately 600 law enforcement agencies in this state.

In order to enforce the implied consent law, each of these must be prepared to administer two tests for blood alcohol content. The method by which they meet this requirement is as follows. The state owns 160 breathalyzer machines, and local units of government own 20, for a total of 180 such machines for the whole state. Of the state-owned machines, 32 are used as spares and for training. The remaining 128 machines are furnished free of charge to local units of government. They are usually placed with sheriffs' offices. Of the 72 counties in this state, 71 have such machines. They are available to and are used by all law enforcement agencies in the county. Washburn County does not have such a machine. In that county, the only machine available is in the State Patrol headquarters at Spooner. This machine is available to and used by all law enforcement agencies within that county.

These machines presently cost \$835. Each machine is accompanied by a companion instrument called a breath alcohol simulator. These presently cost \$125. The Division of Motor Vehicles has trained 1,900 local police officers to operate these machines. Each of these people must be reexamined as to their qualifications every two years. The Division has eight technicians who are required to check each machine every 60 days. See sec. 343.305 (9) (b), Stats., and Wis. Adm. Code sections MVD 25.08 (1) (a), 25.09, and 25.10. To provide one such machine, with the necessary personnel, for each of the 600 law enforcement agencies in this state would greatly increase the financial burden of the taxpayers. In small localities, such a machine might rarely be used. This would not be economically feasible.

The method by which each law enforcement agency complies with the statutory requirement that it shall be prepared to administer two tests is by resort to the nearest and most convenient breathalyzer machine for the first test. These machines are usually located at the county seat. Any law enforcement agency in the county may bring a person, arrested for drunk driving, to the location of such machine where there will be on duty a trained breathalyzer operator to conduct the test. The law requires only that a law enforcement agency be prepared to administer the tests. Each of them is so prepared by the method above outlined. Nothing in the law requires that the only way to comply with this requirement is for each law enforcement agency to have such a machine available within its own territorial jurisdiction. This would be a near impossibility. The legislature could not have so intended.

For the second test, which must be made available, law enforcement agencies utilize either the urine test or the blood test. Urine specimen containers are furnished by the State Laboratory of Hygiene to all law enforcement agencies which request them. Most sheriffs' offices would have these available. The specimens are sent to that laboratory for analysis. Thus, the test is actually performed by that laboratory and not by the law enforcement agency. Section 343.305 (9) (a), Stats. Some sheriffs' offices and other law enforcement agencies utilize the blood test as the second test. Those agencies do not employ a medical technician to withdraw blood samples. Instead, they arrange with a local hospital or clinic for this service. Such samples are forwarded to the State Laboratory of Hygiene for analysis. Section 343.305 (9) (a), Stats. In respect to this test, neither the withdrawal of the sample, nor the analysis is actually performed by the law enforcement agency. Thus, the method by which law enforcement agencies comply with the requirement that they must be prepared to administer a second test is to make arrangements with others for obtaining the specimen and for its analysis. Nothing in the law requires that this must be done within the territorial jurisdiction of the particular agency.

It is, therefore, my opinion that a law enforcement agency, which makes available two tests in the manner outlined above, fully complies with the requirement of sec. 343.305 (1), Stats., that it shall be prepared to administer two of the three tests.

A further question arises whether this issue can be raised and litigated in the implied consent refusal hearing. The scope of such hearing is spelled out in sec. 343.305 (7) (c), Stats., as follows:

“... The hearing shall be transcribed and shall be limited to the issues stated in sub. (2) (b). ...”

As set forth in sec. 343.305 (2) (b), Stats., those issues are the following: whether the person was under arrest at the time he was asked to submit to the test; whether he refused the test; whether he was informed of the consequences of refusal, and of his rights under subsecs. (4) and (5) (a) of sec. 343.305; and, whether his refusal was unreasonable. Since the issue as to whether the agency had two tests available is not included in this list, it is my opinion that such issue is not before the court in an implied consent refusal hearing.

RWW:AOH

Land; Each of two adjacent platted lots may not be divided for the purpose of sale or building development if such division will result in lots or parcels which do not comply with minimum lot width and area requirements established under sec. 236.16 (1), Stats. Section 236.335, Stats., discussed.

April 26, 1974.

ROBERT J. MUBARAK, *Assistant District Attorney*
Jackson County

You ask my opinion with respect to several questions regarding the division of several lots which apparently were surveyed, platted, and recorded under the provisions of ch. 236, Stats., at some time in the past.

You first inquire whether the owner of a block, which has been subdivided into 50 x 100 foot lots, may sell the east one-half of the north one-half of one lot within such block and the adjoining west one-half of the north one-half of an adjacent lot within the block without replatting said land.

Section 236.02 (13), Stats., defines replat as follows:

“Replat” is the process of changing, or the map or plat which changes, the boundaries of a recorded subdivision plat or part thereof. *The legal dividing of a large block, lot or outlot within a recorded subdivision plat without changing exterior boundaries of said block, lot or outlot is not a replat.*” (Emphasis added.)

In a prior opinion, my predecessor in office was asked whether the dividing of a large block, lot or outlot in a recorded plat was to be treated as a replat within the meaning of the above definition or as a new subdivision. 55 OAG 14 (1966). That opinion distinguished the terms “replat” and “subdivision”, on p. 17, as follows:

“By its terms, sec. 236.02 (13) provides that so long as the exterior boundaries of a legally divided large block, lot or outlot with a recorded subdivision plat are not changed by the dividing, no replat occurs. Whether a subdivision would occur depends on whether the act of division creates 5 or more parcels or building sites of 1 1/2 acres each or less in area, or whether in case of successive division, 5 or more such parcels are created within a 5 year period. Sec. 236.02 (8). *Scheer v. Weis* (1961), 13 Wis. 2d 408, 108 N.W. 2d 523.”

The division of each of the two adjacent platted lots for the purpose of the above-described sale apparently is intended to result in the creation of three parcels or building sites of 1 1/2 acres each or less in area. Under such circumstances, no subdivision would result. Likewise, the division of each of the two adjacent platted lots you have described would not necessarily be a replat within the meaning of sec. 236.02 (13), Stats., as long as the external boundaries of each platted lot are not changed by the act of dividing. However, whether the division of each platted lot and the subsequent conveyance of the resulting partial lots or parcels is permissible also involves the application of sec. 236.335, Stats.

Section 236.335, Stats., relates specifically to the subdividing and subsequent sale or use of a lot or parcel of land in a recorded plat and provides in part:

“No lot or parcel in a recorded plat shall be divided, or thereafter used if so divided, for purposes of sale or building development if the resulting lots or parcels do not conform to

this chapter or any applicable ordinance of the approving authority or the rules of the department of health and social services under s. 236.13. ...”

Further, sec. 236.16 (1), Stats., relating to minimum lot width and area requirements for platting purposes, provides in part:

“... in counties of less than 40,000, each lot in a residential area shall have a minimum average width of 60 feet and a minimum area of 7,200 square feet. 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.”

Generally speaking, if the parcels resulting from a division of a platted lot are in conformity with sec. 236.16 (1), Stats., then, of course, a conveyance and subsequent use of those parcels for building development is permissible. Further, if two such adjoining parcels, located in two adjacent platted lots, are conveyed for use as a single building site, then in my opinion, a building could properly be constructed across the platted lot line, if such construction was otherwise in compliance with local regulations.

However, sec. 236.335, Stats., clearly limits the division of a lot or parcel in a recorded plat and the subsequent sale or use of the resulting lots or parcels, if they do not conform to ch. 236, Stats., and other applicable regulatory provisions. Compliance with sec. 236.16 (1), Stats., is a prerequisite for creating a valid subdivision and is therefore applicable to any division of land within a recorded subdivision. In applying secs. 236.16 (1) and 236.335, Stats., to the dividing of the two platted lots which you have described, it is obvious that no division of such lots would be in compliance with those statutes. You indicate that the platted lots are presently only 50 feet wide by 100 feet deep, dimensions which were apparently appropriate at the time the plat was initially approved. Therefore, in the absence of a subdivision control ordinance properly reducing the allowable minimum lot width and area requirement, set forth in sec. 236.16 (1), Stats., division of the lots you have described, for purposes of sale or building development, is clearly prohibited by ch. 236, Stats.

Finally, assuming real estate in a recorded subdivision plat may be conveyed in the manner you describe, you ask whether recordation of a certified survey map of such real estate, prepared pursuant to sec. 236.34, Stats., would be proper or would constitute a replat within the meaning of sec. 236.02 (13), Stats.

Since I have previously indicated that the division of the lots you describe would not be in compliance with ch. 236, Stats., it is also clear that the preparation and recordation of a certified survey map to accomplish such division would likewise be in violation of ch. 236, Stats.

RWW:JCM

County Board; Highways; Section 83.025 (1), Stats., as amended by ch. 160, Laws of 1973, does not require counties to develop a functional and jurisdictional classification of highways. Nor is a properly approved classification plan a prerequisite to a county board's exercise of its authority pursuant to sec. 83.025 (1), as amended, to incorporate town roads into the county trunk highway system without prior approval of town boards.

April 26, 1974.

JACK E. JOYCE, *Assistant District Attorney*
Dunn County

You have asked my opinion regarding the effect of ch. 160, Laws of 1973, on the authority of county boards to incorporate town roads into the county trunk system pursuant to sec. 83.025, Stats.

As I understand it, the county administrator requested an opinion from your office as to whether the county board could incorporate (assuming highway commission approval) a town road into the county trunk highway system without approval of the town board. You were about to reply in the affirmative based on sec. 83.025 (1), Stats.; *Stoehr v. Red Springs* (1928), 195 Wis. 399, 216 N.W. 487; and 28 OAG 588 (1939), when ch. 160, Laws of 1973, was published. Chapter 160, Laws of 1973, effective January 31, 1974, amends sec. 83.025 (1) by adding the following language:

“Whenever a county has completed a functional and jurisdictional classification of highways and such classification plan has been approved by the county board, the local governing bodies and the highway commission, those roads and streets allocated to the county’s jurisdiction will be known as county trunk highways. Additions and deletions from such county trunks in the various municipalities may be made only by the county board with the consent of the commission.”

Although “functional and jurisdictional classification of highways” is not defined in sec. 83.025 (1) nor anywhere else in the statutes, I am informed that it is the term for a standard procedure readily familiar to highway officials. As one would expect, it involves classifying the use of highways and then allocating responsibility for certain classes (or specific highways) to the most appropriate governmental unit.

In this context, you ask whether the legislature now intends that counties complete a “functional and jurisdictional classification” of highways and obtain the specified approvals prior to undertaking changes in the county trunk system. More precisely, is a fully approved classification plan now a condition precedent to a county board’s exercise of its long-standing authority pursuant to sec. 83.025 (1), Stats.?

It is my opinion that ch. 160, Laws of 1973, does *not* impose a prerequisite to the exercise of authority given county boards by sec. 83.025 (1), Stats. Furthermore, I concur in your conclusion that sec. 83.025 (1) authorizes county boards to incorporate town roads into the county trunk system without town board approval. *Stoehr, supra*, and 28 OAG 588 (1939).

Section 83.025 (1), Stats., as amended by ch. 160, Laws of 1973, does not itself require counties to develop functional and jurisdictional classification plans. Nor does any other statute or regulation. Therefore, I read the “whenever” which starts the first sentence of the amendment to be synonymous with “if.” Accordingly, developing such a classification plan is entirely optional.

Chapter 160, Laws of 1973, began its legislative odyssey as 1971 Assembly Bill 1209. It was reintroduced in the 1973 session as 1973

Assembly Bill 816. Representative Mohn introduced the bill at the behest of the Department of Transportation. The Department of Transportation advises that the major impetus for the bill was the need for an acceptable means to alleviate the problems caused by the following language in sec. 83.025 (1), Stats.:

“... All streets or highways in any city or village over which is routed a county trunk highway or forming connections through such city or village between portions of the county trunk highway system shall be a part of such system unless the governing body of the city or village, by resolution, removes such street or highway from the county trunk system, but such removal shall apply only to that portion of any street or highway which is situated wholly within the city or village. ...”

This language authorizes cities and villages to unilaterally remove (assert jurisdiction over) segments of the county trunk system that lie within their jurisdiction. 29 OAG 23 (1940). The result of such removals has often been disjointed county trunk highways and confused jurisdictional responsibility.

Encouraging counties to develop functional and jurisdictional classification plans is one solution to the unilateral removal problem. Developing a plan provides a mechanism for the county and local governing bodies to agree upon an integrated highway system with clear-cut responsibility. If a plan is approved by the county board, local governing bodies, and the highway commission, then changes in the county trunk system (those highways allocated to the county's jurisdiction irrespective of political boundaries) can only be made by the county board with the consent of the highway commission. Cities and villages will have relinquished their unilateral removal authority.

RWW:CAB

Salaries And Wages; Public Officials; Elections; A legislator may be elected to a constitutional or statutory state elective office even though the emoluments of such office were raised during his legislative term. If so elected, he is limited by sec. 13.04 (1), Stats., to the emoluments of the office prior to such increase. A legislator is not eligible, however, for appointment to an office created during his

term or to an office the emoluments of which appointive office were raised during his legislative term.

April 26, 1974.

ROBERT C. ZIMMERMAN
Secretary of State

Section 152 of ch. 90, Laws of 1973, established a new compensation plan consisting of ten executive salary groups. Such section effectuates increased salaries for various elective and appointive state offices. Several members of the legislature have announced or are contemplating announcing their candidacy for various state offices. Additionally, members of the legislature may be considered for appointment to state offices created during the current legislative session. You, therefore, request my opinion "as to whether Art. IV, sec. 12 of the Wisconsin Constitution, precludes legislators from being elected or appointed to any of these offices or positions."

Article IV, sec. 12, Wis. Const., reads:

"No member of the legislature shall, during the term for which he was elected, be appointed or elected to any civil office in the state, which shall have been created, or the emoluments of which have been increased, during the term for which he was elected."

Chapter 90, sec. 152, Laws of 1973, raises the emoluments of constitutional officers and other elected state officials "effective immediately ... subject to the provisions of Article IV, Section 26 of the Wisconsin Constitution." Article IV, sec. 26, Wis. Const., generally prohibits increase in the compensation of any public officer during his term of office.

"CIVIL OFFICE" DISCUSSED

The prohibition of Art. IV, sec. 12, Wis. Const., extends to election or appointment "to any civil office in the state." "Office" is defined in *Martin v. Smith* (1941), 239 Wis. 314, 332, 1 N.W. 2d 163, as follows:

" '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.”

In addition, civil is distinguished from military. See Webster's Seventh New Collegiate Dictionary at p. 152 and the distinctions evident in Art. V, sec. 4, Art. XIV, sec. 5, and Art. X, sec. 13, Wis. Const.

OFFICE TO WHICH THE CONSTITUTIONAL PROHIBITION APPLIES

Offices created by the Constitution and having salaries initially specified therein and changeable only by amendment are not within the prohibition of Art. IV, sec. 12. See *State ex rel. Zimmerman v. Dammann* (1930), 201 Wis. 84, 228 N.W. 593, wherein the court held that Art. IV, sec. 12 did not prohibit a member of the legislature that increased legislative salaries from being a candidate to succeed himself, the rationale being that the framers of the Constitution could not congruently have intended the provision to apply to offices, the emoluments of which were not determinable by the legislature. And this is so, even though, by subsequent constitutional amendment, the emoluments for such offices are made determinable by the legislature.

32 OAG 378 (1943) opined, on the basis of the rationale in *Zimmerman*, that Art. IV, sec. 12, Wis. Const., did not prohibit a legislator from running for Governor even though the Governor's salary was raised during such legislator's term of office.

I concur in this opinion and am of the view additionally that the courts would follow the rationale of *Zimmerman* and hold that sec. 12 does not apply to those offices that were both created by and had their compensation fixed by the Constitution at the time of adoption.

I conclude, therefore, that the offices of legislator, Governor and Lieutenant Governor are, under the rationale of *Zimmerman*, excluded from the prohibition of Art. IV, sec. 12, Wis. Const. In the original Constitution, the compensation of the Secretary of State, Treasurer and Attorney General was left for determination by statute, Art. VI, sec. 3, Wis. Const. (1848). Judges' salaries were controlled only as to minimum, Art. VII, sec. 10, Wis. Const. (1848), in contrast to the State Superintendent of Public Instruction whose maximum compensation was controlled. Art. X, sec. 1, Wis. Const. (1848). Since the compensation of judges and the Superintendent of Schools was to be set by the legislature within the constitutional limitations, I do not deem these positions to be excluded from Art. IV, sec. 12, Wis. Const.

In summary, without attempting to enumerate all the offices to which this constitutional prohibition may apply, it appears that it is clearly applicable to the following offices: Secretary of State; Treasurer; Attorney General; Superintendent of Public Instruction; and judges.

“EMOLUMENT” DEFINED

The term “emoluments” as used in Art. IV, sec. 12, Wis. Const., requires slight definition. “Emolument” is defined by Webster’s Third New International Dictionary at p. 742 as:

“1: profit or perquisites from office, employment, or labor:
FEES, SALARY, ... COMPENSATION ...”

The meaning of “emolument” is more comprehensive than salary and includes gain, profit and compensation. *Dugger v. Board of Supervisors of Panola County* (1925), 104 S. 459, 461, 139 Miss. 552.

“ELECTED” - DEFINED

Another issue to be considered in construing Art. IV, sec. 12, Wis. Const., is whether the prohibition disqualifies a legislator from running for a prohibited civil office during his term or merely from qualifying for the office during his term. In other words, is the constitutional prohibition inapplicable to a legislator whose term would expire before he or she would assume the new office?

In *Zimmerman, supra*, at pp. 92-93, the court stated:

“It is considered that sec. 12 does not, when properly construed, prevent a member of the legislature who votes for the increase of legislative salaries from being a candidate to succeed himself. The conclusion at which we have arrived finds further support in a general principle of law that eligibility for office is to be determined as of the time the person assumes the duties of the office, and that a person who by reason of alienage, non-age, or similar reason is not eligible at the time he is voted for, but becomes such before he is required to assume the duties of the office, is properly elected to office. See *State ex rel. McKeever v. Cameron*, 179 Wis. 405, 192 N.W. 374, and cases there cited.”

The argument could be made on the basis of the above language that the court construed the Art. IV, sec. 12 provision to not exclude a legislator from being elected to the office during his term as long as his term runs out before he is required to assume the duties of the new office.

While “eligibility for office” is not synonymous with “shall ... be ... elected ...,” I cannot ignore that the Supreme Court was construing the constitutional provision under consideration. I note that *Zimmerman, supra*, follows the holding in *State ex rel. Schuet v. Murray* (1871), 28 Wis. 96, 99, 100, wherein the court held the rule of law to be:

“... it is that a person thus disqualified shall not be eligible *to hold* such office. Such disqualification does not relate to the *election to*, but to the *holding of*, the office...”

The court then cautioned:

“As a matter of course, none of these remarks are intended to apply to a case where a different rule has been enacted by constitutional or statutory provision.”

I note that the Wisconsin Supreme Court has not adopted the strictest construction of the prohibition. *State ex rel. Ryan v. Boyd* (1866), 21 Wis. 210, held that the Art. IV, sec. 12 prohibition did not apply to a legislator elected to the office of county judge before the judges' salaries were increased even though the increase was during his term as member of the legislature.

It is my view that "elected" as used in the portion of Art. IV, sec. 12, Wis. Const., "elected to any civil office in the state," refers to election day. While the Constitution and statutes both recognized that canvassing and certification of elections take place after election day, such actions are the means of determining who was elected and do not change the date of election, the date the ballots were cast. Article XIV, sec. 11 dealing with the first elections, reads in part:

"... The returns of election for state officer ... shall be certified and transmitted to the speaker of the assembly ... and as soon as the legislature shall be organized the speaker of the assembly and the president of the senate shall, in the presence of both houses, examine the returns and declare who are duly elected to fill the several offices hereinbefore mentioned, and give to each of the persons elected a certificate of his election."

Section 5.01 (3), Stats., compels the same conclusion in these words:

"... The person receiving the greatest number of legal votes for the office shall be declared elected, and the canvassers shall so determine and certify."

See also *State ex rel. Schuet v. Murray, supra*, for the proposition that election refers to the day the ballots are completed by the voters.

The State of Washington held on the basis of a constitutional provision similar to Wisconsin's that a legislator was not eligible for election notwithstanding the fact that her legislative term expired before commencement of her new office. *State ex rel. Pennick, et al. v. Hall* (1946), 26 Wash. 2d 172, 173 P. 2d 153. However, in a later case, *State ex rel. O'Connell v. Dubuque* (1966), 68 Wash. 2d 553, 413 P. 2d 972, the court specifically overruled *Pennick v. Hall, supra*, holding that where the actual salary increase does not take place during the legislator's term, he is eligible to stand for election and serve in office at the higher salary commencing with the expiration of his elected term, since no part of the increase would be earned during his elected term as legislator.

I cannot help note that carrying the dicta above quoted from *Zimmerman* to its logical extension would entirely vitiate the constitutional provision under consideration.

I conclude, therefore, that the prohibition of Art. IV, sec. 12 is against election or appointment to office, during the legislator's term and that absent sec. 13.04 (1), Wis. Stats., all legislators are precluded from such election or appointment.

CONSTITUTIONALITY OF SEC. 13.04 (1), STATS.

The final issue I shall discuss is the constitutionality of sec. 13.04 (1), Stats., which reads:

“Any member of the legislature who, during the term for which he was elected, is appointed or elected to any other civil office, the emoluments of which were increased during his term of office as a member of the legislature, shall be eligible to appointment or election to such office but shall be entitled to compensation only at the rate in effect prior to such increase. Any former member of the legislature, who, after expiration of the legislative term for which he was elected, is appointed or elected to any other civil office, shall be entitled to the full statutory compensation and expenses therefor.”

Section 13.04 (1), Stats., was apparently created to eliminate one of the evils to which Art. IV, sec. 12 is addressed and to legislatively interpret such section of the Constitution as permitting a legislator to assume another civil position as long as the compensation was limited to “the rate in effect prior to such increase.” The Wisconsin Supreme Court has not had occasion to rule on whether sec. 13.04 (1) is in conflict with Art. IV, sec. 12.

In *State ex rel. Fraser v. Gay* (1947), 28 S. 2d 901, 158 Fla. 465, the Florida Supreme Court considered the constitutionality of a similar statute. The Florida constitutional provision and statute in effect at the time were quoted at 28 S. 2d 902 as follows:

“Section 5, Article III of the Constitution is as follows: ‘No Senator or member of the House of Representatives shall during the time for which he was elected, be appointed, or elected to any civil office under the Constitution of this State that has been created, or the emoluments, whereof shall have been increased during such time.’

“Subsection (4) of Section 1, Chapter 22913, is as follows: ‘(4) Any member of the legislature who may during the time

for which he was elected senator or member of the house of representatives, be appointed or elected to a civil office referred to in section 5, article 3 of the constitution shall receive during the term for which he was elected or appointed to such civil office the salary or emoluments which under the provisions of law appertain to such office at the beginning of the time for which he was elected senator or member of the house of representatives.”

The Florida court held the statute invalid when applied to a state senator, elected state comptroller during his senatorial term, in that the salary of the office of comptroller was raised during such term. The Florida court stated at p. 902:

“Section 5 of Article III of the Constitution in words as clear as can be stated bars any member of the Senate or House of Representatives from election or appointment to certain civil offices during the time for which he was elected to the legislature and the office of Comptroller is, by reason of the salary raise in Chapter 22913 within the forbidden class. The terms of Section 5, Article III are so clear and direct that they defy misinterpretation. Any one who reads English can interpret them. To offer an interpretation other than their clear meaning imports would be a distortion of the English sentence. The test of the validity of the quoted provisions of the acts is whether or not they hamper the operation of the constitutional mandate.”

And further at p. 903:

“... The relator was a member of the Senate that raised the Comptroller's salary, his term does not expire till November 1948, so he is clearly within the class declared to be ineligible for election or appointment to another civil office by resigning from the legislature. If this be true certainly it cannot avoid the constitutional prohibition by remitting the raise in salary for the period of this election to the legislature. A more conclusive reason is that if the assaulted provisions of the two acts are permitted to stand, Section 5 of Article III is circumvented and its practical purpose nullified.”

In a later case, *State ex rel. West v. Gray* (Fla., 1954), 74 S. 2d 114, the court held, however, that a state senator was eligible for election to the office of Governor even though the salary of the Governor was increased during his legislative term. While there was agreement of a majority of the court as to the result, there was little agreement as to the rationale for the result. The per curiam opinion distinguished *State ex rel. Fraser v. Gay, supra*, in the following language from p. 119:

“There is a clear distinction between the facts here present and those in the case of *State ex rel. Fraser v. Gay, supra*. There, the increase was a statutory increase which, so long as it remained unchanged by another statute, was a fixed and permanent obligation of the state; here, the increase is only a temporary one which, by its very terms, will expire well in advance of what at the time of its enactment was any foreseeable gubernatorial election. ...

“For the reasons stated, we are of the opinion that the emoluments of the office of Governor have not been increased by the action of the 1953 session of the Legislature, within the spirit and intent of Section 5, Article III, Constitution of Florida, so that such section does not render Senator Johns ineligible for the office.”

While a majority of the members of the *West v. Gray* court agreed in the result, two advocated receding from *Fraser v. Gay, supra*, as the reason for their agreement. I am aware of no other state that has in its statutes a provision similar to sec. 13.04 (1), Stats.

In 52 OAG 425, 430, a former Attorney General, when faced with the question of the constitutionality of sec. 13.04 (1), Stats., (then sec. 13.36), stated:

“It cannot in my judgment be said that sec. 13.36 is clearly irreconcilably in conflict with Art. IV, sec. 12, so as to be beyond a reasonable doubt, which is the test that should be met before concluding that a statute is unconstitutional.”

The Utah Supreme Court in *Shields v. Toronto* (1964), 395 P 2d 829 16 Utah 2d 61, was urged to literally interpret a similar constitutional provision to preclude legislators from running for Governor and Secretary of State. The court refused to preclude the

legislators from being candidates on the ground, among others, that no showing of actual impropriety was made and a literal reading of the constitution provision would unnecessarily conflict with the right of citizens to vote for candidates of their choice. The decision reads in part on pp.831-832:

“The absence of any improper machinations being practiced here is rendered even plainer by the fact that all that has been done has had full exposure to public view, and that these candidates have had full exposure to the elective process. Months before this suite was filed they had announced their candidacies for office. They had to run before and obtain the approval of the conventions of their respective parties. They were obliged to run in the public primaries against formidable opponents; and must face candidates of the opposing party in the general election. All of this with the public fully aware of all of the circumstances so they are free to approve or disapprove what the candidates have done.

“So important that it cannot be ignored, but must be considered in the composite picture, is the effect the plaintiffs contended for application of this Constitutional provision would have upon the fundamental rights of citizens and upon the overall functioning of our democratic system of government. The foundation and structure which give it life depend upon participation of the citizenry in all aspects of its operation. On patriotic occasions we hear a great deal of oratory declaiming how precious is the right and how essential is the duty to vote for the candidate of one’s choice. The emphasis is placed on the first clause—the right to vote; and the second clause—for the candidate of one’s choice, is minimized or forgotten. Lost sight of is the fact that the two rights are correlative, and that to make the first meaningful, the second must also be assured. Furthermore, the natural corollary of the right to vote is the right to seek and to serve in public office. Reflection on the matter will reveal that these rights are of vital importance both to individual citizens and to the public. ...”

It should be noted that the Utah Court used the right to vote to mitigate against a literal application of the constitutional prohibition. In *State ex rel. Frederick v. Zimmerman* (1949), 254 Wis. 600, 613,

37 N.W. 2d 472, the Wisconsin Court describes the right of suffrage in these words:

“The right of a qualified elector to cast a ballot for the election of a public officer, which shall be free and equal, is one of the most important of the rights guaranteed to him by the constitution. If citizens are deprived of that right, which lies at the very basis of our democracy, we will soon cease to be a democracy. For that reason no right is more jealously guarded and protected by the departments of government under our constitutions, federal and state, than is the right of suffrage. It is a right which was enjoyed by the people before the adoption of the constitution and is one of the inherent rights which can be surrendered only by the people and subjected to limitation only by the fundamental law. (Cases cited.)

“While the right of the citizen to vote in elections for public officers is inherent, it is a right nevertheless subject to reasonable regulation by the legislature.” (Cases cited.)

It is inescapable that the constitutional provision literally read says: “thou shalt not” and the statutory provision says: “thou mayest, provided. ...” However, both Art. IV, sec. 12, Wis. Const. and sec. 13.04 (1), Stats., have the same overall objective—that of barring legislators from receiving increased emoluments which such legislators have provided. The constitutional prohibition should be strictly and narrowly construed in favor of eligibility. *State ex rel. Zimmerman v. Dammann, supra*, p. 92.

While Art. IV, sec. 12, Wis. Const., states a prohibition against election or appointment of a member of the legislature during the term for which he was elected to any civil office, the emoluments which were increased during his term, there is significant rationale which would probably cause our court to hold that what sounds like a very clear prohibition must be read in the light of the evil to be prevented (officers benefiting from self-enacting pay increases) as against the right of the people to select candidates for public office from one of the most appropriate pools of such talent, i.e., the legislature.

I, therefore, conclude, given the strong presumption of constitutionality which attaches to enacted statutes, that sec. 13.04 (1), Stats., is constitutional in application and does enable a

legislator to assume an elected state office provided he does so at the salary level existing prior to the voted increase. My conclusion is based on the further reasoning that the withholding of the increased compensation and the submission for consideration of the candidate's actions as a legislator to the public at the ballot box after he has participated in (and perhaps voted for) the legislation increasing the emoluments for the office sought is a sufficient handling of the evils which Art. IV, sec. 12, was intended to prevent. It is my belief that the law should be construed in favor of maximizing the right of the public to vote for candidates of its choice, and to give a literal interpretation to this section of the Constitution would appear to unduly infringe on that right.

A legislator may not, however, be *appointed* to positions which were created or the emoluments of which were increased during his term. Section 13.04 (1), Stats., does not make provision for offices created during the legislative term. Moreover, in either event, the element of the right of the electorate to vote for candidates of their choice and the corresponding liability of the legislator having to face the electorate for approval of the action in raising the emoluments is absent. Absent the necessary catharsis of the vote of the electorate, I deem sec. 13.04 (1), Stats., to be unconstitutional in its application to appointive positions and therefore unavailable to cure the evil which the constitutional provision is designed to prevent.

CONCLUSION

Legislators may be candidates for the position of Governor and Lieutenant Governor, offices whose salaries were initially specified in the Constitution, since such offices are not within the prohibition of Art. IV, sec. 12, Wis. Const. As to the offices of Secretary of State, Treasurer, Attorney General, Superintendent of Schools and the Judiciary, any legislator may be a candidate by virtue of sec. 13.04 (1), Stats. In any event, in all of the above offices, including Governor and Lieutenant Governor, the legislator, if he attains the office, would be limited by sec. 13.04 (1), Stats., to the salary prior to the increase during his term as legislator.

RWW:WMS

County Highway Committee; County Board; Counties; Section 83.015, Stats., does not preclude county boards from auditing county highway committee vouchers prior to payment thereof from county

funds. However, the board's audit authority is limited to determining whether the expenditure is within the scope of the committee's statutory or delegated authority.

April 29, 1974.

DENNIS G. MONTABON, *District Attorney*
Lincoln County

You have requested my opinion as to whether a county board has authority to require that vouchers approved by the county highway committee be reviewed and approved by the board's finance committee prior to payment from county funds.

As I understand it, the finance committee of the Lincoln County Board of Supervisors reviews the vouchers and approves the expenditures of all county departments and committees except the highway department and county highway committee. A resolution has been introduced for board consideration that would subject highway expenditures to the same audit procedures as other county disbursements.

Chapter 83, Stats., vests responsibility for administering the construction and maintenance of county highways with county highway commissioners and county highway committees. Section 83.01 (7), Stats., provides, in part:

“DUTIES. (a) The county highway commissioner shall have charge under the direction of the county highway committee of the construction of highways built with county aid and of the maintenance of all highways maintained by the county.

“(b) He shall perform all duties required of him by the county board and by the county highway committee ...”

County highway committees are established by sec. 83.015, Stats. Subsection (1) provides, in part:

“... The committee shall be known as the ‘county highway committee,’ and *shall be the only committee representing the county in the expenditure of county funds in constructing or maintaining, or aiding in constructing or maintaining highways.* ...” (Emphasis supplied.)

Subsection (2) delineates the committee's powers and duties. It provides, in part:

“POWERS AND DUTIES. The county highway committee shall purchase and sell county road machinery as authorized by

the county board, ... enter into contracts in the name of the county, and make necessary arrangements for the proper prosecution of the construction and maintenance of highways provided for by the county board, ... direct the expenditure of highway maintenance funds received from the state or provided by county tax, *meet from time to time at the county seat to audit all pay rolls and material claims and vouchers resulting from the construction of highways* and perform other duties imposed by law or by the county board.” (Emphasis supplied.)

The language of subsecs. (1) and (2) emphasized above raises the question of whether sec. 83.015, Stats., precludes boards from reviewing and approving expenditures approved by the county highway committee prior to payment from county funds.

In my opinion, boards have limited authority pursuant to secs. 59.07 (3), 59.20, 83.01 (7) (b), and 83.015 (2), Stats., to examine (i.e., audit) vouchers approved by the county highway committee prior to payment thereof from county funds. However, such a prepayment audit does not provide the occasion for a board (or its finance committee) to substitute its judgment for the highway committee's with respect to contracts the highway committee is authorized to enter into on behalf of the county. Payment on a voucher could only be disallowed if the expenditure is beyond the scope of the highway committee's authority under sec. 83.015, Stats.

County boards are vested with primary authority over expenditures of county funds. County boards (hereinafter, boards) are expressly authorized to examine all proposed expenditures and order disbursements therefor. Sec. 59.07 (3), Stats. Section 59.20 (2), Stats., provides that the county treasurer may only disburse county funds pursuant to an order of the board, signed by the county clerk (see secs. 59.17 (3) and 59.81 (2), Stats.), and countersigned by the chairman of the board:

“... except when special provision for the payment thereof is otherwise made by law; and, except in counties having a population of 500,000 or more, pay out all moneys belonging to the county road and bridge fund on the written order of the county commissioner of highways, signed by the county clerk and countersigned by the chairman of the county board.”

Section 59.20 (4), Stats., requires the treasurer to keep an account of the receipt and expenditure of all moneys in books subject to examination by the board at any time. Furthermore, the treasurer must be prepared to exhibit his vouchers for money received and disbursed "... at such other times as they [the board] may direct ... *to be audited and allowed.*" (Emphasis supplied.) Sec. 59.20 (4), Stats.

The language of sec. 83.015 (1), Stats., to the effect that the highway committee shall be the only committee representing the county in the expenditure of county highway funds, does not immunize the committee from fiscal oversight by the board. The fact that the highway committee may order disbursements from the county road and bridge fund does not affect the board's authority to examine the committee's accounts pursuant to sec. 59.07 (3), Stats., and audit its vouchers pursuant to sec. 59.20 (4), Stats. The highway committee is merely "an agency of the county," acting "for and in the place of the county board with reference to certain matters," and as "representative and agent of the county board." 26 OAG 349, 351 (1937); see also, 48 OAG 241 (1959), and 54 OAG 191 (1965). Among the express duties of committees is the responsibility to "... perform other duties imposed ... by the county board." Sec. 83.015 (2), Stats. A board could rely on this language as the basis for requiring the highway committee to routinely submit its vouchers to the board or its delegate for examination and audit before it (the committee) directs issuance of a disbursement order.

I do not view the audit responsibilities of highway committees under sec. 83.015 (2), Stats., to be in conflict with, and thereby a limitation on, the limited authority of boards to examine and/or audit vouchers for expenditures of county highway funds. They do not conflict because they constitute different functions.

In supporting this proposition, I begin with *Rinder v. Madison* (1916), 163 Wis. 525, 158 N.W. 302. *Rinder* was decided on the basis of sec. 1317m-5, sub. 8, Statutes of 1915, a predecessor of sec. 83.015, Stats. The audit function was somewhat different then in that it was to be performed together with the county clerk. Sec. 1317m-5, sub. 8 (3) (e). Moreover, sec. 1317m-5 did not contain the "only" language of the present sec. 83.015 (1), Stats. The court

distinguished the highway committee's audit authority from board authority as follows:

"It is contended that this subsection delegates powers and authority to such committee which are conferred by the constitution on county boards and county clerks. These powers and duties of this committee are clearly administrative in their nature and in no way conflict with the duties imposed by law on county clerks. The committee can only carry out the road improvement authorized by the county board and perform administrative features connected therewith. It is suggested that they have the ultimate power to pass on the legality of claims for services and material furnished for the construction of roads and bridges. The duty to 'audit' such claims as provided by par. (3) (c) of this subsection is not to be interpreted as abrogating the duties imposed by law on county clerks, nor is it to be considered that such 'audit' implies that the committee is given power to finally pass on the allowance or disallowance of claims against the county. It is evident that their duties under this part of the act are to examine claims to ascertain whether or not they pertain to and properly itemize the charges for material furnished and work done, and to check the items as to their correctness in these respects to assist the county clerk and the county board to determine whether they are just and legal claims." 163 Wis. at 533.

The legislature added the "only" language to the highway committee statute in 1919. Ch. 458, sec. 1, Laws of 1919. The amended statute, as recreated as part of ch. 82, 1929 Stats., was discussed in *Joyce v. Sauk County* (1931), 206 Wis. 202, 239 N.W. 439. *Joyce* involved a dispute between the highway committee and a contractor over the balance due on a grading contract. The committee agreed to arbitration which resulted in a finding that the contractor was owed an additional sum. The board disallowed the claim. The appeal was taken on an overruled demurrer and centered on the issues of whether submitting the claim to the board pursuant to sec. 59.76, Stats., was a condition precedent to suit and whether the highway committee had authority to agree to arbitration. The court discussed the relationship between boards and highway committees as follows:

“It is clear that the county board has the power under sec. 82.06 to determine what highway projects shall be undertaken by the county. It is equally clear that such determination having been made, the county highway committee is expressly vested with power to make contracts binding upon the county for the prosecution of this work. The statute has vested in the county highway committee the power not only to make contracts but to audit payrolls, material claims, and vouchers, and to order the expenditure of money from the road and bridge fund, *and its acts in pursuance of this authority are binding upon the county. When it has acted within its authority, rights are created in the person contracting with the county through this committee, which exist independently of any action by the county board. ...*” (Emphasis supplied.) 206 Wis. at 206.

In 1943, one of my predecessors was asked for an opinion as to what claims may be paid by a county treasurer upon audit by a standing or special committee of the board (e.g., the highway committee) without audit by the entire board. In 32 OAG 347 (1943), the then attorney general first opined that it is contemplated by secs. 59.07 (3), 59.17 (3), and 59.20 (2), Stats., that all claims against a county are to be audited by the board before payment, except as otherwise provided by law. The opinion then found the audit provided for in sec. 83.015 (2), Stats., to be such an exception so as to conclude:

“Hence, ... it would seem that as to items *properly within their authority* the audit of the county highway committee *would be sufficient* and that no county board audit would be required before payment.” (Emphasis supplied.) 32 OAG at 351

In doing so, the opinion qualified *Rinder, supra*, on the basis of *Joyce, supra*. I concur in that assessment. It bears noting, however, that the issue here is not the sufficiency of a highway committee’s audit, but whether sec. 83.015, Stats., precludes prepaying review of vouchers by boards.

These authorities lead me to conclude that, although a board may require a prepayment review of highway committee vouchers, such a review is limited to a determination of whether the proposed expenditure falls within the scope of the highway committee’s

statutory or delegated authority. Boards must direct county highway policy at the taxing, appropriation, and project approval stages. They may not use their prepayment review authority as a mechanism to substitute their judgment for the highway committee's on matters within the committee's authority.

RWW:CAB

Libraries: A county having a population in excess of 85,000 and which does not presently operate and maintain a library but which contains a city of over 30,000 operating a library, can establish a single-county federated library system. Secs. 43.15 (4) (a) and 43.19, Stats.

April 30, 1974.

JOSEPH J. SALITURO, *Corporation Counsel*
Kenosha County

Kenosha County has a Library Planning Committee organized pursuant to sec. 43.11, Stats. According to the 1970 federal census, Kenosha County had a population of 117,917 and the City of Kenosha had a population of 78,805. The current estimate of Kenosha County's population, by the Department of Administration, is 122,252. You advise that the City of Kenosha is the only municipality within the county which presently maintains a library for its residents. Such library is organized pursuant to sec. 43.52, Stats.

You inquire whether the Kenosha County Board of Supervisors may create a single-county federated system.

I am of the opinion that it can even though the City of Kenosha is the only potential member currently operating a library.

As used in secs. 43.15 (4) (a) and 43.19, Stats., a federated public library system is the result of *an agreement* between the county, and the governing boards of "its underlying cities, villages and towns *as have public libraries* and are participating *in the system.*" (Emphasis added). Sec. 43.15 (4) (a), Stats. There is no

requirement that the local municipalities be presently operating library *systems* or that the county be presently operating a library or a system. Sec. 43.001 (3), Stats., provides:

“(3) ‘Public library system’ means a system established as either a federated public library system under s. 43.19 or a consolidated public library system under s. 43.21.”

Kenosha County meets the population requirements of sec. 43.15 (1) (a) as to population of the territory to be included; it is in excess of 85,000, and includes at least one public library established under sec. 43.52, Stats., in a city having a population in excess of 30,000.

Since Kenosha County has a population of less than 150,000, it is ineligible to create a county library system under sec. 43.57 (1), Stats. A county is a municipality within the meaning of that term as used in sec. 43.52 (1), Stats., and the predecessor statute did specifically use the term “county.” See sec. 43.001 (4), Stats. Whereas Kenosha County could establish and maintain a public library under that section, it is not a necessary prerequisite to the establishment of a single-county federated system. Kenosha County would also qualify for establishment of a consolidated system. The advantages of the various systems should be discussed with the Division of Library Services, Wisconsin Department of Public Instruction. Section 43.13 (1) (a), Stats., provides that no public library *system* may be established without the approval of the division.

Whether a Kenosha County federated library system would qualify for the state aids provided in sec. 43.24, Stats., would in part be determined by the determination required of the Division of Library Services.

RWW:RJV

Public Records; Teachers; Matters and documents in the possession or control of school district officials containing information concerning the salaries, including fringe benefits, paid to individual teachers are matters of public record.

May 6, 1974.

ERNEST C. KEPPLER, *State Senator*
Legislature

As chairman and on behalf of the Senate Organization Committee, you request my opinion on the question of whether or not the salaries, including all fringe benefits, paid individual teachers for services as public employes are matters of public record.

Section 19.21 (1), Stats., provides:

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

There are several documents or records within the possession or control of the superintendent of a school district that would contain information on the salaries, including fringe benefits, paid to individual teachers employed by the district. A non-exclusive listing of such documents would include: (1) individual teachers' contracts, which necessarily would contain information concerning salary and other fringe benefits, or reference to other documents setting forth such information; (2) payroll records necessary to determine gross salary, paychecks, required federal and state income tax withholding, and other wage deductions; (3) collective bargaining agreements, if such have been entered into by the school district and the collective bargain unit; and (4) all materials including but not limited to correspondence, computer data and ancillary records as they relate to the categories just listed.

Since these records are properly in the possession, control, or entitlement of the superintendent or his or her deputies, they are clearly public records within the meaning of sec. 19.21 (1), Stats.

Section 19.21 (2), Stats., provides:

“Except as expressly provided otherwise, any person may with proper care, during office hours and subject to such orders

or regulations as the custodian thereof prescribes, examine or copy any of the property or things mentioned in sub. (1). Any person may, at his own expense and under such reasonable regulations as the custodian prescribes, copy or duplicate any materials, including but not limited to blueprints, slides, photographs and drawings. Duplication of university expansion materials may be performed away from the office of the custodian if necessary.”

I am unaware that there is any express provision that the above-mentioned records do not fall within the ambit of sec. 19.21, Stats., and therefore conclude that your question must be answered in the affirmative.

RWW:WHW

Industrial Development Corporation; Typical “turn-key” projects financed by industrial development revenue bonds pursuant to sec. 66.521, Stats., are not subject to sec. 66.293 (3), Stats.

May 6, 1974.

PHILIP E. LERMAN, *Chairman*
Department of Industry, Labor and Human Relations

You have asked for my opinion concerning the applicability of sec. 66.293 (3), Stats., to projects financed by industrial development revenue bonds.

Section 66.293 (3), Stats., was amended by ch. 181, Laws of 1973, published April 18, 1974, to read:

“(3) Every municipality, before making a contract by direct negotiation or soliciting bids on a contract, for any project of public works except highway, street or bridge construction, shall apply to the department of industry, labor and human relations to ascertain the prevailing wage rate, hours of labor and hourly basic pay rates in all trades and occupations required in the work contemplated. The department shall determine the prevailing wage rate, hours of labor and hourly basic pay rates

for each trade or occupation pursuant to s. 103.49, make its determination within 30 days after receiving the request and file the same with the municipality applying therefor. Reference to such prevailing wage rates and hours of labor determined by the department or a municipality exempted under par. (d) shall be published in the notice issued for the purpose of securing bids for the project. Whenever any contract for a project of public works except highway, street or bridge construction is entered into, the wage rates and hours determined by the department or exempted municipality shall be incorporated into and made a part of the contract. No laborer, workman or mechanic employed directly upon the site of the project by the contractor or by a subcontractor, agent or other person, doing or contracting to do any part of the work, may be paid less than the prevailing wage rate in the same or most similar trade or occupation; nor may he be permitted to work a greater number of hours per day or per calendar week than the prevailing hours of labor determined under this subsection, unless he is paid for all hours in excess of the prevailing hours at a rate of at least 1-1/2 times his hourly basic rate of pay."

The typical construction project financed by industrial development revenue bonds pursuant to sec. 66.521, Stats., is a "turn-key" project whereby an industrial concern constructs a plant facility with interim financing. Eventually the project is paid for with the proceeds from the bonds. The industrial concern agrees to sell, and the municipality involved agrees to buy the project with the proceeds from the bonds. The industrial concern agrees to lease the project back from the municipality on such terms which would retire the bonds as they mature.

The Wisconsin Supreme Court upheld the constitutional and statutory validity of a "turn-key" project financed by industrial development revenue bonds in *State ex rel. Hammermill Paper Co. v. La Plante* (1973), 58 Wis. 2d 32, 205 N.W. 2d 784.

The question thus is whether a typical "turn-key" construction project financed by industrial development revenue bonds pursuant to sec. 66.521, Stats., involves a situation where a municipality is "making a contract by direct negotiation or soliciting bids on a contract, for any project of public works."

The answer is in the negative, and sec. 66.293 (3), Stats., does not apply, since a typical "turn-key" project is constructed by private industry rather than by the municipality involved.

RWW:APH

Clerk of Courts; Civil Service; Provisions of a county civil service ordinance enacted under sec. 59.07 (20), Stats., or collective bargaining agreement entered into pursuant to sec. 111.70, Stats., establishing a procedure to be followed prior to discharge of a classified employe, supersede and modify provisions of sec. 59.38 (1), Stats., which authorize a clerk of court to discharge a deputy clerk of court at pleasure.

May 7, 1974.

ROBERT RAHR FLATLEY, *Corporation Counsel*
Brown County

You request my opinion on the following question:

May the clerk of courts discharge a deputy clerk of courts at his pleasure without following the discharge procedures contained in either a county civil service ordinance or in a collective bargaining agreement which includes such employe?

On the basis of the facts set forth herein, I am of the opinion that such officer does not have the power to discharge at pleasure.

With respect to the civil service feature of your question, this opinion assumes that the deputy clerk of courts involved is not a chief deputy clerk of courts within the meaning of secs. 59.38 (2) and 63.03 (1) (h), Stats., that the county civil service ordinance was promulgated under the authority of sec. 59.07 (20), Stats., and that there is no county civil service commission. With respect to the collective bargaining feature of your question, this opinion assumes that such deputy is not an independent contractor, supervisor, confidential, managerial or executive employe. See sec. 111.70 (1) (b), Stats. Since you advise me that the Wisconsin Employment Relations Commission has certified the bargaining unit to include the

deputy, I consider the latter assumption to be conclusively established.

You state that Brown County has a civil service ordinance adopted solely under sec. 59.07 (20), Stats., that deputy clerks of court are included, and that the ordinance establishes a specific procedure to be followed in the discharge of a civil service employe, including the filing of a statement of charges and the right to a hearing before a civil service appeal board. You further state that, pursuant to sec. 111.70, Stats., Brown County has entered into a collective bargaining agreement with a bargaining unit certified by the Wisconsin Employment Relations Commission, and that such agreement includes deputy clerks of court and contains provisions regulating discharge procedures.

Section 59.38 (1), Stats., provides:

“59.38 (1) Counties of less than 500,000 population. Every clerk of the circuit court shall appoint one or more deputies, men or women, which appointments shall be approved by the judge of the circuit court, but shall be revocable by the clerk at pleasure, except in counties having a population of 500,000 or more. Such appointments and revocations shall be in writing and filed in the clerk’s office; such deputies shall aid the clerk in the discharge of his duties, and in his absence from his office or from the court they may perform all his duties; or in case of a vacancy by resignation, death, removal or other cause the deputy appointed shall perform all such duties until such vacancy is filled.”

Section 253.30 (2), Stats., which is applicable to the appointment of deputies to serve regularly as clerk of a particular branch of county court, provides:

“253.30 (2) In counties with multibranch county courts, the clerk of circuit court may appoint one or more deputies for each branch except branch No. 1 and, in counties having a population of 500,000 or more, branch No. 2, which appointments shall be approved by the judge of the branch which the deputy will serve. A deputy appointed to serve a particular branch may serve any other branch of the county court.”

Under sec. 59.38 (1), Stats., it would appear that the clerk of court could revoke the appointment of a deputy and discharge him at pleasure. Section 253.30 (2), Stats., makes no reference to power to discharge at pleasure, and secs. 59.38 (2) and 253.30 (3), Stats., make it clear that in counties of over 500,000 population deputy clerks can be included within a county civil service ordinance. Section 59.38 (1), Stats., was amended by ch. 495, Laws of 1961, to include the word "shall" before the words "be revocable by the clerk at pleasure" and to except such revocability provisions in counties having over 500,000 population. Section 59.38 (2) provides that in such counties only the chief deputy clerk is removable at pleasure. I am of the opinion, however, that by reason of secs. 59.07 (20), and 59.15 (2), (4), Stats., a county may include deputy clerks of court within a county civil service system, and that where included, the provisions of the civil service ordinance as to discharge control over the provisions of sec. 59.38 (1), Stats., which provides for removal at pleasure.

Section 59.07 (20), Stats., provides:

"59.07 (20) Civil service system. Establish a civil service system of selection, tenure and status, and the system may be made applicable to *all county personnel, except the members of the board, constitutional officers, members of boards and commissions and judges.* The system may include also uniform provisions in respect to classification of positions and salary ranges, pay roll certification, attendance, vacations, sick leave, competitive examinations, hours of work, tours of duty or assignments according to earned seniority, employe grievance procedure, disciplinary actions, layoffs and separations for cause subject to approval of a civil service commission or the board. The board may request the assistance of the department of administration and pay therefor, pursuant to s. 16.295." (Emphasis added.)

Deputy clerks of circuit and county court are not excepted under this statute.

Section 59.15 (2) (a), Stats., as amended by ch. 118, Laws of 1973, and sec. 59.15 (2) (c), (d), and (4), provide in material part:

“59.15 (2) (a) The board has the powers set forth in this subsection ~~and~~, sub. (3) and s. 59.025 as to any office, department, board, commission, committee, position or employe in county service (other than elective offices included under sub. (1), supervisors and circuit judges) created under any statute, the salary or compensation for which is paid in whole or in part by the county, and the jurisdiction and duties of which lie within the county or any portion thereof and the powers conferred by this section shall be in addition to all other grants of power and shall be limited only by express language.”

“59.15 (2) (c) The board may provide, fix or change the salary or compensation of any such office, board, commission, committee, position, employe or deputies to elective officers without regard to the tenure of the incumbent (except as provided in par. (d)) and also establish the number of employes in any department or office including deputies to elective officers, and may establish regulations of employment for any person paid from the county treasury ****”

“59.15 (2) (d) The board or any board, commission, committee or any agency to which the board or statutes has delegated the authority to manage and control any institution or department of the county government may contract for the services of employes, setting up the hours, wages, duties and terms of employment for periods not to exceed 2 years.”

These sections clearly give the board power to establish regulations of employment for any person paid from the county treasury, not excepted in sec. 59.15 (2) (a), Stats., and expressly include deputies to elective officers.

Section 59.15 (4), Stats., provides:

“59.15 (4) **Interpretation.** In the event of conflict between this section and any other statute, this section to the extent of such conflict shall prevail.”

In 35 OAG 69 (1946) it was stated that civil service rules can apply to all county personnel not expressly excluded from sec. 59.07

(20), Stats. In 38 OAG 21 (1949), it was stated that sec. 59.07 (20), Stats. (then 59.074), authorizes the inclusion of a position such as deputy county treasurer within the county civil service system and to that extent supersedes the provision of then sec. 59.19 (1), Stats. In 41 OAG 105 (1952), it was stated that where a county civil service system, established pursuant to then sec. 59.074, Stats., includes a deputy register of deeds and a tenure provision thereof conflicts with the apparent right of the register of deeds to dismiss such deputy at pleasure, the tenure provision of the civil service system supersedes the conflicting statute.

In *Richards v. Board of Education* (1973), 58 Wis. 2d 444, 460b, 206 N.W. 2d 597, it was stated that a board of education could, under sec. 111.70, Stats., enter into an agreement establishing a grievance procedure relating to dismissals and that such subject is within the embrace of “wages, hours and conditions of employment” as defined in sec. 111.70 (1) (d), Stats. Section 111.70, Stats., being a subsequent enactment, modifies the otherwise absolute power to hire and fire. *Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B.* (1967), 35 Wis. 2d 540, 557, 151 N.W. 2d 617.

The county board has power to contract for the services of employes, setting up “hours, wages, duties and terms of employment” under sec. 59.15 (2) (d), Stats., and may establish “regulations of employment for any person paid from the county treasury” and establish the number of employes in each department “including deputies to elective officers” under sec. 59.15 (2) (c), Stats. Therefore, I am of the opinion that the board can enter into a collective bargaining agreement with a duly certified bargaining unit of employes under sec. 111.70, Stats., which establishes a grievance procedure relative to discharge, without the express consent of the elected officials under whom such deputies serve. To the extent that such bargaining agreement is consistent with powers granted to the county board under secs. 59.15 (2) and 111.70, Stats., it modifies the provisions of a statute such as sec. 59.38 (1), Stats., which permits a clerk of circuit court to remove a deputy clerk of court at pleasure.

RWW:RJV

Public Service Commission: The Public Service Commission must hold a public hearing prior to the adoption of the minimum gas safety standards of the federal Department of Transportation as rules pursuant to sec. 196.745 (1), Stats.

May 15, 1974.

JAMES J. BURKE

Revisor of Statutes

You advise that the Public Service Commission has filed with the Revisor of Statutes administrative rules relating to gas safety adopted pursuant to sec. 196.745 (1), Stats. These rules incorporate by reference certain changes and additions made by the Federal Department of Transportation to federal regulations promulgated under the Natural Gas Pipeline Safety Act of 1968, 82 Stat. 720, 49 U.S.C. 1671 et seq. The Commission did not hold a public hearing prior to adopting these rules, and you inquire whether a public hearing was required.

Section 227.02 (1), Stats., states that an agency shall precede all rule making with notice and public hearing unless the rules fall within one of the exceptions specified therein. The Commission apparently is of the view that the rules in question fall within the exception of subsec. (1) (b) in that "The proposed rule is designed solely ... to comply with a federal requirement. ..." The Commission argues that it has no real alternative except to comply with changes in federal regulations since, if it does not adopt the federal safety standards applicable to pipeline facilities and transportation of gas in order to become certified under sec. 5 (a) (2) of the Natural Gas Pipeline Safety Act of 1968, it will lose jurisdiction over its gas pipeline safety functions to the federal government. The Commission therefore submits that to require a hearing before the adoption of such rules would be to require a useless act.

Although an exception to the hearing requirement of sec. 227.02, Stats., is created by subsec. (1) (b), it must also be noted that subsec. (2) (a) states that the exceptions to the general hearing requirements set forth in 227.02 (1) do not apply if:

“(a) Another section of the statutes specifically requires the agency to hold a hearing prior to adoption of the proposed rule under consideration. ...”

The statute pursuant to which the rules in question were adopted, sec. 196.745 (1), Stats., authorizes the Commission to issue orders or rules dealing with gas safety “... after holding a hearing. ...” Since sec. 196.745 (1) specifically requires the agency to hold a hearing prior to the adoption of gas safety rules, it appears that the 227.02 (1) (b) exception to the public hearing requirement is not applicable in this case.

Additional support for this result may be found in the fact that the legislature in 1969 amended sec. 196.745 (1), Stats., by, *inter alia*, adding the words “holding a” before the term “hearing” in its second sentence. Laws of 1969, ch. 103, sec. 1, effective July 13, 1969. Thus, even after the Natural Gas Pipeline Safety Act of 1968 was passed which required the Commission to adopt federal safety standards in order to retain jurisdiction over the regulation of pipeline gas safety, the legislature, rather than eliminating the hearing requirement under sec. 196.745 (1), Stats., amended the language of said section to make it clear that public hearings were required to be held by the Commission prior to adoption of rules pursuant to that section.

Furthermore, even if the Commission’s rule making is merely the adoption of federal safety standards in order to retain jurisdiction over gas pipeline safety, it does not necessarily follow that requiring a hearing before the adoption of such rules would be a useless act as the Commission suggests. A hearing would allow members of the public to express their views regarding such issues as whether the state should go further than the federal safety standards for pipeline facilities and the transportation of gas by adopting more stringent or additional standards or, on the other hand, whether the state should perhaps relinquish its jurisdiction over the enforcement of these federal standards to the federal government.

It is therefore my conclusion that the Public Service Commission in adopting the rules in question pursuant to sec. 196.745 (1), Stats.,

is required to precede the adoption of such rules with a public hearing.

RWW:WCW

Public Health; Funeral Directors And Embalmers; Although sec. 156.03 (2) (a), Stats., authorizes the state health officer and the examining council by joint action to make rules governing the business practices of funeral directors and embalmers; such rules, unless specifically exempted therefrom, should be enacted pursuant to the provisions of ch. 227, Stats., or otherwise, they could be subjected to a declaratory judgment proceeding and probably would be declared null and void.

May 16, 1974.

GEORGE H. HANDY, M.D., *State Health Officer*
Department of Health and Social Services

You state that on December 3, 1973, you, as State Health Officer, and the Examining Council for funeral directors and embalmers, by joint action, established funeral director guidelines on consumer disclosure, pursuant to the provisions of sec. 156.03 (2) (a), Stats., for the purpose of amplifying and clarifying sec. 156.12 (4), Stats. You further state that said guidelines will be used to determine what constitutes proper business practice in the funeral directing profession. You also state that it is your intent to take action to revoke or suspend licenses of funeral directors who fail to comply with said guidelines pursuant to the provisions of sec. 156.13, Stats. You then request my opinion on the following question:

“Were these regulations properly developed and will we be able to enforce them, either through the administrative hearing process or through the courts?”

The “guidelines” in essence would require: (1) each funeral establishment to disclose separately in writing the price of the casket, services and other merchandise included in funeral arrangements prior to selection; (2) the funeral service licensee to provide a signed statement to the person or persons making such arrangements prior to the time services are rendered which contains the price of service selected and what services are included therein, the price of each

supplemental item of service or merchandise requested, the amount involved for each item for which the funeral director will advance monies as an accommodation to the family and the agreed upon method of payment; and (3) that the funeral service licensee make an appropriate adjustment or allowance for merchandise not provided or services not rendered and make available for the review of the department records documenting the method or methods used in determining these allowances.

I note that these guidelines were adopted by the joint action of yourself and the Examining Council without notice or hearing, but copies of the guidelines were sent to each funeral establishment in the State of Wisconsin.

Section 156.03 (2) (a), Stats., reads as follows:

“(2) The state health officer and the examining council by joint action may:

“(a) Make and enforce rules and regulations not inconsistent with this chapter establishing professional and business ethics for the profession of funeral directors and embalmers and for the general conduct of the business of funeral directing and embalming, and for the examination and licensing of funeral directors and embalmers and the registration of apprentices.”

Section 156.12 (4), Stats., reads as follows:

“(4) No licensed funeral director, licensed embalmer or operator of a funeral establishment shall publish, or cause to be published, any false, misleading or fraudulent advertisement, or take undue advantage of his patrons or commit any fraudulent act in the conduct of his business, or do any other act not in accord with the *rules and regulations established by the department* and not in accord with proper business practice as applied to the business or profession of funeral directing and embalming.” (Emphasis added.)

In order to answer the question you pose, it is necessary to determine whether these guidelines fall within the exceptions to the notice and hearing requirements for rule making set forth in secs.

227.01 (4), (5) and 227.02 (1), Stats. Section 227.02 (1), Stats., reads in part, as follows:

“227.02 When hearings required. (1) An agency shall precede all its rule making with notice and public hearing unless:

“(a) The proposed rule is procedural rather than substantive; or

“(b) The proposed rule is designed solely to bring the language of an existing rule into conformity with a statute which has been changed or adopted since the adoption of such rule, to bring the language of an existing rule into conformity with a controlling judicial decision, or to comply with a federal requirement; or

“(c) The proposed rule is adopted pursuant to s. 227.027 as an emergency rule; or

“(d) It is the adoption, revocation or modification of a statement of general policy coming within the provisions of s. 227.01 (4); or

“(e) The proposed rule is published in the notice section of the administrative register together with a statement to the effect that the agency will adopt the proposed rule without public hearing thereon unless, within 30 days after publication of the notice, it is petitioned for a public hearing on the proposal by 25 persons who will be affected by the rule, a municipality which will be affected by the rule, or an association which is representative of a farm, labor, business or professional group which will be affected by the rule. If the agency receives such a petition it shall not proceed with the proposed rule making until it has given notice and held a hearing as prescribed by ss. 227.021 and 227.022. ...”

Section 227.02, Stats., must be read in conjunction with pertinent subdivisions of sec. 227.01, Stats., which read as follows:

“(3) ‘Rule’ means a regulation, standard, statement of policy or general order (including the amendment or repeal of any of the foregoing), of general application and having the effect of law, issued by an agency to implement, interpret or

make specific legislation enforced or administered by such agency or to govern the organization or procedure of such agency.

“(4) Every statement of general policy and every interpretation of a statute specifically adopted by an agency to govern its enforcement or administration of legislation shall be issued by it and filed as a rule. The fact that a statement of policy or an interpretation of a statute is made in the decision of a case or in an agency decision upon or disposition of a particular matter as applied to a specific set of facts involved does not render the same a rule within sub. (3) or constitute specific adoption thereof by the agency so as to be required to be issued and filed as provided in this subsection.” (Emphasis added.)

The guidelines are not procedural in nature. There are no existing rules specifically relating thereto. The “guidelines” clearly were not adopted pursuant to sec. 227.027, Stats., as an emergency rule. Section 227.01 (3), Stats., provides that a rule “means a regulation, standard or statement of general policy ... of general application and having the effect of law, issued by an agency to ... make specific legislation enforced or administered by such agency ...” Subsection (4) thereof provides that every “statement of general policy ... specifically adopted by an agency to govern its enforcement or administration of legislation shall be issued by it and filed as a rule ...” The “guidelines” do not constitute a statement of policy made in a decision in a case or agency decision upon a particular matter as applied to a specific set of facts involved. I note that sec. 156.12 (4), Stats., provides that no licensed funeral director shall take undue advantage of his patrons in the conduct of his business or do any act not in accord with the “rules and regulations established by the department.”

It is my opinion that the guidelines do not fall within the exceptions contained in secs. 227.01 (4), (5) and 227.02 (1), Stats. Since, as you state, your office intends to exercise its supervisory and enforcement powers through revocation or suspension of licenses for failure to comply with said guidelines, the notice and hearing requirements set forth in the Wisconsin Administrative Procedure Act or at least the provisions contained in sec. 227.02 (1) (e), Stats.,

should be complied with. I should note at this point that a review of the rules of the department pertaining to the business of funeral directing and embalming and contained in the Wisconsin Administrative Code discloses the following information:

- (1) Chapter H 16 deals with special examinations for licensing funeral directors and embalmers, registration of apprentices as well as matters pertaining to the conduct of the business of funeral directing and embalming; and
- (2) Chapters H 17 and H 18 pertain to matters relating to the general conduct of the business of funeral directing and embalming.

These rules, of course, were adopted pursuant to the provisions of sec. 156.03 (2) (a) and in accordance with the notice and hearing requirements of ch. 227, Stats.

The Wisconsin Supreme Court in *Frankenthal v. Wisconsin R.E. Brokers' Board* (1958), 3 Wis. 2d 249, 88 N.W. 352, affirmed the decision of the lower court that the requirement that all members of a partnership must be licensed as a condition to licensing, contained in the mimeographed instructions issued by the Wisconsin Real Estate Brokers without notice and hearing, constituted a rule within the meaning of the Wisconsin Administrative Procedure Act. Thus, the court concluded said rule could be challenged in a declaratory judgment proceeding pursuant to the provisions of sec. 227.05, Stats. The court affirmed the lower court's decision that the rule was invalid, nugatory and of no effect.

Accordingly, it is my opinion that a court could very well hold that said guidelines constitute rules which could be challenged in a declaratory judgment proceeding pursuant to the provisions of sec. 227.05, Stats., and perhaps would be declared null and void. Consequently, it is my recommendation that you should follow the notice and hearing requirements set forth in ch. 227, or at least the procedure set forth in sec. 227.02 (1) (e), Stats.

RWW:GBS

Legislature: Since there is no difference between an otherwise valid administrative rule and a law, such a rule cannot be suspended or revoked by joint resolution of the legislature and no statute can grant the legislature the power to do so. The legislature could, however, by law empower itself or a committee of its members to function as an administrative review agency, provided that the delegation of power restricted such review to a determination whether the administrative rule was a correct application or interpretation of the relevant enabling legislation and provided that such determination is subject to judicial review. There is no material distinction between an otherwise valid administrative rule and an otherwise valid policy pronouncement by an agency inasmuch as they both have the force of law, but the policy pronouncements of administrators do not have the force of law. Judicial review of a policy pronouncement cannot be defeated merely by the failure of the administrative agency to properly adopt the same as a rule.

May 20, 1974.

THE HONORABLE, THE ASSEMBLY

Legislature

By 1973 Assembly Resolution 58 you have requested my opinion as to the power of the legislature to suspend or revoke administrative rules.

The issues posed could be ruled upon in a case pending in the state supreme court. *Wisconsin Telephone Company v. ILHR Department*, No. 595, August Term 1973. It is the normal policy of this office not to answer opinion requests on questions currently in litigation.

The reason for this policy is two-fold. First, the dignity of an attorney general's opinion, and therefore its reliability for the legislature and the public, is diminished if it appeared to be issued to influence a court. Second, this policy is compelled by respect due courts.

The particular case pending before the supreme court, however, involves the issues posed by Resolution 58 only tangentially. This

office is one of the participants on behalf of a state agency and is the only party which would raise the issue. Further, I have determined to urge the court not to rule on the issue in that case inasmuch as it is not the real issue before the court.

Essentially the same issue is raised by 1973 Senate Resolution 33 and 1973 Assembly Resolution 44. I have already declined to speak to this issue in two previous opinions because of the pending litigation.

I will proceed to answer the opinion request only because of the peculiar circumstances here, to-wit: both the senate and the assembly have asked for this opinion in three separate resolutions and the issue is before the supreme court only tangentially and probably will not be ruled upon in that case.

The first question is:

“What is the distinction, if any, between an administrative rule and a law?”

Administrative rules are basically of two kinds. The first kind interprets legislation. Such interpretation may be in the nature of pure statutory construction, or may implement or make specific certain legislation. The second kind relates to the internal organization or procedure of an agency. These features of administrative rules are included within the statutory definition of “rule.” Section 227.01 (3), Stats., provides:

“ ‘Rule’ means a regulation, standard, statement of policy or general order ... of general application and having the effect of law, issued by an agency to implement, interpret or make specific legislation enforced or administered by such agency or to govern the organization or procedure of such agency.”

In order to have the effect of law, administrative rules: (a) must be correct interpretations, sec. 227.014 (2) (a), Stats.; (b) must be preceded with notice and hearing, with certain exceptions, sec. 227.02, Stats.; (c) must be filed, secs. 227.01 (4) and 227.023 (1), Stats.; (d) must be published, sec. 227.025, Stats.; (e) must be authorized by enabling legislation, *Kachian v. Optometry Examining Board* (1969), 44 Wis. 2d 1, 8, 170 N.W. 2d 743; (f) must be reasonable, *Kachian, supra*; (g) must be adopted by the agency

having the power to enforce the rule, *Barry Laboratories, Inc. v. State Bd. of Pharm.* (1965), 26 Wis. 2d 505, 514-516, 132 N.W. 2d 833; (h) must be of an interpretive nature, *Barry Laboratories, supra*; and (i) must have general application rather than a limited, specific application. *Frankenthal v. Wisconsin R.E. Brokers' Board* (1958), 3 Wis. 2d 249, 257b, 88 N.W. 2d 352, 89 N.W. 2d 825; *Mondovi Co-op. Equity Ass'n. v. State* (1951), 258 Wis. 505, 511, 46 N.W. 2d 825; and secs. 227.01 (4) and 227.02 (1) (d), Stats.

If otherwise valid under these criteria, an administrative rule has the full force and effect of law. See *Josam Mfg. Co. v. State Board of Health* (1965), 26 Wis. 2d 587, 596, 133 N.W. 2d 301; *Thomson v. Racine* (1943), 242 Wis. 591, 596, 9 N.W. 2d 91; and *Verbeten v. Huettl* (1948), 253 Wis. 510, 519, 34 N.W. 2d 803.

It is important to understand that administrative rules cannot create power but are made in the exercise of power given by the legislature. See *State ex rel. Democrat Printing Co. v. Schmiede* (1963), 18 Wis. 2d 325, 336, 118 N.W. 2d 845. In fact, the legislature cannot constitutionally delegate to an agency the power to determine whether there shall be a law or what its limits shall be, but may delegate only such legislative powers as are necessary to carry into effect the general legislative purpose. *Clintonville Transfer Line v. Public Service Comm.* (1945), 248 Wis. 59, 68-69, 21 N.W. 2d 5. Such delegation must be pursuant to standards evincing an ascertainable legislative purpose and must also provide for procedural safeguards such as judicial review. See *Watchmaking Examining Bd. v. Husar* (1971), 49 Wis. 2d 526, 536, 182 N.W. 2d 257, and *State ex rel. Atty. Gen. v. Wisconsin Constructors* (1936), 222 Wis. 279, 286, 268 N.W. 238. A power to make a rule is delegated if it is "by fair implication and intendment incident to and included in the authority expressly conferred." *State ex rel. Farrell v. Schubert* (1971), 52 Wis. 2d 351, 358, 190 N.W. 2d 529, vacated on other grounds, 408 U.S. 915, 92 S.Ct. 2500, 33 L.Ed. 2d 327.

I conclude, therefore, that if an administrative rule is properly adopted under these criteria and is within the power of the legislature to delegate there is no material difference between it and a law.

The second question is:

“May the legislature by joint resolution suspend or revoke an administrative rule?”

One of my predecessors has concluded that a proposal to repeal an administrative rule by joint resolution would be invalid if enacted, 43 OAG 350 (1954). The reasoning there was that since an administrative rule is a law and since a law can be repealed only by presentment of a bill to the governor, an administrative rule cannot be repealed by joint resolution. For the same reasons another of my predecessors concluded that a proposal to empower a committee of legislators to void an administrative rule would be invalid. 52 OAG 423 (1963). Accord: Opinions of the Michigan Attorney General, 1957-1958 OAG (Mich) 246 and 1967-1968 OAG (Mich) 65. See also *M. St. P. & S.S.M.R. Co. v. Railroad Comm.* (1908), 136 Wis. 146, 163, 116 N.W. 905.

I agree with my predecessors for the reasons stated in their opinions. In addition, I have considered the argument that those opinions erroneously assumed that an administrative rule is a law in the same sense as is enabling or repealing legislation. That argument would be that since an administrative rule does not become “law” by presentment of a bill to the governor it need not be repealed by presentment of a bill only.

Such an argument must fail, in my opinion, for the reason that administrative rules do not create laws but are exercises of powers pursuant to existing laws. Such rules are invalid if they exceed the bounds of correct interpretation. Section 227.014 (2) (a), Stats. A valid rule is merely a duly adopted correct statement or application of what the law already is. Thus, to repeal a valid rule is effectively to repeal the enabling statute *pro tanto*.

An administrative rule is either a correct application of its enabling statute or it is not. If it is not, it is invalid and no joint resolution of the legislature could change that fact. If it is a correct application, it is valid and no joint resolution of the legislature could change that fact.

It does not follow that when an agency modifies or repeals its own rules it voids an enabling statute *pro tanto*. For such agency action, to be valid, must be predicated on better interpreting or applying already established legislative policy in view of changing

circumstances or new knowledge. Further, there is often more than one correct way to apply or interpret legislative policy. Not only are agency repeals subject to the standards of the applicable enabling legislation, they also are subject to judicial review. See secs. 227.01 (3) and 227.05, Stats. As concluded in my answer to your third question, *infra*, the legislature could empower itself or a committee of its members to affirm or set aside an agency's rule if the legislature or the committee were subject to proper standards and safeguards. Under such standards and safeguards, the legislature or a committee of its members could affirm or set aside an administrative rule in view of changing circumstances, new knowledge, or simply as a reviewing agency examining old knowledge and circumstances in the context of established statutory policy. To repeal an administrative rule other than pursuant to such standards or in the absence of such safeguards, however, is to abrogate what is, by definition, a valid statutory interpretation or application. Therefore, it is to unconstitutionally encroach on executive or judicial functions or both, as is more fully explained in my answer to your third question, *infra*.

I perceive no material distinction between repealing a law and suspending or revoking it. The effect is the same, to-wit: to take what has been law and make it no longer law. Thus, I conclude that the legislature may not by joint resolution suspend or revoke an administrative rule, absent proper standards and safeguards.

The third question is:

“May the legislature by law authorize the legislature, by joint resolution, to suspend or revoke an administrative rule?”

No law, including a valid administrative rule, can be suspended or revoked by joint resolution of the legislature. The reason is that such a joint resolution deprives the executive branch of government the opportunity to exercise its power to veto an act of the legislature. Such a joint resolution, therefore, unconstitutionally encroaches on the executive branch of government.

Such encroachment cannot be validated by a statute, even if a particular governor were to approve such a statute. The constitution vests the veto power in the executive. Art. V, sec. 10, Wis. Const. A governor could no more constitutionally approve the delegation of executive veto power to another branch of government than the

legislature or the supreme court could approve the delegation of their respective powers to another branch of government.

Thus, the legislature cannot by law authorize the legislature by joint resolution to "suspend or revoke" an administrative rule. A constitutional amendment would be necessary to grant such a power.

The reason an administrative rule can have the force of law is because the legislature has by law provided that administrative agencies have the power to make rules which are valid to the extent they do not exceed the bounds of correct interpretation. I have given consideration to the argument that the legislature could make such rule-making power contingent upon approval by some body either as a condition precedent or subsequent, and that such body might be the legislature acting by joint resolution. On this argument the power given to the legislature by joint resolution would not be to "suspend or revoke" an administrative rule, but would be to "affirm or set aside" such rule as a super agency, as it were, or as another level of administrative review. Such affirmance or setting aside would not be in the nature of voiding a law, as is the case with suspension or revocation, but would be in the nature of a quasi-judicial determination of the validity of an administrative rule as a correct or incorrect interpretation or application of the relevant enabling legislation.

My predecessor dismissed this possibility because such a reviewing agency would not be acting pursuant to ascertainable standards. 43 OAG at 352. I agree with his analysis to the extent such a delegation would not restrict the legislature to act pursuant to such standards. I consider, however, the possibility of a law delegating such power but providing that its exercise be pursuant to proper standards. The question facing the legislature as such a reviewing agency would not be the policy of the enabling law or the policy of the administrative rule, those questions being not at all delegable, but the correctness of a particular administrative rule as an interpretation or application of established legislative policy under standards already legislated.

The determination that an administrative rule is or is not authorized by an enabling statute is a judicial act. See 2 Am. Jur. 2d, *Administrative Law*, sec. 656, p. 517; *Northwestern Wis. Elec. Co. v. Public Service Comm.* (1946), 248 Wis. 479, 485, 22 N.W. 2d 472, 23 N.W. 2d 459; and *John F. Jelke Co. v. Beck* (1932), 208 Wis.

650, 664, 242 N.W. 576. The legislature may bestow such quasi-judicial powers on agencies as are incidental to their administration of particular statutes. *State ex rel. Volden v. Haas* (1953), 264 Wis. 127, 132, 58 N.W. 2d 577, and *Holland v. Cedar Grove* (1939), 230 Wis. 177, 188, 282 N.W. 111. Agency determinations which are quasi-judicial in nature, however, must be subject to review by the courts. See *Family Finance Corp. v. Sniadach* (1967), 37 Wis. 2d 163, 176, 154 N.W. 2d 259, *reversed* on other grounds, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed. 2d 349. See also *Boynton Cab Co. v. Giese* (1941), 237 Wis. 237, 296 N.W. 630, and *Watchmaking Examining Bd., supra*, 49 Wis. 2d at 536.

While quasi-judicial powers may be delegated, certain strictly judicial functions cannot be at all delegated. See *Wendlandt v. Industrial Comm.* (1949), 256 Wis. 62, 67, 39 N.W. 2d 854. The question becomes whether the determination that an administrative rule is authorized by enabling legislation, or is a correct interpretation or application thereof, is such a strictly judicial function which cannot be delegated.

I conclude that the courts are likely to hold that such a function can be delegated. The very act of making a rule pre-supposes an agency's quasi-judicial determination that the rule is so authorized and correct. That determination may be delegated since rule-making itself is delegable. Rule-making, then, involves both quasi-judicial and quasi-legislative functions. Further, I see no qualitative difference between an examiner's quasi-judicial decision which becomes the decision of the agency absent a petition for review, see secs. 111.07 (5) and 102.18 (3), Stats., and an agency's rule which is subject to quasi-judicial review by another agency.

It is imperative, however, that judicial review be retained. Article 7, sec. 2, Wis. Const., vests the state's judicial power in the courts. The legislature is not competent to empower itself by joint resolution, a committee of its members or an agency to be the final arbiter of the judicial question whether a rule of an agency is valid under the proper criteria. The legislature would usurp judicial prerogatives were it to empower any body other than a court the final authority to determine the validity of an administrative rule.

Therefore, I conclude that no law can empower the legislature to suspend or revoke, by joint resolution, an administrative rule on

policy grounds. On the other hand, I conclude that the legislature can be empowered to affirm or set aside an administrative rule by joint resolution if: (a) the delegation restricts the legislature to application of the standards already established by the relevant enabling law, and (b) the legislature's joint resolution determination is subject to judicial review at the instance of a party with sufficient standing.

The fourth question is:

“May the legislature by joint resolution or law authorize a committee or joint committee of the legislature to suspend or revoke an administrative rule?”

Because of the analysis above, the answer to this question must be no. No valid administrative rule can be suspended or revoked by the legislature by joint resolution or by a committee or joint committee of the legislature. Such a rule, however, could be subject to affirmance or setting aside as a matter of administrative review by such committees acting pursuant to the standards and qualifications discussed in my answer to the third question.

I wish to comment on the wisdom of any proposal to vest quasi-judicial powers in the legislature or in a committee composed of legislators. I am aware that members of both houses feel that certain administrative rules do not in fact reflect the intent of the original legislation. The feeling is that although these rules may be tested in the courts, see sec. 227.05, Stats., there is need for quicker disposition.

It is this type of need that led to the creation of administrative agencies in the first place. An additional advantage to the administrative system has also been the expertise that develops so that rights are determined quickly and objectively. I urge that the legislature create an additional, independent reviewing agency composed of appropriate professionals before it gives this function to itself or to a committee of its members.

The fifth question is:

“What is the distinction, if any, between a policy pronouncement issued by an administrator or administrative agency and an administrative rule?”

Section 227.01 (3), Stats., includes “statement of policy” within the very definition of an administrative rule:

“ ‘Rule’ means a regulation, standard, *statement of policy* or general order ... of general application and having the effect of law, *issued by an agency* ...” (Emphasis added.)

Thus, if a statement of policy, or policy pronouncement, is otherwise valid under the criteria discussed in answer to the first question, it is no different than any other administrative rule and has the full force of law. If such pronouncement is not otherwise valid, however, as where it has not been duly filed and published, it does not have the force of law and is a legal nullity.

The fact that a policy pronouncement is a legal nullity does not preclude judicial review thereof if that pronouncement is treated by the agency as though it were a validly adopted rule. In other words, if the effect is to apply the statute generally according to such policy pronouncement, judicial review cannot be defeated by the failure of the agency to properly adopt the policy as a rule. See *Frankenthal* and *Barry Laboratories, supra*.

The *italicized* language from sec. 227.01 (3), Stats., *supra*, also makes it clear that a policy statement which has the force and effect of law is that which is issued by the agency. Rule-making authority is given only to agencies. Section 227.014, Stats. Since only agencies can adopt rules, the power to do so cannot be delegated to a subordinate. *Park Bldg. Corp. v. Industrial Comm.* (1960), 9 Wis. 2d 78, 86, 100 N.W. 2d 571. Even a letter from the chief officer of an agency claiming to state agency policy is not official agency action, and in order to avoid confusion the court gave this admonition in *Universal Org. of M. F., S. & A.P. v. WERC* (1969), 42 Wis. 2d 315, 323, 166 N.W. 2d 239:

“... We suggest that, when letters of inquiry are answered by letters of individual commissioners, such letters contain a disclaimer of official commission action so that it is clear to all, particularly laymen, that no ‘decision’ is involved.”

I conclude, then, that: (a) there is no material difference between an otherwise valid administrative rule and an otherwise valid policy pronouncement by an agency; and (b) there is a material difference between an otherwise valid administrative rule and a policy

pronouncement by an administrator inasmuch as the former has the force of law and the latter does not.

RWW:CDH

Legislature; The vote of an absent member of the joint committee for review of administrative rules cannot be counted. No time need be allowed for a roll call vote before the committee votes. Notwithstanding sec. 13.56 (2), Stats., to the contrary, the committee cannot constitutionally suspend an otherwise valid administrative rule.

May 20, 1974.

THE HONORABLE, THE ASSEMBLY

Legislature

By 1973 Assembly Resolution 44 you have asked for my opinion as to the legality of the voting procedures of the joint committee for review of administrative rules (committee) with particular reference to that committee's vote on July 9, 1973, dealing with MVD 24.03 (5).

The committee is established by sec. 13.56, Stats., and is composed of four senators and five representatives. You advise that the assembly has rules dealing with the right of an absent committee member to vote and the holding open of an executive session to permit an absent member to vote, but that the senate has no rules on these subjects. I am advised of no joint resolution establishing procedural rules for the committee, and it is evident that the rules of one house cannot bind a joint committee of both houses.

The first question is whether an absent committee member may vote. The answer is no.

Unquestionably, no action can be taken by the committee without a quorum. Section 13.45 (5), Stats., provides:

"RULES OF PROCEDURE; QUORUM. Unless otherwise provided by law, every legislative committee or committee on which there are legislative members selected by

either house or the officers thereof may adopt such rules for the conduct of its business as are necessary, but a majority of the members appointed to a committee shall constitute a quorum to do business and a majority of such quorum may act in any matter within the jurisdiction of the committee.”

Thus, the committee is empowered to adopt a rule answering this question, but has not done so. Accordingly, it is necessary to look to the common law.

At common law, the quorum was required to be present. The word “quorum” evolved from the rule of the King of England by which he designated certain justices to keep the peace and provided that:

“... any two or more of them [may] inquire of and determine felonies and other misdemeanors, in which number some particular justices, or one of them, are directed to be always included, and no business to be done *without their presence*.” (Emphasis added.) See *Snider v. Rinehart* (1892), 18 Colo. 18, 31 P. 716, 718.

In *Wheeler v. River Falls Power Co.* (1906), 215 Ala. 655, 111 So. 907, 909, the court said:

“... The sum of it is that ... a majority of the members must attend any meeting of the committee called for legislative purposes, otherwise there is no committee competent to act, but a majority of those *present*, when legally met, may bind all the rest.” (Emphasis added.)

In *United States v. Ballin* (1892), 144 U.S. 1, 6, 12 S.Ct. 507, 36 L.Ed. 321, the court said:

“... when a quorum is *present*, the act of a majority of the quorum is the act of the body.” (Emphasis added.)

In *Wheeler, supra*, the court held that since a quorum must be present, absentee votes by mail could not be counted to make up a quorum. My research discloses no cases dealing with the situation where a quorum was present and an attempt was made to count the votes of members not present. It is my opinion, however, that to count such votes would contradict the common law principle, incorporated into sec. 13.45 (5), Stats., that a committee can act only through a majority of a quorum which is present. It is the act of

a majority of the quorum present which gives validity to committee acts.

The second question is the length of time, if any, which must be allowed for a roll call vote of the committee.

I am aware of no statutory or constitutional provisions which dispose of this question. The common law appears to have addressed itself only to the situation where members are in the legislative chamber. In *Gaskins v. Jones* (1942), 198 S.C. 508, 18 S.E. 2d 454, 456, the court said:

“... As long as the members are present in the council chambers and have an opportunity to act and vote with the others, it is their duty to act, and they will be regarded as present for the purpose of making a quorum and rendering legal the action of the council.”

I am aware of no requirement that the committee chairman must make a roll call or otherwise solicit the presence of absent members. Absent a requirement in the common law, the statutes, the Constitution and the procedural rules of the committee itself, it is my opinion that no time need be allowed for a roll call vote.

The third question is whether the committee's vote on July 9, 1973, concerning MVD 24.03 (5) was legal. I am informed that by a five to three vote the committee suspended MVD 24.03 (5); that by a six to two vote the committee voted to keep the roll call open to allow an absent member to vote by noon of the next day; that the absent member then voted making the vote six to three to suspend; and that later, because of questions as to this procedure, the committee again met and voted six to three to suspend. Whether the six to two vote was effective under sec. 13.45 (5), Stats., to enable the absentee vote to be counted and whether the final six to three vote cured any previous procedural irregularities need not be decided. For it is my opinion that the committee, regardless of its voting procedure, was without power to suspend those administrative rules.

Section 13.56 (2), Stats., provides that the committee may:

“... suspend any rule complained of by the affirmative vote of at least 6 members. If any rule is so suspended, the committee shall as soon as possible place before the legislature, at any

regular session and at any special session upon the consent of the governor, a bill to repeal the suspended rule. If such bill is defeated, or fails of enactment in any other manner, the rule shall stand and the committee may not suspend it again. If the bill becomes law, the rule is repealed and shall not be enacted again unless a properly enacted law specifically authorizes the adoption of that rule. ****" (See later amendments, ch. 90, sec. 5c, and ch. 162, sec. 1, Laws of 1973.)

One of my predecessors concluded that a proposal to repeal an administrative rule by joint resolution would be invalid if enacted. 43 OAG 350 (1954). Another of my predecessors concluded that a proposal to empower a committee of legislators to void an administrative rule would be invalid. 52 OAG 423 (1963).

I am persuaded that those opinions are correct. The reasoning is that an otherwise valid administrative rule has the force of law. A law can be repealed or voided only by presentment of a bill to the governor so that he may have an opportunity to veto it. An administrative rule being a law, an attempt to void it without presentation of a bill to the governor usurps the prerogatives of the executive by circumvention. The determination that a rule is not valid is essentially a judicial question, and that function can be delegated to an administrative agency as a quasi-judicial duty only under appropriate standards which also provide the safeguard of judicial review. I have this day issued an opinion in response to 1973 Assembly Resolution 58 which discusses the authoritative basis for these conclusions.

Section 13.56 (2), Stats., contemplates that the administrative rule is not permanently voided but is suspended and "shall stand" only if the legislature fails to pass a law repealing the rule. The natural meaning of the word "suspend" implies that the administrative rule is voided in the meantime. Only the legislature, however, by presentment of a bill to the governor, has the discretion to prevent a valid law from taking effect. As stated in *M., St. P. & S.S. M.R. Co. v. Railroad Commission* (1908), 136 Wis. 146, 163, 116 N.W. 905:

"... But neither the commission nor the court can be vested with discretion to determine whether the precedent law declared

by the legislature shall or shall not go into effect in particular cases.”

By definition, if an administrative rule is valid it is a correct interpretation or application of a law. An attempt to void such a rule is to attempt to repeal the enabling statute *pro tanto*. Since this can only be done by presentment of a bill to the governor, I conclude that the committee is constitutionally without power to suspend an administrative rule which is otherwise valid notwithstanding sec. 13.56 (2), Stats., to the contrary.

I have struggled to find a construction of the word “suspend” which might save the constitutionality of this subsection. If such suspension merely was notice that the committee would present a bill to the legislature for enactment, this subsection probably would be constitutional. The *American Heritage Dictionary of the English Language* (1969), p. 1296, however, defines “suspend” as follows:

“1. To bar for a period from a privilege, office, or position, usually as a punishment: *suspend a student from school*. 2. To cause to stop for a period; interrupt: ... 3.a. To maintain in an undecided state; hold in abeyance: *suspend judgment*. b. To render ineffective temporarily under certain conditions: *suspend a sentence; suspend parking regulations*. ...”
(Emphasis the dictionary’s.)

I believe “suspend” as used in sec. 13.56 (2), Stats., means that the administrative rule is temporarily rendered ineffective.

Since a valid law can be rendered ineffective, temporarily or otherwise, only by the legislature presenting a bill to the governor, it is my opinion that the courts would hold that sec. 13.56 (2), Stats., is unconstitutional to the extent it provides otherwise inasmuch as: (a) it purports to authorize a committee of the legislature to circumvent the constitutional prerogatives of a governor to veto a proposal to repeal a valid interpretation or application of a law, and (b) it fails to provide sufficient standards or the safeguards of judicial review essential to treating the committee as a reviewing agency to which has been lawfully delegated powers of a quasi-judicial nature.

RWW:CDH

Legislature; The one man-one vote principle is inapplicable to legislative committees since that principle applies only to the exercise of legislative powers and such powers cannot constitutionally be delegated to these committees. There has been no such unconstitutional delegation as to the joint committee on finance, the board on government operations, the joint legislative council or the committee to visit state properties. As to the joint committee for review of administrative rules, however, the legislature has unconstitutionally delegated to it the power to suspend a law.

May 20, 1974.

THE HONORABLE, THE SENATE

Legislature

By 1973 Senate Resolution 33 you have asked for my opinion concerning the composition of the joint committee on finance, the board on government operations, the joint committee for review of administrative rules, the joint legislative council, and the committee to visit state properties. The question asked is whether the statutory membership of these committees constitutes a denial of the equal protection and equal representation provisions of the United States and the Wisconsin Constitutions or Art. IV, sec. 1 of the Wisconsin Constitution.

The United States Constitution's Fourteenth Amendment guarantee of equal protection of the laws includes the right of voters to have equal representation in the state legislature. In *Reynolds v. Sims* (1964), 377 U.S. 533, 565, 84 S.Ct. 1362, 12 L.Ed. 2d 506, the court said:

“... Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the *election* of members of his state legislature.” (Emphasis added.)

The guarantee of the Wisconsin Constitution is substantially identical to that of the federal constitution. See *State ex rel. Reynolds v. Zimmerman* (1964), 22 Wis. 2d 544, 564, 126 N.W. 2d 551.

Legislative committees, therefore, would come within the "one man-one vote" principle if and only if they exercised legislative power. The Wisconsin Constitution, however, provides that all legislative power is vested in the senate and the assembly. Art. IV, sec. 1, Wis. Const. Thus, if any such committee were granted legislative powers, those powers would be null and void as constituting an unconstitutional delegation of legislative powers.

It follows that the precise question raised by 1973 Senate Resolution 33 is whether any of the named committees have been given legislative powers.

I have this day issued my opinions in response to 1973 Assembly Resolutions 44 and 58 that the joint committee for review of administrative rules has been unconstitutionally given the power to suspend administrative rules. The premise to those opinions is that a law, which includes a valid administrative rule, can be voided only if the legislature makes presentment of a bill to the Governor.

The joint committee on finance is established by sec. 13.09, Stats. This committee may appoint a subcommittee to "act" on bills not exceeding \$10,000 and claims not exceeding \$2,500, but the "act" is only recommendatory since sec. 13.09 provides:

"... The subcommittee shall meet and hold hearings at the direction of the committee and report its *recommendations* to the committee. ..." (Emphasis added.)

The committee's own power as to federally aided programs is to make a recommendation to the legislature. Sec. 13.095, Stats. Further, the committee has only recommendatory powers as to the fiscal needs of veterans housing (sec. 45.355, Stats.) and as to state revenues and appropriations (sec. 16.48, Stats.).

The Board on Government Operations (BOGO) is given power to supplement appropriations. Section 13.58 (2), Stats., provides:

"[BOGO] is authorized to supplement the appropriation of any department, board, commission or agency, which is insufficient because of unforeseen emergencies or insufficient to accomplish the purpose for which made, if the board finds:

"(a) That an emergency exists;

“(b) That no funds are available for such purposes;

“(c) That the purposes for which a supplemental appropriation or transfer is requested have been authorized or directed by the legislature.”

The power of supplemental appropriation is not the power to impose a tax or similarly to raise revenues. It is the power to draw on already raised revenues to aid in the fulfillment of an already declared legislative objective upon finding the facts as to an emergency, the unavailability of funds, and the proposed use of the funds as fitting within the legislative authorization. BOGO is prevented from granting monies for purposes not legislatively authorized. See 43 OAG 202 (1954). Although BOGO's powers contain an element of discretion, see 58 OAG 174, 178 (1969), it is my opinion that such discretion is sufficiently confined to the implementation of laws rather than the creation of laws so that there is no unconstitutional delegation of legislative power. See *State ex rel. Board of Regents v. Zimmerman* (1924), 183 Wis. 132, 140-141, 197 N.W. 823.

This conclusion is equally valid with respect to BOGO's power to transfer funds. For such funds can be transferred only if “legislative intent will not be changed.” Sec. 13.58 (2a), Stats.

The powers of the joint legislative council are clearly recommendatory only. See sec. 13.81 (3), Stats. The joint legislative committee to visit state properties is given the power to visit and inspect all state properties. Sec. 13.47 (2), Stats. Such power does not entail the power to make a law.

In summary, then, it is my opinion that none of these committees is invalid by virtue of the one man-one vote principle inasmuch as they do not, and indeed cannot, possess legislative powers. The only exception is the joint committee for review of administrative rules which has been unconstitutionally delegated the legislative power to suspend administrative rules, as is more fully explained in my answer to 1973 Assembly Resolution 58. As to this committee, the invalidity follows from the delegation of a legislative power. Therefore, it is unnecessary to answer whether the composition of the committee accords with the one man-one vote principle.

RWW:CDH

Public Welfare, Department Of; Probation And Parole; When required by the right effectively to present a defense, the Department of Health and Social Services, having authority to do so, in the exercise of sound discretion must issue, and for an indigent pay the costs of, compulsory process to obtain the attendance of witnesses on behalf of probationers and parolees at revocation proceedings.

May 21, 1974.

WILBUR J. SCHMIDT, Secretary
Department of Health and Social Services

You have asked my opinion on several questions concerning the duty and authority of the Department of Health and Social Services to issue compulsory process to obtain the attendance of witnesses at probation and parole revocation proceedings.

1. Does the Department of Health and Social Services have a constitutional or other legal duty to afford compulsory process to an alleged probation or parole violator in revocation proceedings before the department?

2. If so, does the department or its revocation hearing examiner have the legal power or authority to issue compulsory legal process?

3. If your answers to questions No. 1 and 2 are in the affirmative, does the department have discretion prior to the issuance of any subpoena to decide whether or not the request for compulsory process is both reasonable and seasonable?

4. Is the department obligated to pay witness fees and mileage for witnesses subpoenaed by an indigent probation or parole violator?

I have concluded that, when required by the right effectively to present a defense, the department, having authority to do so, in the exercise of sound discretion must issue, and for an indigent pay the costs of, compulsory process to obtain the attendance of witnesses on behalf of probationers and parolees at revocation proceedings.

1. When required by the right effectively to present a defense, the department has a constitutional duty to provide compulsory process to obtain the attendance of witnesses on behalf of probationers or parolees at revocation proceedings.

The right to compulsory process to obtain the attendance of witnesses on one's behalf has its genesis in the Sixth Amendment to the Constitution of the United States and Art. I, sec. 7 of the Wisconsin Constitution.

Since both federal and state constitutional provisions apply expressly in criminal prosecutions, however, they are not directly relevant to probation and parole revocation proceedings. Such proceedings are not part of a criminal prosecution and the full panoply of rights due a criminal defendant does not apply. *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 782, 93 S.Ct. 1756, 36 L.Ed. 2d 656; *Morrissey v. Brewer* (1972), 408 U.S. 471, 480, 92 S.Ct. 2593, 33 L.Ed. 2d 485. Also see *State ex rel. Cresci v. Schmidt* (1974), 62 Wis. 2d 400, 250 N.W. 2d 361 (No. 151, dec'd March 5), op. p. 5.¹

Nevertheless, revocation proceedings are required to be conducted in accord with the conditions of due process of law. *Gagnon v. Scarpelli*, *supra*, 782; *Morrissey v. Brewer*, *supra*, 482; *State ex rel. Johnson v. Cady* (1971), 50 Wis. 2d 540, 547, 185 N.W. 2d 306. Also see *State ex rel. Ball v. McPhee* (1959), 6 Wis. 2d 190, 199, 94 N.W. 2d 711.

At a minimum, due process in revocation proceedings includes an opportunity for the probationer or parolee to be heard in person and to present witnesses to show, if he can, that he did not violate the conditions of his release, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation. *Morrissey v. Brewer*, *supra*, 488, 489; *State ex rel. Cresci v. Schmidt*, *supra*, 5.

The right to present witnesses to establish a defense is the right to compel the appearance of witnesses if necessary. *Washington v.*

¹It should be noted that in *State ex rel. H&SS Department v. Circuit Court* (1973), 57 Wis. 2d 329, 204 N.W. 2d 217, the Wisconsin supreme court stated that revocation of probation essentially is a criminal matter. *Id.* 330. That generalization, however, does not affect the fact which is of significance for this inquiry, that probation revocation is not part of a criminal prosecution. See 34A *Words and Phrases*, pp. 489-494, pocket part (1973), p. 40.

Texas (1967), 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed. 2d 1019. Due process, therefore, incorporates the right to compulsory process. *Ibid.*; *Elam v. State* (1971), 50 Wis. 2d 383, 389, 184 N.W. 2d 176.

“But due process is not so rigid as to require that the significant interests in informality, flexibility, and economy must always be sacrificed.” *Gagnon v. Scarpelli, supra*, 788. Rather, “... due process is flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer, supra*, 481.

Due process is pliable enough so that, where appropriate, the conventional substitutes for live testimony, i.e., letters, affidavits, depositions and documents not admissible in a criminal trial, can be considered as evidence in revocation proceedings. *Gagnon v. Scarpelli, supra*, 783, fn. 5, *Morrissey v. Brewer, supra*, 489; *State ex rel. Johnson v. Cady, supra*, 549.

Nevertheless, “... in some cases there is simply no alternative to live testimony ...” *Gagnon v. Scarpelli, supra*, 783, fn. 5.

While the right to compulsory process as incorporated in the concept of due process does not require that all possible witnesses be subpoenaed in every revocation proceeding, in those situations in which the right effectively to present a defense requires that witnesses be present to give oral testimony on behalf of a probationer or parolee accused of violating the conditions of his release, compulsory process to obtain the appearance of the witnesses must be provided.

Because of the almost infinite variety of factual circumstances which are likely to present themselves at revocation hearings it is not possible to formulate an absolute rule with respect to the right, there, to compulsory process; the decision whether to use a substitute for live testimony or to subpoena a witness to appear in person must be made on a case-by-case basis considering the demands of the particular situation. Cf. *Gagnon v. Scarpelli, supra*, 790, 791.

2. The department has legal authority to issue compulsory process to obtain the attendance of witnesses at revocation proceedings.

Section 140.05 (4), Stats., enumerating various powers of the Department of Health and Social Services, provides that:

“The department may administer oaths, certify to official acts, issue subpoenas, compel the attendance of witnesses, and production of papers, books, documents and testimony.”

Although that grant of power is found in the statutes pertaining to public health, there is no limitation in the grant to that aspect of the department's responsibilities.

Absent such limitation, the department possesses general subpoena power which may be used to compel the attendance of witnesses at any hearing held by the department in pursuance of its mandated missions. Among these, of course, is the administration of parole and probation matters. Sec. 46.03 (6) (c), Stats.

Moreover, it is a well-established principle that an administrative agency possesses every power which necessarily or reasonably is implied in an express grant of power and which is indispensable to the power expressly granted. 46 OAG 280, 281 (1956); 1 Am. Jur. 2d, *Administrative Law*, sec. 44, p. 846. Also see *Id.* sec. 73, p. 869.

Since due process permits probation or parole to be revoked only after a hearing, *Gagon v. Scarpelli*, *supra*; *Morrissey v. Brewer*, *supra*, wherein witnesses, in some circumstances, must be compelled to attend, the power to compel the attendance of witnesses is indispensable to the express power of administering parole and probation matters and necessarily must be implied in the grant of that power.

Finally, a subpoena to require attendance of witnesses may be issued by any person authorized to take testimony in any proceeding authorized by law. Sec. 885.01 (4), Stats.

Revocation hearings not only are authorized but, as has been pointed out, required by law. Note *Nick v. State Highway Commission* (1963), 21 Wis. 2d 489, 495, 124 N.W. 2d 154.

And since revocation hearings inherently are evidentiary, requiring reception, in some cases, of oral testimony, the hearing officer, whose function it is to consider and evaluate the facts, impliedly possesses power to take testimony necessary to acquire knowledge of the facts. See *Gagnon v. Scarpelli*, *supra*, 783, fn. 5, 784; *Morrissey v. Brewer*, *supra*, 487, 488; *State ex rel. Bernal v.*

Hershman (1972), 54 Wis. 2d 626, 631, 196 N.W. 2d 721. Also see secs. 227.10, 227.12, Stats.

3. The department has discretion to determine at each revocation proceeding whether the right effectively to present a defense requires issuance of compulsory process to obtain the attendance of witnesses at that proceeding.

In any proceeding when an accused requests compulsory process, the burden is on him to establish a colorable need for the person summoned. *Hoskins v. Wainwright* (5th Cir. 1971), 440 F. 2d 69, 71, and cases cited; *State v. Groppi* (1968), 41 Wis. 2d 312, 323, 164 N.W. 2d 266, vac. on other grounds, 400 U.S. 505, conformed to 50 Wis. 2d 407. And need is not established by an affidavit or argument which merely is conclusional. *United States v. Bottom* (9th Cir. 1972), 469 F. 2d 95, 95.

The due process origin of the right to compulsory process at revocation proceedings requires that determinations be made at each proceeding and with respect to each requested witness whether the right to present a defense requires the physical presence of the witness.

What was said of the right to counsel at revocation proceedings, which similarly comprehends situational decisions concerned with the demands of due process, applies equally, therefore, to the right to compulsory process at such proceedings.

“[T]he decision as to the need for [compulsory process] must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system.” *Gagnon v. Scarpelli*, *supra*, 790. Also see *State ex rel. Cresci v. Schmidt*, *supra*, 11; *United States v. Rigdon* (6th Cir. 1972), 459 F. 2d 379, 380, cert. den. 409 U.S. 1116, and cases cited.

Even in criminal prosecutions where the right to compulsory process is relatively rigid, a defendant may be refused process, in the discretion of the court, when his request is untimely, when the proposed witness would not offer relevant and material testimony, or when there is no reasonable expectation that the witness will be located. *Elam v. State*, *supra*, 389, 390; *United States v. Grooms* (7th Cir. 1972), 454 F. 2d 1308, 1311, cert. den. 409 U.S. 858;

United States v. De Stefano (7th Cir. 1973), 476 F. 2d 324, 330; *United States v. Rodriguez* (5th Cir. 1973), 474 F. 2d 587, 591.

It follows that the department has discretion to deny compulsory process in revocation proceedings when one of the above circumstances exists.

But in addition, considering the flexibility of the right in revocation proceedings, in determining whether it will issue compulsory process the department may take into account the availability and adequacy of a substitute for live testimony, *Gagnon v. Scarpelli*, *supra*, 783, fn. 5, whether the accuracy of any substitute is contested, *State ex rel. Bernal v. Hershman*, *supra*, 631, the effect of oral testimony on the informality and flexibility of the proceeding, *Gagnon v. Scarpelli*, *supra*, 788, and the difficulty and expense of transporting witnesses to the proceeding. *Ibid.*; *Id.* 783, fn. 5.

With respect to the consideration of economy, it generally has been held that the courts, and consequently the department, have wide latitude in determining whether to subpoena witnesses for indigent accused at state expense. See, e.g., *United States v. Zuideveld* (7th Cir. 1963), 316 F. 2d 873, 881, cert. den. 376 U.S. 916.

In those circumstances, though, where, taking all relevant factors into account, it reasonably appears that the accused probation or parole violator cannot adequately defend himself without live testimony, compulsory process must be issued to the witness or witnesses who would offer the indispensable testimony.

4. The department is obligated to pay the costs of compulsory process issued on behalf of an indigent accused probation or parole violator.

Section 140.05 (4), Stats., which bestows on the department the authority to issue compulsory process provides further:

“Witness fees and mileage shall be paid by the state and charged to the appropriation for the department, but no witness subpoenaed at the instance of parties other than the department shall be entitled to fees or mileage from the state, unless the department certifies that his testimony was material.”

Since the department need subpoena only witnesses whose testimony will be relevant and material, it may be supposed that the department must pay fees and mileage for most, if not all, witnesses subpoenaed to appear at revocation proceedings.

Furthermore, both the due process and equal protection clauses of the Constitution require the state to waive or pay any costs levied on an indigent's right to compulsory process.

It is a denial of due process if an accused is prevented by indigency from securing the attendance of witnesses necessary for a fair hearing. See *State v. Zwicker* (1969), 41 Wis. 2d 497, 516, 517, 164 N.W. 2d 512. If the witness' appearance is necessary, under the criteria previously discussed, to comport with the requirements of due process at a revocation proceeding, due process further requires that the department pay the costs of securing that witness to appear on behalf of an indigent probationer or parolee.

Nor may the state deny equal protection of the law by interposing between its indigent prisoners and their exercise of the right to sue for their liberty any financial considerations. *Smith v. Bennett* (1961), 365 U.S. 708, 709, 81 S.Ct. 895, 6 L.Ed. 2d 39. Every accused, therefore, has a right to compulsory process whether or not he is able to pay. *People v. Virella* (1973), 55 Ill. 2d 102, 302 N.E. 2d 327, 329; *United States v. Julian* (10th Cir. 1972), 469 F. 2d 371, 375.

RWW:TJB

Social Development; Municipalities; Functions of a community relations--social development commission authorized under sec. 66.433, Stats., are not limited to study, analysis and planning, but have authority to carry out some human relations programs providing services directly to citizens.

May 22, 1974.

THE HONORABLE, THE SENATE
Legislature

Senate Resolution 40 (1973) requests my opinion on the authority of community relations--social development commissions authorized under sec. 66.433, Stats.

The resolution specifically inquires:

1. Does the commission have the authority to operate programs and provide direct services to individual citizens?

The answer to this question is "yes."

The resolution further requests that the opinion clearly delineate the functions of such a commission.

It is impossible to clearly delineate the functions of such a commission in view of the broad statute under which it was created. Such a commission has all of the powers and functions expressly given by statute and those which are necessarily implied. A reading of the whole statute makes it clear that the powers of such commission are not limited to:

"... study, analyze and recommend solutions for major social, economic and cultural problems which affect people residing or working within the municipality ..."

Section 66.433 (3), Stats., provides:

"(3) PURPOSE AND FUNCTIONS OF COMMISSION.

(a) The purpose of the commission is to study, analyze and recommend solutions for the major social, economic and cultural problems which affect people residing or working within the municipality including, without restriction because of enumeration, problems of the family, youth, education, the aging, juvenile delinquency, health and zoning standards, and discrimination in housing, employment and public accommodations and facilities on the basis of class, race, religion or ethnic or minority status.

"(b) The commission may:

"1. Include within its studies problems related to pornography, industrial strife and the inciting or fomenting of class, race or religious hatred and prejudice.

"2. Encourage and foster participation in the fine arts.

"(c) The commission shall:

"1. Recommend to the municipal governing body and chief executive or administrative officer the enactment of such ordinances or other action as they deem necessary:

"a. To establish and keep in force proper health standards for the community and beneficial zoning for the community area in order to facilitate the elimination of blighted areas and to prevent the start and spread of such areas;

"b. To insure to all municipal residents, regardless of race or color, the rights to possess equal housing accommodations and to enjoy equal employment opportunities.

"2. *Co-operate with state and federal agencies and nongovernmental organizations having similar or related functions.*

"3. Examine the need for publicly and privately sponsored studies and programs in any field of human relationship which will aid in accomplishing the foregoing objectives, and *initiate such public programs and studies and participate in and promote such privately sponsored programs and studies.*

"4. Have authority to conduct public hearings within the municipality and to administer oaths to persons testifying before it.

"5. Employ such staff as is necessary to implement the duties assigned to it." (Emphasis added.)

Under sec. 66.433 (3) (c) 2, 3, Stats., there is some authority to operate programs and provide direct services to individual citizens.

Further, sec. 66.433 (7), Stats., provides:

"(7) DESIGNATION OF COMMISSIONS AS CO-OPERATING AGENCIES UNDER FEDERAL LAW. (a) The commission may be the official agency of the municipality

to accept assistance under title II of the federal economic opportunity act of 1964. No assistance shall be accepted with respect to any matter to which objection is made by the legislative body creating such commission, but if the commission is established on an intergovernmental basis and such objection is made by any participating legislative body said assistance may be accepted with the approval of a majority of the legislative bodies participating in such commission.

“(b) The commission may be the official agency of the municipality to accept assistance from the community relations service of the U.S. department of justice under title X of the federal civil rights act of 1964 to provide assistance to communities in resolving disputes, disagreements or difficulties relating to discriminatory practices based on race, color or national origin which may impair the rights of persons in the municipality under the constitution or laws of the United States or which affect or may affect interstate commerce.”

Public Law 88-452, August 20, 1964, is known as the “Economic Opportunity Act of 1964.” Title II of such act is concerned with “Urban and Rural Community Action Programs.” The purpose of Part A of Title II is to provide stimulation and incentive for urban and rural communities to mobilize their resources to combat poverty through community action programs. While the program does provide for study, planning, and mobilization of resources of a community to attack poverty, sec. 202 (a) (2) contemplates that a community action program should *provide services*, assistance, and other activities to help eliminate poverty through “developing employment opportunities, improving human performance, motivation, and productivity, or bettering the conditions under which people live, learn, and work.” Part B of Title II is concerned with “Adult Basic Education Programs.” Its purpose in part is to “initiate programs of instruction for persons who have attained age eighteen and whose inability to read and write the English language constitutes a substantial impairment of their ability to get and retain employment commensurate with their real ability ...” It is clear that local educational agencies, which include boards of education, are to be utilized to carry out programs of instruction for individuals. Part C of Title II is concerned with a “Voluntary Assistance Program For Needy Children.” A section of the Office of Economic Opportunity

was to establish an information and coordination center to encourage voluntary assistance for deserving and needy children by persons who voluntarily desire to financially assist such children.

Public Law 88-352, July 2, 1964, is known as the "Civil Rights Act of 1964." Title X thereof provides for the "Establishment of Community Relations Service." The Federal Service had the duty "to provide assistance to communities and persons therein in resolving disputes, disagreements, or difficulties relating to discriminatory practices based on race, color, or national origin which impair the rights of persons in such communities under the Constitution or laws of the United States or which affect or may affect interstate commerce. ..." It is clear that the federal officers and employes may work directly with individual citizens in resolving disputes, etc., and the agency is authorized to "utilize the cooperation of appropriate state or local, public or private agencies." A local community action commission could cooperate and would necessarily have to work with individual citizens in most cases.

The present Economic Opportunity Act is greatly expanded over the Act of 1964, and Urban and Rural Community Action Programs appear in Title 42, U.S.C.A. secs. 2781-2837. Many programs contemplate that the community action commission cooperate in providing direct assistance to individual citizens. Among the various programs are: Project Headstart, Comprehensive Health Services, Emergency Food and Medical Services, Family Planning, Senior Opportunities and Services, Alcoholic Counseling and Recovery, Drug Rehabilitation, Environmental Action, Rural Housing Development and Rehabilitation, Training, Research and Technical Assistance with respect to the aforesaid, Neighborhood Centers, Youth Recreation and Sports Programs, and Consumer Action Programs.

It is true that sec. 66.433 (7) (a), Stats., only made reference to the "federal economic opportunity act of 1964" and did not use the words "as amended" which are used in sec. 22.13 (2) (m), Stats., which grants the Wisconsin Department of Local Affairs and Development, power to assist in the development and administration of human resource programs. A court might hold, however, that local community relations--social development commissions have power to carry out at least some of the expanded functions authorized by the

present federal economic opportunity act. The precise limits cannot be determined in a legal opinion. The facts and circumstances in any specific situation would in part determine the outcome of any court test.

In *State ex rel. Cities Service Oil Co., v. Bd of Appeals* (1963), 21 Wis. 2d 516, 527, 124 N.W. 2d 809, the court held that where a city of the first class by ordinance,

“... adopts a particular section of ch. 62, Stats., ... *such adoption embraces any subsequent amendment* which the legislature may thereafter make in the adopted statute *which is not wholly incompatible* with such statute as it stood at the time the adopting ordinance was enacted. ...” (Emphasis added.)

RWW:RJV

Schools And School Districts; Taxation; Vocational, Technical and Adult Education District owning residential property is subject to tax levied for school purposes under sec. 70.114 (1), Stats.

May 22, 1974.

EUGENE LEHRMANN, *State Director*
Board of Vocational, Technical and Adult Education

In your letter of October 9, 1973, you ask whether a Vocational, Technical and Adult Education District which owns an apartment building partially used for vocational school purposes and partially rented to persons for residential purposes, is exempt from general property taxes.

Section 70.11 (2), Stats., exempts:

“Property owned by any county, city, village, town, school district, vocational, technical and adult education district, metropolitan sewerage district, municipal water district created under s. 198.22 or town sanitary district; lands belonging to cities of any other state used for public parks; land tax-deeded to any county or city before May 2; but any residence located upon property owned by the county for park purposes which is rented

out by the county for a nonpark purpose shall not be exempt from taxation. Except as to land acquired under s. 59.965 (5) (d) this exemption shall not apply to land conveyed after August 17, 1961, to any such governmental unit or for its benefit while the grantor or others for his benefit are permitted to occupy the land or part thereof in consideration for the conveyance.”

In addition to this exemption, it has been held that an exemption in favor of the state must be construed to make exemption the rule and taxation the exception. *State v. City of Madison* (1972), 55 Wis. 2d 427, 198 N.W. 2d 615; *Wisconsin University Building Corporation v. Bareis* (1950), 257 Wis. 497, 44 N.W. 2d 259.

While sec. 70.11 (2), Stats., is clear and unambiguous, there are two provisions of ch. 70 which tend to raise doubts as to whether the Vocational, Technical and Adult Education district is entitled to a complete exemption from payment of general property taxes.

Section 70.11 (8), Stats., provides in part:

“(8) TAXED IN PART. Where property for which exemption is sought pursuant to this section is used in part for exempt purposes and in part for pecuniary profit, then the same shall be assessed for taxation at such percentage of the full market value of said real and personal property as shall fairly measure and represent the extent of such use for pecuniary profit. In determining the amount of such assessment, the term “pecuniary profit” as used in this section is hereby defined as the use of any portion of said premises or facilities for purposes not directly included within the objects of such organization for which use compensation is received, and the space so used, the period of such use, and all other factors tending to measure the extent thereof, shall be considered in fixing the amount of such assessment. ...”

In my opinion, this section of the statute does not apply to the Vocational, Technical and Adult Education districts. By their very nature, public Vocational, Technical and Adult Education districts are not operated “for pecuniary profit.” There is no element of profit accruing to anyone and all of the net income is devoted to a public

purpose, i.e., operation of the Vocational, Technical and Adult Education district.

In *Milwaukee Protestant Home v. Milwaukee* (1969), 41 Wis. 2d 284, 296, 164 N.W. 2d 289, 37 A.L.R. 3d 571, the court interpreted "pecuniary profit" as used in sec. 70.11 (8), Stats. In quoting with approval from *Sisters of St. Joseph v. Plover* (1941), 239 Wis. 278, 1 N.W. 2d 173, the court wrote at p. 296, adding its own emphasis:

"The respondent's claim is to the effect that the River Pines Sanatorium should be taxed on the ground that it aims to operate at a profit ... all benevolent institutions endeavor so to operate. But *as the profit* made by these institutions, if any, *is payable to nobody, but is only turned back into improving facilities* or extending the benevolence in which the institutions are primarily engaged, *the profit element becomes immaterial.*"

And again, the court in *Milwaukee Protestant Home v. Milwaukee, supra*, noted:

"Where there is no element of gain to anyone and where all of the net income is devoted exclusively to carrying on the benevolent purposes of the institution, there is not an operating 'for pecuniary profit.'"

It is manifest that the same principle applies to state agencies and municipalities.

Since sec. 38.14 (2) 2, Stats., provides that district boards may purchase or lease suitable land and buildings and rent to others any portion of land and buildings not needed for school purposes, no question arises as to the use of the premises for purposes not directly included within the objects of the district as required in sec. 70.11 (8), Stats.

The second provision of ch. 70 to be considered is sec. 70.114. This section provides in part:

"Payment of school tax on tax-exempt lands. (1) Notwithstanding any other provision in this chapter, all land owned by the state, or by any county in such county or in any other county, or by any city, village, town *or other municipality*, or by any agency of any of the foregoing, which is residential

property and is a part of, used by or held and kept for the purposes of a public educational institution shall be subject to any tax levied for school purposes the same as other real estate. If such taxes are not paid, such lands shall be subject to tax sale as are privately owned lands." (Emphasis added.)

This section directs our attention to the question of whether a Vocational, Technical and Adult Education district is to be considered a "municipality" within the meaning of sec. 70.114 (1), Stats.

This section was created by ch. 643, Laws of 1955. A minor amendment was added by sec. 31, ch. 610, Laws of 1957. Other than an explanatory note to the bill indicating that it was the legislative intent of the law to apply to cities, villages, towns and all other municipalities, there is no legislative history which would help to determine whether the term "municipality" includes Vocational, Technical and Adult Education districts.

Chapter 70 does not define the term municipality. However, sec. 990.01 (22), Stats., provides as follows:

"MUNICIPALITY. 'Municipality' includes cities and villages; it may be construed to include towns."

To apply this definition would be to ignore the phrase "or other municipality" as used in sec. 70.114, Stats. In the words of sec. 990.001, Stats., to apply this definition would "produce a result inconsistent with the manifest intent of the legislature."

In Wisconsin law, a distinction is frequently made between a "municipality" and a "municipal corporation." For example, counties have been held not to be municipal corporations but rather municipalities to permit them to make certain charitable contributions as provided by statute. *Lund v. Chippewa County, et al.* (1896), 93 Wis. 640, 67 N.W. 927.

In other authorities it is stated that whenever the legislature so intended, the term "municipality" will be construed to include the term "quasi-municipal corporation." To determine the meaning of the word "municipality" as used in the statute, it is necessary to consider the intention of the legislature in relation to the general situation to which the statute applies.

A quasi-municipal corporation is a public agency created or authorized by the legislature to aid the state in, or take charge of, some public or state work, other than community government, for the general welfare. See 1 McQuillin, *Municipal Corporations*, sec. 2.20, p. 472, *et seq.*

The rule of statutory construction applicable here is *ejusdem generis i.e.*, where general words follow specific words in an enumeration describing the legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. The specific enumeration contained in sec. 70.114 includes counties and towns which have been held to be quasi-municipal corporations. See *State ex rel. City of Shawano v. Engel* (1920), 171 Wis. 299, 177 N.W. 33. Therefore, the term "municipality" as used in sec. 70.114, Stats., is intended to include both quasi-municipal and municipal corporations. The above reasoning assumes the constitutionality of tax statutes involved.

Public school districts in Wisconsin have been held to be quasi-municipal corporations--see *Iverson, et al., v. Union Free High School District of the Towns of Springfield and Curran, et al.* (1925), 186 Wis. 342, 202 N.W. 788, and *Schaut v. Joint School District No. 6 of the Towns of Lena and Little River* (1926), 191 Wis. 104, 210 N.W. 270. Also in 56 OAG 308, 310, my predecessor noted that a school district being a quasi-municipal corporation has only such powers as are given to it by statute.

It is my opinion that Vocational, Technical and Adult Education districts, as provided for in ch. 38, Stats., are also quasi-municipal corporations and that as such they are "municipalities" within the meaning of sec. 70.114, Stats., and subject to the provisions thereof. Therefore since the property owned by the district is residential, it is subject to the tax provided in sec. 70.114, Stats.

RWW:JWC

Real Estate Examining Board; Public Officials; Incumbent Real Estate Examining Board member is entitled to hold over in office until his successor is duly appointed and confirmed by the Senate, and Board is without authority to reimburse nominee for expenses incurred in attending meeting during orientation period prior to confirmation under facts stated.

May 23, 1974.

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

You request my opinion whether a person appointed to the Wisconsin Real Estate Examining Board, but not yet confirmed by the Senate, can be reimbursed for expenses incurred in attending Board meetings for orientation purposes, and travel expenses to meetings of the National Conference of Law Officials where the holdover official continues to serve as a member of the Board. You state that it is not contemplated that such appointee would be paid the regular per diem provided for Board members.

It is my opinion that reimbursement for any such expenses is not permissible under the facts stated.

On March 27, 1974, the Governor appointed Mrs. Marcy Mills to the Real Estate Examining Board to succeed Randall B. Bezanson for a term ending July 1, 1979 (Vol. 14, Civil Appointments, 477, in the Office of the Secretary of State). Mr. Bezanson's term expired on July 1, 1973, and he continues to serve.

Section 15.405 (11), Stats., provides that the Examining Board shall consist of three members appointed to staggered six-year terms. Section 15.08 (1), Stats., provides that all members of Examining Boards "shall ... be nominated by the governor, and with the advice and consent of the senate appointed. ..."

Section 15.08 (7), Stats. provides:

"COMPENSATION AND REIMBURSEMENT FOR EXPENSES. Each member of an examining board shall, unless he is a full-time salaried employe of this state, be paid a per

diem of \$25 for each day on which he was actually and necessarily engaged in the performance of his duties. Each member of an examining board shall be reimbursed for his actual and necessary expenses incurred in the performance of his duties.”

The Board has only those powers which are expressly provided by statute or which are necessarily implied. There is no statute which would permit the Examining Board or the Department of Regulation and Licensing to pay per diem or expenses under sec. 15.08 (7), Stats., to anyone other than a *de jure* or *de facto* member of the Board.

On March 27, 1974, the legislature was in session. The office was occupied by a duly appointed and confirmed officer who had a right to hold office after the expiration of his term until a successor was appointed and qualified. There was no vacancy within the meaning of sec. 17.03, Stats. The provisions of secs. 17.20 (1), (2), and 14.22, Stats., were not applicable because the legislature was in session.

In *State ex rel. Thompson v. Gibson* (1964), 22 Wis. 2d 275, 290-291, 125 N.W. 2d 636, it is stated:

“... it cannot be said that an office is ‘vacant’ for the purposes of sec. 17.20, where the incumbent holds over after expiration of his term.”

Incumbent Bezanson is entitled to hold over in office until his successor is duly appointed and confirmed by the Senate. *State ex rel. Thompson v. Gibson, supra*, p. 293.

RWW:RJV

Land: A replat of a recorded subdivision must comply with the formal platting requirements of ch. 236, Stats., relating to new subdivision plats, including those relating to the survey, approval and recording.

June 5, 1974.

WILLIS J. ZICK, *Corporation Counsel*
Waukesha County

You request my opinion whether a replat of a part of a recorded subdivision must comply with the formal platting requirements of ch. 236, Stats., even though such replat does not result in a further "subdivision," as defined in sec. 236.02 (8), Stats.

In my opinion, your question must be answered in the affirmative.

Section 236.03 (1), Stats., provides as follows:

"Any division of land which results in a subdivision as defined in s. 236.02 (8) (a) shall be, and any other division may be, surveyed and a plat thereof approved and recorded as required by this chapter. *No map or survey purporting to create divisions of land or intending to clarify metes and bounds descriptions may be recorded except as provided by this chapter.*" (Emphasis added.)

The second sentence of sec. 236.03 (1), Stats., above quoted, was added to the statute by ch. 274, Laws of 1959. The statute was apparently amended to negate the effect of a prior opinion of this office, which had indicated that maps or surveys other than those complying with ch. 236, Stats., could be recorded. See 48 OAG 54 (1959).

Section 236.02 (13), Stats., defines replat as follows:

"*'Replat'* is the process of changing, or the map or plat which changes, the boundaries of a recorded subdivision plat or part thereof. The legal dividing of a large block, lot or outlot within a recorded subdivision plat without changing exterior boundaries of said block, lot or outlot is not a replat." (Emphasis added.)

Section 236.36, Stats., provides as follows:

"Except as provided in s. 70.27 (1), replat of all or any part of a recorded subdivision, if it alters areas dedicated to the public, may not be made or recorded except after proper court action, in the county in which the subdivision is located, has

been taken to vacate the original plat or the specific part thereof.”

This latter section was interpreted in 58 OAG 145 (1969) to require application of the court proceedings set forth in secs. 236.40 through 236.43, Stats., when a replat alters areas dedicated to the public. But, where public areas are not involved, the opinion was expressed that a recorded subdivision may be replatted without undertaking court proceedings, where the replat complies with the procedural and technical requirements of ch. 236, Stats., applicable to original plats. The opinion stated at p. 149:

“However, although sec. 236.36, Stats., allows non-judicial replat of land under certain circumstances, it does not follow that such replat requires any less formality or adherence to statutory standards than is required for original subdivision plats. On the contrary, if the purpose, integrity and effectiveness of the platting statutes, as well as each subdivision plat adopted pursuant thereto, is to be maintained, a replat under the authority contained in sec. 236.36, Stats., must comply in all respects with the provisions of ch. 236, Stats., relating to new subdivision plats, including those regulating the survey, approval and recording thereof.”

I find no reason to recede from the opinion previously expressed in 58 OAG 145. While sec. 236.34, Stats., authorizes the preparation and filing of certified survey maps of not more than four parcels, that statute contains few approval and review requirements and is inappropriate for the purpose of replatting. A “replat” under ch. 236, Stats., is a making anew or remaking of a recorded subdivision plat or part thereof by the rearrangement of boundary lines. Little purpose would exist for the various reviews, approvals and other requirements imposed as a condition of final approval of a subdivision plat, if the boundaries of the subdivision could be thereafter immediately altered by a procedure which avoided the constraints imposed on original subdivisions.

RWW:JCM

Counties; County Board; County Clerk; County Board is without power to provide for compensation for members of County Board of Health where express statute, sec. 140.09 (5), provides that they will serve without compensation but may be reimbursed for expenses. Statutory powers of County Clerk with respect to budgeting and record keeping cannot be transferred by County Board to new position of Finance Officer.

June 5, 1974.

WILLIS J. ZICK, *Corporation Counsel*
Waukesha County

You request my opinion on several questions involving sec. 59.025, Stats., created by ch. 118, Laws of 1973.

Your first question is whether the County Board can authorize compensation for members of the County Board of Health.

I am of the opinion that it cannot.

Section 140.09, Stats., provides for creation of a County Board of Health, and sec. 140.09 (5), Stats., provides that:

“(5) ... Members shall serve without compensation but may be reimbursed for their actual and necessary expenses.”

Section 59.025, Stats., as created by ch. 118, Laws of 1973, provides:

“59.025 COUNTY ORGANIZATION. (1) PURPOSE. The purpose of this section is to improve the ability of county government to organize its administrative structure, within constitutional limits. The state constitution now authorizes the legislature to establish one or more systems of county government. Consistent with this constitutional authority, it is the intent of the legislature to *increase the organizational discretion which county government may exercise in the administration of powers conferred upon county boards of supervisors by the legislature.*”

“(2) INTENT AND CONSTRUCTION. For the purpose of giving counties the largest measure of organizational autonomy compatible with the constitution and general law, it is hereby declared that this section shall be construed in favor of the rights, powers and privileges of counties *to organize and administer county functions. The powers hereby conferred shall be in addition to all other grants and shall be limited only by express language but shall be subject to the constitution and such enactments of the legislature of statewide concern as shall with uniformity affect every county. In the event of conflict between this section and any other statute, this section to the extent of such conflict shall prevail.*

“(3) CREATION OF OFFICES. Except for the offices of supervisor, judge, county executive and county assessor and those officers elected under section 4 of article VI of the constitution, the county board may:

“(a) Create any county office, department, committee, board, commission, position or employment it deems necessary to administer functions authorized by the legislature.

“(b) Consolidate, abolish or reestablish any county office, department, committee, board, commission, position or employment.

“(c) Transfer some or all functions, duties, responsibilities and privileges of any county office, department, committee, board, commission, position or employment to any other agency including a committee of the board.

“(4) SELECTION PROCESS FOR OFFICES. The county board may determine the method of selection of any county offices except for the offices of supervisors, judges, county clerk, county treasurer, clerk of courts, county executive and county assessor and those officers elected under section 4 of article VI of the constitution. The method may be by election or by appointment and, if by appointment, the county board shall determine the appointing authority, subject to ss. 59.031 and 59.032.

“(5) PART-TIME OFFICES. The county board may designate any county office a part-time position.” (Emphasis added.)

Chapter 118, Laws of 1973, also amended sec. 59.15 (2) (a), Stats., to provide:

“59.15 (2) (a) The board has the powers set forth in this subsection ~~and~~, sub. (3) and s. 59.025 as to any office, department, board, commission, committee, position or employe in county service (other than elective offices included under sub. (1), supervisors and circuit judges) created under any statute, the salary or compensation for which is paid in whole or in part by the county, and the jurisdiction and duties of which lie within the county or any portion thereof and *the powers conferred by this section shall be in addition to all other grants of power and shall be limited only by express language.*” (Emphasis added.)

Section 59.15 (2) (c), Stats., provides:

“(c) The board may provide, fix or change the salary or compensation of any such office, board, commission, committee, position, employe or deputies to elective officers without regard to the tenure of the incumbent (except as provided in par. (d)) and also establish the number of employes in any department or office including deputies to elective officers, and may establish regulations of employment for any person paid from the county treasury, but no action of the board shall be contrary to or in derogation of the rules and regulations of the department of health and social services pursuant to s. 49.50 (2) to (5) relating to employes administering old-age assistance, aid to dependent children, aid to the blind and aid to totally and permanently disabled persons or ss. 63.01 to 63.17.”

I am of the opinion that the power of the County Board to provide, fix or change the salary or compensation of any such office, board, etc., is, as to members of the County Board of Health, limited under sec. 59.15 (2) (a), Stats., by the express language of sec. 140.09 (5), Stats., which provides that members are to “serve without compensation but may be reimbursed for their actual and necessary expenses.”

Your second question is whether *statutory* powers of the County Clerk in regard to budgeting and record keeping can be transferred to a new position of Finance Officer.

It is my opinion that they cannot.

Powers conferred on a county officer by statute cannot be narrowed, taken away, or enlarged by the County Board except in cases where the legislature has authorized it by statute. *Beal v. The Supervisors of St. Croix Co.* (1861), 13 Wis. 559; *The Town of Crandon v. Forest County* (1895), 91 Wis. 239, 64 N.W. 847; *Reichert v. Milwaukee County* (1914), 159 Wis. 25, 150 N.W. 401.

Although the office of County Clerk is not expressly referred to in the Constitution, it is included with "other county officers" in Art. VI, sec. 4, Wis. Const. 24 OAG 787 (1935), State ex rel. Williams v. Samuelson (1907), 131 Wis. 499, 111 N.W. 712.

Section 59.025 (3), Stats., excepts those officers elected under Art. VI, sec. 4, of the Constitution, and the County Board does not have the powers granted under sec. 59.025 (3) (c), Stats., with respect to the office of County Clerk.

This opinion is limited to the statutory powers of a County Clerk with respect to budgeting and record keeping in a county which does not have a County Executive or County Administrator. Section 59.17, Stats., grants the County Clerk extensive powers as to record keeping. His statutory powers as to budgeting are less clear. The primary power with respect to formulating a budget in counties without a County Executive or Administrator is in the County Board. See sec. 65.90, Stats. A County Clerk has powers as auditor under sec. 59.72 (1), Stats.; however, these powers may be performed by a County Auditor by reason of sec. 59.72 (2), Stats., and could be performed by a Finance Officer.

RWW:RJV

Towns; Zoning: Under the provisions of sec. 59.97 (5) (c), Stats., town board approval of a comprehensive county zoning ordinance must extend to such ordinance in its entirety and may not extend only to parts of such ordinance.

June 12, 1974.

RUSSELL FALKENBERG, *District Attorney*
Chippewa County

You advise that your county is considering the adoption of a comprehensive county zoning ordinance under the provisions of sec. 59.97 (5), Stats. Upon adoption by the county board, such ordinance will be submitted to the various town boards within the county for their consideration, as required by sec. 59.97 (5) (b), Stats. You inquire whether town board approval of such ordinance must extend to such ordinance in its entirety or may extend only to parts of such ordinance.

The answer to your question is dictated by the provisions of sec. 59.97 (5) (c), Stats., which provides in part that:

“(c) 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. If the town board approves an ordinance adopted by the county board, as provided by this section, a certified copy of the approving resolution attached to one of the copies of such ordinance submitted to the town board shall promptly be filed with the county clerk by the town clerk. ...”

It is my opinion that under sec. 59.97 (5) (c), Stats., town board approval of a comprehensive county zoning ordinance must extend to such ordinance in its entirety and may not extend only to parts of such ordinance.

When statutory language is clear and unambiguous, it must be given its ordinary, generally understood and accepted meaning. *Transamerica Financial Corp. v. Wis. Dept. of Revenue* (1972), 56 Wis. 2d 57, 201 N.W. 2d 552; *State v. City of Madison* (1972), 55 Wis. 2d 427, 198 N.W. 2d 615. I find the language of subsec. (5) (c) neither unclear nor ambiguous. The statute states that a comprehensive zoning ordinance adopted by a county board will not be effective in any town which has not “approved” such ordinance. The word “approve” has no technical meaning and neither the subject matter of the statute nor the context in which the term is employed suggests that it would be appropriate to extend or qualify the ordinary and accepted meaning of the word.

Ordinarily, "approval" or "approve" means to confirm, ratify, sanction or consent to some act or thing done by another. See cases in 3A Words and Phrases, "Approval" and "Approve," pp. 499-512. In this instance, the action which is submitted to the town boards for approval is the action of the county board in adopting an ordinance containing certain specific provisions. That act is not severable. A town board may determine that it cannot approve that action because of opposition to some of the provisions of the ordinance. In such case, however, no part of the ordinance would be effective in such town, and the adoption of a resolution by the town board approving the ordinance in part would be wholly meaningless and would not make the approved portions of the ordinance effective in such town.

RWW:JCM

Land; Agencies engaging in "advance land acquisitions" must comply with sec. 32.19, Stats., *et seq.*, Wisconsin's relocation assistance and payment law.

June 12, 1974.

PAUL L. BROWN, *Director*
State Bureau of Facilities Management

You have requested my advice on the question of whether a state agency, engaging in "advance land acquisitions," is required to comply with the provisions of sec. 32.19, Stats., *et seq.*

You state in your letter that no particular construction project is involved in such acquisitions but that the lands are acquired for possible future construction sites. An example of "advance land acquisitions," sometimes commonly referred to as "hardship acquisitions," is where the University of Wisconsin System acquires parcels in close proximity to the campus for future campus expansion.

It is understood in answering that condemnation is not involved in these acquisitions although the agency may have such statutory authority.

It is implicit in your letter that you raise this question because “no specific project has been identified for the site.”

The answer to your question is found in the language of sec. 32.25 (1), Stats., which reads:

“Relocation payment plan and assistance services. (1) Notwithstanding ch. 275, laws of 1931, or any other provision of law, 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 has had both such plans approved in writing by the department of local affairs and development.”

In my view, the word “project,” as employed in the above section, does not necessarily mean a “construction project” or “building project.” Many state projects do not involve construction projects, and I have particularly in mind land acquisition by the Department of Natural Resources as an example.

Further, it seems to me that land acquisition alone is a “project” in and of itself.

The purpose of the State Relocation Act is to provide additional benefits to displaced persons. The law does not distinguish between these persons displaced because of land acquisition alone or in conjunction with a particular building construction project.

Surely, state agencies do not purchase parcels promiscuously but must have some definite geographical limits in mind. Accordingly, it is my opinion that a plan should be filed pursuant to sec. 32.25, Stats., encompassing such areas of future use.

In this regard, I assume that the agency involved could prepare and submit a plan that is relevant and sufficiently detailed to fit the situation of “advance land acquisitions” and that the Department of Local Affairs and Development will recognize the situation for what it is and approve such a plan.

This opinion does not address the question of whether any particular grantor in the context of advance acquisitions is a “displaced person” within the meaning of sec. 32.19, Stats., *et seq.*

Such determination must be made on the facts surrounding each particular transfer of title.

RWW:CAB

County Board; Members of a county board appointed to a unified board, created pursuant to sec. 51.42 (4) (b), Stats., serve for the full term for which appointed, without reference to the termination of their office as county board members.

June 12, 1974.

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

Your county has created a county mental health, mental retardation, alcoholism and drug abuse board, under the authority set forth in sec. 51.42 (4), Stats. The composition of your board is governed by sec. 51.42 (4) (b), Stats., which provides:

“51.42 (4) (b) Except in counties having a population of 500,000 or more, in any county which does not combine with another county the board shall be composed of not less than 9 nor more than 15 persons of recognized ability and demonstrated interest in the problems of the mentally ill, mentally retarded, alcoholic or drug abuser. The board shall have representation from each of the aforementioned mental disability interest groups. No more than 5 members may be appointed from the county board of supervisors.”

Your county ordinance creating such board provides that “not more than five of the nine member Unified Board may be county board members.”

You advise that recent county board elections have resulted in the defeat of two county board members who were also members of the unified board. You inquire whether such defeated county board members may continue to sit on the unified board for the balance of the term for which they were originally appointed.

In my opinion, since a unified board, created pursuant to sec. 51.42 (4) (b), Stats., need not be composed of members of the county board, if members of the county board are appointed to the unified board, they serve for the full term for which appointed, without reference to the termination of their office as county board members.

The board created under sec. 51.42 (4) (b), Stats., must be chosen from "persons of recognized ability and demonstrated interest in the problems of the mentally ill, mentally retarded, alcoholic or drug abuser," and county board membership is in no sense a qualification for appointment to such unified board. In fact, I note that the legislature has specifically limited the number of county board members that may be appointed to the unified board.

My predecessors have repeatedly concluded that a member of a county board who is a member of the county highway committee may serve out his unexpired committee membership even though not reelected to the county board. 48 OAG 241, 242 (1959). The reasoning supporting that opinion, as first stated in 5 OAG 339, 340 (1916), appears equally applicable here:

"... The membership of this committee is not confined to the membership of the county board. ... If a person not a member of the county board were elected or appointed a member of this committee, there would be no thought that his term of office expired at the spring election, because he was not elected a member of the county board. There is no greater reason for assuming that the term of office of a person who is elected or appointed to this committee from the membership of the county board expired because he was not reelected."

RWW:JCM

County Treasurer; Taxation; County Treasurer has duty to collect personal property tax returned delinquent by the town, but may charge tax back to the town after one year. Collection methods discussed.

June 18, 1974.

JOSEPH SALITURO, *Corporation Counsel*
Kenosha County

You ask whether under sec. 74.17, Stats., your county treasurer must collect personal property taxes which have been returned delinquent by a town within the county. You answer this question in the affirmative, and I agree. The statute says that such taxes "shall be accepted by the county treasurer for collection ..." This same duty has been imposed upon the county treasurer for many years. See secs. 1111-1114, Rev. Stats. 1878, and 8 OAG 242 (1919). However, the picture is more complex than that.

Section 74.31, Stats., provides that the county treasurer, a year after any delinquent personal property tax has been returned to his office by a town and upon the sheriff's affidavit that the tax is uncollectible, shall charge the tax back to the town. If any delinquent personal property tax is charged back to the town by the county treasurer, the obligation to collect falls back upon the town. Sec. 74.19 (4), Stats. Also, sec. 74.19 (3) (b), Stats., permits a town to retain for collection delinquent personal property taxes, rather than returning them to the county treasurer pursuant to sec. 74.17.

Also, you ask what methods are to be used by the county treasurer to collect delinquent personal property taxes; whether there is a conflict between secs. 74.11 and 74.29, Stats.; and how to draft--and who must sign--the warrant mentioned in sec. 74.29.

As you have said, sec. 74.11, Stats., refers to the town, city or village as the plaintiff in an action brought under that section. The district attorney does not appear in an action under that statute, unless he is requested by the county treasurer to handle an appeal to the Circuit Court. However, the district attorney or corporation counsel could initiate an action under sec. 74.12, upon request of the county treasurer. Also sec. 74.29 provides that the county treasurer shall issue his warrant directed to the sheriff, commanding him to collect personal property taxes which have been returned delinquent, and attach a schedule of such taxes.

There does not appear to be any conflict between secs. 74.11 and 74.29, Stats. A predecessor of mine concluded that a town, village or city could not bring an action to collect personal property taxes after

the date when such taxes should have been returned delinquent to the county treasurer. 22 OAG 1018 (1933). After that date only the county may bring an action to collect, unless the taxes have been retained by the local municipality, under sec. 74.19 (3) (b), or have been charged back to such municipality, under sec. 74.31. Thus, the provision in sec. 74.11 (2)--that the town, city or village shall be the plaintiff--has no applicability to a proceeding under secs. 74.12 or 74.29, where the proceeding to collect is initiated by the county.

There is no statutory form for the warrant to be issued under sec. 74.29, but the warrant should include the provisions set forth in subsec. (2). It could be modeled upon a general form of execution, such as that set forth in 6 Callaghan's Wis. Pleading and Practice, sec. 44.18. The treasurer's warrant should run in the name of the treasurer in his official capacity and, as the statute prescribes, must be signed by such officer. The warrant would not refer to any judgment but should refer to the schedule attached and should command the sheriff to satisfy the delinquent taxes set forth on such schedule. The return should be to the county treasurer, rather than to the clerk of Circuit Court.

RWW:EWW

Motor Carriers; Motor carrier permit fees required by sec. 194.04 (4) (a), (b), and (c), Stats., are not in conflict with Interstate Commerce Commission regulations and may be collected. The permit fee required by sec. 194.04 (4) (d), Stats., is in conflict with such regulations and may not be collected.

June 19, 1974.

NORMAN M. CLAPP, *Secretary*
Department of Transportation

You have requested my opinion whether the collection of motor carrier permit fees prescribed by sec. 194.04 (4), Stats., conforms to the requirements of the Interstate Commerce Act in 49 U.S.C.A. sec. 302 (b) (2) and the regulations issued thereunder in Title 49 C.F.R. sec. 1023.33.

Common motor carriers are required by sec. 194.23, Stats., to obtain a certificate for their operations. Similarly, contract carriers are required by sec. 194.34, Stats., to obtain a license for their operations. Section 194.04, Stats., provides that the carrier must make application for the certificate or license to the Public Service Commission. A carrier doing an interstate business in this state and holding an authority from the Interstate Commerce Commission merely presents such ICC authority with its application and receives a certificate or license from the Public Service Commission. The filing fee for a certificate is \$40, and for a license is \$25. Such \$40 fee will be reduced to \$25 to the extent necessary to comply with the Interstate Commerce Commission regulation in Title 49 C.F.R. sec. 1023.13, which provides that such a fee may not exceed \$25. Such carriers also pay permit fees as prescribed by sec. 194.04 (4), Stats. Common motor carriers pay \$20 per vehicle per year. Contract motor carriers pay \$10 per vehicle per year. Common motor carriers of property pay an additional \$10 per vehicle per year. All of these fees are paid into the highway fund. Such carriers also pay registration fees for each vehicle as prescribed by ch. 341, Stats., except where exempt under reciprocity agreements.

Public Law 89-170, 49 U.S.C.A. sec. 302 (b) (2), authorizes the Interstate Commerce Commission to promulgate standards as to:

“... forms and procedures required to evidence the lawfulness of interstate operations of a carrier within a State by (a) filing and maintaining current records of the certificates and permits issued by the Commission, (b) registering and identifying vehicles as operating under such certificates and permits, ...”

Pursuant to this statute, the Interstate Commerce Commission has promulgated certain standards for the registration and identification of carriers in interstate commerce. Title 49 C.F.R. Part 1023. Section 1023.32 of such standards provides that the state shall issue an identification stamp or number and that these shall be used to identify vehicles operated by carriers to indicate that such carriers are authorized to operate within the state. Section 1023.33 of such standards provides that the state may charge the carrier not to exceed \$5 for each vehicle operated. Until recently, that section further provided:

“... The prescription of the maximum fee of \$5 for the issuance of such identification stamp or number shall not preclude a State from imposing an additional fee in a reasonable amount to be paid to a State commission prior to the issuance of such stamp or number if such additional fee shall be used solely for defraying the cost of the regulation of carriers by highway operating within the borders of such State and the enforcement of laws pertaining thereto.”

This part of the section has now been amended to read as follows:

“... The prescription of the maximum fee of \$5 for the issuance of such identification stamp or number shall not preclude a State from imposing an additional fee in a reasonable amount to be paid to a State commission prior to the issuance of such stamp or number if such additional fee shall be *subject to exclusive use by the State commission* and used *by it* solely for defraying the cost of the regulation of carriers by highway operating within the borders of such State and the enforcement of laws pertaining thereto. *The State commission shall maintain adequate records to identify the receipt and disbursement of such funds collected pursuant to the provisions of this section.*” (Italics indicate the language added by amendment.)

This amendment to the regulation was published in the Federal Register on November 27, 1973, in Vol. 38, p. 32580, and again on December 7, 1973, in Vol. 38, p. 33772.

Section 194.04 (1) (bd), Stats., provides that each holder of a certificate shall pay an annual permit fee for each vehicle operated under the certificate, and sec. 194.23 (1), Stats., provides that no person shall operate a vehicle as a common motor carrier except in accordance with his certificate, and except by virtue of a permit issued to him for the operation of such vehicle. Sections 194.04 (1) (cb) and 194.34 (1), Stats., make similar requirements as to contract carriers. Thus, it is clear that the permits so issued are for the purpose of registering and identifying such vehicles as being operated under the authority issued by the Interstate Commerce Commission and the Public Service Commission, and that such permits are subject to the regulations of the Interstate Commerce

Commission as provided in Public Law 89-170, 49 U.S.C.A. sec. 302 (b) (2).

Since the Wisconsin permit fees vary from \$10 to \$30, it is clear that they exceed the \$5 maximum permitted by the federal regulation. In *State ex rel. Sammons Trucking, Inc. v. Boedecker* (1972), 158 Mont. 397, 492 P.2d 919, the Montana Supreme Court struck down a similar \$10 fee as being in conflict with the federal law which preempts this field and supersedes state law on the same subject to the extent that they are in conflict. In that case, there was no attempt to show that the \$10 fee was, in fact, used solely for defraying the cost of the regulation of highway carriers and the enforcement of laws pertaining thereto as permitted by the federal regulations. However, Wisconsin spends, for regulation of motor carriers and law enforcement related thereto, substantially more than the total revenue derived from the permit fees charged. For example, for the fiscal year 1972-1973, total permit fees received were \$715,244. During that year, the cost of operating the motor carrier section of the Public Service Commission was \$594,387. Figures received from the Bureau of Enforcement of the Division of Motor Vehicles indicate they spend in excess of \$1,500,000 per year for enforcement of motor carrier regulations alone. From this, it is clear that the Wisconsin fees are reasonable in amount and are, in fact, used solely for defraying the cost of motor carrier regulation. Thus, the \$10 and \$20 permit fees provided by sec. 194.04 (4) (a), (b), and (c), Stats., are clearly authorized by and not in conflict with federal regulations.

This leaves for consideration only sec. 194.04 (4) (d), Stats., which provides:

“Motor vehicles operated by common motor carriers of property, \$10. Such fees shall be remitted by the division to an association rate and tariff bureau designated by each carrier and shall be used by such bureau to publish the rates and tariffs of such carrier and to promote the efficient use of common motor carriers of property in this state.”

These fees are collected by the Division of Motor Vehicles and remitted to a rate and tariff bureau designated by the carrier to be used for publishing tariffs. Regulated carriers are required to publish their rates and tariffs which are large, detailed documents consisting

of many pages. Carriers are permitted and encouraged to utilize tariff bureaus to publish such tariffs, which are then filed with the Interstate Commerce Commission and the Public Service Commission. They are available for use by carriers, shippers, receivers, and the general public.

Prior to the recent amendment of the Interstate Commerce Commission regulation in Title 49 C.F.R. sec. 1023.33, it could be argued that the \$10 permit fee collected by the Division of Motor Vehicles and remitted to a rate and tariff bureau is reasonable in amount, and is, in fact, used solely for defraying the cost of motor carrier regulation. However, as set forth above, this regulation has now been amended to provide that such fee shall be "subject to exclusive use by the State commission and be used by it solely for defraying the cost of the regulation of carriers by highway." It is my opinion that the \$10 permit fee remitted to the rate and tariff bureau is not subject to exclusive use by a state commission and is not used by it as is required by the regulation. It follows that the collection of this fee is in conflict with such federal regulation which, in this area of interstate commerce, preempts the field and supersedes the state regulation. It is, therefore, my opinion that such fee may not be collected from any carrier operating in interstate commerce.

RWW:AOH

Land; Section 236.36, Stats., permits the replat of a part of a previously recorded subdivision plat, without circuit court action, where the only areas dedicated to the public in that portion of the original subdivision being replatted, were previously fully and properly vacated under the provisions of sec. 66.296, Stats.

June 19, 1974.

JAMES A. BOTTONI, JR., *Corporation Counsel*
Washington County

You inquire whether sec. 236.36, Stats., permits the replat of a part of a previously recorded subdivision plat, without circuit court action, where the only areas dedicated to the public in that portion of

the original subdivision being replatted, were previously vacated under the provisions of sec. 66.296, Stats.

“Replat” is defined in sec. 236.02 (13), Stats., as follows:

“236.02 (13) ‘Replat’ is the process of changing, or the map or plat which changes, the boundaries of a recorded subdivision plat or part thereof. The legal dividing of a large block, lot or outlot within a recorded subdivision plat without changing exterior boundaries of said block, lot or outlot is not a replat.”

Section 236.36, Stats., provides as follows:

“236.36 Replats. Except as provided in s. 70.27 (1), replat of all or any part of a recorded subdivision, if it alters areas dedicated to the public, may not be made or recorded except after proper court action, in the county in which the subdivision is located, has been taken to vacate the original plat or the specific part thereof.”

Section 236.40, Stats., *et seq.*, provides a procedure whereby all or part of a recorded subdivision plat may be vacated or altered upon application to the circuit court for the county in which the subdivision is located.

I have previously indicated that sec. 236.36, Stats., clearly provides that if a replat of all or part of a recorded subdivision does not alter areas dedicated to the public, it may be made and recorded without the necessity of pursuing the court procedure provided for in sec. 236.40, Stats., *et seq.*, 58 OAG 146 (1969). Obviously, as indicated in that opinion, if the proposed replat alters areas dedicated to the public, proper court proceedings must be taken to vacate or alter the original plat, or the specific part thereof, before the replat may be made or recorded. See sec. 236.43, Stats., regarding court vacation or alteration of platted areas dedicated to the public. The answer to your question, therefore, turns on whether a street properly discontinued under the provisions of sec. 66.296, Stats., continues to be “dedicated to the public” as that phrase is used in sec. 236.36, Stats.

The effect of the recording of a subdivision plat, in reference to the dedications to the public made therein, is set forth in sec. 236.29 (1), Stats., as follows:

“236.29 (1) **Effect of recording on dedications.** When any plat is certified, signed, acknowledged and recorded as prescribed in this chapter, every donation or grant to the public or any person, society or corporation marked or noted as such on said plat shall be deemed a sufficient conveyance to vest the fee simple of all parcels of land so marked or noted, and shall be considered a general warranty against such donors, their heirs and assigns to the said donees for their use for the purposes therein expressed and no other; and the land intended for the streets, alleys, ways, commons or other public uses as designated on said plat shall be held by the town, city or village in which such plat is situated in trust to and for such uses and purposes.”

In *Kimball v. City of Kenosha* (1855), 4 Wis. 321*, our court considered the effect of the discontinuance of a public street which had been previously laid out, surveyed, mapped and dedicated as part of a recorded plat of the village of Southport (City of Kenosha), which was subject to the provisions of a statute which read essentially as sec. 236.29, Stats., presently reads. The court concluded that although the statute passed a trust estate in the land designated as streets to the corporation authorities, where such authorities discharged and abandoned the trust created by the act of recording the plat, by discontinuing and vacating such public streets, they were divested of all estate in the premises. It is there stated, at page 332*:

“... The public authorities have all the control over the streets which the statute grants to them, so long as the streets are continued as such; and when they cease to be such, are vacated or abandoned, the *rights of the public therein are extinguished*, and those of the individual owner may be resumed.” (Emphasis added.)

See also sec. 80.32 (3), Stats., which provides for a reversion of title upon the discontinuance of any highway.

It is therefore evident that the discontinuance of a public street, under a statute such as sec. 66.296, Stats., abolishes that street altogether. See *Huenig v. Shenkenberg* (1932), 208 Wis. 177, 179, 242 N.W. 552. Such a discontinued and vacated street hardly can continue to be considered as “dedicated to the public,” as that phrase is used in sec. 236.36, Stats.

Further, a comparison of the various street vacation provisions contained in sec. 66.296, Stats., with those in sec. 236.40, Stats., *et seq*, discloses that both statutory procedures establish requirements for notification of and effective participation by affected property owners and require approval by the appropriate municipal governing body as a condition of such discontinuance and vacation. Once a street has been discontinued and vacated under sec. 66.296, Stats., no meaningful purpose is served by requiring what is essentially a repetition of the vacation procedure, in another but similar form, under sec. 236.36, Stats.

In light of the foregoing, it is my opinion that sec. 236.36, Stats., permits the replat of a part of a previously recorded subdivision plat, without circuit court action, where the only areas dedicated to the public in that portion of the original subdivision being replatted, were previously fully and properly vacated under the provisions of sec. 66.296, Stats.

RWW:JCM

County Park Commission; Gifts; The practice of a county park commission, in granting free or complimentary season golf passes for the use of the county-owned and operated golf course to elected county officials and certain appointed county officials, is deemed to be in excess of the authority of such commission where such practice cannot be shown to serve any identifiable public purpose.

June 19, 1974.

DENNIS J. FLYNN, *Corporation Counsel*
Racine County

You advise that recently the Racine County Park Commission has instituted a practice of issuing free or complimentary season golf passes, for the use of the county-owned and operated golf course, to elected county officials and to certain appointed county officials. Ordinarily such a pass costs \$75.00. You further indicate that these complimentary passes are "not a part of any bargained for salary of any appointed County official, nor ... referred to in any ordinance

which establishes the salary of County Board members or other elected County officials." The practice of issuing such passes is not of long standing and has apparently been sanctioned by the county park commission rather than by the county board.

Based on the foregoing facts, you inquire whether the Racine County Park Commission may determine to grant complimentary season golf passes to the county-owned and operated golf course to elected county officials and to certain appointed county officials.

In my opinion, the facts you set forth fail to demonstrate any legal basis which would support the action of the county park commission in giving away the free passes you describe.

Although the county park commission has charge and supervision of all county parks, the commission remains subject to the general direction and supervision of the county board and to such regulations as the board prescribes. Sec. 27.05, Stats. The county board, of course, has only such power as has been conferred on it by the statutes, expressly or by clear implication, *Dodge County v. Kaiser* (1943), 243 Wis. 551, 11 N.W. 2d 348; *Maier v. Racine County* (1957), 1 Wis. 2d 384, 84 N.W. 2d 76, and the commission as its arm or agency possesses no broader authority.

However, counties do possess the authority to develop and maintain golf courses and such projects may even be financed by the issuance of mortgage bonds. Sec. 59.07 (1) (d), Stats. Fees and other income, revenues and rentals would of course be necessary to retire such mortgage bonds. However, fees may be imposed for the use of such facilities even in the absence of such bonds. Where the operation and maintenance of a county golf course falls under the control of a county park commission established pursuant to sec. 27.02, Stats., such commission exercises all the powers and duties of a county rural planning committee under sec. 27.015, Stats. See sec. 27.015 (13), Stats. Section 27.015 (7) (f), Stats., specifically authorizes a county planning committee to impose fees for the use of county park facilities, by providing that:

"It may under the direction of the county board, operate a county park or parks for tourist camping and general public amusement, and may establish fees, concession privileges and

grants and employ such help as is needed to operate the park or parks for the best county interests. ...”

Therefore, it can be fairly implied that the park commission can set such fees and establish such classifications with regard to fees as will best serve the interests of the county. Common examples of the use of such authority might include the setting of lower fees on week days or reduced rates for groups of school children. The issue thus becomes whether or not the classification scheme adopted by the Racine County Park Commission, which gives to certain county officials a free season's golf pass to the county golf course while requiring all others to pay \$75 for an identical pass, is a reasonable use of their authority to set fees.

In order for classifications within a governmental regulatory scheme to be valid, they must meet specific standards of reasonableness. *State ex rel. Ford Hopkins Co. v. Mayor* (1937), 226 Wis. 215, 276 N.W. 311; *Brennan v. Milwaukee* (1953), 265 Wis. 52, 60 N.W. 2d 704; *State ex rel. Baer v. Milwaukee* (1967), 33 Wis. 2d 624, 148 N.W. 2d 21; *Dane County v. McManus* (1972), 55 Wis. 2d 413, 198 N.W. 2d 667. As stated in *State ex rel. Real Estate Examining Board v. Gerhardt* (1968), 39 Wis. 2d 701, 710, 711, 159 N.W. 2d 622:

“Five standards for proper classification were promulgated by this court in *State ex rel. Ford Hopkins Co. v. Mayor*, and expanded in *State ex rel. Baer v. Milwaukee*. They are:

“(1) All classification must be based upon substantial distinctions which make one class really different from another.

“(2) The classification adopted must be germane to the purpose of the law.

“(3) The classification must not be based upon existing circumstances only. [The following sentence was added to No. 3 by *State ex rel. Risch v. Trustees*: “It must not be so constituted as to preclude addition to the numbers included within a class.”]

“(4) To whatever class a law may apply, it must apply equally to each member thereof.

“... ”

“ “ “(5) That the characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.’ ” ” ”

Nothing you have indicated in your statement of facts serves to readily identify elected and appointive county officials as a class so substantially different than the general public, insofar as the imposition of golf course fees are concerned, as to justify or support the grant to them of free privileges for the use of such county facility. Outside of the rather neutral fact that the recipients of the free passes are all county officials, nothing has been pointed to as even suggesting that the creation of such county fee exemption serves any purpose relating to the execution of the county park laws or any other present law relating to county government.

It is therefore my opinion that a classification which allows elected county officials and certain appointed county officials to use the county park free of charge, while requiring the rest of the public to pay a set fee, is not germane to the purpose of the law establishing parks for educational and recreational purposes and for the preservation of land for public use. As previously pointed out, this is not to say that all price reductions are unreasonable. It may be that a price reduction for a particular group would further the educational, recreational or other purposes of the law. However, in the instant case the classification has not been shown to be germane.

In addition, through the subject classification scheme the park commission has further distinguished elected county board members and some appointed officials from certain other appointed officials and from county employees generally. I cannot discern any basis for these distinctions and the park commission apparently has not offered any reasons which require or justify such different treatment. Certainly the recipients of the complimentary golf course passes have not been shown to be so far different from the general public or other county personnel as to reasonably suggest the propriety of such free passes.

Regulations promulgated by local governmental authority must serve some public purpose to justify their existence. *Dane County v. McManus, supra*, p. 424. As stated in 2 McQuillin, *Municipal Corporations* (3d ed.), p. 817, sec. 10.31:

“Public purpose as limit of power. Any power conferred on a municipality must be exercised for a public use or purpose as distinguished from a private purpose. ... A municipal corporation is a public institution created to promote public, as distinguished from private, objects. All its powers, property and offices constitute a public trust to be administered by its authorities. ...”

Based on the foregoing, it is evident that the recent practice of the Racine County Park Commission in granting free season golf passes to the county officials you describe fails to serve any identifiable public purpose.

RWW:JCM

Civil Service; Public Officials; State employes covered by the Hatch Act cannot be discharged for partisan political participation while on leaves of absence pursuant to sec. 16.35 (2) and (4).

June 20, 1974.

NORMAN M. CLAPP, *Secretary*
Department of Transportation

I am in receipt of your recent letter concerning the duties of your department as to state employes, covered by the Hatch Act, who request leaves of absence pursuant to sec. 16.35 (2) and (4), Stats.

The Hatch Act prohibits an officer or employe of a state, who is principally employed in connection with a federally financed activity, from taking an active part in political management or in political campaigns. 5 U.S.C. secs. 1501, 1502. It has long been the policy of the United States Civil Service Commission that these prohibitions apply to employes even while on leave without pay. Pamphlet 20, *Political Activity of Federal Officers and Employees*, at p. 8, reads:

“An employee who is subject to the basic political-activity prohibitions while on active duty is subject to them while on leave with pay, leave without pay, or furlough, and incurs the same penalties for an offense committed while in leave or

furlough status as for an offense committed while on active duty.” Quoted in *Montgomery, et al.*, 3 P.A.R. 45 (1970).

If the United States Civil Service Commission finds that a state employe, covered by the Hatch Act, has violated the Act and that this violation warrants removal, the Commission may not order the employe’s removal as it could with a federal employe. The Commission may, if the state has not removed the employe within 30 days of notice of violation, certify to the appropriate federal agency an order to withhold from its loans or grants to the state an amount equal to two years’ pay at the rate the employe was receiving at the time of the violation.

This federal policy, to prohibit all partisan political activity by “Hatched” state employes, runs contrary to the state policy set forth in sec. 16.35 (2) to (5). These subsections encourage political activity by state employes who take leave without pay. Section 16.35 (2) states that an employe who wishes to run for a partisan political office “*shall* be given a leave of absence for the duration of the election campaign.” Section 16.35 (4) states that an employe “*may* be granted ... a leave of absence to participate in partisan political campaigning.”

The “Hatch Act” has just recently been upheld as not “unconstitutionally vague or fatally overbroad” in the important case of *United States C. Serv. Com’n. v. National Ass’n of Let. Car.*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed. 2d 796 (1973). There is no question at this point but that the prohibitions of the Hatch Act, in its regulation of the partisan political activities of covered employes, is a valid exercise of congressional power.

In the *Letter Carriers* case, *supra*, the Supreme Court discusses the balancing of interests that must take place in the political participation area. At 93 S.Ct. 2890, the Court states:

“But as the Court held in *Pickering v. Board of Education*, 319 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968), the government has an interest in regulating the conduct and ‘the speech of its employes that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the

interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees.' Although Congress is free to strike a different balance than it has, if it so chooses, we think the balance it has so far struck is sustainable ..."

Wisconsin has recently struck a different balance from the federal government in considering its interests as an employer and its employees' interests in partisan political participation. Section 16.35 (2) to (5) was created in ch. 270, Laws of 1971. Before that time, there was nothing in the statutes that allowed employes leaves of absence to engage in partisan political activities. With ch. 270, Laws of 1971, state employes were in effect encouraged to engage in such activities by allowing leaves without pay to do so.

The issue presented by your request is whether a state agency may adopt a policy that proscribes partisan political activity to state employes covered by the Hatch Act even though the legislature approves of such conduct when the procedures of sec. 16.35 (2) and (4) are followed. It is my opinion that an agency may not adopt such a policy.

In rendering this opinion, I am cognizant of the potential loss of federal funds if covered employes are found in violation and the violation warrants removal. I am also aware of the case of *Wisconsin State Emp. Ass'n. v. Wisconsin Nat. Resources Bd.* (W.D. Wis. 1969), 298 F.Supp. 339. In this case, a state agency formulated a policy prohibiting partisan political participation by its employes. This policy went beyond the proscriptions of then sec. 16.30 [now 16.35 (1)], Stats. The case, however, involved an employe, still in active state service, running for office and was before the enactment of sec. 16.35 (2) to (5), allowing leaves of absence for such activity. The critical factor is that, since this case was decided, the legislature has formally redefined the balance between an agency's interests and the employe's interests by specifically allowing leaves of absence for such activity. A similarly situated employe today certainly may take leave to run for office and no policy of an agency could be upheld that allowed for his discharge because of it.

I do not see any distinction in sec. 16.35 between employes covered by the Hatch Act and those that are not. It should be noted, however,

that only leaves of absence granted under sec. 16.35 (2), to employes who wish to run for partisan political office must be mandatorily given. The giving of leaves of absence under 16.35 (4) to participate in partisan political campaigning are discretionary with the appointing authority. The appointing authority in this latter area surely has the right to deny such leave on the grounds that the receipt of federal funds would be placed in jeopardy.

RWW:SJN

County Board Chairman; County Clerk; County Executive Committee; Where County Board has designated the County Executive as purchasing officer and county auditor, neither County Clerk nor County Board Chairman has authority to issue a directive to department heads requiring purchase vouchers to be referred to the committees of jurisdiction rather than to the County Executive. Salary of County Executive cannot be increased so as to be effective during current term of such officer.

June 21, 1974.

WILLIAM J. SCHUH, *Corporation Counsel*
Outagamie County

You have requested my opinion relative four questions which involve the respective powers of the County Board Chairman, County Board, County Clerk, and County Executive.

You submit the following statement of facts:

“At the January session of the Outagamie County Board held on the 15th day of January, 1974, the Chairman of the County Board in his address to said Board issued the following directive:

“Directed the County Clerk to refer all purchase vouchers to the committee of jurisdiction rather than the County Executive. Those Department Heads not under a committee of jurisdiction will refer vouchers to the Coordinating Committee.

“Thereafter on January 16, 1974, the County Clerk issued the following directive to all Department Heads:

“Please be advised that I will confirm [sic] with a directive issued by County Board Chairman, Russell DeLaHunt, during the January 15, 1974, session of the Outagamie County Board.

“The following directive will become effective immediately:

“The County Clerk be directed to refer all purchase vouchers to individual committees of jurisdiction rather than the County Executive. Those Department Heads who have no committee of jurisdiction will be referred to the Coordinating Committee.

“Therefore, the respective committees are requested to approve all vouchers, then return same to my office for the Clerk’s signature.

“Upon his return from Washington on the 18th day of January, 1974, the County Executive informed all Department Heads verbally that the procedures for handling and processing purchase vouchers as originally established by the Finance Committee in May of 1970, and further reaffirmed by himself in a letter to Department Heads dated June 27, 1973, remained in full force and effect ir-regardless [sic] of the contrary directives issued by the Chairman of the Board and the County Clerk. This procedure is summarized as follows:

- “1. Requisition forms are to be presented to the County Executive’s office for approval or disapproval.
- “2. Approved requisition forms will be forwarded to the Service Center for assignment of purchase order.
- “3. Upon receipt of bill, Department Head should submit the billing under voucher to the County Executive’s office. Said voucher must have the Department Head’s approval somewhere on the inside of the voucher.

“4. The County Executive’s office will attach the original purchase order to the approved voucher and forward it to the Accounting Department for payment.

“***

“The purchasing procedure customarily followed in Outagamie County was further re-emphasized in the Board Rules adopted by the County Board for the 1973-1974 session which states in part on pp. 53-55 as follows:”

The Finance Committee shall:

“(a) ... annually recommend a county budget prepared by the County Executive for submission to the County Board for its approval at the annual meeting in November.

“(b) ... advise the County Executive and his staff on policy and legislation on financial and purchasing matters.

“***

“(d) The County Executive is charged with the responsibility to examine, settle and allow all general accounts against the County and to issue County orders therefore excepting, however, those accounts permitted to be paid as set out elsewhere in Rule 4.

“***

“(n) Heads of county departments who desire to purchase office equipment and furniture for their offices situated in the Court House shall first obtain permission and approval of the County Executive before trying out or having demonstrated to them such equipment and furniture.

“(o) It shall, with the cooperation of the various departments, and office of County Executive, bring about improved and more economical methods to be followed in purchasing procedures.

“***”

You further advise that in creating the office of County Executive the County Board provided that such officer shall:

“(1) Be the County Auditor and function pursuant to Wisconsin Statutes, sec. 59.72.

“***

“(6) Be directly responsible for the administration and management of staff functions, such as budgeting, purchasing, personnel administration and as Agent of the Board coordinate the activities of other departments.”

QUESTIONS INVOLVED

1. Does the County Board Chairman have the authority to direct the County Clerk to refer all purchase vouchers to committees of jurisdiction rather than to the County Executive?
2. Does the County Clerk have the authority to issue a directive requiring all purchase vouchers to be referred to the committees of jurisdiction and thereafter to himself for approval rather than being referred to the County Executive?
3. Does the County Executive under sec. 59.032, Wis. Stats., have the administrative authority to approve and process purchase vouchers and pay bills for those items included within the executive budget as approved and adopted by the County Board?
4. Can the salary of the County Executive be increased during his term so as to be effective during such term?

With respect to question one, I am of the opinion that the County Board Chairman does not have unilateral authority to issue a directive requiring the County Clerk to submit purchase orders to committees of jurisdiction rather than to the County Executive.

With respect to question two, I am of the opinion that under the facts stated, where the County Board has by Board rule designated the County Executive as purchasing officer and county auditor, the County Clerk does not have authority to issue a directive requiring all purchase vouchers to be referred to the committees of jurisdiction and thereafter to himself for approval rather than being referred to the County Executive.

With respect to question three, I am of the opinion that a County Executive does not have power under sec. 59.032, Stats., acting alone, to approve and process purchase vouchers and pay bills for those items included in the executive budget as approved and adopted by the County Board. However, under the facts stated, where the County Board by Board rule has designated the County Executive as purchasing officer and county auditor, I am of the opinion that such officer does have power to approve and process vouchers for payment if included within the executive budget as approved and adopted by the County Board. Before payment, however, such vouchers must be approved and signed by the County Clerk and County Treasurer in compliance with check-order requirements. Secs. 66.042 (1) and (3), and 59.17 (3), Stats. Before the County Clerk approves, payment must have been approved by the County Board or by a committee or officer such as the County Executive, which is the case here, acting in pursuance to a resolution or ordinance adopted by the County Board.

County officers, including officers of the Board, only have those powers expressly given by the Constitution, by or pursuant to statute, or which are necessarily implied. *Maier v. Racine County* (1957), 1 Wis. 2d 384, 84 N.W. 2d 76.

The Chairman of the County Board is a statutory officer. His principal powers are set forth in sec. 59.05 (1), Stats., which provides:

“59.05 Chairman; vice chairmen; powers and duties. (1) The board, at the first meeting after each regular election at which members are elected for full terms, shall elect a member chairman. He shall perform all duties required of the chairman until the board elects his successor. He may administer oaths to persons required to be sworn concerning any matter submitted to the board or a committee thereof or connected with their powers or duties. He shall countersign all ordinances of the board, and shall preside at meetings when present. When directed by ordinance he shall countersign all county orders, transact all necessary board business with local and county officers, expedite all measures resolved upon by the board and shall take care that all federal, state and local laws, rules and regulations pertaining to county government are enforced.”

Under sec. 59.06 (1), Stats., he may be authorized by the County Board to appoint committees to carry out the business of the Board. The County Board may authorize him to carry out administrative tasks, in addition to those specified in sec. 59.05 (1), Stats., which may be exercised by the Board or a committee under sec. 59.15 (2) (a), Stats., as amended by ch. 118, Laws of 1973, or other express statute.

Powers conferred on a county officer by statute cannot be taken away by the County Board absent a statute permitting such action. *Beal v. The Supervisors of St. Croix Co.* (1861), 13 Wis. 559; *The Town of Crandon v. Forest County* (1895), 91 Wis. 239, 64 N.W. 847. A county through its Board "may by its acts arouse official action and official duties upon the part of county officers, but the powers of the latter derived from the state legislature may not be narrowed," taken away, or "enlarged" by the County Board "except in cases in which the legislature has authorized" it. *Reichert v. Milwaukee County* (1914), 159 Wis. 25, 35, 150 N.W. 401.

The facts furnished do not indicate that the County Board had by ordinance or resolution authorized the Chairman of the County Board to issue a directive to department heads. Whereas the Board could have authorized the Chairman to request the County Clerk to exercise his statutory powers in a certain manner, neither the Board nor the Chairman could direct that he act in a given manner except perhaps with respect to his duties as Clerk of the County Board. In the instant case the directive of the Chairman appears to be in direct violation of the procedure adopted by the County Board with respect to purchase requisitions and pre-audit procedures. By rule adopted pursuant to resolution, these functions had been transferred from the County Clerk to the Chief Executive under statutory authority contained in secs. 59.07 (7), and 59.72 (2), Stats.

Although the office of County Clerk is not expressly referred to in the Constitution, it is included with "other county officers" in Art. VI, sec. 4, Wis. Const.; 24 OAG 787 (1935). *State ex rel. Williams v. Samuelson* (1907), 131 Wis. 499, 111 N.W. 712.

Neither the legislature nor the Board may transfer the immemorial and important duties of a constitutional officer which characterize the office to another office or department. 24 OAG 787, 789-794 (1935).

The *Samuelson* case states that the County Clerk was essentially the Clerk for the County Board of Supervisors. Over the years the Clerk of the County Board of Supervisors was given additional duties by statute and was known as the County Clerk. He often assumed other duties which were not vested by statute in other officers by reason of necessity and availability. In *Bulger v. Moore* (1886), 67 Wis. 430, 433, 30 N.W. 713, it was stated:

“... The ‘county clerk’ and ‘clerk of the board of supervisors’ is the same officer with two names ... He is substantially and materially the clerk of the board of supervisors, and *nominally* county clerk. ...”

The duties of the County Clerk are set forth in sec. 59.17, Stats., and many other statutes. I do not find any statute which expressly or impliedly vests power in such officer to issue directives to other officers or department heads relative to procedures to be followed with respect to purchase vouchers. The County Board could probably give the County Clerk that power, at least in counties without a County Executive. However, you state that the County Board has not authorized such action by resolution here.

I am of the opinion that duties of purchasing officer which may be exercised by a County Clerk and duties of pre-audit are not immemorial and important duties which characterize the office of County Clerk and hence can be transferred to a County Executive under the provisions of secs. 59.07 (7) and 59.72 (2), Stats.

Article IV, sec. 23, Wis. Const., authorizes the legislature to provide that counties may elect:

“... a chief executive officer with such powers of an administrative character as they [the legislature] may from time to time prescribe. ...”

Article IV, sec. 24, Wis. Const., grants such chief executive veto powers over “Every resolution or ordinance passed by the county board. ...”

Section 59.032, Stats., provides in part:

“59.032 County executive in other counties. ...

“***

“(2) DUTIES AND POWERS. The duties and powers of the county executive shall be, without restriction because of enumeration, to:

“(a) Coordinate and direct, by executive order or otherwise, all administrative and management functions of the county government not otherwise vested by law in boards or commissions, or in other elected officers.

“***

“(3) ADMINISTRATIVE SECRETARY TO COUNTY EXECUTIVE; STAFF. The county executive may appoint an administrative secretary and such additional staff assistants as are deemed necessary.”

Under sec. 59.032 (5), Stats., the County Executive has a duty to communicate with the County Board as to the condition of the county, to recommend actions, and to submit the annual budget, reserving the power of veto with respect thereto. Under sec. 59.032 (6), Stats., such executive has the power to approve or veto all resolutions or ordinances, including power of approval in part as to appropriations.

County Clerk is an elective office included in sec. 59.15 (1), Stats., and is, therefore, excepted from the broad transfer of duties and powers referred to in sec. 59.15 (2), Stats., as amended by ch. 118, Laws of 1973. However, certain duties which the County Clerk may have exercised over the years which were not “otherwise vested by law in boards or commissions, or in other elective officers” could properly be transferred to the County Executive by the County Board or by action of the County Executive. Section 59.032 (2) (a), Stats., does authorize the County Executive to exercise substantial control over “all administrative and management functions of the county government not otherwise vested by law in boards or commissions, or in other elected officers.” The County Executive can by executive order exercise direct control over the personnel performing such administrative and management functions and, in effect, transfer such personnel to his office by reason of sec. 59.032 (2) (a) and (3), Stats., or can exercise indirect control over such personnel. In the latter case, such personnel would continue to perform their functions within the department or office where they are presently located.

In counties having a County Executive, the role of the County Board becomes primarily, but not exclusively, policy-making and legislative. Pursuant to Art. IV, sec. 22, Wis. Const., the legislature has authorized county boards of supervisors to exercise both legislative and administrative powers. The legislature has not clearly spelled out the full powers of the County Executive, and the County Board has authority to transfer duties and functions of an administrative nature to such officer if they are not expressly reserved to some other elective officer, or are not immemorial and important duties of a constitutional officer which characterize such office.

Your fourth question is whether the salary of the County Executive can be increased during his term so as to be effective during such term. I am enclosing an opinion to the Corporation Counsel of Brown County dated November 4, 1970, which answers this question in the negative. Section 59.032 (4), Stats., provides that the salary of a County Executive shall be established at least 90 days prior to any election held to fill the office. Section 59.15 (1) (a), Stats., provides that such compensation cannot be increased or decreased during the term. Whereas sec. 66.197, Stats., does permit certain emergency salary increases, it expressly provides:

“... The power granted by this section shall not extend to elected officials who by virtue of their office are entitled to participate in the establishment of the compensation attending their office.”

Under sec. 59.032 (5), Stats., the County Executive is responsible for submission of the annual budget and may exercise the power of veto against any increase or decrease. Under sec. 59.032 (6), Stats., the County Executive must approve or veto every resolution or ordinance passed by the County Board. Also see Art. IV, sec. 23a, Wis. Const. Since the County Executive is entitled to participate in the establishment of compensation attending his office, his salary could not be increased during his term by reason of sec. 66.197, Stats.

RWW:RJV

Land; Relocation Assistance Payments--State and Federal Requirements--Wisconsin condemnors are not bound by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, P.L. 91-646, 84 Stat. 1894. Relocation assistance and payments to displaced persons must be made in accordance with secs. 32.19 to 32.27, Stats. Unrelated individuals who share a common dwelling for convenience sake without a common head of the household are "persons" under sec. 32.19, Stats. Payments to displaced persons must be made in accordance with state law.

June 21, 1974.

CHARLES M. HILL, SR., *Secretary*
Department of Local Affairs and Development

You have requested my opinion on six questions which relate to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, P.L. 91-646, 84 Stat. 1894 (hereinafter referred to as the Federal Act), certain rules promulgated thereunder by the United States Department of Health, Education and Welfare, and secs. 32.19 through 32.27, Stats.

In your first question you ask:

"If differences exist regarding the relocation payment to be made to the relocatee under Wisconsin law (Secs. 32.19 through 32.27, Wis. Stats.) and under federal law (The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, P.L. 91-646, 84 Stat. 1894 and the regulations thereunder), which law is controlling?"

The Federal Act does not preempt the field of relocation assistance legislation nor does it create substantive rights enforceable in federal courts by displaced persons, except when a federal agency is the condemnor. Its purpose is to provide a uniform policy or guidelines for the fair and equitable treatment of persons displaced as a result of federally assisted programs. Where the requirements of the Wisconsin law and the federal law and rules differ, a state governmental agency is bound by the law of this state. Section 201, P.L. 91-646, 84 Stat. 1894; *Rubin v. Department of Housing and*

Urban Development (1972), 347 F.Supp. 555; *Wil-Tex Plastics Mfg., Inc. v. Department of H. & U. Dev.* (1972), 346 F.Supp. 654; *Martinez v. Department of Housing & Urban Develop.* (1972), 347 F.Supp. 903.

Although the Federal Act does not preempt the field, the intent and directive to take maximum advantage of federal payments or assistance has been made quite clear by the Wisconsin legislature. Section 32.19 (1), Stats., declares that it is in the public interest to fairly compensate persons for losses which they sustain as the result of public projects, and sec. 32.27 (2) (b), Stats., provides in part:

“... It is intended that the payments and services described by ss. 32.19 to 32.27 are required for any project which is not subject to federal regulation under P.L. 91-646; 84 Stat. 1894. *Any condemnor exercising the power of eminent domain under this chapter for a project subject to such federal regulation shall be required to make payments and provide services described in ss. 32.19 to 32.27 only to the extent required to receive federal payment or assistance.* The intent of this paragraph is to assure that condemnors take maximum advantage of federal payment or assistance for relocation. ...”
(Emphasis added.)

That portion of sec. 32.27, Stats., which has been emphasized above should be considered with respect to Art. IV, sec. 1, Wis. Const., which states:

“The legislative power shall be vested in a senate and assembly.”

The question to be initially determined is whether or not the legislature has attempted an unlawful delegation of the legislative power to the federal government by its reference to federal regulation.

The subject of legislation by reference has been dealt with in 50 OAG 107 (1961). Therein, it was pointed out that most state statutes, which have adopted federal statutes with the administrative rulings *to be made* under them, have been declared unconstitutional for delegating legislative power to an administrative board. This follows the general rule that while a state legislature does not invalidly delegate its legislative authority by adopting a law or rule of

Congress if such law or rule is already in existence or operative, it is generally held that the adoption of prospective federal legislation or federal administrative rules constitutes an unconstitutional delegation of legislative power.

Article VII, sec. 21, Wis. Const., provides:

“The legislature shall provide by law for the speedy publication of all statute laws ... made within the state, as may be deemed expedient, and no general law shall be in force until published.”

This has been construed to mean that the state legislature cannot constitutionally adopt *prospective* federal legislation by reference. This includes both federal rules and regulations made thereunder. See 10 OAG 648 (1921).

Even though the Federal Act is expressly mentioned in sec. 32.27 (2) (b), Stats., specific provisions are not set out in detail. No attempt was made, either expressly or impliedly, to incorporate federal administrative rules promulgated thereunder, if there were in fact any federal rules in existence when sec. 32.27 (2) (b), Stats., was enacted on January 2, 1971. I am also unaware of the Federal Act ever having been published in this state under appropriate legislative authority.

I am of the opinion that there has been no attempt to incorporate federal administrative rules by reference to the Federal Act in sec. 32.27 (2) (b), Stats. I am also of the opinion that any attempt to incorporate the Federal Act by reference into ch. 32, Stats., would be invalid and not in compliance with Art. VII, sec. 21, Wis. Const. The payments and services described by secs. 32.19 to 32.27, Stats., should be made and performed in all cases where state public projects displace persons or families in this state, for state public projects *are not* governed or regulated by the Federal Act.

It is quite clear that a condemnor must provide satisfactory assurances that it can and will comply with the federal agency guidelines to assure federal participation in state projects. Sec. 210, P.L. 91-646, 84 Stat. 1894. However, state administrative agencies have only those powers which have been expressly granted to them or reasonably implied from the nature of their particular duties and any powers which an agency seeks to exercise must be found within the

state statute under which the agency proceeds. *American Brass Co. v. State Board of Health* (1944), 245 Wis. 440, 448, 15 N.W. 2d 27.

Therefore, based upon the foregoing, the federal rules in question are solely informational insofar as state governmental agencies are concerned. They establish the guidelines which must be followed by states if federal payments or assistance are desired. *Rubin v. Department of Housing and Urban Development, supra*. Nevertheless, federal participation may be maximized and payments may be made to displaced persons by state agencies only as provided for and in accordance with secs. 32.19 to 32.27, Stats., the Federal Act and rules notwithstanding.

Your second question is as follows:

“Must a relocatee residing with a completely unrelated person be considered as a ‘person’, as that term is defined in Sec. 32.19 (2) (a) 4 Wis. Stats., and as an ‘individual’ as that term is used in Sec. 32.19 (4) (b), Wis. Stats. or are they to be considered a family under Sec. 15.4 (h), Federal Register, Volume 38, Number 62, Page 8493?”

Section 32.19 (2) (a) 3 and 4, Stats., defines “person” as:

“An individual who is the head of a family; or

“An individual not a member of a family.”

Although the term “family” was previously defined by sec. 32.19 (2) (a) Stats., as two or more individuals living together in the same dwelling unit who are related to each other by blood, marriage, adoption, or legal guardianship, that particular subsection was repealed in ch. 103, Laws of 1971. Consequently, we no longer have the benefit of an express definition of the term “family” even though the word still appears in the Wisconsin Relocation Assistance law.

Although concerned with the application of a zoning ordinance, our Supreme Court has held that a legislative body may include or exclude the requirement of a relationship by blood or marriage in defining the word “family.” In the absence of such a definitional requirement, it cannot be said that the legislature intended to restrict the use of the word family to members of a group related within degrees of sanguinity or affinity. In noting that the term “family”

does not necessarily imply the ties of a legal relationship by blood or marriage, the court stated:

“... but now its accepted definition is a collective body of persons living together in one house, under the same management and head subsisting in common, and directing their attention to a common object, the promotion of their mutual interests and social happiness. ...” (*Missionaries of La Salette v. Whitefish Bay* (1954), 267 Wis. 609, 615, 66 N.W. 2d 627)

The legislative action of repealing the former definition of “family,” the ordinary usage of the term as noted by the court, as well as the fact that sec. 32.19 (2) (a) 3, Stats., *inter alia*, acknowledges “the head of a family,” leads me to conclude that a blood or other legal relationship is not necessary for there to be a “family” as the term applies to secs. 32.19 to 32.27, Stats.

Under sec. 32.19, Stats., as it is presently written, two or more unrelated individuals living together for the sake of convenience in a common apartment without a common head of the household must each be considered as a “person” for relocation assistance purposes, and as such, are individually entitled to payments under sec. 32.19 (4) (b) 1, Stats.

Whether unrelated persons residing with one another in fact constitute a “family” or are “persons” or “individuals” is an administrative determination to be made by the condemnor based upon the facts and circumstances in each particular case.

Your third question asks:

“Is such a person or individual entitled to an ‘in lieu of’ moving expense payment and a dislocation allowance (Sec. 32.19 (3) (b) 1, Wis. Stats.), and a replacement housing payment, not to exceed \$4,000 (Sec. 32.19 (4) (b) 1).”

Under sec. 32.19 (3) (b) 1, Stats., a displaced person may elect to accept a moving expense allowance “in lieu of” actual moving expenses and, in addition thereto, a dislocation allowance of \$200.

Section 32.19 (4) (b), Stats., provides:

“Tenants and certain others. In addition to amounts otherwise authorized by this chapter, the condemnor shall make a payment to any individual or family displaced from any dwelling not eligible to receive a payment under par. (a) ...”
(Emphasis added.)

Therefore, in answer to your third question, a displaced person is entitled to an “in lieu of” moving expense payment, a dislocation allowance, *and* a replacement housing payment in accordance with the above-cited sections of the statutes.

Your fourth question is as follows:

“If the answer to 3 above is ‘yes,’ or if any replacement housing payment is to be made to such person under Sec. 32.19 (4) (b) 1, then is such payment to be made for a comparable dwelling, as defined in Sec. 32.19 (2) (f), Wis. Stats., or for a dwelling which, as set forth in Sec. 32.19 (4) (b) 1, Wis. Stats., is decent, safe and sanitary and adequate to accommodate such individual in an area not generally less desirable in regard to public utilities, public and commercial facilities and places of employment? (This question arises, for example, when a person sharing an apartment relocates into an unshared apartment.)”

Whereas the term “comparable dwelling” appears in sec. 32.19 (4) (a) 1, Stats., which provides for a payment to an *owner* of real property acquired for a public project, it does not appear in sec. 32.19 (4) (b) 1, Stats., the subsection which provides for a payment to *tenants and certain others*. It is noted that the latter payment shall be an amount *which is necessary* to enable the displaced person to rent or acquire:

“... a decent, safe and sanitary dwelling ... adequate to accommodate such individual or family in an area not generally less desirable in regard to public utilities, public and commercial facilities and places of employment, ...” (Sec. 32.19 (4) (b) 1, Stats.)

If subsec. (4) (b) 1 included the term “comparable dwelling,” there would be no question but that the replacement housing payment made thereunder would have to be computed in a manner consistent with the payment made to landowners under subsec. (4) (a) 1, Stats., but it does not.

Where a statute is plain and unambiguous, interpretation is not necessary. The intent of the legislature must be gathered from the terms of the law. *State ex rel. Badtke v. School Board* (1957), 1 Wis. 2d 208, 83 N.W. 2d 724. The language of sec. 32.19 (4) (b) 1, Stats., is clear and unambiguous. The payment made pursuant to sec. 32.19 (4) (b) 1, Stats., is not to be based upon a "comparable dwelling" standard, but must be for a decent, safe and sanitary dwelling adequate to accommodate the displaced person or family in an area not generally less desirable in regard to public utilities, public and commercial facilities, and places of employment, as determined jointly by your Department and the Department of Industry, Labor and Human Relations.

In question five you ask:

"Can rental assistance payments be based upon amounts which exceed the actual costs incurred by a person in obtaining replacement housing or does the language 'amount which is necessary' in Sec. 32.19 (4) (b) 1, Wis. Stats. taken with the language 'will be based on the rental agreed to by the displaced person' under Sec. 15.39 (c), Federal Register, Volume 38, Number 62, Page 8497, dictate paying no more than actual costs?"

Keeping in mind that the legislature did not include the term "comparable dwelling" in the provisions of sec. 32.19 (4) (b) 1, Stats., and the effect of that omission as herein discussed, the language "amount which is necessary" is controlling.

The state law in this instance is consistent with the administrative rules of the United States Department of Health, Education and Welfare, which limits payments to the rent agreed to by a displaced person.

I am of the opinion that the rental assistance payments to be paid to an individual or family under the provisions of sec. 32.19 (4) (b) 1, should not exceed the actual costs incurred by a person obtaining replacement housing.

Your last question is as follows:

"Does the language 'a payment' and 'such payment' in Sec. 32.19 (4) (b) require a lump-sum payment, or allow for four

yearly installments? Is the language in Sec. 15.39 (f) of Federal Register, Volume 38, Number 62, Page 8497, which calls for semiannual installment payments permissive or mandatory?"

Section 32.19 (4) (b) refers to "a payment" and "such payment," and is silent with respect to any type of installment payments. Words in statutes are to be given their commonly understood meanings, unless inconsistent with the manifest legislative intent. *Greenbaum v. Department of Taxation* (1957), 1 Wis. 2d 234, 83 N.W. 2d 682.

The manner in which relocation assistance payments are to be made must be determined in accordance with the language found in secs. 32.19 to 32.27, Stats. I am of the opinion that the payments referred to in sec. 32.19 (4) (b), Stats., must be in the form of a lump sum or single payment. Again, state agencies are not bound by the Federal Act or the federal administrative rules promulgated thereunder. *Rubin v. Department of Housing and Urban Development*, *supra*. At most, an agency's inability to comply with the federal rules will disqualify a particular project or projects from federal participation.

I would note, however, that the particular portion of the federal rule which you have cited does not appear to be inflexible in that it may be modified upon request to reflect the wishes of the displaced person. Whether or not the language found in sec. 15.39 (f), Federal Register, Vol. 38, No. 62, at p. 8497, is permissive or mandatory insofar as eligibility for federal participation is concerned is a question which can only be initially answered by the administering federal agency. If it is deemed to be mandatory, sec. 32.19 (4) (b), Stats., would have to be amended to permit installment payments.

RWW:MP

Real Estate Examining Board; Zoning; Provisions in Executive Order 67 (1973), with respect to duty of real estate broker to advise prospective purchasers of flood plain zoning status of property, do not constitute new standard but suggest course of action Real Estate Examining Board might take. Action to be taken would depend on facts in each case.

June 21, 1974.

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

You have forwarded a copy of Governor Lucey's Executive Order 67 dated November 26, 1973. The order states that it was promulgated under provisions of sec. 144.26, Stats., which provides that the Navigable Waters Protection Law shall be administered by the Department of Natural Resources which is to cooperate with municipalities to make plans for and authorize municipal shoreland zoning regulations. The same section provides that flood plain zoning regulations are for the purpose of preserving the shore cover and natural beauty, to protect fish and aquatic life, prevent and control water pollution, and to maintain safe and healthful conditions. Section 144.26 (7), Stats., provides that the department, municipalities and *all state agencies* shall mutually cooperate to accomplish the objectives of the section.

The Executive Order further provides in part:

“... The Real Estate Examining Board, in order to preclude purchasers of property from unknowingly exposing life and property to flood and erosion hazards, *should* in license review, suspension and revocation proceedings pursuant to section 452.10 (2) of Wisconsin Statutes *consider the failure by a real estate broker, salesman or agent to properly inform a potential purchaser that property under consideration lies within an area subject to a flood or lakeshore erosion hazard recognized by the Department of Natural Resources (as determined from Department, regional planning commission, local ordinance, United States Department of Housing and Urban Development, United States Geological Survey, or Army Corps of Engineer's maps, reports or other documents) to constitute a 'substantial misrepresentation,' a 'false promise of character' or a 'demonstrated untrustworthiness or incompetence to act as a broker ... or ... salesman in such a manner as to safeguard the interests of the public.'*” (Emphasis added.)

You inquire whether the Examining Board could take action where warranted for violation of any of the provisions set forth in the Executive Order.

It is questionable whether the Executive Order does in fact establish any new obligation on the part of a broker. There is an implicit suggestion that a broker has a duty to inquire as to the status of each property he is attempting to sell with respect to inclusion in flood plain ordinances; however, the Governor is without authority to legislate to that effect and the legislature has not adopted a statute to that effect, nor has the Examining Board adopted a formal rule in the area.

Under Art. V, sec. 4, Wis. Const., the Governor has a duty to "take care that the laws be faithfully executed." The Governor is not a rule-making authority within the meaning of sec. 227.01 (1), Stats. However, such officer is a state agency within the meaning of sec. 144.26 (7), Stats., and has a duty to cooperate to accomplish the objectives of sec. 144.26, Stats. He has power to urge state agencies and municipalities to action and can suggest a course of action.

The Executive Order carries an admonition to the Examining Board that it "should" consider the failure of a broker to inform a purchaser that the properties within a flood or lakeshore erosion hazard area as defined by the Department of Natural Resources, local ordinance, or specified federal agency maps or documents will constitute a "substantial misrepresentation" or "demonstrated untrustworthiness or incompetence to act as a broker ... or ... salesman in such a manner as to safeguard the interests of the public." I do not construe the provision as having any force of law as to whether such failure would in fact constitute "misrepresentation," "incompetency or untrustworthiness."

The legislature has charged the Examining Board with the duty of administering the statutes regulating licensing of brokers and salesmen. In disciplinary proceedings, the Examining Board has power to determine whether sec. 452.10 (2), Stats., has been violated. Such determination must be made upon the circumstances of each case. *Hilboldt v. Wisconsin Real Estate Brokers' Board* (1965), 28 Wis. 2d 474, 481, 137 N.W. 2d 482. *Wall v. Wisconsin Real Estate Brokers' Board* (1958), 4 Wis. 2d 426, 90 N.W. 2d 589.

In its License Law News of December, 1973, the Examining Board has urged brokers to contact the Department of Natural Resources for information whether or not the property is recognized to be a flood or lakeshore erosion hazard. This is a reasonable

precaution for the broker where he does not know the status of the property in that respect.

In *Gregory v. Selle* (1973), 58 Wis. 2d 367, 371-372, 206 N.W. 2d 147, it was stated:

“... The fiduciary obligations and increased standard of conduct do not devolve upon the mere status of a person as a licensed real-estate broker, but rather upon his functioning as an agent.”

“***

“ ‘A real-estate broker owes the duty of a fiduciary to the property owner *for whom he acts as agent*’ ” (Citing *Nolan v. Wisconsin Real Estate Brokers’ Board* (1958), 3 Wis. 2d 510, 533, 89 N.W. 2d 317.

There will be cases where the broker is in fact agent for the purchaser. In other cases, his primary duty will be to the seller, although he also has obligations to a prospective purchaser with whom he is dealing and who has made an offer on the property. 54 OAG 31, 36 (1965). 12 Am. Jur. 2d, *Brokers*, sec. 109, p. 858.

A broker dealing with persons with whom he has no agency arrangements must be careful to avoid intentional or careless misrepresentations. Licensed real estate brokers have a special duty not to deceive or mislead purchasers. *Lien v. Pitts* (1970), 46 Wis. 2d 35, 46, 174 N.W. 2d 462.

The Examining Board will have to determine in each case whether there was an agency, whether the licensee was negotiating with a prospective purchaser on a non-agency basis, whether the licensee knew or should have known of the flood plain zoning status of the property, whether there was in fact misrepresentation or concealment, or whether the actions or omissions of the licensee amounted to demonstrated untrustworthiness or incompetence to act as a broker or salesman in such a manner as to safeguard the interests of the public.

RWW:RJV

Automobiles And Motor Vehicles; Licenses And Permits;
Suspension or revocation of operating privilege under secs. 343.30 (1) and (1m), Stats., applies to both the regular driver's license and to the chauffeur's license.

June 21, 1974.

DANIEL L. LAROCQUE, *District Attorney*
Marathon County

You point out that sec. 343.30 (1), Stats., provides that a court may suspend or revoke a person's operating privilege for certain violations. Also sec. 343.30 (1m), Stats., provides that the court shall suspend a person's operating privilege for a certain violation. Your question is whether the court has discretion to suspend only the regular driver's license and not the chauffeur's license. In 49 OAG 147 (1960), this office expressed the opinion that such order of suspension must apply to all licenses. The reasoning is that the statutes authorize suspension of the operating privilege which is defined by sec. 340.01 (40), Stats., to include all licenses.

Section 343.30 (1q), 1971 Rev. Stats., provided that for first offense of drunk driving the court shall revoke the operating privilege. In 60 OAG 129 (1971), I concluded that this includes both the regular and chauffeur's license. In that opinion, I pointed out that as to second offense of drunk driving under sec. 343.31 (1) (b), Stats., only the regular license is revoked, if the person was not operating as a chauffeur at the time of the offense. I recommended that legislation be introduced to correct this inconsistency. By ch. 70, Laws of 1973, the legislature made a similar provision as to first offense of drunk driving, so that now on first offense only the regular license is revoked, if the person was not operating as a chauffeur at the time of the offense.

RWW:AOH

Police; Criminal Law; Bonds; Law enforcement officers may be authorized by court rule to accept surety bonds for, or, under specified circumstances, 10 percent cash deposits of, the amount listed in a misdemeanor bail schedule when an accused cannot be promptly taken before a judge for bail determination. However, such rules may not afford officers discretion as to the amount or form of bail an individual accused must post.

July 1, 1974.

ROBERT P. RUSSELL, *Corporation Counsel*
Milwaukee County

You have conveyed for my opinion Chief Judge Foley's question as to whether the judges having jurisdiction over misdemeanors may adopt rules enabling law enforcement officers to accept surety bonds for, or a 10 percent cash deposit of, the amount specified in a misdemeanor bail schedule.

On December 21, 1972, the Milwaukee County judges having misdemeanor jurisdiction adopted a misdemeanor bail schedule in accordance with sec. 969.06, Stats. The rules governing application of the schedule were as follows:

"The following Misdemeanor bail schedule is adopted effective immediately for use in all Misdemeanor offenses excepting all offenses covered by the Uniform Wisconsin Bond Schedule which shall remain the same.

"1. The bail in all cases shall be in accordance with the attached schedule.

"2. A surety bond will be required in the following cases:

"a. The Defendant has not been a resident of the State of Wisconsin for at least the preceding year.

"b. The Defendant has a *capias* for non-appearance on his record.

"c. The Defendant has a criminal action pending before any Court in Milwaukee County.

“3. The commanding officer shall have the authority within the above framework to require a 10 per cent cash deposit bond (minimum of \$25.00) for any individual not falling into the categories described in Paragraph 2 above.

“This bail schedule shall supersede all previously set bail schedules.”

As I understand it, sometime thereafter, Chief Judge Foley expressed concern that the authority conferred on law enforcement officers by sec. 969.07, Stats., may be limited to accepting only cash for the full amount specified on the misdemeanor bail schedule when releasing an accused without an appearance before a judge. Evidently, this concern prompted the judges to adopt new rules for applying the bail schedule pending an opinion from this office. New rules were adopted on May 31, 1973. The numbered paragraphs of the December, 1972, rules are replaced with what follows:

“The officer shall accept only cash pursuant to the bail schedule attached hereto.”

Section 969.07, Stats., authorizes Wisconsin law enforcement officers to take bail once the conditions thereof, either for a particular offense or an individual defendant, have been judicially set. Section 969.06, Stats., requires county judges having jurisdiction over misdemeanors to adopt by rule a schedule of cash bail for all misdemeanors. It is clear that the legislature intended such bail schedules to constitute the setting of bail conditions for misdemeanors in advance so as to permit law enforcement officers to take bail pursuant to sec. 969.07, when an accused misdemeanant cannot be promptly taken before a judge for a bail determination pursuant to sec. 969.02, Stats.

The note following sec. 969.06, R. S. 1969, states:

“NOTE: This section, which applies only to misdemeanors, is designed to insure the right of a defendant to a prompt determination of bail when he cannot be taken before a judge immediately upon his arrest. In traffic matters, bail schedules have been utilized successfully in the state for many years. See s. 8.02 (1) of the ALI Model Code of Pre-Arrestment Procedure.” Ch. 255, sec. 63, Laws of 1969.

It is my opinion that law enforcement officers may be authorized by judicial rule to accept surety bonds for, or 10 percent cash deposits of, the amount specified in a misdemeanor bail schedule. However, such rules may not afford officers discretion as to the amount or form of bail an individual accused must post.

My opinion is founded on the distinction generally made between the judicial and ministerial aspects of bail administration. Admitting an accused to bail and establishing the terms therefor is generally regarded as an entirely different act from the taking, accepting, or approving of bail after its allowance. The former is a judicial function and the latter a ministerial function which may be performed by any authorized official. See 8 C.J.S. *Bail*, sec. 38.

Section 969.06, Stats., is a judicial element of misdemeanor bail administration. The statute does not specify what the bail shall be. It simply requires that every county have a cash bail schedule. The "cash bail" phraseology does not, in my opinion, preclude judges from exceeding the minimum requirement by establishing rules specifying circumstances under which officers must allow accused misdemeanants to post surety bonds rather than cash. Similarly, sec. 969.06 does not preclude judges from establishing rules specifying circumstances under which officers must allow misdemeanants to post a 10 percent cash deposit in lieu of the full schedule amount. In essence, judges may establish rules pursuant to which officers must take the various forms of bail authorized in sec. 969.02, Stats. Once a bail schedule and the rules for applying it are adopted, the judicial function of setting bail conditions for persons who cannot be promptly taken before a judge is complete.

Section 969.07, Stats., falls within the ministerial aspects of misdemeanor bail administration. It merely delegates ministerial authority enabling law enforcement officers to take bail once the conditions thereof have been judicially set. It provides, in part:

"When bail conditions have been set for a particular offense or defendant, any law enforcement officer may take bail in accordance with ss. 969.02 and 969.03 and release the defendant to appear in accordance with the conditions of the appearance bond. ..." (Emphasis supplied.)

The reference in sec. 969.07 to secs. 969.02 and 969.03, Stats. (both of which allow surety bonds), militates against the inference that officers may only take cash bail. An officer's authority to approve and accept a surety bond rather than cash should not depend on whether bail was judicially set pursuant to sec. 969.02, or sec. 969.06, Stats. Approving a surety bond is just as ministerial as taking cash so long as the officer has no discretion as to which he will take. 8 C.J.S. *Bail*, sec. 41, provides the general rule:

“Where an accused has been admitted to bail by the proper court or officer, the act of taking and approving the bail bond in accordance with the court's order has been held to be a ministerial act which may be delegated, without statutory authority ...” 8 C.J.S. at 115.

Although there is no Wisconsin case law precisely on point, 40 OAG 101 (1951), states in accord:

“While in the case of *Gregory v. State, supra*, an act authorizing a ministerial officer, that is, a clerk of court, to fix the amount of bail and to accept it, was held unconstitutional and void, the same case recognizes that approving and accepting bail after it has been fixed by competent authority is a ministerial act and may be performed by the sheriff or other competent officer. This case expressly recognizes that the amount of a bond may be fixed by the terms of the statute.” 40 OAG at 102.

It bears particular emphasis, however, that the authority conferred on officers by sec. 969.07, Stats., is expressly limited to taking bail which has been judicially set. The general rule regarding delegation of judicial authority in the context of bail administration is as follows:

“The allowance of bail and fixing the amount thereof being judicial acts, in the absence of statute providing otherwise, the court or judicial officer vested with such power cannot delegate it to another.” 8 C.J.S., *supra*, at 115.

Our legislature has not authorized judges to delegate their authority to fix the amount or form of bail. Accordingly, a schedule or rule which allowed officers to exercise any discretion with respect to the

amount or form of bail would constitute an unlawful delegation of judicial authority.

The December, 1972 rules set out above are clear with respect to when a surety bond is required. But they are ambiguous regarding persons who do not fall within the criteria of paragraph 2. If the intent of paragraph 3 is to afford officers discretion in determining whether an accused must post full cash bail pursuant to the schedule or merely a 10 percent deposit, the rules constitute an unlawful delegation of judicial authority. The practical effect of such discretion is a delegation of the judicial function of fixing the amount of bail for individual misdemeanants. If, however, the intent is to allow all persons not falling within paragraph 2 to post a 10 percent deposit of the schedule amount, paragraph 3 should be revised to state that intent more clearly. The practical effect then would be a schedule with bail amounts designed to secure appearances of higher risk persons (i.e., those enumerated in paragraph 2), but which allows low risk persons to simply pay a 10 percent cash deposit of the schedule amount.

RWW:DCM:CAB

Appropriations And Expenditures; Outdoor Recreation Act; Outdoor Recreational Program funds (ORAP) may be used to restore deteriorated milldams provided a public use is evident.

July 2, 1974.

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

Your first inquiry relates to the legality of utilizing Outdoor Recreational Aids Program (ORAP) funds to reconstruct deteriorated milldams and improve millponds for recreational purposes. Your question is presented under the following specific hypothetical circumstances:

- “a. The land surrounding the millpond will be totally in private ownership, and there will be no public access to the water surface;

- “b. The land surrounding the millpond will be totally in private ownership, however public access can be gained by navigating downstream into the millpond from an upstream location;**
- “c. The land surrounding the millpond will have substantial private ownership, however a public land access to the millpond is or will be provided;**
- “d. The land surrounding the millpond is partially privately owned, however a local public park or other recreational facility is or will be provided;**
- “e. The land surrounding the millpond is partially privately owned, however a state park or other recreational facility is riparian to the millpond;**
- “f. The land surrounding the millpond is totally in public ownership, either local or state.”**

Secondly, you are interested in the existence of other state funds which might be used for reconstruction of milldams in any of the above-enumerated situations.

Finally, you inquire whether it would be legally possible for the legislature to enact legislation to provide state funding of milldam reconstruction in each of these situations.

The framework of the Outdoor Recreation Program is set forth in sec. 23.30, Stats. Subsections (1) and (3) (a) (b) read as follows:

“23.30 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.

“(3) **NATURAL RESOURCES BOARD.** The natural resources board is the body through which all governmental agencies and nongovernmental agencies may coordinate their policies, plans and activities with regard to Wisconsin outdoor recreation resources. To this end it shall:

“(a) Consider and recommend to the governor and legislature broad policies and standards to guide the comprehensive development of all outdoor recreation resources in Wisconsin, including, without limitation because of enumeration, outdoor recreation development in relation to state population patterns, low-cost sewage system studies, the several outdoor recreation activities, outdoor recreation development to aid the state recreation industry, and policies and standards to coordinate the respective outdoor recreation development programs of federal, state and local governmental agencies and the recreation programs operated by private enterprise.

“(b) Coordinate the development of a comprehensive long-range plan for the acquisition and development of areas necessary for a state-wide system of recreational facilities. The comprehensive plan shall be based upon the outdoor recreation plans of the several state agencies and local governmental agencies, and shall be coordinated and modified as the board deems necessary to comply with its policies and standards.”

It is evident from the above that the program involves multi-step activity designed to achieve recreational facilities for general public use and contemplates area acquisition, maintenance and development. The essential key for utilization of ORAP funds, then, is acquisition of recreation areas for public use. Hence, not only must the Department acquire the milldam area to qualify for outdoor recreation program funds, but a public use must also be evident. Public use may be forthcoming by virtue of either the state's ownership of the area or the presence of a navigable body of water.

State acquisition of an entire area -- including land and waterbed - would permit public access to the water, as well as allow public use thereof, and would eliminate the need to determine whether public rights attach by virtue of navigability. However, your hypotheticals describe situations in which the Department of Natural Resources

has not acquired the entire surrounding area. In such situations, the question of navigability is pertinent to whether public rights attach.

Although there have been several different tests of navigability, the present Wisconsin test is that enunciated in *Muench v. Public Service Commission* (1952), 261, Wis. 492, 53 N.W. 2d 514, 55 N.W. 2d 40. There the court interpreted sec. 30.10 (2), Stats., and concluded that "any stream is 'navigable in fact' which is capable of floating any boat, skiff, or canoe, of the shallowest draft used for recreational purposes." *Id.* at 506.

The language of the present Mill Dam Act, sec. 31.31, Stats., indicates that milldams are authorized only across nonnavigable streams.

"31.31. Dams on nonnavigable streams. Any person may erect and maintain upon his own land, and, with the consent of the owner, upon the land of another, a water mill and a dam to raise water for working it upon and across any stream that is not navigable in fact for any purpose whatsoever upon the terms and conditions and subject to the regulations hereinafter expressed; and every municipality may exercise the same rights upon and across such streams that they may exercise upon or across streams navigable for any purpose whatsoever."

Rights to the use of natural nonnavigable waters accrue only to riparian owners or their designees and not to the public. Since the purpose of the outdoor recreation program, sec. 23.30 (1), Stats., is to acquire, maintain and develop recreational facilities for "public use," it would appear at first blush that state funds are not authorized to improve milldams across nonnavigable waters because no "public rights" attach thereto.

If, however, the millpond is navigable, public rights may attach. This could happen in two ways: The waterway dammed by a milldam may have been navigable originally, before construction of the milldam. In this case, public rights attach not only to the original navigable area by virtue of the public trust, but to the artificially raised areas as well. See *Mendota Club v. Anderson* (1899), 101 Wis. 479, 493, where it was held that the public has a common right to navigate waters previously navigable but artificially raised, "the same as though they had always remained in that condition."

The other way public rights may attach is that a nonnavigable waterway behind the milldam may have become navigable after construction of the milldam, in which case public rights attach, but only if there is a subsequent dedication to or prescription by the public. See *Haase v. Kingston Cooperative Creamery Association* (1933), 212 Wis. 585, 250 N.W. 444. However, even if public rights do attach to artificially raised waterways, the state does not take title to the underlying beds. Rather, title to the submerged lakebeds of artificially formed lakes remains in their original owner. *Haase, supra*, at 589. Moreover, even ownership along the shoreline of an artificially created navigable millpond does not automatically confer riparian rights. While property ownership on a *natural* body of water confers riparian rights, “[i]n the case of artificial bodies of water, all of the incidents of ownership are vested in the owner of the [submerged] land.” See *Mayer v. Grueber* (1965), 29 Wis. 2d 168, 176.

The Department should be prepared in each case to compensate landowners whose lands are flooded or rights otherwise impaired by improvements of old dams, for taking of private riparian rights for public use without compensation violates Art. I, sec. 13, Wis. Const. *Bino v. City of Hurley* (1956), 273 Wis. 10, 21. The Department has no obligation, however to compensate a landowner for the loss of his ability to exclude the public from the millpond, for example, in the case of navigable waters surrounded by private land. Such an ability to exclude the public is not a right conferred by riparian ownership. See *Branch v. Oconto County* (1961), 13 Wis. 2d 595, 601-602, 109 N.W. 2d 105; 51 OAG 190 (1962).

Returning now to your first question and to your various hypothetical situations, each situation is repeated, and my opinion follows each situation:

“a. The land surrounding the millpond will be totally in private ownership, and there will be no public access to the water surface.”

Even if the millpond is navigable, there is no public access and, hence, outdoor recreation program funds cannot be used because there is no “public use” involved as required by sec. 23.30 (1).

“b. The land surrounding the millpond will be totally in private ownership, however public access can be gained by navigating downstream into the millpond from an upstream location.”

I will assume the millpond is now navigable and that it was navigable before construction of the millpond because the language of the hypothetical so indicates. There is public access, and public rights would attach under *Mendota Club v. Anderson, supra*. Use of ORAP funds would be appropriate, since a public use is involved.

“c. The land surrounding the millpond will have substantial private ownership, however a public land access to the millpond is or will be provided.”

Again, I will assume the millpond is navigable. If the millpond was navigable before construction of the milldam, public rights attach under *Mendota Club*. If the millpond was nonnavigable before construction of the milldam, public rights attach only if there has been a dedication or prescription under *Haase*. Depending on which applies, use of outdoor recreation program funds are appropriate if a “public use” is involved.

“d. The land surrounding the millpond is partially privately owned, however a local public park or other recreational facility is or will be provided.”

Again, I will assume the millpond is navigable. And, as above in (c), if the millpond was navigable before construction of the milldam, public rights attach under *Mendota Club*. If the millpond was nonnavigable before construction of the milldam, public rights attach only if there has been a dedication or prescription under *Haase*. If either one of these theories applies, use of outdoor recreation program funds is appropriate since a “public use” is involved.

“e. The land surrounding the millpond is partially privately owned, however a state park or other recreational facility is riparian to the millpond.”

Again, as in (c), if the millpond was navigable before construction of the milldam, public rights attach under *Mendota Club*, and if the millpond was nonnavigable before construction of the milldam, public rights attach only if there has been a dedication or prescription under *Haase*. And as in (d), ownership of land abutting an artificially formed navigable waterway does not confer riparian rights, except by prescription or dedication, or by purchasing the pondbed from the original owner who was flooded out.

“f. The land surrounding the millpond is totally in public ownership, either local or state.”

Again, the use of ORAP funds is permissible because of the rationale expressed in (c), (d) and (e).

I think it is clear that your proposed hypothetical situations present a myriad of potential legal problems and uncertainties in terms of riparian rights; navigability; landowner compensation; dedication, prescription and adverse possession; etc. As previously discussed, ORAP appears to contemplate acquisition of the entire area to be used as a public recreation site. In light of the statutory language, even though very broad in scope, I believe it advisable that the Department commence such a program with the thought of purchasing the entire area to be used for implementation of said program. In acquiring the land underlying the milldam and resultant millpond as well as adequate access property, the Department will assure that the desired goal of public use is achieved.

Your second question is whether other state funds are available for the reconstruction of deteriorated milldams. The Department of Natural Resources has authority to maintain abandoned dams under sec. 29.04 (2), Stats.:

“(2) Whenever the department determines that the conservation of any species or variety of wild animals will be promoted thereby, the department may maintain and repair any dam located wholly upon lands the title to which is in the state either as proprietor or in trust for the people after giving due consideration to fixing the level and regulating the flow of the public waters.”

Section 20.370 (u), Stats., appropriates funds for that purpose. These provisions, however, deal with the conservation of fish and game, rather than recreational considerations and would be so limited in application.

There are also funds available to the State Historical Society appropriated by sec. 20.245, Stats., to carry out sec. 44.02 (2), Stats., to develop outdoor historic sites related to the outdoor recreation program. Depending on the historic interest generated by a restored milldam, funds may be used if public use is involved.

Your third question concerns possible legislation on state funding for milldam reconstruction. The legislature could approve state funding for milldam reconstruction in all cases hypothesized except (a).

RWW:DCM:RJB

Land; University: The University of Wisconsin System may sell a dormitory which no longer is needed for educational purposes upon such terms as are agreeable to the Wisconsin State Agencies Building Corporation and H.U.D. to guarantee the payment of the bonds issued for the initial construction of the building.

July 10, 1974.

J. S. HOLT, *Secretary*
Board of Regents, University of Wisconsin System

You have asked me certain questions related to the possible conversion of a vacant student residence hall at the University of Wisconsin--Whitewater into a housing facility for the elderly.

Enclosed is a copy of an opinion relating to the same matter which I recently sent to Mr. Charles Hill, Secretary, Department of Local Affairs and Development. It answers some of your inquiries.

You ask these four specific questions:

- “1. Do provisions of any of the ‘securing documents’ which relate to the bonds issued to finance the construction of

Wellers Hall at UW-Whitewater or like buildings under similar bond issues prohibit a change in use and possession of the building?

- “2. Can the University, within its statutory authority, *operate* Wellers Hall as an elderly housing facility? If your answer is in the affirmative, would the property become subject to real estate taxes and the income be considered ‘unrelated’ for income tax purposes?
- “3. Can the University lease or sell Wellers Hall or similar buildings to another State agency, non-state non-profit agency, or a private profit-oriented organization for purposes of providing an elderly housing facility?
- “4. If the University can sell or lease Wellers Hall or similar buildings, must the proceeds be sufficient to guarantee the University’s debt service payments for the life of the lease with Wisconsin State Agencies Building Corporation?”

The answers to questions 1 and 2 are “yes” and “no,” respectively, for the reasons stated in my letter to Mr. Hill.

The answer to question 3 is that the University of Wisconsin System can sell the property, assuming that it is no longer needed for educational purposes. I have assumed the University of Wisconsin System has concluded there no longer is a need for this building as a student dormitory, or for any other educational purpose. If the building still can fulfill an educational need, I assume the University of Wisconsin System would not even be contemplating the possibility of such a conversion. If my assumptions are correct, it is my opinion that the building, and the land upon which it rests, must be sold and not leased. If the University of Wisconsin System concludes the building can no longer fulfill an educational purpose, it should be disposed of by outright sale, as provided under sec. 37.02 (1), Stats.

The proceeds of any sale must be sufficient to guarantee the payment of the bonds issued for the initial construction of the building, and upon such terms as are agreeable to the Wisconsin

State Agencies Building Corporation and the holder of those bonds,
H.U.D.

RWW:DCM:APH

Counties; Real Estate; Register Of Deeds; In a county maintaining a tract index system, the register of deeds must enter into the index any deed, mortgage or other instrument recorded in his office which affects title to or mentions an indexed tract or any part thereof.

July 10, 1974.

RICHARD C. KELLY, *District Attorney*
Juneau County

You have requested the opinion of this office as to whether a supplemental indenture mortgaging real estate must be indexed in the Juneau County Tract Index. You state that the Wisconsin Power and Light Company has recently executed such a supplemental indenture to the First Wisconsin Trust Company. You state that approximately 1,250 parcels of real estate are involved, all of which are apparently located in Juneau County. Indexing this indenture in the county tract index would, therefore, require approximately 1,250 entries at an estimated cost of \$125.00 to Wisconsin Power and Light Company.

Additionally, you state your opinion that the indenture must be indexed in the county tract index. Your opinion, and the reasons you give for it, appear to be correct.

Section 59.51, Stats., states:

“The register of deeds shall:

“***

“(3) Keep the several books and indexes hereinafter mentioned in the manner provided.”

Section 59.55 (1), Stats., provides:

“*The register shall also keep a tract index* in suitable books, so ruled and arranged that opposite to the description of each quarter section, sectional lot, town, city or village lot or other

subdivision *of land in the county*, which a convenient arrangement may require to be noted, there shall be a blank space of at least forty square inches *in which he shall enter* in ink the letter or numeral indicating each volume, and the class of records of such volume designating mortgages by the letter M, deeds by the letter D, and miscellaneous by the abbreviation Mis., and the register of attachments, sales and notices by the letter R, together with the page of said volume upon which *any deed, mortgage or other instrument affecting the title to or mentioning such tract or any part thereof shall heretofore have been or may hereafter be recorded or entered*; provided, that no such index shall be kept in any county where none now exists until ordered by the county board to be made; but no such index, when once made in any county, shall ever thereafter be discontinued, unless such county has or shall adopt, keep and maintain a complete abstract of title to the real estate therein as a part of the records of the office of the register of deeds thereof." (Emphasis supplied.)

Accordingly, since Juneau County maintains a tract index, the register of deeds is required by sec. 59.51 (3) to "keep" it. Keeping it, as the above-emphasized language of sec. 59.55 (1) makes clear, requires that the register enter into the index all recordings which affect title to or mention tracts which are covered by the tract index.

A supplemental indenture of the sort you describe falls within the ambit of sec. 59.55 (1), Stats. It is a mortgage instrument mentioning and affecting the title of tracts of real estate.

The letters you attached to your request make reference to secs. 182.025 and 706.08 (2), Stats. As you recognize, these statutes are not pertinent to the precise issue raised.

Section 182.025, Stats., authorizes utility corporations and cooperative associates to mortgage properties and provides special provisions for recording the security interests created thereby. If such a mortgage falls within the criteria of sec. 59.55 (1), Stats., and is recorded in a county that maintains a tract index, the register of deeds must enter it in the index.

Section 706.08 (2), Stats., simply provides that if a recording is deficient or erroneous but the conveyance is properly indexed in a

tract index, it will be deemed duly recorded. The committee comment to the bill which created sec. 706.08 (2), Stats., states the purpose of the section as follows:

“... To reverse, where notice is assured by tract index, the ‘chain of title’ rule adopted in *Zimmer v. Sundell* [1941], 237 Wis. 270, 296 N.W. 589.” Ch. 285, sec. 23, Laws of 1969, p. 920.

Thus, the statute has no bearing on the question of whether a particular instrument must be entered in the county tract index.

I conclude that sec. 59.55 (1), Stats., requires that a supplemental indenture be indexed to the parcels of land which are affected thereby. Moreover, failure to do so could subject the register of deeds to personal liability for damages suffered by subsequent purchasers of the unindexed tracts if such damages result from the failure of the index to give notice of incumbrances on the title to the property. *Johnson v. Brice* (1899), 102 Wis. 575, 78 N.W. 1086.

RWW:DCM:CAB

Counties; County Board; County board acting pursuant to secs. 59.025 (3) (b) and (c), and 59.15 (2) (a), Stats., can authorize the county administrator to appoint personnel at county health care facility.

July 16, 1974.

PHILLIP M. STEANS, *District Attorney*
Dunn County

You inquire whether the county board can authorize the county administrator to appoint personnel at the county health care facility.

I am of the opinion that it can if it acts under secs. 59.025 (3) (b) and (c), and 59.15 (2) (a), Stats., to transfer some of the powers of the board of trustees and the superintendent to the county administrator.

Section 59.025 (3) and (4), Stats., as created by ch. 118, Laws of 1973, provides:

“(3) CREATION OF OFFICES. Except for the offices of supervisor, judge, county executive and county assessor and those officers elected under section 4 of article VI of the constitution, the county board may:

“(a) Create any county office, department, committee, board, commission, position or employment it deems necessary to administer functions authorized by the legislature.

“(b) Consolidate, abolish or reestablish any county office, department, committee, board, commission, position or employment.

“(c) Transfer some or all functions, duties, responsibilities and privileges of any county office, department, committee, board, commission, position or employment to any other agency including a committee of the board.

“(4) SELECTION PROCESS FOR OFFICES. The county board may determine the method of selection of any county offices except for the offices of supervisors, judges, county clerk, county treasurer, clerk of courts, county executive and county assessor and those officers elected under section 4 of article VI of the constitution. The method may be by election or by appointment and, if by appointment, the county board shall determine the appointing authority, subject to ss. 59.031 and 59.032.”

Section 46.18 (1), Stats., provides that every county health care facility shall be managed by a board of trustees, electors of the county, chosen by ballot by the county board. Section 46.18 (2), Stats., provides that no member of the county board shall serve as trustee during the term for which he is elected. Under sec. 59.033 (2) (c), Stats., the county administrator would have power to appoint such trustees subject to confirmation by the county board. Section 46.19 (1), Stats., provides that the trustees shall appoint a superintendent of each institution and shall prescribe his duties. Section 46.19 (3), Stats., provides that the superintendent, subject to the approval of the trustees, shall appoint and prescribe the duties of necessary additional officers and employes subject to county civil

service law. A superintendent is ex officio secretary of the board of trustees by reason of sec. 46.18 (5), Stats., is required to file a bond and is considered an officer of the county under sec. 49.19, Stats.

County boards have only such legislative powers as are expressly granted by statute or necessarily implied. *Columbia County v. Wisconsin Retirement Fund* (1962), 17 Wis. 2d 310, 116 N.W. 2d 142; *Maier v. Racine County* (1957), 1 Wis. 2d 384, 84 N.W. 2d 76. Section 59.025 (2), Stats., as created by ch. 118, Laws of 1973, provides in part:

“... The powers conferred shall be in addition to all other grants and shall be limited only by express language but shall be subject to the constitution and such enactments of the legislature of statewide concern as shall with uniformity affect every county. In the event of conflict between this section and any other statute, this section to the extent of such conflict shall prevail.”

Similar “in the event of conflict” language is contained in sec. 59.15 (4), Stats.

The powers granted the various county boards of supervisors are subject to limitations of express language in applicable statutes and to the Constitution. Neither the legislature nor the county board may transfer the immemorial and important duties of a constitutional officer which characterize the office to another office or department. 24 OAG 787, 789-794 (1935). Neither the board of trustees of a county health care center nor its superintendent is a constitutional officer.

While it can be argued that the manner in which county institutions are managed is a matter of statewide concern, sec. 46.18, Stats., insofar as it relates to houses of correction, only applies to counties with less than 500,000 population. That in itself would not necessarily mean that the enactment does not “with uniformity affect every county” as even under the uniform as practical requirement of former Art. IV, sec. 23, Wis. Const., reasonable classification of counties would permit some variation in the one system of county government rule. Present Art. IV, sec. 23, Wis. Const., permits the legislature to establish “one or more systems of county government.”

The legislature has indirectly determined that the manner in which county institutions are managed is not a matter of statewide concern which must be provided for in a uniform pattern in every county. Every county is not required to have one or more of the institutions provided for in sec. 46.18, Stats. The offices of the board of trustees in any given county and the office of superintendent of the respective institution are probably created *under a statute* and not *by a statute*. See discussion at 61 OAG 287, 289 (1972), as to the applicability of sec. 59.15 (2) (a), Stats., in such case.

Former sec. 59.08 (8), 1931 Stats., empowered a county board at its annual meeting to abolish, create or reestablish any office or position, with exceptions, *created by any special or general provision of the statutes*. In 21 OAG 1036 (1932), it was stated that the county board could abolish a board of trustees of a county institution by reason of such statute and provide for performance of the functions of such board by a county board committee.

In 1945 the provisions of former sec. 59.08 (8), Stats., became a part of sec. 59.15 (2) (a) and (b), Stats. Ch. 559, Laws of 1945. Subsection (2) (a) referred to "any office, board, commission, committee, position, or employe ... *created by or pursuant to any special or general provisions of the statutes*" and subsec. (2) (b) provided:

"(b) The county board at any regular or special meeting may abolish, create, or reestablish any such office, board, commission, committee, position, or employment, and in furtherance of this authority may transfer the functions, duties, responsibilities and privileges to any other existing or newly created agency including a committee of the county board *except as to boards of trustees of county institutions.*" (Emphasis added.)

Chapter 651, Laws of 1955, amended sec. 59.15 (2) (a), Stats., by changing "created by or pursuant to any special or general provisions of the statutes" to "created under any statute" but retained the language in sec. 59.15 (2) (b), Stats., "except as to boards of trustees of county institutions."

Chapter 118, Laws of 1973, repealed sec. 59.15 (2) (b), Stats., and amended sec. 59.15 (2) (a), Stats., to provide:

“59.15 (2) (a) The board has the powers set forth in this subsection ~~and~~, sub. (3) and s. 59.025 as to any office, department, board, commission, committee, position or employe in county service (other than elective offices included under sub. (1), supervisors and circuit judges) created under any statute, the salary or compensation for which is paid in whole or in part by the county, and the jurisdiction and duties of which lie within the county or any portion thereof and the powers conferred by this section shall be in addition to all other grants of power and shall be limited only by express language.”

The “created under any statute” language was retained and was made applicable to board powers under sec. 59.025, Stats., as well as subsecs. (2) and (3) of sec. 59.15, Stats.

The material provisions of former sec. 59.15 (2) (b), Stats., are incorporated in new sec. 59.025 (3), Stats., created by ch. 118, Laws of 1973, but it is noteworthy that the board’s power to abolish, create, reestablish any county office, committee, board, commission, position or employment, or to transfer the functions, duties, responsibilities and privileges to any other agency including a committee of the county board, is no longer limited by language “except as to boards of trustees of county institutions.”

RWW:RJV

Natural Resources, Department Of; Nuisances; Water; A municipality has no jurisdiction over chemical treatment of waters to suppress aquatic nuisances. The Department of Natural Resources is granted statewide supervision over aquatic nuisance control under sec. 144.025 (2) (i), Stats. Applications for permits to chemically treat aquatic nuisances under sec. 144.025 (2) (i), Stats., may be denied even though statutory and regulatory requirements have been met if such chemical treatment would be counterproductive in achieving the goals set out in sec. 144.025 (1), Stats.

July 19, 1974.

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

You have requested my opinion concerning chemical treatment of aquatic nuisances under permits issued by the Department of Natural Resources in light of opposition from the City of Madison to chemical treatment. Your letter states that riparians along Lake Mendota have applied, under sec. 144.025 (2) (i), Stats., for permits to chemically treat the weed growth along their shorelines. The City Attorney of Madison wrote you stating the City's position that granting such permits would be improper because, among other things, 1) the legislature has granted jurisdiction over Lakes Mendota and Monona to the City of Madison, and 2) that the chemical treatment is contrary to the public policy of the City, as established pursuant to its jurisdiction.

You ask, specifically:

"1. Generally, does the Department of Natural Resources have authority to grant a permit to an owner of riparian land, or someone retained by him, for control of aquatic nuisances in waters adjacent to his property if the city within which both the property and lake are located has a policy which is contrary to such treatment?

"2. Has there been a legislative grant of authority, either by original city charter approval or otherwise, which would allow the City of Madison to prevent the issuance of a permit to a landowner in the City of chemical treatment [sic] of Lake Mendota waters adjacent to his property? Would such a delegation of authority be permissible in light of *Muench v. Public Service Commission*, 251 Wis. 492 (1952) and *Menzer v. Elkhart Lake*, 51 Wis. 2d 70 (1970)?

"3. Assuming that the City of Madison has general police power jurisdiction over Lake Mendota to its high water mark, could the City then prevent an owner of riparian land outside the City limits (e.g., Maple Bluff or Middleton) from receiving a permit from the Department to chemically treat Lake Mendota waters for aquatic nuisances?

“4. More generally, may the Department deny an application, made pursuant to Section 144.025(2)(i), Wisconsin Statutes, for aquatic nuisance control where the applicant complies with all statutes and administrative rules enforced by this Department or the Department of Agriculture which relate to the use of pesticides? (Note: see Section 29.29(4) and 94.69(9), Wisconsin Statutes, and Chapters NR 80 and 107, and Ag. 12, Wisconsin Administrative Code, for provisions relating to pesticide use.)”

1. DNR AUTHORITY TO CONTROL AQUATIC NUISANCES

With respect to the first question, it is my opinion that the Department of Natural Resources does have authority to grant a permit to chemically control aquatic nuisances notwithstanding a municipal policy contrary to such treatment. Section 144.025 (2) (i), Stats., authorizes the Department of Natural Resources to:

“... supervise chemical treatment of waters for the suppression of algae, aquatic weeds, swimmers’ itch and other nuisance-producing plants and organisms. ...”

Certainly a city cannot lawfully forbid what the legislature has expressly licensed, authorized, or required. *Fox v. City of Racine* (1937), 225 Wis. 542, 275 N.W. 513. Here the legislature has expressly authorized the chemical treatment of state waters for the purpose of controlling aquatic nuisances. Sec. 144.025 (2) (i), Stats. This section was first enacted by ch. 614, sec. 37, Laws of 1965.

The City of Madison has, however, adopted a resolution, January 12, 1971, resolving:

“that it is the policy of the Common Council of the City of Madison to prohibit city departments or subdivisions thereof the application of all herbicides and chemicals in Madison lakes except for reasons of public health as determined by the health department”

and further,

“that the city reject the annual blanket permit granted by the State of Wisconsin, Department of Natural Resources for the

purpose of allowing individuals or governmental units to apply herbicide or chemical treatment to the Madison lakes”

and further,

“that the City of Madison file with the Department of Natural Resources a permanent objection for issuance of a permit for individuals or governmental units to apply herbicides or chemicals to Madison lakes.”

In light of the Department’s authority under sec. 144.025 (2) (i), this city policy has no legal effect. In an analogous situation, a former opinion of this office, 60 OAG 523 (1971), concluded that the Department of Natural Resources had authority to require a municipality to construct a public water supply system pursuant to sec. 144.025 (2) (r), Stats., even though the town had rejected such plan by referendum.

While the City of Madison’s policy is not binding upon the Department, it may be considered as a factor in the decision-making process in the spirit of sec. 144.025 (1), which states:

“[I]t is the express policy of the state to mobilize governmental effort and resources at all levels, state, federal and local, allocating such effort and resources to accomplish the greatest result for the people of the state as a whole.”

2. DELEGATION OF AUTHORITY TO MADISON

In response to your second question, I have concluded that the City of Madison has no jurisdictional authority to prevent the issuance of permits to riparians for chemical treatment of adjacent waters. *Fox v. Racine, supra*.

Special acts of the legislature creating the city of Madison gave the city some jurisdiction over the lakes bordering on the city. These charter provisions were repealed by sec. 62.02, Stats., Laws of 1921, ch. 242, sec. 2. Whatever powers may have survived relating to the municipal management and control of navigable waters by virtue of sec. 62.04 and sec. 62.11 (5), Stats., the state has preempted this area by legislative enactments, particularly chs. 29, 30, 31, 144, and 147, Stats. Neither the special charter provisions nor sec. 62.11 (5), reserve to the City of Madison the authority to frustrate the Department of Natural Resources’ role in supervising the “chemical

treatment of waters for the suppression of ... nuisance-producing plants and organisms." See *Department of Natural Resources v. Clintonville* (1971), 53 Wis. 2d 1, 4, 191 N.W. 2d 866, which cites *Muench v. Public Service Commission* (1952), 261 Wis. 492, 53 N.W. 2d 514, 55 N.W. 2d 40, as authority that "the state must maintain pre-eminence in the control of navigable waters in this state."

Section 62.11 (5) was also interpreted in *City of Madison v. Tolzmann* (1959), 7 Wis. 2d 570, 97 N.W. 2d 513, in which the Supreme Court struck down a Madison ordinance which required boats to be registered with the Chief of Police after payment of a license fee. The court held that Madison's special charter contained no authority to enact such an ordinance. The court also noted that sec. 62.11 (5), Stats., was enacted as enabling legislation after the adoption of the home-rule amendment to the Constitution. Art. XI, sec. 3, Wis. Const. That amendment granted power to cities in all local affairs, but not in matters of statewide concern. *Madison v. Tolzmann, supra*, at 573.

An example of a local concern is health and safety regulations. In *Menzer v. Elkhart Lake* (1971), 51 Wis. 2d 70, 186 N.W. 2d 290, the court upheld municipal boating regulations adopted under the specific delegation in sec. 30.77, Stats. These regulations were required not only to be in the interest of health and safety, but also to be consistent with the applicable statutes and guidelines. Here, in contrast, the legislature never expressly authorized municipalities to enact aquatic nuisance control ordinances. Furthermore, Madison's policy is in direct conflict with sec. 144.025 (2) (i), Stats., which grants the Department supervisory authority over aquatic nuisance control.

In discussing the relationship between matters of local and statewide concern, the court in *Van Gilder v. City of Madison* (1936), 222 Wis. 58, 267 N.W. 25, 268 N.W. 108, said:

"The powers of municipalities are subject to the limitation that the municipality cannot by its charter deal with matters which are of state-wide concern and its power to enact an organic law dealing with local affairs and government is subject to such acts of the legislature relating thereto as are of state-

wide concern and affect with uniformity all cities. *Van Gilder, supra*, at 73.

“When the legislature deals with matters which are primarily matters of state-wide concern, it may deal with them free from any restriction contained in the home-rule amendment.” *Van Gilder, supra*, at 84.

Thus, the legislature can deal with the waters of the state free from any restriction contained in the homerule amendment and sec. 62.11 (5), Stats. Conversely, the City of Madison is restricted from dealing with matters of statewide concern. It is well established that the navigable waters of the state are a matter of statewide concern. *Madison v. Tolzmann, supra*, at 575, 576; *Fond du Lac v. Town of Empire* (1956), 273 Wis. 333, 338, 77 N.W. 2d 699. Furthermore, legislative enactment of sec. 144.025 (2) (i) deems aquatic nuisance control a matter of statewide concern. Consequently, whatever authority there is granted by virtue of sec. 62.11 (5) does not extend to the supervision of aquatic nuisance control.

3. RIPARIANS OUTSIDE MADISON

The answer to your third question cannot assume, as your question suggests, that the City of Madison has general police power jurisdiction superior to that of the Department of Natural Resources. This issue was resolved above to the effect that, while Madison has been delegated limited jurisdiction over the navigable waters within its boundaries, it is subject to the broader authority of the Department of Natural Resources in the area of aquatic nuisance control. Thus, the City could not prevent a riparian outside the city limits, acting under DNR supervision, from treating his shoreline with weed-killing chemicals.

4. DENIAL OF PERMITS

Your fourth question asks whether the Department may deny permit applications which would comply with all applicable statutes and administrative rules. This question assumes that there is a great body of statutes and rules regulating chemical treatment of aquatic nuisances. Actually, the pertinent administrative rules are skeletal. NR 80.03 (10) and Ag 20.12 (2), Wis. Adm. Code, specifically exempt applicants for permits issued under sec. 144.025 (2) (i), Stats. The rules set out in NR 107, Wis. Adm. Code, deal essentially

with application forms and fees and supervisory fees. Hence, there presently are few substantive rules with which prospective applicants must comply.

While the legislature has determined that chemical treatment is a proper method to control aquatic nuisances, sec. 144.025 (2) (i), Stats., the Department of Natural Resources' supervision of such treatment must be exercised in light of the policy and purpose set out in sec. 144.025 (1), Stats.

“The Department of Natural Resources shall serve as the central unit of state government to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private. Continued pollution of the state has aroused widespread public concern. It endangers public health and threatens the general welfare. A comprehensive action program directed at all present and potential sources of water pollution ... is needed to protect human life and health, fish and aquatic life, scenic and ecological values and domestic, municipal, recreational, industrial, agricultural and other uses of water. The purpose of this act is to grant necessary powers and to organize a comprehensive program under a single state agency for the enhancement of the quality, management, and protection of all waters of the state, ground and surface, public and private.”

While the legislature gave the Department a great deal of discretion in its supervision of weed control, it has at the same time charged the Department to guard the trust and to carry out the purposes of sec. 144.025 (1), Stats. Hence, in reviewing applications for permits to chemically treat aquatic nuisances, the Department must consider not only the statutes and administrative rules, but must also, in the exercise of this supervisory function, bear in mind the ultimate purpose which sec. 144.025 (1) and other appropriate statutes and rules are designed to promote. Even if an applicant would be in compliance with the letter of the statutory and administrative requirements, his permit may be denied if the Department finds that application of chemicals to the state's navigable waters would be counter-productive in achieving the goals of ch. 144, i.e., to “protect, maintain and improve the quality and management of the waters ... to direct a comprehensive program at

all present and potential sources of water pollution ... to protect human life and health, fish and aquatic life, scenic and ecological values and domestic, municipal, recreational, industrial, agricultural and other uses of water.”

The decision to grant or deny permits, however, would be subject to judicial review. Though not a “contested case” within the meaning of sec. 227.01 (2), Stats., denial of a permit application is nonetheless reviewable, *Town of Ashwaubenon v. Public Service Commission* (1963), 22 Wis. 2d 38, 46, 125 N.W. 2d 647, 126 N.W. 2d 567. Section 227.15, Stats., referring to judicial review, contains no requirement of a “contested case” or a “hearing required by law.” Judicial review would proceed on the record which, though not as full as when a hearing has taken place, may consist of interdepartmental correspondence and files. *Id.* at 47. Denial of permit applications may be accompanied by findings of facts in order to assist judicial review.

In summary, it is my opinion that, while the Department of Natural Resources has ultimate supervision over chemical treatment of aquatic nuisances in Madison lakes, the Department must exercise its function in light of the public trust and the purposes set out in sec. 144.025 (1).

RWW:LMC

Health And Social Services, Department Of; Section 46.16, Stats., does not convey authority to the Department of Health and Social Services to order methods of operation, numbers and qualifications of staff, standards for food service, and the nature of treatment and training programs in local places of confinement. Section 46.17, Stats., relates to construction and maintenance of confinement buildings and provides no additional authority to the department under sec. 46.16, Stats.

July 24, 1974.

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

You request my opinion on two questions regarding the authority and responsibility given your department under secs. 46.16 and 46.17, Stats., with respect to places of confinement operated by counties or municipalities.

First you ask:

“Specifically, does Section 46.16 convey any authority for the Department to order or prescribe methods of operation for local places of confinement, the numbers and qualifications of staff to be employed, standards for food service, and the nature of programs to be provided for the treatment and training of persons confined.”

State agencies, of course, have only such powers as are expressly granted by statute or necessarily implied as incidental to carrying out the duties and powers expressed in the statutes. Any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds. *American Brass Co. v. State Board of Health* (1944), 245 Wis. 440, 15 N.W. 2d 27; *The State ex rel. Priest v. The Regents of the University of Wisconsin* (1882), 54 Wis. 159, 11 N.W. 472.

Section 46.16, Stats., reads in material part:

“General supervision and inspection by department. (1) **GENERALLY.** The department shall investigate and supervise all the charitable, curative, reformatory and penal institutions, including county infirmaries of every county and municipality ... and all industrial schools, hospitals, asylums and institutions, organized for the purpose set forth in s. 58.01, and familiarize itself with all the circumstances affecting their management and usefulness.

“***

“(4) **Prisons.** It shall visit all places in which persons convicted or suspected of crime or mentally ill persons are confined, and ascertain their arrangement for the separation of

the hardened criminals from juvenile offenders and persons suspected of crime or detained as witnesses; *collect statistics concerning the inmates, their treatment, employment and reformation*; and collect information of other facts and considerations affecting the increase or decrease of crime and mental illness.

“(5) **Inspections.** It shall inquire into the methods of treatment, instruction, government and management of inmates of the institutions mentioned in this section; the conduct of their trustees, managers, directors, superintendents and other officers and employes; the condition of the buildings, grounds and all other property pertaining to said institutions, and all other matters pertaining to their usefulness and management; and *recommend to the officers in charge such changes and additional provisions as it deems proper.*

“(6) **Frequency of inspections.** It shall inspect and investigate each institution annually, or oftener; and, when directed by the governor, it shall make special investigation into its management, or anything connected therewith, and *report to him the testimony taken, the facts found and conclusions thereon.*” (Emphasis added.)

I am unable to find in sec. 46.16, Stats., any express grant of authority for your department to order methods of operation, adequacy of staff, food service standards and treatment programs. While the title and introductory sentence of sec. 46.16 (1), Stats., indicate that “The department shall investigate and supervise ...”, no specific supervisory power is indicated by the remaining paragraphs. It is an established rule of statutory construction that while a caption to a statute and legislative history may be persuasive to ascertain legislative intent, these sources of information cannot prevail in the face of clear language of a statute to the contrary. *Hoefl v. Milwaukee & Suburban Transport Corp.* (1969), 42 Wis. 2d 699, 168 N.W. 2d 134. *Prechel v. Monroe* (1968), 40 Wis. 2d 231, 161 N.W. 2d 373. While (5) requires the department to inquire into the methods of treatment, government and management of inmates, etc., specific authority is given solely to “recommend to the officers in charge such changes and additional provisions as it deems proper.” In a similar manner, (6) requires the department to investigate each

institution annually or oftener without providing authority to do more than recommend changes.

Section 46.17, Stats., provides substantial control in the department of construction and maintenance of buildings used for confinement. Such section provides:

“County buildings; establishment, approval, inspection. (1) The department *shall fix reasonable standards and regulations for the design, construction, repair and maintenance of ... houses of correction, ... jails and lockups, and juvenile detention homes and shelter care facilities, with respect to their adequacy and fitness for the needs which they are to serve.*

“(2) The selection and purchase of the site, and the plans, specifications and erection of buildings for such institutions *shall be subject to the review and approval of the department.*

...

“(3) Before any such building is occupied, and annually or oftener thereafter, the department shall inspect it with respect to safety, sanitation, adequacy and fitness, and report to the authorities conducting the institution any deficiency found, and *order the necessary work to correct it or a new building.* If within 6 months thereafter such work is not commenced, or not completed within a reasonable period thereafter, to the satisfaction of the department, it shall suspend the allowance of state aid for, and prohibit the use of such building until said order is complied with.” (Emphasis added.)

It is evident then that the legislature in sec. 46.17, Stats., provided specific control in the department over county buildings used for confinement even to the extent of prohibiting the use of unfit buildings. Given the variance between the authority granted under sec. 46.16, Stats., and that granted in 46:17, Stats., is there a basis for the necessary implication that the department has rulemaking and approval power over methods of operation, staffing, food service, etc., functions not related to the building itself? I find no such necessary implication in sec. 46.16, Stats. While it could be argued that the broad language of sec. 46.16 (1), Stats., provides general rulemaking and enforcement authority over the listed aspects of the care of

confined persons in county institutions, I see no basis to indicate that such was the intent of the legislature.

In sec. 46.17, Stats., the legislature provided specific enforcement authority over the physical plant of such buildings. By secs. 140.055 and 140.05, Stats., the department was given supervision of sanitary aspects of the subject institutions. Section 140.05 (1), Stats., provides enforcement power in these words:

“(1) ... It shall have power to execute what is reasonable and necessary for the prevention ... of disease. ...”

No such enforcement language is present in sec. 46.16, Stats. It is therefore my opinion that sec. 46.16, Stats., does not convey authority to order or prescribe methods of operation for local places of confinement, numbers or qualifications of staff to be employed, standards for food service, and the nature of training programs provided confined persons, unless such factors directly affect sanitary conditions regulated by secs. 140.055 and 140.05, Stats.

Your second question is:

“Does Section 46.17 provide any implicit authority for the establishment of standards and methods of operation which would not otherwise appear to be conveyed by Section 46.16?”

Section 46.17, Stats., is limited to design, construction, repair and maintenance of confinement buildings. The department may order correction of defects relating to safety, sanitation, adequacy or fitness, and may prohibit use of the building until the order is complied with. No such enforcement authority is provided in sec. 46.16, Stats., in relation to treatment and management of inmates, etc., factors not relating to the structure or maintenance of buildings. I see no indication of legislative intent to have the enforcement powers over buildings of sec. 46.17, Stats., apply to the area of management of inmates set forth in sec. 46.16, Stats. On the contrary, sec. 46.16 (5), Stats., clearly indicates that the department's powers in this area are limited to recommending changes to officers-in-charge or upon his request, to the Governor. It is my opinion that the authority to suspend state aid or prohibit the

use of buildings given in sec. 46.17 (3), Stats., is not available to the department for enforcement of sec. 46.16, Stats.

RWW:WMS

Schools And School Districts; Public Records; Common school districts are presently without authority to destroy records which fall within sec. 19.21 (1), Stats., and which are not pupil records under sec. 118.125 (1), Stats. Where city school district is involved, city council could by ordinance provide for destruction of obsolete school district records under sec. 19.21 (5) (a), Stats. Meaning of public records as related to school districts discussed.

July 24, 1974.

DORIS J. HANSON, *Chairman*
Public Records Board

The Public Records Board requests my opinion on the following questions:

1. Under what authority may school districts destroy records?
2. May the State Superintendent of Public Instruction or the State Public Records Board establish minimum retention periods for local school districts' records which contain information used to report to the Superintendent of Public Instruction?

I have been unable to find any statute which specifically authorizes school districts to destroy records. Section 118.125 (3), Stats., created by ch. 254, Laws of 1973, does grant each school board power to adopt rules establishing the time *pupil records* shall be maintained, places a limitation on the time pupil behavioral records may be maintained and by implication empowers school boards to destroy those records without need of tender to the State Historical Society. This new law becomes effective at the beginning of the 1974 school year.

Under sec. 120.13 (12), Stats., a common school district can:

“120.13 (12) **Historical records.** Under s. 44.09, transfer title to any school records to the state historical society which

are no longer needed for the proper administration of the school district and which the society determines are of permanent historical interest.”

Section 44.09, Stats., provides in part:

“44.09 County, local and court records. The proper officer of any county, city, village, town, school district or other local governmental unit may offer, and the historical society may accept for preservation, title to such noncurrent records as in the historical society’s judgment are of permanent historical value and which are no longer needed for administrative purposes by such local governmental unit. ...”

Section 44.10, Stats., permits the historical society power to establish regional depositories which can house school district records of historical value.

By reason of secs. 120.49 and 120.75, Stats., the power to transfer records to the historical society would be within powers of a city school district or unified school district. Section 19.23 (2), Stats., is applicable to all school districts including those of cities of the first class, and provides:

“19.23 (2) The proper officer of any county, city, village, town, school district or other local governmental unit, may under s. 44.09 offer title and transfer custody to the historical society of any records deemed by the society to be of permanent historical importance.”

Under general law in the United States, public records are the property of the state or other unit of government and not of the individual or officer who happens at the moment to have them in possession. When they are deposited in the place designated for them by law, they must remain and can be removed, transferred, or disposed of only as provided by statute. 66 Am. Jur. 2d, *Records and Recording Laws*, sec. 10, p. 347.

In 38 OAG 22 (1949), it was stated that under then existing law municipal clerks could not, absent specific statute, destroy or transfer to the State Historical Society noncurrent public records.

Statutes with respect to cities, villages, and towns have been changed to permit transfer and destruction under certain conditions.

No change has been made with respect to destruction as far as school districts are concerned except as to pupil records. With respect to school districts other than city school districts, I am of the opinion that the reasoning in 38 OAG 22 (1949) would apply to school records other than pupil records which are public records within the meaning of sec. 19.21 (1), Stats., except as is herein modified.

Section 120.41 (1), Stats., provides that a city school system does not constitute a separate legal entity. Chapter 119, Stats., grants the school board in cities of the first class substantial independence. It is nevertheless closely tied to the city as the city provides the money and owns the physical property of the school system. *Village of Brown Deer v. City of Milwaukee* (1956), 274 Wis. 50, 79 N.W. 2d 340.

Section 19.21 (5), Stats., provides in part:

“19.21 (5) (a) Any city council or village board may provide by ordinance for the destruction of obsolete public records. Prior to any such destruction at least 60 days' notice in writing of such destruction shall be given the historical society which shall preserve any such records it determines to be of historical interest. The historical society may, upon application, waive such notice. ...”

“(b) The period of time any city or village public record shall be kept before destruction shall be as prescribed by ordinance unless a specific period of time is provided by statute. The period prescribed in such ordinance shall be not less than 2 years with respect to water stubs, receipts of current billings and customer's ledgers of any municipal utility, and 7 years for other records unless a shorter period has been fixed by the public records board pursuant to s. 16.80 (3) (e).”

I am of the opinion that a city council of a city operating a city school district or city council of a city of the first class could, with the cooperation of the respective school board, provide by ordinance for the destruction of obsolete public records of such school district if the terms of sec. 19.21 (5), Stats., are met.

Your inquiry mentions “school records,” and a most difficult question is presented as to what are “public records,” insofar as school districts are concerned, within the meaning of sec. 19.21 (1) and (3), Stats., which provides:

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

“***

“19.21 (3) Upon the expiration of his term of office, or whenever his office becomes vacant, each such officer, or on his death his legal representative, shall on demand deliver to his successor all such property and things then in his custody, and his successor shall receipt therefor to said officer, who shall file said receipt, as the case may be, in the office of the secretary of state, county clerk, town clerk, city clerk, village clerk, school district clerk, or clerk or other secretarial officer of the municipality or district, respectively; but if a vacancy occurs before such successor is qualified, such property and things shall be delivered to and be received for by such secretary or clerk, respectively, on behalf of the successor, to be delivered to such successor upon the latter's receipt.”

Independent of statute, “public records” include not only papers specifically required to be kept by a public officer, but all written memorials made by a public officer within his authority where such writings constitute a convenient, appropriate, or customary method of discharging the duties of the office. *International Union v. Gooding* (1947), 251 Wis. 362, 29 N.W. 2d 730.

Section 19.21 (1), Stats., goes much further than this in defining public records in Wisconsin. However, even the *International Union* case recognizes that this section does not require an officer to keep, file, and ultimately deliver to his successor every paper or communication without respect to the relation of the paper to the functions of the office but that an officer may dispose of purely fugitive papers having no relation to the function of the office. 38 OAG 22, 23 (1949).

Section 16.80 (2) (a), Stats., provides that insofar as state agencies are involved:

“16.80 (2) (a) ‘Public records’ means all books, papers, maps, photographs, films, recordings, or other documentary materials or any copy thereof, regardless of physical form or characteristics, *made, or received* by any agency of the state or its officers or employes in connection with the transaction of public business *and retained* by that agency or its successor as evidence of its activities or functions because of the information contained therein; ...” (Emphasis added.)

While this definition is not directly applicable to school districts, it is a codification of case law with respect to the definition of public records. It recognizes that an officer has the right to determine whether a paper which is not required by law or valid rule to be filed, deposited, or kept in his office, should be retained as evidence of the activities or functions because of the information contained therein.

I am of the opinion that officers covered by sec. 19.21 (1) and (3), Stats., have the same power and that such power permits the destruction of fugitive papers, scrap paper, and in some cases, preliminary work sheets, drafts, surplus copies, etc.

A given paper may be a public record within the meaning of sec. 19.21 (1), Stats., for the purposes of inspection and copying as long as it is in the lawful possession or control of an officer, or his deputies, but may not necessarily be one which said officer is required to preserve under sec. 19.21 (1), Stats., or to deliver to his successor under sec. 19.21 (3), Stats. Under the latter statute he need only deliver “all such property and things then in his custody.” There are many documents which may lawfully come into the hands of a public officer over which he is only entitled to temporary custody and which may or must be surrendered to the person owning the same or for other purposes. For example, certificates of bonds must be delivered when sold or at maturity.

All records of a school district are not necessarily public records under sec. 19.21 (1), Stats. Section 16.80 (2) (a), Stats., which defines state public records, covers matters “*made, or received by any agency of the state or its officers or employes ...*” (Emphasis added.) Section 19.21 (1), Stats., is only concerned with “Each and every

officer of ... any ... school district” and covers materials “received from his predecessor or other persons *and required by law to be filed, deposited, or kept in his office* or which are in the lawful possession or control *of himself or his deputies*, or to the possession or control of which he or they may be lawfully entitled, *as such officers.*” (Emphasis added.)

Certainly the records of the board or those kept by any officer of the board or to which they were lawfully entitled would be public records within sec. 19.21 (1), Stats. There is a question, however, as to whether a superintendent or teacher is a deputy within the meaning of the statute. For purposes of sec. 19.21 (1), Stats., I would construe “officers” of the district as including superintendents and principals and would treat public records as including scholastic and administrative records in their offices. It is questionable whether teachers are deputies of any school board officer. They may be deputies of the superintendent or principal within the meaning of sec. 19.21 (1), Stats. We need not here determine whether pupils’ work products including examination papers are public records within the meaning of sec. 19.21 (1), Stats. Even if they are, it is my opinion that they can be returned to and kept or destroyed by the pupil after record is made without violation of sec. 19.21 (1), Stats. It is my opinion that pupil records including behavioral records and progress records which are required to be kept are public records.

In *Valentine v. Independent School Dist.* (Iowa 1919), 174 N.W. 334, it was held that in a graded school system, records of attainment of individual pupils must be kept, that such records are the property of the school district and not of the teacher, principal, or superintendent, and are public records to which the pupil is entitled.

Section 118.125 (1), Stats., created by ch. 254, Laws of 1973, provides:

“118.125 PUPIL RECORDS. (1) DEFINITIONS. In this section:

“(a) ‘Pupil records’ means all records relating to individual pupils maintained by an elementary or high school but does not include notes or records maintained for personal use by a teacher or other person who is required by the department under s. 115.28 (7) to hold a certificate, license or permit if such

records and notes are not available to others nor does it include records necessary for, and available only to persons involved in, the psychological treatment of a pupil.

“(b) ‘Behavioral records’ means those pupil records which include psychological tests, personality evaluations, records of conversations, any written statement relating specifically to an individual pupil’s behavior, tests relating specifically to achievement or measurement of ability, the pupil’s physical health records and any other pupil records which are not progress records.

“(c) ‘Progress records’ means those pupil records which include the pupil’s grades, a statement of the courses the pupil has taken, the pupil’s attendance record and records of the pupil’s school extracurricular activities.”

Section 118.125 (2), Stats., provides that such pupil records are confidential except as is expressly provided in pars. (a) to (g).

In *Board of School Director of Milwaukee v. WERC* (1969), 42 Wis. 2d 637, 655, 168 N.W. 2d 92, it was held that the names, addresses, salaries, and working conditions of teachers are a matter of public record and that the district could not grant exclusive access to anyone.

Records concerning school administration, school building plans, curriculum development, growth projections, annual meetings, budget, and state and federal aids would be covered by the same rule.

In view of the above, it is evident that further legislation would be desirable to establish procedures for the orderly transfer or destruction of all noncurrent records of school districts.

With respect to your second question, it can be stated that the Public Records Board and the State Superintendent of Public Instruction have only those powers which are specifically provided by statute or necessarily implied.

I find no statute which would permit the Public Records Board to establish minimum retention periods for all school districts.

Under sec. 16.80 (3) (e), Stats., the Public Records Board has power to establish the minimum period of time before destruction of

any city or village record. Since the records of city school districts and districts in cities of the first class are city records, in the broad sense, the Public Records Board could establish minimum retention periods applicable to such districts for public records other than pupil records.

As noted above, sec. 19.21 (1) and (3), Stats., places a duty on school district officers to preserve public records and transfer them to their successors. The statutes do not provide a method for the destruction of records with the exception of pupil records and those of city school districts acting in cooperation with the respective city council. It is questionable whether there is a need for the State Superintendent to set minimum periods of retention in most cases. However, since sec. 115.28 (3), Stats., does require the State Superintendent to supervise and inspect public schools and advise principals and local authorities thereof, and since sec. 115.30, Stats., provides that the Department of Public Instruction may require certain reports, it is my opinion that the State Superintendent could by rule prescribe minimum periods of retention of school district records which contain information on which reports to the State Department of Public Instruction are based. There is a need for legislation in this area also.

RWW:RJV

Courts; Juvenile Court; A pre-petition investigation provided for by sec. 48.19, Stats., is authorized whenever any human being directs information to the juvenile court tending to show that a child is delinquent, in need of supervision, dependent or neglected.

August 1, 1974.

ALEX J. RAINERI, *District Attorney*
Iron County

You advise that, pursuant to sec. 48.06 (2) (b) of the Children's Code, the Iron County Welfare Department has been authorized to furnish investigative and supervisory services to the juvenile court. You indicate that in the past, a child welfare worker did not become

involved in the pre-judicial investigation of any juvenile matter pursuant to sec. 48.19, Stats., until and unless a referral was made to him in writing which recited probable cause for the investigation and was signed by a police officer. Of late, you explain, the juvenile court judge has ordered an investigation based on information he receives "from persons, newspaper items or ... any source whatsoever." In many of those cases, you add, the police had conducted an investigation and were requested to drop the matter by all parties concerned. As to these cases, you indicate that the juvenile court judge has directed the child welfare worker to reopen the matter and report to him.

Premised upon such information, you make the following inquiries: (1) What is the method provided by Wisconsin law for making a complaint to the court concerning a juvenile pursuant to sec. 48.19, Stats.? (2) What kind of complaint is necessary to commence proceedings against a juvenile pursuant to sec. 48.19, Stats.? (3) Can a child welfare worker be ordered to investigate a juvenile without a written complaint of referral made either to him or to the court by a person?

Your questions are best answered together. Section 48.19, Stats., provides in part as follows:

"48.19 Informal Disposition. Whenever any person gives the court information tending to show that a child comes within the provisions of s. 48.12 or 48.13, an investigation shall be made by persons designated by the court to determine the facts. ... If the investigation shows that the child is within the provisions of s. 48.12 or 48.13 the court may authorize the filing of a petition under s. 48.20 or, if it determines that neither the interests of the child nor of the public require that a petition be filed, may defer further proceedings on the condition that the child appear with his parents, guardian or legal custodian for counseling and advice ..." (Emphasis added.)

In sum, your questions are directed to the form and manner of the initial "giving of information to the court," referred to in the emphasized language above, which then triggers the pre-petition investigation by the child welfare worker. As to these matters, there is little if any direction provided by the legislative history of the

Children's Code or the decisions of the Wisconsin Supreme Court interpreting such Code.

The emphasized language about which you inquire originated with sec. 48.06 (1), Stats. (1929), and was enacted by ch. 439, sec. 3, Laws of 1929. It provided that:

“[w]henever any person gives to the juvenile court information tending to show that a child is neglected, dependent or delinquent, or that such child has committed any act or has pursued a course of conduct which if found true would make him a delinquent child, the court shall make preliminary inquiry to determine whether ... formal jurisdiction should be acquired ...”

However, there was then and there is now no requirement that the initial information provided to the court be in writing or that it be in the form of a police complaint signed by a police officer, although in most instances that is the manner in which a juvenile is referred to the juvenile court. There is no question but that the procedure of police referral was recognized as proper under sec. 48.06 (1) and would therefore still be proper under the present sec. 48.19. In the case of *Harry v. State* (1944), 246 Wis. 69, 76, 16 N.W. 2d 390, that procedure was utilized and its propriety implicitly acknowledged by the Wisconsin Supreme Court. However, nothing in the decision in *Harry* restricted the form or manner of providing information to the court simply to police referral. Moreover, in the case of *Lueptow v. Schraeder* (1938), 226 Wis. 437, 439, 277 N.W. 124, it appears that the same language of sec. 48.06 (1) was implicitly satisfied where members of the school board appeared before the juvenile court judge in person and complained under oath of certain delinquent acts of specified juveniles. Again, however, nothing in the *Lueptow* decision is restrictive of the manner by which such information is provided to the court nor the form such information must assume. The requirements of giving information to the juvenile court which triggers a pre-petition investigation appear to have been determined solely from the statutes themselves. Therefore, any guidelines as to form and manner must be gleaned from a reading of sec. 48.19 itself in conjunction with any statutes which are *in pari materia*. Moreover, any such interpretation must be broad enough to cover the

two methods of referral implicitly sanctioned by the Wisconsin Supreme Court in *Harry* and *Lueptow*.

It is therefore my opinion, grounded upon the foregoing analysis and sec. 48.19, Stats., that there are only three definitive requirements which *must* precede the commencement of a pre-petition investigation. First of all, the information must be provided to the court by a "person." Generally, this term is understood as denoting a natural person unless from the context it appears that artificial persons such as corporations were intended to be included therein. 70 C.J.S., *Person*, pp. 688-689. In view of the fact that there appears to be no such indication in sec. 48.19 that "person" refers to an artificial person, it follows that the word "person" refers herein to a human being. This works no hardship on the public since a corporation or a school board would supply information to the court through one of its officers.

Secondly, since sec. 48.19 provides, "[w]henver any person gives the court information ..." (emphasis supplied), it is my opinion that there exists a requirement that such information be specifically directed to the court. This second requirement would seem to preclude the obtainment of information by a juvenile court judge who reads an article in a newspaper since the information supplied by a newspaper is not specifically directed to the juvenile court. It must also be noted here that this discussion would not be complete without a consideration of what is entailed by the use of the term "court" in sec. 48.19. In view of the fact that the meaning of that word is not entirely discernible from a reading of sec. 48.19 alone, it is necessary to construe sec. 48.19 in the light of those statutes which are *in pari materia*, i.e., dealing with the same subject matter. *Weiss v. Holman* (1973), 58 Wis. 2d 608, 619, 207 N.W. 2d 660. Such statutes must be read together and harmonized. *Id.* Moreover, it should be noted that the Wisconsin Supreme Court has seen fit to apply this same rule of construction to other provisions of the Children's Code. See, e.g., *Jung v. State* (1972), 55 Wis. 2d 714, 720, 201 N.W. 2d 58.

In compliance with that directive, consideration must be given to sec. 48.02 (2). Section 48.02 (2) makes clear that by the use of the term "court" in sections other than secs. 48.81 to 48.97 is meant the juvenile court. It is thus certain that when sec. 48.19 speaks of giving information to "the court," the legislature intended that to be the

juvenile court. Nor is there any other specification in the statute. A question next arises as to what constitutes the juvenile court. In the case of *State ex rel. Journal Co. v. County Court* (1969), 43 Wis. 2d 297, 302, fn. 1, 168 N.W. 2d 836, the Wisconsin Supreme Court broadly construed the term "court" to include the judge and any officers "exercising the function of the court." Thus, while the terms juvenile court and juvenile court judge may be used interchangeably, it is clear that the judge must be acting in his official capacity when he constitutes "the court." As was aptly stated by the Supreme Court of Illinois:

"... courts are political agents established under the Constitution, and, in contemplation of law, have separate existence distinct from the judges who preside over them; ... a judge has no judicial power outside of the court in which he officiates, and when discharging the functions of his office he is the court in concrete form, and in this sense is often called the 'court' ..." *Hartshorn, et al. v. Illinois Valley Ry. Co.* (1905), 216 Ill. 392, 75 N.E. 122, 126.

The third and final requirement is that the information itself must tend to show that a child is delinquent, in need of supervision, neglected or dependent as those terms are defined in secs. 48.12 and 48.13, respectively. These three are the only requirements mandated by sec. 48.19, and whenever these are present, a pre-petition investigation is authorized. Moreover, in view of the fact that this initial referral or "complaint" as you describe it does not constitute a petition by which the juvenile court obtains jurisdiction over the child who is allegedly delinquent, dependent, neglected or in need of supervision, the requirements of probable cause do not attach.

One final question implicitly raised by your inquiry is whether the method provided by sec. 48.19 is the only method by which a pre-petition investigation may be authorized or whether sec. 48.08 (1) empowers the juvenile court judge to order a pre-petition investigation under any circumstances at his discretion. In my opinion, sec. 48.08 (1) does not so allow. Section 48.08 (1) provides as follows:

"Duties of person furnishing services to court. (1) It is the duty of each person appointed to furnish services to the court as

provided in ss. 48.06 and 48.07 to make such investigations and exercise such discretionary powers as the judge may direct, to keep a written record of such investigations and to submit a report to the judge. Such person shall keep informed concerning the conduct and condition of the child under his supervision and shall report thereon as the judge directs.”

It is clear from a reading of this statute that it does not outline the powers and duties of the juvenile court judge but simply the powers and duties of those persons who are appointed to perform the investigatory and supervisory functions for the court. Even if such statute were interpreted to empower a juvenile court judge to order investigations at his discretion for some other purpose, however, it is equally clear that the *only* method by which a pre-petition investigation is authorized under sec. 48.19 is the method specifically provided therein and outlined above. To this end, the maxim of construction *expressio unius est exclusio alterius* is determinative as applied by the Wisconsin Supreme Court in the recent case of *State ex rel. Jerry Harris v. Richard Larson, et al.*, decided June 28, 1974:

“Chapter 48, Stats., the Children’s Code, is a comprehensive legislative plan for dealing with children in need of supervision and neglected, dependent, and delinquent children. It is a chapter of carefully spelled out definitions and enumerated powers. Court jurisdiction is spelled out in great detail in sec. 48.12 ff. Procedures are carefully detailed. ...

“The chapter reflects the legislature’s desire to specifically define the authority of appropriate officers. *Where there is evidence of such enumeration, it is in accordance with accepted principles of statutory construction to apply the maxim, expressio unius est exclusio alterius; in short, if the legislature did not specifically confer a power, it is evidence of legislative intent not to permit the exercise of the power.*” (Emphasis added.) *Harris, supra*, at pp. 5-6 of slip opinion.

In summary then, as long as the information is directed by a person to the juvenile court, which includes the juvenile court judge acting in his official capacity, and that information tends to show that a juvenile falls within the purview of sec. 48.12 or 48.13, a pre-petition investigation is authorized. There are no additional statutory

requirements, nor may such investigation be commenced by any other method.

RWW:CMW

Advertising; Statutes; Section 84.30, Stats., is presumed constitutional, and the Attorney General is governed by such legal doctrine in considering this act of the legislature.

August 5, 1974.

THE HONORABLE, THE ASSEMBLY
State Capitol

You have requested my opinion as to whether any part of sec. 84.30, Stats., involving regulation of outdoor advertising, is unconstitutional.

Section 84.30, Stats., was initially adopted to bring the state into harmony with the federal act so as to insure future eligibility for federal highway aids and grants. Accordingly, the law is of particular importance to the citizens of our state.

It is a well-established doctrine of the law that acts of the legislature are presumed to be constitutional. *In re City of Beloit* (1968), 37 Wis. 2d 637, 155 N.W. 2d 633. Even in those situations where there is an actual judicial proceeding challenging the constitutionality of an act of the legislature, our court in *State v. Stehlek* (1953), 262 Wis. 642, 56 N.W. 2d 514, issued the following caveat:

“It is a fundamental principal of statutory construction that a regularly enacted statute, or an order of an administrative body, made pursuant to statutory authority will be presumed to be constitutional until it has been declared to be otherwise by a competent tribunal. Such presumption is raised by the fact of the enactment of the statute by the legislature, and it extends to everything in the act on which it is based. The party attacking the statute has the burden of overcoming the presumption and showing that the statute is unconstitutional. The burden does

not shift, because of the difficulty in proving it." 16 C.J.S., Constitutional Law, pp. 250-260, sec. 99.

In *Just v. Marinette County* (1972), 56 Wis. 2d 7, 26, 201 N.W. 2d 761, it was held:

"... Of course, a presumption of constitutionality exists until declared otherwise by a competent court, which we think the trial courts of Wisconsin are, because a regularly enacted statute is presumed to be constitutional and the party attacking the statute must meet the burden of proof of showing unconstitutionality beyond a reasonable doubt."

Even though the naked language of the statute may possibly be subject to challenge by a litigant, such danger may be avoided or at least minimized by the adoption of certain procedures by the agency charged with the responsibility of enforcement. Such is the case at hand. The State Highway Commission, having been advised of particular troublesome areas in the law, has placed certain procedural requirements or restrictions on its own enforcement which should and have actually resulted in the upholding of the statute by the circuit court of Dane County against attack on constitutional grounds.

This office, at the request of the Division of Highways, recently commenced an action to enforce the provisions of this law against an alleged violator. This action was instituted by this office on the basis of the legal presumption that the statute is constitutional.

Under the law of this state, sec. 84.30, Stats., is presumed to be constitutional.

RWW:CAB

County Highway Commissioner; Public Officials; Salaries; County highway commissioners are appointed by the county board. Their salary is to be fixed, and may be changed during their term, pursuant to sec. 59.15 (2), Stats.

August 6, 1974.

ALEX J. RAINERI, *District Attorney*
Iron County

You have requested my opinion concerning the salary of the Iron County Highway Commission. You indicate that the previous commissioner died in office, and that the present commissioner was first elected by the county board last November. No resolution was passed setting the salary of the new commissioner prior to his election. Your specific questions are:

- (1) Must the county board pay the new commissioner the same salary as was paid to his immediate predecessor?
- (2) Can the county board set a new salary for the new commissioner?

Section 83.01 (3), Stats., provides:

“SALARY. The salary of the county highway commissioner shall be as determined under the provisions of sec. 59.15.”

Unfortunately, the above provision does not specify which subsection of sec. 59.15, Stats., applies. Section 59.15 differentiates between elective officials (subsec. 1), and appointive officials (subsec. 2), in such a way as to produce contrary answers to your questions. Therefore, the answer to your questions lies in determining whether the office of county highway commissioner is elective or appointive in the context of sec. 59.15.

Section 83.01 (1), Stats., provides:

“ELECTION. The county board shall *elect* a county highway commissioner, but in lieu thereof may by resolution request the highway commission to appoint a county highway commissioner. If the county board shall fail to elect a county highway commissioner or to make such request to the highway commission, the county shall not participate in state allotments for highways.” (Emphasis supplied.)

Use of the term “elect” in the statute to describe the mode of selection of the county highway commissioner seems to indicate that the office is elective. However, it is my opinion that the context in which “elect” is used requires that it be construed as “appoint.”

The general rule is that words and phrases in statutes shall be construed according to common and approved usage; but technical words and others that have peculiar meaning in the law shall be construed according to such meaning. Sec. 990.01 (1), Stats. I have concluded that Art. XIII, sec. 9, Wis. Const., gives "elect" a technical meaning when it is used to describe the selection of a county official by other than the county electorate. When so used, "elect" means "appoint." Presumably, the legislature used "elect" in sec. 83.01 (1), Stats., in accordance with this technical meaning.

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

"Election or appointment of statutory officers. SECTION 9. All county officers whose election or appointment is not provided for by this constitution shall be elected by the electors of the respective counties, or appointed by the board of supervisors, or other county authorities, as the legislature shall direct. ... All other officers whose election or appointment is not provided for by this constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people or appointed, as the legislature may direct."

The clear implication of this constitutional language is that county officials are either elected by the county electorate or appointed by the board of supervisors. Since the county highway commissioner is "elected" by the county board rather than the electorate, his office must be construed as appointive in terms of the language of Art. XIII, sec. 9, Wis. Const. A different conclusion would lead to a conflict between Art. XIII, sec. 9, Wis. Const., and sec. 83.01, Stats., in that the statute would provide a method of selection for county officials not provided for in the constitution. Statutes are to be construed to avoid such conflicts where possible. *Milwaukee v. Milwaukee Amusement, Inc.* (1964), 22 Wis. 2d 240, 125 N.W. 2d 625.

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

"... Perhaps, accurately speaking, under sec. 9, art. XIII, Const., and the provisions of the city charter in the instant case

the council appoint and do not elect the city attorney. But *whether the term 'elect' or 'appoint' be used in the charter the power of the council over the subject matter is the same. It is in reality an appointing power, ...*" (Emphasis supplied.)

For similar interpretations, see 55 OAG 260 (1966) and 61 OAG 116 (1972).

The language of sec. 59.15, Stats., is supportive of this interpretation. Section 59.15, as amended by ch. 118, Laws of 1973, provides, in part:

"(1) ELECTIVE OFFICIALS. (a) The board shall, *prior to the earliest time for filing nomination papers for any elective office to be voted on in the county ...* which officer is paid in whole or part from the county treasury, establish the total annual compensation for services to be paid him ... 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.

"(2) APPOINTIVE OFFICIALS, DEPUTY OFFICERS AND EMPLOYES. (a) The board has the powers set forth in this subsection, sub. (3) and s. 59.025 as to any office, department, board, commission, committee, position or employe in county service (other than elective offices included under sub. (1) ...) created under any statute, the salary or compensation for which is paid in whole or in part by the county, and the jurisdiction and duties of which like within the county or any portion thereof ...

"(c) The board may provide, fix or change the salary or compensation of any office, board, commission, committee, position, employe or deputies to elective officers without regard to the tenure of the incumbent (except as provided in para. (d))

...

"(d) The board ... may contract for the services of employes, setting up the hours, wages, duties and terms of employment for periods not to exceed 2 years." (Emphasis supplied.)

It would require strained interpretation to construe the emphasized language of subsec. (1) as descriptive of the selection of a county highway commissioner. Therefore, it is my opinion that the salary of a county highway commissioner is to be determined pursuant to subsec. (2) of sec. 59.15, Stats. The county board may change his salary pursuant to sec. 59.15 (2) (c) unless it has contracted otherwise pursuant to sec. 59.15 (2) (d). An appointment, however, does not operate as a contract as contemplated by sec. 59.15 (2) (d). Otherwise, sec. 59.15 (2) (c) would be meaningless.

Accordingly, the answer to your first question is a qualified "No." The county highway commissioner is only entitled to the salary previously fixed for his office until it is formally changed pursuant to sec. 59.15 (2) (c), Stats. The answer to your second question then is "Yes." His salary may be changed during his term pursuant to that statute.

RWW:CAB

Building Commission, State; Condemnation; The Building Commission has the power of condemnation under sec. 13.48 (16), Stats., for the acquisitions authorized by sec. 13.48 (17), as created by ch. 90, Laws of 1973. Such power also exists for acquisitions under sec. 13.48 (18), as created by ch. 90, Laws of 1973, provided the acquisitions fall within the criteria of sec. 13.48 (16). The Commission must file the plan called for in sec. 32.25, Stats., whenever it contemplates engaging in land acquisition activities for which the power of condemnation exists under law.

August 7, 1974.

WAYNE F. MCGOWN, *Deputy Secretary*
Department of Administration

You have requested my opinion on the following question:

"Does the Department of Administration or the State Building Commission have the power of condemnation when

acquiring land pursuant to sections 13.48 (17) and 13.48 (18), Wis. Stats.?”

Section 13.48 (17) and (18), created by ch. 90, Laws of 1973, provide as follows:

“(17) **ADVANCED LAND ACQUISITION.** In the interest of preventing land speculation the commission may acquire property within the blocks bordered by East Washington Avenue, South Webster Street, East Wilson Street and South Hancock Street in the city of Madison for possible future construction.

“(18) **ACQUISITION OF OPEN SPACES.** The commission may acquire property adjacent to or within 2 blocks of any state facility for the purpose of establishing and developing open green spaces and possible future construction.”

Section 13.48 (16), Stats., provides:

“**MADISON DOWNTOWN STATE OFFICE FACILITIES.** The eminent domain authority of the building commission under ch. 32 is limited to the acquisition of such parcels of land as it deems necessary for a site for Madison downtown state office facilities, whenever the commission is unable to agree with the owner upon the compensation therefor, or whenever the absence or legal incapacity of such owner, or other cause prevents or unreasonably delays such agreement.”

Subsection (16) was created by ch. 397, Laws of 1969, to facilitate the acquisition of lands for the then contemplated and subsequently constructed Madison downtown state office facility.

The answer to your question depends on whether the power granted by subsec. (16) was intended to be limited to a particular office facility or whether the legislature intended to restrict such authority to a particular area and purpose.

The language “for a site for Madison downtown state office facilities,” in my opinion, supports the latter construction. The opposite conclusion would require that the word “site” be construed as singular. Such construction would be contrary to sec. 990.001 (1), Stats., which requires that in construing statutes, “the singular includes the plural,” unless such construction “produces a result

inconsistent with the manifest intent of the legislature.” I find nothing to indicate that such construction violates the manifest intent of the legislature. In fact, the manifest intent would seem to be just the contrary. Chapter 397, Laws of 1969, which created sec. 13.48 (16), Stats., was published on February 24, 1970. In March of 1969, or almost one year before the enactment of ch. 397, the Building Commission filed its 1969-1975 State Building Program report with the legislature. This report (PP 145-152) extensively discusses the possible construction of a Madison downtown office complex in succeeding phases. This report clearly shows that the building program contemplated more than one state office facility and more than one site.

Accordingly, sec. 13.48 (16), Stats., authorizes the Building Commission to acquire sites by condemnation. However, under sec. 13.48 (16), the power of condemnation of the Building Commission is restricted to the downtown Madison area and to sites for state office facilities.

The authority to acquire such sites belongs to that state agency known as Building Commission. The Department of Administration does not have the power of condemnation under sec. 13.48, Stats., nor may the Department of Administration acquire lands under secs. 13.48 (17) and (18), as created by ch. 90, Laws of 1973. These subsections all refer to the Building Commission.

It seems to me, and it is my opinion, that the power of condemnation may be exercised by the Commission to acquire lands for “possible future construction,” as authorized by sec. 13.48 (17).

First of all, subsec. (17) defines an area that meets the downtown Madison criteria as set forth in subsec. (16). Secondly, considering sec. 13.48, Stats., in its entirety, one finds that the primary purpose of the Building Commission is to provide housing for state agencies. Accordingly, the term “possible future construction,” as used in subsec. (17), must refer to “state office facilities.” Accordingly, the second criteria necessary for the exercise of the power of condemnation, as contained in subsec. (16), is met in subsec. (17).

As to subsec. (18) of sec. 13.48, as created by ch. 90, Laws of 1973, the answer depends on the location of the area involved. Obviously, the Commission cannot condemn lands under subsec.

(16) in any area that does not fall within the description "Madison downtown." Under subsec. (18), the Commission may purchase lands for the purposes specified in the subsection, but condemnation may not even be considered as a possibility if the lands do not fall within the geographic limits established in subsec. (16).

Condemnation may be employed under subsec. (18), if the lands are located within the "Madison downtown" area, and if the lands are acquired for possible future construction, or in other words, for a future state office facility.

Subsection (18) is somewhat confusing. Under this subsection, lands may be acquired "for the purpose of establishing and developing open green spaces *and* possible future construction." It is difficult to determine from the above-quoted language whether the legislature intended that all acquisitions under this subsection were to be acquired and held for future construction or whether lands could be acquired for the sole purpose of developing green spaces. If the latter interpretation is correct, it would have been clearer if the legislature had employed the word "or" rather than the word "and."

Our court in *State ex rel. Wisconsin D. M. Co. v. Circuit Court* (1922), 176 Wis. 198, 186 N.W. 732, has noted that the words "and" and "or" are often used incorrectly in statutes. Continuing, the court concluded that one may be substituted for the other in deference to the meaning of the context. "Open green spaces" and "future construction" could be, in a given situation, mutually exclusive or inconsistent uses. In my opinion, it appears that it was the intent of the legislature to authorize, under subsec. (18), the acquisition of green spaces for that purpose alone. Such acquisitions add to and preserve the beauty and usefulness of state buildings. However, the question remains as to whether lands may be acquired by condemnation for green or open spaces when such use is the only use and future construction on such lands is not within the intent of the Commission. The answer to this question depends on whether such open or green spaces fall within the term "office facilities," as used in subsec. (16) of sec. 13.48.

The term "facility" is defined in Webster's Seventh New Collegiate Dictionary as:

“1 : the quality of being easily performed 2 : ease in performance : APTITUDE 3 : readiness of compliance 4 a : something that facilitates an action, operation, or course of conduct - usu. used in pl. b : something (as a hospital) that is built, installed, or established to serve a particular purpose.”

In my opinion, the terms “open or green space” do not fall within the meaning of the phrase “office facilities.” Accordingly, in my opinion, the power of condemnation, as authorized under sec. 13.48 (16), Stats., may not be employed when such acquisitions do not involve any possibility of future construction of an office facility. Lands may be condemned and put to the interim use of open or green space, but such acquisitions must encompass the possibility of future construction and, as previously mentioned, condemnation for the purposes of subsec. (18) is restricted to the Madison downtown area by sec. 13.48 (16), Stats., and is further limited by subsec. (18) to an area “within 2 blocks” of a state facility.

You also ask:

“Is the Department of Administration or the State Building Commission, when acquiring land pursuant to sections 13.48 (17) and 13.48 (18), Wis. Stats., required to file a relocation plan and is it authorized to use public funds to make relocation payments as might be appropriate pursuant to section 32.19, Stats., et seq. where the negotiations are initiated by the seller or where the seller has publicly given indication of a desire to sell?”

In answering the above-quoted questions, I again restrict consideration to the Building Commission, for sec. 13.48 only relates to that particular agency.

In the acquisition of lands under sec. 13.48 (17), and in the acquisition of lands under sec. 13.48 (18), for which the power of condemnation may be exercised, as previously discussed, a relocation assistance plan must be filed pursuant to sec. 32.25 (1), Stats. This statute reads:

“Notwithstanding ch. 275, laws of 1931, or any other provision of law, 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 has both such plans approved in writing by the department of local affairs and development.*" (Emphasis ours.)

I am of this opinion, even though the Building Commission has not or may not authorize condemnation.¹

The term "condemnor," as employed in secs. 32.19 through 32.27, must refer to an agency that has the power of condemnation, rather than whether such power is used. For example, sec. 32.25, Stats., requires that a plan be filed and approved by a condemnor before "*any property acquisition activities*" are commenced.

Further, "displaced person," as defined in sec. 32.19 (2) (c), Stats., refers to those who are required to move as a "result of the acquisition." In other words, a person may be "displaced" within the meaning of the Act even though the acquisition resulted from a negotiated sale.

Sections 32.19 through 32.27, Stats., the State Relocation Assistance Act, is remedial legislation as can be seen from the legislative declaration set forth in sec. 32.19 (1), Stats., which reads:

"DECLARATION OF PURPOSE. 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; and the legislature further finds and declares that, notwithstanding ch. 275, laws of 1931, or any other provision of law, payment of such relocation assistance and assistance in the acquisition of replacement housing are proper costs of the construction of public improvements. If the public improvement is funded in whole or in part by a nonlapsable trust, the relocation payments and assistance constitute a purpose for which the fund of the trust is accountable."

¹Also, see opinion, dated August 3, 1973, addressed to Chas. M. Hill, Sr., Secretary, Department of Local Affairs and Development.

Remedial statutes are to be liberally construed so as to suppress the mischief and advance the remedy they offer. *Stone v. Inter-State Exchange* (1930), 200 Wis. 585, 229 N.W. 26.

The evils or loss occasioned by public acquisition is not dependent on whether the acquisition is accomplished by sale or condemnation. The same evils may exist in either process.

Accordingly, a plan must be filed by the State Building Commission for acquisitions where the power of condemnation exists even though the Commission has no intention of using such power.

Assuming an appropriation, the use of public funds for the payment of relocation assistance is, of course, appropriate.

Whether relocation benefits are payable in any given situation depends on whether such person is a "displaced person" within the meaning of that term as defined by law. The answer to whether such benefits are payable depends on an examination of all the facts relating to a particular situation. Therefore, I cannot answer the question you have asked in regard to this particular matter.

In this opinion, I have restricted consideration to the specific questions asked. The opinion is to be considered in the light of such restrictions.

In conclusion, it is my opinion that the Building Commission may exercise the power of condemnation, as given by sec. 13.48 (16), Stats., for acquisitions under sec. 13.48 (17), as created by ch. 90, Laws of 1973, and for acquisitions under subsec. (18), when such acquisitions involve lands located within the downtown Madison area and are acquired as a site for the possible future construction of state office facilities.

The Commission must file a plan as required by sec. 32.25, Stats., whenever it contemplates engaging in land acquisition activities where the power of condemnation exists under law.

RWW:CAB

Counties; Housing; Section 59.07 (1), Stats., is not sufficiently broad to permit county to furnish housing for elderly and low-income persons where specific statutes provide for furnishing of such housing.

August 8, 1974.

ROBERT P. RUSSELL, *Corporation Counsel*
Milwaukee County

You request my opinion whether sec. 59.07 (1), Stats., is broad enough to permit Milwaukee County to engage in a program of furnishing housing to the elderly in cooperation with the United States Department of Housing and Urban Development utilizing sec. 23 of the Housing Act of 1937. The county would apply for financial assistance from HUD for 150 dwelling units and would act as a clearing house for elderly tenants and rental properties. Tenants who qualify would be placed by Milwaukee County in one of the privately-owned rental units with the tenant and county paying the rent. HUD would reimburse the county for the amount of the rent subsidy plus the cost of administering the program. Title would remain in the federal agency until the property is purchased by the low-income family.

I am of the opinion that the provisions of sec. 59.07 (1), Stats., are not sufficiently broad to support such a program.

Counties have only such legislative powers as are expressly granted by statute or necessarily implied. *Maier v. Racine County* (1957), 1 Wis. 2d 384, 84 N.W. 2d 76.

Section 59.07 (1) (a), Stats., does grant the county broad general power to acquire, hold, lease, or rent real and personal property "for public uses or purposes of any nature, including without limitation acquisitions for county buildings, airports, parks, recreation, highways, dam sites in parks, parkways and playgrounds, flowages, sewage and waste disposal for county institutions, lime pits ..." etc. Subsection (d) permits the county to:

"(d) *Construction, maintenance and financing of county-owned buildings and public works projects:* 1. Construct,

purchase, acquire, lease, develop, improve, extend, equip, operate and maintain all county buildings, structures and facilities hereinafter in this subsection referred to as "projects", including without limitation swimming pools, stadiums, golf courses, tennis courts, parks, playgrounds, bathing beaches, bathhouses and other recreational facilities, exhibition halls, convention facilities, convention complexes, including indoor recreational facilities, dams in county lands, garbage incinerators, courthouses, jails, schools, hospitals, home for the aged or indigent, regional projects, sewerage disposal plants and systems, and including all property, real and personal, pertinent or necessary for such purposes.

"2. Finance such projects, ... by the issuance of mortgage bonds under s. 66.066, and payable solely from the income, revenues and rentals and fees derived from the operation of the project ...

"3. Operate or lease such projects in their entirety or in part, impose fees or charges for the use of or admission to such projects. Such projects may include space designed for leasing to others if such space is incidental to the purposes thereof."

The Milwaukee County proposal is essentially a management contract for the furnishing of housing to the elderly. From the information given it is not clear that the county would acquire any interest in real estate or occupy the position as landlord. Whereas sec. 59.07 (1) (a), (d), Stats., is to be construed broadly, in favor of power in the county, it is noted that the purposes listed in the statute do not include furnishing of housing to the elderly or persons of low income except in the form of "home for the aged or indigent." Permissible public purposes must be construed in light of those listed and be somewhat similar in nature. Since the legislature has, in sec. 59.07 (55), Stats., provided power in a county over 500,000 to provide housing for "persons who have resided in such county for more than 2 years and whose income is insufficient ..." and has provided in sec. 59.075, Stats., that the county may utilize the provisions of secs. 66.40 to 66.404, Stats., to create a housing authority to provide housing for persons of low income, it is my opinion that the legislature intended that such housing be furnished under one of the last mentioned statutes. Section 66.395, Stats., does

permit cities to create a housing authority for elderly persons regardless of income; however, the legislature has not made that statute applicable to counties.

Section 59.075 (3), Stats., is a provision which attempts to prevent overlapping jurisdiction and provides that a county housing authority shall not undertake any housing project within a city or village unless such municipality passes a resolution indicating a need for the county housing authority to exercise its power within the city or village. Section 66.4325, Stats., providing for a housing and redevelopment authority in cities of the first class, also contains provisions to prevent overlapping jurisdiction between such authority and "any housing authority created under s. 66.40 operating in such city..."

These specific provisions relating to the manner in which housing can be furnished to the elderly and persons of low income, and accompanying restrictions, are indications that the legislature did not intend that counties should have power to furnish or manage housing facilities for the aged, other than in county-owned, leased or operated homes for the aged or indigent under the general provisions of sec. 59.07 (1), Stats.

Milwaukee County evidently does not wish to utilize secs. 59.075 and 66.40-66.404, Stats., to proceed under a county housing authority. Cooperation of the City of Milwaukee and other cities and villages within the county would be needed. Section 59.07 (55), Stats., when construed with sec. 59.07 (1), Stats., does give the county full power to undertake the project desired. The Department of Housing and Urban Development objects to the two-year residency requirement in the statute. While it may be constitutionally suspect, it is presumed valid until declared invalid in a proper action. I am of the opinion that such restriction is severable. I suggest that, if the county wishes to proceed, renewed effort be made to secure federal financing through the use of that statute. The county may wish to sponsor legislation to remove the residency restriction which the federal agency questioned as early as 1972.

RWW:RJV

Counties; Schools And School Districts; Taxation; Counties are liable for proportionate share of tax certified to them prior to repeal of sec. 59.07 (21) by sec. 300m of ch. 90, Laws of 1973.

August 15, 1974.

WILLIAM LEITSCH, Corporation Counsel
Columbia County

In your letter of April 10, 1974, you ask a question relative to the provisions for county school tax contained in sec. 59.07 (21), 1971 Stats.

Prior to its repeal by sec. 300m of ch. 90, created by the Laws of 1973, this section provided that counties levy a tax "sufficient to pay county aids to districts which qualify in an amount not less than \$350 per teacher unit operating in the county in the preceding year. ..."

In addition, this section provided that if a school district lies in more than one county, "the county in which such elementary teachers during the preceding year are employed shall be reimbursed by any other county in which the school district lies for its share of such \$350 for the number of elementary teachers in the whole district in the ratio which the full valuation of the property of the school district lying in the other county bears to the full valuation of all the property in the district; ..."

Section 300m of ch. 90, Laws of 1973, repealing sec. 59.07 (21), 1971 Stats., became effective August 4, 1973.

As indicated in your letter, under the provisions of sec. 59.07 (21), the State Department of Public Instruction certified to the counties the amount that they should include in their budget for school purposes under sec. 59.07 (21). Where the school districts are located in more than one county, the school district certifies the proportionate share due the county paying the full amount. This county then bills to the other county the amount due from it.

In response to a request for specific facts regarding payments made by Columbia County under sec. 59.07 (21), the County Clerk, Natalie Sampson, in a letter dated May 24, 1974, wrote in part:

“On March 16, 1973 we issued checks to the School District Treasurers in Columbia County in the total amount of \$107,450.00 as certified to us by the Department of Public Instruction for the year 1971-72.

“On March 25, 1974 we sent bills to the counties bordering Columbia County for the pro-rata share in the total amount of \$22,716.40.”

This information is verified by copies of the certification and schedule of apportionments furnished to us by the County Clerk of Columbia County. In addition, we have been furnished with a copy of a schedule of payments made by Columbia County to the treasurers of the school districts pursuant to the apportionment schedule.

Your question is: By repeal of sec. 59.07 (21), 1971 Stats., are such counties liable for payment of the amount billed to them for their proportionate share of the 1972 tax when such share was paid in full prior to the passage of sec. 300m of ch. 90, as created by the Laws of 1973?

In my opinion, the answer to your question is that counties are liable for payment of their proportionate share pursuant to a 1972 certification showing payment of the full amount prior to the passage of sec. 300m of ch. 90, Laws of 1973.

Once the entire sum of aid was paid pursuant to sec. 59.07 (21) (b), the proportional share paid by the county paying the whole amount in the first instance became due to that county from the county on whose behalf payment was made. This right to payment is similar to a contractual right which has been perfected to a degree that the continued existence of the statute is not necessary to protect that right. Because it is a vested right, it has an existence of its own which cannot be extinguished by sec. 300m created by ch. 90, Laws of 1973.

“Under common law principles of construction and interpretation the repeal of a statute or the abrogation of a common law principle operates to divest all the rights accruing under the repealed statute or the abrogated common law, and to halt all proceedings not concluded prior to the repeal. However, a right which has become vested is not dependent upon the

common law or the statute under which it was acquired for its assertion, but has an independent existence. Consequently, the repeal of the statute or the abrogation of the common law from which it originated does not erase a vested right, but it remains enforceable without regard to the repeal.

“In order to become vested, the right must be a contract right, a property right, or a right arising from a transaction in the nature of a contract which has become perfected to the degree that the continued existence of the statute cannot further enhance its acquisition.” Sutherland Statutory Construction, Vol. 1A, 4th Ed., sec. 23.34, p. 283. (Emphasis added.)

In addition, sec. 990.04, Stats., provides in part as follows:

“The repeal of a statute hereafter shall not remit, defeat or impair any ... rights of action accrued under such statute before the repeal thereof, ... and rights of action created by or founded on such statute, ... shall be preserved and remain in force notwithstanding such repeal, unless specially and expressly remitted, ... by the repealing statute. ...”

It is my opinion that this section is applicable here.

In view of the foregoing, it must be concluded that the counties are liable for payment of their proportionate share in accordance with the 1972 certification of the county paying the whole amount in the first instance.

RWW:JWC

Administration, Department Of; Public Records; Department of Administration probably has authority under sec. 19.21 (1), (2), Stats., to provide private corporation with camera-ready copy which is product of printout of computer stored public records if costs are minimal. State cannot contract on a continuing basis for the furnishing of this service.

August 15, 1974.

WAYNE F. MCGOWN, *Deputy Secretary*
Department of Administration

On behalf of the Wisconsin Council on Printing, created by sec. 15.107 (3), Stats., which has the duty under sec. 15.09 (5), Stats., to advise the Department of Administration on state printing matters, you request my opinion whether the Department has authority to provide camera-ready copy of session laws to a private corporation.

You advise that the computer-assisted composition unit of the State Printing Section has the ability to accept a variety of copy inputs and, through an automated text editing program, produce camera-ready copy. The material involved is already on the computer. The Department would use the same format as would be used for the production of public documents. The service to West Publishing Company would consist solely of a pass-through of material already on the computer tape to produce the hard copy on photosensitive paper. The Department proposes to charge the corporation the full cost of services at the same rates charged state agencies for similar service. The corporation would use the camera-ready copy in the production of West's Wisconsin Legislative Service and would effect a savings of rekeyboarding and proofreading.

A pass-through would consist of resetting levers or keys on the machine, so that the camera-ready "copy" would be in a format desired by West Publishing Company, and pressing the button which activates the machine. I am advised that the only hard copy (end product) which the unit produces is camera-ready "copy" on photosensitive paper. It will not reproduce material stored on computer tape on film. Camera-ready "copy" is text material in a form which can be photographed and stored on film which is used in the printing process.

This opinion assumes that the state has authority to have the computer-assisted composition unit and that the unit itself is not used for the purpose of *printing* of materials included within Art. IV, sec. 25, Wis. Const., which are required to be let by contract to the lowest bidder. See 1910 OAG 777; 1912 OAG 128, 130; 1912 OAG 914; 6 OAG 54 (1917); 23 OAG 106 (1934); 31 OAG 60 (1942); 32 OAG 95 (1943); *Sholes v. The State* (1850), 2 Pin. 499, 2 Chand. 182;

Democrat Printing Co. v. Zimmerman (1944), 245 Wis. 406, 14 N.W. 2d 428.

I do not view the constitutional provision or those opinions or cases as prohibiting the state from operating a machine which produces copy ready for a contract printer.

In 59 OAG 145 (1970), it was stated that sec. 16.74, Stats., would permit the sale of computer programs as *surplus* provided that they were not created for resale purposes and that such programs were public records within the meaning of sec. 19.21 (1), Stats., and could be inspected and copied. The opinion stated that sec. 19.21 (2), Stats., would enable the custodian to copy and charge reasonable copying costs.

The corporation could receive copies of the session laws under sec. 35.87 or 35.91, Stats. It wants something more. The computer tapes themselves are public records within the meaning of secs. 16.80 (1) (a) and 19.21 (1), Stats., and are subject to inspection and copying. The camera-ready copy the state produces for its own use or for contract printers is also a public record, subject to inspection and copying. I am informed, however, that camera-ready copy cannot be copied so as to provide another camera-ready copy, but that the computer tape must be run through the unit again to produce another useable camera-ready copy on photosensitive paper. State public funds may be expended only for a state public purpose. *State ex rel. Larson v. Giessel* (1954), 266 Wis. 547, 64 N.W. 2d 421.

I do not view sec. 16.74, Stats., as authorizing sale of camera-ready copy since it cannot, under the circumstances, be viewed as surplus. I am of the opinion, however, that under the rationale of 59 OAG 145 (1970), that sec. 19.21 (2), Stats., would permit the Department to furnish a copy of the printout of the computerized composition unit, and since the unit will produce nothing else than camera-ready copy on photosensitive paper, such copy may be furnished to the private corporation at reasonable charge if the extra expense of personnel and material is minimal. It is my further opinion that the Department does not have authority to contract on a continuing basis for the furnishing of camera-ready copies. The primary purpose of sec. 19.21 (1), (2), Stats., is to enable the public to discover what is in public records.

RWW:RJV

Legislation; Statutes; A bill such as 1973 Assembly Bill 1480 would probably result in a valid law even if the procedures specified in sec. 13.50 (6), Stats., are disregarded by the legislature. When an act is passed by both houses, in accordance with constitutional requirements, the courts will not inquire into whether statutory legislative procedures were followed.

August 16, 1974.

THE HONORABLE, THE SENATE

Legislature

By Senate Resolution No. 44 you request my opinion on two questions regarding 1973 Assembly Bill 1480. You ask (1) whether such bill is "legally before the Senate" and (2) "whether any law resulting from the enactment of 1973 Assembly Bill 1480 would be valid." Both questions are premised on the fact that the bill was passed by the Assembly and messaged to the Senate without referral to the Joint Survey Committee on Retirement Systems under sec. 13.50 (6), Stats.

By virtue of the adjournment provisions of 1973 enrolled joint resolution 4, Assembly Bill 1480 may be presumed to be adversely acted upon and, therefore, dead. Thus, the issues of whether the bill is now properly before the Senate and whether a law resulting from its enactment would be valid are moot. However, I consider the real issue raised--whether the failure of either branch of the legislature to follow statutory rules for legislative proceedings invalidates an otherwise validly enacted statute--is an issue proper for discussion and answer. It is for this reason that I have answered your inquiry.

Section 13.50 (6) (a) and (b), Stats., reads:

"(6) **POWERS AND DUTIES.** The committee shall have the following powers and duties:

"(a) No bill or amendment thereto creating or modifying any system for, or making any provision for, the retirement of or

payment of pensions to public officers or employes, shall be acted upon by the legislature until it has been referred to the joint survey committee on retirement systems and such committee has submitted a written report on the proposed bill. Such report shall pertain to the probable costs involved, the effect on the actuarial soundness of the retirement system and the desirability of such proposal as a matter of public policy.

“(b) No bill or amendment thereto creating or modifying any system for the retirement of public employes shall be considered by either house until the written report required by par. (a) has been submitted to the chief clerk. Each such bill shall then be referred to a standing committee of the house in which introduced. The report of the joint survey committee shall be printed as an appendix to the bill and attached thereto as are amendments.”

Clearly, Assembly Bill 1480 fits within the category of bills that are required to be sent to the Joint Survey Committee on Retirement Systems before consideration by either house. What then is the effect of one or both houses disregarding sec. 13.50 (6), Stats., and passing the bill without reference to the committee?

Article IV, sec. 8, Wis. Const., provides that “Each house may determine the rules of its own proceedings.” While the two houses of the legislature have joined together to adopt a procedural rule by statute, sec. 13.50 (6), Stats., neither house is effectively bound to observe such rule.

The effect of disregarding a rule of procedure is summarized in Sutherland Statutory Construction, 4th Ed., Vol. 1, sec. 7.04 at p. 264:

“The decisions are nearly unanimous in holding that an act cannot be declared invalid for failure of a house to observe its own rules. Courts will not inquire whether such rules have been observed in the passage of the act. Likewise, the legislature by statute or joint resolution cannot bind or restrict itself or its successors as to the procedure to be followed in the passage of legislation. In those jurisdictions where the enrolled bill is conclusive the rule is explained on the ground that the courts, as in other cases, will consider no evidence except the enrolled bill.

More generally applicable is the rule that the constitution having conferred this rule-making power on the legislature, excludes the court. The court without violating the separation-of-powers rule and the specific constitutional directions could not review the legislative act. The reason has been well stated by the Supreme Court of the United States in *United States v. Ballin*: "The constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just. It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and, within the limitations suggested, absolute and beyond the challenge of any other body or tribunal."

Section 13.50 (6), Stats., does not embody any constitutional requirement. Consequently, disregard of such section by one or both houses of the legislature is not violative of the fundamental law. The extent of legislative power and the role of the court in review of such power is stated in *State ex rel. McCormack v. Foley* (1962), 18 Wis. 2d 274, 280-281, 118 N.W. 2d 211, in the words:

"... This court has consistently held that the legislative power is not derived from either the state or federal constitution. The constitutional provisions are only limitations upon the legislative power. This court has uniformly approached the question as to the constitutionality of a legislative act on the basic principle that every presumption and intendment is in favor of the legislative act's validity. The rule is that it is the recognized duty of the court to sustain the act of the legislature unless it is clear beyond a reasonable doubt that it is violative of the fundamental law."

It is my view that sec. 13.50 (6), Stats., a rule of legislative procedure not mandated by the Constitution, is not binding upon the present or subsequent legislatures and cannot be the basis for invalidation of enactments resulting from contrary procedures. The Wisconsin Supreme Court at an early date adopted the proposition that legislative procedures, not in violation of constitutional requirements, are not reviewable by the courts. In *McDonald v. State* (1891), 80 Wis. 407, 411-412, 50 N.W. 185, the court stated:

“The courts will take judicial notice of the statute laws of the state, and to this end they will take like notice of the contents of the journals of the two houses of the legislature far enough to determine whether an act published as a law was actually passed by the respective houses in accordance with constitutional requirements. Further than this the courts will not go. When it appears that an act was so passed, no inquiry will be permitted to ascertain whether the two houses have or have not complied strictly with their own rules in their procedure upon the bill, intermediate its introduction and final passage. The presumption is conclusive that they have done so. We think no court has ever declared an act of the legislature void for non-compliance with the rules of procedure made by itself, or the respective branches thereof, and which it or they may change or suspend at will. If there are any such adjudications, we decline to follow them.”

It must be noted that an argument could be made that the court in *State ex rel. General Motors Corp. v. Oak Creek* (1971), 49 Wis. 2d 299, 329, 182 N.W. 2d 481, suggested that an alternative ground for holding the statute concerned therein unconstitutional was the legislature's failure to comply with the statutory mandates for enactment of such statute. I met this argument in a previous opinion, 60 OAG 245, and reaffirm the language from such opinion, p. 250-251, wherein I stated:

“... In light of all of the circumstances, including the well established principles set forth above, as well as the presumption of constitutionality, I conclude that until the issue is squarely presented and argued to the court, this language should be regarded as *obiter dictum*.”

In conclusion then, it is my opinion, based upon the above authorities, that the courts would consider the question of whether a bill such as 1973 Assembly Bill 1480 is legally before the Senate improper for their determination if the alleged illegality is that of failure to follow procedure set forth in the statutes. I further conclude that any law resulting from enactment of such a bill would enjoy the conclusive presumption of constitutionality and the courts would not look into the question of compliance with sec. 13.50 (6), Stats.

RWW:WMS

Counties; Parks: An agreement to purchase park land whereby a county is to make deferred payments from an existing nonlapsing account (sufficient to cover the entire obligation) secured by mortgaging the property to the grantor, would not create an obligation within the ambit of ch. 67, Stats., nor constitute a debt in the context of Art. XI, sec. 3, Wis. Const.

August 20, 1974.

JAMES A. BOTTONI, JR., *Corporation Counsel*
Washington County

You have requested my opinion as to whether an option agreement Washington County is negotiating with the owner of a proposed park site falls within the purview of ch. 67 of the Wisconsin Statutes.

As I understand it, the option agreement calls for five annual payments secured by a mortgage note. Interest is to be paid the grantor annually on the unpaid balance. The option agreement specifies that the county will apply for federal and state funding for portions of the project's cost. A prerequisite for such nonlocal funding is the establishment of a nonlapsing account sufficient to purchase the site. Since the county has already set aside the required fund, there is no apparent need to borrow money for the project. Nevertheless, the nature of the agreement causes you to inquire whether it is within the purview of ch. 67 or whether there are any

prohibitions against a county entering into an agreement providing for a deferred payment schedule secured by a mortgage note.

It is my opinion that the purchase agreement you describe does not fall within the ambit of ch. 67. Nor would it constitute a debt in the context of Art. XI, sec. 3, Wis. Const.

Chapter 67 regulates municipal borrowing. It authorizes municipal borrowing for enumerated purposes; codifies the constitutional debt limitation and exceptions thereto; and, specifies the procedure for borrowing when it is permissible. Section 67.03, Stats., provides, in part:

“(1) Except as provided in s. 67.01 (8), municipalities *may borrow money and issue municipal obligations therefor* only for the purposes and by the procedure specified in this chapter. The aggregate amount of indebtedness, including existing indebtedness, of any municipality shall not exceed 5% of the value of the taxable property located therein as equalized for state purposes except as follows: ...” (Emphasis supplied.)

Although the agreement seems to fit within the broad definition of “municipal obligation” set out in sec. 67.01 (2), Stats., the obligation is not one incurred in the course of borrowing money. Consequently, ch. 67 does not apply. Furthermore, the transaction would not create an obligation subject to the more comprehensive debt limitations of Art. XI, sec. 3, Wis. Const.

Article XI, sec. 3, Wis. Const., provides, in part:

“... No county, city, town, village, school district or other municipal corporation may become indebted in an amount that exceeds an allowable percentage of the taxable property located therein equalized for state purposes as provided by the legislature. In all cases the allowable percentage shall be five per centum except as follows: ...

“Any county, city, town, village, school district, or other municipal corporation incurring any indebtedness as aforesaid, shall before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal

thereof within twenty years from the time of contracting the same; ...”

Unlike ch. 67, Art. XI, sec. 3 is not limited to the borrowed money situation. It is conceptually applicable to all obligations to pay money or its equivalent. *State ex rel. Owen v. Donald* (1915), 160 Wis. 21, 151 N.W. 331. But, “debt” has been construed so as to exempt various obligations which do not pose the danger of the abuses that Art. XI, sec. 3, was designed to prevent. See Kiernan, *Wisconsin Municipal Indebtedness, Part I, The Power To Become Indebted And Its Limits*, 1964 Wis. L. Rev. 173.

One such exception is the situation where there is money in the treasury to meet a liability at the time it is incurred. The general rule is stated in 15 McQuillin *Mun. Corp.* (3rd Ed.), sec. 41.20:

“If at the time the obligation is created, there is money in the treasury sufficient to meet a liability, and which can be applied thereto when due, no indebtedness is incurred.’ Thus, if when a city makes a contract, for a filtration plant for example, it has on hand funds available, that is, sufficient in amount to meet its obligations under the contract as they mature, obviously no indebtedness is thereby created. It is a cash transaction.”

The footnote cites *Earles v. Wells* (1896), 94 Wis. 285, 68 N.W. 964. In *Earles, supra*, the court held that a debt ostensibly incurred by a private party was in reality a municipal indebtedness. A private party constructed a waterworks to be leased to the city. The agreement provided that once municipal rental payments retired the builder’s mortgage, title to the facility would pass to the city. In the course of its decision, the court exempted liabilities covered by money already in the treasury or imminently collectable from consideration as debt for purposes of Art. XI, sec. 3, Wis. Const.:

“So long as the current expenses of the municipality are kept within the limits of the moneys and assets actually in the treasury, and the current revenues collected or in the process of immediate collection, the municipality may be fairly regarded as doing business on a cash basis, and not upon credit,—even though there may be for a short time some unpaid liabilities. ... But the moment an indebtedness is voluntarily created ‘in any manner or for any purpose,’ with no money or assets in the

treasury, nor current revenues collected or in process of collection for the payment of the same, that moment such debt must be considered in determining whether such municipality has or has not exceeded the constitutional limit of indebtedness." 94 Wis. at 298-299.

This distinction, albeit dicta in *Earles*, has been reiterated in numerous subsequent cases. In *State ex rel. Warren v. Nusbaum* (1973), 59 Wis. 2d 391, 428, 208 N.W. 2d 780, the court utilized the following quote from *State ex rel. Owen, supra*:

"There is nothing particularly technical about the meaning of the word "debt" as used in the constitution. It includes all absolute obligations to pay money, or its equivalent, from funds to be provided, *as distinguished from money presently available or in process of collection and so treatable as in hand.* *Earles v. Wells*, 94 Wis. 285, 68 N. W. 964; *Doon Tp. v. Cummins*, 142 U. S. 366, 376, 12 Sup. Ct. 320." (Emphasis supplied.) 160 Wis. at 59.

Another exception from Art. XI, sec. 3, Wis. Const., which may be applicable is the exemption afforded obligations that do not encumber the municipality's general revenues nor assets owned prior to incurring the debt. *Burnham v. City of Milwaukee* (1897), 98 Wis. 128, 73 N.W. 1018, held that an obligation is not a constitutional debt if it is neither payable from general revenues, nor secured by any asset owned by the municipality prior to incurring the debt. *See also*, sec. 67.03 (3), Stats., with respect to obligations to which ch. 67 is applicable.

Therefore, I conclude that since the option agreement does not involve borrowing money, the arrangement is not within the purview of ch. 67, Stats. Furthermore, if there is in the treasury a nonlapsing account sufficient to cover the entire obligation created by the agreement (or if the agreement clearly specifies that it does not encumber the county's general revenues or property owned prior to the transaction), it is not a debt subject to Art. XI, sec. 3, Wis. Const. Accordingly, the agreement is only subject to ch. 27, Stats., and other provisions regarding county acquisition of park lands.

RWW:CAB

ERRATA SHEET

Replace page 313 of 1974 opinions, Volume 63, with this page.

OPINIONS OF THE ATTORNEY GENERAL

313

Governor; Governor's veto of inseparable part of section 3 of Senate Bill 598 constitutes an objection to all of section 3 within the meaning of Art. V, sec. 10, Wis. Const., and the entire section 3 is returned to the legislature for reconsideration. Article V, sec. 10, Wis. Const., discussed.

August 21, 1974.

ERNEST C. KEPPLER, *Chairman*
Committee on Senate Organization

Section 3 of Senate Bill 598 (ch. 298, Laws of 1973) was vetoed in part by the Governor. Section 3, as passed by the legislature, provided:

"Section 3. 20.370 (2) (vr) of the statutes is created to read:

"20.370 (2) (vr) Snowmobile law enforcement. From interest earnings on snowmobile registration, the amounts in the schedule for departmental law enforcement under ch. 350 not to exceed \$130,000 or the amount of interest earned in any fiscal year from snowmobile registration fees, whichever is less."

As partially vetoed, section 3 provides:

"20.370 (2) (vr) Snowmobile law enforcement. ~~From interest earnings on snowmobile registration,~~ the amounts in the schedule for departmental law enforcement under ch. 350 not to exceed \$130,000 ~~or the amount of interest~~ earned in any fiscal year from snowmobile registration fees, ~~whichever is less.~~"

You ask, on behalf of the Senate Committee on Organization, my opinion of the effect of such partial veto, i.e., does it constitute an objection to all of section 3, requiring the return of section 3 in its entirety to the legislature for reconsideration.

The Governor's authority to veto parts of an appropriation bill is found in Art. V, sec. 10, Wis. Const., set out in part below:

"... 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. ...”

The requirements for a valid partial veto were set out as follows in *State ex rel. Finnegan v. Dammann* (1936), 220 Wis. 143, 146, 264 N.W. 622:

“In the previous case of *State ex rel. Wisconsin Tel. Co. v. Henry*, 218 Wis. 302, 260 N.W. 486, this court for the first time had occasion to consider the scope of the 1930 constitutional amendment. It was there held: (1) That the 1930 amendment permits the veto by the governor of any separable part of an appropriation bill; and (2) that this power to partially veto exists, although the part vetoed does not deal with appropriations. ...”

Because section 3 contains an appropriation, only one question remains to be answered: Is that portion vetoed a “separable part”?

In *State ex rel. Wisconsin Tel. Co. v. Henry* (1935), 218 Wis. 302, 260 N.W. 486, an extensive discussion of what constitutes a “separable part” was conducted by the court. In that discussion, set out in part below, the court made it clear that a “separable part” *did not* include contingencies or conditions placed on the appropriation by the legislature:

“We have not found any reported cases construing the similar constitutional provision in Mississippi, Kentucky, New Mexico, and North Dakota, with the exception of *State ex rel. Teachers & Officers v. Holder, supra*, and *Miller v. Walley*, 122 Miss. 521, 84 So. 466. As in those cases, the parts of a bill which were disapproved by the executive prescribed conditions upon which the payment of the appropriation was expressly made contingent, so that the parts vetoed were clearly integral and inseparable parts of the appropriation made in the bill, ... what constitutes a ‘part’ of an appropriation bill, and is therefore subject to a partial veto under sec. 10, art. V, Wisconsin constitution, is not difficult to ascertain in this case, if, as stated, the provisions in the disapproved parts of Bill No. 48 A were not provisos or conditions upon which the appropriation in the approved portions was made dependent or contingent.” pp. 312-313-314.

Section 3, as passed by the legislature, would appropriate for enforcement purposes the lesser of \$130,000 or the amount of interest earned from snowmobile registration fees. The effect of the veto would be to appropriate, in any year, \$130,000 for enforcement regardless of the amount of interest earned on registration fees, assuming those fees total more than \$130,000. Thus, a contingency or condition on the amount appropriated in any year was removed by the partial veto. Therefore, such a partial veto was not authorized by Art. V, sec. 10, Wis. Const., and was invalid.

My conclusion of invalidity is supported by the purpose of Art. V, sec. 10, Wis. Const., as 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,”

The probable effect of the partial veto of section 3 would be to increase the amount appropriated in any year contrary to the purpose of a partial veto, i.e., the reduction or elimination of individual appropriations.

The effect of an invalid partial veto was considered by the Wisconsin Supreme Court in only one case, *State ex rel. Finnegan v. Dammann* (1936), 220 Wis. 143, 264 N.W. 662. The result of that consideration was as follows at pages 149-150:

“The next question is as to the effect of the partial veto. We have been favored with able argument to the effect that the veto being a nullity, the approval of the governor must be considered as unqualified. We are satisfied that this contention is not

sound. It is conceded by both plaintiff and defendant that in order to become a law this act required the governor's approval. Both sound principle and the decisions bearing upon the question establish that whether or not an invalid partial veto results in an act being in force or wholly inoperative, depends entirely upon whether the act could become a law without the governor's sanction and approval, or whether it required this approval before it could become law. In the former case, the partial veto being ineffective as a veto and no approval being required, the law is in force. In the latter case, an express approval of the law as enacted being required and only a qualified approval given, the act wholly fails. *Nowell v. Harrington*, 122 Md. 487, 89 Atl. 1098; *Wood v. State Administrative Board*, 255 Mich. 220, 238 N. W. 16; *Mills v. Porter*, 69 Mont. 325, 222 Pac. 428, 35 A. L. R. 592; *State ex rel. Jamison v. Forsyth*, 21 Wyo. 359, 133 Pac. 521; *State ex rel. Teachers & Officers of Ind. Inst. and College v. Holder*, 76 Miss. 158, 23 So. 643; *Regents of State Univ. v. Trapp*, 28 Okla. 83, 113 Pac. 910.

"However invalid and nugatory the veto may have been, it did in fact operate to destroy the unequivocal character of the governor's approval. *This question is not to be answered by conjecture or speculation whether the governor would or would not have signed the act had he correctly determined the extent of his powers partially to veto it.* The question is whether, as a matter of fact, the bill as enacted had the governor's approval. The partial veto, however invalid, indicates that it did not.

"Since the act required the approval of the governor, and did not receive it, the conclusion is inevitable that Bill No. 312, S., never became a law and *mandamus* does not lie to compel its publication by the defendant." (Emphasis added.)

In *State ex rel. Finnegan v. Dammann*, the partial veto was invalid because the bill was not an appropriation bill and therefore not subject to partial veto. The Governor could only approve or veto the bill in its entirety. The court, as indicated by the quoted passage, would not speculate on the Governor's response had he realized that a veto in part was not possible and therefore held the entire bill invalid. In contrast, Senate Bill 598 is a proper subject for partial veto. The

Governor approved all of the bill except a portion of section 3, and that approval in part would have been proper had the Governor "correctly determined the extent of his powers partially to veto it." Therefore, we need not speculate as to the Governor's intent with respect to those parts of the bill previously approved. They became law as Art. V, sec. 10, Wis. Const., provides:

"... the part approved shall become law ..."

However, the ascertaining of the Governor's reaction to section 3 "had he correctly determined the extent of his powers partially to veto it" would require speculation, and thus, I must conclude that the Governor objected to all of section 3. Therefore, section 3 must "be returned in the same manner as provided for other bills" for legislative reconsideration.

RWW:JEA

County Board; Libraries; County board, in county having a single-county federated public library system, cannot abolish system board appointed under sec. 43.19 (1) (a), Stats., and transfer functions and duties to committee of county board.

August 27, 1974.

DR. BARBARA THOMPSON, *State Superintendent*
Department of Public Instruction

You request my opinion whether a county board, in a county having a federated public library system whose territory lies within a single county and which is governed by a system board pursuant to sec. 43.19 (1) (a), Stats., can abolish such system board and transfer the functions, duties, responsibilities and privileges of such board to a committee of the county board of supervisors.

I am of the opinion that it cannot. Whereas sec. 43.18 (2), Stats., would permit the county to abolish "a public library system" whose territory lies only within the county, it cannot retain the system and at the same time abolish the board which is expressly provided for by statute.

County boards have only such legislative powers as are expressly granted by statute or necessarily implied. *Columbia County v. Wisconsin Retirement Fund* (1962), 17 Wis. 2d 310, 116 N.W. 2d 142; *Maier v. Racine County* (1957), 1 Wis. 2d 384, 84 N.W. 2d 76.

Section 59.025 (3) (b), (c) and (4), Stats., as created by ch. 118, Laws of 1973, does contain broad language as to the power of counties to “consolidate, abolish or reestablish any county office, department, committee, *board*, commission, position or employment” and to “transfer some or all functions, duties, responsibilities and privileges” of such agencies to “any other agency including a committee of the board” of supervisors and provides, subject to exceptions, that the board may determine the method of selection of any county officers.

This broad language is subject to the limitations contained in the introduction to sec. 59.025 (3), Stats., and to sec. 59.025 (2), Stats., which provides in part:

“... The powers hereby conferred shall be in addition to all other grants and *shall be limited only by express language but shall be subject to the constitution and such enactments of the legislature of statewide concern as shall with uniformity affect every county*. In the event of conflict between this section and any other statute, this section to the extent of such conflict shall prevail.” (Emphasis added.)

Section 43.17 (1), Stats., provides in part:

“(1) BOARD TERMS. Every public library system *shall be governed by a board appointed under s. 43.19 or 43.21 ...*” (Emphasis added.)

Section 43.19 (1) (a), Stats., provides:

“(1) (a) In a federated public library system whose territory lies within a single county, the system board *shall consist of 7 members appointed by the county board*. At least 3 members of the system board, at the time of their appointment, *shall be active voting members of library boards governing public libraries of participating municipalities, and at least one of these shall be a member of the library board governing the headquarters library*. *At least one but not more than 2*

members of the county board shall be members of the system board at any one time." (Emphasis added.)

Section 43.19 (1) (b), Stats., which is applicable to multi-county federated public library systems, provides that the system board shall have representation from the governing board of the headquarters library, representatives from the governing boards of participating libraries, public members and expressly limits the number of county board members who may serve.

Section 43.21 (1), Stats., which is applicable to consolidated public library systems, provides that the *initial* board shall consist of at least three members who are voting members of library boards governing public libraries consolidated and expressly provides that at least one and not more than two members of the county board shall be members of the system board at any one time.

I am of the opinion that the provisions of secs. 43.19 (1) (a), (b), 43.21 (1), Stats., are "enactments ... of statewide concern as shall with uniformity affect every county" even though sec. 43.19 (3), Stats., permits some variance with respect to counties over 500,000. Reasonable classification permits some variation. Section 43.19 (3), Stats., does not prohibit counties over 500,000 from utilizing sec. 43.19 (1), (2), Stats.

Chapter 43, Stats., makes a distinction between public libraries and public library systems. A county may have a public library under sec. 43.52, Stats., and if over 150,000 population, can have a county library system under sec. 43.57, Stats. In the latter case membership of the governing board is governed by sec. 43.54, Stats., and subsec. (1) (c) thereof provides that not more than one member of the municipal governing body shall at any one time be a member of the library board. While sec. 43.57, Stats., refers to a county system of libraries as a public library system, it is not the type of system contemplated under secs. 43.19, 43.21, Stats., as sec. 43.001 (3), Stats., provides:

"(3) 'Public library system' means a system established as either a federated public library system under s. 43.19 or a consolidated public library system under s. 43.21."

Chapter 152, Laws of 1971, revised and recodified library laws and created provisions and standards for the establishment of public

library systems. I am of the opinion that provisions of ch. 43, Stats., which relate to the establishment and operation of public library systems, are matters of statewide concern which affect every county.

While sec. 43.19 (2) (a), Stats., provides that a federated public library system whose territory lies within a single county is a county agency and sec. 43.21 (2) (a), Stats., provides that a consolidated public library system, which by sec. 43.15 (3) (a), Stats., can consist of only one county, is a county agency, other sections evidence a purpose of overriding statewide concern. Section 43.09 (2) (a), Stats., provides that the Division for Library Services under the State Superintendent shall promulgate necessary standards for public library systems. Section 43.13 (1) (a), Stats., provides that "No public library system may be established without the approval of the division. ..." Section 43.15, Stats., provides standards for public library systems and subsec. (4), Stats., thereof provides for the method of operation. There must be a headquarters library and in a federated system, the governing body of each county must enter into written agreements with underlying cities, villages and towns "as have public libraries and are participating in the system." Section 43.17, Stats., has provisions as to board terms, that every system be governed by a system board under sec. 43.19 or 43.21, Stats., fiscal year, administration, reports to the state division, retirement, contracts and bidding. Section 43.18, Stats., governs withdrawal and abolition, sec. 43.19, Stats., governs federated systems, and sec. 43.21, Stats., governs consolidated systems. State monetary aids are provided in sec. 43.24, Stats., conditioned on state division review to insure that the systems receiving state aids conform to state standards.

In my opinion, in order to conform to state standards, a federated public library system whose territory lies within one county would have to be governed, as provided in sec. 43.17 (1), Stats., by a board appointed under and comprised of membership established in sec. 43.19 (1) (a), Stats.

RWW:RJV

Counties; Municipalities; Counties may charge a one percent of project cost administrative fee for work done on municipal roads pursuant to sec. 83.035, Stats.

August 28, 1974.

DAVID B. DEDA, *District Attorney*
Price County

You have requested my opinion on the question of whether the county highway department may charge towns a fee of one percent of project cost to cover administrative costs of road work performed by the county for the town.

As I understand it, the Price County Highway Committee established the one percent charge in 1961. It was apparently patterned after the one percent fee the Department of Transportation, Division of Highways, pays counties to compensate for the administrative costs generated when counties do work on state highways.

It is my opinion that counties may charge a one percent of project cost administrative fee for work done on municipal roads. Authority to do so is necessarily implied from counties' express authority to enter into contracts to do road work for municipalities. Section 83.035, Stats., provides as follows:

"Streets and highways, construction. Any county board may provide by ordinance that the county may, through its highway committee or other designated county official or officials, enter into contracts with cities, villages and towns within the county borders to enable the county to construct and maintain streets and highways in such municipalities."

This grant of authority was originally sec. 59.08 (35), Stats. (1953). It was repealed and recreated as sec. 83.035, by ch. 651, sec. 21, Laws of 1955. In 36 OAG 69 (1947), sec. 59.08 (35) was interpreted as follows:

"The compensation the county charges for this work is covered by the contract with the municipality and the charges

may well include such items as insurance, depreciation of equipment, and the wages of the county employes for the time they are engaged in work for the municipality." 36 OAG at 70.

In accordance with my predecessor's interpretation, I conclude that the compensation received by the county for work done pursuant to sec. 83.035 is simply a matter of contract between governmental units. Administrative expenses are legitimate costs of a project. There is nothing in the language of sec. 83.035, Stats., that requires counties to absorb such costs. Therefore, a contract may include a fee to reimburse the county for administrative costs incurred. If such a fee is to be charged, it should be clearly incorporated in the contract agreed upon.

As you point out, sec. 499 of the Uniform Cost Accounting System for Wisconsin County Highway Departments is indicative of the legitimacy of the one percent charge. The Uniform Cost Accounting System is imposed on counties by sec. 83.015 (3), Stats. Section 499 provides:

"The county may establish a policy, similar to that now in use on state work, of adding a 1% loading on work performed for all local units of government other than the county itself. The credit for this percentage is reflected in this account.

"Credit the administration memo fund with amounts entered in this account."

In spite of its language, sec. 499 cannot be construed as a grant of authority for such charges. Section 83.015 (3), Stats., does not authorize charges or expenditures. Rather, it simply establishes uniform accounting procedures for highway monies raised, appropriated and expended under authority of other statutes.

However, the very existence of sec. 499 is supportive of the proposition that the charge is authorized by and within the contemplation of sec. 83.035, Stats. The fact that the manner of accounting for the one percent fee (if charged) has been established pursuant to sec. 83.015 (3), Stats., is a clear manifestation that various state agencies and the county boards have construed such charges as appropriate and proper in conjunction with contracts under sec. 83.035, Stats. Administrative interpretation of a statute by officers charged with its implementation is entitled to great weight

if such interpretation is longstanding, uniform and unchallenged. *Department of Taxation v. Miller* (1942), 239 Wis. 507, 300 N.W. 903.

RWW:DCM:CAB

Contracts; Corporations; Indigents; Assuming individual is entitled to attorney at public expense in mental hearings required by sec. 51.02, Stats., or alcohol or drug abuse hearings required by sec. 51.09 (1), Stats., power to appoint, to determine indigency and to fix compensation are judicial and must be exercised by the court or under its direction and cannot be limited by the county board or delegated to private nonprofit corporation. Any power of the county board to contract for such services is limited to administrative details.

August 28, 1974.

DENNIS J. FLYNN, *Corporation Counsel*
Racine County

You request my opinion whether Racine County can contract with a non-stock, nonprofit corporation to provide legal representation for indigents at mental hearings required by sec. 51.02, Stats., or alcohol and drug abuse hearings required by sec. 51.09 (1), Stats., as amended by ch. 198, Laws of 1973.

I am of the opinion that the county can enter into a contract limited to the administrative details of providing legal services only with the concurrence of the judges of the courts involved and providing that the court, after determining that the individual involved is indigent, in each case makes the appointment of a specific attorney whom he deems competent to represent the individual and provided that the court retain power to appoint a private attorney not connected with the non-stock, nonprofit corporation where it deems such appointment to be in the public interest and in the interests of the individual involved.

Whereas the right to counsel in criminal proceedings is guaranteed to defendants by the Sixth Amendment to the U.S. Constitution and Art. I, sec. 7, Wis. Const., and sec. 970.02 (6), Stats., with

compensation provided for in sec. 967.06, Stats., there is no express federal or state constitutional provision or state statute which specifically provides for the appointment of counsel at public expense for indigents involved in civil actions or civil proceedings such as those required under secs. 51.02 and 51.09, Stats. If indigents have right to counsel at public expense in proceedings under secs. 51.02 and 51.09, Stats., it is probably derived from the due process or equal protection of the laws' requirements of the Fourteenth Amendment to the U.S. Constitution. It may also partially rest on Art. I, secs. 1, 6, 9, 11, and 22; Art. VII, secs. 2, 8, and 20, and Art. XIV, sec. 13, Wis. Const.

In *Lessard v. Schmidt* (1972), 349 F. Supp. 1078, 1097-1100, a three-judge federal district court held that, although sec. 51.02 (4), Stats., did provide for the appointment of a guardian *ad litem*, who was required to be an attorney, in civil commitment cases, such appointment could not satisfy the constitutional requirement of representative counsel. At p. 1097, the court stated:

“There seems to be little doubt that a person detained on grounds of mental illness has a right to counsel, and to appointed counsel if the individual is indigent.”

In *Schmidt v. Lessard* (1974), 414 U.S. 473, 94 S.Ct. 713, 38 L.Ed. 2d 661, the U.S. Supreme Court vacated and remanded the case to the lower court on other grounds. However, for the purposes of this opinion it is assumed that the right to counsel enunciated in the lower court's opinion is required by the federal and state constitutions.

In an opinion to the Corporation Counsel for Milwaukee County dated January 21, 1974, it was stated that “the power to appoint counsel for an indigent in a criminal case is a *judicial power*, which cannot lawfully be vested, by statute or in any other manner, in a non-judicial person or entity ...”

I am of the opinion that the power to appoint counsel for an indigent in a civil proceeding is also a *judicial power*. It cannot be exercised by the county board or by a non-stock, nonprofit corporation. Art. VII, sec. 2, Wis. Const. Under Art. IV, sec. 22, Wis. Const., the legislature can confer on county boards only powers of a local, legislative and administrative character.

In 1859, before the legislature had provided by statute that courts appoint counsel for indigent defendants and that they be compensated at public expense, the Supreme Court held that circuit courts had the power and duty to appoint counsel for indigents and that the county was liable to pay for the services of such attorney. *Carpenter v. County of Dane* (1859), 9 Wis. 249.

In 1860, the legislature enacted a statute which provided that "where in a criminal action or proceeding, any attorney or counselor shall defend the person charged with any offense, by order of the court or otherwise, the county in which such action or proceedings arose shall not be held liable to pay the attorney or counselor for services in making such offense." In *County of Dane v. Smith* (1861), 13 Wis. *585, the court held that the statute was void, that the legislature could not impose the duty of defense on an attorney without compensation, and that the power of the court to appoint counsel for the indigent in criminal cases was derived from the common law. The Supreme Court stated that the legislature could not limit the court's exercise of judicial power and that the liability of the county results from the existence and exercise of the power.

The courts established by the constitution are endowed with all the incidental, implied, or inherent powers, not expressly limited by the constitution, which are essential to the efficient performance of the judicial functions delegated to them. *State v. Cannon* (1929), 199 Wis. 401, 226 N.W. 385.

In 20 Am. Jur. 2d, *Courts*, sec. 79, pp. 440, 441, it is stated:

"Courts have inherent power to do all things that are reasonably necessary for the administration of justice within ... their jurisdiction. ... courts have inherent power ... to provide counsel for the indigent ..."

In *Knox County Council v. State ex rel. McCormick* (1940), 217 Ind. 493, 29 N.E. 2d 405, it was held that a court has inherent power and authority to incur and order paid all expenses necessary for the holding of court and the administration of its duties and that the power to appoint counsel for indigent defendants in criminal cases is derived from the constitution and not from the legislature and cannot be directed, controlled or impeded by other departments of government. Thus it held that a statute which denied courts to make

allowances for payment of court appointed counsel, unless the county council had made sufficient appropriation and had established limitations on its use, was invalid and that the orders of the court establishing the amount due and ordering payment were valid.

The legislature has recognized that the power to determine indigency and power to appoint counsel for an indigent defendant is judicial. Sec. 970.02 (1) (b), (6), Stats.

Section 260.22, Stats., provides that the court or a judge may appoint a guardian *ad litem* who is an attorney for a minor or mentally incompetent person.

Section 256.49, Stats., recognizes the power of the court to fix the compensation for services of court appointed attorneys even where a statute fixes a fee for certain designated services. In *Schwartz v. Rock County* (1964), 24 Wis. 2d 172, 128 N.W. 2d 450, it was held that the ultimate responsibility of determining the amount of the fees is with the court.

Assuming as we have that the indigent has a right to counsel at a mental hearing or alcohol and drug abuse hearing, it is my opinion that the rationale involved in the indigent criminal defendants' cases noted above applies. The duty and right to determine indigency, appoint counsel and to fix reasonable fees for the legal services performed is judicial in nature and must be exercised by the court or in conformance with specific approval of the courts involved. Any power of the county board to contract is limited to administrative details. Judicial power may not be delegated to a private nonprofit corporation. Where appointment is made by the court and the court determines the reasonableness of the fees for services performed, the county is liable to pay the same.

RWW:DCM:RJV

Counties; Highways; Each town board providing fire protection and whose fire fighting facility responds to a fire call occasioned by a motor vehicle fire on a county trunk highway maintained by the county is entitled to reimbursement by the county an amount not to exceed \$100.

August 28, 1974.

JAMES E. MURPHY, *Corporation Counsel*
Marinette County

You request my opinion as to the extent of liability of the county under the following state of facts.

An accident involving a car and a truck with a cargo of gasoline occurred on a county trunk highway resulting in gasoline spillage. A member of the sheriff's department arrived on the scene and summoned the fire department from the town in which the highway was located and the fire department from the adjoining town and village. The two municipalities have presented claims to Marinette County for approximately \$800 each.

For the purposes of this opinion, I am assuming that there is no cooperative agreement between the fire departments that did respond to the call.

I am of the opinion that, if there was no fire, the county is not liable in any amount. If there was a fire, the county is liable for a sum not to exceed \$100 in favor of each town that responded to the fire call.

Section 60.29 (20) (e), Stats., provides in part:

“Any town board providing fire protection shall be reimbursed for fire calls occasioned by fires on public highways as follows:

“1. The cost not to exceed \$100, for a fire call for a vehicle on a county trunk highway shall be reimbursed by the county maintaining that portion of the highway where the vehicle is located at the time of the fire; ...”

The statute is clear. It says that each town board that provides fire protection and whose fire fighting facility responds to a fire call occasioned by a fire in or on a vehicle on a county trunk highway maintained by the county shall be reimbursed by the county in an amount not to exceed \$100.

RWW:DCM

Courts; Traffic; Courts may not dismiss traffic complaints on payment of penalty and costs, or costs alone.

August 29, 1974.

NORMAN M. CLAPP, *Secretary*
Department of Transportation

Records on file with the Division of Motor Vehicles show that a large number of courts are disposing of traffic cases by dismissing the charge upon a monetary payment by the defendant. One such court reduces the charge to a warning and dismisses it upon payment of "court costs." In many of these cases, such "court costs" are a substantial amount. For example, in one case where the defendant pleaded guilty to driving while intoxicated, the court dismissed the charge upon the payment of \$129 costs. In another case, a different court dismissed the same charge upon the payment of \$184 costs. You point out that these amounts appear to be more in the nature of a forfeiture penalty than a reflection of costs authorized by statute. Other cases are dismissed upon payment of lesser amounts or court costs authorized by statute, such as \$7 in civil cases and \$9 in criminal cases. One court finds the defendant guilty upon his plea of guilty or no contest and imposes a monetary penalty and costs. The court then advises the defendant that the case will be held open for 90 days, and that, if during that period of time the defendant maintains a driving record clear of violations, the court will then dismiss the "point assessment." Since the court has no control over the assessment of demerit points, it appears that what the court is doing is to dismiss the charge entirely, but the monetary penalty and costs are not returned to the defendant. Such dispositions do not result in a point assessment by the Division of Motor Vehicles because there are no convictions in these cases. Nevertheless, the county or municipality involved receives substantial sums of money. You point out that such dispositions frustrate the purpose of the demerit point system authorized by the legislature in sec. 343.32 (2), Stats.

Your question is whether courts are authorized by statute to dispose of traffic citations by dismissal upon the payment of court

costs or a payment of a penalty and court costs. It is my opinion that such a disposition is not authorized by statute.

This problem has arisen previously, and 49 OAG 171 (1960) ruled that this is an improper practice. This opinion was followed by extended litigation in the Circuit Court of Dane County over the practice of the then Superior Court of Dane County of dismissing traffic citations upon the payment of costs. This litigation was finally terminated upon the agreement of the judge of that court that he would no longer follow that practice in future cases. However, this problem has now arisen again and the practice seems to be followed, at least in certain cases, by a number of courts.

Court costs were unknown to the common law. Their origin is strictly statutory. Accordingly, unless there is a statute which expressly provides for the taxation of costs, no court is authorized to render a judgment for costs in connection with either a civil or a criminal case. This principle is fully discussed in 20 C.J.S. *Costs*, secs. 2 and 435. In *Faust v. The State* (1878), 45 Wis. 273, 277, the court held:

“... The imposition of costs upon a party to either a civil or criminal action is regulated by statute. At common law no costs were recoverable by either party.”

In *Will of Larson* (1933), 211 Wis. 237, 241, 247 N.W. 880, the court reversed an allowance of costs which exceeded the statutory amount, saying:

“... This was error. Costs are not allowable except as provided by statute ...”

In *Hurlbut v. Wilcox* (1865), 19 Wis. 441, 442, the court reached a similar result. To the same effect, see *State ex rel. Nelson v. Grimm* (1935), 219 Wis. 630, 637, 263 N.W. 583; *Gustin v. Johannes* (1967), 36 Wis. 2d 195, 208, 153 N.W. 2d 70; *Rheingans v. Hepfler* (1943), 243 Wis. 126, 134, 9 N.W. 2d 585; *Flies v. Fox Brothers Buick Co.* (1929), 198 Wis. 496, 224 N.W. 705, and *American Express Co. v. Citizens State Bank* (1923), 181 Wis. 172, 190, 194 N.W. 427.

The basic principle of the taxation of costs is that they are taxed against the losing party in favor of the winning party. Section 271.01

(1), Stats., provides that costs shall be allowed, of course, to the plaintiff upon a recovery. Similarly, sec. 271.02 (2), Stats., provides that in equitable actions, the court may award to the successful party such costs not exceeding \$100 as the court deems reasonable and just. Also, sec. 271.03 (1), Stats., provides that, if the plaintiff is not entitled to costs, the defendant shall be allowed costs. From this, it is clear that costs may not be awarded to the plaintiff unless he prevails, and the defendant must pay costs only if he loses. In *Squires v. Brown* (1919), 170 Wis. 165, 173, 174 N.W. 548, the court commented upon this problem as follows:

“... Under the foregoing statute the plaintiff is entitled thereto [to costs] upon a recovery in his favor, and the defendant shall recover costs in the action ‘unless the plaintiff be entitled to costs therein.’ These provisions clearly indicate that costs shall be awarded to the plaintiff if he obtains any recovery, and that the defendant is entitled thereto only when the plaintiff fails in a recovery in the action. ...”

It follows that, when the plaintiff's complaint is dismissed, the plaintiff loses and the defendant prevails. Such a plaintiff is not entitled to costs, but the defendant is entitled to costs. It would be entirely inconsistent to require the defendant to pay costs when the complaint is dismissed and the defendant prevails. There is no statutory authority for such a result. It follows that no court is authorized to dismiss a complaint and tax costs against the defendant when he prevails.

Violations of county and municipal traffic ordinances and most state traffic statutes are punishable only by a civil forfeiture and not by a fine or imprisonment. Thus, most actions for traffic violations are now civil in nature. The procedure for prosecuting such actions is set forth in ch. 345, Stats. Section 345.34 (1), Stats., provides that, upon arraignment, the defendant may plead guilty, not guilty, or no contest. Section 345.34 (2), Stats., provides:

“If he pleads guilty or no contest the court shall accept the plea, find him guilty and proceed under s. 345.47.”

If the defendant pleads not guilty, a trial date is set as provided by sec. 345.36, Stats., and the case proceeds to trial. If the defendant is found guilty upon his plea of guilty or no contest, or upon the trial,

the court then proceeds under sec. 345.47 (1), Stats., which provides that, if the defendant is found guilty, the court may enter judgment against him for a monetary amount not to exceed the maximum forfeiture provided for the violation and for costs. It is clear from these statutes that a monetary penalty and costs may be assessed against the defendant only on a finding of guilty and only by the entry of a judgment. There is no authority for the assessment of a penalty and costs or costs alone without a guilty finding and entry of judgment. It follows that there is no authority for the assessment of a penalty and costs or costs alone as a condition of dismissal.

As previously discussed, costs are ordinarily taxed against the losing party in favor of the prevailing party. However, as to traffic cases, this is not entirely correct. Section 345.53, Stats., provides that in traffic regulation actions, costs may not be taxed against the plaintiff. Section 271.21 (3), Stats., provides that a municipality need not advance the suit tax, but shall be exempt from such tax until the defendant pays costs pursuant to sec. 299.25, Stats. Similarly, sec. 299.08, Stats., provides that a municipality, as plaintiff, is exempt from the clerk's fee and suit tax until the defendant pays costs. Thus, in traffic regulation cases, the plaintiff does not advance the clerk's fee and suit tax, and if the complaint is dismissed, such costs are not taxed against the plaintiff. However, this furnishes no authority for taxing costs against the defendant where the complaint is dismissed. The defendant pays costs only where he has been found guilty and a judgment has been entered. The result of this is that where the complaint is dismissed, costs are not taxed against either party.

As to criminal cases, sec. 972.13 (1), Stats., reads:

“A judgment of conviction shall be entered upon a verdict of guilty by the jury, a finding of guilty by the court in cases where a jury is waived, or a plea of guilty or no contest.”

Section 972.13 (6), Stats., provides the form which may be used for the judgment. This form provides certain alternate paragraphs which may be used to fit the needs of a particular case. One of these alternate paragraphs reads:

“IT IS ADJUDGED that the defendant is ordered to pay a fine of \$.... (and the costs of this action).”

This section also includes a form for judgment where the defendant is found not guilty, which reads, in part:

“IT IS ADJUDGED that the defendant has been found not guilty by the verdict of the jury (by the court) and is therefore ordered discharged forthwith.”

This form contains no reference to costs.

Section 973.06 (1), Stats., reads, in part:

“The costs taxable against the defendant shall consist of the following and no others:”

This is followed by a specification of the disbursements and fees which can be allowed in criminal cases. Section 973.06 (2), Stats., reads:

“The court may remit the taxable costs, in whole or in part.”

It is clear from these statutes that a defendant in a criminal case may be required to pay costs only when he has been found guilty. There is no statutory authority to permit a court to assess costs against a defendant in such a case upon dismissal. This would apply to the few remaining statutory traffic violations which are still criminal in nature.

Where a person has been found guilty upon his plea of guilty or no contest, and judgment for a monetary forfeiture and costs has been entered, the amount of such costs is relatively small. In civil traffic cases, the costs are \$7. This includes a \$2 clerk's fee and \$5 suit tax. See secs. 299.08 and 271.21 (1) (b) and (2), Stats. In criminal traffic cases, the costs are \$9. This is made up of a \$6 clerk's fee and a \$3 additional fee. See sec. 59.42 (1) (a) and (e), Stats. These statutes furnish no authority for taxing these costs or substantially higher costs against the defendant as a condition of dismissal.

We assume that, when a court dismisses a traffic complaint upon the payment of “court costs,” the money is paid to the clerk of court. We are not informed how this money is applied by the clerk, and whether it is applied to clerk's fees, suit tax, or other fees and costs. However, in most cases, these costs are greatly in excess of any fees such clerks are authorized to receive even upon a finding of guilty and the entry of a judgment for a forfeiture and costs. In the opinion of

this office in 49 OAG 171, 173, previously referred to, the opinion was expressed that the charging of excessive fees is illegal and that such conduct probably violates sec. 946.12 (5), Stats. That opinion also stated:

“Sec. 66.113 requires that every officer upon receiving fees for an official duty must, upon request, provide a particular receipted account of such fees, specifying for what they respectively accrued. It naturally follows that only a service necessary to the disposition of a cause before the court can be listed and charged for. To attempt to make a charge for a service which was not performed, or which the judge or justice knows was not a necessary service to the fulfillment of his duty, would be in violation of sec. 946.12 (4).”

It is the public policy of this state, as established by sec. 343.32 (2), Stats., that persons who are habitually reckless or negligent in the operation of motor vehicles or who have repeatedly violated the traffic laws shall have their operating privileges suspended or revoked for a time. This statute further provides that, for the purpose of determining when to suspend or revoke an operating privilege, the Administrator of the Division of Motor Vehicles may determine and adopt by rule a method of weighing traffic convictions by their seriousness. Pursuant to this authority, the Administrator has adopted the so-called “point system,” published as a rule in ch. MVD 11, Wis. Adm. Code. Under this system, traffic violations are assigned a point value. When a person accumulates a certain number of demerit points in a specified period of time, the Administrator revokes the operating privilege for a period of time, up to one year, depending on the seriousness of the driver’s record. This point system operates on the basis of reports of convictions sent in by the court clerks as required by sec. 343.28, Stats.

At this point, I wish to make it clear that any court may and should, in the exercise of sound judicial discretion, dismiss any traffic complaint when it is the opinion of that court that there is a legal defect in the proceedings or the evidence is insufficient to establish the offense charged. However, to dismiss a complaint where the evidence would support a conviction, results in no conviction report being sent to the Division of Motor Vehicles. Under such circumstances, the driver’s record at the Division of Motor Vehicles

does not accurately reflect his driving habits and ability, and does not correctly measure his potential as a safe or unsafe driver. Thus, a driver, whose driving is such that his operating privileges should be revoked, may remain on the highway and be a potential danger to other users of the highway.

The legislature has delegated to the Administrator of the Division of Motor Vehicles the authority and responsibility for determining when a person should be warned, counseled, reexamined, or taken off the road by the revocation of his driving privilege. The Administrator cannot fully perform his function if he does not receive all conviction reports which are the basic data upon which he makes his determinations. Where a court concludes that the evidence is sufficiently clear to show that the defendant should be punished and, therefore, assesses a substantial monetary penalty and costs, or costs alone as a condition to dismissal, the Administrator receives no conviction report. The result is that the person's driver's record does not accurately reflect his driving behavior and the Administrator is deprived of the basic data he needs to perform his duties. If a defendant is innocent, the traffic complaint should be dismissed without penalty or costs. Where the defendant is guilty and deserving of punishment, the court should find him guilty and assess the appropriate penalty and costs, and send a conviction report to the Administrator. It is apparent that some courts in some cases are reluctant to dismiss a complaint without a penalty because they feel that the defendant is deserving of punishment and that the public treasury should receive the penalty to be paid. This appears to be the reason why they dismiss upon the payment of penalty and costs. The result is that the defendant is punished, the public treasury receives the money, no conviction is entered, and the Administrator receives no conviction report. Thus, the driver's record inaccurately depicts his driving habits. This frustrates the basic public policy established by statute, pursuant to which the point system was established.

It is, therefore, my opinion that courts may not dismiss traffic complaints upon payment of penalty and costs, or costs alone, for the reason that this is not authorized by statute, and for the further reason that this frustrates the public policy which led to the establishment of the point system.

RWW:DCM:AOH

Drugs; Physicians And Surgeons; The practice of dispensing drugs, medicines, or other articles by physicians' office personnel permitted by 41 OAG 23 (1952) within the purview of sec. 450.04 (3), Stats., is not in violation of sec. 450.04 (2), prohibiting dispensing of such items by persons other than registered pharmacists or registered assistant pharmacists under pharmacist supervision, or in violation of sec. 450.07, prohibiting the delivering of a prescription drug without a prescription of a practitioner.

Long-standing 41 OAG 23 is not modified.

Violations of secs. 450.04 (2) or 450.07 (2), Stats., should be reported to appropriate law enforcement authorities.

September 3, 1974.

KARL W. MARQUARDT, *Executive Secretary*
Pharmacy Examining Board

You have asked that I review 41 OAG 23 (1952) which concludes that there was no violation of then secs. 151.04 (2) or 151.07 (3), R.S. 1951, if the medicine or drug dispensing is done by a physician or an agent under the physician's supervision. Specifically, 41 OAG 23, at p. 28, provided:

“In view of the foregoing it is concluded that where a doctor has a stock of drugs on hand and in the course of treating a patient he instructs his office girl to furnish the patient with certain named tablets, which she proceeds to obtain from the container and measure out for the patient, delivering the same to the patient, there is no violation of sec. 151.04 (2) or sec. 151.07 (3) although the doctor may be liable for his own negligence or the negligence of his employe in such case. In any event the physician may not, except by complying with sec. 151.02 (9), either directly or indirectly through his employe engage in what amounts to a drug store business by the dispensing and sale of drugs to the general public where the relationship of physician and patient does not exist between him and the purchaser.”

This opinion was based upon a specifically recited fact situation, found on p. 23 of the opinion. The recital provides in part:

“The doctor has a stock of drugs on hand. After naming the patient, he orally or in writing instructs his office girl to furnish the patient with certain drugs. The girl selects a container from among several ..., and counts out the number indicated. She then packages and labels the package. The exchange is also completed by her with the patient. ...”

In your letter you state that this prior opinion “has resulted in physicians’ office personnel dispensing prescription drugs without any supervision by the doctor to verify the accuracy of the functions performed by such an agent. Frequently the dispensing takes place in the absence of a doctor on the premises.” It would appear that the hypothetical facts you relate, if applied to a specific individual and proven, would take the activity out of the exception contained in sec. 450.04 (3), Stats., “This shall not interfere with the dispensing of drugs, medicines or other articles by physicians, ...” and make the agent guilty of violating either sec. 450.04 (2) or 450.07 (2), Stats. 41 OAG 23 clearly contemplates and is predicated upon the fact that the agent dispensing the medicines or drugs does so under the supervision of a physician. If you have evidence of a violation of either sec. 450.04 (2) or 450.07 (2), Stats., you should bring it to the attention of the proper prosecuting authority.

You further relate in your letter that, “Very often such prescriptions are also not labeled to comply with state and federal prescription labeling requirements.” Again, if you have proof of a specific violation of applicable federal or state law, I believe that it is incumbent upon you to report such violation to the proper federal or state authorities for appropriate action.

41 OAG 23 has been on the books for over twenty years and many intervening sessions of the legislature. The legislature has not seen fit to repudiate this opinion, and has, in fact, maintained the applicable statutory provisions without material change. Further, I am not aware of any court decisions that have overturned this opinion. Under the circumstances, it would appear inappropriate at this time to overrule 41 OAG 23. Rather, the facts you relate in your letter

suggest that persons who do not confine their activities to the ambit of this standing opinion may be subject to prosecution.

RWW:DCM:WHW

Municipalities; Public Health; Waters; To accomplish public health protection as well as prevention of ground water pollution, a county health commission, where such activity is undertaken with the consent of the property owner, can authorize its staff to enter private property for the purpose of determining the location of an existing private sewage disposal system. If consent of the property owner to such activity on his premises is not obtained, it can only be undertaken by county health commission staff pursuant to a special inspection warrant obtained under sec. 66.122, Stats.

September 5, 1974.

GEORGE H. HANDY, M.D., *State Health Officer*
Department of Health and Social Services

You ask my advice on this question:

“To accomplish public health protection as well as prevention of ground water pollution, can the Door County Health Commission authorize staff to enter private property for the purpose of determining the location of an existing private sewage disposal system, including where necessary, probing on the property and excavation of such amount of cover material as is necessary to locate the site and nature of the disposal of the sewage liquid on the property?”

It is my opinion that the Door County Health Commission (hereinafter called “the Commission”) can authorize its staff to engage in the activity described in your above-stated question, *but only where such activity is undertaken with the consent of the property owner*. If such consent is not obtained, it is my further opinion that such activity could only be undertaken on the nonconsenting property owner’s premises pursuant to a special inspection warrant obtained pursuant to sec. 66.122, Stats.

It is clear that the Commission has ample statutory power to conduct sanitary surveys which would involve activity by Commission personnel of the kind described in your question. Under

sec. 141.01 (5), the Commission is empowered and obligated to "take such measures as shall be most effectual for the preservation of the public health." The health director of the Commission has the duty (and the concomitant power) to, "Make an annual sanitary survey and maintain continuous sanitary supervision over his territory." Sec. 141.01 (6) (a), Stats. Under sec. 141.01 (7), the Commission has "all the powers now vested in local boards of health and local health officers ..." Under sec. 141.015 (6), Stats., a local board of health has the duty and concomitant power to "take such measures as shall be most effectual for the preservation of the public health," and this power is that of a county health commission under sec. 141.01 (7), Stats., although the same power, as noted above, is conferred on such a commission by sec. 141.01 (5), Stats. In the light of these statutory provisions, I believe it manifest that the Commission can authorize its personnel to engage in the activity in question, to be undertaken, however, only with the property owner's consent.

In any instance in which the property owner refused to consent to such activity on his premises, then the Commission could, I believe, have resort to sec. 66.122, Stats. It provides:

"Special inspection warrants. (1) All state, county, city, village and town officers and their agents and employes, charged under statute or municipal ordinance with powers or duties involving inspection of real or personal property including buildings, building premises and building contents, for, without limitation because of enumeration, such purposes as building, housing, electrical, plumbing, heating, gas, fire, health, safety, environmental pollution, water quality, waterways, use of water, food, zoning, property assessment, meter, and weights and measures inspections and investigations, shall be deemed peace officers for the purpose of applying for, obtaining and executing special inspection warrants under s. 66.123.

"(2) Except in cases of emergency where no special inspection warrant shall be required, special inspection warrants shall be issued for inspection of personal or real properties which are not public buildings or for inspection of portions of public buildings which are not open to the public only upon showing that consent to entry for inspection purposes

has been refused. The definition of 'public building' under s. 101.01 (2) (h) applies to this section."

The above-quoted statute, and sec. 66.123, Stats., setting forth illustrative forms for use under sec. 66.122, Stats., constitute a response of our legislature to the decision handed down by the United States Supreme Court in *Camara v. Municipal Court* (1967), 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed. 2d 930. In *Camara*, the Court recognized that in certain emergency situations, prompt inspection of premises by health authorities, even without a warrant, was proper. As examples of such situations, the court cited seizure of unwholesome food; compulsory smallpox vaccination; health quarantine; and summary destruction of tubercular cattle. See 18 L.Ed. 2d at 941; 387 U.S. at 539. The question with which this opinion deals plainly contemplates no such emergency situation, and nothing in your letter to me presenting such question indicates the presence of an emergency situation which causes the Commission to desire to undertake the activity described in such question. The situation which apparently has produced the Commission's desire to undertake such activity would, then, appear to be of a non-emergency nature, subject to the key *Camara* holding that under the Fourth Amendment, applicable to the states through the due process clause of the Fourteenth Amendment, a person has a constitutional right to insist that administrative searches to enforce a state, a county, or municipal fire, health, or housing inspection program be made pursuant to search warrant.

Referring to language found in sec. 66.122 (1), it is my opinion that officers or employes of the Commission would be "... county ... officers and ... employes, charged under statute ... with powers or duties involving inspection of real or personal property including buildings, building premises and building contents, for, without limitation because of enumeration, such purposes as ... environmental pollution, water quality, ... [and] use of water ..." With Commission officers and employes so charged, they are, under the provisions of sec. 66.122 (1), to be "deemed peace officers for the purpose of applying for, obtaining and executing special inspection warrants under s. 66.123."

In closing this opinion, it seems advisable to me to point out that I would assume that at least in most instances, if not all, a private

sewage disposal system is within the "curtilage" of the house which it serves. The importance of this is that, as recently noted by the Wisconsin Supreme Court, the protection afforded by the Fourth Amendment, insofar as houses are concerned, has never been restricted to the interior of the house, but has extended to open areas immediately adjacent thereto. *Ball v. State* (1972), 57 Wis. 2d 653, 660, 205 N.W. 2d 353. In *Ball*, the Court went on to cite language to the effect that the differentiation between an immediately adjacent protected area and an open field unprotected by the Fourth Amendment has usually been analyzed as a problem of determining the extent of the "curtilage." The Court in *Ball* then went on to cite the following language from *United States v. Potts* (1961-6 C.A.), 297 F. 2d 68, 69:

"Generally speaking, curtilage has been held to include all buildings in close proximity to a dwelling, which are continually used for carrying on domestic employment; or *such place as is necessary and convenient to a dwelling, and is habitually used for family purposes.*" (Emphasis added.)

It would seem clear that the average private sewage disposal system would fall into the category of "such place as is necessary and convenient to a dwelling, and is habitually used for family purposes," so that the protection afforded by the Fourth Amendment would apply thereto, and a search of such place, unless performed with the owner's consent or in an emergency such as that above described, can be lawfully undertaken only if pursuant to a search warrant.

RWW:DCM:JHM

Criminal Law; Police agencies and district attorneys are not prohibited by sec. 427.104 (1) (b) from sending letters threatening criminal prosecution to persons who have issued worthless checks.

September 5, 1974.

DANIEL L. LAROCQUE, *District Attorney*
Marathon County

You have advised me that it is a common practice for district attorneys and police agencies to send letters to private citizens who have issued worthless checks. In some instances, these letters threaten criminal prosecution under sec. 943.24, Stats., unless payment of the check is made within a specified time. You have requested my opinion as to the legality of continuing the use of this procedure in light of sec. 427.104 (1) (b), Stats.

Section 427.104 (1) (b), Stats., provides as follows:

“In attempting to collect an alleged debt arising from a consumer credit transaction, a debt collector shall not: ... (b) threaten criminal prosecutions; ...”

Section 427.103 (3), Stats., defines “debt collector” as:

“... any person engaging, directly or indirectly, in debt collection, ...”

“Debt collection” is defined in sec. 427.103 (2), Stats., as:

“... any action, conduct or practice of soliciting claims for collection or in the collection of claims owed or due or alleged to be owed or due a merchant by a customer.”

In essence, sec. 427.104 (1) (b), Stats., prohibits “debt collectors” from threatening criminal prosecution in attempting to collect an alleged debt arising from a consumer credit transaction.

It is my opinion that police departments, sheriffs’ departments and district attorneys do not fall within the definition of “debt collector” as defined in sec. 427.103 (3), Stats., that their practices of sending letters threatening criminal prosecution to persons who have issued worthless checks do not constitute “debt collection” as defined by sec. 427.103 (2), Stats., and thus they are not prohibited by sec. 427.104 (1) (b), Stats., from threatening criminal prosecution in cases involving debts allegedly arising from consumer credit transactions.

RWW:DCM:RAV

Veterans; Funds for a first mortgage loan program to finance private housing for veterans cannot be obtained through state general obligation bonding within the meaning and intent of Art. VIII, sec. 7, Wis. Const.

September 5, 1974.

THE HONORABLE, THE ASSEMBLY

Legislature

Assembly Resolution 75 (1973) requests my opinion on the constitutionality of 1973 Assembly Bill 1387.

I am of the opinion the bill, as of March 21, 1974, and prior to changes made thereto by subsequent amendment, is unconstitutional because it is in violation of Art. VIII, sec. 7 (2) (a), Wis. Const., which 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.”

A detailed analysis of the bill by the Legislative Reference Bureau appears on the first two pages of 1973 Assembly Bill 1387, but the main features of the bill for purposes of this opinion are that the bill establishes a first mortgage loan program administered by the Department of Veterans Affairs, and the loan funds for the program are to be made available through state general obligation bonds. Section 4 of the bill creates sec. 20.866 (2) (zn), Stats., and provides for \$130,000,000 of bonding authority.

An examination of the file of the Legislative Reference Bureau for 1969 Assembly Joint Resolution 1 shows that the amendment of Art. VIII, sec. 7, Wis. Const., granted the state the authority to contract debt and borrow money for only limited public purposes. The question for ratification as stated on the ballot was as follows:

“Shall section 7 of article VIII of the constitution be amended to permit the state to contract public debt, limited in

amount, in order to acquire, construct, develop, extend, enlarge or improve land, waters, property, highways, buildings, equipment or facilities for public purposes, 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.)"

Thus, the main thrust of the amendment was to substitute general obligation bonding for the dummy building corporation scheme of financing state building projects. General obligation bonding never was intended to be a substitute for the direct appropriation of tax revenues for financing any state program possessed with a public purpose. Clearly the amendment never contemplated borrowing for all public purposes, but for only those public purposes specifically referred to in Art. VIII, sec. 7 (2) (a), Wis. Const.

Accordingly, funds for a first mortgage loan program to finance private housing for veterans cannot be obtained through state general obligation bonding within the meaning and intent of Art. VIII, sec. 7, Wis. Const.

RWW:DCM:APH

Towns: A town board not operating a sewage system cannot make special assessments on property located within the corporate limits of the town but outside the corporate limits of a town sanitary district for benefits claimed to accrue from the system operated by the district and pay the same to the district.

September 10, 1974.

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

You request my opinion on the following question:

Can a town which does not own or operate a sewage system, but which is authorized by its electors under sec. 60.18 (12), Stats., to exercise village powers, make special assessments across *all of the property "within the town"* and within the present corporate limits of a town sanitary district *and within the proposed extended service area of such district*, for benefits expected to accrue from construction of sanitary sewage facilities, and pay such assessments to the town sanitary district to help pay for such improvements? (Emphasis added.)

I am of the opinion that it cannot. I would reach the same conclusion if the town board had not been authorized to exercise village powers. It would appear that the power to make special assessments is personal to the municipal unit making the improvement, in most cases must be levied within the corporate units of the municipality, and is to be used by such municipality.

A town has only such powers as are conferred on it by statute or as are necessarily implied therefrom. *Pugnier v. Ramharter* (1957), 275 Wis. 70, 71, 81 N.W. 2d 38.

Whereas sec. 60.18 (12), Stats., authorizes a town meeting to direct its town board to exercise all powers relating to villages and conferred on village boards by ch. 61, such statute excepts such power, "the exercise of which would conflict with the statutes relating to towns and town boards."

While it can be argued that there is a conflict between the manner in which the statutes require sanitary sewage systems to be operated in towns, i.e., by the town or by creation of town sanitary districts, and statutes relating to village operated systems, there is no need to set forth possible conflicts. I am aware of no authority of a village board to make special assessments, over all or part of the property within a village, to be paid over to a separate governmental agency for benefits which may accrue from the operation conducted by the other agency.

I am of the opinion that a town can construct, acquire, lease or extend and improve a plant and equipment within or without its corporate limits for the collection, treatment and disposal of sewage. Sec. 66.077 (1), Stats.

I am aware of the opinion in 32 OAG 380, 382 (1943), but do not agree with the somewhat more restricted conclusion reached therein which states that:

“... It would authorize a town to construct sanitary sewers only as a part of, and in connection with, the construction of a sewage disposal plant, or to extend sanitary sewers in connection with a disposal plant already in existence.”

Also see *Town of Norway v. State Board of Health* (1966), 32 Wis. 2d 362, 145 N.W. 2d 790; secs. 144.01 (2), (12), 144.04, 144.06, 144.07, and with respect to towns having village powers, secs. 61.34 (1), 61.36, Stats.

Towns have the further power to finance such systems from the general fund, taxation, special assessments, service charges or from the sale of bonds. Secs. 66.076 (1), 60.29 (19), and 66.60 (1), (5), Stats., as amended by ch. 19, Laws of 1973.

Sections 60.30 through 60.316, Stats., provide for the creation, operation, powers and dissolution of town sanitary districts. Such districts have power to collect, transport, pump, treat and dispose of sewage and may “sell” any of its services to users outside its corporate limits. Sec. 60.30 (1), Stats. Whereas the district has power to make special assessments, it appears that sec. 60.309 (1), Stats., limits such power to improvements within and parcels within the corporate limits of the district. *Duncan Devel. Corp. v. Crestview San. Dist.* (1964), 22 Wis. 2d 258, 263, 125 N.W. 2d 617.

Even under sec. 66.65, Stats., the power of a city, village or town to levy special assessments on property outside corporate limits is limited to abutting property.

The legislature evidently created provisions permitting town sanitary districts to deal with sanitary problems in the more populated areas of towns. All or a portion of a town may be included if need is proven. Section 60.31, Stats., provides for alteration of sanitary districts when part or all of the territory is annexed to a city

or village. Section 60.303 (8), Stats., permits additions to sanitary districts on petition, approval of the town board, hearing and proof of need. *Fort Howard Paper Co. v. Town of Ashwaubenon* (1960), 9 Wis. 2d 329, 332, 100 N.W. 2d 915.

It would appear that a town sanitary district should only make application for approval of improvements which are necessary to serve present and future needs for the area within its boundaries or areas in which it can readily sell its services. If adjacent areas are demanding service, petition for enlargement of the district should be considered. In highly populated towns which are urban in nature, dissolution of a town sanitary district might be an alternative if the town is willing to operate a town system or desires to create a town utility district provided for in sec. 66.072, Stats.

I am of the opinion that a town board not having a system cannot make special assessments on property within the corporate limits of the town but outside the corporate limits of a sanitary district which it believes is indirectly benefited and pay such amounts to the district.

RWW:RJV

Legislation; Article VII, sec. 21, Wis. Const., requires full text publication of all general laws, and publication of an abstract or synopsis of such laws would not be sufficient under the Constitution. Methods other than newspaper publication, under sec. 985.04, Stats., may be utilized to give public notice of our general laws. The constitutional provisions which require the taking of yea and nay votes and the entry thereof on the journals of the senate and assembly can be complied with by recording the total aye vote together with a listing of the names of those legislators who voted no, were absent or not voting or were paired on the question. See Art. IV, sec. 20; Art. V, sec. 10; Art. VIII, sec. 8; Art. XII, sec. 1, Wis. Const.

September 10, 1974.

WAYNE F. MCGOWN, *Deputy Secretary*
Department of Administration

You have requested my opinion concerning several questions relating to the requirements for publication of laws and legislative proceedings. You first inquire as follows:

“The Legislative Audit Bureau has asked how the word ‘publication’ is to be interpreted in Article VII, Section 21, Wis. Const., and indicates that the same question applies to the words ‘published’ and ‘publication’ as used in ss. 985.04 (2) and 990.05, Wis. Stats. More specifically they inquire, does either Article VII, Section 21, or Statute s. 990.05 require *newspaper* publication and does newspaper publication required under Statute s. 985.04 (2) require *full text* publication?”

Article VII, sec. 21, Wis. Const., reads as follows:

“The legislature shall provide by law for the speedy publication of all statute laws, and of such judicial decisions, made within the state, as may be deemed expedient. And no general law shall be in force until published.”

The term “general,” as used in this constitutional provision, has been broadly construed by our court. That term and the term “public” are synonymous, and “the fact that an act is local or special does not necessarily militate against its being public and general.” *Milwaukee County v. Isenring* (1901), 109 Wis. 9, 12, 85 N.W. 131; *Clark v. Janesville* (1859), 10 Wis. 136*. Of course, an act repealing a public or general law is also a public or general law. *State ex rel. Voight v. Hoeflinger* (1872), 31 Wis. 257.

Section 985.04, Stats., implements Art. VII, sec. 21, Wis. Const., and provides:

“OFFICIAL STATE NEWSPAPER; PUBLICATION OF LAWS. (1)
The legislature shall declare some newspaper published in Wisconsin to be the official state paper, which shall publish all the laws, advertisements, proclamations and communications required to be published. Any such publication from any of the state agencies shall be deemed official. Until a further

designation is made the Wisconsin State Journal, Madison, is declared to be the official state paper.

“(2) Every law shall be published once in the official state paper immediately after its approval, in type not smaller than 5 1/2 point, and the costs charged to the legislature.”

The Wisconsin Supreme Court has consistently construed Art. VII, sec. 21, Wis. Const., as leaving broad latitude in the legislature in choosing the method by which our laws are to be published. *Sholes v. The State* (1850), 2 Pin. 499, 2 Chand. 182. See *The State ex rel. Cothren v. Lean* (1859), 9 Wis. *279, and *State ex rel. Martin v. Zimmerman* (1939), 233 Wis. 16, 20, 288 N.W. 454. Hence it was stated in *Sholes v. State, supra*, at pp. 511-512:

“This provision we do not regard as dependent upon or necessarily connected with the provision in relation to printing. While it is true that the employment of the art of printing is the best *means* of publication, still *publication* cannot be confined to the limited signification of mere *printing*, but comprehends the exercise of additional labor and skill. This provision implies a discretion to be exercised in the method of publication; for instance,—that the general laws which cannot be in force until published, shall be published in the public journals, that being the most speedy method; or in pamphlet form, that being more convenient for many purposes; or even by proclamation at the door of the court house in each county, and that the whole body of the laws and the decisions of the supreme court shall be published in the more permanent form of a bound book. ...”

Likewise, in *Mills v. The Town of Jefferson* (1865), 20 Wis. *50, where publication of a general law in a county newspaper rather than in the official state newspaper was challenged, the court said, at p. *55:

“... the publication made was unquestionably the best calculated to bring an early knowledge of the law home to the locality and people most concerned in and affected by its provisions. ... *to say that the legislature was not competent to provide a different manner of publication, is to deny its power over the subject of the publication of the laws. ...*” (Emphasis added.)

The legislature has in fact provided several different forms of publication of the statutes and other governmental pronouncements having the force and effect of law. In response to the direction of Art. VII, sec. 21, Wis. Const., in addition to sec. 985.04 (2), Stats., the legislature has enacted secs. 35.15, 35.18, 35.19 and 35.37, Stats., providing for publication of Wisconsin Session Laws, Wisconsin Statutes, pamphlet laws and Supreme Court Reports, respectively, as well as secs. 227.025 and 227.027, Stats., which provide for publication of administrative rules.

The motivation for Art. VII, sec. 21, Wis. Const., was to insure that persons affected by new laws have notice of their existence, before such laws go into effect. *O'Connor v. City of Fond du Lac* (1901), 109 Wis. 253, 261, 85 N.W. 327. As pointed out by our court in *Clark v. Janesville, supra*, at page *183:

“... Courts and people are bound to take notice of general laws; and that upon which their operation depends should be capable of being readily ascertained *with the highest certainty*. ...” (Emphasis added.)

Thus, as previously stated in 10 OAG 648 (1921), at pp. 656-657:

“... It would seem that the constitutional purpose of giving the people of the state an opportunity to know with certainty what the law of Wisconsin is can be accomplished only by publishing that law in full, so that one who subscribes to the official state paper for the purpose of obtaining all the laws of the session, or a person who buys a copy of the session laws for the same purpose, will find all the law there without searching further. ...”

Finally, it appears that the legislature has viewed the constitutional mandate as requiring full text publication.

Section 1 of Wis. Rev. Stats., Ch. 5, p. 61, (1849), provided:

“The secretary of state, immediately after any general law of the legislature, shall have been deposited with him, shall furnish a copy thereof to the person authorized to print the laws, who shall immediately publish the same in a newspaper printed at the seat of government.”

The clear direction of this statutory language, enacted immediately after the adoption of the Wisconsin Constitution in 1848, is to provide that all general laws of the legislature be published verbatim. See *State ex rel. Cothren v. Lean* (1859), 9 Wis. *279, *290, *291. Although the above statutory language has been changed several times up to enactment of present sec. 985.04, Stats., the intent to provide for full text publication is no less obvious under our current statutes. Such contemporaneous and long continued practice by the legislature reflects a legislative construction of the Constitution which is entitled to great weight. 16 Am. Jur. 2d, *Constitution Law*, secs. 83 and 85, pp. 264-265, 267-269.

From the foregoing, it is evident that the initial publication of new laws required by Art. VII, sec. 21, Wis. Const., may be accomplished in any manner which effectively and fully informs the public. Newspaper publication under sec. 985.04, Stats., is simply a current mode which the legislature is using to accomplish that purpose. Other methods of publication can be utilized. However, it is also clear that Art. VII, sec. 21, Wis. Const., requires full text publication of our laws and that publication in substance would not be adequate to provide proper notice of the enactment of general legislation to the public at large.

The legislature has in fact already exercised its discretion by allowing administrative rules "having the effect of law" to be published in the Wisconsin Administrative Code or register in the manner prescribed in sec. 35.93, Stats. See secs. 227.01 (3) and 227.025, Stats. A system of establishing effective dates and publishing rules in the official state paper on an emergency basis is also provided for in secs. 227.026 and 227.027, Stats. I find no reason why a similar procedure could not be followed for the publication and dissemination of state statutes.

As always, however, caution must be taken when changing the method of publication to insure that the act designed to give notice of the existence of the law actually does give notice and takes place sufficiently in advance of the law going into effect. In this regard, the standards already applicable to administrative rules would form a legitimate point of first inquiry.

Your first question also refers to sec. 990.05, Stats., which provides:

“Laws and acts; time of going into force. Every law or act which does not expressly prescribe the time when it takes effect shall take effect on the day after its publication.”

This statute simply states when a published law takes effect, and although it necessarily refers to “publication” and evolved in the context of newspaper publication, the statute in no way requires *newspaper* publication. However, the statute does highlight the need for actual and fully completed publication as prerequisite to a law becoming effective. See *O'Connor v. City of Fond du Lac, supra*, at p. 261. As stated previously in 10 OAG 1099 (1921), at p. 1101:

“Publication implies something more than printing. If to be done through the newspapers, publication is effected only when the papers are issued to the public. The constitution forbids a law being effective until it is actually published.”

You next ask whether the legislature may amend sec. 985.04, Stats., to provide for publication of laws in abstract or synopsis form, in much the same manner as presently allowed in the case of the publication of the “proceedings” of local governing bodies. Sec. 985.01 (2) (a), Stats.

This question has been answered by my response to your first inquiry. Although nothing precludes the legislature from amending sec. 985.04, Stats., to provide for newspaper or other publication of an abstract or synopsis of all new statutes, no such publication would satisfy the constitutional requirement of public notice of our general laws by full text publication.

Your last question asks whether Art. IV, sec. 20 and Art. VIII, sec. 8, Wis. Const., require the printing of a list of the individual legislators voting yea or nay in the legislative journals or whether a printing of the total yea vote, together with a listing of the names of those legislators voting nay, abstaining or absent, would suffice.

Article IV, sec. 8, Wis. Const., provides that each house of the legislature may determine the rules of its own proceedings, and Art IV, sec. 10, Wis. Const., requires each house to keep and publish a journal of its proceedings, except parts requiring secrecy.

Article IV, sec. 20, provides:

“The yeas and nays of the members of either house on any question shall, at the request of one-sixth of those present, be entered on the journal.” (Emphasis added.)

Article VIII, sec. 8, provides:

“On the passage in either house of the legislature of any law which imposes, continues or renews a tax, or creates a debt or charge, or makes, continues or renews an appropriation of public or trust money, or releases, discharges or commutes a claim or demand of the state, the question shall be taken by yeas and nays, which shall be duly entered on the journal; and three-fifths of all the members elected to such house shall in all such cases be required to constitute a quorum therein.” (Emphasis added.)

The taking of a yea and nay vote and entry thereof on the journals of both houses is also required by Art. V, sec. 10 (bills passed over the veto of the governor), and Art. XII, sec. 1 (constitutional amendment proposals). See also Art. VIII, sec. 6 (laws authorizing public debt), Art. IV, sec. 26 (bills increasing teachers' retirement benefits), and Art. XI, sec. 4 (enactment of general banking laws), which provide that the vote on such matters “be taken by yeas and nays,” but do not require their entry upon the journal. *Integration of Bar Case* (1943), 244 Wis. 8, 22-23, 11 N.W. 2d 604, 12 N.W. 2d 699.

In *Integration of Bar Case, supra*, our court clearly stated the impact of such constitutional provisions as those referred to in your question. The court there stated, at p. 23:

“By the great weight of authority it is held that an enrolled bill will be declared void where the journals fail to show upon final passage thereof a yea and nay vote was taken which together with those voting for and against a measure was spread upon the journals if the constitution so requires. ...”

And further at p. 27:

“We hold in accordance with the weight of authority upon that question that where the constitution requires the entry in the journal of certain steps in the enactment of a bill that it must

appear from the journal that those steps have been taken or the act was not validly enacted. ...”

Thus, in *State ex rel. General Motors v. Oak Creek* (1971), 49 Wis. 2d 299, 182 N.W. 2d 481, in noting that the legislative journals did not reveal that the yeas and nays were taken or entered in the journals of either house of the legislature, as required by Art. VIII, sec. 8, the court stated at p. 322:

“... where a tax is enacted it is mandatory that yeas and nays be recorded in the legislative journals. This defect alone is sufficient to render sec. 70.11 (8m), Stats., a nullity.”

With respect to the object of the constitutional requirement, the court also pointed out, at pp. 322-323:

“ ‘... The object and purpose of art. VII, sec. 8, of the constitution above cited seems very clear. In important legislation of the character there indicated it was deemed necessary that there should be a quorum present consisting of three fifths of all members of either house. The requirement that the question should be taken by yeas and nays and duly entered on the journal was deemed necessary both to furnish proof that the law was enacted by a majority and *to fix responsibility on each member voting. ...*’ *State ex rel. Crucible Steel Casting Co. v. Wisconsin Tax Comm.* (1925), 185 Wis. 525, 534, 201 N.W. 764.” (Emphasis added.)

It is evident from the foregoing that Art. IV, sec. 20, and Art. VIII, sec. 8, as well as Art. V, sec. 10 and Art. XII, sec. 1, Wis. Const., require that the individual legislators voting yea or nay on particular matters be identified by entries in the respective journals of each house of the legislature. However, such provisions also leave a large discretion with the legislature as to the contents of the journals. See *Integration of Bar Case, supra*, p. 23. As indicated in *State ex rel. Postel v. Marcus* (1915), 160 Wis. 354, 389, 152 N.W. 419, the framers of the Constitution understood that the unqualified requirement that something be “entered” in the journals could be satisfied by a simple but intelligible reference:

“We reach the conclusion that ever since the adoption of the constitution the legislative and executive branches of the government, as well as the people themselves, have construed

the word 'entered' as meaning simply entered by title, number, or brief *description in such manner as to make identification certain*; that this is a permissible and not unusual meaning of the word; and that such meaning must now be held to be controlling under the well established principles of practical construction." (Emphasis added.)

Thus, as long as the constitutional mandate is in fact satisfied, the *manner* in which the yeas and nays of individual legislators are entered in the journal is subject to legislative control. The senate and assembly have, of course, established rules in reference to their own procedure in some detail, including rules concerning the recording of attendance, the noting of absences and the taking and recording of votes. See Senate Manual, dated July 1, 1973, and Assembly Manual, Rules of the Assembly, adopted January 2, 1973. The rules of both the senate and assembly provide for a roll call of the members as the first order of business of each daily session and require that the names of those present or absent be entered in the journal for that day. In my opinion, if these rules are followed, and all members not voting aye are individually identified by name in the journals under appropriate descriptive references indicating whether they voted no on the measure, were absent or not voting or were paired on the question, then, there is no reason why anything more than the number of members voting aye need be set forth in the journals. The results of any roll call vote taken during that day need only be compared with the attendance list to determine the names of those individual legislators who voted aye on a question.

RWW:JCM

Drainage Districts; 1. The powers of the drainage district board are not superseded by the shoreline zoning board or the Department of Natural Resources; however, drainage ditches which are navigable are within the jurisdiction of the Department of Natural Resources pursuant to sec. 144.26 (2) (d), Stats. The only specific exemption from the jurisdiction of the Department of Natural Resources regarding navigable waters is that of sec. 30.19 (1) (d), Stats., concerning the agricultural uses of land.

2. Although soil conservation districts and drainage districts are created for a different purpose, some activities of both accomplish similar ends; therefore, each district retains control over those activities which it undertakes for the purposes for which it was created.

3. The Department of Natural Resources determines dam regulations for dams on drainage ditches, regardless of the purpose of the dam.

September 11, 1974.

THE HONORABLE, THE ASSEMBLY

Legislature

In Assembly Resolution 82 you have requested my opinion on the following matters:

“1. Are the powers granted the district drainage commissioners by chapter 89, laws of 1961, over drainage ditches specifically dredged for agricultural purposes superseded by the shoreline zoning board and the department of natural resources once such ditches are declared navigable? If so, what guarantees of adequate maintenance of the drainage ditches are to be provided farmers dependent on such ditches?

“2. Is control of a drainage district in counties which are also soil conservation districts exercised by the drainage district commissioners or the soil conservation district personnel?

“3. If a water-shed is formed in a drainage district operating under chapter 89, laws of 1961, are dam regulations for dams on

drainage ditches to be determined by the drainage district commissioners, the department of natural resources or the soil conservation district personnel?"

The authority of drainage district commissioners over drainage ditches is conferred by ch. 88, Stats. Chapters 88 and 89, 1961 Stats., relating to drainage of lands were repealed by ch. 572, sec. 1, Laws of 1963, effective January 1, 1965. Chapter 88, Stats., on the same subject, was created by ch. 572, sec. 2, Laws of 1963, effective June 13, 1964. Section 88.15, provided transition provisions.

In sec. 88.21 (9), (10), Stats., the drainage board may:

"(9) With the consent of the court, purchase or lease and maintain and operate the equipment and machinery necessary to construct, maintain or repair the drains within the districts under its jurisdiction, including the control of weeds or brush through use of herbicides.

"(10) With the consent of the court, purchase, construct, maintain and operate all levees, bulkheads, reservoirs, silt basins, holding basins, floodways, floodgates and pumping machinery necessary to the successful drainage or protection of any district or of any considerable area thereof, whether located within or outside the district."

In addition, sec. 88.63 (1), Stats., provides:

"(1) It is the duty of the drainage board to maintain in good condition the drains in all districts under the board's jurisdiction and to repair such drains when necessary. ..."

These powers of the drainage district board are not superseded by those of the shoreline zoning board or the Department of Natural Resources. The board is, however, subject to the ordinances established under sec. 59.971, Stats., as is any other person. See OAG 17-74, wherein the Juneau County District Attorney inquired whether a county could zone lands along a drainage ditch. That opinion states that drainage ditches fall within the "other waters" provision of sec. 144.26 (2) (d), Stats., and if navigable under the laws of the State, they fall within the jurisdiction of the Department of Natural Resources.

The legislature has declared that the Department of Natural Resources has an overriding interest in protecting navigable waters. The same policy considerations noted in that opinion relative to navigable water protection and drainage ditches apply to the questions you have asked.

The only specific exemption from the jurisdiction of the Department of Natural Resources regarding navigable waters concerns the agricultural uses of land. Section 30.19 (1) (d), Stats., provides:

“This section shall not apply to the construction and repair of public highways or to any agricultural uses of land, ...”

This exemption specifically applies only to the activities for which permits are required by sec. 30.19, Stats. Consequently, the drainage district boards are subject to the provisions of all other relevant statutes, including those regarding navigable waters and the shoreland zoning ordinances. See 17 OAG 74.

A drainage district does not have the power or authority to destroy navigable waters within the drainage area. *State v. Adelmeyer* (1936), 221 Wis. 246, 265 N.W. 838; *In re Horicon Drainage District* (1908), 136 Wis. 227, 116 N.W. 12.

You also ask what guarantees of adequate maintenance of the drainage ditches are to be provided farmers dependent on the ditches.

Section 31.02 (6), (7), (8), (9), provides:

“(6) The department shall operate, repair and maintain the dams and dykes constructed across drainage ditches and streams in drainage districts, in the interest of drainage control, water conservation, irrigation, conservation, pisciculture and to provide areas suitable for the nesting and breeding of aquatic wild bird life and the propagation of fur-bearing animals.

“(7) The department shall confer with the drainage commissioners in each drainage district on the formation of policies for the operation and maintenance of the dams; in districts having no commissioners, the department shall confer in like manner with the committee appointed by the county board, if any, to represent either such drainage district, or in the event that the drainage district is dissolved, to represent the

interests of the county in all matters whatsoever pertaining to water conservation and control within the area which theretofore constituted such drainage district.

“(8) The department shall give careful consideration to the suggestions of the drainage commissioners or committee of the county board, but the final decision in all matters under consideration shall rest with the department.

“(9) So far as seems practicable, the department may designate or employ the drainage commissioners of any drainage district, or the committee of the county board above referred to, to operate the dams in such district or area formerly comprising a drainage district or perform services in the repair and maintenance of the dams, dykes and other works.”

These subsections were created by ch. 379, Laws of 1937, as sec. 31.36 (6), (8), (9), (11), Stats. The language has essentially remained unchanged since that time, having been renumbered as secs. 31.02 (6), (7), (8), (9), by ch. 614, sec. 18, Laws of 1965, and the Department of Natural Resources having replaced its predecessor agencies.

Section 30.19 (1) (d), Stats., exempts agricultural uses of land from the requirement of a permit to construct, maintain or otherwise work on drainage ditches affecting navigable waters. Under sec. 88.63 (1), noted above, the drainage district board has the duty and power to maintain “drains” but not dams or dykes, which are covered by sec. 31.02 (6), (7), (8), (9), Stats.

However, the authority granted by sec. 88.63 (1), Stats., is restricted by sec. 88.31 (1), Stats., which provides:

“(1) If it appears to the board from its investigation or from the hearing held on the petition that it will be necessary to enter upon any waters that may be navigable, or to acquire and remove any dam or obstruction therefrom, or to clean out, widen, deepen or straighten any stream that may be navigable, the board shall file with the department of natural resources an application for a permit to do such work. ...”

Section 88.31 (2), (3), (4), (5), Stats., provides the procedures to be used in reviewing the application, the persons to be notified,

including the chairman of the soil and water conservation district (sec. 88.05 (4)), and the standards to be applied by the Department of Natural Resources in granting a permit. If the ditch concerned is a navigable water within the meaning of the law, or if any other navigable water will be affected, a permit under sec. 88.31 is required. Although general and special statutes should be read together and harmonized, in cases of conflict between them, the special statute prevails over the general statute unless it appears that the legislature intended to make the general act controlling. Accordingly, it is my opinion that the special or specific statute herein involved, sec. 88.31, Stats., which provides no agricultural exemption for work done by drainage districts on navigable waters, prevails over the general statute, sec. 30.19, Stats., which does provide an exemption for agricultural uses of land. Thus the agricultural exemption authorized to individuals under sec. 30.19, Stats., does not extend to drainage districts or work done by or authorized by drainage districts pursuant to ch. 88, Stats.

Reading all these statutes together, as they must be, it is apparent the legislature has given the Department of Natural Resources final authority in all cases affecting navigable waters except for the activities and structures covered by sec. 30.19, Stats., in a case where the purpose is the agricultural use of land.

The Department of Natural Resources is, according to sec. 31.02 (7), Stats., obliged to:

“... confer with the drainage commissioners in each drainage district on the formation of policies for the operation and maintenance of the dams; in districts having no commissioners, the department shall confer in like manner with the committee appointed by the county board, ...”

In addition, sec. 31.02 (8), Stats., provides:

“(8) The department *shall give careful consideration to the suggestions of the drainage commissioners or committee of the county board, but the final decision in all matters under consideration shall rest with the department.*” (Emphasis added.)

The second question posed by you reads: “Is control of a drainage district in counties which are also soil conservation districts exercised

by the drainage district commissioners or the soil conservation district personnel?"

Drainage districts and soil conservation districts are created for different purposes. Drainage districts are created for the "purpose of promoting the public health or welfare and for the drainage of land." *Cranberry Creek Drainage District v. Elm Lake Cranberry Company* (1920), 170 Wis. 362, 174 N.W. 554.

Soil conservation districts are organized under ch. 92, 1973 Stats., the Soil and Water Conservation District Law. Section 92.02 is a declaration of policy by the legislature detailing the purposes of creating soil conservation districts.

Section 92.02, Stats., reads as follows:

"Declaration of policy. It is declared to be the policy of the legislature to provide for the conservation of the soil and soil resources of this state, and for the control and prevention of soil erosion, and for the prevention of floodwater and sediment damages, and for furthering agricultural phases of the conservation, development, utilization and control of water, and thereby to preserve natural resources, control floods, prevent impairment of dams and reservoirs, assist in maintaining the navigability of rivers and harbors, preserve wildlife, protect the tax base, protect public lands, and protect and promote the health, safety and general welfare of the people of this state."

There are clearly some activities undertaken by both kinds of districts which tend to accomplish very similar ends, whether intended or not. In my opinion, each district retains control over those activities which it undertakes for the purposes for which it was created. Any "extra" results of these activities which benefit the goals and purposes of other kinds of districts are just that: "extra," and control remains with the appropriate board of commissioners. I find no references in the statutes nor case law which cover the issues raised in the request from you. It is my opinion that chs. 88 and 92 should be read so as to give each kind of board control over its activities and structures, regardless of whether there are duplicated results.

There are no prohibitions in the statutes or in the cases which would prohibit the same individuals from serving on both the

drainage district board and the soil conservation board. Consequently, when there is sufficient duplication to justify it, it appears possible in the interest of efficiency for the boards to be consolidated into one board. In effect, the board would have two titles, would keep two sets of records, and would have two sets of purposes. Their functions and goals are compatible, not in conflict.

The provisions of sec. 31.02 (6), (7), (8), (9), Stats., would appear to answer the third inquiry of yours. Specifically, the Department of Natural Resources is given clear authority in sec. 31.02 (6), Stats., to:

“... operate, repair and maintain the dams and dykes constructed across drainage ditches and streams in drainage districts, in the interest of drainage control, water conservation, irrigation, conservation, pisciculture and to provide areas suitable for the nesting and breeding of aquatic wild bird life and the propagation of fur-bearing animals.”

It is my opinion that the Department of Natural Resources determines dam regulations for dams on drainage ditches, regardless of the purpose of the dam.

RWW:SBW

Coroner; County Board; County board in county under 500,000 can abolish elective office of coroner and implement medical examiner system to be effective at end of incumbent coroner's term.

Language in 61 OAG 355 (1972) inconsistent herewith is withdrawn.

September 13, 1974.

WILLIS J. ZICK, Corporation Counsel
Waukesha County

You request my opinion as to the date the county board of supervisors may effectively abolish the elective office of coroner and implement a medical examiner system.

It is my opinion that any such change should be made as to be effective at the end of the term for which the incumbent was elected.

In 61 OAG 355 (1972), it was stated that although Art. VI, sec. 4, Wis. Const., had been amended to permit counties of less than 500,000 population to abolish the elective office of coroner and implement a medical examiner system, implementation legislation was a necessary prerequisite.

The necessary implementation legislation is provided by ch. 272, Laws of 1973, but does not provide all details necessary to orderly transition.

In 61 OAG 355 (1972), it was stated that if implementation legislation were enacted, the change could be made at any time without regard to the tenure of any incumbent coroner. I feel constrained to withdraw this language. While it can be argued that the provisions of Art. VI, sec. 4, Wis. Const., contain an implied power to abolish the office of coroner and implement a medical examiner system at any time, the same section provides that coroners shall be elected every two years and orderly transition would require that such office be abolished at the end of a term for which the incumbent was elected.

In 63 Am. Jur. 2d, *Public Officers and Employees*, sec. 147, p. 719, it is stated:

“There is no doubt of the power of the legislature which creates an office, to abolish it or to change it, and the legislature may shorten or lengthen the term of the office itself, *in the absence of constitutional inhibition. ...*” (Emphasis added.)

Also see *State v. Douglas* (1870), 26 Wis. 428.

The office of coroner in Wisconsin is constitutional with statutory powers, and the term is partially established by the Constitution.

State ex rel. Kleist v. Donald (1917), 164 Wis. 545, 160 N.W. 1067 holds that where the term of a circuit judge is prescribed by the Constitution, the legislature cannot shorten it by statute which in effect would constitute a removal from office.

I am of the opinion that a county board may abolish the office of coroner and institute a medical examiner system to be effective at the

end of the term of the incumbent coroner irrespective of the fact that nomination papers have been circulated and filed for the election of a coroner under the present system.

RWW:RJV

Industry, Labor And Human Relations, Department Of; Open Meeting: Joint apprenticeship committees, appointed pursuant to 4 Wis. Adm. Code, sec. 85.02, are governmental bodies within the meaning of sec. 66.77 (2) (c), Stats., and subject to the requirements of the Open Meeting Law (sec. 66.77, Stats.).

September 13, 1974.

PHILIP E. LERMAN, Chairman

Department of Industry, Labor and Human Relations

Section 66.77, the so-called Open Meeting Law, was repealed and recreated by ch. 297, Laws of 1973. You request my opinion as to whether joint apprenticeship committees are "governmental bodies" within the meaning of sec. 66.77 (2) (c), Stats., and thus subject to the various requirements of the Open Meeting Law. These committees, composed of citizens serving without reimbursement, are appointed by the Department of Industry, Labor and Human Relations (DILHR) to help carry out its responsibilities under ch. 106, Stats. The committees are nonstatutory and serve largely in an advisory capacity to DILHR.

Section 66.77 (2) (c), Stats., provides as follows:

"'Governmental body' means a state or local agency, board, commission, committee, council or department created by constitution, statute, ordinance, rule or order; a municipal or quasi-municipal corporation; or a formally constituted subunit of any of the foregoing."

Joint apprenticeship committees are appointed pursuant to DILHR rule 85.02, which outlines their function and composition. As committees created by rule, they are "governmental bodies" within the meaning of sec. 66.77 (2) (c), Stats.

Section 66.77 (2) (b), Stats., provides:

“‘Meeting’ means the convening of a governmental body in a session such that the body is vested with authority, power, duties or responsibilities not vested in the individual members.”

I see no indication that individual committee members are possessed of any “authority, power, duty or responsibility.” However, from the information you supply, it appears that DILHR has delegated to the committees “authority and power.” Among those you list are:

“To establish area standards.”

“To pass upon each new apprenticeship.”

“To encourage parties to indentures to bring their complaints and grievances before the committee for adjustment.”

“To determine time credit for past experience.”

“To certify graduate apprentices.”

As a “governmental body” conducting “meetings,” joint apprenticeship committees fall within the scope of sec. 66.77, Stats., and must comply with the requirements thereof.

RWW:JEA

Counties; Sheriffs; A county sheriff's department is not a consumer reporting agency subject to the Fair Credit Reporting Act. The Federal Trade Commission has taken an opposite position.

September 17, 1974.

WILLIAM LEITSCH, *Corporation Counsel*
Columbia County

You have requested my opinion whether the Fair Credit Reporting Act, P.L. 91-508, 15 U.S.C.A. 1681, prohibits a county sheriff's department from releasing motor vehicle accident report information

for use by credit companies, armed forces recruiters or insurance companies.

Under sec. 346.70 (4), Stats., law enforcement agencies investigating traffic accidents prepare uniform traffic accident reports and forward copies to the Division of Motor Vehicles. The purpose of such reports is for use in the prosecution of traffic law violations, in negligence litigation among the parties to the accident, and for statistical uses. Section 346.70 (4) (f), Stats., provides that any person may examine and copy such reports in the hands of local authorities. Such reports might be used by members of the public for the purpose of establishing a consumer's eligibility for credit, insurance or employment. However, these are not the purposes for which these reports are prepared.

The question whether the Fair Credit Reporting Act applies to such reports in the hands of the sheriff's department turns on whether such department is a consumer reporting agency and whether the accident report is a consumer report. Section 603 (f) of the act defines consumer reporting agency as follows:

"The term 'consumer reporting agency' means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports."

Section 603 (d) of the act defines consumer report as follows:

"The term 'consumer report' means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment

purposes, or (3) other purposes authorized under section 604.
..."

A county sheriff's department prepares accident reports for law enforcement and statistical purposes only. It does not, for monetary fees, regularly engage in the practice of assembling consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties. Thus, it is not a consumer reporting agency. Since a consumer report is defined as a communication of information by a consumer reporting agency, the accident reports are not consumer reports. Clearly they are not prepared for use, or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing a consumer's eligibility for credit, insurance or employment.

It is, therefore, my opinion that the Fair Credit Reporting Act does not apply to accident reports prepared by a county sheriff's department. The Attorney General of Arkansas has reached the same conclusion. In his opinion number 74-58, dated April 24, 1974, he pointed out that the state police are not in the business of collecting consumer credit information for the purpose of furnishing consumer reports to third parties, even if traffic and accident reports compiled by them may be used by others for this purpose. Similarly, the Attorney General of Texas, in his opinion number H-263, dated March 19, 1974, has concluded that the Texas Department of Public Safety is not a consumer reporting agency within the meaning of the Fair Credit Reporting Act.

The Federal Trade Commission has taken a different view as to driver record reports furnished by a state motor vehicle department. It says that when a state motor vehicle department furnishes a driver record report bearing on the personal characteristics of the consumer, the report is a consumer report and the department is a consumer reporting agency. The reason given for this conclusion is that when such reports are used as a factor in establishing a consumer's eligibility for insurance, the Fair Credit Reporting Act should apply. It concludes, however, that this is not intended to interfere with legitimate law enforcement activities of state motor vehicle departments. 16 C.F.R. sec. 600.4. It is the view of the commission's staff that the act does apply to the furnishing of information for consumer reporting purposes, such as determining eligibility for

credit, insurance, or employment. It would no doubt apply the same reasoning to accident reports as it does to driver record reports.

RWW:AOH

Vocational, Technical And Adult Education, Board Of; Vocational, Technical and Adult Education Districts and the State Board of Vocational, Technical and Adult Education do not have the power of eminent domain and, therefore, are not subject to secs. 32.19 to 32.27, Stats. (Relocation Act).

September 17, 1974.

CHARLES M. HILL, SR., *Secretary*
Department of Local Affairs and Development

You have requested the opinion of this office concerning the applicability of the Relocation Act, secs. 32.19 to 32.27, Stats., to the land acquisition activities of the sixteen Vocational, Technical and Adult Education (VTAE) districts, located throughout the State of Wisconsin. The answer to this request requires an examination of the Relocation Act, the general statutes relating to the power of eminent domain, the statutes defining the powers of the VTAE districts, and the powers of the State Board of Vocational, Technical and Adult Education (VTAE Board).

In my opinion, the Relocation Act, secs. 32.19 to 32.27, Stats., applies only to authorities which possess the power of eminent domain. The Relocation Act is ambiguous in this respect, however, so it is necessary to explain the basis of my opinion on this matter in some detail.

The term "condemnor" is employed consistently throughout the Relocation Act to designate the authorities to whom the Act applies. In all, the word "condemnor" is so employed on twenty-seven different occasions in the Relocation Act.

Section 990.01, Stats., provides:

"Construction of laws; words and phrases. In the construction of Wisconsin laws the words and phrases which

follow shall be construed as indicated unless such construction would produce a result inconsistent with the manifest intent of the legislature:

“(1) GENERAL RULE. All words and phrases shall be construed according to common and approved usage; but technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning.”

The word “condemnor” is generally used in legal parlance to denote an authority actually exercising the power of eminent domain. “Condemnor,” in its usual legal usage, is the correlative of “condemnee.” “Condemnor” is used in this sense in *Luber v. Milwaukee County* (1970), 47 Wis. 2d 271, 279, 177 N.W. 2d 380, for example. Ordinarily, therefore, the word “condemnor” used in a statute would be construed to mean “authority employing the power of eminent domain.”

Moreover, the words “land condemned” appear in sec. 32.19 (4) (a) 2, Stats., and the phrase “such condemning authority” appears in sec. 32.20, Stats. The Relocation Act itself is located in the eminent domain section of the statutes, ch. 32.

However, statutory language will not be construed to produce a result inconsistent with the manifest intent of the legislature. Sec. 990.01, Stats.

There is a considerable amount of internal evidence in the Relocation Act indicating that the legislature did not intend the ordinary legal meaning of “condemnor” when it employed that word in the Relocation Act. The legislative declaration of purpose does not even refer to the power of eminent domain. Moreover, many benefits provided by the Act require that the beneficiary be a “displaced person.” “Displaced Person,” as defined in sec. 32.19 (2) (c), Stats., includes:

“... any person who moves from real property or who moves his personal property from real property, ... as a result of the *acquisition* of such real property, in whole or in part 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 or, who moves or discontinues his business, or moves other personal property, or moves from his dwelling ... *as a direct result* of any project or program undertaken under title I of the federal housing act of 1949, as amended, *or as a result* of carrying out a comprehensive city demonstration program under title I of the federal demonstration cities and metropolitan development act of 1966.” (Emphasis added.)

The “jurisdictional offer” mentioned in the quoted statute is a specific step in condemnation proceedings under ch. 32, Stats. The explicit reference to condemnation in the quoted statutory provision is supplemented with language referring to “acquisitions.” In construing a statute, effect is to be given to every word, clause and sentence if possible. *Fuller v. Spieker* (1954), 265 Wis. 601, 603, 62 N.W. 2d 713. Thus, the definition of “displaced person” in sec. 32.19 (2) (c), Stats., encompasses persons and businesses displaced as a result of land acquisition activities including, but not limited to, condemnation.

Additionally, sec. 32.20, Stats., which provides the procedure for the collection of itemized items of compensation, contains the words “condemnee’s or claimant’s” and the phrase “in case no condemnation is involved.” The import of this language is plain.

Finally, sec. 32.25 (1), Stats., provides:

“... 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 has had both such plans approved in writing by the department of local affairs and development.” (Emphasis added.)

The quoted statutory provision refers to “acquisition” of property as do many other sections of the Relocation Act. Section 32.19 (2) (c), Stats., is an example. The word “acquisition” has a broader definition than the word “condemnation.” Thus, in common usage it is proper to state that one makes an acquisition by means of condemnation or by some other means. “Acquire,” the root word of

“acquisition,” is defined in the statutes to include “condemnation” as well as other means of obtaining title to property. Sec. 990.01 (2), Stats. Use of the word “acquisition” in the statute in question suggests that the legislature intended the statute to apply to more than the “condemnation” activities of a “condemnor.” This being the case, “condemnor” must denote something in the Relocation Act other than its usual legal definition described above. A serious ambiguity is therefore presented by the use of the word “condemnor” in the context of the Relocation Act.

The problem is to ascertain the precise meaning of the word “condemnor” intended by the legislature in the Relocation Act. Because the statute is ambiguous in this regard, resort may be had to the rules of statutory construction. *Miller v. Wadkins* (1966), 31 Wis. 2d 281, 284, 285, 142 N.W. 2d 855.

A statute should be construed to effectuate its leading idea and the whole should be brought into harmony therewith if possible. *Pella Ins. Co. v. Hartland R. T. Ins. Co.* (1965), 26 Wis. 2d 29, 41, 132 N.W. 2d 225. Moreover, in determining the meaning of any single phrase in a statute, it is necessary to look at it in the light of the whole statute. *State ex rel. Tilkens v. Board of Trustees* (1948), 253 Wis. 371, 373, 34 N.W. 2d 248. The statute should first be examined to determine the legislative purpose, and when that purpose is determined, it is to be construed so as to effect the evident purpose of the legislature if the language admits of that construction. *Pella Ins. Co., supra*.

In determining legislative purpose, the declaration of the legislature is entitled to great weight. *State ex rel. Harvey v. Morgan* (1966), 30 Wis. 2d 1, 10, 139 N.W. 2d 585.

Section 32.19 (1), Stats., declares the legislative purpose underlying the Relocation Act. Secs. 32.19 to 32.27, Stats. That section states:

“(1) DECLARATION OF PURPOSE. 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; and the legislature further finds and declares

that, notwithstanding ch. 275, laws of 1931, or any other provision of law, payment of such relocation assistance and assistance in the acquisition of replacement housing are proper costs of the construction of public improvements. If the public improvement is funded in whole or in part by a nonlapsible trust, the relocation payments and assistance constitute a purpose for which the fund of the trust is accountable.”

Thus, the evident purpose of the Relocation Act is to remedy the evils of dislocation attending the acquisition of real property for public projects. The evils of dislocation are the same whether or not the power of condemnation is exercised to acquire the property involved.

The Relocation Act is a remedial statute, as is shown by the declaration of purpose in sec. 32.19 (1), Stats. Remedial statutes are to be construed liberally to advance the remedy. *Hall v. Merrill* (1947), 251 Wis. 203, 209, 28 N.W. 2d 363. Thus, the Relocation Act should be construed liberally to suppress the evils of dislocation attending acquisitions of real property for public projects.

Accordingly, in order to give full effect to all parts of the Relocation Act, and to harmonize the parts with the intent underlying the whole, I interpret the word “condemnor” as denoting those land acquiring authorities which possess the power of eminent domain. Cf., OAG, August 3, 1973, addressed to Mr. Charles M. Hill, Sr. Therefore, in my opinion, the Relocation Act applies only to authorities vested with the power of eminent domain.

The answer to your inquiry depends, then, upon whether or not the VTAE districts or the VTAE Board are vested with the power of eminent domain. In my opinion, they are not.

State administrative agencies have only such powers as are expressly granted to them or necessarily implied and any power attempted to be exercised must be found within the statute under which the agency proceeds. *American Brass Co. v. State Board of Health* (1944), 245 Wis. 440, 448, 15 N.W. 2d 27.

Section 38.04, Stats., which establishes the powers and duties of the VTAE Board, does not even grant the Board the power to hold and acquire real property.

Section 32.02, Stats., provides:

“Who may condemn; purposes. The following municipalities, boards, commissions, public officers and corporations may acquire by condemnation any real estate and personal property appurtenant thereto or interest therein which they have power to *acquire and hold* or transfer to the state, for the purposes specified, in case such property cannot be acquired by gift or purchase at an agreed price:

“(1) Any ... school district, ... or any public board or commission, for any lawful purpose, ...” (Emphasis added.)

Section 990.01 (2), Stats., provides:

“ACQUIRE. ‘Acquire,’ when used in connection with a grant of power to any person, includes the acquisition by purchase, grant, gift or bequest. It includes the power to condemn in the cases specified in s. 32.02.”

Since the VTAE Board lacks the power to “acquire” real property, it also lacks the power to condemn it.

The VTAE districts are governed by the district boards. Arguable, these boards are “boards” in the context of sec. 32.02 (2), Stats. The VTAE districts may also be “school districts” in context of sec. 32.02 (1), Stats., even though they are clearly not “school districts” in context of sec. 115.01 (3), Stats. As will be shown, even if either or both of these possibilities is fact, sec. 32.02 (1), Stats., does not confer condemnation powers on the VTAE districts.

Section 38.14, Stats., establishes the powers of the VTAE district boards. Section 38.14 (2), Stats., provides:

“(a) For the use of the district schools, the district board may:

“***

“2. Purchase or lease suitable land and buildings ...”

Thus, sec. 38.14 (2), Stats., specifically limits the land acquiring authority of the VTAE districts to acquisition by “purchase” or “lease.” The VTAE districts do not have general authority to “acquire” land.

In *Martineau v. State Conservation Comm.* (1970), 46 Wis. 2d 443, 175 N.W. 2d 206, a state commission attempted to condemn lands under authority of sec. 32.02 (1), Stats. Another statute created after sec. 32.02 (2), granted the commission power to acquire lands for the purpose in question by grant, devise, gift or purchase, but did not expressly grant the power of eminent domain. The court stated:

“It is a cardinal rule of statutory construction that when a general and a specific statute relate to the same matter, the specific statute controls and this is especially true when the specific statute is enacted after enactment of the general statute.” 46 Wis. 2d at 449.

The court held that the commission could not exercise the power of eminent domain for the purpose in question.

The operative facts of *Martineau* are virtually identical to the operative facts of the situation presently under discussion. Section 32.02 (1), Stats., was created by ch. 571, Laws of 1919. Thus, the holding in *Martineau* must be deemed controlling in the present case. The specific later statute (sec. 38.14 (2) created by ch. 154, Laws of 1971), controls over the earlier, general statute (sec. 32.02 (1)). Therefore, the VTAE districts do not have the power of eminent domain.

In summary, then, I have concluded that the Relocation Act, secs. 32.19 to 32.27, Stats., applies only to authorities possessing the power of eminent domain. I have also concluded the VTAE districts do not possess the power of eminent domain. Moreover, the VTAE Board has no authority to acquire real property by condemnation. Therefore, I conclude that the VTAE Board and the VTAE districts are not subject to the requirements of the Relocation Act, secs. 32.19 to 32.27, Stats.

RWW:CAB

Religion; University; Leasing of University buildings to a religious congregation during nonschool days and hours on a temporary basis while the congregation's existing facility is being renovated and leasing convention space to a church conference would not violate separation of church and state provisions of the First Amendment to United States Constitution and Art. I, sec. 18, of the Wisconsin Constitution.

September 18, 1974.

J. S. HOLT, Secretary

Board of Regents, University of Wisconsin System

Your letter of July 22, 1974, requests advice concerning the use of University space by religious organizations. Information provided along with your request and learned in subsequent conversations with University staff members indicates that the Council on Ministries of the Wisconsin Conference of the United Methodist Church has inquired whether the campuses of the University of Wisconsin-Stevens Point and the University of Wisconsin-River Falls might be available on June 5, 6, 7, and 8, 1975, for their annual conference.

In addition, you have received an inquiry from Congregation Emanu-El B'ne Jeshurun of 2419 East Kenwood Boulevard, Milwaukee, a Jewish synagogue, as to whether the University campus at Milwaukee might rent space to that religious organization while a renovation of a portion of its existing facility takes place from mid-October to the end of the 1974-75 school year.

You ask whether there are any constitutional or statutory prohibitions against allowing such uses of University property. I will deal with the constitutional questions first.

FIRST AMENDMENT

The First Amendment to the Constitution of the United States provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; ..." The federal constitutional provision applies to Congress and federal agencies and to the states through the Fourteenth Amendment.

Some discussion on what the United States Supreme Court has said in regard to what can and cannot be done under the Establishment Clause of the First Amendment appears in order.

In *Cantwell v. Connecticut* (1940), 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, the United States Supreme Court made both the Establishment Clause and the Free Exercise Clause of the First Amendment applicable to the states through the Fourteenth Amendment.

In *Zorach v. Clauson* (1952), 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954, a New York City program for releasing students during the school day so that they could leave the school buildings and school grounds and go to religious centers for religious instruction or devotional exercises was found not to violate the First Amendment. The court distinguished the case of *McCullum v. Board of Education* (1948), 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 249, where the classrooms were turned over to religious instructors during a portion of the school day. The court rejected a suggestion that the releasing of children to attend religious classrooms was a system of coercion to get the public school students to attend the religious classes.

Although supporting the doctrine that the First Amendment reflects the philosophy of our Founding Fathers that the church and state should be separated, the court made this significant statement:

“... The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other-- hostile, suspicious, and even unfriendly. ...” 343 U.S. 312.

This language seems to approve some forms of state and religious cooperation and more recent cases seem to turn on the amount of “entanglement” between government and the church.

In the case of *Committee for Public Education and Religious Liberty v. Nyquist* (1973), 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed. 2d 948, the court held that a New York statute providing for payment out of public funds for maintenance and repair for private schools, tuition reimbursement for private school pupils, and income tax

benefits to parents of children attending New York's nonpublic schools all violate the Establishment Clause of the First Amendment. On the same date the court decided *Sloan v. Lemon* (1973), 413 U.S. 825, 93 S.Ct. 2982, 37 L.Ed. 2d 939, which held that a Pennsylvania statute providing for reimbursement of tuition paid by parents who send their children to nonpublic schools had the impermissible effect of advancing religion and was unconstitutional under the Establishment Clause. However, also on the same date, the court decided *Hunt v. McNair* (1973), 413 U.S. 734, 93 S.Ct. 2868, 37 L.Ed. 2d 923. This was an action challenging the South Carolina statutory scheme for aiding colleges by issuance of revenue bonds for projects excluding facilities for sectarian study or religious worship but involving a benefit to a Baptist-controlled college. The court held that the *purpose* of the act is secular, the benefits being available to all institutions of higher education whether or not they have the religious affiliation and that therefore the statute does not have the *primary effect* of advancing or inhibiting religion. The court concluded that the statute does not foster an *excessive entanglement* with religion.

It appears that the United States Supreme Court has adopted a three-pronged rule which governs their consideration of statutes challenged as being in violation of the Establishment Clause: first, whether the statute has a secular legislative purpose; second, whether its principal or primary effect is one that neither advances nor inhibits religion; and three, whether it fosters an excessive entanglement with religion. The above decisions and others make it clear that the First Amendment does not bar all state aid to religion of whatever kind or extent. This is obvious when we consider that states do and may furnish churches and parochial schools with police and fire protection, water and sewerage facilities, tax exemptions for places of worship, bus transportation for parochial students as well as those going to public schools, books, and as the court held in *Hunt v. McNair*, *supra*, the state may become the owner of property of a church-sponsored college and lease it back to the college, all with the purpose and effect of permitting revenue bonds issued in connection with the college's operation to be tax-exempt with a lower rate of interest. As Justice White points out in his dissent in *Nyquist*, the court cases evidence the difficulty in perceiving when the state's involvement with religion passes the peril point.

Although the United States Supreme Court has not yet considered the question of whether leasing of facilities in a public institution to a religious organization violates the First Amendment, it is apparent that such question would be judged by the three elements mentioned above.

WISCONSIN CONSTITUTION

Article I, sec. 18, of the Wisconsin Constitution prohibits giving any preference by law to any religious establishments or modes of worship and also prohibits the drawing of any money from the state treasury for the benefit of religious societies or religious or theological seminaries.

Although the Wisconsin Supreme Court has not considered whether the use of public school or college buildings by religious groups constitutes a violation of the provisions of Art. I, sec. 18, it has spoken on the use of a sectarian building for public school purposes. In *Dorner v. School District* (1908), 137 Wis. 147, 118 N.W. 353, the court approved the maintenance of a public school in a parochial school building, and in *State ex rel. Conway v. District Board* (1916), 162 Wis. 482, 156 N.W. 477, the court found that holding public school graduation exercises in a church where invocations were offered by Catholic and Protestant clergymen did not violate Art. I, sec. 18, of the Wisconsin Constitution.

Article I, sec. 24, of the Wisconsin Constitution as created in April, 1972, reads as follows:

“Nothing in this constitution shall prohibit the legislature from authorizing, by law, the use of public school buildings by civic, religious or charitable organizations during nonschool hours upon payment by the organization to the school district of reasonable compensation for such use.”

In accordance with the authority of sec. 24, the legislature amended sec. 120.13 (19) by ch. 290 of the Laws of 1973. This section reads as follows:

“120.13 School board powers. The school board of a common or union high school district may:

“(19) USE OF PROPERTY FOR FEES. Grant the use of school buildings and grounds to any responsible organization for public meetings to which an admission price is demanded, and to charge for such use an amount fixed by the school board and grant the use of school property during nonschool hours to religious organizations upon payment of reasonable fees and upon such conditions as the board determines, if such use does not interfere with the prime use of the school property. Amounts so received shall be paid into the school district treasury to constitute part of the general fund and to be used for the benefit of the schools of the school district.”

Thus, both by Wisconsin constitutional provisions and statute, *public* school buildings may be used by religious organizations upon payment of reasonable fees and upon such other conditions as the Board determines. *Public school buildings* are usually construed to be grade and high school buildings, so these provisions would not apply to state-owned college or university buildings. See *Words and Phrases, Public Schools*.

Article X, sec. 6, of the Wisconsin Constitution provides in part:

“... no sectarian instruction shall be allowed in such university.”

This provision prohibits the University from offering courses which either have the effect of advancing or opposing religion. See 55 OAG 262, 263 (1966), and 1966 Wis. L. Rev. 297.

The Wisconsin Supreme Court adopted the “primary effect” rule in *State ex rel. Warren v. Reuter* (1969), 44 Wis. 2d 201, 227, 170 N.W. 2d 790. Our court directly applied that test in *State ex rel. Warren v. Nusbaum* (1972), 55 Wis. 2d 316, 198 N.W. 2d 650, as well as the “excessive entanglement” rule. See also 58 OAG 163 (1969).

See also *State ex rel. Warren, et al. v. Nusbaum* (1974), 64 Wis. 2d 314, 219 N.W. 2d 577, where the “three-pronged” test was used to approve ch. 89 of the Laws of 1973 which deals with aids to children with exceptional educational needs.

STATUTORY AUTHORITY

In the question before us we are not dealing directly with a statute but with contracts which might be entered into under authority of general statutes which give the Board of Regents "... all powers necessary or convenient for the operation of the system except as limited in this chapter." (Sec. 36.09 (1) (k), as created by ch. 335, Laws of 1973.) There being no limitation on the Regents' authority to rent or lease portions of University premises in ch. 335 except for "purposes, objects and uses of the system authorized by law" (sec. 36.11 (1) (b)), I must conclude that the general authority to temporarily lease space to outside organizations, whether religious in nature or otherwise, has been given to the Regents by the legislature. I must also conclude that the statute involved has a secular legislative purpose and that the primary effect of the statute is not to advance religion.

EXCESSIVE ENTANGLEMENTS

The last question is more difficult to answer. Would the proposed use of state-owned facilities at University campuses by Methodist and Jewish organizations result in "excessive entanglements" within the meaning of that term as used in *State ex rel. Warren, et al. v. Nusbaum, supra*, *State ex rel. Warren v. Nusbaum, supra*, *Lemon v. Kurtzman* (1971), 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed. 2d 745, and *Tilton v. Richardson* (1971), 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed. 2d 790?

Justice Robert W. Hansen, writing for the court in *Nusbaum* (1972), said at 55 Wis. 2d, page 330:

"... What we are dealing with is '... the risk that government aid will in fact serve to support religious activities. ...' *Tilton* listed facts and factors that reduced such risk in that case. The *Tilton* opinion concluded that, cumulatively, weighed together they shaped a 'narrow and limited relationship with government' and, as a result, there was 'less potential for realizing the substantive evils against which the Religion Clauses were intended to protect.'"

And, at page 334:

"... However, *Tilton* lessens the reach of earlier decisions of this court⁸⁸ insofar as the first amendment is concerned ..."

The footnote cites *State ex rel. Weiss v. District Board* (1890), 76 Wis. 177, 44 N.W. 967, *State ex rel. Reynolds v. Nusbaum* (1962), 17 Wis. 2d 148, 115 N.W. 2d 761, and *State ex rel. Warren v. Reuter, supra*, all cases which have adhered to tight standards in the separation of church and state.

In seeking guidance from the state and federal supreme court decisions we must remember that the cases are not directly in point which have dealt with the entanglement question.

In order to determine whether government entanglement with religion is excessive the court in *Lemon v. Kurtzman* pointed to three criteria that should be examined, as follows:

- (1) The character and purposes of the institutions that are benefited.
- (2) The nature of the aid that the state provides.
- (3) The resulting relationship between the government and the religious authority.

In that case, and a companion case, the court held there was excessive entanglement of state with church where (1) salary supplements were paid to teachers of secular subjects in nonpublic schools, and (2) where there is reimbursement of nonpublic schools for teacher salaries, textbooks and instructional materials for teaching secular subjects.

By contrast, the Higher Education Facilities Act was approved, except as to a 20-year government interest, in *Tilton v. Richardson*. Federal construction grants to colleges and universities which are church-related are authorized if the buildings are to be used for secular educational functions. No grant can be made for a facility to be used for "... sectarian instruction or as a place for religious worship ..."

Some cases involving this type of entanglement have been decided in other states. However, most of the reported cases from other states involve the question of a *public* school building or grounds to be used during nonschool time for holding religious meetings or for other religious purposes, and do not involve college or university buildings. The constitutional provisions usually invoked by those objecting to the use of public school premises for religious meetings or other

religious purposes during nonschool time are those which require separation of church and state or prohibit taxation or use of government funds for the support of any religion or religious institution or house of worship. There are a number of cases in which the particular use of a public schoolhouse or premises for religious purposes during nonschool time permitted or authorized by the school authorities have been held not to violate the particular clause or clauses of the state constitution invoked by the objecting party. In most of these instances the use for religious meetings or the like was permitted only infrequently or on a temporary basis.

In the case of *Southside Estates Baptist Church v. Board of Trustees* (Fla. 1959), 115 S. 2d 697, 79 A.L.R. 2d 1142, a Florida statute provided that the trustees of a school district could provide for or permit the use of school buildings and grounds in nonschool hours during the school term or during vacation for "any legal assembly." Under that authority the trustees of a school district permitted a number of different churches to use various school buildings on Sundays for holding church services, each of the authorizations for use being for temporary use of the buildings pending completion of construction of church buildings. The court denied an injunction sought by taxpayers of the district to prohibit such temporary use of the public school buildings for religious meetings and the appellate court upheld that denial. The court said that the statute and the permission granted thereunder did not, under the circumstances shown, violate any of the complaining taxpayers' rights under the Florida Constitution which provided that "No preference shall be given by law to any church, sect or mode of worship and no money shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination or in aid of any sectarian institution."

The court found nothing in the record to support a conclusion that any public funds had been contributed to any of the churches and it considered that the slight wear and tear upon the school building involved in such religious meetings, if such was an indirect contribution from the public treasury, was immaterial under the maxim "de minimis non curat lex" and that it did not appear that any preference had been given to one sect or denomination over any other in this activity since its inauguration of the policy permitting such temporary usage.

The court went on to find that such temporary use of the school buildings for holding church services on Sunday was not a violation of the First Amendment to the Federal Constitution providing that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," the court reasoning that it found nothing in the conduct of the trustees to suggest the involvement of public funds or property in the establishment of religion or in preferring one religious faith over another.

The opinion emphasizes that the various religious denominations were permitted to make use of the school buildings on Sundays only, temporarily during the pendency of the construction of the individual organization's church building, and implies that if the use of the school buildings was permitted for prolonged periods of time without evidence of an immediate intention on the part of the church to construct its own building, the answer might be different.

Other cases finding no constitutional objection to the use of school properties by religious organizations include:

Nichols v. School Directors (1879), 93 Ill. 61, 34 Am. Rep. 160;

Davis v. Boget (1878), 50 Iowa 11;

State ex rel. Gilbert v. Dilley (1914), 95 Neb. 527, 145 N.W. 999;

Baer v. Kolmorgen (1958), 14 Misc. 2d 1015, 181 N.Y.S. 2d 230.

There are relatively few cases holding a constitutional provision violated by the particular religious use of public school premises permitted at times when the school was not in session. However, a few Pennsylvania cases, although somewhat indefinite as to the specific constitutional provision infringed, seem to agree that the fundamental law of the state was violated by permitting a public schoolroom to be used for religious meetings or other religious purposes during nonschool time. See *Bender v. Streabich* (1897), 182 Pa. 251, 37 A. 853, and *Hysong v. Gallitzin Borough School Dist.* (1894), 164 Pa. 629, 30 A. 482.

CONCLUSION

The first situation on which you seek advice is the case of the Jewish Congregation directly across the street from the campus in Milwaukee which has scheduled a renovation of a portion of its existing facility which will displace the religious school program from mid-October through the 1974-75 school year. Classes are held primarily on Saturday and Sunday mornings, with additional classes being held in the late afternoon on Monday and Wednesday; 500 students are affected. The Congregation desires to rent space from the University during the period when this renovation program is taking place. It just happens that the University and the synagogue are adjacent to one another, but there is no question but that the character and purposes of the institution are religious in nature. The nature of the proposed contract (aid) would be to make available to the Congregation, on a temporary basis during nonschool hours and apparently primarily on nonschool days, space that presumably would not be used for any other purpose at that time. The relationship of the parties would be merely that of landlord and tenant for the temporary period.

It would appear that such arrangements would not result in "an excessive entanglement" between the State of Wisconsin and the Congregation involved. There is no question but what such an arrangement would result in some entanglement between church and state. The rule, however, is that such entanglement must not be *excessive*. If the arrangement is for a limited specified period of time at a reasonable rental without the state being involved in any way in the instructional program, it would appear that the occasional use of state-owned properties in this manner would be consistent with the philosophy that the Establishment Clause of the First Amendment does not require the government to adopt an attitude of active antipathy towards religion.

My advice, of course, is based upon what I conclude to be the likely result if a lawsuit was started to test this type of arrangement. An ultimate answer would have to be obtained from the appropriate appellate court where the law could be applied to a specific case.

Having made conclusions in regard to the use of University property for a temporary religious school program, the second question, in regard to the use of University facilities by the United Methodist Church for their 1975 annual conference, seems to present

even less evidence of excessive entanglement between church and state.

Here, assuming that space is available, about 1,000 members of the Methodist Church would convene in the summer of 1975. The Conference would be expected to pay full costs for the use of the facilities and the conference itself is primarily a meeting at which the business of the Wisconsin Conference of the Council on Ministries is transacted. I am of the opinion, therefore, that whether the Regents wish to accommodate a conference of this nature is more a matter of policy than constitutional determination. However, it should be kept in mind that the manner in which facilities are rented to religious organizations could create a constitutional question. For instance, if one religious group is granted certain privileges and another group is denied those same privileges, an allegation could be made that one religion is being favored by the state over another. Therefore, if the University embarks on a policy of allowing religious organizations to use the University facilities, it will be necessary to treat all religious groups alike in order to avoid a charge of favoritism.

It is well recognized, of course, that public officials have, in the absence of statutory provisions for such use, the authority to prohibit the use of a public school or college building for religious purposes. *Hunt v. Board of Education of County of Kanawha* (S.D. W.Va. 1971), 321 F. Supp. 1263; *State ex rel. Greisiger v. Grand Rapids Board of Education* (1949), 88 Ohio App. 364, 100 N.E. 2d 294, app. dsmd. 153 Ohio St. 474, 92 N.E. 2d 393, cert. den. 340 U.S. 820, 71 S.Ct. 51, 95 L.Ed. 603, reh. den. 341 U.S. 917, 71 S.Ct. 733, 95 L.Ed. 1352.

Finally, I would advise that if University property is leased to a religious group the charges to be made for use of the property be sufficient to insure that the state will not be required to expend any public funds to accommodate those renting the premises during the period authorized. The Board should also make sure that the renting of the facilities to religious organizations does not interfere with the use of those facilities for school purposes.

RWW:LLD

Regents, Board Of; Students; Regents should identify how compulsory fees will be used to necessarily and conveniently further the objects of the University before approving a segregated fee, under sec. 37.11 (8), Stats., to finance a legal services program for Oshkosh Student Association.

September 18, 1974.

J. S. HOLT, *Secretary*

Board of Regents, University of Wisconsin System

You advise that the Board of Regents adopted a resolution calling for the implementation, on a trial basis, of a legal services proposal at the University of Wisconsin-Oshkosh supported by a segregated fee and the Regents desire clarification of the opinion issued on February 29, 1972, to Robert W. Winter, assistant director of the Wisconsin State Universities System, which relates to the use of the segregated fee under sec. 37.11 (8) (a), Stats., which reads as follows in relevant part:

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

That opinion, 61 OAG 120, advised that the Regents may charge student fees only for activities that relate to a legitimate educational purpose, and it was pointed out that whether a proposed student activity fee for the purpose of acquiring accident, death, and disability insurance coverage for occurrences arising out of University sanctioned activities involving off-campus travel relates to a legitimate school function depends upon whether the Regents can, *as a matter of fact*, identify the use of the fee with a legitimate educational purpose. Depending on the type of insurance involved and the activities involved, it was left for the Board to determine if there can be identified a worthwhile benefit which can be demonstrated as relating to the educational purposes of the ch. 37 institutions.

The key sentence in the opinion to Robert W. Winter is as follows:

“... If, in the Board’s opinion, a worthwhile benefit is achieved, which benefit can be demonstrated as relating to the educational purposes of the Chapter 37 Institutions, the fee may be imposed and the insurance program initiated. ...” (61 OAG 120, 122.)

From information provided to this office, it appears that the Oshkosh Student Association has made a proposal to the Regents for the adoption and approval of a Student Legal Services Program at the University of Wisconsin-Oshkosh. It also appears that the Student Association has sponsored a legal services program at Oshkosh since the 1969-70 school year, which has been self-funding. The initial idea was to provide a counseling service for students, involving no litigation or other legal work. A lawyer was engaged and a minimum charge of \$5 per client was made for a 15-minute appointment. The Association canvassed student organizations and asked for donations to finance the program.

Later, under a new director, the funds were obtained primarily through endorsement and fees paid the Association by the Globe Life Insurance Company. The Association endorsed that insurance company’s policy during the years from 1970 through 1973. Two lawyers eventually were employed on a part-time basis, holding office hours in Reeve Union on Tuesday and Thursday nights. One of the lawyers suggested altering the program by charging students an extra fee for any legal service provided other than purely verbal counseling and advising. Because of a constantly increasing work load and subsequent paper work, a secretary was hired. Thereafter, attempts were made to secure the program’s funding from the student activity fee. Representatives of the program appeared before the Council of Chancellors of the University of Wisconsin System and the question was then referred to the Board of Regents. In September of 1972 Mr. Steve Ballard, director of the Legal Services Program at Oshkosh, Mr. Mark Mitchell, Oshkosh Student Association president, and Attorney Wallace P. Barlow appeared before the Business and Finance Committee of the Board of Regents. A motion to refuse funding was defeated by a 3-to-3 tie vote. The issue was then presented to the entire Board of Regents, where it was tabled on November 3, 1972.

The Legal Services Program at Oshkosh, which apparently is now being handled by Mr. Barlow alone, has performed a variety of legal services, having served more than 750 students in the 1972-73 school year. In the recent proposal submitted to the Regents, 69 different types of legal questions are listed on which the attorneys have apparently given legal assistance and advice to the students at Oshkosh.

It appears that many of the types of cases involve advising the individuals as to legal rights and consequences and referring the cases to other authorities, but many of the cases lead to court action either directly or indirectly.

On January 11, 1974, the Regents removed the legal services proposal from the table and resolved that the proposal "... be deemed of potential benefit to students and a legitimate institutional function in the manner of segregated fee-supported activities sufficient to merit its implementation on a trial basis as a segregated fee-supported activity at UW-Oshkosh ..." This approval was conditioned upon the approval of the chancellor, an opinion of the attorney general, and other stated conditions.

Your question not only relates to a clarification of the Winter opinion, but to the basic question as to whether a legal services program as described may be supported by student fees exacted under the authority of sec. 37.11 (8) (a), Stats. Although this section has been given liberal administrative interpretation (61 OAG 120, 122), the rule remains that statutes affecting personal or property rights are to be strictly construed. 15 Callaghan's Wis. Digest, *Statutes*, sec. 190. Also, "... an incorporated university ... or an incorporated board of regents ..., as in the case of any other corporation, can do no act for which authority is not expressly or impliedly granted ..." 14 C.J.S., *Colleges and Universities*, sec. 6.

In my opinion the language of the resolution does not indicate that the Regents have identified a benefit from the proposed legal services program which can be "demonstrated as relating to the educational purposes of the Chapter 37 Institutions." There is also a great deal of doubt as to whether such a nexus could be made between a *compulsory* fee-supported legal services program and the educational purposes of the University of Wisconsin-Oshkosh so as to be able to

assure the Regents that the program could be successfully defended against legal attack.

In Opinion 7-051 issued September 10, 1971, the Attorney General of Ohio, William J. Brown, advised the President of Ohio University that state funds could not be used to finance an office of student defender at a state university where such office would represent students in criminal and civil proceedings. The reasoning was that the student defender office could not be realistically justified as advancing the well-being of the communal body or promoting the purpose of education.

Other Attorneys General and university counsel have been considering similar problems in recent years. In some states, student groups have sought funds from mandatory fees to hire lawyers and scientists on a full-time basis to devote efforts toward "constructive social change" by studying and working for change in such areas as consumer protection, environmental protection, occupational health and safety, and housing, to name a few. These groups are known as Public Interest Research Groups (PIRGs).

An opinion of the Attorney General of Maryland, dated August 14, 1973, takes the position that state institutions of higher education are without authority to impose on students a mandatory fee for the benefit and support of the Maryland Public Interest Research Group because

"... it does not appear that support of this organization is either necessary and convenient to accomplish the objects for which the State institutions of higher education have been founded, nor that the support of MaryPIRG is reasonably incidental to the main purpose of maintaining these academic institutions, nor even that it is associated with the well-being of the academic community of an educational institution."

The Attorney General further advised that it would be within the discretion of each institution's governing board to determine, as a matter of policy, "whether it wishes to act as a collection agency for voluntary contributions to MaryPIRG by its students," and that, moreover, each institution could determine "whether a PIRG meets its qualifications for a recognized student activity entitled to request an allocation from the regular student activities fee."

In yet another instance, where PIRG proposed that the University of Massachusetts collect a two-dollar fee every semester from every student with unwilling students requesting subsequent refunds, the Board of Trustees was advised by University counsel on May 25, 1972, that the proposed fee was mandatory in nature and could not be authorized by the Board. The Board was further advised that while any mandatory fees charged must be necessary and convenient to accomplish the objects for which the University was founded, and the Board could exercise powers which were incidental to the main educational purpose of the institution, "WMPIRG's activities are not close enough to the main activities of the University. Accordingly, the Board is unauthorized to approve this fee mechanism on the ground of customary or traditional power." The Board also was advised, however, that it did have the authority to approve or reject the collection of the PIRG fee "at the voluntary request of a student" for transmission to PIRG. See "Legal Aspects of Student Activities Fees," *Journal of College and University Law* (Winter 1973-74), Vol. 1, No. 2, p. 190.

The "necessary and convenient" standard mentioned in the Maryland Attorney General's opinion is substantially the same standard applied by the Wisconsin Supreme Court in *Priest v. Regents* (1882), 54 Wis. 159, 11 N.W. 472. There the court concluded that fees could be properly charged students for the expense of heating and lighting of public halls and rooms of the University. The court considered the payment of such fees as "... an expense necessary and convenient to accomplish the objects mentioned in the statute, and that the general powers granted to the board of regents authorized them to enact the by-law in question ..."

Here, if the payment of a compulsory fee were attacked, it is certainly questionable whether the proper nexus of "necessary and convenient" could be established. For one thing, the resolution does not limit the program proposed in its scope.

For instance, although the proposal offered by the Oshkosh Student Association provides that the attorney could not represent students, faculty, or staff members of the University of Wisconsin System at any stage in any proceeding in federal, state, county, or local court where such proceeding is antagonistic to the University of Wisconsin System or any person in his *official* capacity as an officer

of the System, it does not prohibit suits against officials of the System in their *individual* capacity.

This would mean that suits could be brought against individual regents, the president, the chancellors, and all other officials of the University System in their individual capacities under either state or federal law. Whether this is advisable is for the Regents to determine within the legal guidelines that the fee must be for "an expense necessary and convenient" to accomplish the purposes for which the University has been founded. It would not appear that authorizing the use of such compulsory fees on a "trial basis" as stated in the resolution would be wise unless it can first be determined that such use falls within the "necessary and convenient" category. See *Stringer v. Gould* (1970), 64 Misc. 2d 89, 314 N.Y.S. 2d 309, where the Supreme Court of New York held that where a student fee was mandatory in nature the Board of Trustees would be required to determine *in advance* whether expenditures from a fund created by the fees were for the purposes authorized.

I must conclude, therefore, that the Regents should give this matter further study and at least be prepared to limit the scope of any proposed program, place controls on any such operation, and identify how the fees will be used to necessarily and conveniently further the objects for which the University of Wisconsin-Oshkosh was founded.

I am aware of the provisions of sec. 36.09 (5), as created by ch. 335 of the Laws of 1973 (July 8, 1974), which provides in part as follows: "... Students in consultation with the chancellor and subject to the final confirmation of the board shall have the responsibility for the disposition of those student fees which constitute substantial support for campus student activities. ..."

It is my opinion that the Regents' duties as set out above are unchanged by sec. 36.09 (5).

RWW:LLD

Municipalities; Votes And Voting; 1973 Senate Bill 59 contains inconsistent provisions which require redrafting, although the general intent of the bill appears to be to provide nonresident property owners with a voice in both metropolitan sewerage district and town sanitary district bond elections. Such a limited extension of voting rights probably would not infringe the local district electors' federal or state constitutional guarantees of equal protection. Such extension of suffrage probably is required to be submitted to a vote of the electors of the state, under Art. III, sec. 1, Wis. Const.

September 19, 1974.

THE HONORABLE, THE ASSEMBLY

Legislature

By Assembly Resolution No. 29, you have inquired as to the constitutionality of 1973 Senate Bill 59 by which the class of persons eligible to participate in both metropolitan sewerage district and town sanitary district bond elections would be expanded to include nonresident property owners.

By virtue of the adjournment provisions of 1973 enrolled joint resolution 4, Senate Bill 59 may be presumed to be adversely acted upon and, therefore, dead. Nevertheless, I deem the constitutional question raised to be of sufficient continuing importance to justify discussion and answer for your future guidance. It is for this reason that I have answered your inquiry.

Sections 66.20 through 66.26, Stats., provide for the establishment of a metropolitan sewerage district, governed by a commission, to provide sanitary collection and treatment services for the district. Section 66.25, Stats., provides for the financing of the necessary facilities by special assessment against property receiving services or by levying a tax upon the taxable property in the district or by assessing users with a service charge. Further, in order to spread the tax burden upon property owners or users of the service over a long period of time, subsec. (6) of the statute authorizes a district to finance new facilities by borrowing through the issuance of bonds pursuant to a resolution adopted by the metropolitan sewerage district commission. However, subsec. (7) (b) of sec. 66.25, Stats.,

provides a referendum procedure which, if invoked, requires that the borrowing resolution adopted by the governing body be submitted in a special election "to a vote of the electors of the district" for approval.

Sections 60.30 through 60.316, Stats., provide a similar statutory framework for the establishment and financing of a town sanitary district, which is also governed by a commission. Subsection (1) of sec. 60.307, Stats., authorizes such a district to borrow money by the issuance of bonds pursuant to a resolution adopted by the town sanitary district commission. In the event the referendum procedure there provided is invoked, subsec. (3) directs that the resolution be submitted in a special election "to a vote of the electors of said district."

1973 Senate Bill 59 was apparently proposed for the purpose of amending the referendum provisions of secs. 66.25 (7) (b) and 60.307 (3), Stats., so as to provide for submittal of bond issue resolutions to the vote of both the electors of the district and nonresident property owners. Thus, initially we must examine the proposed amendments in the bill to determine if the apparent purpose so intended was clearly effectuated.

Amended sec. 60.307 (3), as appearing in 1973 Senate Bill 59, reads in part as follows:

"Such resolution shall be submitted to a vote of the electors of said district *and all individuals who hold title of record to any lands in the district and who would otherwise be eligible to vote had they resided in the district for the required time, if, ... a petition requesting said submission, [is] signed by electors numbering at least ... 10% of the votes cast for governor in the district at the last general election. ...*"

Section 66.25 (7) (b), Stats., would be amended by the bill to read in part:

"Such resolution shall be submitted to a vote of the electors of the district if, ... a petition requesting the submission, [is] signed by electors numbering at least 10% of the votes cast for governor in the district *and all individuals who hold title of record to any lands in the district and who would otherwise be*

eligible to vote had they resided in the district for the required time, at the last general election ...”

In essence the amendment to sec. 60.307 (3), Stats., would permit both electors and nonresident property owners to vote on metropolitan sewerage district bond issues in the event a valid petition is filed by 10% of the electors voting in the last gubernatorial election, thus invoking the referendum procedure. On the other hand, the amendment to sec. 66.25 (7) (b), Stats., would appear to permit only electors to vote in town sanitary district bond elections, providing a valid petition invoking the referendum procedure is filed by electors *and* nonresident property owners. Reading both proposed amendments in their entirety, it does not appear that the obvious inconsistency between their provisions was intended, but rather, may have arisen inadvertently in the drafting process. If, as it would appear, both proposed amendments were intended to effectuate the same purpose, namely, to permit nonresident property owners to have a voice in voting on the subject bond issue referendums, redrafting would obviously be necessary to make the two provisions consistent in that regard.

Assuming that a bill such as 1973 Senate Bill 59 were so redrafted, I am of the opinion that the limited extension of voting rights contemplated will not infringe the local district electors' federal or state constitutional guarantees of equal protection. In light of the fact that the ultimate financial burden for sanitary facilities in a district is imposed on the property owner, the legislature could reasonably conclude that it would be equitable, considering his pecuniary interest, to permit the nonresident property owner to participate in the referendum process relating to the bond issues directly imposing that burden. However, if such extension of voting rights did not include the right to petition, the denial of that right could well be challenged on the basis that the right to petition is an integral part of the voting rights exercised under the subject statutes and that such rights must be fully extended to nonresident property owners on the same basis as electors.

The United States Supreme Court has had several recent opportunities to construe the limits of the Equal Protection Clause with regard to state legislation establishing voter classifications on the basis of the ownership of property. The common thread in the

decisions of the U.S. Supreme Court appears to be the court's concern that the distinctions created by a classification affecting the exercise of the voting franchise actually support the interest which the state claims to be protecting.

Thus, in *Kramer v. Union School District* (1969), 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed. 2d 583, 590 (school election), *Cipriano v. City of Houma* (1969), 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed. 2d 647 (revenue bond election) and *City of Phoenix v. Kolodziejski* (1970), 399 U.S. 204, 90 S.Ct. 1990, 26 L.Ed. 2d 523 (general obligation bond election), the court held that the denial of the right to vote of some residents, based on property ownership qualifications, constituted a denial of equal protection of the law, since such qualification did not reasonably relate to or meet a legitimate state goal. The different circumstances existing in *Salyer Land Company v. Tulare Lake Basin Water Storage District* (1973), 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed. 659 (election of district directors), and *Associated Enterprises, Inc., and Johnston Fuel Liners v. Toltec Watershed Improvement District* (1973), 410 U.S. 743, 93 S.Ct. 1237, 35 L.Ed. 2d 675 (referendum re creation of district), led to different results. These decisions upheld the validity of the California Water Storage District Act and Wyoming Watershed Improvement District Act respectively, which permitted only landowners to vote and denied the franchise to otherwise qualified residents.

While the above federal cases demonstrate that property ownership or tax paying may be a legitimate qualification for voting under certain circumstances, such decisions concern state legislation which attempts in some way to *restrict* the exercise of the voting franchise to property owners. On the other hand, 1973 Senate Bill 59 does not purport to restrict the voting franchise in sanitary district bond issue elections to electors who are property owners or even just to property owners. In essence, the bill would *expand* the group eligible to participate in the bond referendum process to include nonresident property owners.

The question of an expanded voter franchise in general elections, so as to include nonresident property owners, has been the subject of much litigation in both the state and federal courts of Georgia. That state's Supreme Court has upheld such an expansion even where it

was limited to nonresident owners of property in a particular municipality. *Bobo v. Mayor and Councilmen of the Town of Savannah Beach* (1960), 216 Ga. 12, 114 S.E. 2d 374, appeal dismissed by Supreme Court for want of a substantial federal question, 364 U.S. 409, 81 S.Ct. 181, 5 L.Ed. 2d 185. Likewise, the federal courts held, in *Spahos v. Mayor and Councilmen of Savannah Beach, Tybee Island, Georgia* (S.D. Ga. 1962), 207 F.Supp. 688, affirmed per curiam, 371 U.S. 206, 83 S.Ct. 304, 9 L.Ed. 2d 269, that such an expansion of the electorate does not violate a resident's civil rights under the Equal Protection Clause of the Fourteenth Amendment, stating, at 207 F.Supp. 692:

"The objective of the legislature here was undoubtedly to permit those persons owning property within the municipality, many of whom were summer residents therein, to have *a voice in the management of its affairs*. This appears to be a rational objective and the plaintiffs have failed to show that the classification thereunder is arbitrary or unreasonable." (Emphasis added.)

Therefore, I conclude that the proposed limited expansion of the franchise to include nonresident property owners of the subject districts would not constitute a denial of equal protection to resident electors of such districts. As previously indicated, however, if such voting rights were granted, the courts might find that a refusal to allow nonresident property owners to also join with electors in petitioning for an election would be constitutionally objectionable on equal protection grounds.

A bill such as 1973 Senate Bill 59 must also be considered in reference to the provisions of Art. III, sec. 1, Wis. Const., which defines an elector as follows:

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

"(1) Citizens of the United States.

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

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

This constitutional provision contains no property qualification, but it does set forth age limitations and requires residence in an election district precedent to exercising the franchise as an elector. As stated in *State ex rel. Wannemaker v. Alder* (1894), 87 Wis. 554, 558, 58 N.W. 1045:

“... By the constitution (art. III, sec. 1) an elector must reside in the election district where he offers to vote. ...”

Further, Article III, sec. 1, para. (3), Wis. Const., clearly provides that a proposal to extend the right of suffrage to persons not enumerated in Art. III must be approved by a referendum of the voters in a general election. 44 OAG 106 (1955), 50 OAG 50 (1961).

Generally, the enumeration in the Constitution of the qualifications of electors is the complete and final test as to who shall be permitted to vote, and such qualifications can be altered only by constitutional amendment. However, the legislature may prescribe voter qualifications for elections not provided for in the state Constitution. 25 Am. Jur. 2d *Elections*, sec. 60, p. 753. In addition, statutes prescribing property qualifications to vote on financial questions have been held not to conflict with such constitutional provisions. 25 Am. Jur. 2d *Elections*, sec. 59, p. 752 and sec. 79, p. 770.

Therefore, it might be argued that the “elections” to which the voter qualifications set forth in Art. III, sec. 1, Wis. Const., refer, do not include referendum elections on propositions to incur bonded indebtedness, and that the legislature may establish different voter

qualifications in reference to such elections, as long as such qualifications are otherwise constitutional. See 25 Am. Jur. 2d *Elections*, sec. 2, p. 692. It has been held, for instance, that the state constitutional voter regulations applicable to persons seeking public office and to voting at "any election," which regulations provided that no property qualification could be required, related only to elections contemplated by the Constitution and did not apply to prevent a legislature from creating drainage districts directed by freeholders elected by resident taxpayers. *State ex rel. Gilson v. Monahan* (1905), 72 Kan. 492, 84 P. 130. Also, in *Menton v. Cook* (1907), 147 Mich. 540, 111 N.W. 94, the court held that the submission of a proposition to borrow money and issue bonds for a city hall and firehouse was not an "election" within the state constitutional provision which prescribed the qualifications of electors, so that the legislature was authorized to limit the right to vote at such election to electors who were taxpayers.

It has likewise been held that a constitutional provision which provided that male citizens having prescribed qualifications were entitled to vote at all "elections" related to elections for the choice of officers alone and did not prohibit a legislature from authorizing women to vote on the issuance of bonds, borrowing money, or increasing the tax levy. *Coggeshall v. City of Des Moines* (1908), 138 Iowa 730, 117 N.W. 309. Other cases concluding that the term "election" in state constitutional provisions prescribing election regulations or voter qualifications apply only to elections for the choice of public officers and not to referendum-type votes: *Schieffelin v. Komfort* (1914), 163 App. Div. 741, 149 N.Y.S. 65 (referendum re constitutional convention), *Oregon-Wisconsin Timber Holding Co. v. Coos County* (1914), 71 Ore. 462, 142 P. 575 (election to authorize special tax in road district), *Mayor, etc., of Town of Valverde v. Shattuck* (1893), 19 Colo. 104, 34 P. 947 (election to determine annexation), *Bliss v. Hamilton* (1915), 171 Cal. 123, 152 P. 303 (election re formation and bonding of county irrigation districts).

In *State ex rel. Knowlton v. Williams* (1856), 5 Wis. 308, 314-315, the court did describe the "voters" which are authorized by Art. XIII, sec. 8, Wis. Const., to vote on the removal of a county seat as "those who have a right to vote at the elections held for the purpose of choosing state officers," and referred to Art. III, sec. 1, Wis. Const.,

as setting forth the qualifications of such voters. It can also be pointed out, of course, that the Constitution does set forth a number of individual provisions requiring that the election of particular officers or the submission of specific questions be committed to voters having the requisite constitutional qualifications. Arguably these are the only elections to which Art. III, sec. 1, refers in establishing elector qualifications for "any election."

Therefore, there is authority to support the conclusion that the voter qualifications set forth in Art. III, sec. 1, Wis. Const., need not be viewed as exclusive, at least insofar as bond referendum elections in sanitary districts are concerned. In fact, cases such as those described above strongly influenced one of my predecessors when considering whether the legislature could constitutionally restrict voting at local elections on bond issues. 10 OAG 58 (1921). In that opinion the following is stated, at pages 59-60:

"Ordinarily it could be predicted with a good deal of confidence that our court would follow the rule established by the courts of other states on this subject, but in view of the somewhat strict view that our court takes of the inherent nature of the voting right, [*State ex rel. McGrael v. Phelps* (1910), 144 Wis. 1, 128 N.W. 1041] it is just possible that the court would be inclined to construe sec. 1, art. III as covering all kinds of elections, and, in that event, the legislation you suggest would be unconstitutional. I believe, however, the chances are pretty strongly in favor of such a law being held valid, especially in view of the very reasonable and logical distinction between elections for the choosing of officers and elections which would place heavy burdens of indebtedness upon the taxpayers."

The obvious weight and persuasiveness of the foregoing cases from other states must be acknowledged. As pointed out in 10 OAG 58, however, it cannot be stated with complete assurance that our court would so hold, since the right to vote has long been treated by our court as a broad and fundamental right. *State ex rel. McGrael v. Phelps*, *supra*, pages 14-15; *State ex rel. La Follette v. Kohler* (1930), 200 Wis. 518, 547, 228 N.W. 895; *State ex rel. Barber v. Circuit Court* (1922), 178 Wis. 468, 473, 190 N.W. 563; *State ex rel. Frederick v. Zimmerman* (1949), 254 Wis. 600, 613, 37 N.W. 2d 472, 37 N.W. 2d 473; *Gradinjan v. Boho* (1966), 29 Wis. 2d 674,

684-685, 139 N.W. 2d 557. In addition, there is other, more direct Wisconsin precedent, not treated in 10 OAG 58, which leads me to reject that opinion and conclude that our court probably would hold that any extension of suffrage such as that contemplated under 1973 Senate Bill 59 must be submitted to a vote of the electors of the state under Art. III, sec. 1, Wis. Const.

Our own court appears to have given some indication that "elections" under Art. III, sec. 1, may include those which involve referendum-type votes on questions relating to bonding. *Hall v. Madison* (1906), 128 Wis. 132, 107 N.W. 31. The *Hall* case arose under an act of the legislature which had extended the right of suffrage in "any election pertaining to school matters" to women on much the same terms as the general right of suffrage possessed by men. The law had been submitted to a vote of the people pursuant to Art. III, sec. 1, Wis. Const. While arguably the court was only considering whether a school bond referendum was an "election" within the meaning of ch. 211, Laws of 1885, the court did hold that the school "elections" referred to in the law under attack, which law was "essentially a part of the constitution," included elections held on the question of the issuance of bonds for school purposes as well as elections for the purpose of choosing school officers. Noting that "election" was generally defined as "the act of choosing; choice," *Brown v. Phillips* (1888), 71 Wis. 239, 253, 36 N.W. 242, the court stated that "Whether it is a choice between alternative policies or a choice between persons, it is equally an election." *Hall, supra*, p. 138.

The *Hall* case has subsequently been cited and relied on by the court in *Vulcan Last Co. v. State* (1928), 194 Wis. 636, 640, 217 N.W. 412, where the court held that a referendum on the question of issuing bonds for the construction of a waterworks was an "election," and both *Hall* and *Vulcan* were cited in *Otey v. Common Council of City of Milwaukee* (E.D. Wis. 1968), 281 F.Supp. 264, 276, Chief Judge Tehan writing: "... virtually since its inception, the direct referendum in Wisconsin has been deemed a conventional form of election. ..." See also *State ex rel. Birchmore v. State Board of Canvassers, et al.*, (1907), 78 S.C. 461, 59 S.E. 145 and *Taylor, et al. v. Independent School Dist. of Earlham* (1917), 181 Iowa 544,

164 N.W. 878, where constitutional references to "elections" were held to include referendum-type votes.

RWW:JCM

Governor; Public Records; Scope of the duty of the Governor to allow members of the public to examine and copy public records in his custody discussed.

September 19, 1974.

PATRICK J. LUCEY

Governor

You request my opinion as to the scope of your duty, if any, to allow members of the public to examine and copy documents in your office of which you have official custody as Governor.

Your inquiry is occasioned in part by a request from a citizen to examine all correspondence addressed to you concerning a bill recently passed by the legislature. However, you are also concerned with any duty you have to permit examination with respect to the following:

"(1) Correspondence

- "(a) concerning or explaining legislation or other matters of general concern or official policies and actions;
- "(b) concerning problems involving either (i) the policies or practices of a governmental agency or official or (ii) matters not involving governmental action or public policy *and* directly affecting the correspondent or another;
- "(c) concerning complaints against or allegations of any kind of misconduct by public officials or others;
- "(d) obtained by me upon my promise of confidentiality;
- "(e) expressly (e.g., marked as 'confidential' or 'personal') or implicitly designated in some way as private by the correspondent;

“(f) whether or not otherwise subject to disclosure, containing defamatory or other matters adversely reflecting upon the reputation of any person.

“(2) Memoranda or working papers of any sort prepared by members of the staff of the Executive Office or other governmental (federal, state or local) agency for their own or my use in the conduct of official State business.”

It will be impossible in this opinion to answer with specificity all of the possible questions involved or implied with respect to the above or connected with the four other questions you raise which will be set forth hereunder. Your determination to permit or withhold inspection must be made on a case-by-case basis in view of the specific document, time elements and all other circumstances then and there existing. Specific legal advice can best be given on the same basis.

I am of the opinion that all of the correspondence, documents and memoranda referred to above, with the exception of truly personal correspondence or purely fugitive papers having no relation to the function of your office, are public records within the meaning of secs. 16.80 (2) (a), 19.21 (1), Stats., and are by reason of sec. 19.21 (2), Stats., available to any citizen for purposes of inspection and copying *subject to the limitations* contained in *State ex rel. Youmans v. Owens* (1965), 28 Wis. 2d 672, 137 N.W. 2d 470 and *Beckon v. Emery* (1967), 36 Wis. 2d 510, 153 N.W. 2d 501.

Response to your inquiry requires limited discussion of the separation of powers doctrine.

In our constitutional scheme there are three coordinate, substantially independent branches; namely, executive, legislative, and judicial. Each, so long as operating within its legitimate field, is supreme. It is for the court, in the ultimate, to determine whether the boundaries of a particular field have been overstepped and, if so, to nullify or stay the transgression. The power to make a law is vested in the Senate and Assembly. *State ex rel. Mueller v. Thompson* (1912), 149 Wis. 488, 491, 137 N.W. 20.

The legislature cannot interfere or preclude the exercise of constitutionally conferred executive power. Where the Constitution does not otherwise provide or preclude, the legislature has power to

enact a law which the executive is constitutionally bound to faithfully execute. Where the Constitution or a statute vests discretion in the chief executive officer, neither the legislature nor the courts can control its exercise so long as it continues to be vested in him. *State ex rel. Warren v. Nusbaum* (1973), 59 Wis. 2d 391, 450, 208 N.W. 2d 780.

The Governor and his agents are liable to judicial remedies, when not acting within the scope of executive authority, in violation of law or in excess of their powers, the same as other persons, and the court has power but will not act coercively as to the Governor except in cases of extreme urgency. The acts of the Governor within the exercise of his lawful authority are not subject to judicial review. *Ekern v. McGovern* (1913), 154 Wis. 157, 208, 142 N.W. 595.

I am aware of no constitutional provision or statute which by express language or necessary implication makes any of the public records in your custody confidential or otherwise absolutely privileged which would absolve you from the requirement of compliance with the provisions of sec. 19.21 (2), Stats., as limited.

Section 19.21 (1), (2), (3), (4), Stats., provides:

“19.21 Custody and delivery of official property and records.

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

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

materials may be performed away from the office of the custodian if necessary.

“(3) Upon the expiration of his term of office, or whenever his office becomes vacant, each such officer, or on his death his legal representative, shall on demand deliver to his successor all such property and things then in his custody, and his successor shall receipt therefor to said officer, who shall file said receipt, as the case may be, in the office of the secretary of state, county clerk, town clerk, city clerk, village clerk, school district clerk, or clerk or other secretarial officer of the municipality or district, respectively; but if a vacancy occurs before such successor is qualified, such property and things shall be delivered to and be receipted for by such secretary or clerk, respectively, on behalf of the successor, to be delivered to such successor upon the latter’s receipt.

“(4) Any person who violates this section shall, in addition to any other liability or penalty, civil or criminal, forfeit not less than \$25 nor more than \$2,000; such forfeiture to be enforced by a civil action on behalf of, and the proceeds to be paid into the treasury of the state, municipality, or district, as the case may be.”

Section 16.80 (2), Stats., is applicable to records in the office of the Governor and provides, in part:

“(2) DEFINITIONS. As used in this section:

“(a) ‘Public records’ means all books, papers, maps, photographs, films, recordings, or other documentary materials or any copy thereof, regardless of physical form or characteristics, made, or received by any agency of the state or its officers or employes in connection with the transaction of public business and retained by that agency or its successor as evidence of its activities or functions because of the information contained therein; except the records and correspondence of any member of the state legislature.

“(b) ‘State agency’ means any officer, commission, board, department or bureau of state government.

“***”

Section 16.80 (4), Stats., provides:

“(4) APPROVAL TO DESTROY. All public records made or received or in the custody of a state agency shall be and remain the property of the state and as such may not be destroyed without the written approval of the originating office or its legal successor and the written approval of the public records board.”

In an opinion to the Chairman of the State Public Records Board dated July 24, 1974, it was stated in part:

“Under general law in the United States, public records are the property of the state or other unit of government and not of the individual or officer who happens at the moment to have them in possession. When they are deposited in the place designated for them by law, they must remain and can be removed, transferred, or disposed of only as provided by statute. 66 Am. Jur. 2d, *Records and Recording Laws*, sec. 10, p. 347.

“***

“Independent of statute, ‘public records’ include not only papers specifically required to be kept by a public officer, but all written memorials made by a public officer within his authority where such writings constitute a convenient, appropriate, or customary method of discharging the duties of the office. *International Union v. Gooding* (1947), 251 Wis. 362, 29 N.W. 2d 730.

“Section 19.21 (1), Stats., goes much further than this in defining public records in Wisconsin. However, even the *International Union* case recognizes that this section does not require an officer to keep, file, and ultimately deliver to his successor every paper or communication without respect to the relation of the paper to the functions of the office but that an officer may dispose of purely fugitive papers having no relation to the function of the office. 38 OAG 22, 23 (1949).

“... [The definition in sec. 16.80 (2) (a), Stats.] is a codification of case law with respect to the definition of public records. It recognizes that an officer has the right to determine whether a paper which is not required by law or valid rule to be

filed, deposited, or kept in his office, should be retained as evidence of the activities or functions because of the information contained therein.

“I am of the opinion that officers covered by sec. 19.21 (1) and (3), Stats., have the same power and that such power permits the destruction of fugitive papers, scrap paper, and in some cases, preliminary work sheets, drafts, surplus copies, etc.

“A given paper may be a public record within the meaning of sec. 19.21 (1), Stats., for the purposes of inspection and copying as long as it is in the lawful possession or control of an officer, or his deputies, but may not necessarily be one which said officer is required to preserve under sec. 19.21 (1), Stats., or to deliver to his successor under sec. 19.21 (3), Stats. Under the latter statute he need only deliver ‘all such property and things then in his custody.’ There are many documents which may lawfully come into the hands of a public officer over which he is only entitled to temporary custody and which may or must be surrendered to the person owning the same or for other purposes. For example, certificates of bonds must be delivered when sold or at maturity.”

You inquire what materials, if any, are absolutely privileged.

It is my opinion that none of the documents you refer to are absolutely privileged in the sense that you can unilaterally and absolutely deny disclosure. A member of the public would have the right to institute “mandamus” in Circuit Court for Dane County to determine whether the document or other item sought to be inspected was in fact a public record within the meaning of secs. 16.80 (2) (a), 19.21 (1), Stats., and to test any reason given for denial of inspection.

You further inquire what factors may be properly considered in deciding whether to disclose.

The leading Wisconsin cases governing the right to public access are *State ex rel. Youmans v. Owens* (1965), 28 Wis. 2d 672, 137 N.W. 2d 470 and *Beckon v. Emery* (1967), 36 Wis. 2d 510, 153 N.W. 2d 501.

These cases essentially hold, as elaborated in 58 OAG 67 (1969), 60 OAG 9 (1971), 60 OAG 43 (1971), 60 OAG 284 (1971), 60 OAG 470 (1971), 61 OAG 12 (1972), 61 OAG 361 (1972), that:

1. The public right to full access to all public records provided for in sec. 19.21 (2), Stats., is qualified in the following respects:

- a. The right to inspect is subject to such reasonable regulations with respect to hours, procedure, etc., that the custodian may prescribe to limit unreasonable interference with the ordinary operations of his office.
- b. The right may be limited or denied by express statutory provision.
- c. The custodian may and has a duty to deny inspection where he determines that permitting inspection would result in harm to the public interest which outweighs any benefit that would result from granting inspection. Specific reasons must be given when inspection is withheld and the person seeking the same can then resort to court action to test the sufficiency of such reasons. Statements that the records are "confidential" or that permitting inspection would be "contrary to the public interest" are merely legal conclusions and are not a substitute for the specific reasons which must be given in each case. In testing the sufficiency of a stated specific reason, the trial judge would examine the record or document *in camera* and would determine "whether or not the harm likely to result to the public interest by permitting the inspection outweighs the benefit to be gained by granting inspection." *State ex rel. Youmans, supra*, p. 682. Where no specific reason was given for withholding inspection "the writ of mandamus compelling its production should issue as a matter of course." *Beckon v. Emery, supra*, p. 518.

2. Any member of the public, regardless of his motives, has a right to inspect any public record, subject to the three limitations stated above. This does not mean that the custodian or court cannot consider the claimed or stated purpose for which

the record is to be used in balancing the interests. See *United States v. Richard M. Nixon, infra*.

3. "... public policy, and hence the public interest, favors the right of inspection of documents and public records. It is only in the unusual or exceptional case, where the harm to the public interest that would be done by divulging matters of record would be more damaging than the harm that is done to public policy by maintaining secrecy, that the inspection should be denied." *Beckon v. Emery, supra*, p. 516.

4. The custodian should make his determination on a case-by-case basis in view of the record involved and the circumstances then and there existing. In *Youmans* the court declined to catalog the situations which might justify refusal but stated that sec. 19.21, Stats., will be construed *in pari materia* with sec. 66.77, Stats., the Wisconsin open meeting law, and that the policy guidelines for holding closed meetings contained in sec. 66.77 (4), Stats., as recreated by ch. 297, Laws of 1973, will be applicable to the question of sufficiency of stated reason for withholding inspection under sec. 19.21, Stats. We will not set forth the detailed provisions of sec. 66.77 (4), Stats., here. A discussion of the (4) (b), (c), (e) exceptions appears in 60 OAG 468, 476-481. A discussion of the (4) (d), (e), (f) exceptions appears in 61 OAG 361, 364. Those discussions will not be restated here other than to note that any damage to reputations to justify withholding must be "undue" damage and that time elapsed, pendency of or probability of criminal prosecution are matters to be considered. The *Youmans* case did point out that other common law exceptions may justify withholding of access; including documentary evidence in the hands of a district attorney, minutes of a grand jury, evidence in a divorce action sealed by the court and information gathered under a pledge of confidentiality. With respect to pledges of confidentiality, opinions at 60 OAG 284, 289 (1971), 61 OAG 361, 365 (1972), state that the following criteria should be applied:

"... First, there must have been a clear pledge made. Second, the pledge should have been made in order to obtain the

information. Third, the pledge must have been necessary to obtain the information.

“Finally, even if a pledge of confidentiality fulfills these criteria, thus making the record containing the information obtained clearly within the exception, the custodian must still make an additional determination in each instance that the harm to the public interest that would result from permitting inspection outweighs the great public interest in full inspection of public records. ...”

Statutory rules of privilege as to production of evidence and the giving of testimony may form the basis in proper case for nondisclosure of records. In many cases the privilege is conditional and may be waived by the person for whose protection the privilege exists. A non-exhaustive listing would include private communications between husband and wife, sec. 885.18, Stats.; confessions to clergymen, sec. 885.20, Stats.; communication by student to dean of institution of higher education or school psychologist, sec. 885.025, Stats.; communications to doctors by patients, sec. 885.21, Stats.; and communications to attorneys, sec. 885.22, Stats. None of these would be directly applicable to the Governor with the exception of the last and that would only apply to documents in custody of his attorney and not to documents officially in his own custody.

Article XIV, sec. 13, Wis. Const., continues such parts of the common law in force in the Territory of Wisconsin not inconsistent with the Constitution as part of the law of this state until altered or suspended by the legislature.

Since *Youmans, supra*, p. 681, states that common law exceptions may justify withholding of access to public records in certain cases, some discussion of executive privilege is in order. I am not aware of any Wisconsin cases dealing with the subject with the possible exception of *State ex rel. Reynolds v. Circuit Court* cited below. It would generally refer to privilege with respect to the required production of evidence or giving of testimony in court proceedings. I am of the opinion that limited executive privilege exists in Wisconsin which would in certain cases justify the withholding of public access to specific public records on the basis of specific reasons stated and

upheld by a court. In my opinion it would apply to the office of Governor as the chief executive office of the state.

Since executive privilege involves some of the concepts applicable to the lawyer's work product rule, reference to the following Wisconsin cases is appropriate.

State ex rel. Reynolds v. Circuit Court (1961), 15 Wis. 2d 311, 112 N.W. 2d 686, 113 N.W. 2d 537, involved a state condemnation proceeding. The court stated that the attorney-client privilege was to be narrowly construed and restricted to communications made by the client to the attorney and would not cover transactions had with or communications to third persons. The court referred to the "work product of the lawyer" rule referred to in *Hickman v. Taylor* (1947), 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451, in which the U.S. Supreme Court held that the work product of an attorney, there considered, was outside the attorney-client privilege, but that absent compelling justification, the court should not require production of written statements of witnesses, and the lawyer's memoranda and mental impressions of oral statements of witnesses. However, in *Reynolds* the court held that a claim of privilege could be interposed if one of the experts was asked to disclose a communication which he had made to the State Highway Commission or its staff or counsel but that neither the attorney-client privilege nor the "work product of the lawyer" rule would preclude attorneys for the landowner from taking depositions of the expert concerning the "relevant opinions they have formed, and the observations, knowledge, information, and theories on which the opinions are based." p. 321.

Wisconsin has adopted the rationale of *Hickman v. Taylor* as applied to sec. 269.57, Stats., inspection of documents and sec. 887.12, discovery proceedings. In *State ex rel. Dudek v. Circuit Court* (1967), 34 Wis. 2d 559, 589, 150 N.W. 2d 387, the court stated:

"From *Hickman*, as quoted above, we conclude that a lawyer's work product consists of the information he has assembled and the mental impressions, the legal theories and strategies that he has pursued or adopted as derived from interviews, statements, memoranda, correspondence, briefs, legal and factual research, mental impressions, personal beliefs, and other tangible or intangible means.

“This broad definition of lawyer’s work product requires that most materials, information, mental impressions and strategies collected and adopted by a lawyer after retainer in preparation of litigation and relevant to the possible issues be initially classified as work product of the lawyer *and not subject to inspection or discovery unless good cause for discovery is shown.*” (Emphasis added.)

Also see *Halldin v. Peterson* (1968), 39 Wis. 2d 668, 673, 159 N.W. 2d 738.

In *Carl Zeiss Stiftung v. V. E. B. Carl Zeiss* (D.C.D.C. 1966), 40 F.R.D. 318, 324, it was stated:

“[3] ‘Executive privilege is a phrase of release from requirements common to private citizens or organizations’--an exemption essential to discharge of highly important executive responsibilities. While it is agreed that the privilege extends to all military and diplomatic secrets, its recognition is not confined to data qualifying as such. Whatever its boundaries as to other types of claims not involving state secrets, it is well established that the privilege obtains with respect to intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.

“[4] This privilege, as do all evidentiary privileges, effects an adjustment between important but competing interests. There is, on the one hand, the public concern in revelations facilitating the just resolution of legal disputes, and, on the other, occasional but compelling public needs for confidentiality. In striking the balance in favor of nondisclosure of intra-governmental advisory and deliberative communications, the privilege subserves a preponderating policy of frank expression and discussion among those upon whom rests the responsibility for making the determinations that enable government to operate, and thus achieves an objective akin to those attained by other privileges more ancient and commonplace in character. Nowhere is the public interest more vitally involved than in the fidelity of the sovereign’s decision--and policy-making resources.”

The *Carl Zeiss* case contains one of the best statements of the rule, its purpose and limitations. It also gathers the U.S. Supreme Court citations which support the privilege including *United States v. Morgan* (1941), 313 U.S. 409, 422, 61 S.Ct. 999, 85 L.Ed. 1429, which holds that it is not the function of the court to probe the mental processes by which the Secretary of Agriculture made his determination to make an order fixing maximum rates for stockyards, and *United States v. Reynolds* (1953), 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727, which recognized that executive privilege as to military and state secrets has been long established in the law of evidence and that whether the privilege shall lie shall be for the court and cannot be left to the caprice of executive officers. At pp. 7-8 of *Reynolds*, the court stated:

“... The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect. ...”

Executive privilege must be asserted on the basis of specific reasons by the chief executive officer or other high official involved who has the burden of establishing the privilege. At least one court has held that the court cannot in every case insist on *in camera* inspection of the documents involved but that proof can be by other means. The privilege is conditional and not absolute, with the court balancing the competing interests.

In *United States v. Gates* (D.C. Colo. 1964), 35 F.R.D. 524, the court held that historical files prepared by the Internal Revenue Service reflecting valuation of a company and past tax returns of members of a family sued, even though in the hands of government attorneys, were not within attorney-client privilege and did not constitute government attorneys' work product and that they were not protected from discovery by executive privilege since there was no claim that military, diplomatic or other high policy secrets were involved and that even if there were, executive privilege was waived

where the government as plaintiff maintains an action in which the documents in question would be discoverable in the absence of purported executive privilege.

In *Wood v. Breier* (E.D. Wis. 1972), 54 F.R.D. 7, it was held that under the federal statute discovery may be proper notwithstanding a claim for executive privilege when the basis of the suit arises from alleged misconduct or perversion of power by a governmental official involving federal, state or local government. The court gave the following guidelines. The government should not lightly invoke claim of executive privilege when it fears discovery of its confidential information will impair its ability to function as it is the duty of the court to make independent determination of whether a privilege does exist. Such determination cannot be made in the abstract but must be done on a case-by-case *ad hoc* basis by balancing the applicable public policies and the material sought to be discovered in each individual case. Where law enforcement investigations are involved, discovery is often refused where there is an on-going investigation but once the investigation and prosecution have been completed, discovery should be permitted. In other situations, the investigation may have long since been completed and no prosecution contemplated. The privilege has been generally recognized for "intra- and inter-agency advisory opinions submitted for consideration in the performance of decision and policy-making functions" and is conditional and will not prohibit discovery where there is need for discovery to preclude prejudice and unfairness. Such conditional privilege does not apply to factual reports and summaries. In some cases, the informer's privilege, the government's privilege to withhold from disclosure the identity of persons who furnish information of violations of the law, may be applicable. Such privilege, however, is limited to *voluntary civilian* cooperation with law enforcement agencies.

In *United States v. Richard M. Nixon, President* (July 24, 1974), 418 U.S. 683, 42 LW 5237, the U.S. Supreme Court held that "it is 'emphatically the province and the duty' of this court 'to say what the law is' with respect to the claim of privilege presented ..." and that "neither the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more, can sustain an absolute, unqualified presidential privilege from immunity from judicial process under all circumstances. The President's need

for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of presidential communications is significantly diminished by production of such material for *in camera* inspection with all the protection that a district court will be obliged to provide." The court ordered the production of the records sought by subpoena which were essential to enforcement of criminal statutes for *in camera* inspection.

You inquire whether disclosure may be withheld or limited solely on the ground that full disclosure would create an undue administrative burden.

I am of the opinion that it cannot be absolutely withheld and that it can be limited only by means of express statute, reasonable regulations with respect to hours and procedures to limit unreasonable interference with the ordinary operations of the office, and by denial for express stated reasons subject to limitations of the *Youmans* and *Beckon v. Emery* cases cited above.

You inquire whether the exercise of executive discretion is subject to review and if so in what forum and by what standards.

Limited executive privilege must be recognized as being beyond review as is the executive's exercise of discretion generally. See *State ex rel. Warren v. Nusbaum* (1973), 59 Wis. 2d 391, 450, 108 N.W. 2d 780. Nevertheless, the courts may determine whether the executive has overstepped the permissible area in which he may properly exercise unreviewable discretion. See *State ex rel. Mueller v. Thompson* (1912), 149 Wis. 488, 491, 137 N.W. 20. Similarly, the courts may determine whether the claim to executive privilege is lawfully asserted. *United States v. Nixon* (1974), 42 L.W. 5237. A mandamus action brought in the Dane County Circuit Court will vest the courts with power to make these determinations. See sec. 261.01 (9), Stats.

I conclude, then, that while the exercise of executive discretion or executive privilege is not subject to judicial review, whether it is

properly claimed or asserted is judicially determinable and the courts would apply the standards described herein.

RWW:RJV

Open Meeting; Votes And Voting: Voting procedures employed by Workmen's Compensation and Unemployment Advisory Councils which utilize adjournment of public meeting for purposes of having members representing employers and members representing employes or workers to separately meet in closed caucuses and to vote as a block on reconvening are contrary to secs. 66.77 and 15.09 (4), (5), Stats.

September 27, 1974.

PHILIP E. LERMAN, *Chairman*

Department of Industry, Labor and Human Relations

You request my opinion whether the procedures utilized by the Workmen's Compensation Advisory Council and Unemployment Compensation Advisory Council referred to below are in conformity with requirements of the "Open Meeting Law" as set forth in sec. 66.77, Stats., as amended by ch. 297, Laws of 1973.

You state that each council is composed of an equal number of employer and worker representatives and is chaired by an employe of the Department. The Council on Workmen's Compensation has three representatives from casualty insurance companies who are nonvoting members. Each council is required to submit proposals for amendment of the respective chapters, ch. 102 and ch. 108, to each session of the legislature, to give views on pending legislation to the respective committees of the legislature and to advise the Department on the administration of each law. The councils follow the customary procedure of conducting a series of public hearings followed by a series of discussion meetings and a series of negotiating or bargaining sessions. Each of the latter sessions customarily includes a number of recesses during which the worker representative members and the employer representative members meet separately in closed caucuses with each "side" traditionally agreeing on a single position which is

presented to the other, usually leading to an eventual "unanimous" agreement. You state that the chairman provides information and suggestions but never exercises the voting power granted under law and that the representative members do not vote at the meeting of the full council since each "side" has one vote in essence and two votes are required for agreement and action.

It is my opinion that the voting procedures utilized are improper and contrary to law. They deprive members of their individual rights to vote in the governmental body proper. In combination with the separate closed caucuses, the voting procedures deprive individual members and the public from the opportunity to hear the discussion of all members of the governmental body who may wish to exercise their right of discussion and deprive them of the right to know how each member voted on any specific issue. Whereas each council has an equal number of members representative of employers and of employes or workers, the statutes do not contemplate that they constitute "sides" or that members representing such groups should vote as a block. There must be certain issues on which a representative of one group might have good reason for voting in a manner opposed to the desires of the other members representing such group.

Section 15.227 (3), (4), Stats., provides:

"(3) COUNCIL ON UNEMPLOYMENT COMPENSATION. There is created in the department of industry, labor and human relations a council on unemployment compensation appointed by the industry, labor and human relations commission to consist of an employe of the department of industry, labor and human relations who shall serve as chairman and of one or more representatives of employers and an equal number of representatives of employes.

"(4) COUNCIL ON WORKMEN'S COMPENSATION. There is created in the department of industry, labor and human relations a council on workmen's compensation appointed by the industry, labor and human relations commission to consist of a member or designated employe of the industry, labor and human relations commission as chairman, 5 representatives of employers and 5 representatives of employes. The commission

shall also appoint 3 representatives of casualty insurance companies as nonvoting members of the council.”

Section 102.14 (2), Stats., provides:

“(2) The council on workmen’s compensation shall advise the department in carrying out the purposes of this chapter. Such council shall submit its recommendations with respect to amendments to this chapter to each regular session of the legislature and shall report its views upon any pending bill relating to this chapter to the proper legislative committee.”

Section 108.14 (5) (a), (6), Stats., provides in part:

“(5) (a) The council on unemployment compensation shall advise the department in carrying out the purposes of this chapter. The council shall submit its recommendations with respect to amendments of this chapter to each regular session of the legislature, and shall report its views on any pending bill relating to this chapter to the proper legislative committee.

“(6) ... The department, with the advice and aid of any employment councils appointed under sub. (5) (b) and the council on unemployment compensation, shall take all appropriate steps within its means to reduce and prevent unemployment. ...”

Section 15.09, Stats., is the general statute applicable to councils. It is clear that the power to act is in the full body and that each member, except as otherwise provided by express statute, shall have the right to vote in such body. Whereas the councils here are not created under sec. 15.04 (3), Stats., sec. 15.09 (2), Stats., provides that:

“(2) SELECTION OF OFFICERS. Unless otherwise provided by law, at its first meeting in each year every council shall elect a chairman, vice chairman and secretary from among its members. Any officer may be re-elected to succeed himself. For any council created under the general authority of s. 15.04 (3), the constitutional officer or secretary heading the department or the chief executive officer of the independent agency in which such council is created shall designate an

employe of the department or independent agency to serve as secretary of the council and to be a voting member thereof.

I am of the opinion that the departmental employe designated as chairman of the respective council under sec. 15.227 (3), (4), Stats., not only has the power to vote but, in some cases, such as in case of a tie, may have a duty to vote.

Under sec. 15.09 (3), Stats., a majority of the members may call a meeting of the council. The power to act is in the whole body, not in individual members or in representatives from employers or representatives of employes or workers.

Section 15.09 (4), (5), Stats., provides:

“(4) QUORUM. A majority of the membership of a council constitutes a quorum to do business, and a majority of a quorum may act in any matter within the jurisdiction of the council.

“(5) POWERS AND DUTIES. A council shall advise the head of the department or independent agency in which it is created and shall function on a continuing basis for the study, and recommendation of solutions and policy alternatives, of the problems arising in a specified functional area of state government.”

Section 66.77, Stats., as amended by ch. 297, Laws of 1974, provides in part:

“66.77 OPEN MEETINGS OF GOVERNMENTAL BODIES. (1) In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental affairs and the transaction of governmental business. The intent of this section is that the term ‘meeting’ or ‘session’ as used in this section shall not apply to any social or chance gathering or conference not designed to avoid this section.

“(2) In this section:

“(a) ‘Closed session’ means any meeting not an open session.

“(b) ‘Meeting’ means the convening of a governmental body in a session such that the body is vested with authority, power, duties or responsibilities not vested in the individual members.

“(c) ‘Governmental body’ means a state or local agency, board, commission, committee, council or department created by constitution, statute, ordinance, rule or order; a municipal or quasi-municipal corporation; or a formally constituted subunit of any of the foregoing.

“(d) ‘Open session’ means a meeting which is held in a place reasonably accessible to members of the public, which is open to all citizens at all times, and which has received the public notice required by statute, if any.

“(e) ‘Public notice’ means statutorily required notice, if any. If no notice is required by statute, it means a communication by the chief presiding officer of a governmental body or his designee, to the public and to the official municipal or city newspaper designated under s. 985.05 or 985.06, or if none exists, then to members of the news media who have filed a written request for such notice, which communication is reasonably likely to apprise members of the public and of the news media of the time, place and subject matter of the meeting at a time, not less than one hour prior to the commencement of such meeting, which affords them a reasonable opportunity to attend.

“(3) Except as provided in sub. (4), all meetings of governmental bodies shall be open sessions. No discussion of any matter shall be held and no action of any kind, formal or informal, shall be introduced, deliberated upon, or adopted by a governmental body in closed session, except as provided in sub. (4). Any action taken at a meeting held in violation of this section shall be voidable.

“(4) A governmental body may convene in closed session for purposes of:

“(a) Deliberating after judicial or quasi-judicial trial or hearing;

“(b) Considering employment, dismissal, promotion, demotion, compensation, licensing or discipline of any public employe or person licensed by a state board or commission or the investigation of charges against such person, unless an open meeting is requested by the employe or person charged, investigated or otherwise under discussion;

“(c) Probation, parole, crime detection and prevention;

“(d) Deliberating or negotiating on the purchasing of public property, the investing of public funds, or conducting other public business which for competitive or bargaining reasons require closed sessions;

“(e) Financial, medical, social or personal histories and disciplinary data which may unduly damage reputations;

“(f) Conferences between any local government or committee thereof, or administrative body, and its attorney concerning the legal rights and duties of such agency with regard to matters within its jurisdiction.

“(g) Partisan caucuses of members of the state legislature;

“(h) Transacting the business of the state legislature, pursuant to joint rules or rules of the senate or assembly, which specifically so permit.

“(5) No motion to hold a closed session or to adjourn an open session into a closed session shall be adopted unless the chief presiding officer announces to those present at the meeting at which such motion is made the general nature of the business to be considered at such closed session, and no other business shall be taken up at such closed session. No governmental body shall commence an open session, subsequently recess into a closed session, and subsequently reconvene into an open session within a 12-hour period, unless public notice of such subsequent open session was given at the same time and in the same manner as the public notice of the initial open meeting.

“(6) Unless otherwise specifically provided by statute, no secret ballot shall be utilized to determine any election or other decision of a governmental body at any meeting, and any member of such body may require that a vote be taken in such

manner that the vote of each member may be ascertained and recorded.

“(7) No duly elected or appointed member of a governmental body shall be excluded from any meeting of such body, or from any closed session of a subunit thereof, unless the parent body adopts rules to the contrary.

“(8) Any member of a governmental body who knowingly attends a meeting of such body at which a violation of this section occurs shall forfeit without reimbursement not more than \$200 for each such violation, provided that he shall not be liable if he calls for a vote on whether the body shall take that action constituting such violation, or if he is recorded in the minutes of the body as voting against the action constituting such violation. ...”

We are dealing with a situation where each council “meets,” within the meaning of sec. 66.77 (2) (b), Stats., *as a body*. Each council is clearly a “governmental body” within the meaning of sec. 66.77 (2) (c), Stats. The public notice required by sec. 66.77 (2) (e), Stats., is a prerequisite to holding such meeting. Even if the representatives of employers and representatives of workers or employees were “formally constituted subunits,” the larger governmental body could not adjourn for the purpose of permitting the subunits to meet unless each subunit had given the public notice which is required for each meeting. The respective council could go into executive session *of that body* only for purposes permitted by sec. 66.77 (4), Stats. Under certain circumstances subsec. (4) (d), Stats., might permit the respective council to go into closed session as a body. Some support for such action can be found in sec. 108.14 (7), Stats., by analogy.

The Open Meeting Law does not prevent a governmental body from adjourning for short periods for reasonable purposes. It is not illegal for members to converse in groups and members may discuss, privately, positions they wish to take on matters to come before the body. I am of the opinion, however, that it is improper for a governmental body other than a house of the state legislature to adjourn for the specific purpose of permitting groups which may have a common interest to go into separate closed caucuses to determine

the manner in which such group shall vote as a block on any given issue.

RWW:DCM:RJV

Cities; Redevelopment Authority; A city may reimburse a commissioner of the city redevelopment authority for his legal expenses incurred where charges are filed against him in his official capacity seeking his removal from office for cause and such charges are found by the common council to be unsupported. Such reimbursement is discretionary. The city redevelopment authority lacks statutory authority to authorize reimbursement for such legal expenses.

September 27, 1974.

CHARLES M. HILL, SR., *Secretary*
Department of Local Affairs and Development

You inquire whether a city may reimburse a commissioner of the redevelopment authority of the city for his legal expenses incurred where charges are filed against him in his official capacity seeking his removal from office for cause and such charges are found by the common council to be unsupported. The answer to the question is "yes." You also inquire whether the redevelopment authority of the city also has authority to reimburse a commissioner for such expenses. The answer is "no."

City redevelopment authorities are created by sec. 66.431, Stats. Section 66.431 (3) (a), Stats., provides for appointment of authority commissioners by the mayor or other head of the city government, with the confirmation of the local governing body, and sec. 66.431 (3) (b), Stats., states that the removal of commissioners is governed by sec. 66.40, Stats. Section 66.40 (8), Stats., describes the manner in which authority commissioners are removed and provides as follows:

"REMOVAL OF COMMISSIONERS. For inefficiency or neglect of duty or misconduct in office, a commissioner of an authority may be removed by the mayor, but a commissioner

shall be removed only after he shall have been given a copy of the charges at least ten days prior to the hearing thereon and had an opportunity to be heard in person or by counsel. In the event of the removal of any commissioner, a record of the proceedings, together with the charges and findings thereon, shall be filed in the office of the city clerk. To the extent applicable, the provisions of section 17.16 relating to removal for cause shall apply to any such removal."

Section 17.16 (3), Stats., provides for a speedy public hearing on such charges at which the officer is entitled to be heard in his defense, personally and by counsel.

Under sec. 895.35, Stats., discretion is granted to cities and certain other governmental entities to pay all or any part of the legal expenses incurred by a city officer where "charges of any kind are filed" against him "in his official capacity" and the charges are "discontinued or dismissed or such matter is determined favorably to such officer, or such officer is reinstated, ..." In order to determine whether this statute applies, it is necessary to consider whether commissioners of a redevelopment authority established pursuant to sec. 66.431, Stats., are city officers, at least for the purposes of reimbursement of legal expenses, under sec. 895.35, Stats.

The status of redevelopment authorities created under sec. 66.431, Stats., was considered by the Wisconsin Supreme Court in *Redevelopment Authority v. Canepa* (1959), 7 Wis. 2d 643, 97 N.W. 2d 695. In that case the court determined that a redevelopment authority is subordinate to the city, notwithstanding sec. 66.431 (3) (f), Stats., which provides that "the authority is deemed an independent, separate and distinct public body and a body corporate and politic." The court, considering the statute as a whole, determined that the city had the power to control the activities of the authority to such a degree as to deprive the authority of its independence, and the court therefore treated the redevelopment authority as if it were a department of the city.

It is evident from the provisions of sec. 66.431, Stats., that redevelopment commissioners are public officers. Such conclusion is obvious if for no other reason than the fact that they are subject to "removal from office" under the provisions of sec. 17.16, Stats. Further, in light of *Redevelopment Authority v. Canepa, supra*, I also

conclude that such commissioners are "city officers," at least within the meaning of sec. 895.35, Stats., and are therefore entitled to have their requests for reimbursement of legal expenses considered under the terms of that statute. On the other hand, reimbursement of expenses under sec. 895.35, Stats., is not mandatory and the statute confers no right on the officer to be reimbursed. *Page v. Milwaukee County* (1939), 230 Wis. 331, 283 N.W. 833.

In light of my conclusion that sec. 895.35, Stats., authorizes a city to reimburse redevelopment commissioners for certain legal expenses, I do not consider it necessary to fully treat another statute which authorizes reimbursement of legal expenses, sec. 62.09 (7) (e), Stats., other than to comment concerning its possible application. Section 62.09 (7) (e), Stats., provides:

"Whenever a city official in his official capacity proceeded against or obliged to proceed before any court, board or commission, to defend or maintain his official position, or because of some act arising out of the performance of his official duties, and he has prevailed in such proceeding, or the council has ordered the proceeding discontinued, the council may provide for payment to such official such sum as it sees fit, to reimburse him for the expenses reasonably incurred for costs and attorney's fees."

Using the same rationale as applied above in the interpretation of sec. 895.35, Stats., I find it probable that a commissioner would be considered to be a "city official" within the meaning of sec. 62.09 (7) (e), Stats. However, I also note that the statute only applies to instances where the city official is proceeded against before a "court, board or commission," and a court might conclude that a proceeding before the common council does not fall within such language.

None of the above discussed statutes authorizing the reimbursement of legal expenses for public officers or officials would authorize a city redevelopment authority to reimburse such expenses under the circumstances you relate, and I find nothing in sec. 66.431, Stats., which authorizes such payment. In the absence of statutory authorization, it is my opinion that the principles enunciated in *Page, supra*, control, and the redevelopment authority lacks authority to reimburse one of its commissioners for legal expenses incurred because charges are filed against him in his official capacity seeking

his removal from office by the common council for cause, even though such charges are found by the council to be unsupported.

RWW:JCM

Defendant; District Attorney; Under new Evidence Rule (sec.) 906.09, defendant may not be cross-examined about prior convictions until the court has ruled in proceedings under Rule (sec.) 901.04 that such convictions are admissible. Nature of former convictions may now be proved under the new rule.

Defendant has burden of proof to establish that a former conviction is inadmissible to impeach him because obtained in violation of his right to counsel, under *Loper v. Beto*, 405 U.S. 473.

Rule of *Loper v. Beto*, 405 U.S. 473, does not apply to claimed denial of constitutional rights other than the right to counsel, although the conviction would be inadmissible for impeachment if it had been reversed on appeal, whether on constitutional or other grounds, or vacated on collateral attack.

September 27, 1974.

RICHARD C. KELLY, *District Attorney*
Juneau County

You have requested an opinion on the following question:

On cross examination, can the District Attorney impeach a defendant's testimony by asking the defendant whether or not he has previously been convicted of a criminal offense?

Under the law as it was before January 1, 1974, the answer to the question would have been an unqualified yes, but under the new Evidence Code promulgated by the Supreme Court the rule is now changed. Rule (sec.) 906.09 (59 Wis. 2d R176) effective January 1, 1974, provides:

“906.09 Impeachment by evidence of conviction of crime.

“(1) GENERAL RULE. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a

crime is admissible. The party cross-examining him is not concluded by his answer.

“(2) EXCLUSION. Evidence of a conviction of a crime may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

“(3) ADMISSIBILITY OF CONVICTION. No question inquiring with respect to conviction of a crime, nor introduction of evidence with respect thereto shall be permitted until the judge determines pursuant to s. 901.04 whether the evidence should be excluded.

“(4) JUVENILE ADJUDICATIONS. Evidence of juvenile adjudications is not admissible under this rule.

“(5) PENDENCY OF APPEAL. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.”

The former rule in Wisconsin limited the state to showing that the witness had been convicted and the number of convictions, and did not permit disclosure of the nature of the offense, on cross-examination of the witness. *State v. Adams* (1950), 257 Wis. 433, 43 N.W. 2d 446; *State v. Ketchum* (1953), 263 Wis. 82, 87, 56 N.W. 2d 531.

The purpose was to prevent the jury from learning that the defendant had previously been convicted of the same or similar crimes, a prejudicial fact. But the effect was to prevent the jury from assessing the impeaching quality of the prior convictions; conviction for perjury or a crime involving fraud or deception reflects more upon the veracity of the witness than one for, e.g., negligent homicide or violation of the game laws. Thus to avoid prejudice in a few cases, the former Wisconsin rule very nearly threw the baby out with the bath water. It was, in the modern expression, “overbroad.”

The new rule permits proof of the nature of the offense. The matter of prejudice is taken care of by sec. 906.09 (2), which provides for exclusion of the evidence of the conviction if its probative value (for impeachment) is substantially outweighed by the danger of unfair prejudice. Thus evidence of prior conviction is brought

within the general rule of relevance applicable to all evidence stated in Rule (sec.) 904.03 (59 Wis. 2d R73). See *Whitty v. State* (1967), 34 Wis. 2d 278, 294, 149 N.W. 2d 557; *State v. Hutnik* (1968), 39 Wis. 2d 754, 763-764, 159 N.W. 2d 733.

In order to insure that convictions which are excludable under the foregoing principle will not be unfairly suggested to the jury before the court has had an opportunity to rule, Rule (sec.) 906.09 (3), prohibits the asking of any question regarding conviction of a crime (or the introduction of evidence with respect thereto) until the judge has decided the question of exclusion pursuant to Rule (sec.) 901.04 (59 Wis. 2d R14-R15) which provides:

“901.04 Preliminary questions.

“(1) QUESTION OF ADMISSIBILITY GENERALLY. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to sub. (2). In making his determination he is bound by the rules of evidence only with respect to privileges.

“(2) RELEVANCY CONDITIONED ON FACT. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

“(3) HEARING OF JURY. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require.

“(4) TESTIMONY BY ACCUSED. The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

“(5) WEIGHT AND CREDIBILITY. This section does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.”

It follows that while the defendant may be cross-examined regarding prior convictions, he may not be so cross-examined until there has been a 901.04 hearing on the admissibility of his prior

conviction or convictions. If the court has ruled that some are admissible and others inadmissible, he may be examined regarding only those ruled admissible.

There need be no surprise to the defense in this regard since sec. 971.23 (2), Stats., relating to discovery in criminal cases, requires the district attorney to furnish a defendant a copy of his criminal record upon demand. The defendant may therefore be prepared to contest the admissibility of any prior convictions which the state may intend to use to impeach him as a witness.

Your letter, however, raises further questions stemming from *Loper v. Beto* (1972), 405 U.S. 473, 92 S.Ct. 1014, 31 L.Ed. 2d 374, which may be phrased as follows:

Is the rule of *Loper v. Beto, supra*, limited to cases of denial of counsel or does it extend to denial of other constitutional rights as well, and must the state prove *beyond a reasonable doubt* that the prior conviction contains no constitutional infirmities?

In a five-to-four decision, the Supreme Court ruled in *Loper v. Beto* that a conviction obtained in an action in which the defendant was denied his constitutional right to counsel cannot be used to impeach him as a witness in a later case.

The defendant in that case admitted four previous felony convictions during the course of questioning, the purpose of which was to impeach his credibility. The four member plurality of the court appeared satisfied that he was without counsel in the prior cases, although this point was disputed by the dissenters.

All four of these convictions were obtained during the period following the decision in *Betts v. Brady* (1942), 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595, prior to *Gideon v. Wainwright* (1963), 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799, 93 A.L.R. 2d 733. The court's view of those convictions made use of a retroactive application of *Gideon* which deeply encroaches upon the presumption of regularity discussed below.

Mr. Justice White, concurring in the result, held that the questions whether *Loper* was represented by counsel in the earlier cases, and if

not, whether he waived counsel, remained open and should be considered by the Court of Appeals on remand.

All four dissenting justices joined in the dissent of Mr. Justice Rehnquist, who was of the opinion that the petitioner had not met his *burden of proof* to establish that he did not competently and intelligently waive his constitutional right to the assistance of counsel (405 U.S. at 499.).

The court had previously held that a conviction obtained in violation of the defendant's right to counsel could not be used to enhance his punishment under a recidivist statute, *Burgett v. Texas* (1967), 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed. 2d 319. This case was very heavily relied on by the plurality in *Loper* as was the more recent case of *United States v. Tucker* (1972), 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed. 2d 592. In *Tucker*, two prior convictions obtained in violation of the constitutional right to counsel were considered by the judge in imposing a maximum sentence for the present conviction. This conviction was remanded for resentencing without consideration of the prior convictions by the court of appeals, whose judgment was affirmed by the Supreme Court. (In *Tucker* the invalidity of the two prior convictions was conclusively determined several years *after* the sentencing, in a *collateral proceeding* in a state court. The case before the United States Supreme Court arose out of a 28 U.S.C. sec. 2255 proceeding (post-conviction collateral attack) initiated after the state court proceedings. The state court's determination was thus given retroactive effect to invalidate a sentence long previously imposed in a federal court.)

In *Stockwell v. State* (1973), 59 Wis. 2d 21, 207 N.W. 2d 883, the Wisconsin Supreme Court followed *Tucker* and applied it to a pre-*Gault* adjudication of delinquency in which the juvenile had been denied the right to counsel, overruling earlier Wisconsin cases holding that such adjudications might be considered in imposing sentence in later adult convictions.

All these cases involve the right to *counsel* only. Neither the Wisconsin Supreme Court nor the United States Supreme Court has suggested that the court must consider whether *other* constitutional rights have been denied in deciding whether a conviction is admissible to impeach a defendant as a witness. For reasons which will be

discussed below it seems improbable that such an inquiry will be required.

Of course, if a conviction has previously been reversed on appeal or vacated in post-conviction collateral proceedings it may not be used for impeachment purposes. This will be true no matter what the grounds for reversal or collateral attack were.

But so long as the judgment of conviction remains unreversed and has not been vacated in collateral proceedings it is entitled to the presumption of regularity and correctness applicable to all judgments of courts of record. In 29 Am. Jur. 2d 211 - Ev. sec. 170 it is stated in part:

“Under the law of evidence, it is presumed, unless the contrary appears, that judicial acts and duties have been duly and regularly performed, the presumption of regularity attending the acts of public officers being applicable to judges and courts and their officers, and to justices of the peace. Thus, on the review of a lower court decision by a higher court, all reasonable presumptions and intendments consistent with the record will be indulged in favor of the validity of the judgment or decision under review, and of the regularity and legality of the proceedings below; every presumption consistent with the record is in favor of the correctness of the decision of the trial court. *The same principles apply whenever a judicial proceeding or a judgment or decree rendered therein becomes a factor in the trial of another case.* The familiar maxim ‘omnia praesumuntur rite et solemniter esse acta’ [All things are presumed to have been rightly and duly performed.] is given full application whenever a judgment or decree of another court of either general or special jurisdiction comes into question. The court rendering the judgment is presumed to have had jurisdiction of the subject matter and the parties, and to have rendered a judgment valid in every respect. However, jurisdiction to render a judgment in a particular case or against particular persons may not be presumed where the record itself shows that jurisdiction has not been acquired, or where there is something in the record showing the absence of jurisdiction.”
(Bracketed material supplied.)

The foregoing rule has been recognized in this state from the earliest times to the present. *Jackson v. Astor* (1841), 1 Pinney 137; *Merritt v. Baldwin* (1857), 6 Wis. *439, *443; *Tallman v. Ely* (1858), 6 Wis. *244, *259; *Ableman v. Roth* (1860), 12 Wis. *81, *90; *Bunker v. Rand* (1865), 19 Wis. *253, *260; *Tarbox v. French* (1871), 27 Wis. 651, 654; *Oakes v. The Estate of Buckley* (1880), 49 Wis. 592, 598, 599, 6 N.W. 321; *In re Estate of McCormick* (1900), 108 Wis. 234, 238, 84 N.W. 148; *State ex rel. La Follette v. Circuit Court* (1967), 37 Wis. 2d 329, 344, 155 N.W. 2d 141.

It has also been applied by the United States Supreme Court. *In Re Cuddy* (1889), 131 U.S. 280, 33 L.Ed. 154, 9 S.Ct. 703; *Johnson v. Zerbst* (1938), 304 U.S. 458, 468, 469, 58 S.Ct. 1019, 82 L.Ed. 1461, 1468, 1469, 146 A.L.R. 357.

Accordingly, on collateral attack it is recognized that the petitioner has the burden of showing the invalidity of the judgment. *Johnson v. Zerbst, supra*; *Kitchens v. Smith* (1971), 401 U.S. 847, 91 S.Ct. 1089, 28 L.Ed. 2d 519; 39 Am. Jur. 2d 284-285 - Hab. Corp. sec. 152, 146 A.L.R. 413. The Wisconsin Supreme Court has not had occasion to pass on this question directly, but in *State ex rel. Kohl v. Kubiak* (1949), 255 Wis. 186, 38 N.W. 2d 499, a habeas corpus attack on an extradition warrant, it was held that the petitioner had the burden of proof to overcome the presumption arising from the face of the governor's warrant.

By parity of reasoning, a defendant claiming the invalidity of a conviction sought to be used to impeach him must likewise assume the burden of proof. This is recognized by the dissenters in *Loper v. Beto, supra*, 405 U.S. at 499.

If the prior conviction was in Wisconsin, the judgment or certificate of conviction will generally disclose whether or not the petitioner was represented by counsel. If it does show representation, that should be sufficient to end the matter. If it does not, two questions must be asked: (1) Was the defendant able to retain counsel at his own expense, so that his lack of representation was by his own choice and (2) if he was indigent, did he effectively waive appointment of counsel?

Since the enactment of ch. 448, Laws of 1945, Wisconsin courts in felony cases, and more recently in all cases where required by the

Constitution, have been required to advise unrepresented defendants of their right to counsel, and that counsel will be appointed at public expense if they are financially unable to retain an attorney. See Stats. 1967, sec. 957.26 (1), and Stats. 1971, sec. 970.02 (1) (b). The presumption of regularity referred to above requires that in the absence of a showing to the contrary, it must be presumed that the court performed its statutory duty and that counsel was voluntarily and intelligently waived.

Moreover, the requirement of proof beyond a reasonable doubt applies only to the essential elements of the crime. McCormick, *Evidence* (2d Ed. 1972), page 799; *In Re Winship* (1970), 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed. 2d 368.

It is true that the Wisconsin Supreme Court has imposed the duty on the state of proving voluntariness of confessions beyond a reasonable doubt, *State ex rel. Goodchild v. Burke* (1965), 27 Wis. 2d 244, 264-265, 133 N.W. 2d 753, cert. den. 384 U.S. 1017, although ordinarily there is no such burden to establish the admissibility of evidence. But the state is not aided by any presumption that the confession of a person accused of crime is voluntary or was obtained in accordance with the *Miranda* rules. On the contrary, there is a presumption in favor of the regularity of judgments of conviction.

The Wisconsin court has wavered on the placement of burden of proof in search and seizure questions. In *Gray v. State* (1943), 243 Wis. 57, 9 N.W. 2d 68, it was held that the defendant had the burden of establishing that evidence was unconstitutionally seized. But the court later held that the state had the burden to prove that consent to search was voluntarily given, *Barnes v. State* (1964), 25 Wis. 2d 116, 130 N.W. 2d 264, by clear and positive evidence, *State v. Camara* (1965), 28 Wis. 2d 365, 137 N.W. 2d 1.

However, the burden to show denial of constitutional right is on the petitioner on motion for leave to withdraw a plea of guilty. *Creighbaum v. State* (1967), 35 Wis. 2d 17, 29, 150 N.W. 2d 494.

Both the Wisconsin Evidence Rule (sec.) 906.09 (5), quoted above, and the Proposed Federal Evidence Rule 609 (e) (41 Law Week 4028) submitted to Congress by the United States Supreme Court November 20, 1972, adopt the majority view (see 16 A.L.R.

3d 726) that the pendency of an appeal from a conviction does not render evidence thereof inadmissible for impeachment. The Federal note (59 Wis. 2d R184) states that this is based on the presumption:

“Sub. (e). The presumption of correctness which ought to attend judicial proceedings supports the position that pendency of an appeal does not preclude use of a conviction for impeachment.”

The presumption of regularity which the rule itself thus clearly recognizes is quite inconsistent with any requirement that the validity of the judgment be established by the state beyond a reasonable doubt. The burden is the other way.

Finally, it appears most improbable that the Supreme Court will extend the rule of *Loper v. Beto*, *supra*, to other constitutional rights. Lower courts are not warranted in assuming that the rule does so apply.

Although the court in *Loper* painted with a broad brush in stating the issue on *certiorari* (405 U.S. at 480), its actual decision is limited to convictions void for denial of counsel in violation of *Gideon v. Wainwright* (1963), 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799, 93 A.L.R. 2d 733, relying heavily on the theory that “[t]he absence of counsel impairs the reliability of such convictions” (405 U.S. 483) and “that the principle established in *Gideon* goes to ‘the very integrity of the fact-finding process’ in criminal trials” (405 U.S. 483-484). It was for that reason also that *Gideon* received retroactive application. *Linkletter v. Walker* (1965), 381 U.S. 618, 639, 85 S.Ct. 1731, 14 L.Ed. 2d 601, 614.

In contrast, at least some other constitutional rights, such as that against unreasonable searches and seizures and the *Miranda* rule, are not essentially necessary to the integrity of the fact-finding process. *Linkletter v. Walker*, *supra*, at 637; *Johnson v. New Jersey* (1966), 384 U.S. 719, 730, 86 S.Ct. 1772, 16 L.Ed. 2d 882. See also *Tehan v. Shott* (1966), 382 U.S. 406, 415, 86 S.Ct. 459, 15 L.Ed. 2d 453.

And in cases on review of alleged constitutional errors other than representation by or waiver of counsel, it is always necessary to search the record to determine questions of waiver and harmless error as well as whether the error even occurred. While nearly all of these cases are without merit, it is very time consuming to make the record

on which the issues can be determined. To permit such issues to be injected collaterally into another trial in a hearing on admissibility of the conviction to impeach a witness would be like delaying an airline flight with the passengers aboard and seatbelts fastened, to hold a hearing on whether the pilot correctly answered the questions on his written examination for his pilot's license many years earlier.

As shown earlier, both the United States Supreme Court and the Wisconsin Supreme Court have provided in the evidence rules that pendency of an appeal does not exclude the conviction. It is most improbable that the United States Supreme Court intended a complicated collateral attack on the conviction, a full-scale lawsuit in itself, to be injected into the trial when even the pendency of an appeal is insufficient.

RWW:WAP

Court Commissioner; Salaries And Wages; Part-time Family Court Commissioner also serving as District Attorney not entitled to practice law privately is entitled to minimum salary of \$16,500 as District Attorney by reason of sec. 59.471 (3), Stats., separate salary from county as Family Court Commissioner under sec. 247.17, Stats., and to the state supplement at the annual rate of \$2,000 provided by sec. 59.495 (2), Stats., created by ch. 331, Laws of 1973.

September 30, 1974.

CLEMENS V. HEDEEN, *District Attorney*
Door County

You have requested my opinion on seven questions relating to sec. 59.495, Stats., as created by ch. 331, Laws of 1973, which provides for state salary supplements to full-time and part-time Family Court Commissioners.

Section 59.495, Stats., provides, in part:

“FAMILY COURT COMMISSIONERS; SALARY SUPPLEMENTS. (1) In counties having a population of less than 500,000, each family court commissioner, deputy family

court commissioner and assistant family court commissioner, who is employed on a full-time basis shall receive, in addition to his present county paid salary, office expenses, supplies and stenographic services as provided in s. 247.17, an annual supplement of \$4,500 per year payable under s. 20.855 (2) (c). The payments shall be made to the county in which he is appointed, and the supplements shall be paid to the family court commissioners, deputy family court commissioners and assistant family court commissioners in at least semimonthly installments by such counties out of the county treasury.

“(2) Each family court commissioner who is employed on a part-time basis shall receive an annual salary supplement of \$2,000 per year in the same manner as prescribed under sub. (1).

“****”

1. Is the Door County Family Court Commissioner entitled to the \$2,000 per year annual supplement?

I am of the opinion that he is. As later pointed out, the office is part-time in Door County.

2. Is the Family Court Commissioner entitled to \$2,000 in 1974?

I am of the opinion that he is not. The law became effective July 3, 1974. Section 59.495 (1), (2), Stats., provides that the supplement shall be payable in at least semimonthly installments. It is my opinion that a part-time Family Court Commissioner would be entitled to semimonthly installments for that period of 1974 subsequent to July 3, 1974, during which he served, not to exceed \$1,000 for the period July 3, 1974 through December 31, 1974. While the statute does not specifically require proration, the salary supplement is on an annual basis and is to be paid in installments. It is my opinion that the amounts should be prorated and that the state will only pay the county a pro rata amount based on the annual rate.

3. Is the County Treasurer required to commence semimonthly payments before receipt of funds from the state?

I am of the opinion that he is not. The right to such funds accrues to the Family Court Commissioner, however. The provisions of sec. 59.495 (1), Stats., differ from sec. 59.471 (1), Stats. The latter statute requires payment of the District Attorney's salary supplement semimonthly out of the county treasury with reimbursement by the state. The former provides that "payments shall be made to the county ... and the supplements shall be paid to the family court commissioner ... in at least semimonthly installments by such counties out of the county treasury."

4. May a county refuse to increase the compensations of the Family Court Commissioner?

The answer is that the county is without power to act with respect to the increase in the form of a salary supplement payable from state funds which the legislature has expressly provided for. The county cannot decrease the compensation provided from county funds which is required by sec. 247.17, Stats. Paragraph (2) of sec. 1 of ch. 331, Laws of 1973, expressly provides:

"... No county shall reduce the salary and allowances it is currently providing any family court commissioner, deputy or assistant as of the effective date of this act."

5. May a county refuse to accept the salary supplement paid by the state?

The answer is "no."

The statute provides for a salary supplement. It is payable from state funds and belongs to the Family Court Commissioner as an incident of his office. The County Treasurer performs a ministerial task in paying out the funds pursuant to the statute. The statement of intent in ch. 331, Laws of 1973, clearly evidences that the matter is one of statewide concern.

Counties are required to comply with regularly enacted statutes affecting them.

"Counties ... are mere instrumentalities of the state, and statutes confer upon them their powers, prescribe their duties, and impose their liabilities. ..." *Douglas County v. Industrial Comm.* (1957), 275 Wis. 309, 313-314, 81 N.W. 2d 807.

“... The state retains the inherent power to redefine the relative rights of the county ...

“The right of a county to challenge acts of the legislature is sharply restricted. ... the county is a creature of the state and exists in large measure to handle the state’s burdens of political organization and civil administration.” *State v. Mutter* (1964), 23 Wis. 2d 407, 412, 413, 127 N.W. 2d 15, appeal dismissed, 85 S.Ct. 328, 379 U.S. 201, 13 L.Ed. 2d 339.

6. Is sec. 59.495, Stats., unconstitutional by reason of the provision in sec. 59.495 (3), Stats., which results in counties over 500,000 population receiving a supplement for Family Court Commissioners and not having to pay such supplement directly to the Family Court Commissioner?

The answer is “no.”

Section 59.495 (3), Stats., provides:

“(3) In counties having a population of 500,000 or more each family court commissioner, deputy family court commissioner and assistant family court commissioner shall receive for his services \$6,000 per year payable in monthly instalments to the treasurer of the county in which he serves to compensate in part the county for the expense of operating such office.”

The legislature must have determined that Family Court Commissioners in counties over 500,000 were currently being compensated at a more reasonable rate in view of their duties and responsibilities than was being paid in other counties. Section 247.13 (2), Stats., creates such office “in the classified civil service” although appointment is by the judge of the circuit and county court. Section 59.495 (3), Stats., grants such counties a larger supplement for each officer and assistant in view of the volume of work in such highly populated county and leaves the matter of passing along part of the supplement to the county board of such county if it should deem it appropriate.

The statute is presumed constitutional. Counties are no longer required to have one system of government which shall be as uniform

as practicable. Article IV, sec. 23, Wis. Const., as amended in 1972, permits the legislature to "establish one or more systems of county government." In my opinion the varied treatment of counties over 500,000 population provided for in sec. 59.495 (3), Stats., would be a reasonable classification under the former constitutional provision. In any event, counties have no standing to challenge duly enacted statutes. *State v. Mutter, supra*, p. 412; *Columbia County v. Wis. Retirement Fund* (1962), 17 Wis. 2d 310, 116 N.W. 2d 142.

7. May the county abolish the position of Family Court Commissioner and recreate a position at a lower salary?

The answer is "no."

Section 247.13 (1), Stats., creates the office and provides that such officer shall be appointed by the circuit and county judges in and for said county. Section 247.17, Stats., provides that:

"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 whether he is on a full or part-time basis ..." (Emphasis added.)

As pointed out in 61 OAG 443, 446 (1972), the office is judicial in nature and created by a statute rather than under a statute. It was there stated that under former sec. 59.15 (2) (a), (b), 1971 Stats., the county board was without power to abolish, create or reestablish the office or transfer the duties to some other county agency. I am of the opinion that the county board does not have such power under sec. 59.025 (3), Stats., as created by ch. 118, Laws of 1973. Section 59.025 (2), Stats., provides that the power granted "... shall be limited only by express language but shall be subject to the Constitution and such enactments of the legislature of statewide concern as shall with uniformity affect every county." Section 59.15 (2) (a), Stats., as amended by ch. 118, Laws of 1973, gives the county board broad powers to change the salary of any offices, with exceptions, "... created under any statute, the salary or compensation for which is paid in whole or in part by the county, ... and the powers ... shall be limited only by express language."

Express language in par. (2), sec. 1 of ch. 331, Laws of 1973, prohibits the county from reducing the salary and allowances the county is currently providing any Family Court Commissioner as of

the effective date of this act. Express language in sec. 247.17, Stats., requires counties to provide an annual salary for Family Court Commissioners. Chapter 331, Laws of 1973, makes the office and salary of Family Court Commissioner matters of statewide concern. Each county must have a Family Court Commissioner and it is my opinion that the varied treatment of the salary supplement to Family Court Commissioners in counties over 500,000 population is based on reasonable classification, and that sec. 59.495, Stats., is an enactment of statewide concern which with uniformity affects every county. Absolute uniformity is not required.

The resolutions of the County Board for Door County which you enclose indicate that the county is not in compliance with the requirements of sec. 59.471 (3), Stats., which requires a minimum salary of \$16,500 per annum for a District Attorney who is not permitted to practice law privately and sec. 247.17, Stats., which requires a county board to provide an annual salary for the Family Court Commissioner whether he is on a full or part-time basis. You presently hold both offices. In the opinion to you in 61 OAG 443, 447 (1972), it was stated:

“Whereas the offices are now compatible by statute, within limits, the offices are separate, have separate mandatory annual salaries and one is elective and one is appointive by the judiciary. Where an individual is serving in both capacities he is entitled to both salaries. 52 OAG 14 (1963)”

Door County Resolution 22-64, May 18, 1964, made the position of District Attorney a full-time position and provided that such officer could also assume the duties of Family Court Commissioner.

Door County Resolution 10-68, February 20, 1968, reaffirmed that situation and provided an annual salary for District Attorney of \$16,500 of which \$4,500 was to be reimbursed to Door County by the state by reason of ch. 325, Laws of 1967.

No separate salary was provided for services as Family Court Commissioner.

Door County Resolution 68-72, December 19, 1972, provided that the position of District Attorney shall be full-time, that such officer shall also serve as Family Court Commissioner, and that

“part of the salary of \$16,500 payable to the District Attorney is hereby allocated payable to the Family Court Commissioner as salary under Wisconsin Statutes 247.17.”

You state that Door County passed Resolution 17-74 in 1974 which establishes the District Attorney's salary at “\$16,500.00, as per statute.”

I construe these resolutions as prohibiting the District Attorney to practice law privately. Such officer is by reason of sec. 59.471 (3), Stats., entitled to a minimum annual salary of \$16,500. No portion of that salary can be allocated to another office or withheld from such officer. If you also serve as Family Court Commissioner on appointment by the circuit and county judges, with approval of the county board, you are entitled to a separate salary as Family Court Commissioner under sec. 247.17, Stats., and to the state supplement provided in sec. 59.495 (2), Stats.

If there is continued noncompliance with the requirements of these statutes, you would be entitled to make a claim and commence an appropriate action.

RWW:RJV

Secretary Of State; Changes in Uniform Commercial Code filing procedures brought about by the amendments to secs. 409.401 (1) (c) and 409.403 (1), Stats., by ch. 215, Laws of 1973, discussed.

September 30, 1974.

ROBERT C. ZIMMERMAN
Secretary of State

You request my opinion concerning the extent to which the amendments to secs. 409.401 (1) (c) and 409.403 (1), Stats., enacted by ch. 215, Laws of 1973, have changed the filing requirements and procedures of your office relating to the perfection of security interests under those provisions of ch. 409, Stats., the Uniform Commercial Code--secured transactions.

As a general rule, in order for a security interest to be perfected under ch. 409, Stats., a financing statement must be filed. Sec. 409.302, Stats. Section 409.401 (1), Stats., sets forth the place to file in order to perfect a security interest. Prior to amendment by ch. 215, Laws of 1973, sec. 409.401 (1) (c), Stats., required dual filing in the office of the secretary of state and in the office of the appropriate county register of deeds to perfect a security interest, where transactions which were essentially business or commercial were involved. However, ch. 215, Laws of 1973, amended the statute by eliminating the register of deeds filing. The original intent and main purpose of that amendment was described in a legislative council committee note appended to sec. 409.401 (1) when it was proposed as part of 1973 Senate Bill 177. That note stated in part:

“The convenience of local filing for search purposes is offset by the added costs and the inherent dangers of a dual filing system. If a creditor errs in determining the proper county of local filing under present sub. (1) (c), his filing is ineffective to perfect his security interest, even though he files centrally.”

In light of the amendment to sec. 409.401 (1) (c), Stats., current filings under that subsection need only be made in your office in order to perfect the security interest.

Section 409.403 (1), Stats., which sets forth what constitutes filing, was amended by ch. 215, Laws of 1973, to read as follows:

“409.403 (1) Presentation for filing of a financing statement and tender of the filing fee or acceptance of the statement by the filing officer constitutes filing under this chapter. In the case of a filing under s. 409.401 (1) (c), duplicate copies of the financing, continuation or termination statement or statement of assignment or release and twice the fee specified in sub. (5), ss. 409.404 (3), 409.405 (1) and (2) and 409.406 for any service rendered with respect to the statement except the issuance of a certificate under s. 409.407 (2), shall be submitted

to the secretary of state. Upon receipt, the secretary of state shall return one copy of the statement filed and one-half of the fee received to the register of deeds of the county of the debtor's residence."

Inasmuch as the register of deeds is no longer the filing officer for the perfecting of security interests under sec. 409.401 (1) (c), Stats., question legitimately arises as to the legislative purpose in requiring that a "duplicate" statement be forwarded to the register of deeds of the county of the debtor's residence together with one-half of the double fee collected.

The portion of sec. 409.403 (1), Stats., emphasized above was not part of 1973 Senate Bill 177 as originally introduced by the legislative council but was added by amendment to the bill. Its adoption as part of ch. 215, Laws of 1973, was probably motivated in part by the fiscal note to the bill. This note indicated that the removal of duplicate UCC filings from the register of deeds offices would result in a significant decrease in local revenues only a part of which would be reflected by increased revenues in the secretary of state's office occasioned by increased record searching services.

You have expressed the view that the copies of statements forwarded by your office under sec. 409.403 (1), Stats., have little, if any, purpose other than to furnish "financial audit" information for the various registers of deeds and that such "filings" are not governed by all of the other provisions of ch. 409, Stats. I do not fully agree with your conclusion.

Quite clearly, the submittal of the duplicate statement to the register of deeds is in no way required for the perfection, continuation, termination, assignment or release of security interests subject to sec. 409.401 (1) (c), Stats. Therefore, in a sense, the duplicate copy forwarded to the register of deeds under sec. 409.403 (1), Stats., is similar to the informational memoranda evidencing the notation of a security interest upon the certificate of title of a vehicle, which is required by sec. 342.20 (3), Stats., to be forwarded by the Wisconsin Department of Transportation to register of deeds for

filing in their office. However, as stated in sec. 409.403 (1), Stats., the fees under that provision are related to services rendered with respect to filed statements. By requiring twice the fee specified "for any service rendered with respect to the statement" and requiring that a duplicate statement and one-half the fee be forwarded to the register of deeds, I conclude that the legislature intended that the register of deeds would perform filing and indexing functions in his office similar to those performed in the secretary of state's office, for which he should receive compensation. A double fee was not specified in regard to the issuance of certificates of filing or certified copies under sec. 409.407 (2), Stats., since those functions are performed by the filing officer and the register of deeds performs no function under that statute in reference to filings under sec. 409.401 (1) (c), Stats.

You further inquire as to what constitutes a "duplicate copy" within the meaning of sec. 409.403 (1), Stats. In 20 OAG 167 (1931), this office considered a provision of the statutes similar to that language which was added to sec. 409.403 (1), Stats., by ch. 215, Laws of 1973, except that the duplicate papers were filed with the register of deeds and he forwarded one duplicate to a local municipal clerk. At page 169 the following is stated:

"'Duplicate' means a document which is essentially the same as some other instrument--not a mere copy thereof; *State ex rel. Fenelon et al. v. Graffam et al.*, (1889) 74 Wis. 643, 43 N. W. 727. 'Duplicate' means to double, repeat, make, or add a thing exactly like a preceding one. 'Reproduce exactly' is a synonym."

In my opinion, the duplicate statements required by law to be filed with your office must be such that either copy could be filed with you with the same effect as an original. This means that such "duplicate copies" should be duplicate originals or, in the case of a security agreement or financing statement, comply with sec. 409.402 (1) (b), Stats., which provides that:

"... An accurate reproduction of the security agreement or the financing statement, certified to be a true copy by the

secured party, public officer or notary public, or a carbon copy bearing signatures appearing by carbon impression, may be filed.”

You indicate that under your current method of operation you have some difficulty in ascertaining the debtor’s county of residence, since provisions such as sec. 409.402 (1) (a), Stats., which sets forth the formal requisites of a financing statement, only require that the debtor’s mailing address be shown.

Under sec. 409.403 (1), Stats., your office has the duty to ascertain the debtor’s county of residence so that copies of the statement will be forwarded to the proper county. Such duty cannot be delegated to the local registers of deeds. However, your office is also authorized to prescribe standard forms for use in filing such statements. Under the circumstances, the difficulty you describe can be remedied by requiring that the forms filed with your office, standard or otherwise, identify the county of residence of each debtor.

You further inquire concerning whether your office should require county filing numbers where a statement relates to a financing statement filed prior to the enactment of ch. 215, Laws of 1973. You point out that if the filing is anything other than a financing statement, the statutes require that the document “set forth,” “contain” or “identify” the original statement by “file number.” Secs. 409.403 (3), 409.404 (1), 409.405 (2) and 409.406, Stats. Although such provisions clearly require the filing to identify the file number previously assigned by the secretary of state, they do not as clearly require the county number which may have been assigned the financing statement under the old dual filing system. However, as pointed out in sec. 990.001 (1), Stats., in construing statutes the singular includes the plural, and in light of the local informational filing requirement introduced by the amendment to sec. 409.403 (1), Stats., and the need to identify a subsequent filing with the original financing statement in order for such filing to be meaningful, it is my opinion that the county filing office and number assigned the financing statement by the register of deeds should be noted where a filing relates to a statement previously filed under the dual filing system in existence prior to the adoption of ch. 215, Laws of 1973.

Finally, you request my comments concerning how your office should operate under the provisions of sec. 409.403 (1), Stats., where the statement filed with your office refers to several debtors residing in different counties.

While sec. 409.403 (1), Stats., clearly covers filings where all the debtors named in the statement reside in the same county, the statute is admittedly more difficult to apply and implement where the statement relates to debtors residing in different counties. However, a statute should be examined to discover the legislative purpose and then be construed so as to effect the evident purpose of the legislature, if its language admits of such construction. *Pella Farmers Mut. Ins. Co. v. Hartland Richmond Town Ins. Co.* (1965), 26 Wis. 2d 29, 41, 132 N.W. 2d 225; *Beckman v. Bemis-Hooper-Hays Co.* (1933), 212 Wis. 565, 571, 250 N.W. 420.

One apparent legislative purpose in adopting sec. 409.403 (1), Stats., was to provide for informational filings at the county level by requiring that the secretary of state return a duplicate copy of each statement to a debtor's county of residence. In the instance where the statement names two or more debtors having residence in different counties, it is clear that the legislative mandate to your office to forward one copy to the debtor's residence cannot be met unless the statute can be construed, as I believe it must, to require the filing with your office of sufficient duplicate copies to enable you to return one copy to each county involved.

It is also apparent that by requiring the secretary of state to collect twice the uniform filing fee and forward one-half of such fee to the register of deeds of the county of residence, the legislature intended that the register of deeds would receive the same payment for filing and indexing his copy of the statement as that retained for such services by the secretary of state. Regardless of what may have been intended, however, the legislature clearly authorized the secretary of state to exact only twice the uniform fee for each filing. The statutory language chosen by the legislature governs and we are not free to determine whether the legislators would have enacted different provisions if they had given greater attention to the application of the statute upon particular facts. *State ex rel. Neelen v. Lucas* (1964), 24 Wis. 2d 262, 268, 128 N.W. 2d 425.

Since you are entitled to retain one-half of such fee for your filing and indexing services, only the remaining one-half is available for distribution to registers of deeds. Where the statement involves two or more debtors having residence in different counties, such one-half fee cannot be arbitrarily forwarded to only one of the counties. Since the register of deed's office in each county will perform the same services in filing and indexing such statement, except where more than one name must be indexed, each register of deeds is at least entitled to such proportionate share of the one-half fee as is represented by the services he must render in respect to such statement. In this manner the legislative intent is implemented to the extent that such implementation is possible under the provisions of the statute.

RWW:JCM

Navigable Waters; Riparian Rights; 1. Where a bulkhead line has been established pursuant to sec. 30.11, Stats., a riparian owner must nonetheless obtain a permit or contract pursuant to sec. 30.20, Stats., prior to removing material from the bed of a navigable water landward of the bulkhead line, but within the original ordinary high water mark.

2. Where a bulkhead line has been established, a riparian owner may place a layer of sand or similar material landward of the bulkhead line without obtaining an additional permit pursuant to sec. 30.12 (2) (b), Stats.

3. Where a bulkhead line has been established, the original ordinary high water mark presumably will be considered the ordinary high water mark for purposes of determining the applicability of sec. 30.19, Stats., although particular fact circumstances may dictate that the bulkhead line or the edge of the filled area should be considered the ordinary high water mark.

4. Where a township located on Green Bay wishes to remove organic sediment and aquatic vegetation from the shoreline, it would be more appropriate for the town to apply for a zone of removal pursuant to sec. 30.205, Stats., than to apply for a bulkhead line pursuant to sec. 30.11, Stats.

October 1, 1974.

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

You have requested my opinion regarding the authority granted a riparian under several sections of ch. 30, Stats., including secs. 30.11 (4), 30.12 (1), 30.12 (2), 30.19, 30.20, and 30.205, Stats. Your letter stated that:

“A township wishes to receive blanket authority for the removal of organic sediment and aquatic vegetation along the shore of Green Bay. It has requested that the Department of Natural Resources approve the establishment of a bulkhead line pursuant to Wis. Stat. 30.11.

“Wis. Stats. 30.11 (4) and 30.12 (1) authorize a riparian owner to place solid structures or fill up to the duly established bulkhead line without obtaining a permit pursuant to section 30.12 (2). However, can other work normally requiring DNR permits under various provisions of Chapter 30, Wis. Stats., be performed by a riparian owner in the area between the original ordinary high water mark and the bulkhead line without receiving permits from the Department?”

You specifically ask the following questions, all of which relate to that area landward of the bulkhead line and lakeward of the original ordinary high water mark:

“1. Must the riparian owner obtain a contract or permit pursuant to Wis. Stat. 30.20 prior to removing material from the bed of any navigable water landward from the bulkhead line?

“2. Must the riparian owner obtain a permit pursuant to Wis. Stat. 30.12 (2) (b) prior to the placing of a sand blanket landward from the bulkhead line?

“3. What is to be considered the ordinary high water mark for the purposes of determining the applicability of Wis. Stat. 30.19? Would it be:

“a. The original ordinary high water mark;

“b. The edge of the filled area; or,

“c. The established bulkhead line?”

“4. For the limited purposes of removing organic sediment and aquatic vegetation from the shoreline, would it be more appropriate for the township to obtain approval of a zone for the removal of materials pursuant to Wis. Stat. 30.205?”

In order to answer your question, it is necessary to discuss generally the effect of establishing a bulkhead line under sec. 30.11, Stats. Section 30.11 (1) permits any municipality to establish a bulkhead line by ordinance along the shore of any navigable water within its boundaries, subject to approval of the Department of Natural Resources (DNR). Section 30.11 (2) sets forth the standards for establishing bulkhead lines. These standards are: (1) they shall be in the public interest, and (2) they shall conform as nearly as practicable to the existing shores. Subsection (2) also contains the exception that in the case of certain leases provided for under sec. 30.11 (5) and sec. 24.39 (4), Stats., bulkhead lines may be approved farther from the existing shoreline if they are consistent with and a part of any lease executed by the Board of Commissioners of Public Lands. Subsection (3) contains the procedures whereby a municipality establishes a bulkhead line. Subsection (4) refers to riparian rights and provides as follows:

“(4) RIPARIAN RIGHTS PRESERVED. Establishment of a bulkhead line shall not abridge the riparian rights of riparian proprietors. Riparian proprietors may place solid structures or fill up to such line.”

Subsection (5) concerns the previously referred to leases by the Board of Commissioners of Public Lands. Such leases may be for a term of fifty years under the provisions of sec. 24.39 and, in order to be approved, there must be a finding that the lease is consistent with the public interest. That standard is to be determined, however, by DNR rather than by the Commissioners of Public Lands. Its application is subject to several additional standards set forth in 30.11 (5) which are not directly germane to this opinion.

Section 30.12, Stats., prohibits the placing of material on the bed of a navigable water, without a permit by the DNR, “Where no bulkhead line has been established” (sec. 30.12 (1) (a)) or “beyond a lawfully established bulkhead line” (sec. 30.12 (1) (b)).

Sections 30.11 and 30.12 were created pursuant to ch. 441, Laws of 1959. As originally created, sec. 30.11 did not contain the provisions for leases by the Commission of Public Lands. Subsequent to the enactment of sec. 30.11, my predecessor issued an opinion stating that the establishment of a bulkhead line was equivalent to the establishment of a "shoreline" under the statutes as they existed prior to 1959. 49 OAG 126 (1960). A "shoreline" constituted a determination of the ordinary high water mark for purposes of clearly establishing title as between riparians and the state in situations where the natural ordinary high water mark is not easily determinable. 49 OAG 126 then cited prior opinions to the effect that a shoreline "should not create any substantial new land areas out of what was formerly the bed under the water." 49 OAG at 129. The rationale for the opinion was that the state, under the public trust doctrine, has unqualified title to lakebeds and qualified title to riverbeds, and that "the state cannot transfer, to private interest, property which it holds in trust for the public." *Idem*.

Subsequent to that opinion, and, apparently in response to it, the legislature enacted ch. 535, Laws of 1961, which created sec. 24.39 (4), Stats., and amended sec. 30.11 (2) and (5) to provide for leases by the Commission of Public Lands. They were enacted in the same form, essentially, as the current statutes. Effect of that amendment was discussed briefly in a subsequent opinion dated March 5, 1963. 52 OAG 42.

In December, 1963, the Wisconsin Supreme Court issued a decision involving the same question in the case of *Town of Ashwaubenon v. Public Service Commission* (1963), 22 Wis. 2d 38, 125 N.W. 2d 577, 126 N.W. 2d 567. This case involved an appeal from the denial of a bulkhead line application by the Public Service Commission (PSC), predecessor to the DNR in administering ch. 30 regulations. *Ashwaubenon's* application involved a bulkhead line extending from 90 to 1,000 feet out from the existing shore, and an area of 137 acres. The Supreme Court held that the PSC could not reject the application solely on the grounds that the line varied greatly in geographical distance from the original shoreline. In a split decision (4 to 3), the majority refused to adopt the reasoning of the prior Attorney General's opinion (49 OAG 126, *supra*). Rather, the court held that a bulkhead line such as the one in question there could be established without a violation of the trust doctrine:

“... The appellants’ argument that the trust doctrine precludes such activities is contradicted by the existence of the statute itself. One does not have to deny either the trust doctrine or the state’s paramount title to determine that an intrusion upon the navigable waters is permissible.” 22 Wis. 2d at 49.

The court specifically held that, with respect to the bed of the navigable water landward of the established bulkhead line, ownership does not pass to the private riparian. Rather, the riparian obtains the *limited* right to fill the bed landward of the bulkhead line, and to use it exclusively once he has filled it, unless and until the legislature chooses to revoke that right:

“The respondents do not challenge the paramount title of the state to the riverbed and concede that the legislature may, in the future, revoke the right of the riparian owners to retain structures up to the bulkhead line under sec. 30.11 (4), Stats. 1959. It cannot be denied that the riparian owners have only a qualified title to the bed of the waters. The title of the state is paramount and the rights of others are subject to revocation at the pleasure of the legislature.

“Nevertheless, a riparian owner, with knowledge of his qualified title and his revocable rights under sec. 30.11, Stats. 1959, by dint of that very statute may enjoy the use of the riverbed up to the established bulkhead line. ...” 22 Wis. 2d at 49.

This definition of a riparian’s limited rights under sec. 30.11 was quoted with approval in *State v. Mutter* (1964), 23 Wis. 2d 407, 412, 127 N.W. 2d 15.

The dissenting justices in the *Ashwaubenon* case placed a greater emphasis on the legislative standard requiring that bulkhead lines conform as nearly as practicable to the original shoreline. 22 Wis. 2d at 54. In a recent decision involving the bulkhead line statutes, *State v. McFarren* (1974), 62 Wis. 2d 492, 215 N.W. 2d 459, the unanimous opinion was written by Justice Wilkie, one of the three original dissenting justices in *Ashwaubenon*. Although neither the *Ashwaubenon* case nor the 1960 Attorney General’s opinion were mentioned specifically, the opinion indicates that the bulkhead line

statute is to be interpreted to emphasize the requirement that bulkhead lines be established as close to the original ordinary high water mark as practicable. 62 Wis. 2d at 497-498.

The court also drew a clear distinction between a bulkhead line, a natural shoreline and the low and high water mark on the shore:

“... Thus, a bulkhead line is not merely the natural shoreline but is a line legislatively established by a municipality which may differ from the existing shore line. A bulkhead line should also be distinguished from the low- and high-water marks on the shore ...” 62 Wis. 2d at 498.

From these two cases, it must be concluded then, that the establishment of a bulkhead line under sec. 30.11 does not grant full title to the bed landward of the line, but only grants a limited right of use of the bed for the placing of fill up to the bulkhead line. Furthermore, that right, even if it is exercised, is revocable by the legislature.

In light of this interpretation of sec. 30.11, the answers to your specific questions are as follows:

“1. Must the riparian owner obtain a contract or permit pursuant to sec. 30.20 prior to removing material from the bed of any navigable water landward of the bulkhead line?”

The answer is yes. Section 30.11 contains no expression of legislative intent to grant a contract under sec. 30.20 for the removal of materials from the bed landward of the bulkhead line. This is in contrast to the express language in secs. 30.11 and 30.12 waiving the requirement for a permit to place fill up to the bulkhead line. Under the *Ashwaubenon* case, the state control under the Trust Doctrine remains essentially intact except for area filled under the right established by that statute and, even in that area, the state retains the right to revoke the permit.

“2. Must the riparian owner obtain a permit pursuant to sec. 30.12 (2) (b) prior to the placing of sand landward to the bulkhead line?”

The answer to this question is no. Section 30.12 prohibits structures and deposits without a permit in navigable waters where no bulkhead line has been established. One such permit available

under sec. 30.12 (2) (b) is for the placing of a sand blanket. Section 30.11 (4) grants riparians the right to place solid structures or fill up to a bulkhead line. It is my opinion that "a layer of sand or other similar material" as referred to in sec. 30.12 (b) would come within the more general term "fill" as it is used in 30.11 (4). The two statutes, construed together, clearly show that a riparian has the right to place a sand blanket as well as a solid fill or solid structure up to a bulkhead line where one has been established.

"3. What is considered to be the ordinary high water mark for purposes of determining the applicability of Wis. Stat. 30.19? Would it be:

- "a. The original ordinary high water mark
- "b. The edge of the filled area; or,
- "c. The established bulkhead line?"

The original high water mark will, presumably, be considered the ordinary high water mark for purposes of determining the applicability of sec. 30.19, Stats. This is a presumption, however, and not an absolute rule. Either of the other two suggested alternatives might be appropriate under particular fact circumstances. For example, in some cases bulkhead lines are established in areas where the natural ordinary high water mark is difficult or impossible to determine. In such cases they serve the place of the established shoreline under the old shoreline statute. 49 OAG 126 (1960); *State v. McFarren, supra*. This would be one instance where the facts clearly require that the bulkhead line serve as the ordinary high water mark.

Another circumstance might be where the fill has been placed and maintained for a number of years, after which the riparian creates an enlargement without a permit within five hundred feet of the original high water mark but not within five hundred feet of the edge of the fill. Under the *Ashwaubenon* case, the state has retained the right to have the fill removed and the original shoreline restored at the original ordinary high water mark. It follows that the state retains the right to regulate the five hundred feet landward of the original high water mark under sec. 30.19. There is no express language in sec. 30.11 relinquishing regulation of any portion of the five hundred

foot strip landward of the ordinary high water mark under sec. 30.19, nor can it be necessarily implied. Nonetheless, in circumstances such as described above, particularly where the fill has existed for a long time, and where the property has changed hands several times in the meantime, the state may well have relinquished its right to exact the penalty for violation of 30.19 because of the lack of notice to the landowner that he is constructing within a regulated area.

Absent specific factual circumstances such as related in the above examples, I believe public policy dictates that the presumption that the ordinary high water mark for purposes of regulation under sec. 30.19 will be the original ordinary high water mark. This would be the broadest construction favoring the protection of the public rights in navigable waters. Such construction is favored if not required. *Reuter v. DNR* (1969), 43 Wis. 2d 272, 168 N.W. 2d 860; *Just v. Marinette County* (1972), 56 Wis. 2d 7, 201 N.W. 2d 761. It is also consistent with the decision in *State v. McFarren, supra*, which clearly distinguished the ordinary high water mark from a bulkhead line established under sec. 30.11.

“4. For the limited purposes of removing organic sediment and aquatic vegetation from the shoreline, would it be more appropriate for the township to obtain approval of a zone for the removal of materials pursuant to sec. 30.205, Stats?”

The answer to this question is yes. Section 30.205 appears to be tailor made for the instant situation. Section 30.205 (4) states that “this section applies only to outlying waters as defined in s. 29.01.” The latter section includes Green Bay within the definition of outlying waters. Thus, clearly, a township could obtain approval for a zone of removal under 30.205 (2) provided, however, that the town is the riparian owner. The statute specifically requires that the application for establishment of a zone of removal must be made by a riparian owner.

RWW:SMS

Counties; Office of Commissioner on Policy Board of Consortium of counties under federal Comprehensive Employment and Training Act and office of President of District Vocational Technical and Adult Educational School Board which would be applicant and competitor for funds allocated are incompatible; however, counties under present statutes do not have power to form Consortium for purposes of federal act where Governor has not designated them as participating units of government under sec. 16.54 (6), Stats.

October 2, 1974.

DENNIS J. FLYNN, *Corporation Counsel*
Racine County

Racine County has entered into an agreement with Kenosha County and Walworth County for participation to form a Tri-County Comprehensive Employment and Training Act Consortium. Under the program the Consortium will receive substantial federal funds for manpower training and education. Article 5.02 of the Consortium Agreement provides that the Consortium Policy Board shall be composed of six members. Each County Board shall appoint two members of their respective board to serve on the Policy Board. The Policy Board, subject to the federal law, is to decide if and when CETA funds should be allocated or reallocated to public agencies including vocational and technical educational schools, private agencies, including corporations, and individuals who participate in the programs.

You state that approximately \$1.6 million are available for manpower programs and that Gateway Technical Institute will probably receive a substantial portion of this amount although there will be other competitors for the funds. Gateway Technical Institute serves the same three counties covered by the manpower Consortium. The Walworth County Board has appointed one of its supervisors to serve on the Policy Board who is also President, without compensation, of the Gateway Technical Institute governing board. He is entitled to reimbursement for expenses.

You inquire whether there is incompatibility of offices or other conflict of interest which would make such supervisor ineligible to serve on the Policy Board of the Consortium.

A county board supervisor is a county officer. Sec. 59.03 (3) (d), as renumbered by ch. 118, Laws of 1973. A member of a district board in charge of a vocational, technical and adult education school is a public officer. 60 OAG 178 (1971). Gateway Technical Institute is such a school. I am of the opinion that a member of a district board referred to in secs. 38.01 (2), 38.08, Stats., is not a county officer. The court approached but did not determine that issue in *Village of West Milwaukee v. Area Board of VTAE* (1971), 51 Wis. 2d 356, 387, 187 N.W. 2d 387, appeal dismissed 404 U.S. 981, 92 S.Ct. 452, 30 L.Ed. 2d 364.

Section 38.08 (1) (a), (4), Stats., provides:

“(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.

“***

“(4) District board members shall receive their actual and necessary expenses incurred in the performance of their duties.”

Section 38.10 (1) (b), Stats., provides:

“(1) (b) If the petition for creation of a district was filed by the governing bodies of counties or any combination of school districts, counties and municipalities, the county board chairmen of counties having territory within the district shall constitute the appointment committee.”

I am of the opinion that the offices of county board supervisor and member of a district board of a VTAE school are not incompatible. In 19 OAG 609 (1930), it was stated that the offices of alderman and member of a local vocational board were incompatible since the local board reported the amount of funds needed to the municipality and

the city council levied and collected the tax. Power of levy with respect to district VTAE schools is now in the district and the county board has little to do with the functioning operations carried on by the district VTAE school. A county board can petition the state board for detachment from a district and attachment to another district. Sec. 38.06 (1), Stats.

Assuming for the present that the counties involved have power to enter into the joint agreement to form a Consortium, we must now consider the legal standing of the Policy Board provided for by the agreement. The word Consortium is not contained in ch. 59, Stats., or otherwise in the statutes as far as I have been able to ascertain. It was apparently used because it appears in rules promulgated by the U.S. Secretary of Labor to implement the Comprehensive Manpower Program. See sec. 95.3, Federal Register, Vol. 39, No. 108, June 4, 1974.

Section 66.30 (2), Stats., provides for intergovernmental cooperation between units of government including counties "for the receipt or furnishing of services or the joint exercise of any power or duty *required or authorized by statute.*" Where sec. 66.30, Stats., is applicable, counties may create a commission by contract. The counties here involved have attempted to do this in the creation of the Policy Board. It is my opinion that the Policy Board is a commission which is not a separate legal entity but is an agency of the three counties. Neither sec. 66.30, Stats., nor the federal act involved require that Policy Board members be county board supervisors. Since commissioners are in effect county officers, county board members would be ineligible to act were it not for the provisions of secs. 59.06 and 59.025 (3) (a), (c), Stats., as created by ch. 118, Laws of 1973, since sec. 59.03 (4), Stats., as renumbered by ch. 118, Laws of 1973, provides:

"(4) COMPATIBILITY. No county officer or employe is eligible to the office of supervisor, but a supervisor may also be a member of a town board, the common council of his city or the board of trustees of his village."

I am of the opinion that sec. 59.06, Stats., relating to the power of the county board to create special committees and sec. 59.025 (3) (a), (c), Stats., would permit county board supervisors to serve on

such a Policy Board in spite of the language of sec. 66.11 (2), Stats., which provides in part:

“(2) *Eligibility of other officers.* Except as expressly authorized by statute, no member of a town, village or county board, or city council shall, during the term for which he is elected, be eligible for any office or position which during such term has been created by, or the selection to which is vested in, such board or council, but such member shall be eligible for any elective office. The governing body may be represented on city or village boards and commissions where no additional remuneration is paid such representatives and may fix the tenure of such representatives notwithstanding any other statutory provision. ...”

It is noted that the exception in sec. 66.11 (2), Stats., which permits the governing body to be represented on commissions does not include county boards or commissions. Participation would be permissible under the “except as expressly authorized by law” exception since sec. 59.06, Stats., permits county boards to create committees of county board members for special purposes and sec. 59.025 (3) (a), (c), Stats., provides:

“(3) **CREATION OF OFFICES.** Except for the offices of supervisor, judge, county executive and county assessor and those officers elected under section 4 of article VI of the constitution, the county board may:

“(a) Create any county office, department, committee, board, commission, position or employment it deems necessary to administer functions authorized by the legislature.

“***

“(c) Transfer some or all functions, duties, responsibilities and privileges of any county office, department, committee, board, commission, position or employment to any other agency including a committee of the board.”

I am of the opinion that the office of Commissioner on a Policy Board of a Consortium whose function is to determine which, when and how much educational facilities within the three counties shall receive funds under the Comprehensive Employment and Training

Act and the unsalaried but expense reimbursable office of President of the governing body of a district vocational, technical and adult education school, which is an applicant competitor for such funds, are incompatible by reason of common law rules of incompatibility.

In *Martin v. Smith* (1941), 239 Wis. 314, 326, 1 N.W. 2d 163, it is stated:

“... at common law where the nature and duties of two offices were such as to render it improper from considerations of public policy for one person to discharge the duties of both, a person could hold but one; that if one holding a public office accepts another incompatible with the one which he holds, he thereby vacates the first office. *State ex rel. Nebraska Rep. State C. Com. v. Wait* (1912), 92 Neb. 313, 138 N. W. 159, 43 L. R. A. (N. S.) 282, 291, and cases cited. Sec. 13, art. XIV, of the constitution continues the common law in force in the territory of Wisconsin at the time of its adoption so far as it is not inconsistent with the provisions of the constitution.”

These matters are discussed in 37 OAG 624 (1948), 44 OAG 159 (1955) and 55 OAG 59 (1966).

In *Woodhull v. Manahan* (1964), 85 N.J. Super 157, 204 A. 2d 212, affd. 43 N.J. 445, 205 A. 2d 441, it was held that a town attorney could not sit on the county board of taxation. The court relied on the extensive treatment given to the problem of incompatible offices in *Jones v. MacDonald* (1960), 33 N.J. 132, 162 A. 2d 817, in which it was held that a city councilman could not sit on the county board of taxation, in part because the county board would likely review cases in which the municipality had a direct or indirect interest. The court stated that subordination of one office to another clearly evidences incompatibility of those offices even if less than complete, but that the doctrine of incompatibility is not limited to instances of subordination; it is enough that conflict of duties may arise in the regular operation of the statutory plan.

In 3 McQuillin, *Municipal Corporations*, 3rd Ed. Revised, sec. 12.67, *Incompatible offices*, pp. 294-299, some of the grounds for incompatibility are discussed:

“... Public policy demands that an officeholder discharge his duties with undivided loyalty. The doctrine of incompatibility is

intended to assure performance of that quality. Its applicability does not turn upon the integrity of the person concerned or his individual capacity to achieve impartiality ... The doctrine applies inexorably if the offices come within it, no matter how worthy the officer's purpose or extraordinary his talent. ... this common-law rule is sometimes buttressed and sometimes qualified by statutory provision. They should be construed together so far as possible. ... At common law, offices were not incompatible unless the functions were inconsistent. ... While incompatibility has been described as physical impossibility to perform the duties of both offices, it is not simply a physical impossibility to discharge the duties of both offices at the same time, it is an inconsistency in the functions of the two offices, as where one 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. Two offices are said to be incompatible when the holder cannot in every instance discharge the duties of each. Incompatibility arises, therefore, from the nature of the duties of the offices, when there is an inconsistency in the functions of the two, where the functions of the two are inherently inconsistent or repugnant, as where antagonism would result in the attempt by one person to discharge the duties of both offices, or where the nature and duties of the two offices are such as to render it improper from considerations of public policy for one person to retain both. The true test is whether the two offices are incompatible in their natures, in the rights, duties or obligations connected with or flowing from them. ..."

It is doubtful whether such President would have a private pecuniary interest in any public contract, direct or indirect, which would involve the criminal statute, sec. 946.13, Stats. However, under well-settled principles of the common law, public policy requires that an office holder discharge his duties with individual loyalty. In the instant case, the President of the Gateway Technical Institute would be participating in the application for substantial funds to be allocated or reallocated by the Policy Board of the Consortium and at the same time would be acting as a member of the Policy Board in the allocation of such sums.

Although I have answered your question as to compatibility of offices assuming that the counties have power to enter into the Consortium for the purposes stated, it is incumbent that the question of county power be examined.

I am of the opinion that the counties involved did not have power to enter into the Consortium under the facts stated. It is probable that the Governor could designate counties as municipal units of government to act as prime sponsors, under the federal act referred to, to carry out specific duties required by the act.

The Comprehensive Employment and Training Programs Act, Pub. Law 93-203, became law December 28, 1973, and appears at 29 U.S.C.A. 801-992.

The program description for the Comprehensive Manpower Services portion of the act is set forth in sec. 811 as follows:

“Sec. 811. Program description

“It is the purpose of this subchapter to establish a program to provide comprehensive manpower services throughout the Nation. Such program shall include the development and creation of job opportunities and the training, education, and other services needed to enable individuals to secure and retain employment at their maximum capacity. Comprehensive manpower services may include, but shall not be limited to, programs and activities designed to carry out the purpose of this subchapter, such as-

“(1) outreach to make persons aware of the availability of manpower services and persuade them to use such services,

“(2) assessment of the individual’s needs, interests, and potential in the labor market and referral to appropriate employment, training, or other opportunities,

“(3) orientation, counseling, education, and institutional skill training to prepare the individual to enter the labor market or to qualify for more productive job opportunities,

“(4) training on the job,

“(5) payments or other inducements to public or private employers to expand job opportunities, but payments to employers organized for profit shall not exceed the difference between the costs of recruiting, training, and providing supportive services for low-income persons and those regularly employed,

“(6) services to individuals to enable them to retain employment,

“(7) payment of allowances to persons in training for which they receive no remuneration and payment of such allowances for transportation, subsistence, or other expenses incurred in participating in manpower services or employment as are necessary to enable the individual to participate therein,

“(8) supportive services to enable individuals to take advantage of employment opportunities, including necessary health care and medical services, child care, residential support, assistance in securing bonds, or any other necessary assistance incident to employment, and any other service needed to participate in employment or manpower services,

“(9) development of information concerning the labor market and activities, such as job restructuring, to make it more responsive to objectives of the manpower services program,

“(10) manpower training, employment opportunities, and related services conducted by community-based organizations,

“(11) transitional public service employment programs, and

“(12) any programs authorized by part A of subchapter III of this chapter and by subchapter IV of this chapter.”

The purpose of the Public Service Employment Programs portion of the act is set forth in sec. 841 as follows:

“Sec. 841. Congressional statement of purpose

“It is the purpose of this subchapter to provide unemployed and underemployed persons with transitional employment in jobs providing needed public services in areas of substantial unemployment and, wherever feasible, related training and manpower services to enable such persons to move into employment or training not supported under this subchapter.”

Part A of subch. III of the act is concerned with providing additional manpower services for youth, offenders, persons of limited English-speaking ability, veterans, Indians and Alaskan natives, older workers and others who are disadvantaged.

Subchapter IV of the act is concerned with a Job Corps of low-income disadvantaged young men and women and authorizes residential and nonresidential centers in which enrollees will participate in programs of education, vocational training work experience, counseling and other activities. Section 918 (b) provides that education and vocational training may be through local public or private educational agencies, vocational educational institutions or technical institutes. Section 919 (a) provides that enrollees may be provided with personal, travel and leave allowances, quarters, subsistence, transportation, equipment, clothing, recreational services and other expenses.

Section 812 (a) (1) (b) provides that a state may be a prime sponsor only if local units of government or combinations thereof have not submitted timely applications. A prime sponsor other than the state is a local unit of government, or combination of local units, having a population of 100,000.

Section 981 (a) (10), provides:

“(10) ‘Unit of general local government’ means any city, municipality, county, town, township, parish, village or other general purpose political subdivision which has the power to levy taxes and spend funds, as well as general corporate and police powers.”

Wisconsin counties probably qualify within the definition although there is a question whether they do in fact have “general” corporate and police powers.

Section 59.01 (1), Stats., provides that:

“(1) *Status*. Each county in this state is a body corporate, empowered to sue and be sued, to acquire and hold, lease or rent real and personal estate for public uses or purposes, including lands sold for taxes, to sell, lease and convey the same, including the authority to enter into leases or contracts with the state for a period of years for the uses and purposes specified in s. 23.09 (2) (d), to make such contracts and to do such other acts as are necessary and proper to the exercise of the powers and privileges granted and the performance of the legal duties charged upon it.”

Section 59.02 (1), Stats., provides:

“(1) The powers of a county as a body corporate can only be exercised by the board thereof, or in pursuance of a resolution or ordinance adopted by it.”

Counties are quasi-municipal corporations. They are governmental arms of the state and can exercise only those powers specifically conferred on them by statute or necessarily implied. *Spaulding v. Wood County* (1935), 218 Wis. 224, 260 N.W. 473; *Maier v. Racine County* (1957), 1 Wis. 2d 384, 84 N.W. 2d 76.

Article IV, sec. 22, Wis. Const., provides:

“Powers of county boards. 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.”

Only the Wisconsin Legislature can confer powers on county boards. Such powers cannot be conferred by the congress except where the legislature has authorized counties to act pursuant to federally enacted legislation.

Under sec. 66.30, Stats., counties can enter into cooperation agreements to carry out functions jointly. However, the furnishing of services or joint exercise of power is limited to “*any power or duty required or authorized by statute.*” (Emphasis added.) Sec. 66.30 (2), Stats.

Section 66.30, Stats., does not refer to contracts with the federal government. Even where sec. 66.30, Stats., is applicable, each governmental unit must have independent power to carry out the services or functions involved.

The legislature has not specifically authorized counties to carry out the provisions of the federal act referred to. The legislature has provided county power with respect to cooperation under other federal laws. See sec. 66.433, Stats., relative community relations-social development commissions.

Without question a county has power to engage in some of the activities contemplated under the federal act. Section 59.07 (17), Stats., permits the county to accept "grants for any public governmental purpose *within the powers of the county.*" (Emphasis added.) Section 59.07 (95), Stats., permits the county to appropriate money for "educational" programs concerned with music or visual arts. The county has broad powers of employment for county purposes under sec. 59.15, Stats. There are other statutes which would permit the county to engage in some of the function contemplated by the federal act. Counties, unlike cities and villages, have no broad home rule powers such as those set forth in sec. 66.11 (5), Stats., and Art XI, sec. 3, Wis. Const. I am of the opinion that sec. 59.07 (5), Stats., does not provide adequate power for the purposes involved since power granted county boards is limited by the phrase underlined. Section 59.07 (5), Stats., provides:

"(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.*" (Emphasis added.)

An avenue is available to counties and groups of counties to qualify as prime sponsors under the federal act. Section 16.54 (1), (6), Stats., provides:

"(1) Whenever the United States government shall make available funds for the education, the promotion of health, the relief of indigency, the promotion of agriculture or for any other

purpose other than the administration of the tribal or any individual funds of Wisconsin Indians, the governor on behalf of the state is authorized to accept the funds so made available. In exercising the authority herein conferred, the governor may stipulate as a condition of the acceptance of the act of congress by this state such conditions as in his discretion may be necessary to safeguard the interests of this state.

“(6) The governor may accept for the state the provisions of any act of congress whereby funds or other benefits are made available to the state, its political subdivisions, or its citizens, so far as the governor deems such provisions to be in the public interest; and to this end the governor may take or cause to be taken all necessary acts including (without limitation because of enumeration) the making of leases or other contracts with the federal government; the preparation, adoption and execution of plans, methods, and agreements, and the designation of state, municipal or other agencies to perform specific duties.”

Under subsec. (6), the Governor could designate counties as agencies to carry out the provisions of the federal act within their respective areas. Counties could then enter into agreements with other counties or with municipalities to qualify as prime sponsors. The provisions of sec. 16.54 (6), Stats., are presumed constitutional and the legislature intended that the Governor have such power with respect to federal legislation enacted after sec. 16.54, Stats., became law.

The Governor did by Executive Order No. 25 (1971) create a State Manpower Planning Council. It did not designate counties as participating agencies for the purposes of the federal act we are concerned with which did not become law until December, 1973.

An alternate avenue would be for the legislature to specifically provide for county participation under the full terms of the Comprehensive Employment and Training Act of 1973.

RWW:RJV

Municipalities; Taxation; Local government units cannot include the value of tax-exempt manufacturing machinery and specific processing equipment and tax exempt merchants' stock-in-trade, manufacturers' materials and finished products and livestock in their property valuation totals for "non-tax" purposes, such as for municipal debt ceilings, tax levy limitations, shared tax distributions and school aid payments.

October 2, 1974.

DAVID W. ADAMANY, *Secretary*
Department of Revenue

In your capacity as chairman of the Study Committee on Manufacturing Equipment and Personal Property Tax Exemptions, you have requested my opinion on the following question:

Would it not be possible, if applied uniformly among all taxing districts, for local governmental units to include the value of tax exempt machinery and equipment and tax exempt merchants' stock in trade, manufacturers' materials and finished products and livestock in their property valuation totals for "non-tax" purposes, such as for municipal debt ceilings, tax levy limitations, shared tax distributions and school aid payments?

The answer is, "no, it would not be possible."

As you have pointed out, secs. 70.11 (27) and 70.04 (3), Stats., created by ch. 90, Laws of 1973, provide for the exemption from property taxation of manufacturing machinery and specific processing equipment, merchants' stock-in-trade, manufacturers' materials and finished products and livestock.

The answer to your question is resolved by an examination of the statutory language relating to such "non-tax" purposes as municipal debt ceilings, tax levy limitations, shared tax distributions and school aid payments. Without attempting to examine all such statutes, the examination of the following statutes is sufficient for purposes of responding to your inquiry.

Section 67.03 (1), Stats., refers to municipal debt ceilings, and provides that the aggregate amount of municipal indebtedness shall not exceed 5 percent of the taxable property located therein.

Section 62.12 (4), Stats., refers to tax limitations on cities, and provides that the tax levied for any one year shall not exceed 3 1/2 percent of the assessed value of the real and personal property in the city.

Section 70.62 (2), Stats., refers to tax limitations on counties, and provides that the tax levied against the taxable property of any county in any one year shall not exceed in the whole 1 percent of the total valuation of said county.

As used in the context of these statutes, the term "assessed value" and "total value" are synonymous with the term "value of taxable property" to the extent that they all refer to the value of only that portion of property which is subject to taxation.

Article XI, sec. 3, of the Wisconsin Constitution provides, in part:

"... No county, city, town, village, school district or other municipal corporation may become indebted in an amount that exceeds an allowable percentage of the taxable property therein equalized for state purposes as provided by the legislature. ..."

Thus, the frame of reference for all of these statutes relating to municipal debt limitations is the constitutional provision referring to "an allowable percentage of the taxable property" located within the various municipalities.

Other sections of the statutes examined include: sec. 60.18 (1), Stats., which refers to tax limitations on towns, and provides for a limitation of 1 percent of the assessed valuation of such town; sec. 61.46 (1), Stats., which refers to the limitation on village taxes, and provides for a levy on taxable property not to exceed 2 percent of the assessed valuation of such property; sec. 79.03, Stats., which refers to a shared tax formula based in part upon the municipality's full value of all taxable property; and sec. 121.07 (4), Stats., which defines school district equalized valuation to be the full value of the taxable property in the district.

The statutory language relating to these various debt ceilings and distribution formulas is controlling. The suggestion that uniformity

of application results in the validity of a method is without merit when that method is inconsistent with what the legislature has provided by statute.

RWW:APH

Administrative Procedure; Admission of service by an assistant attorney general or a clerk specifically designated for that purpose by the Attorney General will constitute service of process within the meaning of sec. 262.06 (3), Stats.

October 2, 1974.

PHILIP S. HABERMANN, *Executive Director*
State Bar of Wisconsin

I am advised by a member of the bar that in November, 1970, an assistant attorney general admitted service on a summons and complaint, and that an attorney now examining an abstract of title questions the authority of an assistant attorney general to admit service on behalf of the Attorney General. Apparently merchantable title of record to the property in question depends upon valid service of process and notice to the office of the Attorney General of the pendency of a legal action allegedly involving the rights of the state in the matter.

You are advised, and the public is advised by virtue of publication of this opinion, that an admission of service by assistant attorneys general while in performance of their duties as such, are acts of the Attorney General. Therefore, an admission of service by an assistant attorney general is as legally binding as is an admission of service by the Attorney General.

While the Attorney General is a constitutional officer and charged by statute with many duties, the law clearly recognizes that the Attorney General may act through officially appointed assistant attorneys general. See secs. 165.055, 165.065 and 165.07, Stats.

In prescribing how a court obtains personal jurisdiction, the legislature has provided in sec. 262.06 (3), Stats., that in an action

involving the state, service may be obtained "by delivering a copy of the summons and of the complaint to the attorney general or leaving them at his office in the capitol with his assistant or clerk."

I would call to the attention of the bar, that I have designated certain personnel in the Department of Justice as clerks within the meaning of sec. 262.06 (3), Stats., for the purpose of admitting service on process. If the pleadings are mailed to my office and are otherwise valid and in compliance with sec. 285.10, Stats., either an assistant attorney general or one of the specifically designated clerks will admit service on the papers served and return the admission of service form or card. No other personnel are authorized to admit service. If requested, my office will furnish a photocopy of the document designating clerks within the meaning of sec. 262.06 (3), Stats.

Occasionally a complaint in a foreclosure or quiet title action will merely allege that the state has or may claim to have some interest in the property involved in the action without further detail. Such allegation is not in conformity with sec. 285.10, Stats., and consequently admission of service is refused.

RWW:WHW

Counties; Corporation Counsel should provide legal advice and representation to 51.42 and 51.437 Boards as well as to the County Board.

October 2, 1974.

DENNIS J. FLYNN, *Corporation Counsel*
Racine County

In 1973 the legislature revised the Mental Health Act by delegating to the counties the primary responsibility of providing or purchasing services for persons in need of certain types of care. This was achieved by allowing the county to establish two boards under sec. 51.42, Stats., (commonly known as the Comprehensive Mental Health Board) and sec. 51.437, Stats., (commonly known as the

Developmental Disabilities Board). You ask who should provide legal counsel to these two Boards if necessary.

Although you indicate no reluctance to provide such services as Corporation Counsel, you express some concern that the interests of these Boards will not always be in harmony with that of the Racine County Board of Supervisors. As examples, you cite instances in which these Boards must request supplementary financing from the County Board because of the shortage of funds and the necessity for the County Board to pass on the plan and budget prepared by these Boards. You also refer to a dispute between the State Department of Health and Social Services and the 51.437 Board in your county over recoupment of funds which allegedly were overpaid in the past.

It is your opinion that these Boards are authorized to retain their own legal counsel under secs. 51.42 (6) (c) 1 and 51.437 (7) (b) 1. You also believe that any expense incurred would be reimbursable from the State Department of Health and Social Services under secs. 51.42 (8) (c) and 51.437 (8) (b) 5. These latter two subsections seemingly grant broad powers to the Secretary of the State Department of Health and Social Services to make grants in aid for any necessary expenditures not specifically enumerated. Although I tend to agree with this observation, I do not feel that the authority of the Boards is sufficiently broad to permit the hiring of legal counsel. The subsections upon which you rely state that the Director of the respective Boards shall make recommendations for personnel and salaries. It is my opinion that the legislature did not intend to create or allow new legal positions at the county level in addition to the offices of District Attorney and Corporation Counsel which, of course, are authorized under ch. 59.

Except for Milwaukee County which derives its power from sec. 59.455, counties are authorized to employ a Corporation Counsel under sec. 59.07 (44). His duties include giving legal opinions to the County Board and its committees and interpreting the powers and duties of the Board and county officers. For reasons hereafter set forth, I see no reason why you cannot represent these newly created Boards and the County Board at the same time.

The concerns which you express relate to matters of policy and not legal issues. For example, whether the County Board should approve supplementary financing and whether it should pass favorably on the

plan and budget submitted by either Board is a matter of judgment to be exercised by the County Board. If a conflict does arise relative to some legal issue, it is your duty to advise the respective parties as to whose position is correct.

Relative to the possible necessity for instituting legal actions on behalf of any of the three Boards, I again see no conflict. The 51.42 and 51.437 Boards operate under the supervision of the State Department of Health and Social Services. If these Boards or the County Board through acts of omission or commission failed to meet the standards and serve the purposes required under these programs, the Department of Health and Social Services can exercise its supervisory powers and take such measures as may be appropriate.

Although it may place the Corporation Counsel in an uncomfortable position when required to resolve a legal issue between two or more boards which he is required to advise, I foresee no circumstances under which a conflict of interest would arise. If the solution to any conflict regarding policy or law arises, you should feel free to address your inquiry to the Department of Health and Social Services and my office, respectively.

RWW:DPJ

Open Meeting: Governmental body can call closed session for proper purpose without giving notice to members of news media who have filed written request under sec. 66.77 (2) (e), Stats.

October 3, 1974.

DANIEL J. MIRON, *District Attorney*
Marinette County

You request my opinion whether a governmental body can call a closed meeting without giving notice to the members of the news media who have filed written request for notice under sec. 66.77 (2) (e), Stats., created by ch. 297, Laws of 1973.

It is my opinion that it can. This opinion assumes that the purpose for which such meeting is called is within the exceptions set forth in

sec. 66.77 (4), Stats., and that discussion is limited to matters which can be considered at a closed session. This opinion further assumes that there is no express statute relating to the particular governmental body involved which would require some form of public notice for any meeting.

Section 66.77 (8), Stats., provides for a forfeiture for "any member of a governmental body who knowingly attends a meeting at which a violation of this section occurs." Since the statute contains a penalty, its provisions are to be strictly construed.

Section 66.77 (2) (a), (b), (d), (e), (3), (4), (5), Stats., provides, in part:

"(2) In this section:

"(a) 'Closed session' means any meeting not an open session.

"(b) 'Meeting' means the convening of a governmental body in a session such that the body is vested with authority, power, duties or responsibilities not vested in the individual members.

"(d) '*Open session*' means a meeting which is held in a place reasonably accessible to members of the public, which is open to all citizens at all times, and which has received public notice.

"(e) 'Public notice' means statutorily required notice, if any. If no notice is required by statute, it means a communication by the chief presiding officer of a governmental body or his designee, to the public and to the official municipal or city newspaper designated under s. 985.05 or 985.06, or if none exists, then to members of the news media who have filed a written request for such notice, which communication is reasonably likely to apprise members of the public and of the news media of the time, place and subject matter of the meeting at a time, not less than one hour prior to the commencement of such meeting, which affords them a reasonable opportunity to attend.

"(3) *Except as provided in sub. (4), all meetings of governmental bodies shall be open sessions.* No discussion of any matter shall be held and no action of any kind, formal or

informal, shall be introduced, deliberated upon, or adopted by a governmental body in closed session, except as provided in sub. (4). Any action taken at a meeting held in violation of this section shall be voidable.

“(4) A governmental body may convene in closed session for purposes of:

“*** [(a) through (h) not quoted]

“(5) *No motion to hold a closed session or to adjourn an open session into a closed session shall be adopted unless the chief presiding officer announces to those present at the meeting at which such motion is made the general nature of the business to be considered at such closed session, and no other business shall be taken up at such closed session. No governmental body shall commence an open session, subsequently recess into a closed session, and subsequently reconvene into an open session within a 12-hour period, unless public notice of such subsequent open session was given at the same time and in the same manner as the public notice of the initial open meeting.*” (Emphasis added.)

Subsection (5) contemplates that the governmental body can by motion made and passed determine to hold a closed session. I am of the opinion that such procedure is not the exclusive means by which a closed session may be called. Some governmental bodies are required by special statute to call meetings in a specified manner. Other governmental bodies generally meet on call of their chief presiding officer.

Whereas public notice in the form specified in sec. 66.77 (2) (e), Stats., is required for open sessions, and whereas sec. 66.77 (5), Stats., requires the chief presiding officer to announce “to those present at the meeting at which such motion is made the general nature of the business to be considered at such closed session,” there appears to be no language which prohibits the convening of a governmental body into a closed session for proper purpose, on call of the presiding officer or other duly authorized officer, on a date when no open session is being held prior to the closed session, and there is no language which requires that notice of such meeting and the matter to be discussed be given to the public or to news media.

If the legislature had intended that notice of closed meetings be given to the public and news media in such instances, it could have expressly provided therefor.

In most instances, it may be advisable to give public notice, and notice to the news media of the time, place and subject matter of the proposed closed session, and I commend such practice.

RWW:RJV

Public Instruction, Superintendent Of; Schools And School Districts; The Department of Public Instruction may, if so authorized under sec. 16.54, Stats., implement the School Lunch Program and Special Food Service Plan for Children in secular and sectarian private schools and child-care institutions without violating the United States or Wisconsin Constitutions.

October 4, 1974.

DR. BARBARA THOMPSON, *State Superintendent*
Department of Public Instruction

Your predecessor requested my opinion on a number of questions pertaining to your duties in administering the National School Lunch Act. The first question is:

1. Can the Department of Public Instruction, as the State Educational Agency defined in the National School Lunch Act, disburse federal funds apportioned to the Department of Public Instruction under such act to parochial schools operated or governed by parochial institutions for the maintenance, operation and expansion of nonprofit school lunch programs to be operated by the parochial school or on behalf thereof in the parochial school?

The National School Lunch Act (42 U.S.C. 1751-63), appropriates funds to the Secretary of Agriculture for apportionment among the states to assist the states in the establishment, maintenance, operation and expansion of nonprofit school lunch

programs (42 U.S.C. 1752-53). The Act places the basic responsibility for administration of the program on state educational agencies (42 U.S.C. 1757).

The State Educational Agency selects schools for participation, makes agreements with participating schools, pays reimbursement claims from funds advanced to the states by the Secretary of Agriculture, and generally supervises operations in the local schools within the policies and regulations established by the Secretary of Agriculture (42 U.S.C. 1757 and 7 CFR 210.14). The Act further provides that in the event the State Educational Agency is not permitted, by state law, to disburse the funds paid to it to private schools or to match federal funds made available for use by such private schools, the Secretary of Agriculture is authorized to administer the program in such schools (42 U.S.C. 1759).

The applicable federal regulation, 7 CFR 210.14, requires that the state agency handling the federal funds must also provide program supervision as well as inspection and advisory services.

The second question asked is whether the required administration, supervision and inspection of parochial schools is permissible. I deem it appropriate to consider these two questions together since your agency apparently cannot disburse the monies without providing the required administration, supervision and inspection.

In order for your agency to disburse funds made available under the National School Lunch Act to parochial schools, it is necessary that you be authorized by state statute to both disburse the federal funds involved to nonpublic schools and to determine the eligibility of nonpublic schools to participate in the program. Administrative agencies have only such powers as are expressly granted by statute or necessarily implied as incidental to carrying out the duties and powers expressed in the statutes. Any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds. *State ex rel. Farrell v. Schubert* (1971), 52 Wis. 2d 351, 190 N.W. 2d 529, *American Brass Co. v. State Board of Health* (1944), 245 Wis. 440, 15 N.W. 2d 27.

The Department of Public Instruction is authorized by sec. 115.34 (1), Stats., to contract with schools generally in order to distribute

federal monetary and food product aids to such schools. The section reads as follows:

“(1) The department may contract for the operation and maintenance of school lunch programs and for the distribution, transportation, warehousing, processing and insuring of food products provided by the federal government. The form and specifications of such contracts shall be determined by the department. Amounts remaining unpaid for 60 days or more after they become payable under the terms of such contracts shall be deemed past due and shall be certified to the department of administration on October 1 of each year and included in the next apportionment of state special charges to local units of government as special charges against the school districts and municipalities charged therewith.”

Such section provides that amounts unpaid for 60 days or more may through certification to the Department of Administration be placed “as special charges against the school districts and municipalities charged therewith.” A persuasive argument can be made that the authority provided by sec. 115.34 (1), Stats., is limited to contracting with public schools. We need not consider whether the section is so limited since the Governor has, pursuant to sec. 16.54 (1) and (2), Stats., authority to accept federal funds and designate the agency to administer such funds. Such section reads in part as follows:

“Acceptance of federal funds. (1) Whenever the United States government shall make available funds for the education, the promotion of health, ... the governor on behalf of the state is authorized to accept the funds so made available. ...

“(2) Whenever funds shall be made available to this state through an act of congress and acceptance thereof as provided in sub. (1), the governor shall designate the state board, commission or department to administer any of such funds, and the board, commission or department so designated by the governor is authorized and directed to administer such fund for the purpose designated by the act of congress making an appropriation of such funds, or by the department of the United States government making such funds available to this state.”

The state superintendent has been given specific legislative authority to receive and distribute federal funds under sec. 115.28 (9), Stats., which reads:

“115.28 General duties. The state superintendent shall:

“***

“(9) FEDERAL AIDS. Accept federal funds for any function over which the state superintendent has jurisdiction and act as the agent for the receipt and disbursement of such funds.”

It is clear that the Superintendent has, if so designated by the Governor, the authority to administer funds received from the federal government under the rules and regulations prescribed in the National School Lunch Act in private schools.

Public funds can only be appropriated and used for a public purpose. *State ex rel. Warren v. Reuter* (1969), 44 Wis. 2d 201, 170 N.W. 2d 790; *State ex rel. Bowman v. Barczak* (1967), 34 Wis. 2d 57, 148 N.W. 2d 683; *State ex rel. La Follette v. Reuter* (1967), 36 Wis. 2d 96, 153 N.W. 2d 49.

The stated purpose of the National School Lunch Act is set forth in 42 U.S.C. 1751 as follows:

“It is declared to be the policy of Congress, as a measure of national security, to safeguard the health and well-being of the Nation’s children and to encourage the domestic consumption of nutritious agricultural commodities and other food, by assisting the States, through grants-in-aid and other means, in providing an adequate supply of foods and other facilities for the establishment, maintenance, operation, and expansion of nonprofit school-lunch programs.”

It is my opinion that state payment of the cost of supervision and administration of the program in private schools would be for a public purpose. So far as I am able to determine, no reported court decision, federal or state, has passed on this specific question in relation to the National School Lunch Act. However, in *Cochran v. Louisiana State Board of Education* (1930), 281 U.S. 370, 50 S.Ct. 335, 74 L.Ed. 913, the Supreme Court dealt with a somewhat similar question. In this case it was held that an appropriation by the State of

Louisiana of money derived from taxation to the supplying of school books free for children in private as well as public schools was not objectionable under the Fourteenth Amendment to the United States Constitution as a taking of private property for public purposes where the books furnished for private schools were not granted to the schools themselves but only to or for the use of the children, and were the same as those furnished for public schools and were not religious or sectarian in character. This case was cited for the same proposition in *Board of Education of Central School District No. 1, etc., et al. v. James E. Allen, as Commissioner of Education of New York, et al.* (1968), 392 U.S. 236, 247, 88 S.Ct. 1923, 20 L.Ed. 2d 1060, in these words:

“Another corollary was *Cochran v. Louisiana State Board of Education*, 281 US 370, 74 L Ed 913, 50 S Ct 335 (1930), where appellants said that a statute requiring school books to be furnished without charge to all students, whether they attended public or private schools, did not serve a ‘public purpose,’ and so offended the Fourteenth Amendment. Speaking through Chief Justice Hughes, the Court summarized as follows its conclusion that Louisiana’s interest in the secular education being provided by private schools made provision of textbooks to students in those schools a properly public concern: ‘[The State’s] interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded.’ 281 US, at 375, 74 L Ed at 915.”

The reasoning of the *Cochran* and *Board v. Allen* cases is, I believe, applicable to the situation here under consideration, for if providing children in private or parochial schools with school books of a nonsectarian character is imbued with a public purpose then there is in my judgment a legitimate public purpose in providing the services of state employes to supervise school lunch programs. The supervisory services here in question, like school books, are nonsectarian in character. They would be, if carried out in private or parochial schools in this state, of no different character than the supervisory services now rendered by you in the public schools in connection with the school lunch program. The similarities, then, between the appropriations for purchase of school books in the *Cochran* and *Board v. Allen* cases and the expenditure of state monies for the supervisory services here in question lead me to the

conclusion that to finance such activity would be as clearly an expenditure of this state for a public purpose as was the expenditure, challenged in the *Cochran* and *Board v. Allen* cases. Such legitimate public purpose is not changed because a private school is used as a means to attain the end of promoting the health and welfare of children. *State ex rel. Warren v. Reuter, supra*, p. 214.

Most of the nonpublic schools in Wisconsin are parochial schools. The stipulation of facts in *State ex rel. Reynolds v. Nusbaum* (1962), 17 Wis. 2d 148, 151, 115 N.W. 2d 761, was to effect there were 850 to 875 nonpublic schools in Wisconsin of which only 10 were not operated by any religious, church, or sectarian organization. The funds received by a parochial school to aid in payment of the cost of its school lunch program would constitute "money drawn from the treasury" regardless of whether the origin of the funds was the federal government. Federal funds received under provisions of the National School Lunch Act must be paid into the general fund and are then subject to the limitations of Art. I, sec. 18, Wis. Const. See secs. 20.865 (4) (m) and 20.906 (1), Stats. The proper disposition of federal funds is comprehensively discussed in 55 OAG 124, an opinion related to the state's participation in the education program established by the Federal Elementary and Secondary Education Act of 1965.

The memorandum enclosed with the opinion request letter outlines certain of your supervisory duties in the following words:

"... This supervision consists partly in an administrative review of the operations of the program in each school. The review consists of a personal visit to the school to observe the operation of the program and to determine whether the operations are in compliance with the requirements of the National School Lunch Act and the regulations issued by the Secretary of Agriculture. The review includes, also, a determination as to whether state and local laws, rules, and regulations concerning sanitation in the storage, handling, and preparation and serving of food are being carried out and whether the equipment which has been furnished by the school or school district is adequate and proper for the number of lunches being produced. The reviewer is required to make an examination into the recordkeeping of the school or school

district and to advise and consult with the responsible officials of the school district. ...

“... Where the reviewer’s report shows that there is a serious failure to observe the pertinent laws, rules, regulations and ordinances in the operation of the program, the State Agency has the authority to suspend reimbursement payments until corrective measures have been taken or to proceed with the cancellation of the agreement, according to the seriousness of the situation.”

The applicable federal regulation, 7 CFR 210.14, requires that in addition to program supervision, each state agency must provide adequate personnel for instructional and advisory services. The question therefore arises as to whether the channeling of such federal aid funds through the state treasury and the providing of the required supervisory and advisory services violates the First Amendment to the United States Constitution, or Art. I, sec. 18 of the Wisconsin Constitution.

The Wisconsin Supreme Court has indicated in *State ex rel. Warren v. Nusbaum* (1972), 55 Wis. 2d 316, 332, 198 N.W. 2d 650, and *State ex rel. Warren v. Nusbaum* (1974), 64 Wis. 2d 314, 219 N.W. 2d 577, that Art. I, sec. 18, Wis. Const., and the First Amendment of the United States Constitution, “... operate to serve the same dual purpose of prohibiting the ‘establishment’ of religion and protecting the ‘free exercise’ of religion.”

Article I, sec. 18, Wis. Const., reads as follows:

“SECTION 18. The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any ministry, against his consent; nor shall any control of, or interference with, the rights of conscience be permitted, or 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.*” (Emphasis added.)

The above emphasized portion of Art. I, sec. 18, Wis. Const., has been interpreted by the court in both *Nusbaum* cases as

encompassing the “primary effect test” defined in *Tilton v. Richardson* (1971), 403 U.S. 672, 679, 91 S.Ct. 2091, 29 L.Ed. 2d 790, rehearing denied in 404 U.S. 874, in these words:

“The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion.”

Additionally, the following definitive language also appears in *Nusbaum* at 55 Wis. 2d 333:

“... ‘For the benefit of’ is not to be read as requiring that some shadow of incidental benefit to a church-related institution brings a state grant or contract to purchase within the prohibition of the section. ...”

The United States Supreme Court in *Committee For Public Education and Religious Liberty v. Nyquist* (1973), 413 U.S. 756, 773, 93 S.Ct. 2955, 37 L.Ed. 2d 948, provided the following three-part test to be utilized in answering questions of aid to parochial schools:

“... [T]o pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, ... second, must have a primary effect that neither advances nor inhibits religion, ... and, third, must avoid excessive government entanglement with religion, ...”
(Citations omitted.)

A. Does the National School Lunch Act reflect a clearly secular legislative purpose?

It is my opinion that the National School Lunch Act is in furtherance of a purely secular legislative purpose. Congress has in 42 U.S.C. sec. 1751, declared the purpose of the act in part to “... safeguard the health and well-being of the Nation’s children and to encourage the domestic consumption of nutritious agricultural commodities and other foods, ...” Such legislative declaration of policy should be given great weight. *State ex rel. Warren, et al. v. Nusbaum* (1974), *supra*. Analysis of the entire Act does not indicate a purpose other than the secular purposes stated in the preamble quoted in part above. However, as indicated in *Nusbaum* (1974), at

p. 323, a finding of proper secular legislative purpose does not immunize the Act from further constitutional challenge on the basis of possible “primary effect which advances religion” or “excessive entanglement.”

B. Does the “primary effect” of the Act advance religion?

As previously discussed, the express purpose of the Act is secular, leaving the “primary effect” test to determine whether the furtherance of such secular purpose *principally* benefits a parochial school, or principally benefits children with only incidental and constitutionally permissive benefits accruing to the school. The answer to the “primary effect” test question can best be sought by noting various types of plans involving aid to private elementary and secondary schools decided and held to be permissible under this test by the United States and Wisconsin Supreme Courts.

In *Everson v. Board of Education* (1946), 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711, the United States Supreme Court upheld the constitutionality of a legislative enactment providing state funding for the bussing of all children, including those attending parochial schools. Although the formal “primary effect” test was to develop in later cases, the court said that the legislation involved, “... does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.” 330 U.S. 18. The court upheld the legislation even after noting that some benefit would accrue to the parochial schools.

In *Board of Education v. Allen, supra*, a New York statute requiring local public school authorities to lend secular textbooks to parochial schools was before the court. Applying the “primary effect” test the court held the statute constitutional saying:

“The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, ... Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson*

and does not alone demonstrate an unconstitutional degree of support for a religious institution.” 392 U.S. 243, 244.

The *Everson* and *Allen* cases set forth precedents concerning the “primary effect” test that in my opinion would compel the finding of constitutionality of the National School Lunch Act by the United States Supreme Court. The recent opinion of *State ex rel. Warren v. Nusbaum, supra*, indicates a similar result would probably obtain before the Wisconsin Supreme Court.

In *Nusbaum* (1974), the Wisconsin Court considered, on declaratory judgment, the constitutionality of ch. 89 of the Laws of 1973, a comprehensive act providing educational opportunities for handicapped children. The Act provides that in certain circumstances the state can contract for special educational programs in private institutions, including sectarian institutions. It was this facet of the Act dealt with by the court. The court stated at p. 324:

“Initially it must be recognized that the mere contracting for goods or services for a public purpose with a sectarian institution is appropriate state action. It is only when such a contract has a primary effect of advancing religion that the constitutional prohibitions come into effect.”

Thereafter, in applying the “primary effect test” the court concluded at p. 328:

“The primary effect of ch. 89, Laws of 1973, is not the advancement of a religious organization but the providing of special educational services to the handicapped children of Wisconsin, a secular purpose. Some incidental benefit may accrue to a religious organization, as Mr. Justice ROBERT W. HANSEN commented in *Nusbaum*:

“ ‘ “For the benefit of” is not to be read as requiring that some shadow of incidental benefit to a church-related institution brings a state grant or contract to purchase within the prohibition of the section.’ *Id.* at p. 333.”

“We conclude that sec. 115.85 (2) (d), Stats., of the Laws of 1973 does not violate the religious clauses of the first

amendment of the United States or art. I, sec. 18 of the Wisconsin Constitutions.”

It appears that the potential for prohibited benefit to a parochial school under provisions of the National School Lunch Act is somewhat less in degree than that present in aids to institutions under ch. 89, Laws of 1973. In either situation, the primary or principal beneficiaries are the children. It is my opinion that the “primary effect” of the National School Lunch Act is not the advancement of religion.

C. Does state implementation and administration of the Act in parochial schools require excessive governmental entanglements with religion?

The method of implementing the “excessive entanglements” test was set forth in *Lemon v. Kurtzman* (1971), 403 U.S. 602, 615, 91 S.Ct. 2105, 29 L.Ed. 2d 745, in these words:

“In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority. ...”

Institutions benefited under the Act are the food service programs in all schools. This is quite unlike the situation in *Lemon*, in which the characteristics of parochial teachers and educational philosophy as an institution was compared to that in public schools. The character and purpose of the National School Lunch Act is not sectarian in nature. Aid provided by the Act is to food service programs in schools and it is therefore difficult to imagine any significant difference in character between the program in public and sectarian schools. Thus, it is my opinion that the character of the lunch program is not such that “excessive entanglement” would be present.

The court in *Lemon* stated further as follows at 403 U.S. 616-617:

“The dangers and corresponding entanglements are enhanced by the particular form of aid that the Rhode Island Act provides. Our decisions from *Everson* to *Allen* have

permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials. Bus transportation, *school lunches*, public health services, and secular textbooks supplied in common to all students *were not thought to offend the Establishment Clause*. ...” (Emphasis added.)

Support for the conclusion that the National School Lunch Act does not involve “excessive entanglements with religion,” can be found in the Wisconsin Court’s handling of this test in *Nusbaum* (1974), *supra*. The Wisconsin Court stressed therein that the nature of the aid, special education for the handicapped, being nonsectarian, rendered governmental involvement with the institution minimal and not constitutionally objectionable. Similarly, the nature of the aid involved here, school lunch program assistance, would probably render unobjectionable the contacts your office would necessarily have to make with parochial schools in administering the Act for those parochial schools.

I therefore conclude, notwithstanding the ever present possibility that a constitutional infirmity could arise in implementation of the Act, that neither the United States nor Wisconsin Constitutions prohibit your agency from administering the National School Lunch Act in parochial schools.

The third question asks:

3. Can the Department of Public Instruction, as the State Educational Agency, disburse funds, pursuant to new subsection 13 (a) (1) of the School Lunch, apportioned to it by the National School Lunch Act, to initiate, maintain or expand nonprofit, nonsectarian food service for children in private nonprofit institutions such as child day-care centers, settlement houses, recreation centers which provide day care or other child care where children are not maintained at residence?

Section 13 as set forth in P. L. 90-302; 82 Stats. 117 amends the National School Lunch Act to provide aids for lunch programs in “service institutions” which provide day care and other nonresidential child care such as child day-care centers, settlement houses and recreation centers. This section (42 U.S.C. 1761) is

entitled "Special Food Service Program for Children." The term "service institutions" is defined in 42 U.S.C. 1761 (a) (1) and (2) as:

"(a) (1) ... For purposes of this section, the term 'service institutions' means private, nonprofit institutions or public institutions, such as child day-care centers, settlement houses, or recreation centers, which provide day care, or other child care where children are not maintained in residence, for children from areas in which poor economic conditions exist and from areas in which there are high concentrations of working mothers, and includes public and private nonprofit institutions providing day care services for handicapped children.

"(2) Subject to all the provisions of this section, the term 'service institutions' also includes public or private nonprofit institutions that develop special summer programs providing food service similar to that available to children under the National School Lunch or School Breakfast Programs during the school year, including such institutions providing day care services for handicapped children."

Section 1761 (c) (1) provides that the State Educational Agency is to disburse the funds in these words:

"(c) (1) Funds paid to any State under this section shall be disbursed by the State educational agency to service institutions, selected on a non-discriminatory basis by the State educational agency, ..."

It is necessary to consider, in determining whether the Department of Public Instruction may disburse funds allotted under the Special Food Service Program for Children, first, whether such State Educational Agency is authorized by state statute to implement such program and second, whether the expenditure of state money in implementing the program is for a public purpose. Section 115.34, Stats., authorizing the Department to "contract for the operation and maintenance of school lunch programs" is limited to schools. The word "school" is a generic term which denotes an institution for instruction or education. *State ex rel. Dick v. Kalaher* (1911), 145 Wis. 243, 247, 129 N.W. 1060. Moreover, ch. 115 of the statutes is concerned solely with public schools and special state schools for the

handicapped. The authority given to the State Superintendent to operate the school lunch programs does not extend to day-care centers, settlement houses and recreation centers as specified in the Special Food Service Program for Children. However, as previously stated in this opinion, the Governor has authority, under sec. 16.54 (1) and (2), Stats., to accept federal funds and designate the agency to administer such funds. The State Superintendent, if so designated by the Governor, has specific authority to receive and distribute such funds under sec. 115.28 (9), Stats.

The purpose of the Program is to satisfy the nutritional needs of preschool children and school children during the summer months by providing food assistance programs to day-care and other child-care institutions for children from areas in which poor economic conditions exist and from areas in which there are high concentrations of working mothers. See 1968 U. S. Code Cong. and Admin. News, 1932. A private organization may be used by the state to promote a public purpose. *Warren v. Reuter, supra*, p. 213. With the stated purpose of the bill in mind, it appears that the expenditure of state monies to implement the Special Food Service for Children is for a public purpose. It is therefore my opinion that you may disburse funds pursuant to 42 U.S.C. 1761 of the National School Lunch Act if the Governor has designated your agency to administer such funds under sec. 16.54 (1) and (2), Stats.

The fourth question is:

4. Can the Department of Public Instruction disburse federal funds apportioned to it by the National School Lunch Act to a parochial institution operating programs described in Question 3 above?

Funds paid to a state under the Special Food Service Program for Children are used to reimburse the institution for the cost of obtaining and preparing foods and as grants of aid to institutions to pay for the cost of equipment used in preparation and serving of foods (42 U.S.C. 1761). The secular purpose of this program is set forth in 1968 U.S. Code Cong. and Admin. News, pp. 1932-33, which reads, in part:

“The National School Lunch Act presently provides Federal assistance to the States to carry on school lunch programs at

reduced costs to recipients. Because that act is limited to programs carried on by schools, a great nutritional need exists among preschool children, and also among school-age children during the summer months. This bill proposes to meet this need by providing food assistance programs to day-care and other child-care institutions for children from areas in which poor economic conditions exist and from areas in which there are high concentrations of working mothers. Other public and private nonprofit institutions which provide day-care services for handicapped children are also included. These institutions, including day-care centers, settlement houses, nonresidential summer camps and playgrounds, will be aided in their food programs.

“The bill closely parallels the National School Lunch Act to which it is intended to serve as a complement. Meals may be served to children participating in programs operated by these service institutions. Experience has proven that the inadequate diets received by too many youths handicap them throughout their lives. Many medical problems have their origins in deficient nutrition and poor eating habits acquired during childhood. Faulty nutrition cannot only result in physical disabilities, but also in mental disorders and retardation. Lack of ambition and motivation can often be traced to vitamin and mineral deficiencies.”

I am of the opinion, based upon the reasoning set forth above in relation to the implementation of the National School Lunch Act in parochial schools, that your department may distribute funds under the Special Food Service Plan for Children without violating the aforesaid constitutional provisions relating to aid to parochial organizations.

The final question is:

5. Could the Department of Public Instruction visit the programs described in Questions 3 and 4 above in the manner and for the purposes set out in Question 2?

Section 16.54 (2), Stats., provides:

“Whenever funds shall be made available to this state through an act of congress and acceptance thereof as provided in sub. (1), the governor shall designate the state board, commission or department to administer any of such funds, and the board, commission or department so designated by the governor is authorized and directed to administer such fund for the purpose designated by the act of congress making an appropriation of such funds, or by the department of the United States government making such funds available to this state.”

Subsection 42 U.S.C. 1761 (h) (5) of the Special Food Service Program for Children requires that the “State educational agencies” shall keep such records as the Secretary of Health, Education and Welfare shall require as necessary under the program. You are, if authority is given by the Governor, empowered by sec. 16.54 (2), Stats., to do whatever is necessary to administer the program within the previously discussed confines of the United States and Wisconsin Constitutions.

RWW:WMS

Counties; Real Estate; Under sec. 49.26, Stats., a county department of social services, by its director, may make valid conveyances of real estate acquired by the department as a result of old-age-assistance lien foreclosures or transfers in lieu thereof, or as the result of assignments to the department made by the county court in probate or administration proceedings in the estates of old-age-assistance recipients; or of out-of-state real property voluntarily transferred to the department.

October 7, 1974.

DANIEL L. LAROCQUE, *District Attorney*
Marathon County

You inquire whether the director of the Marathon County Department of Social Services is authorized to convey real estate acquired by the county through assignment by judgment of the county court, probate branch, based upon a lien for old-age assistance

granted, or a claim for medical assistance furnished, or acquired by lien foreclosure. You also inquire whether the director may convey such property if it is acquired by voluntary transfer, presumably from an old-age-assistance or a medical-assistance recipient. You indicate that the problem has arisen because of an objection raised to such deeds by a title examiner. The enclosures accompanying your request indicate that the specific objection is that real estate which had been conveyed by warranty deed executed by the director of the county department had been acquired by that department under a judgment of the county court, probate branch, assigning the realty to the department in an estate which was presumably that of a deceased recipient of old-age assistance. The contention is that there is no statute authorizing the director to execute such deeds.

Generally, the title to all county property is held by the county clerk in the name of the county, and conveyances thereof are to be executed by the county clerk. Section 59.67, Stats., provides:

“(1) HOW HELD. County property shall be held by the clerk in the name of the county. All property, real or personal, conveyed to the county or its inhabitants or to any person for the use of the county or its inhabitants is county property; such conveyances have the same effect as if made directly to the county by name.

“(2) EFFECT OF TRANSFER. All deeds, contracts and agreements made on behalf of the county pursuant to the directions of the board under s. 59.07 (1), when signed and acknowledged by the clerk and the county seal attached, are valid and binding on the county to the extent of the terms of the instrument and the right, title and interest which the county has in the property.”

On the other hand, sec. 49.26, which is part of the statutes relating to old-age assistance, provides in material part as follows:

“(1) PERSONALTY AND FOREIGN REALTY. If the county agency deems it necessary, it may require as a condition to a grant of assistance that all or any part of an applicant’s personal property (except that mentioned in s. 49.22 (2)) and real property not situated in Wisconsin be transferred to the county agency. The property shall be managed by the county

agency who shall pay the net income to those entitled thereto. The county agency may sell, lease or transfer the property, or defend or prosecute all actions concerning it, and pay all just claims against it, and do all other things necessary for the protection, preservation and management of the property.”

“(3) (c) After probate or administration proceedings have been initiated and notice to creditors is given, as required by s. 859.07, and it appears from the inventory filed in said estate that the county claim *for old-age assistance* exceeds the value of estate assets, after deducting such expenses as provided in sub. (5) (b) and (c), the court may order summary closing proceedings under s. 867.01 and assign the real estate, if any, to the county agency which has the claim against the estate.”

“(9) LIENS, LIQUIDATION. The county board may authorize any county agency or official to bid in property at foreclosure under this section at a price not to exceed the amount of the claim for assistance, which claim or any part thereof may be applied as a credit on such a bid, *or such agency or official may accept a conveyance in lieu of foreclosure*. Title to property acquired *under this section* vests in such agency for the purpose of liquidation, and may be sold and title transferred by it without regard to s. 59.07 (1) (c). In the event the county acquires such property, payment as provided by s. 49.25 shall not be made until the property is sold and payment thereon shall be based on the sale price.” (Emphases supplied.)

Section 49.26 is a specific statute regarding the acquisition of property vested in the agency because of a prior grant of old-age assistance, as opposed to sec. 59.67, which is a general statute relating to county property generally. In addition, the substance of sec. 59.67 had its origin in ch. 9, sec. 6 of the 1849 revised statutes of Wisconsin, whereas sec. 49.26 first appeared as ch. 239, sec. 1, Laws of 1931. In such circumstance, there is applicable the rule that when a general and a conflicting specific statute relate to the same subject matter, the specific statute controls, and this is especially true where the specific statute is enacted after the enactment of the general statute. *Martineau v. State Conservation Commission* (1970), 46 Wis. 2d 443, 449, 175 N.W. 2d 206; see also *Kramer v. City of Hayward* (1973), 57 Wis. 2d 302, 311, 203 N.W. 2d 871.

I am therefore of the opinion that since sec. 49.26 (9) expressly provides that title to property acquired under "this section" vests in the county agency for the purpose of liquidation and may be sold and title transferred by the county agency without regard to sec. 59.07 (1) (c), Stats., the agency itself may make the conveyance without the necessity of its execution by the county clerk. Pursuant to sec. 35.18 (3), Stats., the phrase "this section" clearly means the entire sec. 49.26 and not merely subsection (9) thereof. In my view, sec. 49.26 (9) grants a general power of liquidation to the county agency and the reference therein to sec. 59.07 (1) (c) is a clear indication that the legislature intended that any conveyance by the county agency need not be executed by the county clerk.

As the director is the executive and administrative officer of the county department, pursuant to sec. 46.22 (3) and (4), Stats., he may properly execute such conveyances *ex necessitate rei* (the statutes not providing for any other executive or administrative officer in that department), since title to the property would have previously vested in the department, not the county. General county control does not attach in such case until the property has been liquidated under sec. 49.26 (9), i.e., converted into cash. 54 C.J.S., *Liquidation*, pp. 565, 566.

You refer to an "enabling ordinance" enacted by the Marathon County Board of Supervisors, designated as sec. 2.12, which provides:

"Pursuant to Section 49.26 (4), Wisconsin Statutes, as amended by Chapter 522 Laws of 1943, the Welfare Department of Marathon County is authorized and empowered to acquire and dispose of property for the purpose of liquidating Old Age Assistance Liens subject to the provision, however, that before acquiring such property an appraisal should be made and filed by the Welfare Committee with the Public Welfare Department."

Manifestly, this ordinance does not attempt to confer upon the county department of social services, or its director, any power not granted or authorized by sec. 49.26, Stats. It is limited to property acquisition for liquidation of old-age assistance liens "[p]ursuant to Section 49.26 (4) [now (9)], Wisconsin Statutes, as amended by Chapter 522 Laws of 1943." It is therefore not an attempt at unauthorized legislating, as you indicate has been claimed.

As to the power of the county agency to transfer property which it has received by probate assignment, it will be noted that sec. 49.26 (3) (c) expressly provides that after probate or administration proceedings have been initiated (with respect to the estate of a deceased old-age-assistance recipient) and notice to creditors given, and should it appear from the inventory that the county's claim for old-age assistance rendered is in excess of the value of the estate assets after deducting the expenses provided in subsecs. (5) (b), (c), the court may order summary closing proceedings under sec. 867.01 and assign the real estate, if any, to the county agency which has the claim against the estate. This is plainly an authorized additional method by which the county agency may acquire real estate under sec. 49.26, and therefore the property may be transferred without regard to sec. 59.07 (1) (c).

A similar answer is required in the case of a voluntary transfer of in-state property by the old-age-assistance recipient to the county agency in lieu of foreclosure of lien. Section 49.26 (9) so provides. Section 49.26 (1) states that the county agency may require as a condition of an assistance grant that all or any part of an applicant's personal property except that mentioned in sec. 49.22 (2) and real property not situated in Wisconsin be transferred to the county agency. This is yet another method of acquisition under sec. 49.26, and again, a subsequent conveyance of such transferred realty situated outside the state may be made by the county agency pursuant to sec. 49.26 (9).

As noted, your question also refers to situations involving medical assistance granted. I assume you refer only to those instances wherein such assistance has been rendered as a part of an old-age-assistance grant under secs. 49.20 and 49.22, Stats., and not to those persons who are not recipients of old-age assistance, but who are granted medical assistance under secs. 49.46 and 49.47. Recovery of the amounts of assistance granted in the latter instances is confined to suits against the recipients or their estates, pursuant to sec. 49.45 (8) (a), Stats., which does not provide for liens against such a recipient's real property, for assignment to the department, of the realty in estate proceedings, or for its acquisition through voluntary transfer by the recipient.

Apparently the questions posed will eventually become academic, because sec. 49.26 was repealed by ch. 90, sec. 250, of the Laws of 1973, effective August 5, 1973, although not affecting later transfers of property acquired by the county agency prior to that repeal, since OAA liens arising prior to such repeal are preserved. Hence, I conclude that the county department of social services, by its director, may execute valid conveyances of Wisconsin real estate which has been acquired by the agency as a result of old-age-assistance lien foreclosures or by transfer in lieu thereof, or by assignment of the real estate in probate or administration proceedings and transfers of out-of-state realty as provided in sec. 49.26 (1).

RWW:RDM

Natural Resources, Department Of; Navigable Waters; 1. Chapter 30, Stats., applies to navigable ditches that were originally navigable streams. If a navigable ditch was originally nonnavigable or had no previous stream history, Department of Natural Resources' jurisdiction depends upon the facts of each situation.

2. Whether navigable artificial drainage ditches need be connected to a navigable natural lake or stream in order that the Department of Natural Resources have jurisdiction depends upon the facts of each case.

3. The provisions of sec. 31.33, Stats., apply to nonnavigable artificial waterways insofar as is necessary to protect navigable waters and owners of flooded lands.

4. A permit pursuant to sec. 30.20 (2) (c), Stats., is necessary for the removal of material from navigable natural or artificial bodies of water. A distinction need not be made between drainage ditches located in active versus inactive drainage districts.

October 7, 1974.

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

You have asked my opinion regarding several questions having to do with navigable drainage ditches. Specifically, you ask:

1. Are the provisions of ch. 30 (Navigable Waters) (e.g., 30.12¹, 30.18², 30.19³ and 30.20⁴), ch. 31 (Dams and Bridges) and sec. 87.30 (Flood plain zoning), Wis. Stats., applicable to:
 - a. Navigable ditches that were originally navigable streams or lakes before ditching. I have been informed that when surveys of central Wisconsin took place that the surveyors found many of the townships under 20 to 40 inches of water;
 - b. Navigable drainage ditches that originally were not navigable before ditching;
 - c. Navigable drainage ditches that had no previous stream history; or
 - d. Other navigable artificial waterways rather than just drainage ditches.
2. If the answer to question no. 1 is yes, is it necessary that the navigable artificial waterway be connected to a navigable natural lake or stream before the Department has jurisdiction under the above statutory provisions?

¹Prohibiting the placement of any material or structure on the bed of any navigable water where no bulkhead line has been established or beyond a bulkhead line where one is established without a permit from DNR.

²Relating to the diversion of water from lakes or streams and prescribing the guidelines and procedures for obtaining diversion permits from DNR.

³Prohibiting, without a DNR permit, any construction, dredging or any work with respect to any artificial waterway, canal, channel, ditch, lagoon, pond, lake or a similar waterway to connect the same to an existing or natural body of navigable water and prohibiting (with exception) grading or removing topsoil from the bank of any body of navigable water without a permit from DNR.

⁴Prohibiting the removal of any material from the bed of any navigable lake or outlying water or from the bed of any other lake or stream without a DNR permit and prescribing how such permits may be obtained.

3. Are the provisions of sec. 31.33, Wis. Stats., relating to the construction of dams on nonnavigable streams applicable to nonnavigable artificial waterways?

In a subsequent, related opinion request you ask:

1. Is a permit or contract pursuant to sec. 30.20, Wis. Stats., necessary for maintenance dredging of navigable natural or artificial bodies of water?
2. If the answer to the first question is in the affirmative, and in light of sec. 88.63, Wis. Stats., is a permit necessary pursuant to sec. 30.20, Wis. Stats., for maintenance dredging of drainage ditches? Should a distinction be made between ditches located in active versus inactive drainage districts?

In considering your questions, I have particularly noted the policy of the Wisconsin legislature concerning the state's waters as set forth in ch. 614, Laws of 1965. Section 1 of that law, codified as sec. 144.025 (1), Stats., states:

“The purpose of this act is to grant necessary powers and to organize a comprehensive program under a single state agency for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private.”

Two points are important here: the emphasis the legislature has given to protecting water quality, and the intent that a single agency have jurisdiction over the waters of the state.

Chapter 30, ch. 31, and sec. 87.30 relate to Department of Natural Resources regulation of activities affecting the waters of the state.

A key issue implicit in your questions is if, and under what circumstances, navigable drainage ditches and other artificial waterways can be included in the waters protected by the aforementioned policies, particularly with regard to those statutes.

The legislature has defined “navigable waters” as:

“... Lake Superior, Lake Michigan, all natural inland lakes within Wisconsin and all streams, ponds, sloughs, flowages and other waters within the territorial limits of this state including

the Wisconsin portion of boundary waters which are navigable under the laws of this state.”

This definition is part of the “Navigable waters protection law,” the policy of which is set forth in sec. 144.26 (1), Stats.:

“To aid in the fulfillment of the state’s role as trustee of its navigable waters and to promote public health, safety, convenience and general welfare, it is declared to be in the public interest to make studies, establish policies, make plans and authorize municipal shoreland zoning regulations for the efficient use, conservation, development and protection of this state’s water resources. The regulations shall relate to lands under, abutting or lying close to navigable waters. ...”

The state’s clear and overriding responsibility to protect navigable waters necessarily extends to other lands and waters which affect the navigable waters. This, in my opinion, was the intent of the legislature in enacting statutes, including secs. 59.971,⁵ 88.31⁶ and 30.19,⁷ Stats., meant to regulate lands adjacent to navigable waters.

You ask your first question in terms of the history of the ditch. If the ditch was originally a navigable stream, the state has jurisdiction. The state holds the beds of navigable waters in trust for all the people; it cannot give up this responsibility voluntarily, nor can it be taken from the state. *Priewe v. Wisconsin State Land and Improvement Co.* (1889), 103 Wis. 537, 79 N.W. 780; *Village of Pewaukee v. Savoy and another* (1889), 103 Wis. 271, 79 N.W. 436.

If the navigable ditch was originally a nonnavigable water or had no stream history, the jurisdiction of the Department of Natural Resources depends on the specific facts of each situation.

The connection of a navigable artificial waterway to a navigable natural lake or stream to which you allude in your second question is pertinent in this context.

I refer you to OAG 17-74, dated March 6, 1974, which states that artificial streams, including drainage ditches, which connect to

⁵Granting to counties the authority to enact shoreland zoning in conformity with the objectives stated in sec. 144.26 (1), Stats.

⁶Specifying the procedure and guidelines applicable when a drainage district board seeks authority from DNR to work on navigable waters.

⁷*Supra*, f.n 3

navigable natural lakes and streams, are included in the "other waters" mentioned in sec. 144.26 (2) (d), above.

Thus it is my opinion that a ditch connected by a watercourse to a navigable water is subject to the jurisdiction of the Department of Natural Resources, regardless of navigability before or after ditching, or of previous stream history, subject to the narrow exemption of sec. 30.19 (1) (d) for agricultural activities mentioned in sec. 30.19, Stats.

This very narrow exemption means only that a permit is not required for any of the activities listed in sec. 30.19 if the purpose is agricultural use of land. However, once built, and once connected to a navigable water or otherwise made navigable, the ditch is subject to all other provisions of the statutes.

Section 88.31 (1), Stats., provides for special procedures by drainage boards in cases affecting navigable waters:

"If it appears to the board from its investigation or from the hearing held on the petition that it will be necessary to enter upon any waters that may be navigable, or to acquire and remove any dam or obstruction therefrom, or to clean out, widen, deepen, or straighten any stream that may be navigable, the board shall file with the department of natural resources an application for a permit to do such work. ..."

It is my opinion that the special or specific statute herein involved, sec. 88.31, Stats., which provides no agricultural exemption for work done by drainage districts on navigable waters prevails over the general statute, 30.19, Stats., which does provide an exemption for agricultural uses of land. The agricultural exemption authorized to individuals under sec. 30.19, Stats., does not extend to work done by or authorized by drainage districts pursuant to ch. 88, Stats.

You also inquire whether or not drainage districts are subject to the provisions of sec. 87.30, Stats., entitled "Flood plain zoning."

I refer you once again to OAG 17-74 where we read:

"Interpreting the statute to allow counties to include navigable drainage ditches in the County Shoreland and Flood Plain Zoning is consistent with the stated purposes of the statute to further the maintenance of safe and healthful conditions and

prevent and control water pollution. To accomplish these purposes, no valid distinction can be drawn between natural and artificial streams, ...”

The navigability of the ditch is not important, nor is the connection of its floodplain with a navigable water, as the scope of sec. 87.30 is not limited to navigable waters.

Artificial waterways including ditches which are connected to navigable natural lakes or streams take on the same characteristics as navigable natural streams, as indicated in OAG 17-74. Thus, in answer to the last part of your first question, the foregoing discussion applies not just to drainage ditches, but to other artificial waterways as well.

In answer to your second question, a navigable artificial waterway must be connected to a navigable natural lake or stream in order to be subject to the jurisdiction of the Department of Natural Resources.

Drainage ditches or other artificial waterways without connection to a navigable natural body of water, even though navigable themselves, are the equivalent of private, artificial lakes. Section 144.26 (2) (d), Stats., specifically includes natural lakes in its definition of navigable waters protected by the state. But the beds of private, artificial lakes, such as stock ponds, are not subject to the jurisdiction of the Department of Natural Resources, even if navigable. *Mayer v. Grueber* (1965), 29 Wis. 2d 168, 138 N.W. 2d 197. Unconnected ditches fall into this category.

You further inquire concerning the applicability of the provision in sec. 31.33, Stats., relating to the construction of dams on nonnavigable streams to nonnavigable artificial waterways. The relevant language of sec. 31.33 provides that:

“... all dams heretofore or hereafter erected or constructed on streams not navigable in fact for any purpose whatsoever, shall be subject to and regulated and controlled, so far as is applicable, by ss. 31.02, 31.12, 31.18, 31.19, 31.20, 31.25, 31.26, and 196.665, ...”

Section 31.02, Stats., entitled "Powers of department," provides that:

"(1) The department, in the interest of public rights in navigable waters or to promote safety and protect life, health and property may regulate and control the level and flow of water in all navigable waters ..."

In accordance with that authority, secs. 31.12, 31.18, etc., are applicable insofar as is necessary to protect navigable waters and to protect owners of flooded lands.

In harmony with the legislative policy of protecting navigable waters, the provisions of sec. 31.33 are applicable to dams on nonnavigable artificial waterways where there may be an impact on navigable streams.

In your second opinion request you ask if a permit or contract pursuant to sec. 30.20, Stats., is necessary for maintenance dredging of natural or artificial bodies of water.

This section was created by ch. 614, Laws of 1965, and must be construed in conjunction with the other provisions of that law, including the definitions of navigable waters and the statement of legislative purpose set forth therein. (See earlier discussion.) Consistent with these provisions, it is my opinion that a contract as specified by sec. 30.20 (2) (a) is required for removal of material by dredging from the bed of any natural lake or outlying water (designated by sec. 29.01 (4), Stats.) of the state.

A permit is required by sec. 30.20 (2) (c) for maintenance dredging of navigable natural and artificial streams, including drainage ditches connecting with navigable waters. A permit for removal of material from the bed of an artificial lake with no natural lake or stream history and no connection with another navigable water is not required.

Section 88.63, Stats., to which you allude in your last question, simply makes it the duty of the drainage board to maintain the ditches. A drainage district is a "person" in Wisconsin for purposes of interpreting the statutes. Sec. 990.01 (26), Stats. It is necessary for the district to apply to the Department of Natural Resources for a

permit to remove material from the beds of the ditches, just as it is necessary for any individual or municipality to do so.

Finally, you ask, "Should a distinction be made between ditches located in active versus inactive drainage districts?"

Section 31.02 (6), (7), (8), (9), Stats., specifically place in the Department of Natural Resources responsibility regarding drainage districts. The department is to confer with drainage commissioners and consider their suggestions, but "the final decision in all matters under consideration shall rest with the department." Sec. 31.02 (8), Stats.

Section 88.82, Stats., provides for the dissolution of drainage districts; sec. 88.82 (5) provides that:

"Any drains which have been constructed by a drainage district dissolved under this section or under prior law shall remain common waterways for the use of all landowners in the dissolved district. Any such landowner may make repairs thereto at his own expense. ..."

In addition, sec. 31.02 (7), Stats., provides that the department shall confer with a committee appointed by the county board,

"... in the event that the drainage district is dissolved, to represent the interests of the county in all matters whatsoever pertaining to water conservation and control within the area which theretofore constituted such drainage district."

Read together, as I believe they must be in order to make the whole body of law in this area consistent, these statutes give the Department of Natural Resources the authority to confer with a county committee regarding dissolved drainage districts; the department has final decision-making authority, and landowners are authorized to make repairs. However, the fact that the drainage district is dissolved, or inactive, in no way detracts from the obligation of any person, county, or municipality to apply for and receive a permit from the Department of Natural Resources before dredging a navigable ditch or one that affects navigable waters.

RWW:SBW

Children; Vital Statistics; Mother of child born out of wedlock may cause any surname to be entered on the child's birth certificate.

October 7, 1974.

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

You have inquired as to the surname to be given a child born to an unmarried couple on the child's birth certificate. You mention that some of the mothers in Milwaukee County plan to marry the children's fathers but cannot do so because the putative fathers are under the minimum marriageable age. They and the putative fathers wish to give their children the same surnames as those of the putative fathers on the children's birth certificates. You indicate that because of an informal opinion from this office, dated December 5, 1969, the Register of Deeds feels that under the common and Wisconsin law, only the surname of the mother may be put on the certificate of an illegitimate child.

Your inquiry thus raises two questions: (1) whether under common and Wisconsin law there is a requirement that a particular surname be given a child born out of wedlock on its birth certificate; and (2) whether the father of an illegitimate child, due to recent developments in the law, has a right to participate in the naming of his child on its birth certificate.

On several occasions, my predecessors have been asked to interpret Wisconsin law with regard to names and change of name.

The general rule at common law, adopted by Art. XIV, sec. 13, Wis. Const., is that in absence of a statute to the contrary, all persons, including married and divorced women, minors and illegitimate children, can adopt whatever name they please as their "legal" name if for an honest purpose, and can change the same at will, gaining a new name. See 20 OAG 627 (1931), 21 OAG 528 (1932), 34 OAG 72 (1945), 35 OAG 178 (1946), and cases cited therein; *State ex rel. Krupa v. Green* (1961), 114 Ohio App. 497, 177 N.E. 2d 616; *Stuart v. Board of Supervisors of Elections* (1972), 266 Md. 2d 440, 295 A. 2d 223. MacDougall, "Married Women's Common Law

Right To Their Own Surnames," *Women's Rights Law Reporter* (Fall/Winter, 1972/1973). Ginsburg, "Symposium on the Status of Women," 20 *Am. J. Comp. L.* 585 (1972). "For Women Who Wish To Determine Their Own Names After Marriage," *Center For A Woman's Own Name* (Barrington, Illinois, 1974).

In 1945, my predecessor was asked by the State Board of Health whether there was any way for a mother of an illegitimate child, who gave her child her surname at birth, to have the child's birth certificate changed to record the same surname as that of the putative father instead. The request was based on an inquiry by the Bureau of Vital Statistics. My predecessor wrote, that although it is not necessary, it is preferable to have the correct name of a person on his birth certificate.

He wrote:

"In the first place, it may be pointed out that the law does not compel a person to be known all his life by the name recorded on his birth certificate. If the recorded name is John Jones, the person may nevertheless be called John Brown or James Smith and unless such name is assumed for a fraudulent purpose it is to all intents and purposes the true name of the person involved. The common-law right to acquire a new name (38 Am. Jur. 610) has not been abrogated by statute in Wisconsin. XX Op. Atty. Gen. 627; XXI Op. Atty. Gen. 528.

"Of course, it is desirable though not necessary, to have the correct name shown on the birth certificate. Certified copies of such certificates are used for many purposes and a discrepancy in the name considerably impairs the usefulness of the certificate." (34 OAG 72, *supra*, at page 73.)

He then answered that a correction of the surname on a birth certificate is a "major" correction under sec. 69.335 and can only be made by the person himself. Since the child was too young to file such an affidavit himself, the mother would have to have the child's name changed pursuant to sec. 296.36, Stats., if she wished her child's birth certificate to reflect his real name. Had she given her child the same surname as its father at his birth, such action would not have been necessary:

“This office has pointed out in the past that a child’s surname does not necessarily follow that of his parent. It is only by custom that a child takes the surname of his parents. 38 Am. Jur. 600-601; XXI Op. Atty. Gen. 528; see, XX Op. Atty. Gen. 627. If the mother had recorded this child as having the surname of the putative father, or some other surname, it would have been perfectly valid and regular. If the child were of sufficient age to make an affidavit in support of a request to have his surname changed on the certificate and it were shown that he is commonly known by the surname of the putative father rather than by the name recorded on the certificate, such a change could be made under sec. 69.335. But the age of the child, of course, precludes any such proceeding for a number of years to come.” (p. 74)

In 1946, my predecessor stated that correcting the surname on a birth certificate pursuant to sec. 69.335, Stats., could be made on affidavits of children thirteen and seventeen. 35 OAG 311 (1946).

These opinions are consistent with the common law regarding the name of “illegitimate” children.

By custom, the mother of an “illegitimate” child gave it a name, usually her own or that of the putative father. If the child became known by the name, he gained the same by repute.

At common law, no one has such a right to a name he can prevent another from adopting it. *Cowley v. Cowley* (1901), A.C. 450. In *Du Boulay v. Du Boulay* (1869), 16 Eng. Rep. 638, the right of the “illegitimate” son of a former slave of the Du Boulay family, who had assumed the Du Boulay name as his own, was upheld when the old and distinguished family attempted to enjoin him from using the same.

By Marriage Act 26 Geo. II, 33, it was made a requirement that publication of an intended marriage be made in the “true”--“legal”--names of the parties in order for the marriage to be valid. The courts quickly construed this requirement to mean that the “true” or “legal” name of a person was that name by which s/he was (best) known.

Only in a few American cases has the specific issue of the naming of an “illegitimate” child been adjudicated. In *Application of Biegaj* (1941), 25 N.Y.S. 2d 85, the mother of an illegitimate child who had

already adopted the child's father's surname for herself and for her child, petitioned the court to officially change the name of the child to that of the putative father over his objection. The court said:

"Now the mother makes application to this court that both she and the child be given leave to adopt the respondent's name. At the time the child was born, the petitioner gave her own name to the child, instead of respondent's, and it is so recorded. Thereafter, she adopted for herself and the child the respondent's name, without permission of any court, which she had the right to do. ...

"It is not the policy of this court to grant applications of infants for change of name, unless there is a compelling reason for it. It is better for them to wait until they have reached maturity. When the child reaches the age of judgment, he may not wish to bear the name of respondent. ...

"If this application is granted, the child might lose the commonlaw right to change his name, without asking the permission of a court. ..." (p. 86)

In *In Re M* (1966), 91 N.J. Super. 296, 219 A. 2d 906, the mother of an "illegitimate" child petitioned the court to have the child's name changed to that of the putative father. The wife of the father objected, claiming it would cause her and her legitimate children embarrassment. The court granted the petition, saying:

"Thus we approach the question of the right of a person to take or assume another name. The applicable law is clear. In the absence of statute or judicial adjudication to the contrary, there is nothing in the common law which prohibits a person from taking or assuming another name so long as it is not taken or assumed for fraudulent purposes." (p. 907)

In *Buckley v. State* (1923), 19 Ala. App. 508, 98 So. 362, the court upheld the right of a woman born out of wedlock and given her mother's surname at birth to call herself by such when objection was made to her being so named in a rape indictment.

And recently the Maryland Court of Appeals held that it was error for a court to waive publication of a proposed statutory name change

of a child born to an unmarried mother in a case where the mother of such a child sought to have her child's surname statutorily changed *from* that of its natural and unwed father, whose surname was given the child at birth, when the father wished to show objection to the proposed statutory change. *Hardy v. Hardy* 269 Md. 412, 306 A. 2d 244 (1973).

A survey of the English and American cases thus affirms the common law rule enunciated above and approved by my predecessors in previous opinions.

Nothing in the Wisconsin Statutes on birth certificates, vital statistics, adoption, legitimation or change of name of an "illegitimate" child mentions anything about the name(s) to be given an "illegitimate" child. Where no statute prescribes the name(s) to be given a child born out of wedlock at its birth, any name(s) can be inserted on its birth certificate by its mother in accordance with the common law. Norton, "Legal Aspects of Illegitimacy for the Registrar," Vol. XII, 3 Md. L. Rev. 181 (1951). Oregon Attorney General Reports, 1924-1928, p. 541.

By Art. XIV, sec. 13, Wis. Const., Wisconsin has adopted the common law so far as consistent with the state constitution or as altered by the legislature. Since 1945 when my predecessor wrote on this issue, there has been no change in Wisconsin law regarding the name to be given "illegitimate" children.

I, therefore, repudiate my previous informal opinion dated December 5, 1969, to James C. Boll, District Attorney of Dane County, which had indicated that under the common law a child born out of wedlock automatically took its mother's surname and that the State Registrar could prescribe what name must be given a child born out of wedlock. No change in the powers of the State Registrar enumerated in sec. 69.06, Stats., has been made by the legislature since 1945 when my predecessor wrote on this issue.

Of course, in so writing, it should be made clear that the mother of an "illegitimate" child may not unilaterally list the name of the putative father on the birth certificate of the child as the child's father, as to do so would be to "enable her to create *prima facie* evidence that such person was guilty of a crime and is responsible for the support of the child." 34 OAG, at p. 75. That a child born out of

wedlock happens to bear the same surname as its putative father on his birth certificate is *not* evidence of the child's paternity.

The second aspect of your inquiry concerns the right of the father of a child born out of wedlock to participate in the naming of his child.

Section 48.02 (11), Stats., as amended by ch. 263, Laws of 1973, defines "parent" as:

"... either a natural parent or a parent by adoption. If the child is born out of wedlock, but not subsequently legitimized or adopted, 'parent' means the natural mother and a person adjudged in a court proceeding to be the natural father."

While at common law a child born out of wedlock was the child of nobody, Wisconsin has, by statute, changed much of the common law with regard to the legal status of illegitimate children. Wisconsin has long recognized the right of a child born out of wedlock to inherit from and through its mother. An "illegitimate" child may be legitimized by its father, and if recognized by its father, inherit through him. See secs. 237.06 and 235.25, Stats.; *Estate of Traver, supra*.

Naming the child at birth is, however, under present Wisconsin law and universal custom, clearly the prerogative of the mother. 34 OAG 72, *supra*. There is no means provided for changing the name of a child born out of wedlock at its legitimation pursuant to sec. 852.05 (1), Stats.; or by marriage of the parents pursuant to sec. 245.25, Stats., after a judgment of paternity pursuant to sec. 52.37, Stats.; or a person adjudged in a court proceeding to be the natural father pursuant to sec. 48.025 and sec. 48.425, Stats. Pursuant to sec. 48.425 (6n) (a), the natural mother of a child born out of wedlock and not subsequently legitimized or adopted, shall have custody of such child unless legal custody is transferred to another pursuant to secs. 48.34, 48.345, 48.35, 48.43, or 48.425 (2n) or (6b), Stats.

Under Wisconsin law, the responsibility for the care and custody of *legitimate* children rests with both parents. Sec. 246.15, Stats. Section 296.36, Stats., gives to both parents the right to statutorily change the name of their "legitimate" children. Section 48.91, Stats., provides that in case a change of name is requested during

adoption: "The order may change the name of the minor to that requested by petitioners."

The Massachusetts Attorney General recently stated this principle that the naming of children born to married couples belongs, absent specific statutory prohibition to the contrary, to the parents, in the case in which a married couple having different surnames wished to give their child its mother's surname on its birth certificate:

"The statute, G.L. c. 46, sec. 1, does not require that the name of the child include the father's surname as the baby's surname. Nor does such a requirement exist in any other statute of this Commonwealth. ... In short, there is no statutory requirement that a baby's surname be identical with its father's surname ... It is, of course, customary in this country for the baby's surname to be the patronymic rather than the matronymic. Such a practice is, however, only custom and does not have the force of law ... It has not always been customary for a legitimate baby to share its father's surname ... There being no law requiring a legitimate baby to be named with its father's surname as its surname, the right to name the baby otherwise is a right retained to the parents." (Honorable Robert H. Quinn, Attorney General of Massachusetts to Honorable John F.X. Davoren, Secretary of the Commonwealth, January 24, 1974.)

See also, *Carlsson*, "Surnames of Married Women and Legitimate Children," 17 *N.Y.L.F.* 552 (1971); *Smith v. United States Casualty Company*, 197 N.Y. 420, 90 N.E. 947 (1910).

While there has never been a case in which parents of legitimate children disagree as to the name(s) to be given their children at birth, in cases in which a divorced mother seeks to have the surnames of her children changed from that of their father to her birth given surname or to the surname of another husband whose name she has assumed, the courts almost consistently follow the rule that whether or not the change will be granted over the objection of the father depends upon the best welfare of the children. *Mark v. Kahn* (1956), 33 Mass. 517, 131 N.E. 2d 758, 53 A.L.R. 2d 914, and cases cited therein. *Application of Robinson* (1972), 344 N.Y.S. 2d 147. *In re Adoption of McCoy* (1972), 31 Ohio Misc. 195, 287 N.E. 2d 833. *Fulghum v. Paul* (1972), 229 Ga. 463, 192 S.E. 2d 376.

The recognition of the rights of unwed fathers and children born to unmarried persons is being litigated considerably in the courts today. See *Stanley v. Illinois* (1971), 400 U.S. 1020, 27 L.Ed. 2d 631, 91 S.Ct. 584. *State ex rel. Lewis v. Lutheran Social Services* (1973), 59 Wis. 2d 1, 207 N.W. 2d 826. *Rothstein v. Lutheran Social Services* (1972), 405 U.S. 1051, 31 L.Ed. 2d 786, 92 S.Ct. 1488. *Weber v. Aetna Casualty and Surety Co.* (1972), 406 U.S. 164, 31 L.Ed. 2d 768, 92 S.Ct. 1400. *Levy v. Louisiana* (1968), 391 U.S. 68, 20 L.Ed. 2d 436. *Hardy v. Hardy* (1973), 269 Md. 412, 306 A. 2d 244. *Slawek v. Stroh* (1974), 62 Wis. 2d 295, 215 N.W. 2d 9. And the Wisconsin legislature has recently recognized new rights of unwed fathers in enacting ch. 263, Laws of 1973. A *statutory* change of name(s) of a child born out of wedlock and not subsequently legitimized or adopted, must now be made by the natural mother and the natural father unless his rights have been legally terminated. Sec. 296.36, Stats.

The recent cases expanding the rights of fathers of illegitimate children concern an unwed father's rights to determine his paternity of an illegitimate child, and to notices of hearings involving the termination of the mother's custody, adoption or statutory change of name of the child. The care, custody, and control of the child is still, under Wisconsin law, entrusted to the mother of the child above all others if she is fit. *State ex rel. Lewis v. Lutheran Social Services* (1970), 59 Wis. 2d 1, 207 N.W. 2d 826. *Slawek v. Stroh* (1974), 62 Wis. 2d 295, 215 N.W. 2d 9 (Hallows, dissent). 34 OAG 72, *supra*. Sec. 48.425, Stats. See also *In re Dunston*, 18 N.C. App. 647, 197 S.E. 2d 560 (1973).

Therefore, it is my opinion that the rights of fathers of children born out of wedlock have not been expanded by recent court decisions and ch. 263, Laws of 1973, to the extent that they have the right to participate in the naming process of their children to the same extent as fathers of children born in wedlock. In the cases you mention, the young women can give their children the same surnames as the children's putative fathers or any other surnames, in accordance with Wisconsin and common law.

RWW:PM

Open Meeting; Meaning of "communication" in sec. 66.77 (2) (e), Stats., the open meeting law, discussed with reference to giving the public and news media members adequate notice.

October 7, 1974.

GERALD K. ANDERSON, *District Attorney*
Waupaca County

You request my opinion as to the meaning of "communication" as that term is used in sec. 66.77 (2) (e), Stats., as created by ch. 297, Laws of 1973.

Subsection (2) (e) defines "public notice" but does not define "communication" and provides:

"(e) 'Public notice' means statutorily required notice, if any. If no notice is required by statute, it means a communication by the chief presiding officer of a governmental body or his designee, to the public and to the official municipal or city newspaper designated under s. 985.05 or 985.06, or if none exists, then to members of the news media who have filed a written request for such notice, which communication is reasonably likely to apprise members of the public and of the news media of the time, place and subject matter of the meeting at a time, not less than one hour prior to the commencement of such meeting, which affords them a reasonable opportunity to attend."

Section 990.01 (1), Stats., provides:

"GENERAL RULE. All words and phrases shall be construed according to common and approved usage; but technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning."

Webster's Third New International Dictionary defines "communication" as: "facts or information communicated; a letter, note, or other instance of written information; conversation, talk."

The same source defines "communicate" as "to make known; inform a person of; convey the knowledge or information of."

In order to conform with the public notice provisions of sec. 66.77 (2) (d), (e), Stats., it will be necessary for each governmental body to search for any statute or statutes other than the above section which requires notice. In some cases a statute may require notice in a specific form to both members and to the public. Where a statute requires notice, the special statutory method as to form, content and means of communication must be complied with. Statutes relating to some governmental bodies, as in the case of the county board of supervisors, require public notice but do not specify the method of communication. Section 59.04 (3), Stats., provides in part: "The board shall give adequate public notice of the time, place and purpose of each meeting." Under such a statute I recommend that, as a minimum, the method of communication contained in the second sentence of sec. 66.77 (2) (e), Stats., be complied with.

Subsection (2) (e), Stats., requires *communication* by the chief presiding officer or his designee, *to the public, AND to the official municipal newspaper, or if none exists to members of the news media (newspapers, radio, television, press associations) who have filed a written request for such notice.* The communication must be reasonably likely to *apprise members of the public* and of the *news media*, of the *time, place and subject matter of the meeting* and must be given *at a time*, not less than one hour prior to the commencement of such meeting, *which affords them* (members of the public and news media), *a reasonable opportunity to attend.*

Where subsec. (2) (e), Stats., is applicable, each governmental body and the chief presiding officer thereof will have to use their best judgments in determining the method of communicating to the public, official newspaper, or if none exists, to members of the news media who have filed written requests.

Whereas written or verbal communication could be used with respect to all three classes which may be entitled to notice, written notice would be most appropriate insofar as the public is concerned. A single verbal announcement outside the building or meeting place would not reasonably apprise the public or members of the news media in most cases so as to enable them to attend. Such public announcements in verbal form can serve as a supplementary method

of communication. Timely posting of a written notice in one or more readily accessible public places would serve to notify the public under the statute and will probably be the method most used. A paid notice published in a newspaper having circulation likely to give notice in the area and to people likely to be affected could also be used. The meetings of some governmental bodies are newsworthy and such bodies may be able to get the cooperation of newspaper editors to timely and adequately print articles, without charge, to notify the public. Such method can be used to supplement posting. The statute requires notification of the time, place, *and subject matter* of each meeting and although some newspapers carry a calendar of meetings as to body, time and place, they do not always refer to subject matter.

I am of the opinion that notice to the official newspaper, or if none exists, to news media members who have filed written requests, can be given by verbal communication (direct or by telephone) or in written form. Where there is an official newspaper, the timely publishing of a legal notice would in my opinion give adequate notice to the newspaper and to the public. Where there is no official newspaper, the timely publishing of an advertisement in a newspaper of general circulation in the area stating the time, place, and subject matter to be considered would be adequate notice to the public but would not be a substitute for the communication to which members of the news media, who have filed written requests for notice, are entitled.

Governmental bodies should have no difficulty in complying with the requirement of giving notice of the time and place of the meeting. Stating the subject matter is a more difficult problem. Whenever possible, specific subject matters upon which discussion or action is anticipated should be included in the notice. While sec. 66.77, Stats., does provide that the notice reasonably apprise of the "subject matter of the meeting," I do not construe the provision in subsection (2) (e) or any other provision of sec. 66.77, Stats., as precluding a governmental body from taking up business which they are authorized to conduct under other laws, even where specific reference is not made to such subject matter, if the notice contained an agenda item: "such matters as are authorized by law" or "regular business." This is especially true where the governmental body could not at the time of giving notice anticipate the introduction or discussion of such business. Many governmental bodies utilize a detailed agenda which

is in itself suitable for posting or delivering to any official newspaper or members of the news media. Whether adequate notice of the subject matter was given is best left to a determination on a case-to-case basis, considering the circumstances of each case. The intent of the law is clear and the giving of notice under this law should comply, insofar as possible, with that intent.

Governing bodies of some municipalities have designated official newspapers under secs. 985.05, 985.06, Stats. Since any municipality, as defined in secs. 985.01 (5), 345.05 (1) (a), Stats., which includes counties, may designate such an official newspaper, it may be desirable to so do in order to simplify compliance with sec. 66.77 (2) (e), Stats. I am of the opinion that subunits of municipalities, such as county board committees, do not have to separately designate official newspapers where the parent governmental body has acted. Where state governmental bodies are concerned, it is questionable whether communication to the official state paper will alleviate the necessity of notifying members of the news media who have filed written request for such notice since the section refers only to "official municipal or city newspaper." I recommend that state governmental bodies notify the state official paper in any event.

In essence you inquire, whether in case there is an official newspaper, the publishing of a one-time legal notice in January, listing the dates, times, places, and subject matter to be considered at the meetings of such body to be held during the entire year would suffice.

In my opinion, it probably would not in most cases.

In my opinion it would not be "*reasonably likely to apprise members of the public*" ... "of the time, place and subject matter of the meeting at a time, not less than one hour prior to the commencement of such meeting, which affords them a reasonable opportunity to attend." (Emphasis added.)

It is difficult to imagine how any governmental body could with any accuracy predict what specific subject matters would be taken up at meetings many months or even one year in advance. There undoubtedly are some governmental bodies which hold regular meetings to take care of regular business without any formal agenda.

Other governmental bodies may occasionally have an agenda while still others will regularly operate from an agenda. When there is an agenda, even if it be an informal one drawn by the presiding officer or the clerk, this is the sort of information relating to subject matter of the meeting concerning which notice should be given. To say that the publishing of a once-a-year notice in a newspaper giving dates, times, places and general subject matter constituted compliance with the statute would be to relieve a governmental body and its presiding officer of any obligation to give notice of any particular subjects to be taken up at a meeting when such subject matter was scheduled and at least known to the presiding officer. Even where a governing body meets regularly without any agenda, taking up only such business as may properly come before it, and without any real advanced knowledge of what form that business may take, it is my opinion that the mere publication of a once-a-year notice in a newspaper would not constitute compliance with the statute. The statute clearly deals with specific meetings, even though they may be regular and routine meetings, and a separate notice as to each *such* meeting should be given. In terms of time, the statute makes it clear that less than one hour's notice is not acceptable. Beyond that, what constitutes reasonable notice in terms of time within the meaning of the statute must be judged on the circumstances surrounding each individual meeting. A once-a-year published notice designed to cover several or many meetings would not constitute compliance with the statute.

In seeking to comply with this statute, presiding officers and other members of governmental bodies should keep in mind that the public and the news media are entitled to reasonable notice of the time, place and subject matter of these meetings. Every effort should be made to comply with the spirit as well as the letter of this law.

RWW:RJV

Industrial Commission; Industry, Labor And Human Relations, Department Of; Licenses And Permits; Department of Industry, Labor and Human Relations may lawfully issue child labor permits to girls aged 12 and 13 to be employed as caddies on golf courses.

October 7, 1974.

PHILIP E. LERMAN, *Chairman****Department of Industry, Labor and Human Relations***

You ask whether your department may lawfully issue child labor permits to girls aged 12 and 13 to be employed as caddies on golf courses. Section 103.70 (1), 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 occupation or employment unless a written permit is obtained from your department authorizing such employment. Your question arises as a result of an inconsistency contained in two sections of the statutes relating to child labor.

Chapter 271, sec. 22, Laws of 1971, amended sec. 103.67 (2), Stats., by changing the word "boys" to "minors" under subsec. (d) relating to employment as a caddy on a golf course. Since April 30, 1972, sec. 103.67 (2) (d), Stats., has provided that "Minors 12 and 13 may be employed as caddies on golf courses, if they use caddy carts." Considering alone this amendment, its obvious purpose was to extend to girls aged 12 and 13 the same right to caddy as boys subject to the condition that they use caddy carts.

The problem which you pose is predicated on the fact that your authority to issue a work permit to caddies is limited to boys 12 and older under sec. 103.71 (2), Stats. In an act designed to permit girls to be employed in street trades, ch. 183, Laws of 1973, amended sec. 103.71 (2) to read:

"A permit shall not be issued authorizing the employment of any minor under 14 years of age at any time, except minors under 14 as provided in s. 103.78, minors 12 and over in school lunch programs, ~~boys~~ minors 12 and over in street trades as provided in ss. 103.21 to 103.31, and boys 12 and over as caddies on golf courses."

The seemingly obvious purpose in amending sec. 103.67 (2) (d) now is clouded by this inconsistency where, under the above-quoted portion from ch. 183, girls 12 and over can obtain permits to be employed in street trades but cannot receive a similar permit to be employed as caddies.

In construing statutes, the first goal is to discover the legislative purpose, and when that purpose is discovered, the statute is to be so construed as to effect the evident purpose of the legislature if the language admits of that construction. *Pella Ins. Co. v. Hartland Ins. Co.* (1965), 26 Wis. 2d 29, 41, 132 N.W. 2d 225; *State ex rel. Mitchell v. Superior Court* (1961), 14 Wis. 2d 77, 80, 109 N.W. 2d 522. It is fundamental that the spirit and reason of the law prevail over the letter. The basic rule for ascertaining the intent of the legislature is well settled in *State ex rel. Time Ins. Co. v. Superior Court* (1922), 176 Wis. 269, 274, 186 N.W. 748:

“... It has been held that, in order to ascertain the object the legislature had in mind, it is proper to consider the occasion and necessity of the enactment, the defects or evils in the former law, and the remedy provided by the new one, and the statute should be given that construction which is best calculated to advance its object, by suppressing the mischief and securing the benefits intended.”

The legislative intent in ch. 271, Laws of 1971, clearly was to expand the rights of girls 12 and 13 years of age to permit their employment as caddies if they use caddy carts. A contrary interpretation would render nugatory the legislature's efforts in enacting ch. 271, Laws of 1971. The presumption that the legislature does not intend to legislate in vain and always has a specific purpose in mind is well established in Wisconsin. *Haas v. Welch* (1932), 207 Wis. 84, 86, 240 N.W. 789.

In interpreting a statute, it is necessary to consider other statutes dealing with the same class of persons. *Schrab v. State Highway Comm.* (1965), 28 Wis. 2d 290, 293, 137 N.W. 2d 25. It also has long been established that construction of one statute requires harmonizing it with related statutes if possible. *Harris v. Halverson* (1927), 192 Wis. 71, 76-77, 221 N.W. 295.

Reading secs. 103.67 (2) (d) and 103.71 (2) can lead to but one logical conclusion because of what the court in *Scharping v. Johnson* (1966), 32 Wis. 2d 383, 394, 145 N.W. 2d 691, referred to as “a legislatively dropped stitch.” See footnote 6 beginning in 32 Wis. 2d at 393. It is my opinion that your department may issue child labor permits to girls aged 12 and 13 to be employed as caddies on golf

courses and that sec. 103.71 (2) should be amended to reflect the legislative intent in ch. 271, Laws of 1971.

RWW:DPJ

Intoxicating Liquors; Section 100.30 (2) (Lm), Stats., qualifies the term "trade discount" in determining "cost to retailer" under sec. 100.30 (2) (a), Stats., for sales of fermented malt beverages and intoxicating liquors. Section 100.30 (2) (Lm) is not a catchall prohibition against all trade discounts and does not apply to *bona fide* quantity discounts.

October 8, 1974.

FREDERICK J. GRIFFITH, *Deputy Secretary*
Department of Agriculture

You have requested that this office construe ch. 310, Laws of 1973. This enactment adds a new provision to sec. 100.30, Stats., commonly referred to as the "unfair sales act" or "minimum markup law," and provides:

"100.30 (2) (Lm) In the case of retail sales of fermented malt beverages and intoxicating liquors, 'trade discount' shall not include discounts in the form of cash or merchandise."

Retail sales are defined in sec. 100.30 (2) (e), Stats.:

" 'Sell at retail,' 'sales at retail,' and 'retail sale' mean any transfer for a valuable consideration, made in the ordinary course of trade or in the usual prosecution of the seller's business, of title to tangible personal property to the purchaser for consumption or use other than resale or further processing or manufacturing."

You ask whether par. (2) (Lm) qualifies the meaning of the term "trade discounts" in determining "cost to retailer" as defined in sec. 100.30 (2) (a), or whether the statute is a nullity in view of the fact that it is phrased in the context of "retail sales" as defined in sec. 100.30 (2) (e).

The term "trade discounts" as used in the par. (2) (a), which contains the statutory formula for determining cost to retailer and which cost is the foundation for establishing violations of sec. 100.30 by retail merchants, implicitly refers to trade discounts granted by the retailer's supplier. Paragraph (2) (a) neither directly nor by inference refers to or prohibits such discounts as a retailer may grant to his consumer customers. Therefore, by incorporating the par. (2) (e) definition of "retail sale" into par. (2) (Lm), and if par. (2) (Lm) is otherwise read standing alone as proscribing trade discounts granted by a retail merchant to his customers, par. (2) (Lm) would appear to have no legal effect.

A statute should not be construed so as to work absurd or unreasonable results if the statute is open to a reasonable alternative interpretation. *State v. Gould* (1973), 56 Wis. 2d 808, 812, 202 N.W. 2d 903; *Cross v. Hebl* (1970), 46 Wis. 2d 356, 361, 174 N.W. 2d 737; *Volunteers of America of Madison, Inc. v. Industrial Commission* (1966), 30 Wis. 2d 607, 616-617, 141 N.W. 2d 890. When a statute may be construed so as to work an absurd result, the resulting ambiguity justifies the invoking of principles of statutory construction to avert such a result. *Carchidi v. State* (1925), 187 Wis. 438, 443, 204 N.W. 473. An obscurity of meaning may exist, and call for a judicial construction where the literal sense of the statutory language would work an absurd result. A court may enlarge or restrict in meaning some of the words of a statute in order to harmonize them with the manifest legislative intent of the entire statute. *State ex rel. Neelen v. Lucas* (1964), 24 Wis. 2d 262, 268, 128 N.W. 2d 425.

The preamble of an act is an important aid to discovering the scope of the statute and the objects to be accomplished. *Smith v. City of Brookfield* (1956), 272 Wis. 1, 5-8, 74 N.W. 2d 770; *Bloch v. American Insurance Company* (1907), 132 Wis. 150, 164, 112 N.W. 45.

The preamble to ch. 310, Laws of 1973, makes the intent of the law very clear. This introductory language, which describes the chapter as "relating to excluding discounts *in determining minimum retail prices* for sales of malt beverages and liquor," (emphasis added) clearly refers to the formula for determining cost to retailer found in sec. 100.30 (2) (a), Stats.

The entire format and logic of sec. 100.30 (2), Stats., also dictates this construction. As previously indicated, the conceptual root in computing lawful minimum prices, for both retail sales and wholesale sales, is found in the element of "cost" as defined in pars. (2) (a) and (2) (b), respectively. The other paragraphs of subsec. (2) define or modify the various factors of pars. (2) (a) and (2) (b). In construing a statute, its intent must be derived from the act as a whole. *Smith v. City of Brookfield, supra*.

The Wisconsin Supreme Court has held that with respect to sec. 100.30, Stats., it is "abundantly clear that a trade discount is given by a wholesaler or manufacturer to the retailer, not by the retailer to a customer or patron, as defendant would have this court hold." *State v. Eau Claire Oil Company, Inc.* (1967), 35 Wis. 2d 724, 740, 151 N.W. 2d 634.

It is my opinion that sec. 100.30 (2) (Lm), Stats., was intended to further define and restrict the term "trade discount" as used in sec. 100.30 (2) (a), for purposes of determining "cost to retailer" for sales of fermented malt beverages and intoxicating liquors. Section 100.30 (2) (Lm) should be read as if the words "determining cost to retailer for" were inserted after the initial phrase "In the case of" at the beginning of the provision.

You also raise questions as to the meaning and effect of the phrase "discounts in the form of cash or merchandise."

In *State v. Eau Claire Oil Co., supra*, the court referred to these definitions of "trade discount":

"... the difference between the seller's list price and the price at which he actually sells goods to the trade; ..." (Citing 26A C.J.S., *Discount* p. 974)

"'a percentage deduction from the list price of goods allowed by a manufacturer or wholesaler to customers engaged in trade.'" (Citing Webster's Third New International Dictionary)

"'a deduction from the list price of goods, granted by a manufacturer or wholesaler to a retailer.'" (Citing The Random House Dictionary)

Similarly, applicable cases cited in 42 *Words and Phrases* (Trade Discount) and 12A *Words and Phrases* (Discount) indicate that "discount" as used in the context we are examining usually means a deduction from an original price and differs from a "rebate" or "refund" in that a discount is used in computing selling price.

Another factor to consider in construing the new provision is that it is part of a criminal statute, and therefore, a strict construction is required. Paragraph (Lm) does not refer even inferentially to trade discounts in the form of a deduction from the seller's price, an invoice credit, or any other accounting device or procedure.

It appears that sec. 100.30 (2) (Lm), Stats., was not intended to be a catchall prohibition against using any trade discount in computing "cost to retailer" under sec. 100.30 (2) (a). Therefore, it is my opinion that for purposes of determining "cost to retailer," the term "trade discount" as used in sec. 100.30 (2) (Lm) extends only to so-called discounts which are given in the form of money, its equivalent in ready money such as a check, or merchandise. Section 100.30 (2) (Lm) does not cover or prohibit the applying of a *bona fide* quantity discount as a "trade discount" in computing "cost to retailer" under sec. 100.30 (2) (a).

RWW:DAM

Forests; Natural Resources, Department Of; The Department of Natural Resources has no authority to construct spectator sport facilities in state forests, nor has it authority to lease state forest lands for such purpose.

October 17, 1974.

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

You have requested my opinion concerning the construction of certain spectator facilities in a state forest as well as the Department's authority to lease state forest property to other units of government or to private interests for this purpose.

Specifically your first question asks:

“1. Does the Department of Natural Resources have the authority as an outdoor recreation function pursuant to Section 28.04, Wisconsin Statutes, or any other authority, to construct parking lots, bleachers, wells and toilet facilities specifically for spectator sports, such as watching a water ski club show from state forest property?”

It is my opinion that the Department of Natural Resources does not have such authority. Section 28.04, Stats., provides:

“The primary use of forests is silviculture and the growing of recurring forest crops, with scenic values, *outdoor recreation*, public hunting and stabilization of stream flow as extra benefits. Forests are productive properties which contribute to employment in woods and mills, provide commodities essential to national defense and consumers’ needs, and earn returns on the investment. However, full recognition must be given to the principle of multiple use, including designation of special use tracts ranging from natural areas receiving a high degree of protection to *recreation sites with appropriate facilities.*” (Emphasis added.)

This section recognizes the commercial as well as scenic, recreational and environmental values of forest land.

Recreation, however, is considered merely an “extra benefit” subordinate to silviculture. Compared to “natural areas,” to be given a “high degree of protection,” recreation sites seem to be given a low priority.

It is unclear what the Legislature meant by the phrase “recreation sites with appropriate facilities.” One of the aids properly used to clarify the meaning of a doubtful statute is reference to other similar statutes.

“On the basis of analogy the interpretation of a doubtful statute may be influenced by language of other statutes which are not specifically related, but which apply to similar persons, things, or relations. By referring to other similar legislation, a court is able to learn the purpose and course of legislation in general, and by transposing the clear intent expressed in one or

several statutes to a similar statute of doubtful meaning, the court not only is able to give effect to the probable intent of the legislature, but also to establish a more uniform and harmonious system of law. It follows that the usefulness of the rule is greatly enhanced where analogy is made to several statutes or a statute representing a general course of legislation." 2A *Sutherland, Statutory Construction*, sec. 53.03, p. 346, (4th Edition, Sand 1973).

One of those statutes relating to the same subject matter as sec. 28.04 is sec. 23.30, Stats. Created by ch. 353, sec. 31, Laws of 1969, sec. 23.30 established the Outdoor Recreation Aids Program.

"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." (Emphasis added.)

In my opinion, this language was meant to exclude spectator sports from those "fields" to be encouraged by state funds. The nature of state activity in outdoor recreation has been participatory. For example, the Legislature has enthusiastically supported the use of parks and forests for activities such as biking, hiking, swimming, boating, fishing, hunting, trapping, shooting, camping, motorcycling, snowmobiling, enjoyment of scenic beauty, and nature study; but it has never expressly supported team sports, commercial endeavors, or similar activities which include mass spectatorship. It would seem that the Legislature has intended to encourage individual appreciation of and participation in the out-of-doors. I could find nothing express or implied either in the language or history of outdoor recreation, conservation, natural resource, or other related legislation that demonstrates Legislative support for spectator facilities in state parks or forests, with the unique exception of the State Fair Park. See secs. 93.24 and 93.25. Furthermore, it is very

likely that the construction of spectator sport facilities in certain areas would be inconsistent with the primary use and natural state of forest lands.

It is arguable, however, that the phrase in sec. 23.30 "except spectator sports," under the doctrine of "the last antecedent," applies only to "local recreation programs" rather than to the phrase "all fields." However, the Wisconsin Supreme Court in *Service Investment Co. v. Dorst* (1939), 232 Wis. 574, 288 N.W. 169, said, quoting another case:

"The general rule that a modifying clause is ordinarily to be confined to the last antecedent does not apply where a consideration of the subject matter requires a different construction. [Citing cases.] The punctuation of the paragraph ... confirms this view, and punctuation, although often disregarded, may be resorted to when it tends to throw light upon the meaning of the language.'

"When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all."

It is generally accepted that punctuation also acts as an aid to interpretation:

"The better rule is that punctuation is a part of the act and that it may be considered in the interpretation of the act but may not be used to create doubt or to distort or defeat the intention of the legislature. When the intent is uncertain, punctuation, if it affords some indication of the true intention, may be looked to as an aid." 2A *Sutherland, Statutory Construction*, sec. 47.15, p. 98 (4th Edition, Sands. 1973).

The court in *Dorst, supra*, relied on the presence of a comma, the relationship of the modifying clause to the subject matter, and the purpose of the statute to conclude that the clause in question modified all the preceding clauses. Here, it is evident from the circumstances that the clause "except spectator sports," modifies the phrase "all fields." A comma is present and, as the court said in *Dorst*:

“If the modifying clause had been intended to modify only the last antecedent clause, there would have been no occasion for the comma and it would have been omitted.” *Id.* at 577.

Thus, sec. 23.30 (1), Stats., reflects the legislature’s intention to eliminate spectator sports from those fields of recreation to be included in the program’s “comprehensive system of state and local outdoor recreation facilities and services.”

The appropriations scheme also indicates the Legislature’s intention that secs. 28.04 and 23.30, Stats., be construed together. In the same act which created the Outdoor Recreation Aids Program (ORAP), the legislature renumbered and amended sec. 20.370 (2) (i) as sec. 20.370 (2) (dm). See ch. 353, sec. 10, Laws of 1969. That appropriation provided:

“20.370 (2) FORESTRY

“***

“(dm) Biennially from moneys allocated under sub. (7) (a), the amounts in the schedule for the development of forest recreational lands. The total amounts expended under this paragraph and sub. (1) (dm) shall not exceed \$9,232,000 for the 1969-71 biennium.”

Section 20.370 (7) (a), amended simultaneously by ch. 353, sec. 20, Laws of 1969, and referred to in sec. 20.370 (2) (dm), *supra*, provided:

“20.370 (7) OUTDOOR RECREATION PROGRAM.
(a) *General program operations.* The unencumbered balance in s. 20.370 (7), 1967 stats., on June 30, 1969, and as a continuing appropriation on July 1, 1969, and on each July 1 thereafter, an amount equal to .0165% of the current equalized value of all taxable property in this state for an outdoor recreation program. From the moneys credited to this appropriation, an amount equal to the amounts appropriated under par. (b) shall be lapsed into the general fund as required for the payment of principal and interest costs incurred in the financing of recreational facilities. The natural resources board may allocate the remaining funds *in general accordance with s.*

23.30 to the appropriations specified *in subs.* (1), (2), (3), (4) and (8) and ss. 20.245 (1) (d) and 20.395 (3) (a).

“1. The board may authorize expenditures from funds allocated to programs *under subs.* (1), (2) and (3) for such appraisal, surveying, negotiation and legal costs as are directly related to the additional land acquisition herein described, and it may authorize the expenditure of not more than 4% of the funds allocated to programs under sub. (3) (e) for administration of the program under s. 23.09 (19).” (Emphasis added.)

Thus, from money allocated under sec. 20.370 (7) (a) the legislature appropriated money for the development of forest recreational lands under sec. 20.370 (2) (dm). By ch. 125, sec. 108, Laws of 1971, sec. 20.370 (2) (dm) was repealed and has not since been recreated. Existing sec. 20.370 (7) (a), however, retains language referring to allocations of funds “*in accordance with s. 23.30 to the appropriations specified in this section ...*” which of course, would include sec. 20.370 (2), Forestry. See ch. 125, sec. 113, Laws of 1971; ch. 90, sec. 78, Laws of 1973.

I can only conclude that by tying the forestry appropriation under sec. 20.370 (2) with the ORAP funds appropriated under sec. 20.370 (7) (a), the legislature intended that the Department of Natural Resources undertake recreational development on state forest lands “*in accordance with*” the general provisions of ORAP, which, by the language of sec. 23.30 (1), excludes spectator sports from those activities in which the public use will be facilitated and encouraged.

In addition to sec. 23.30, Stats., and the appropriations scheme, other statutes indicate the legislature’s intention that spectator sports are not an appropriate activity in state forests. Section 23.09 (11), Stats., providing state aids to counties desiring recreational facilities in county forests, defines recreational facilities:

“For the purposes of this subsection outdoor recreational facilities shall mean the development of picnic and camping grounds, nature trails, snowmobile trails and areas, beaches and bath houses, toilets, shelters, wells and pumps, and fireplaces. Costs associated with the operation and maintenance of

recreational facilities shall not be eligible for aids under this section." Sec. 23.09 (11) (b), Stats.

This statute clearly does not contemplate construction of bleachers to accommodate spectator sport activities in county forests aided by state funds.

When sec. 28.04, Stats., is read together with secs. 23.30 and 23.09 (11), Stats., and the appropriations scheme to interpret the meaning of "recreation sites with appropriate facilities," it becomes clear that the Department does not have authority to construct bleachers and similar accouterments of spectator sports in state forests.

Your second question was:

"2. Can the Department lease state forest property to another unit of government or to private interests for this purpose pursuant to Section 26.08, Wisconsin Statutes?"

Section 26.08 (1), provides:

"The department may, from time to time, lease for terms not exceeding 15 years, parts or parcels of state park lands or state forest lands; and such leases shall contain proper covenants to guard against trespass and waste. The rents arising therefrom shall be paid into the state treasury to the credit of the proper fund. Licenses also may be granted to prospect for ore or mineral upon any of said lands; but proper security shall be taken that the licensees will fully inform the department of every discovery of ore or mineral and will restore the surface to its former condition and value if no discovery of valuable deposits be made. The department shall retain a copy of each such lease or license and file the original in the office of the board of commissioners of public lands."

It is my opinion that, read in light of the total statutory framework, this section does not authorize the Department of Natural Resources to lease state forest lands for the purpose of constructing spectator sport facilities. To lease state forest lands for this purpose would violate the intention of sec. 23.30, Stats. Even though the Department would spend no state funds on the project, a lease would effectively make state forest land available for

development in a field which the legislature has expressly deemed an inappropriate part of the comprehensive system of state and local recreation facilities. It would seem that state agencies cannot by lease and license authorize another entity to accomplish on state property what the agency itself cannot accomplish, unless such authority were clear from the language of the statute.

Furthermore, sec. 23.30 (3) makes DNR the coordinating body of the Outdoor Recreation Program:

“The natural resources board is the body through which all governmental agencies and nongovernmental agencies may coordinate their policies, plans and activities with regard to Wisconsin outdoor recreation resources. ...”

DNR derives its coordinating authority and duties from the same act (ch. 353, sec. 31, Laws of 1969) that excepts spectator sports from the state's recreation program. In the exercise of its jurisdiction over state forest lands under chs. 26 and 28, Stats., DNR cannot contravene the purpose and goals of its duties and authority under ch. 23.

For the above reasons, I must answer “no” to both your questions.

VAM:LMC

Schools And School Districts; Transportation; Students may have bus riding privileges suspended without being suspended or expelled from school. However, both public and private school students must be afforded due process as provided by sec. 120.13 (1), Stats., before such suspension can take place.

October 17, 1974.

DR. BARBARA THOMPSON, *State Superintendent*
Department of Public Instruction

In your letter of July 29, 1974, you ask whether rules governing student behavior on school busses may include suspension of bus “riding privileges while permitting school attendance for the period

of such suspension.” Put another way, can the bus riding privilege be suspended without suspending the student from school?

Although the duty to enforce certain safety standards concerning the construction and operation of school busses resides with the Department of Transportation, the duty and authority to operate a system of transportation for students attending public and private schools is given to the local school districts by subch. II of ch. 121, Stats. Section 121.54 (2) (a), Stats., specifically provides:

“Except as provided in sub. (1), every school board shall provide transportation to and from public school for all pupils who reside in the school district 2 miles or more from the nearest public school they are entitled to attend.”

The exception in this section refers to an option given the cities which doesn't concern us in this opinion.

There is little doubt that school boards under the provisions of sec. 120.13 (1), Stats., as amended by ch. 94, Laws of 1973, have the authority to promulgate rules governing the behavior of students riding school busses, and in the case of public school students, to provide that such misbehavior might result not only in the suspension of bus riding privileges but also suspension from school or possibly expulsion.

Section 120.13 (1) (b), as amended by ch. 94, Laws of 1973, provides:

“The school district administrator or any principal or teacher designated by him also may make rules, with the consent of the school board, and may suspend a pupil for not more than 3 school days or, if a notice of expulsion hearing has been sent under par. (c), for not more than a total of 7 consecutive school days for noncompliance with such rules or school board rules, or for conduct by the pupil *while at school or while under the supervision of a school authority which endangers the property, health or safety of others*. Prior to any suspension, the pupil shall be advised of the reason for the proposed suspension. The pupil may be suspended if it is determined that he is guilty of noncompliance with such rule, or of the conduct charged, and that his suspension is reasonably justified. The parent or guardian of a suspended minor pupil shall be given prompt

notice of the suspension and the reason therefor. The suspended pupil or his parent or guardian may, within 5 school days following the commencement of the suspension, have a conference with the school district administrator or his designee who shall be someone other than a principal, administrator or teacher in the suspended pupil's school. If the school district administrator or his designee finds that the pupil was suspended unfairly or unjustly, or that the suspension was inappropriate, given the nature of the alleged offense, or that the pupil suffered undue consequences or penalties as a result of the suspension, reference to the suspension on the pupil's school record shall be expunged. Such finding shall be made within 15 days of said conference. A pupil suspended under this paragraph shall not be denied the opportunity to take any quarterly, semester or grading period examinations missed during the suspension period." (Emphasis added.)

In my opinion, the bus driver is, or at least may be appointed such school authority to see that the rules of behavior duly adopted are obeyed by bus riders whether they attend public or private school. In fact, Wisconsin Administrative Code MVD 17.10 (4), relating to school bus drivers, requires that "Driver shall be responsible for the maintenance of order among children being transported. Misconduct shall be promptly reported to proper authority."

In situations where there is a sudden, immediate and grave threat to health and safety caused by the actions of one or more students, the student or students may be ejected from the bus. However, in the exercise of such extreme measures, care must be taken to see that the person or persons ejected are not exposed to harm or injury, that the matter is immediately reported to the authorities and that alternative transportation for those ejected will be provided within a reasonable time.

"Although a common carrier of passengers may have the right to eject a passenger, it must exercise that right at a place and time that is reasonably free from danger, taking into consideration the surrounding circumstances and the condition of the passenger ejected. ..." 14 Am. Jur. 2d, *Carriers*, sec. 1093, p. 511.

This foregoing rule of common law should be tempered by consideration of the fact that for the most part minor students and not, presumably, adult passengers on a common carrier are involved.

Consideration must be given to the fact that sec. 121.54 (2) (a), Stats., provides that the school board *shall* provide transportation to and from public schools. In view of this mandatory provision, it is my opinion that while the bus riding privilege may be revoked or suspended without suspension or expulsion from school, it can only be suspended if the procedure outlined in sec. 120.13 (1) (b), Stats., as amended by ch. 94, Laws of 1973, is followed. The privilege of riding a school bus is, in my opinion, equatable to the privilege of attending school to the extent that the benefit of the mandatory service is conditioned on behavior consistent with public health and safety. In the case of students attending public schools, the procedure outlined in sec. 120.13 (1), Stats., might result in a suspension not only of bus riding privileges but also suspension or expulsion from school. However, this section does not authorize expulsion or suspension from private schools for infraction of school bus rules by a student attending a private school. Nonetheless, such students should be entitled to the same due process that is given a public school child before bus riding privileges are revoked. This conclusion results in all children, whether they attend public or private schools, being treated in the same manner if they misbehave while riding the bus. The fact that the child riding the bus may attend public or private schools should not be a standard for action or inaction. (See footnote 11, *State ex rel. Vanko v. Kahl* (1971), 52 Wis. 2d 206, 188 N.W. 2d 460, citing Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 University of Chicago L. Rev. (1961), 1, 96.)

As the court noted in the *Vanko* case:

“ ‘... there shall be reasonable uniformity in the transportation furnished ... pupils whether they attend public or private schools’ (sec. 121.54 (1), Stats.), ...”

While your letter does not ask a question concerning the discipline of private school students riding the bus, such a discussion as the foregoing was felt necessary in view of the responsibility of the local school districts to provide public and private school students transportation on an equal basis.

In conclusion, it is not necessary that a student be suspended or expelled in order that his bus riding privilege be revoked. It is necessary, however, that each student, whether attending public or private school, be afforded the due process provided for by sec. 120.13 (1), Stats., as amended by ch. 94, Laws of 1973, before his or her bus riding privilege can be suspended or revoked.

VAM:JWC

Counties; Protective Occupation; Retirement Systems; The Age Discrimination in Employment Act of 1967, as amended, does not invalidate secs. 41.02 (23), Stats. (retirement ages under the Public Employes Retirement Law), or 41.11 (1), Stats. (mandatory retirement at reaching retirement age), nor the 35 year maximum age requirement for applicants for deputy sheriffs established by the Waukesha County Civil Service Commission.

October 18, 1974.

*WILLIS J. ZICK, Corporation Counsel
Waukesha County*

You state that sec. 41.02 (23), Stats., requires the mandatory retirement of any county employe upon reaching age 55 if such an employe is a "protective occupation participant" as defined in sec. 41.02 (11) (a), Stats. You also state that the Age Discrimination in Employment Act of 1967 was recently amended to include county employes among those protected by the provisions thereof. You further state that the Waukesha County Civil Service Commission, which is empowered by ordinance to establish qualifications for deputies, has established the maximum age of 35 years for applicants for deputy sheriffs. You then request my opinion as to whether the Age Discrimination in Employment Act of 1967, as amended, invalidates:

- (1) the age 55 retirement provision contained in sec. 41.02 (23), Stats., for protective occupations, and

(2) the 35 year maximum age requirement for applicants for deputy sheriffs established by the Waukesha County Civil Service Commission.

Section 41.02 (11), Stats., defines "protective occupation participant" as "... any participant whose principal duties involve active law enforcement ... provided such duties require frequent exposure to a high degree of danger or peril and also require a high degree of physical conditioning." Deputy sheriffs if so engaged and certified are included therein. Section 41.02 (23), Stats., provides that the normal retirement date for each "protective occupation participant" means the day on which such participant attains the age of 55 years. Section 41.11 (1), Stats., provides that any participating employe who has reached his *normal retirement date shall be retired* at the end of the calendar quarter year in which such date occurs, *unless, his employment is continued by his employer or appointing authority*. Said sections of the statutes, of course, are part of ch. 41 and involve the Wisconsin Retirement Fund.

The applicable portions of the Age Discrimination in Employment Act of 1967,¹ as amended, read as follows:

"Sec. 2. (a) The Congress hereby finds and declares that-

"(b) It is therefore the purpose of this Act to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

"Sec. 4. (a) It shall be unlawful for an employer-

"(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

¹P.L. 90-202, 81 Stat. 602, 29 U.S.C. 621 *et seq.*, as amended by P.L. 93-259, effective May 1, 1974.

“(f) It shall not be unlawful for an employer, employment agency, or labor organization-

“(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

“(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual; or

“(3) to discharge or otherwise discipline an individual for good cause.

“***

“Sec. 11. For the purposes of this Act-

“***

“(b) The term ‘employer’ means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

“***

“(f) The term ‘employee’ means an individual employed by any employer except that the term ‘employee’ shall not include any person elected to public office in any State or political

subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy-making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision.

“***

“Sec. 12. The prohibitions in this Act shall be limited to individuals who are at least forty years of age but less than sixty-five years of age.”

The purpose of the Act is to promote the employment of older persons based upon ability rather than age and to prohibit arbitrary age discrimination in employment of individuals between 40 and 65 years of age. The states and their political subdivisions are included therein. Various exceptions are, however, provided for under the Act. Included among the exceptions are the following: a bona fide occupational qualification reasonably necessary to the normal operation of a particular business or where the differentiation is based on reasonable factors other than age and a bona fide employe retirement plan which is not a subterfuge to evade the purposes of the Act.

The answer to your first question is no.

The normal retirement date for each “protective occupation participant” provided for in sec. 41.02 (23), Stats., becomes mandatory unless his employer or appointing authority continues his employment pursuant to the provisions of sec. 41.11 (1), Stats. For the purposes of this opinion, I assume Waukesha County has decided not to continue such employment beyond age 55.

In *Air Line Pilots Ass'n, Int'l v. Quesada* (1960), 276 F. 2d 892, Cert. denied, 366 U.S. 962, an administrative ruling by the then Federal Aviation Agency disqualifying pilots from active duty upon reaching age 60 was upheld. The court in *McIlvanie v. Pennsylvania State Police* (1972), 6 Pa. Cmwlth 505, 296 A. 2d

630,² held that a Pennsylvania statute requiring mandatory retirement of state policemen at age 60 did not violate the Age Discrimination in Employment Act, since nondiscriminatory bona fide occupational qualifications and retirement and pension programs are exceptions thereto.³

The purpose of sec. 41.02 (23), Stats., is to protect the safety and well being of those individuals who are engaged in hazardous and strenuous occupations, as well as their families and the public in general. As previously stated, secs. 41.02 (11), (23) and 41.11 (1), Stats, are all part of ch. 41 and involve the Wisconsin Retirement Fund, which in my opinion constitutes a bona fide employe retirement and pension plan permitted by the Act.

The answer to your second question is also no.

In *Hodgson v. Greyhound Lines, Inc.* (1974), 499 F. 2d 859, the Court of Appeals for the Seventh Circuit reversed the district court and held that Greyhound's maximum hiring age policy which declined to consider applications for inter-city bus drivers for individuals 35 years of age or older did not violate the Age Discrimination in Employment Act. In reaching this conclusion the court found that Greyhound had sustained its burden of showing that its policy was within the bona fide occupational qualification exception of the Act. Greyhound submitted evidence which showed that under its seniority system all new drivers are given assignments which require vigorous physical and mental demands and that the human body undergoes physical and sensory changes beginning at age 35, which in turn, would increase the risk of harm to its passengers.

Accordingly, it is my opinion that the 35 year maximum age requirement for applicants for deputy sheriffs established by the Waukesha County Civil Service Commission is a bona fide occupational qualification and thus, not invalidated by the Act.

VAM:GBS

²Affirmed 309 A. 2d 801, appeal dismissed for want of a substantial federal question by the United States Supreme Court (1974), 94 S.Ct. 1583.

³A federal district court reached a different result based primarily upon the failure to sustain the burden of proof. *Murgia v. Commonwealth of Massachusetts Bd. of Retire* (1974), 376 F.Supp. 753.

Corporations; A foreign corporation filing application for a certificate of authority to transact business in this state is not entitled to any credit against the filing fee due under sec. 180.87 (1) (i), Stats., even though some part or all of the capital of the newly applying corporation had generated the payment of fees by some other corporation which had previously employed such capital in this state.

October 30, 1974.

ROBERT C. ZIMMERMAN,
Secretary of State

You have requested my opinion as to whether, under sec. 180.87 (1) (i), Stats., previous fee payments made by a foreign corporation on its capital employed in Wisconsin may be credited to another foreign corporation, into which it has merged, upon the latter corporation filing application for authority to transact business in Wisconsin.

Your question is generated by the application of the Green Giant Company, a Delaware corporation, which was formed by the merger of Green Giant Company, a Minnesota corporation, into GG Co., a Delaware corporation, effective November 1, 1973, with the survivor Delaware corporation adopting the name "Green Giant Company." Prior to the merger, only Green Giant Company (Minnesota) was authorized to transact business in Wisconsin.

You have refused to qualify Green Giant Company (Delaware) to transact business in Wisconsin, since that corporation claims a \$2,622 credit against the basic fee of \$6,772, which apparently is mutually agreed is otherwise due under sec. 180.87 (1) (i), Stats. The \$2,622 difference is due to the fact that Green Giant Company (Delaware) is claiming a credit for the amount previously paid in fees by Green Giant Company (Minnesota) prior to the Delaware corporation's application for authority to transact business in Wisconsin, filed on November 8, 1973. The credit claim is based principally on the corporation's interpretation of a previous opinion of this office reported in 57 OAG 185 (1968).

The law is human, but it tends to become dogmatic when written in statutory form. In this case, the latter is true; and as the general counsel for the State of Wisconsin, I am limited to reading the law as written. The irony of the result, however, is that the legislature and many citizens spend large sums of money to attract outside industry to the Badger state. As a citizen, it is my duty to support that program which verifies that "We Like It Here." I cannot transpose the result of legislation to the common consensus as this is a duty of the legislature. Therefore, with reluctance, as a citizen concerned with the growth of the state but with the conviction that the law must remain pure, I render the following opinion.

Section 180.87 (1) (i), Stats., which sets forth the fees to be paid by a foreign corporation in filing its original application for authority to transact business in Wisconsin, reads as follows:

"180.87 Fees for filing documents. (1) The secretary of state shall charge and collect for:

* * *

"(i) Filing an application of a foreign corporation for certificate of authority to transact business in this state, \$50, and \$1 for every \$1,000 of its capital exceeding \$50,000 employed or to be employed in this state, computed as provided in s. 180.813, as shown by such application."

This provision reads exactly as it did when first enacted as part of the 1951 recodification of Wisconsin business corporation law, ch. 731, Laws of 1951, except that initially the statute read "\$25" instead of "\$50" and "\$25,000" instead of "\$50,000." The revision committee notes accompanying the 1951 law provided in part as follows:

"(1) (i) is similar to 226.02 (4) (1949). The fees to be paid by foreign corporations are determined by reference to 180.813 which section retains and clarifies 1949 law on this subject."

Section 180.813, Stats., requires that the application for a certificate of authority, filed by a foreign corporation, contain the "proportion of its capital which is represented in this state by its property to be located or to be acquired herein and by its business to be transacted herein," and the statute describes how that capital is to be calculated.

Generally, a state, having the power to exclude foreign corporations entirely, has the power to impose such license fee as it chooses as a condition precedent to the admission of a foreign corporation to do business in the state. 51 Am Jur., *Taxation*, sec. 843, p. 752; 18 Fletcher, *Cyc. Corp.* (perm. ed.), sec. 1817, p. 616. As stated in *New York Life Ins. Co. v. State* (1927), 192 Wis. 404, 211 N.W. 288, 212 N.W. 801, writ of error dismissed 276 U.S. 602, 48 S.Ct. 323, 72 L.Ed. 726; at pages 407-408:

“It is elementary that Wisconsin has the right to determine the conditions under which it will permit foreign insurance companies to do business in this state. The state may refuse to permit them to transact business within its boundaries or it may impose such restrictions or conditions as it sees fit as a prerequisite to permitting them to do business in this state. Among the conditions that may be required is the payment of a license fee. ...”

Section 180.87 (1) (i), Stats., is quite clear, explicit and wholly unambiguous. Under its provisions, the initial entrance or filing fee which a foreign corporation must pay is based on “its capital ... employed or to be employed in this state” and neither subsec. (1) (i) nor sec. 180.813, Stats., contains any allowance for a credit because some part or all of the capital of the newly applying corporation generated the payment of fees by some other corporation which had previously employed such capital in this state. Section 180.87 (1) (i), Stats., simply requires that there be a qualification fee and sets forth the manner in which it is to be computed.

The 1968 opinion of my predecessor, relied upon by Green Giant Company (Delaware), interpreted the provisions of sec. 180.87 (1) (j), 1967 Stats. Subsequently, that provision has only been changed in one minor regard not here material and presently reads:

“(j) Filing an annual report of a foreign corporation \$15, and in case said annual report shows that the corporation employs in this state capital in excess of the amount of capital on which a fee has previously been paid, computed as provided in s. 180.813, an additional fee which with previous payments made on account of capital employed in this state, will amount to \$1 for each \$1,000 of such excess.”

Subsection (1) (j) provides that once a foreign corporation has been qualified to transact business in Wisconsin by paying an entrance fee on capital computed under sec. 180.813, Stats., it may nevertheless be subject to an additional fee where a subsequent annual report discloses any increase in capital beyond that upon which the entrance fee was based. For the purposes of the annual report, the amount of capital is computed under sec. 180.833, Stats.

The 1968 opinion indicated that when two foreign corporations authorized to do business in Wisconsin merge, the surviving corporation may receive a credit on the filing fee due with its subsequent annual report under sec. 180.87 (1) (j), Stats., to the extent that previous fee payments had been made by the merged corporation on its capital employed within Wisconsin. In reaching such conclusion, the following is stated in 57 OAG 185, at p. 186:

“... It is significant that the filing corporation, in computing its credit under the revised statute, is not limited to ‘the amount of capital on which *it* has previously paid a fee’ but may include any capital on which a fee has previously been paid. ...”

However, the 1968 opinion nowhere deals with the text of sec. 180.87 (1) (i), Stats., which statutory language in fact establishes the basis for the entrance fee to be paid by a foreign corporation desiring authority to transact business in Wisconsin. I also note that sec. 180.87 (1) (i), Stats., here under consideration, contains the very language which the 1968 opinion found significant, but lacking, in sec. 180.87 (1) (j), Stats. Therefore, since neither the law nor the facts under consideration here were treated in the 1968 opinion, I do not consider the latter opinion determinative of the present question.

In my opinion, under sec. 180.87 (1) (i), Stats., previous fee payments made by a foreign corporation on its capital employed in Wisconsin may not be credited to another foreign corporation into which it has merged, upon the latter corporation filing application for authority to transact business in Wisconsin. The statutory provision clearly bases the fee to be paid on the capital of the applying corporation. Furthermore, the law makes no provision for credit or other offset because of any mergers which may have taken place in the past. The statute simply provides that any foreign corporation which wishes to obtain a certificate of authority to transact business

must pay an initial fee based on “*its* capital ... employed or to be employed in this state. ...” (Emphasis added.)

Subsection (i) is not retrospective. That is, upon the filing of an application of a foreign corporation for a certificate to transact business in this state, that corporation is not entitled to a credit for previous payments which may have been made by other foreign corporations in previous years. The applying corporation is required to pay a fee based on “its capital,” regardless of original source.

You further advise that the plan and agreement for the merger of the Delaware and Minnesota corporations provided that the merger would become effective on November 1, 1973, and it is your understanding that the merger was in fact effective on that date, thereby terminating the existence of Green Giant Company (Minnesota). Under the circumstances, it appears that Green Giant Company (Delaware) may have transacted business in Wisconsin from and after November 1, 1973, without having obtained a Certificate of the Authority, contrary to sec. 180.801, Stats., since the corporation did not even apply for such certificate until November 8, 1973. If such be the fact, I agree with the further conclusion of your office that Green Giant Company (Delaware) is subject to the 50 percent penalty provisions of sec. 180.847 (3), Stats., which reads:

“(3) A foreign corporation which transacts business in this state without a certificate of authority, if a certificate of authority is required under this chapter, shall be liable to this state, for the years or parts thereof during which it transacted business in this state without a certificate of authority, in an amount equal to all fees and other charges which would have been imposed by this chapter upon such corporation had it duly applied for and received a certificate of authority to transact business in this state as required by this chapter and thereafter filed all reports required by this chapter and in addition thereto it shall be liable for a penalty of 50% of such amount. Such fees and penalty shall be paid before a certificate of authority is issued.”

It appears appropriate to point out, however, that although the basic fee due from Green Giant Company (Delaware) is apparently not in

question, it appears to have been computed on the basis of a full calendar or fiscal year while sec. 180.813 (1) (k), Stats., provides that it should only be based on that portion of the calendar year during which the corporation expects to transact business in this state.

I note that Green Giant Company (Delaware) has sought to excuse its tardy filing of an application for authority to transact business in Wisconsin by pointing to the fact that delay was experienced in obtaining certified copies of the Articles of Incorporation of the Delaware corporation (presumably as changed upon merger) from the Secretary of State of Delaware. However, I do not understand how the difficulty of the Delaware corporation in this regard would justify the Wisconsin Secretary of State ignoring Wisconsin law in reference to the qualification of foreign corporations to do business in this state. In any event, the Delaware corporation was apparently incorporated under its original name (GG Co.) in Delaware on May 10, 1973, and therefore had a number of months before November 1, 1973, during which it could have made application for authority to transact business in this state.

I indicated earlier that my duty to construe the law as it is written compels this result, and that I cannot usurp the prerogative of the legislature. It is my hope that the problem evident in this legal opinion will be reviewed by the legislature when it convenes next year.

VAM:JCM

Criminal Law; Forms similar to the uniform traffic citation which are used as complaints to initiate criminal prosecutions in certain misdemeanor cases are sufficient to confer subject matter jurisdiction on the court but any conviction which results from their use in the manner described in the opinion is null and void.

November 1, 1974.

ALBERT R. NELSON, *District Attorney*
Jefferson County

You have informed this office that despite your express orders to the contrary, the local sheriff's department was using a form resembling, but not in conformance with, the uniform traffic citation to charge certain misdemeanors under the Wisconsin Criminal Code. You also informed my office that when a party is arrested pursuant to such citation, the jailer informs the arrestee that he may submit a bond of \$50.00 plus \$9.00 in costs to be forfeited by the court in lieu of a personal court appearance by the accused. Failing to appear, a plea of guilty is entered on the record in the accused's behalf as well as a judgment of conviction pursuant thereto, and the bond is entered as a forfeiture.

Based on the foregoing facts you ask two questions: (1) Is the form which resembles and is similar in content to a traffic citation sufficient to charge a violation of the criminal statutes? If so, what procedures must be followed in order to secure a valid conviction on a criminal charge? (2) If the convictions obtained through use of the above form and the procedures you described are invalid, what future action should you take?

In response to your first question, it is first necessary to briefly describe the forms which you have submitted to this office which have been used to charge certain misdemeanors in your county. On those forms there is an appropriate space for the date and place of the offense, a description of the offense and a reference to the statute violated. In *Clark v. State* (1974), 62 Wis. 2d 194, 214 N.W. 2d 450, the Supreme Court of Wisconsin indicated that the charging document in a criminal action is sufficient to confer subject matter jurisdiction on the court if it alleges the offense and makes reference to the statute describing the crime. Based on the *Clark* decision, it is my opinion that the forms under consideration are sufficient to charge a violation of the criminal statutes so as to confer subject matter jurisdiction upon the court.

However, the conclusion that the forms in question are sufficient as charging documents to confer subject matter jurisdiction on the court does not lead to the conclusion that the convictions obtained

through the use of those forms *in the manner you described* are valid. On the contrary, it is my opinion that any conviction *secured in the manner you described* is absolutely invalid. This is so for a number of reasons.

First of all, sec. 968.02, Stats., provides that a complaint charging a person with a criminal offense shall be issued *only* by the district attorney, unless he refuses or is unable to do so, in which case a complaint may be filed by permission of a county judge pursuant to a hearing on the issue of probable cause. A sheriff is thus completely without authority to initiate criminal prosecution. Consequently, it would appear that any prosecution for violation of the Wisconsin Criminal Code commenced by a sheriff would be invalid, cf. *The State v. Russell* (1892), 83 Wis. 330, 331-335, 53 N.W. 441, and any conviction obtained in the manner you described as a result of such prosecution would be declared void. The submitted forms also violate sec. 968.04, Stats., which provides that a summons directed to an accused pursuant to the issuance of a complaint may issue only at the hands of a judge or district attorney. The sheriff has no authority to command the presence of an individual in court.

I would also point out that the forms submitted for my consideration are devoid of a proper space for and any facts which would permit an independent determination of probable cause by a magistrate so as to justify continuation of the criminal process, in violation of the dictates in *State ex rel. Cullen v. Ceci* (1970), 45 Wis. 2d 432, 173 N.W. 2d 175. Moreover, the Wisconsin Supreme Court in *State v. V-Systems of Wisconsin, Inc.* (1968), 41 Wis. 2d 141, 143-144, 163 N.W. 2d 4, ruled that a complaint is not excused from meeting the standards of probable cause simply because it is the basis for issuance of a summons instead of a warrant. Compliance with the probable cause standard is mandated if the complaint is to withstand timely attack by the defendant when he appears before the county judge to whom the summons is returnable.

It is also my opinion that the "forfeiture" procedure you describe is without statutory authority and specifically in violation of chs. 970 and 971, Stats. Apparently, the local sheriff's department is proceeding with respect to certain misdemeanor violations of the Wisconsin Criminal Code in a manner similar to that prescribed for traffic violations under secs. 345.26 and 345.27, Stats. That

procedure, however, is specifically restricted by statute to an arrest for violation of a traffic regulation or the issuance of a citation for violation of a traffic regulation. Nor is there any corresponding procedure in the Criminal Code.

Aside from that, the entry of a plea of guilty on behalf of an accused who is *in absentia* and not represented by an attorney is contrary to secs. 970.01, 970.02, 971.04, 971.05 and 971.08, Stats., as well as the dictates of *Ernst v. State* (1969), 43 Wis. 2d 661, 674, 170 N.W. 2d 713. Sections 970.01 and 970.02 provide that an arrestee is to be then taken before a judge within a reasonable time after arrest, at which time he must be advised of the charges against him and his right to counsel. Section 971.04 provides that a defendant is to be present at his arraignment with the exception that a defendant charged with a misdemeanor violation may, in writing, authorize his attorney to act in any manner in his behalf, with leave of court, and may thus be excused from attendance at any or all proceedings. Barring that, a defendant must appear in person at the arraignment, at which time the district attorney must read the complaint to him pursuant to sec. 971.05 (3), and after which the defendant must enter his plea. Before a plea of guilty is accepted, however, the trial court is mandated to *address the defendant personally* and determine the voluntariness of his plea, his understanding of the offense and the potential penalty, as well as to make sufficient inquiry to ascertain that the defendant in fact committed the crime. See sec. 971.08 (1) (a) and (b), Stats. *Ernst* requires in addition that the trial court determine the extent of defendant's education and general comprehension and alert the accused to the possibility that a lawyer would discover defenses or mitigating circumstances which would not be apparent to him. *Id.* at 674. The procedure you describe allows for none of these requirements.

The defects which I have outlined above in the proceedings which you have described clearly render invalid any conviction entered with respect to an individual who has not personally appeared before the court in the proceeding which resulted in his conviction. The court has simply never acquired personal jurisdiction over such individual. See *Kelley v. State* (1972), 54 Wis. 2d 475, 195 N.W. 2d 457. A trial court must have jurisdiction both of the subject matter and of the person of the defendant in order to convict the defendant of a crime. See *State ex rel. LaFollette v. Raskin* (1966), 30 Wis. 2d 39,

45, 139 N.W. 2d 667. Thus, the lack of personal jurisdiction over the defendants in the proceedings which you have described clearly renders any conviction entered in such proceedings null and void.

As to your second question regarding your responsibilities in view of the probability that the convictions hereinabove discussed are void, I suggest for your consideration sec. 1.4 of the American Bar Association's *Standards Relating to the Prosecution Function*:

"1.4 Duty to improve the law.

It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. *When inadequacies or injustices in the substantive or procedural law come to his attention, he should stimulate efforts for remedial action*" (emphasis added).

VAM:CMW:DJB

Counties; Reapportionment; Under sec. 59.03 (3) (c), Stats., alteration of county supervisory district boundaries between decennial censuses is authorized only where ward boundaries originally relied upon in reapportioning the county have been subsequently altered by incorporation, annexation, detachment or consolidation.

November 6, 1974.

GLENN L. HENRY, *Corporation Counsel*
Dane County

You request my opinion whether sec. 59.03 (3) (c), Stats., which relates to the alteration of the boundaries of county supervisory districts between decennial censuses, prohibits the redistricting of supervisory districts under the following circumstances:

The existing supervisory districts in Dane County were not based upon ward lines. The City of Madison recently annexed a number of town islands and is currently considering redistricting to a 24 aldermanic plan. Since there are now 24 county supervisors representing areas of the City of Madison,

the question has arisen concerning whether Dane County could then redistrict to correspond with the City's aldermanic districts.

Section 59.03 (3) (c), Stats., renumbered from sec. 59.03 (2) (c), by ch. 118, Laws of 1973, provides in part as follows:

“Changes during decade. New ward lines adopted after the enactment of a plan of supervisory districts under par. (b) due to incorporation, annexation, detachment or consolidation may serve as a basis for altering between federal decennial censuses the boundaries of supervisory districts which utilized such ward lines as district boundaries, in the discretion of the county board. ...” (Emphasis added.)

Based on the emphasized language of the statute, it is my opinion that your county board may alter its supervisory district boundaries only where the county board establishing such boundaries originally relied on ward lines which have been subsequently altered by incorporation, annexation, detachment or consolidation. Under the circumstances you relate, there was no initial conformity of district and ward boundary lines. Therefore, the statute would not authorize the county board to now alter its district boundaries to conform with any newly created city aldermanic districts.

VAM:JCM

Cities; Malt Beverages; An alderman holding a Class “B” Fermented Malt Beverage and Intoxicating Liquor License is ineligible to vote on the granting, renewal or revocation of such a license.

November 7, 1974.

BRUCE E. SCHROEDER, *District Attorney*
Kenosha County

You have requested my opinion on the following question.

Can an Alderman who holds a Class “B” Fermented Malt Beverage and Liquor License vote on the granting of, renewal

of, or revocation of a Class "B" Fermented Malt Beverage and Liquor License of a new applicant or current licensee?

It is often said that the tavern owner is all things to all people. Certainly, much legislation is developed in the atmosphere of this friendly host--but it is my duty to limit his influence under the law as it relates to this issue. I have concluded that your inquiry must be answered in the negative.

In this regard, you have referred to 24 OAG 292 (1935), an opinion dealing with this issue and ask whether it continues in force. In relevant part, 24 OAG 292 concludes that:

"... the granting of a liquor license partakes of the nature of a judicial proceeding and one who is a party in interest to the petition to be heard, or who will be affected financially directly or indirectly by the allowance or disallowance of the petition, cannot be a fair and impartial judge and hence cannot be allowed to act in the case. It is against public policy to have an officer profit by his office at the expense of the public or to use his office to fight competitors of his private business."

This opinion merely restated a common law rule of long standing and has been reaffirmed in the ensuing years. The Wisconsin Supreme Court first enunciated the rule in *The Board of Supervisors of Oconto County v. Hall* (1879), 47 Wis. 208, 2 N.W. 291, whereby the court ruled that two county board supervisors, who were sureties for the county treasurer, who had embezzled county funds, were barred from voting on the acceptance of partial restitution from the treasurer which would have the effect of substantially diminishing their liability as sureties, the court saying:

"The general rule of the common law is, that members of a legislative body or municipal board are disqualified to vote therein on propositions in which they have a direct pecuniary interest adverse to the state or municipality which they represent. The rule is founded on principles of natural justice and sound public policy. Perhaps the only recognized exception to this rule is the case where the body or board is permitted to fix the compensation of its members." *Board v. Hall, supra* at p. 213.

24 OAG 292 was the culmination of a series of opinions dealing with potential conflicts between an alderman's roles as legislator and licensee. [See 5 OAG 686 (1916), 6 OAG 461 (1917), 23 OAG 191 (1934).] Subsequently, it was adhered to in 28 OAG 228 (1939) wherein it was noted that although an alderman-licensee would be barred from voting on liquor license applications, mere status as an alderman did not make one ineligible to hold a liquor license or vice versa.

The application of the rule disqualifying members of a council or other body from acting in a matter in which they are personally interested appears to depend upon whether such body is acting in a judicial or legislative capacity. 133 A.L.R. 1257, 1260. The distinction has been stated as follows:

“... a legislative act must be regarded as one which prescribes a general rule of conduct, while a judicial act is one which imposes burdens or confers privileges in specific cases, according to the finding of some person or body, whether the facts exist which make a general rule applicable to the specific case, or according to the discretionary judgment of such person or board as to the propriety of imposing the burden or granting the privilege in a specified case. An ordinance prescribing the conditions upon which streets should be laid out or improved and the procedure to be adopted in accomplishing these purposes would, I suppose, be clearly legislative in character. An ordinance, however, laying out a particular street, or ordering it to be paved, would be judicial in its quality.” *State, West Jersey Traction Co., Prosecutors, v. Board of Public Works* (1894), 56 NJL 431, 29 A 163.

Similarly, for example, a town board taking up the general question of whether to extend the hours for the sale of beer and liquor during months of daylight saving time, would be exercising a legislative function while it would be functioning as a quasi-judicial body in considering the issuance of a Class “B” license to an individual applicant. You have suggested that the Supreme Court has reached a contrary result in *Johnson v. Town Board* (1942), 239 Wis. 461, 1 N.W. 2d 796. Any such indication in *Johnson, supra*, is dicta, the issue there being simply whether a town board had the discretionary power to deny a license application when the applicant

was statutorily qualified and the town's license quota was not filled. In answering the question affirmatively, the court said:

“It follows that the town board, upon any consideration deemed by it importantly bearing upon the question, could deny or grant licenses in the exercise of its legislative powers, and that plaintiff has no standing to demand a license. *Johnson v. Board*, *supra*, at 465.”

The court did not take up the issue of whether the licensing procedure was a legislative or quasi-judicial function. Such a passing characterization of the general nature of a town board's powers is in no way a holding that a municipal governing body, passing on liquor license applications, is exercising a legislative rather than a quasi-judicial function.

The principle enunciated above and in 24 OAG 292 is equally applicable whether the issue before the licensing body is the granting, renewal or revocation of a license.

24 OAG 292 and 28 OAG 228 have been on the books for nearly forty years, and many intervening sessions of the legislature, and are thus entitled to deference. *State ex rel. West Allis v. Dieringer* (1956), 275 Wis. 208, 219, 81 N.W. 2d 533; *State v. Ludwig* (1965), 31 Wis. 2d 690, 698, 143 N.W. 2d 548. The legislature has not seen fit to repudiate these opinions and has, in fact, reiterated their sound public policy underpinnings by the passage of ch. 90, Laws of 1973, a Code of Ethics for State Public Officials. At sec. 11.05 (2) of the code, the legislature has provided that “No state public official may use his public position or office to obtain financial gain for himself or his immediate family, or for any business with which he is associated.” At sec. 11.05 (11) (c), it is further provided that “The legislature recognizes that all state public officials should be guided by a code of ethics and thus: ... (c) Counties and municipalities may and should establish a code of ethics for local public officials.”

For the above stated reasons, the opinions expressed at 24 OAG 292 and 28 OAG 228 are to be adhered to in reference to the inquiries you have made.

VAM:DN

Open Meeting; Investment Board, Wisconsin; Posting in Governor's office of agenda of future Investment Board meetings is not sufficient communication under sec. 66.77 (2) (e), Stats., as created by ch. 297, Laws of 1973, to the public or the news media who have filed a written request for notice.

November 15, 1974.

GEORGE H. AUSTIN, *Executive Director*
State Investment Board

There is an inherent disposition elementary to the legislation which creates the duty of notices to public meetings.

This disposition reaches to a basic validity of the public's "right to know" in a free society.

You ask my opinion on the notice of Investment Board meetings required by sec. 66.77 (2) (e), Stats., as created by ch. 297, Laws of 1973. You indicate that the Board's present practice is to send to the Governor a copy of the meeting agenda whereupon the Governor posts such agenda on a bulletin board in his office for the purpose of informing the press.

Based upon this procedure you ask:

Is the State of Wisconsin Investment Board giving the public notice by sending a copy of its agenda to the Governor who posts it for the press at a convenient place where the press can see it?

Section 66.77 (2) (e), Stats., as created by ch. 297, Laws of 1973, provides:

"(e) 'Public notice' means statutorily required notice, if any. If no notice is required by statute, it means a communication by the chief presiding officer of a governmental body or his designee, to the public and to the official municipal or city newspaper designated under s. 985.05 or 985.06, or if none exists, then to members of the news media who have filed a written request for such notice, which communication is reasonably likely to apprise members of the public and of the news media of the time, place and subject matter of the meeting

at a time, not less than one hour prior to the commencement of such meeting, which affords them a reasonable opportunity to attend.”

You additionally inform me that there is no specific statutorily required notice of Investment Board meetings; consequently, the general language quoted above applies.

“Public notice” as defined in subsection (2) (e), as applicable to the Investment Board, requires communication by the chief presiding officer 1) to the public and, 2) to members of the news media who have filed a written request for such notice. Such communication must be reasonably likely to inform the public and news media of the time, place and subject matter of the meeting “at a time, not less than one hour prior to the commencement of such meeting, which affords them a reasonable opportunity to attend.” “Communication” can be verbal, or written (posted notice or newspaper advertisement). You as the “chief presiding officer” or your “designee” must determine in each specific instance what notice would be “reasonably likely to apprise members of the public and of the news media” of the meeting. I call your attention in this regard to an opinion my predecessor issued to Mr. Gerald K. Anderson, District Attorney of Waupaca County, on October 7, 1974, which opinion defines the term “communication” and discusses the methods of providing such “communication” to the public.

It is my opinion that posting of the Board’s agenda in the Governor’s office is not “reasonably likely to apprise members of the public ... of the time, place and subject matter of the meeting” in that such office is not frequented by the public on a day-to-day basis. If posting is the method to be used, I suggest that the agenda-notice be placed at positions in the various state buildings more generally frequented by the public.

I am of the further opinion that posting in the Governor’s office does not satisfy the requirement of sec. 66.77 (2) (e), Stats., to communicate “to members of the news media who have filed a

written request for such notice.” The introductory paragraph of sec. 66.77, Stats., reads in part:

“66.77 OPEN MEETINGS OF GOVERNMENTAL BODIES. (1) In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental affairs and the transaction of governmental business. ...”

This lends support to my view that direct affirmative action must be taken to give notice to members of the news media who have filed a written request for such notice. Posting in Madison is not sufficient to inform members of the news media who are residents in other areas of the state. Once a member of the news media has filed a written request for notice, such notice must be given, either verbally or by written communication, to the requesting member. The method of providing the written communication to the requesting news media member could be by mail or by furnishing copies to the news media at prior designated locations. The guideline to be used in determining the adequacy of the notice being in the words of sec. 66.77 (2) (e), Stats., “which communication is reasonably likely to apprise members ... of the news media ... which affords them a reasonable opportunity to attend.” You should make every effort to comply with the spirit as well as the letter of the law and err if at all by giving more sufficient notice than required.

VAM:WMS

Vocational, Technical And Adult Education, Board Of; Section 67.12 (12) (e) 5, 6, created by ch. 250, Laws of 1973, is construed to permit a vocational, technical and adult education district board to initiate a referendum on question of borrowing by issuing promissory notes, the result of which will be binding on the board.

November 15, 1974.

PAUL M. NEWCOMB, *Corporation Counsel*
Sauk County

In your letter of October 2, 1974, you have informed me that the District 4 Board of Vocational, Technical and Adult Education has approved an initial resolution providing for the borrowing of \$30,000,000 in promissory notes. Apparently the Board of District 4 has passed another resolution providing for the voluntary placement of the initial resolution on the November 5, 1974, ballot in referendum form. Against this background you asked the following questions:

- 1) Can the Area Board of the Vocational, Technical and Adult Education District #4 voluntarily place the borrowing resolution before the electorate in referendum form on November 5th?
- 2) Is the result of the referendum binding and/or advisory on the District Board?

In a sense the answer to one of your questions is moot since the referendum was approved on the November 5 ballot. However, because of the strong need for clarification of any law that bonds the citizen to the taxing power of the State, this opinion is submitted so that it may take its place in the normal development of the law.

The answer to your first question is yes. The relevant statutory law is sec. 67.12 (12) (e) 6, Stats., as created by ch. 250, Laws of 1973. This section provides:

“6. When a vocational, technical and adult education district board adopts a resolution to borrow a sum for a stated purpose and a referendum on indebtedness is held and the question is approved at a referendum or a sufficient petition for a referendum on indebtedness is not filed within the time permitted in subd. 5 or if such petition is filed and the question is approved at a referendum, the power of the board to borrow such sum and expend the same for the purpose stated shall be deemed approved by the district electors upon the expiration of the time for filing the petition or accomplishment of the referendum, whichever is applicable.”

“In construing several sections of the statutes relating to a single subject, it is the duty of the court to give force and effect to the different sections and not ignore ... them.” *Pelican Amusement Co. v. Pelican* (1961), 13 Wis. 2d 585, 593, 109 N.W. 2d 82.

“... An instrument must always be construed as a whole, and the particular meaning to be attached to any word or phrase is usually to be ascribed from the context, the nature of the subject matter treated of, and the purpose or intention of the ... body which enacted or framed the statute or constitution.” 2A Sutherland, *Statutory Construction*, 4th Ed., sec. 46.05.

In addition,

“... It is an elementary rule of statutory construction that effect must be given if possible to every *word*, clause and sentence thereof.” *Northern Discount Co. v. Luebke* (1958), 6 Wis. 2d 313, 316, 94 N.W. 2d 605.

In applying these rules of statutory construction, it is clear that sec. 67.12 (12) (e) 5 as created by ch. 250, Laws of 1973, *requires* a referendum only when a proper petition is filed. Otherwise a district board “need not submit the resolution to the electors for approval.” Subsection 6 goes on to provide for three circumstances by which the resolution shall be deemed approved: 1) when the board adopts a resolution “and a referendum on indebtedness is held and the question is approved ...”; 2) “a sufficient petition ... is not filed within the time permitted ...”; and 3) “if such petition is filed and the question is approved at a referendum.” The first circumstance can only be given effect by construing the statute as permitting a referendum called by a resolution adopted by the board. No other possibility exists.

Therefore, construing subssecs. 5 and 6 of sec. 67.12 (12) together, it must be concluded that the board need not submit the borrowing resolutions to a referendum in the absence of a petition, but that it may do so voluntarily and in lieu of a special election or referendum place the question on the ballot as provided therein.

The legislative history of ch. 250, Laws of 1973, supports this view. Section 6 of Assembly Bill 857, the parent legislation, omitted the critical words “... and a referendum on indebtedness is held and the

question is approved.” However, the Assembly substitute amendment to the bill did incorporate these words, and the Senate substitute amendment and subsequent amendments did not remove them. It seems clear that the legislature did intend to permit the local boards to voluntarily hold referendums to approve borrowing.

In addition, it is my opinion that sec. 67.12 (12) (e) 5 and 6 are in *para materia* with sec. 67.05 (6m) (a). This latter section deals with the holding of a referendum by a vocational, technical and adult education district board on a resolution to issue bonds. This section provides that: “Any resolution adopted under sub. 1 (of sec. 67.05) at the discretion of the district board, may be submitted to the electors without waiting for the filing of a petition.” In *City of Milwaukee v. Milwaukee County* (1965), 27 Wis. 2d 53, 56, 133 N.W. 2d 393, the court wrote:

“In the construction of the statutory language the legislative intent should be sought from the language of the statute in relation to its scope, history, context, subject matter, and the object intended to be remedied or accomplished, *Scanlon v. Menasha* (1962), 16 Wis. (2d) 437, 114 N.W. (2d) 791, and when there are several statutes relating to the same subject matter they should be read together and harmonized, if possible, *Harris v. Halverson* (1927), 192 Wis. 71, 211 N.W. 295.”

Applying this doctrine it is clear that the legislature intended secs. 67.05 (6m) (a) and 67.12 (12) (e) 5 to be construed together.

The answer to your second question is that the referendum would be binding on the district board whether initiated by the board or by petition. It seems clear that this is the only construction that can be given to subsecs. 5 and 6. In this respect, the legislature in elementary language has made it clear that where the matter is submitted to a referendum of any kind, a majority is required for approval, and failure to achieve a majority in favor constitutes disapproval of the borrowing proposal. This language cannot be considered as anything but binding upon the board.

In a postscript to your letter you have also requested a determination on the final date on which petitions can be filed. Section 67.12 (12) (e) 5 clearly provides that a petition must be filed 30 days after the publication or posting of the resolution authorizing

the borrowing. If the 30th day falls on a day other than a work day, the petition must be filed on the next succeeding work day.

VAM:JWC

Counties; Criminal Law; The authority of county officials to offer rewards for the arrest or conviction of persons violating the criminal law is limited to the circumstances set forth in sec. 59.25 (2), Stats.

November 18, 1974.

LAWRENCE R. NASH, *Corporation Counsel*
Wood County

My powers are limited to interpretation and yet I have normal concern for statutory law that somehow may be incongruous to the pressures of our period. Unfortunately, our society is motivated by economics and few people respond without a prior affirmative reply to the question, "What's in it for me?"

This may be bad citizenship but often produces solutions to criminal problems. The measure of what it may take to turn a common informer into a concerned citizen unfortunately is often controlled by the reward. In this opinion the law does not permit us to let money talk.

You inquire whether Wood County may establish a fund for the purpose of providing rewards for information leading to the arrest and conviction of persons vandalizing county property. Criminal damage to property is punishable under sec. 943.01, Stats., either as a misdemeanor or a felony, depending on the extent and nature of the property destroyed.

Generally, specific statutory authority is necessary for governmental units or public offices to offer rewards for the arrest or conviction of persons violating the criminal law of the state. As indicated in 67 Am. Jur. 2d, *Rewards*, sec. 8, p. 7:

"The authorities very generally agree that municipalities and other subdivisions of a state have no power to offer rewards for the apprehension of offenders against the criminal laws of the

state, unless a statute or charter provision confers such power, as is sometimes done. ...”

And in 77 C.J.S., *Rewards*, sec. 11, p. 368:

“In the absence of express authorization, it is generally held that municipal corporations are not empowered to offer rewards for the arrest or conviction of offenders against the criminal law of the state ...”

The legislature has considered the matter of rewards on a number of occasions in the past and has enacted a number of statutes specifically authorizing various public bodies and officers to offer certain rewards under specific circumstances. Thus, sec. 14.15, Stats., authorizes the Governor to offer a reward of not to exceed \$500 “whenever any person convicted of or charged with any felony escapes, or whenever any heinous crime has been committed,” and secs. 61.75 and 62.26, Stats., authorize officials of villages and cities to offer a reward “when any heinous offense or crime has been committed against life or property within any city.” In addition, sec. 86.192, Stats., authorizes a monetary payment to informers aiding in the prosecution and conviction of persons injuring, defacing or removing state or municipal signs, markers, signals, etc.

However, the only statute specifically authorizing the payment of rewards by county officials, is sec. 59.25 (2), Stats., which provides in part:

“(2) Whenever a person convicted of, or charged with, any felony, the punishment for which is not less than five years’ imprisonment, shall escape, or whenever any such felony shall be committed by any unknown person or persons the sheriff of the county from which such escape was made or in which such felony was committed may, in his discretion and with the consent of the chairman of the board of such county when such board is not in session, and with the consent of the board when they are in session, offer such reward for the apprehension and delivery of such escaped person, or the apprehension or conviction of the perpetrator of such felony as he may deem necessary, not exceeding one thousand dollars in any one case; ...”

The need for specific authority for the offering of rewards by governmental units or public officers was emphasized in reference to this statute, in *Northern Trust Co. v. Snyder* (1902), 113 Wis. 516, 540, 89 N.W. 460, where the following is stated:

“... We have a statute (sec. 725a, Stats. 1898) authorizing the sheriff, with the consent of the county board, or, under certain circumstances, of the chairman thereof, to offer a reward for the apprehension or conviction of the perpetrator of a felony. Such power, manifestly, would not exist unless specially granted, and in the section referred to it will be seen with what care such grants of power are made. ...”

While vandalism of county property may constitute a violation of sec. 943.01, Stats., punishment under that statute is not in excess of five years. Therefore, sec. 59.25 (2), Stats., provides no authority for the creation of the type of fund you describe. Likewise, while sec. 59.07 (64), Stats., provides that the county board may “enact ordinances to preserve the public peace and good order within the county,” such statute is not so broad as to constitute authority for county officials to offer rewards for the arrest or conviction of persons violating the criminal law of the state.

VAM:JCM

Mortgages; Savings And Loan Associations; Second mortgage constitutes equivalent security interest when held by savings and loan association which holds first mortgage, and there are no intervening liens. Sections 428.101, 428.106 (5), 227.014 (2) (a), Stats., discussed.

November 18, 1974.

R. J. McMAHON

Commissioner of Savings and Loan

You indicate that savings and loan associations are authorized to make a limited number of consumer-type home improvement loans under sec. 215.20, Stats. Such loans are often made to persons whose first mortgage is already held by the same savings and loan

association. Prior to the enactment of ch. 428, Stats., which governs first lien real estate loans, these loans were regulated by the Wisconsin Consumer Act, chs. 421 through 427, Stats. Noting the substantial differences in procedural requirements, as well as differences in sanctions for improperly handling loans between ch. 428, Stats., and the Wisconsin Consumer Act, you are interested in determining the scope of loans that are regulated by ch. 428, Stats.

You request my opinion as to the meaning of "equivalent security interest" as that term is used in sec. 428.101, Stats., created by ch. 18, Laws of 1973, which provides:

"Applicability. This chapter shall apply to loans by a creditor to a customer secured by a first lien real estate mortgage or equivalent security interest on which the annual percentage rate does not exceed 12% per annum and the amount financed is \$25,000 or less."

Specifically you ask, does a second mortgage taken by a savings and loan association, which also holds the first mortgage, constitute an "equivalent security interest" for purposes of sec. 428.101, Stats., where there are no intervening liens between the second and the first mortgage on the subject property?

It is my opinion that it does.

The Commissioner of Banking is responsible for administering the Consumer Act under ch. 426, Stats. Pursuant to his administrative authority, the Banking Commissioner has adopted 1 Wis. Adm. Code, Bkg. 80.261, which provides as follows:

"Additional charges; equivalent security interest. The term 'equivalent security interest' as used in section 422.202 (2) (b) shall include a seller's interest under a land contract or a first lien deed of trust, and a second mortgage where there are no intervening liens and the mortgagee holds the first mortgage on the subject property. For cross reference application of this definition, see also sections 422.303 (4), 422.306 (2), 422.408 (6), 422.409 (2) and 422.411 (2), Wis. Stats." (See also sec. 422.208.)

Transactions subject to ch. 428, Stats., are expressly excluded from the control of the Consumer Act by sec. 421.202 (7), Stats.

However, the Banking Commissioner does have certain enforcement responsibility for ch. 428, Stats., by reason of sec. 428.106 (5), Stats. In adopting rules pertaining to the Consumer Act, the Banking Commissioner acts pursuant to a specific obligation of rule-making authority. Sec. 426.104 (1) (e), Stats. It would appear that this delegation of authority does not extend in application to ch. 428, Stats., because of the provision of sec. 428.106 (5), Stats., which provides:

“(5) The administrator specified in s. 426.103, solely through the department of justice, may on behalf of any customer institute an action to enforce this chapter and to recover the damages and penalties provided for this chapter. In such action he may obtain an order restraining by temporary or permanent injunctions any violation of this chapter. This subsection shall not be construed to incorporate or grant to the administrator with respect to the enforcement of this chapter, any of the provisions of ch. 426.”

The clear intent of the legislature, as indicated by the above language, was to provide the Commissioner of Banking with limited powers to enforce ch. 428, Stats., in contrast to the broad scope of powers exercised by the Commissioner over the Consumer Act. The limiting language of sec. 428.106 (5), Stats., however, does not avoid the effect of sec. 227.014 (2) (a), Stats., which provides as follows:

“(2) Rule-making authority hereby is expressly conferred as follows:

“(a) Each agency is authorized to adopt such rules interpreting the provisions of statutes enforced or administered by it as it considers to be necessary to effectuate the purpose of the statutes, but such rules are not valid if they exceed the bounds of correct interpretation.”

As a result, although the enforcement power of the Banking Commissioner over ch. 428, Stats., is limited, it is sufficiently broad in scope to encompass the authority to adopt rules construing provisions of that chapter. Consequently, the above quoted rule of the Commissioner of Banking, 1 Wis. Adm. Code, Bkg. 80.261, controls the meaning of “equivalent security interest” as used in ch. 428, Stats.

I, therefore, conclude that a second mortgage taken by a savings and loan association, where the savings and loan association holds the first mortgage on the subject property and there are no intervening liens, constitutes an "equivalent security interest" for purposes of sec. 428.101, Stats.

VAM:JEA

Health And Social Services, Department Of; Public Health; Liability, reimbursement and collection for services provided under secs. 51.42 and 51.437, Stats., programs discussed.

November 21, 1974.

RUSSELL FALKENBERG, *District Attorney*
Chippewa County

You have inquired regarding changes brought about by recent legislation in the area of fixing and collecting fees for certain mental health care services.

Effective January 1, 1974, sec. 51.36, Stats. (community mental health clinic services) and sec. 51.38 (community care services for the mentally handicapped) were repealed, and with them the provisions for establishing patient fee schedules for services provided under those sections. In addition, the power of any board established under sec. 51.42, Stats., to fix fee schedules was removed by ch. 90, Laws of 1973, effective August 5, 1973.

However, the enactment of ch. 90 also created sec. 46.03 (18), Stats., which required the Department of Health and Social Services to establish a uniform system of fees for services provided or purchased by the department and by boards created under secs. 51.42 and 51.437, which were known as the community mental health, mental retardation, alcoholism and drug abuse governing and policy making board, and the community developmental disabilities service board, respectively. Section 46.03 (18), Stats., provides that the department shall:

“(18) UNIFORM FEE SCHEDULE. Establish a uniform system of fees to be paid by the person, family, or legally responsible relative or guardian of the child or individual receiving services provided or purchased by the department, a county department of public welfare, or a board under sec. 51.42 or 51.437, except for services provided to courts, or for outreach information and referral services, or where as determined by the department, a fee is administratively unfeasible or would significantly prevent accomplishing the purpose of the service.”

In light of these changes, you ask, first, whether the present law allows or requires boards established under secs. 51.42 and 51.437 to “charge back” and collect for services provided; and second, if such authority exists, whether there are any guidelines or criteria for collection of these fees.

Since your initial inquiry, the enactment of additional legislation affecting policies in this area has further complicated the situation. For this reason, your questions will be treated together in the interest of providing a concise and cogent answer.

Prior to the enactment of ch. 90, Laws of 1973, the responsibility for collection of the cost of services provided under ch. 51, Stats., was governed principally by sec. 46.10, Stats. Briefly stated, this section imposed liability for the cost of maintenance upon both patients and outpatients, as well as certain relatives of such patients, for care and maintenance provided in state and county charitable and curative institutions when the state was chargeable with all or a part of the patient’s maintenance. This section also provided a method of making settlements between the state and the counties of the monies collected and provided a formula for the distribution of such funds.

Although ch. 90 completely revised the provisions formerly found in sec. 46.10 (8) (f), Stats., relating to the distributions of monies collected under that section, it is significant that the portions of sec. 46.10 dealing with liability and the enforcement thereof were not altered. The changes effected by the repeal of sec. 46.10 (8) (f) and the enactment of sec. 46.10 (8) (g) clearly contemplated that in the future sec. 46.10 would be enforced in its entirety.

Section 46.10 (8) (g) as created by ch. 90 provided for distribution by the Department of Health and Social Services of collections made "under this section," and for distribution by the department of collections for care furnished during the calendar year 1974 and after January 1, 1975. It specifically required that for care furnished after January 1, 1975, all monies collected shall be retained by the state.

This distribution formula was consistent with historical practices under which there always has been some relation between charges assessed against the state and the counties and the collections distributed to the state and the counties. Section 541j (2) of ch. 90, and sec. 51.42 (8) (c), as amended by sec. 295 of ch. 90, provided for 100 percent payment by the state for care provided under ch. 51, Stats., after January 1, 1975. It is my opinion that this constituted a charge to the state within the meaning of sec. 46.10 (2). Section 541j of ch. 90 relating to state assumption of county share of costs for certain related services also provided a charge to the state.

The changes in sec. 46.10 clearly contemplated that collections for care provided in state and county hospitals as defined in ch. 51, Stats., should be governed by this section after January 1, 1974. Section 46.10 (7) provides that "The department *shall* administer and enforce this section." The duties imposed upon the department by sec. 46.10 are therefore mandatory rather than optional. While this opinion does not rely upon sec. 553m of ch. 90 for the conclusions reached herein, there is some language in that section which could reasonably be construed as indicating an intention on the part of the legislature to adopt a policy of completely separating the delivery of services from the functions of collection and enforcement, and the centralization of the latter functions. See, for example, subsec. 553m (2) (d) 1.

Chapter 90 also made some changes in various provisions of ch. 51, Stats., which directly or indirectly affect the collection function. Patients from counties which had not yet established a comprehensive program under sec. 51.42, who had been properly admitted to state or county mental hospitals before or after August 5, 1973, were liable for their care by sec. 46.10. It remained the duty of the department to enforce such liability for care provided both before and after January 1, 1974. Section 46.10 has not been repealed and

continues to provide both for the liability for the care of patients and the enforcement of such liability in all cases where it applies.

Prior to the enactment of ch. 90, sec. 51.42 (11), Stats., specifically provided for liability for services provided under the sec. 51.42 program, including a specific incorporation by reference in sec. 51.42 (11) (a) of the liability imposed by sec. 46.10 for care provided in institutions specified in sec. 46.10. Section 51.42 (11) (b) extended the liability created by sec. 46.10 to the care furnished patients in general hospitals by 51.42 boards and authorized that boards may refer such accounts to the department for collection. Section 51.42 (11) (c) created liability for all other services and authorized, but did not require, the 51.42 board to enforce that liability.

Chapter 90 repealed all of sec. 51.42 (11), as well as sec. 51.42 (10), which dealt with segregation of the costs of services provided by institutions mentioned in sec. 46.10. Nevertheless, since ch. 90 authorized a charge to the state for the cost of patient care in state and county hospitals, the conditions for liability under sec. 46.10 still existed. As to those hospitals sec. 46.10 remained in force, and it was the duty of the department to enforce such liability.

With respect to services provided under sec. 51.42 in general hospitals and to all other services supplied by sec. 51.42 boards, the problem was more difficult. Former sec. 51.42 (11)(b) and (c) actually created the liability for such services. Section 46.10 did not apply because the services were not provided as inpatient or outpatient care in a state or county institution.

I can find nothing in ch. 90 that either directly or by implication preserved the liability formerly imposed by the repealed portion of sec. 51.42 (11). The general rule is that relatives have no liability for the cost of care furnished to a person by the state or municipalities unless there is a statute creating such liability, since under common law, states and municipalities were not charged with the duty of supporting poor, insane or incompetent persons. For a full discussion on this point, see *State Department of Public Welfare v. Shirley* (1943), 243 Wis. 276, 10 N.W. 2d 215. It also has been held that a husband's common-law liability to support his wife does not extend to support provided outside the home unless extended by statute. *Richardson v. Stuesser* (1905), 125 Wis. 66, 71-72, 103 N.W. 261.

Neither can reliance be placed upon the provisions of ch. 52, Stats., dealing generally with support of dependents. The court has held this chapter to apply only after a judicial determination and not as a result of the type of situation with which we are now dealing. *Ponath v. Heidrick* (1964), 22 Wis. 2d 382, 390, 126 N.W. 2d 28; *Saxville v. Bartlett* (1906), 126 Wis. 655, 105 N.W. 1052.

[As I have pointed out earlier, it has been held that there is no common-law liability on relatives for care provided in mental institutions, and that any attempt to recover from relatives for such services must be specifically authorized by statute.] It is my opinion that indirect reference to charges and receipts in sections not dealing with liability and collections are insufficient to create a liability in derogation of the common law. It follows that for services other than those mentioned in sec. 46.10, there was no enforceable liability to anyone other than the patient himself. There is, of course, always liability on the part of the person receiving the care or services since such liability existed at common law. *Guardianship of Sykora* (1956), 271 Wis. 455, 458, 74 N.W. 2d 164.

Based upon the foregoing considerations, my conclusions relative to your concerns before June 29, 1974, are as follows:

1. For inpatient care and maintenance in all state and county mental hospitals, liability and the enforcement of such liability was governed exclusively by sec. 46.10, Stats., and it was the duty of the department to enforce such liability. This duty was made mandatory by sec. 46.10 (7).

2. For outpatient services provided in state hospitals or county hospitals which have established programs under sec. 51.42, liability and the enforcement of such liability was governed by sec. 46.10, and there was also a mandatory duty upon the department to enforce such liability.

3. For services other than care in state and county mental hospitals, it appears that there was no statute creating liability or identifying those liable for such care. While authority was granted in sec. 46.03 (18), Stats., to fix schedules of fees to be paid by the individual receiving the services and certain others, those other than the patient or his guardian who might be liable were not identified, and there was no language creating a liability. Section 46.036 (4)

(a) required facilities and agencies contracting for services to charge the schedule of fees established by the department but those who were to be charged were not identified, and again there was no language creating any liability. This applies also to services provided under sec. 51.437, Stats.

4. Given the state of the statutory language, there appeared to be no specific collection duties, either mandatory or optional, assigned to counties or providers of services.

Since your request was received, the provisions relating to boards established under secs. 51.42 and 51.437 have been changed drastically by the enactment of ch. 333, Laws of 1973, effective June 29, 1974. Almost all of your questions, as they pertain to problems arising on or after June 29, 1974, are answered by these amendments which are contained in secs. 87 through 95 and secs. 115 through 126. These amendments cover subjects not previously anticipated such as relative responsibility for services provided, reimbursement to the counties and the boards mentioned above, avoidance of duplication of services and other relevant topics. No purpose would be served in repeating the terms and conditions of this new legislation as it speaks directly to your inquiry but only for care and services provided on or after June 29, 1974.

Both before and after June 29, 1974, 51.42 and 51.437 boards were eligible for grants in aid under secs. 51.42 (8) and 51.437 (8). However, some changes in these subsections were made within ch. 333.

You express several concerns which pertain to these programs both before and after the enactment of ch. 333.

You point out that the department has not established a new uniform system of fees but rather has adopted existing fee schedules. I find nothing irregular about this practice; it is one in which state agencies engage often. Moreover, the department has indicated that it will study this problem as the programs develop.

I do not share your concern that administrative second-guessing will be the product of the latitude given the department in determining when a fee is administratively unfeasible or when it would significantly prevent accomplishing the purpose of the service. Although subject to attack on the grounds that they might allow

abuse of departmental discretion, many laws must be drafted in this manner to give maximum opportunity for effective implementation of the legislative purpose.

You contend that sec. 46.03 (18) lacks a proper standard or guideline. In this regard, it is important to distinguish between a uniform *system* of fees as required under sec. 46.03 (18) and a uniform *schedule* of fees which you infer would be more desirable. Apparently because of geographical differences in costs and other administrative considerations the legislature deemed it desirable to require only a uniform system of fees rather than a uniform statewide schedule of fees, which was within its power to enact.

As amended by sec. 87 of ch. 333, sec. 46.03 (18) answers your questions concerning 1) the ability to pay, 2) the tribunal of determination and enforcement, and 3) what services required so-called "charge backs." The primary responsibility for making such determinations rests with the Department of Health and Social Services; but the department may delegate to county departments of public welfare and providers of care and services such powers and duties as it deems necessary. The problem of overlap or duplication of services is covered by secs. 51.42 (8) (b) and 51.437 (8) (b), Stats.

Section 46.10, Stats., now provides that any patient receiving care under secs. 51.42 and 51.437 and his responsible relatives shall be liable for the cost of care in accordance with the fee schedule established by the department, and that the department may bring action for enforcement of such liability. This reference to the enforcement of liability and specific reference to the estates of the patient and his responsible relatives indicate that any claim can be reduced to judgment and filed as a death claim against the estate of the responsible party.

Such actions were, of course, barred prior to the enactment of ch. 333, in view of the lack of a provision vesting relatives with the responsibility to meet the costs of care and maintenance other than that provided under sec. 46.10.

Your question regarding the assignment of insurance benefits requires that we distinguish between what is commonly known as hospitalization insurance and other types of coverage. In dealing

with hospitalization insurance, it is logical to assume that the county is entitled to reimbursement for any services covered by the policy. This would be true of care provided in any public or private facility, notwithstanding the admission of the patient under the special programs established by secs. 51.42 and 51.437. The assignment of benefits from other kinds of insurance such as life insurance could not be effected in the absence of a specific statute authorizing such action. It is my opinion that, absent such a statute, such assignment could be accomplished only by a voluntary agreement between the patient and the board providing services. It should be stressed, however, that such voluntary assignment in no way can be used as a condition for entry into one of those programs.

Last, I refer to your inquiry into possible third party liability. The standards of tort liability logically would apply to any liability incurred by a provider of services. If your question concerns third party liability in the sense of the financial responsibility of relatives for patient care, please refer to the above discussion.

VAM:DPJ

Municipalities; Taxation; There is no constitutional prohibition against increasing either municipal tax rate limitations or increasing the municipal tax base. However, a constitutional amendment would be required to increase municipal debt limitations.

November 21, 1974.

DAVID W. ADAMANY, *Secretary*
Department of Revenue

In your capacity as chairman of the Study Committee on Manufacturing Equipment and Personal Property Tax Exemptions you have asked me the following two questions which were prompted by an earlier opinion to you dated October 2, 1974:

“1. Does Article XI, Section 3, or any other provision of the Wisconsin Constitution, prohibit increasing the rates set forth in the statutory provisions referred to in your opinion of October 2nd (other than those pertaining to municipal and school debt)

in amounts which would offset the effect of the exemptions referred to therein?

“2. Does Article XI, Section 3, or any other provision of the Wisconsin Constitution, prohibit amending the statutes referred to in your opinion of October 2nd so as to provide that the value of the said exempt property shall be added to the value of taxable property in arriving at a total value to which the limiting rates are to be applied?”

Article XI, sec. 3, Wisconsin Constitution, provides in part:

“... No county, city, town, village, school district or other municipal corporation may become indebted in an amount that exceeds an allowable percentage of the taxable property located therein equalized for state purposes as provided by the legislature. In all cases the allowable percentage shall be five per centum except as follows: (a) For any city authorized to issue bonds for school purposes, an additional ten per centum shall be permitted for school purposes only, and in such cases the territory attached to the city for school purposes shall be included in the total taxable property supporting the bonds issued for school purposes. (b) For any school district which offers no less than grades one to twelve and which at the time of incurring such debt is eligible for the highest level of school aids, ten per centum shall be permitted. ...”

This provision sets debt limitations. Elsewhere this constitutional provision provides that a municipality shall raise revenue to pay for its indebtedness.

The opinion of October 2, 1974, includes a reference to statutory provisions relating to tax rate limitations for cities, counties, towns and villages under secs. 62.12 (4), 70.62 (2), 60.18 (1) and 61.46 (1), Stats., respectively. In response to your first question, these rates could be increased by the legislature. There is no constitutional prohibition against increasing municipal tax rates to obtain taxes for valid public purposes. These limitations are currently set at 3-1/2 percent of the assessed value of real and personal property in cities, 1 percent of the total valuation of taxable property in counties, 1 percent of the assessed valuation of taxable property in towns and 2

percent of the assessed valuation of taxable property in villages, as set forth in the statutes referred to above.

In response to your second question, there also is no constitutional prohibition against the legislature redefining the tax base to which municipal tax rates shall be applied for the purpose of raising local revenues.

There are two basic ways to increase local property taxes: increase the rate or increase the base. Current municipal tax limitations are based on a statutory percentage of the taxable property in the municipality. The rate limit could be increased with appropriate legislation. See McQuillin, *Municipal Corporations*, Third Edition, Volume 16, sec. 44.25.

The base could be expanded to include that property exempted by secs. 70.11 (27) and 70.04 (3), Stats., but this approach does not seem practical. The base could be increased without any legislation if local assessors made assessments based on full market value instead of a smaller percentage thereof. See Opinion of the Attorney General, dated March 5, 1973. OAG-12-73.

However, neither an increase in the rate limitation nor an increase in the base will provide relief to any municipality which has reached its constitutional debt limitation under Article XI, sec. 3, Wisconsin Constitution, except to the extent that it may allow some municipalities to pay off their debts more quickly if the taxpayers were able to absorb the impact of higher taxes. The statutory debt limitation under sec. 67.03 (1), Stats., is equal to the constitutional debt limitation. An increase in the municipal debt limitation would require an amendment to the constitution.

VAM:APH

County Board; Elections; County Board may not utilize unidentified paper ballot in voting to appoint County Highway Commissioner, but may vote by ayes and nays or show of hands at open session if some member does not require vote to be taken in such manner that the vote of each member may be ascertained and recorded. Sec. 66.77 (6), Stats.

November 22, 1974.

LAWRENCE R. HEATH, *Corporation Counsel*
Oneida County

You request my opinion on three questions relative voting procedures to be utilized by the County Board in selecting a County Highway Commissioner.

Section 83.01 (1), Stats., as amended by ch. 262, Laws of 1973, provides in part:

“(1) ELECTION. The county board shall elect a county highway commissioner, ...”

Although the term “elect” is used, the County Board is really *appointing* such officer and exercises its power by *voting* pursuant to sec. 59.02 (2), Stats., 61 OAG 116 (1972).

1. In view of the prohibition against the use of secret ballots contained in sec. 66.77 (6), Stats., can the County Board vote by unidentified paper ballots if submitted in writing and thereafter tallied with the totals for each candidate announced publicly?

In earlier times such method of voting was permissible at public meetings where neither statute nor charter required aye or nay vote recording and no statute prohibited the use of a secret ballot. *State ex rel. Burdick v. Tyrrell* (1914), 158 Wis. 425, 149 N.W. 280.

However, I am of the opinion that such voting procedure would be in violation of sec. 66.77 (6), Stats., as created by ch. 297, Laws of 1973, which provides:

“(6) Unless otherwise specifically provided by statute, no secret ballot shall be utilized to determine any election or other decision of a governmental body at any meeting, and any member of such body may require that a vote be taken in such manner that the vote of each member may be ascertained and recorded.”

In my opinion such ballots would be secret ballots within the meaning of that section and I am not aware of any specific statute which would permit members of the County Board to vote by secret ballot.

This section is applicable to both open sessions and closed sessions of governmental bodies. It is my further opinion that the election of a County Highway Commissioner could not be accomplished at a closed session of the County Board. An argument can be made that the Board is "considering employment" and that sec. 66.77 (4) (a), Stats., would be applicable. However, it is my opinion that, even if sec. 66.77 (4) (a), Stats., is applicable to consideration, the vote of the County Board is not an integral part of such consideration and would therefore have to be taken at open session. See 60 OAG 9, 16 (1971): *State ex rel. Cities Service Oil Co. v. Bd. of Appeals* (1963), 21 Wis. 2d 516, 124 N.W. 2d 809, and *Board of School Directors of Milwaukee v. WERC* (1969), 42 Wis. 2d 637, 168 N.W. 2d 92.

In addition to the requirements in sec. 66.77, Stats., county boards are subject to sec. 59.04 (4), Stats., which provides in part:

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

Also see sec. 59.17 (1), Stats., as to the duty of the county clerk to "... record the vote of each supervisor on any question submitted to the board, if required by any member present ..."

The term "secret ballot" is not defined in sec. 66.77, Stats., or sec. 990.01, Stats. The general rule of sec. 990.01 (1), Stats., is applicable and provides:

"(1) GENERAL RULE. All words and phrases shall be construed according to common and approved usage; but technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning."

I am of the opinion that the term "secret ballot" as used in sec. 66.77 (6), Stats., has the same peculiar meaning which it has in the law where *elections* involving *electors* are concerned. In *State ex rel. Briesen v. Barden* (1890), 77 Wis. 601, 606, 46 N.W. 899, it is stated:

"... The absolute secrecy of the vote is required, and to secure that it must be by ballot. ... The paper called a ballot must not disclose for what or for whom it is voted, except by the name of the person voted for and the office on the face thereof."

The court went on to state that certain printing or writing on the outside of a ballot to make the voting of it possible and practicable and not placed there for the purpose of making it known for whom the elector votes would not render a ballot invalid.

My answer to your first question would not preclude the use of identified paper ballots by a County Board.

I am of the opinion that where a paper ballot is utilized by a County Board to appoint a County Highway Commissioner, such ballot must contain the name or other identification of the member voting, in addition to the name of the person voted for, even where no member has requested that the vote be taken in such manner that the vote of each member may be ascertained and recorded. Use of such ballots would prevent following,¹ but would permit other members and members of the public to ascertain how individual members voted. The ballots themselves would be public records within the meaning of sec. 19.21 (1), Stats., and inspection would be permissible under secs. 19.21 (2) and 59.71 (1), Stats.

A secret ballot is required under Art. III, sec. 3, Wis. Const., and by statute in any election, with exceptions, where electors exercise rights of suffrage. The Constitution does not require and the legislature has not deemed it necessary to provide for the use of a secret ballot in matters to be determined by County Boards of Supervisors. Supervisors do not vote on matters before the body as electors, but rather, as representatives of their constituents. A secret ballot would defeat the accountability factor of individual members of the governmental body.

2. May a vote be taken by ayes and nays where some member has not requested that the vote be taken in such manner that the vote of each member may be ascertained and recorded?

I am of the opinion that ayes and nays or a showing of hands can be used. Other members and members of the public in attendance would have some chance of ascertaining how individual members voted. When construed as a whole, sec. 66.77 (6), Stats., would seem to permit such manner of voting where an individual member had not

¹*The act of following the lead of earlier voters in a roll call vote.*

required voting in such manner that the vote of each member could be ascertained and recorded.

3. Can the Chairman of the County Board request individual candidates leave the meeting room at the time the vote is taken?

He can make such a request. Removal cannot be required if such persons are conducting themselves in an orderly manner. Secs. 59.04 (4), 66.77 (1), (2) (d), (3), Stats.

VAM:RJV

Natural Resources, Department Of; Public Records; Public's right under sec. 19.21, Stats., to inspect land acquisition files discussed.

November 22, 1974.

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

You have requested my opinion on several questions regarding the confidentiality of the Department's land acquisition files.

In the last five volumes of the published opinions of the Attorney General, the subject matter of public records has been discussed numerous times.¹

I call these earlier opinions to your attention, particularly for the benefit of your staff attorneys who may be counseling you on similar questions on future occasions. With the exception of one opinion, the mentioned opinions do not cover the subject matter of land acquisition files.² However, the principles of law, as set forth in the opinions, are applicable to your Department's land acquisition records. Accordingly, many, if not all, of your questions can be answered by reference to these opinions.

¹57 OAG 138; 58 OAG 67; 59 OAG 226; 60 OAG 43; 60 OAG 284; 60 OAG 422; 60 OAG 470; 61 OAG 12; 61 OAG 297; 61 OAG 361.

²61 OAG 361.

You first ask:

“1. Are the Department of Natural Resources’ proposed land conveyance files a public record under Section 19.21 of the Wisconsin Statutes? If so, under what conditions may the Department treat a proposed land conveyance file confidential? May the Department treat the proposed land conveyance file confidential until the acquisition is closed and the deed recorded?”

I assume that your pending acquisition files contain numerous documents. Nothing said in this opinion should be construed as implying that the entire contents of any particular file, such as a pending acquisition file, are privileged or closed to public inspection. There is then no such thing as a “closed” file, a file closed to the public. Based on the principles, as hereinafter discussed, the right to public inspection must be evaluated on a document by document basis.

The contents of pending land acquisition files of the Department are public records. 60 OAG 470 (1971), at 472. See also, sec. 16.80 (2) (a), Stats.

Although the Department’s pending acquisition files are public records, this is not to say that the entire contents of such files are open to public inspection. 60 OAG 285 at 287. In this opinion, we stated to you, “that sec. 19.21, Stats., will be construed in *pari materia* with sec. 66.77, Stats., ... the Wisconsin open meeting law, and that the policy guidelines for holding closed meetings set forth in sec. 66.77 (3), Stats., will be applicable to the question of confidentiality of records under sec. 19.21.”

Section 66.77 was repealed and recreated by ch. 297, Laws of 1973. Even though the legislature changed the language of former sec. 66.77 (3), such change does not affect the validity of 60 OAG 285 in respect to the present question. Section 66.77, clearly exempts deliberations or negotiations on the purchase of public property from the requirement of open meetings. By applying the principles that are set forth in 60 OAG at 287, the obvious and general conclusion is that public records regarding pending acquisitions do not have to be made available for public inspection.

Your questions almost assume the answer which is simply that generally speaking, the contents of pending acquisition files are a class of public records of which public inspection may be refused until such time as the transaction is closed and the public interest fully protected by recording of the conveyance.

You further ask:

“2. Are private or staff appraisals public records under Section 19.21, Wisconsin Statutes? If so, under what conditions may the Department treat an appraisal confidential? At what point, if ever, should an appraisal be available for public inspection?”

The appraisal is part of the Department's pending acquisition file and the principles discussed and the answers given in response to your first series of questions apply in all respects to this series of questions.

Your third question is:

“3. Does a private appraiser's contractual right to approve or disapprove the release of appraisal information affect the classification of a private appraisal as public record? Specifically, limitations comparable to the following:

“ ‘Neither all nor any part of the contents of this report shall be conveyed to the public through advertising, public relations, news, sales or other media, without the written consent and approval of the author particularly as to the valuation conclusions and the identity of the appraiser or firm with which he is connected.’ ”

The sample contract language does not appear to me to cause any problems with the legislative and court doctrine of the public's “right to know.” The contract language is not particularly clear, but seems to preclude the Department from disclosing the contents of the report by particular means such as advertising, etc. The contract provision or clause does not relate to or bar public inspection. However, even assuming that the quoted language could be construed as intending to bar public inspection, such contractual provision would be invalid on the grounds of being contrary to public policy. *Pedrick v. First Nat. Bank of Ripon* (1954), 267 Wis. 436, 66 N.W. 2d 154.

Knowledge of the duties and responsibilities imposed by law on your Department are imputed to persons who enter into contracts with your Department. *Herro v. Wis. Fed. Surp. P. Dev. Corp.* (1968), 42 Wis. 2d 87, 114, 166 N.W. 2d 433. It can be stated unequivocally that the court would not uphold action barring public inspection on the basis of the quoted contractual language. What the public does with the information gathered from such public inspection is not the Department's responsibility, nor can any liability attach to the Department from the public's subsequent use.

You also ask:

"4. If the appraisal or the proposed land conveyance file is available for public inspections, what use, if any, may information contained therein be used for private gain?"

In 58 OAG 67 (1969), the following language appears which was quoted from *State ex rel. Youmans v. Owens* (1965), 28 Wis. 2d 672, 137 N.W. 2d 470:

"That his motivation in seeking inspection is to benefit his newspaper and permit it to publish the material gained therefrom is immaterial. The fact that he as a citizen deems it essential that the material contained in the report be made available to the public is sufficient to qualify him as the real party in interest." (P. 70)

Continuing, the opinion concluded:

"As our discussion in the answer to Question (1) indicates, a custodian of public records in this state cannot be concerned with the purposes behind a person's request to view records and obviously the purposes for which certified copies are requested is also immaterial. ..."

As stated in answer to your previous question, the public's use of public information is not the Department's responsibility.

Lastly, you advise:

"Recently, this Department has received numerous requests for proposed land conveyance files containing both staff and private appraisals. The Department is concerned that by

satisfying these requests confidentiality will be breached or future negotiations with prospective sellers will be prejudiced.”

I see no issue of confidentiality in the subject matter of pending acquisition files in the sense that information is gained by your Department on the promise of confidentiality. Certainly, the contract provision previously quoted does not involve confidentiality, for appraisals are contracted and paid for by state funds. For a discussion on confidentiality, based on information acquired on a promise of confidentiality, see 59 OAG 226 (1970); 60 OAG 284; and 60 OAG 422.

In summary, it is my opinion that the contents of the Department's land acquisition files are public records; that much of what is contained therein may be privileged and public inspection denied. The grounds for denying public inspection and the procedures to be employed, are fully discussed in the numerous opinions of this office previously referred to. However, in conclusion, I do have some general comments to make in regard to the specific matter of land acquisition files.

As to acquisition files where the property has been acquired, there can be no general dispositive answer. Whether public inspection should be allowed or denied depends entirely on a balancing of the public's "right to know," as against the need to protect the public interest. In way of illustration, I cite the example of where a particular project may involve numerous acquisitions. Public inspection of the records pertaining to closed transactions may seriously hinder future negotiations on parcels yet to be acquired within the particular project. However, I cannot conclude that in all such situations, disclosure or inspection may be denied, for the time involved between the date of the acquisition and the demand for inspection must be considered as to whether public inspection would really be detrimental to the public interest. Other factors that may have to be considered by the custodian of the files within this same context are the location and similarity of the parcels acquired to those to be acquired. If the custodian of the Department's records concludes that on balance the public interest outweighs the public's "right to know," inspection may be denied even on closed acquisition files. The determination not to allow inspection must be made not only on a case by case situation, but on a document by document basis

with careful deliberation. In any situation, including pending acquisition files where public inspection is refused, the specific reason or reasons must be given to the person seeking inspection. It is not sufficient to merely say that such inspection would be contrary to the public interest.

For a further discussion on what factors may be properly considered in denying public inspection and the procedures to use when denying public inspection, I specifically refer you to 61 OAG 361 (1972). Enclosed for your convenience is a copy of an opinion dated September 19, 1974, addressed to the Honorable Patrick J. Lucey, Governor, which discusses many of these same issues.

VAM:CAB

Corporations; Religion; Religious societies incorporated under ch. 187, Stats., are "persons" within the meaning of the relocation assistance act and are entitled to the benefits of such act if they otherwise qualify.

November 25, 1974.

CHARLES M. HILL, SR., *Secretary*
Department of Local Affairs and Development

Our Constitutional guarantees have provided protection to the separation of Church and State. From a statutory point of view, we have admitted the existence and the legal validity of religious institutions.

Very little happens without structure, and since the structure of religions has verification, it has the further right of definition.

You have requested my opinion as to whether religious societies, incorporated under ch. 187, Stats., are entitled to the relocation benefits as prescribed in sec. 32.19, Stats.

Section 187.01 (1), Stats., provides in part:

"... The members, ... may organize a corporation for religious, ... purposes in the manner hereinafter provided."

Section 187.01 (2), Stats., provides in part:

“... shall be a corporation and shall possess the powers and privileges granted to corporations by ch. 181, ...”

Accordingly, religious societies that either comply with or meet the requirements of ch. 187, Stats., are corporations.

Section 32.19 (2) (a) 1., Stats., defines person as:

“Any individual, partnership, corporation or association which owns a business concern; ...”

The phrase “business concern” would seem to exclude religious societies. However, the word “business” is defined in sec. 32.19 (2) (d) 3., as:

“(d) ... any lawful activity, ... conducted primarily:

“***

“3. By a non profit organization; ...”

The phrase “any lawful activity” is extremely broad and surely encompasses the activity of religious societies, i.e., religious corporations.

The word “organization,” as employed in sec. 32.19 (2) (d) 3., is, in my opinion, sufficiently generic to include corporations.

The word “nonprofit” likewise describes or fits the character and activity of those societies incorporated under ch. 187. However, even assuming that the activities of the corporation might not fall within the meaning of the word “nonprofit,” such fact would not preclude recovery of relocation benefits, for such corporation would then, in all probability, fall within the definition of “business” contained in either sec. 32.19 (2) (d) 1., or 2.

Accordingly, it is my opinion that religious corporations incorporated under ch. 187, are of a class that fall within the definition of the term “person,” as used and defined in sec. 32.19. Religious corporations are entitled to relocation benefits under sec. 32.19, Stats.

VAM:CAB

County Board; Public Health; Since matters affecting health and welfare are of statewide concern, sec. 59.025 (2) (3), Stats., created by ch. 118, Laws of 1973, does not authorize county boards to abolish county departments, boards or committees pertaining to health and welfare and required by existing state statutes nor does it authorize the transfer of their functions and duties or consolidation of them into a single "Community Human Services Board."

November 25, 1974.

WILBUR J. SCHMIDT, Secretary
Department of Health and Social Services

You state that the Department of Health and Social Services is planning to initiate the development of four pilot community human service programs with local governmental subdivisions for the joint conduct of projects to study and demonstrate causes and methods of prevention and treatment of mental illness and other related social problems. You further state:

"The development of Community Human Service Pilot Programs represents a collaborative effort by the Department and the pilot counties to integrate public health, mental health and social service programs into a single, unified community agency which would operate under the jurisdiction of a Community Human Services Board. This comprehensive, unified board would assume the authority of existing boards, namely, the Community Mental Health, Mental Retardation, Alcoholism and Drug Abuse Board (Section 51.42), the Community Developmental Disabilities Board (Section 51.437), the County Board of Public Welfare (Section 46.21, 46.22), the County Board of Health (Section 140.09), County Committees of Health (Section 141.06), County Commissions on Aging (Chapter 118, Section 59.025 (3)(a), and 46.80 (1)(c), County Institution Boards of Trustee and other relevant committees."

You then inquire whether counties, pursuant to ch. 118, Laws of 1973, can establish a Community Human Services Board which would assume the powers and duties of the above existing boards and

would administer all the programs authorized by the statutes you cited above.

Section 59.025 (3), Stats., as created by ch. 118, Laws of 1973, provides:

“(3) CREATION OF OFFICES. Except for the offices of supervisor, judge, county executive and county assessor and those officers elected under section 4 of article VI of the constitution, the county board may:

“(a) Create any county office, department, committee, board, commission, position or employment it deems necessary to administer functions authorized by the legislature.

“(b) Consolidate, abolish or reestablish any county office, department, committee, board, commission, position or employment.

“(c) Transfer some or all functions, duties, responsibilities and privileges of any county office, department, committee, board, commission, position or employment to any other agency including a committee of the board.”

Section 51.42 (3), Stats., provides that the county board of any county *may* establish a community mental health, mental retardation, alcoholism and drug abuse board. Section 51.437 (2), Stats., provides that county boards *shall* establish community developmental disabilities services boards. Section 46.21 (1), Stats., provides that in each county having a population of 500,000 there is created a board of five members which shall be known as the “county board of public welfare.” Section 46.22 (1), Stats., provides that every county having a population of less than 500,000 may by a vote of its county board of supervisors elect to be under sec. 46.21 Stats., if not, there is created a county department of public welfare, which shall consist, *inter alia*, of a “county board of public welfare.” Section 140.09, Stats., provides for the establishment of a county health department or county board of health as well as a multiple county health department or board of health or a city-county health department or board of health. Section 141.06, Stats., provides that county boards shall establish county health committees. Section 46.80 (1) (c), Stats., merely authorizes the division or agency to promote and aid the establishment of programs and services for the

aging within subordinate units of government and sec. 59.025 (3) (a), Stats., was created, of course, by ch. 118, Laws of 1973.

In effect, you inquire whether county boards may abolish the aforementioned county departments, boards and committees and transfer their functions and duties and consolidate them into a non-statutory designated board entitled the "Community Human Services Board."

Section 59.025 (3), Stats., as created by ch. 118, Laws of 1973, does contain extremely broad language. It provides that the county boards, subject to specific exceptions, may create, consolidate, or abolish any county office, department, committee, board, commission, position or employment and transfer some or all functions, duties, responsibilities and privileges. However, this broad language is subject to the limitations set forth in subsection (2), which reads, in part, as follows:

"... The powers hereby conferred shall be in addition to all other grants and shall be limited only by express language but shall be subject to the constitution and such enactments of the legislature of statewide concern as shall with uniformity affect every county. In the event of conflict between this section and any other statute, this section to the extent of such conflict shall prevail."

All of the aforementioned county departments, boards and committees, except for the community mental health, mental retardation, alcoholism and drug abuse boards are established and required by statute. I can find no designation of what has been referred to as the "Community Human Services Board" in the statutes. A review of the legislative history of ch. 118, Laws of 1973, discloses that the legislature adopted the original bill, 1973 Senate Bill 27, with several amendments. Subsection (2) of section 1. of the original bill was amended by Assembly Amendment 7 deleting therefrom the word "liberally" which was contained between the words "construed in" of the original bill. Subsection (3), thereof remained intact. A note below subsection (2) in the original bill reads in part as follows:

"Specifically excluded from the grant of power to counties, under new s. 59.025, is county board authority over any

organizational features related to the following ... Any statutory enactments affecting counties which are considered subjects of statewide concern.”

A city in the performance of its duty to protect the public health is subject to legislative regulation and supervision by state authority in that regard. *State ex rel. Martin v. Juneau* (1941), 238 Wis. 564, 300 N.W. 187. At pages 570 and 571, the Court stated “there can be no question but that the promotion and protection of public health is a matter of statewide concern.” Likewise, sec. 49.50, Stats., provides for state supervision over welfare programs. According to a prior opinion, the then department of public welfare was authorized to establish *uniform standards* for granting old-age assistance, aid to dependent children, aid to the blind and aid to the totally and permanently disabled pursuant to sec. 49.50, Stats. 39 OAG 403.

Furthermore, Art. IV, sec. 22, of the Wisconsin Constitution reads:

“Powers of county boards. SECTION 22. The legislature may confer upon the boards of supervisors of the several counties of the state such powers of a local, legislative and administrative character as they shall from time to time prescribe.”

The court in *Muench v. Public Service Comm.* (1952), 261 Wis. 492, 515, 55 N.W. 2d 40, interpreted the foregoing section of the Constitution to mean that “the state may only delegate to county boards powers of a local character, and may not delegate powers over matters of state-wide concern.”

In my opinion, matters affecting the health and welfare of citizens of this state are of statewide concern. Thus, sec. 59.025 (2) (3), Stats., created by ch. 118, Laws of 1973, does not authorize county boards to abolish county departments, boards or committees pertaining to health and welfare and required by existing state statutes, nor does it authorize the transfer of their functions and duties or consolidation of them into a single “Community Human Services Board.” However, this opinion does not prevent the department from initiating human service programs with local governmental subdivisions for the joint conduct of projects to study

and demonstrate causes, methods of prevention and treatment of mental illness and other related social problems authorized by law.

VAM:GBS

Appropriations And Expenditures; Counties; Under ch. 333, Laws of 1973, counties may not expect reimbursement for care and services when sum certain appropriations are exhausted. Counties do have authority to provide the funding of such services on their own but are not required to do so when reimbursement is unavailable.

November 25, 1974.

WILBUR J. SCHMIDT, Secretary
Department of Health and Social Services

You request my opinion as to the effect of ch. 333, Laws of 1973, on county authority to provide for care and services, as opposed to money grants, to needy persons.

Basically, your opinion request raises three general legal questions of interest to counties. The first question is whether counties may expect reimbursement from the department for care and services after state and federal appropriations for such services have been expended. The answer to this question is "no."

As set forth in sec. 49.51 (3) (c), Stats., created by ch. 333, Laws of 1973, reimbursement for care and services are to be made from the appropriations under sec. 20.435 (4) (dh) and (p). The appropriations provide for a sum certain amount. When expended, the authority of the department to reimburse counties for such services is extinguished. The department cannot increase the appropriation set by the legislature. As set forth under Art. VIII, sec. 2, Wis. Const.: "No money shall be paid out of the treasury except in pursuance of an appropriation by law. ..."

The next general question raised by your opinion request is whether counties may use their own funds to provide for care and services to the needy. This question must be answered in the affirmative.

There is ample authority for counties to expend their own funds for such services. We need go no further than secs. 49.51 (2) (a) 2 and 46.22 (5) (e), Stats., relating to functions, powers and duties in the administration of county welfare services in both populous counties and others, which provide for the furnishing of "services to families or persons other than the granting of financial or material aid where such services may prevent such families or persons from becoming public charges or restore them to a condition of self-support."

These statutes are not conditioned upon an appropriation. In this connection, it is to be noted that when the legislature confers authority upon a municipal body to contract a debt and makes no special provision for payment, power to levy the necessary tax to discharge the debt is implied. *Oconto County v. Town of Townsend* (1933), 210 Wis. 85, 244 N.W. 761. Further, the legislature may properly impose new duties involving financial obligations upon counties without providing any appropriation on the theory that the county is a political subdivision or agency of the state. *Columbia County v. Board of Trustees of Wisconsin Retirement Fund* (1962), 17 Wis. 2d 310, 116 N.W. 2d 142. Relief legislation is intended for the benefit of those in need and the courts will construe such legislation so as not to enable anyone to escape valid and just obligations. Sutherland, *Statutory Construction*, 4th Ed., Vol. 3, sec. 71.08.

In view of the foregoing legal backdrop, I am persuaded that no court would countenance the argument that the authority of a county to assist persons in need is entirely conditioned upon state or federal reimbursement.

The third general question raised by your opinion request relates to the extent of care and services which must be provided by counties under ch. 333, Laws of 1973. Pursuant to sec. 49.51 (4), Stats., the department has identified certain services which have been mandated by the federal government. Section 49.51 (3) (c), Stats., provides in part:

"County agencies shall submit to the department plans and contracts for care and services to be purchased. Such contracts shall be developed under s. 46.036. The department shall review such contracts and approve them if they are consistent

with s. 46.036 and *if state or federal funds are available for such purposes. ...*" (Emphasis mine.)

It should be clear that the foregoing statutes are clearly conditioned upon an appropriation. They can have no effect when the appropriation has been exhausted. It follows that the program of mandatory care and services embraced by these statutes also ceases when appropriations have been expended. Accordingly, counties are not obliged to furnish care and services under secs. 49.51 (3) and 49.51 (4), Stats., after state and federal appropriations have been exhausted, but it should be added by way of a caveat that the federal government has not expressed itself on this point at the present time.

VAM:WLJ

Counties; Land; Soil absorption tests conducted by persons certified under sec. 145.045, Stats., must be accepted by county governments.

November 25, 1974.

GEORGE H. HANDY, M.D., *State Health Officer*
Department of Health and Social Services

You have requested the opinion of this office as to whether or not a county government can refuse to accept the results of soil tests conducted by a soil tester certified under sec. 145.045, Stats., and require that such tests be conducted by county employes. You describe the situation from which your request arises in the following statements:

"Four counties in Wisconsin, ... restrict the evaluation of sites for the construction of soil absorption systems to staff engaged by the county government. With the establishment of Chapter 287, Laws of 1973, ... we had hoped that these indicated counties would recognize and accept the work performed by a certified soil tester. ... we have received information that Winnebago County will not recognize the certified soil tester."

Chapter 287, Laws of 1973, provides:

“145.045 of the statutes is created to read:

“145.045 CERTIFICATION OF SOIL TESTERS. (1) POWERS AND DUTIES. The department shall by rule establish an examining program for the certification of soil testers, setting such standards as the department finds necessary to accomplish the purposes of this chapter. Such standards shall include formal written examinations for all applicants. The department shall charge applicants for the costs of examination and certification. After July 1, 1974, no person may construct soil bore holes, conduct soil percolation tests or other similar tests specified by the department, relating to the disposal of liquid domestic wastes into the soil unless he holds a valid certificate issued under this section.

“(2) REVOCATION OF CERTIFICATE. The department may revoke or suspend the certification of any soil tester but only after a formal hearing for the practice of any fraud or deceit in obtaining the certificate or any gross negligence, incompetence or misconduct in the practice of soil testing.

“(3) A plumber or septic tank installer may also be a soil tester and install any system after approval of the site or project by the state board of health or local county appointed administrator.”

Although sec. 145.045, Stats., refers to “certification” of soil testers, it appears that the statute actually contemplates *licensing* soil testers.

“License” was defined in *State ex rel. Fairchild v. Wisconsin Auto. Trades Assn.* (1949), 254 Wis. 398, 401, 37 N.W. 2d 98, as:

“... ‘Authority to do some act or carry on some trade or business, in its nature lawful but prohibited by statute, except with the permission of the civil authority or which would otherwise be unlawful.’”

Similarly, in *State v. Jackman* (1973), 60 Wis. 2d 700, 711, 211 N.W. 2d 480, the court stated:

“... Normally, a license is a right or permission granted by competent authority to do an act which without such license would be illegal. ...”

After July 1, 1974, no person may engage in the business of soil testing unless certified by the Department of Health and Social Services. Sec. 145.045 (1), Stats. “Certification,” under sec. 145.045, Stats., therefore, is functionally equivalent to “licensing.” *State ex rel. Fairchild v. Wisconsin Auto. Trades Asso., supra; State v. Jackman, supra.*

In *Wilkie v. City of Chicago* (1900), 188 Ill. 182, 58 N.E. 1004, 1007, 80 Am. St. Rep. 182, the court stated:

“The certificate, by express terms, authorizes the recipient to engage in the business of plumbing. A certificate or paper having that effect is a license, which, in its general sense, is an authority to do something which, without such authority, is prohibited. Webster defines a license to be a formal permission from proper authorities to perform certain acts or carry on a certain business, which, without such permission, would be illegal. The certificate is within that definition, and is a license.”

Courts have construed the word “certificate” as equivalent to and interchangeable with the word “license” in statutes where the context suggested that the legislature intended “license” when it used the word “certificate.” *Wilkie v. City of Chicago, supra; Dye v. State* (1939), 28 Ala. App. 473, 188 So. 74, 75, cert. den., 237 Ala. 587, 188 So. 75; *Hahn v. State* (1958), 78 Wyo. 258, 322 P. 2d 896. As the above cases indicate, the use of “certificate” and “license,” as interchangeable terms in appropriate contexts, is in accord with ordinary usage.

Accordingly, I conclude that the term “certificate,” as employed in sec. 145.045, Stats., signifies “license.” Sec. 990.01 (1), Stats.

Section 145.04 (2), Stats., provides:

“(2) NO LOCAL LICENSES. No ... county, ... may require the licensing of any person licensed or registered under this chapter or prohibit such person from engaging in or working at business within the scope of his license or permit.”

I have concluded that the certification provided in sec. 145.045, Stats., is a "license or permit." Accordingly, sec. 145.04, Stats., protects the right to engage in the business of soil testing conferred by certification under sec. 145.045, Stats.

The facts of the present situation are closely analagous to the facts discussed in 51 OAG 24 (1962). The question addressed in that opinion was the following:

"... may the city of Eau Claire lawfully require a plumber, duly licensed as such by the state of Wisconsin, to file an indemnity bond and a public liability insurance policy with the city clerk before he can engage in plumbing in such city?" 51 OAG at pp. 24-25.

Attorney General John W. Reynolds answered the above question in the following way:

"It is my opinion that the city of Eau Claire may not lawfully require the filing of the bond and insurance policy in question before a duly licensed plumber may engage in plumbing in that city. In effect, such a requirement clearly prohibits a plumber, licensed under Ch. 145, from engaging in or working at the business of plumbing until he complies with it. This being so, the requirement violates sec. 145.04 (2) since that statute specifically denies to cities and the other governmental units named the power to 'prohibit plumbers licensed under this chapter from engaging in or working at the business of plumbing.'

"Even if sec. 145.04 (2) did not exist, it would still be my opinion that the bond and insurance policy in question must be deemed unlawful under the principle, well recognized in Wisconsin, that where the state has entered the field of regulation, municipalities may not make regulations inconsistent or in conflict therewith. See *Fox v. Racine*, (1937) 225 Wis. 542, 545. Clearly, an ordinance of the kind in question, denying a plumber, duly licensed by the state, the right to act under such license in Eau Claire, unless and until he meets the bond and insurance policy requirement of such ordinance, is an ordinance in conflict with and inconsistent with state law. ..." 51 OAG at p. 26

Attorney General Reynold's reasoning quoted above is clearly applicable to the situation under discussion. Moreover, sec. 145.04 (2), Stats., was amended since 1962, to apply to the situation at hand. Furthermore, Wisconsin law continues to deny municipalities the authority to make regulations in conflict with state law in areas of state-wide concern. *Milwaukee v. Childs* (1928), 195 Wis. 148, 151, 217 N.W. 703; *Johnston v. Sheboygan* (1966), 30 Wis. 2d 179, 184, 140 N.W. 2d 247; 44 OAG 146 (1955).

All of the above cited cases and opinions concerned municipalities possessing home rule powers under Art. XI, sec. 3, Wis. Const. The issue presently under discussion, concerns counties which lack such powers. A county is an arm of the state, an instrumentality of the state created to carry out state functions at the local level. *State ex rel. Bare v. Schinz* (1927), 194 Wis. 397, 400, 216 N.W. 2d 509; *State ex rel. Sonneborn v. Sylvester* (1965), 26 Wis. 2d 43, 56, 132 N.W. 2d 249. Accordingly, a county has absolutely no authority to make and enforce regulations inconsistent with state public policy as established by statute.

The county regulations under discussion, prohibit a certified soil tester not employed by the county, "from engaging in or working at business within the scope of his license or permit." Sec. 145.04 (2), Stats. Furthermore, the county regulations are inconsistent with the regulatory scheme devised by the legislature in sec. 145.045, Stats.

In my opinion, therefore, a county government cannot refuse to accept the results of soil tests conducted by a soil tester certified under sec. 145.045, Stats., and cannot require that such tests be conducted by county employees.

VAM:CAB

Attorney General; Collective Bargaining; Attorney General declines to render an opinion on what is subject to collective bargaining in view of a preferred legislative intent that such questions be resolved through the declaratory judgment procedure before the Wisconsin Employment Relations Commission subject to judicial review.

November 25, 1974.

ROBERT P. RUSSELL, *Corporation Counsel*
Milwaukee County

You have asked for my opinion as to whether the Municipal Employment Relations Act, secs. 111.70-111.77, Stats., supersedes the County Civil Service Law, secs. 63.01-63.17, Stats. You explain that the cause for your request is a dispute between the county and labor organizations as to whether certain items established by the County Civil Service Law are nevertheless subject to collective bargaining by force of the Municipal Employment Relations Act.

By sec. 7 of ch. 124, Laws of 1971, the legislature created what is now sec. 111.70 (4) (b), Stats., which provides:

“Whenever a dispute arises between a municipal employer and a union of its employes concerning the duty to bargain on any subject, the dispute shall be resolved by the commission on petition for a declaratory ruling. The decision of the commission shall be issued within 15 days of submission and shall have the effect of an order issued under s. 111.07. ...”

An order under sec. 111.07, Stats., is subject to judicial review. See sec. 111.07 (8), Stats.

The Attorney General has a duty to advise district attorneys in all matters “pertaining to the duties of their office.” Sec. 165.25 (3), Stats. The Attorney General’s duty to a corporation counsel is the same as to a district attorney in respect to giving legal advice. See sec. 59.07 (44), Stats.

I respectfully decline to render an opinion on the question you pose for the following reasons:

First, the Attorney General’s duty toward corporation counsels is a general duty relating to all matters pertaining to the duty of their office. Section 111.70 (4) (b), Stats., is a more specific statute relating to the single issue as to what items are subject to the duty to bargain.

Second, sec. 111.70 (4) (b), Stats., is mandatory. Such disputes “shall” be resolved by the commission. Compare the declaratory

judgment procedure under sec. 227.06 (1), Stats., wherein the agency "may" render a declaratory judgment.

Third, by sec. 111.70 (4) (b), Stats., the legislature seeks three objectives: (a) that all interested parties in question have an opportunity to be heard through the declaratory judgment procedure; (b) that the dispute be "resolved;" and (c) that the disputants be entitled to prompt judicial review. An Attorney General's opinion fulfills none of these objectives. It is *ex parte* with no right in the affected parties to be heard; it does not "resolve" the dispute in the same way as does an order of the commission; and affected parties are not entitled to direct judicial review of an Attorney General's opinion.

It is my opinion, therefore, that to be consistent with legislative intent concerning disputes as to what is subject to collective bargaining I must decline to render an opinion in this matter.

VAM:CDH

Public Lands; An interested person may redeem land sold for the nonpayment of taxes up until the time a tax deed conveying the same is recorded.

November 25, 1974.

KEVIN J. KELLEY, *District Attorney*
Forest County

A situation exists in Forest County where a person is attempting to redeem land more than three years after the date of a tax sale, but prior to the issuance and recording of a tax deed. You have asked if the interested person is barred from redeeming the property because the redemption has been tendered more than three years from the date of the tax sale.

Although it might appear that secs. 74.46 and 75.01 (1), Stats., are in conflict, I am of the opinion that they are not.

Section 74.46, Stats., sets forth the statutory form of the certificate of sale to be issued by the county treasurer. This form includes language which specifies that the purchaser, his heirs or

assigns, will be entitled to a deed of conveyance in three years from the date of the certificate.

Section 74.46 and sec. 75.14 (1), Stats., are laws *pari materia* and must be construed with reference to each other. Section 75.14 (1) provides in pertinent part:

“If any land sold for non-payment of taxes shall not be redeemed as aforesaid, the city or village treasurer or county clerk *shall*, after the expiration of the time prescribed by law for the redemption thereof, on presentation to him of the certificate of sale and proof of service of notice, execute ... a deed of the land so remaining unredeemed, ... and [it] may be recorded with the like effect as other conveyances of land.” (Emphasis added)

The provisions of sec. 75.14 (1), Stats., are mandatory and the county clerk has no discretion when the requirements mentioned in that subsection are complied with. See 19 OAG 250 (1930). The mandatory execution of the tax deed is, of course, conditioned upon the initiative of the holder of the tax certificate in that he must present to the appropriate official the certificate of such sale and proof of service of notice.

I am of the opinion that secs. 74.46 and 75.14 (1), Stats., respectively specify when the holder of a tax certificate is eligible to receive a tax deed, and upon what conditions the appropriate official must execute a deed conveying the land described in the certificate to its holder.

From the facts presented, I presume that the holder of the certificate in this instance has not presented it to the county clerk and, therefore, the only question is whether or not the interested party may redeem the property more than three years after the tax sale.

I call your attention to 58 OAG 39 (1969), where at page 40 it provides:

“The period within which the former owner is permitted to redeem from tax sale is prescribed by secs. 75.01, 75.03, Stats. *Swanke v. Oneida County*, (1953) 265 Wis. 92, 60 N.W. 2d 756.”

Neither statutory provision places a time restriction on when redemption can be accomplished.

If the holder of the tax certificate has not presented the tax sale certificate, then the interested party may redeem the land in question.

VAM:MEP

Real Estate; Section 59.513, Stats., which requires identification of the draftsman in order to be a recordable instrument does not apply unless the instrument affects real estate in the manner described in the statute.

November 25, 1974.

JAMES C. EATON, *District Attorney*
Barron County

You have requested my opinion as to whether a particular document falls within the requirements of sec. 59.513, Stats. Subsection (1) of the statute in question reads in part:

“(1) No instrument by which the title to real estate or any interest therein or lien thereon, is conveyed, created, encumbered, assigned or otherwise disposed of, shall be recorded by the register of deeds unless the name of the person who, or governmental agency which, drafted such instrument is printed, typewritten, stamped or written thereon in a legible manner. ...”

The document in question does not bear the name of the draftsman or governmental agency which prepared the instrument.

The document reads in part:

“I, ..., Chairman of the Town of Lakeland, do hereby certify that the Town Board, of said Town of Lakeland is authorized to sell the following described property at a Town meeting held on April 4, 1961.”

The instrument contains a description of the lands and is in compliance with the requirements of sec. 706.07, Stats., the Uniform Acknowledgment Act.

The Register of Deeds of your county, for whom you have requested this opinion, states that she was of the view that sec. 59.513 (1) pertained to all instruments except those specifically mentioned in subsec. (2).

If such were the intent of the legislature, the statute could have easily so provided by eliminating the words following the word "instrument" up to and including the word "of." The statute would then read:

"No instrument shall be recorded by the register of deeds unless the name of the person who, or governmental agency which, drafted such instrument is printed ..."

As can be seen from the above illustration, if one were to accept the view of the Register of Deeds, all the words of the statute following the word "instrument" up to the phrase "shall be recorded" would not be given any force and effect. Such words would be treated as mere surplusage. This construction would violate a cardinal principle of statutory construction that effect must be given, if possible, to every word, clause and sentence of the statute. *Northern Discount Co. v. Luebke* (1959), 6 Wis. 2d 313, 94 N.W. 2d 605.

Following the rule of construction that effect must, if possible, be given to every word results in the conclusion that a specific class of instruments is covered by the statute. This class involves those instruments which actually affect title to real estate, an interest therein or lien thereon which is conveyed, created, encumbered, assigned or disposed of. In other words, the statute pertains to those situations where legal rights in real estate are created or transferred by the instrument.

Actually, the statute appears to be clear and certain. Where there is no ambiguity, construction is not permitted. *Beck v. Hamann* (1953), 263 Wis. 131, 56 N.W. 2d 837. This is certainly true where the intended construction by the Register of Deeds eliminates approximately a third of the statutory language.

Accordingly, it is my opinion that the document in question should be recorded despite the fact that it does not identify the draftsman or agency, for the instrument does not affect real estate or in other words does not create or transfer any rights in the described lands.

VAM:CAB

Counties; Sheriffs; County, with cooperation of sheriff and county board, may join with other counties to share services of deputy sheriffs in narcotics investigations within limits of secs. 59.24 (2), 66.305, 66.315, Stats.

November 25, 1974.

OWEN R. WILLIAMS, *District Attorney*
St. Croix County

This is the type of decision that tests this office.

There is inscribed in gold leaf in the impressive Governor's Conference Room the statement, "The will of the people is the law of the land." This is a simplified version of the American Dream. Sometimes, however, the printed statutes are the law of the land and so it is in this case.

Many good things can be said about consolidation, joint efforts and desire to unify action. Unfortunately, this opinion does not support those good purposes.

You state that the Wisconsin Council on Criminal Justice, Upper West Central Region, has considered the creation of a multi-county Narcotics Bureau in the nine county area adjacent to the Minneapolis-St. Paul metropolitan area. Assistance in funding such a joint program is available.

You inquire whether St. Croix County may join with the other eight counties to share the services of deputy sheriffs in narcotics investigations.

I am of the opinion that it can participate only to the limits permitted by secs. 59.24 (2), 66.305, 66.315, Stats. Sections 59.24

(2) and 66.305, read together, provide for mutual assistance of county law enforcement personnel, upon request, and sec. 66.315 provides for the responsibility for pay, service rights, and other benefits for law enforcement personnel while serving outside the county. The primary supervisory responsibility over the deputy sheriff must remain with the appointing sheriff, with secondary supervision during the period of service in another county being in the head of the law enforcement agency of the county or municipality which requested aid. The statutes do not permit the creation of a separate regional law enforcement agency and neither the sheriff nor the county board has power to delegate supervisory or law enforcement powers to such an agency.

We are concerned with deputy sheriffs paid from the county treasury, and the county board has an interest by reason of secs. 59.15 (2) (c) (granting to the county board the authority to establish the wages and conditions of employment of employes and the number of employes in any department), 66.315 (1), (2), Stats., and an intergovernmental cooperation agreement between the counties would be permissible under sec. 66.30, Stats. Also see sec. 59.21 (1) (c), Stats., 45 OAG 267 (1956), and OAG 70-73, dated November 8, 1973, to District Attorney, Barron County, as to residency requirement for deputies.

It appears to me that any funding assistance would have to be made to the county and be paid into and appropriated out of the county treasury by the county board and could not be paid directly to the sheriff or deputy involved. See secs. 34.105, 59.07 (5), 59.73, 59.74, 65.90, 66.042 (6), Stats.

VAM:RJV

Intoxicating Liquors; Municipalities; Class B liquor licensees must be similarly treated by a municipality as to the hours they may be open for sales of liquor.

December 29, 1974.

ROMAN W. FELTES, *District Attorney*
Trempealeau County

You have requested my opinion concerning the powers of a municipality to regulate the hours a retail intoxicating liquor licensee may remain open for the sale of intoxicating liquors. Specifically, you request:

“May municipalities provide for closing hours for places of business under Sec. 176.06 (5) that differ from that generally required of all other places selling and dispensing intoxicating liquors?”

As you have expressed in your letter, a particular municipality in your county currently does not allow sale of any intoxicating liquors by retail licensees on Sundays. Various hotels, restaurants, bowling alleys and golf courses, which are licensed for the sale of intoxicating liquors, desire to sell such liquors on Sundays. Regular “tavern” owners who are licensed for the sale of intoxicating liquors have objected to this request and desire to remain closed on Sundays.

I am of the opinion that a municipality cannot allow one group of “Class B” intoxicating liquor licensees to remain open for the sale of liquor on Sundays while forbidding another group of “Class B” intoxicating liquor licensees from opening for such sale on Sundays.

If a municipality were allowed to impose different standards on the same type of intoxicating liquor licenses solely on the basis of the type of business conducted by such licensees, the municipality would in effect be creating two types of licenses, i.e., a “Class B” intoxicating liquor license that is allowed to remain open for sales of liquor on Sundays and a “Class B” intoxicating liquor license that is forbidden to open for such sales on that day. Pursuant to statute, municipalities are allowed by state law to grant and issue only two types of intoxicating liquor licenses, “Class A” and “Class B” licenses. It is my opinion that a municipality cannot impose different requirements on the same class of licenses without violating sec. 176.44, Stats., which requires uniformity in the regulation of intoxicating liquors: While it is true that local governments may apply more restrictive provisions on licenses in general than those imposed by state statute (see sec. 176.43 (1), Stats.), such

governmental bodies cannot create within their confines different regulations to be applied to the same class of license.

I am in agreement with the result reached in 23 OAG 433, at 434 (1934), which reads, in part, as follows:

“It has been suggested that the local municipalities subdivide the ‘Class B’ licenses into ‘Class B Retailers’ licenses’ and ‘Class B Club Retailers’ licenses,’ and fix different fees for these classes, by virtue of sec. 176.43, which delegates to the cities, towns and villages power to prescribe additional regulations in or upon the sale of intoxicating liquor not in conflict with the provisions of the state law. This quite obviously would be a circumvention of the law which limits intoxicating liquor licenses to two classes. Such subdivision would be virtually creating three classes although still retaining only two alphabetical designations for the classes. There would be no good reason why the municipality could not as well create a number of other subdivisions under the ‘Class B’ and so completely destroy the uniformity which the legislature desired when it provided, in sec. 176.44, to the effect that the state liquor law ‘shall be construed as an enactment of state-wide concern for the purpose of providing a uniform regulation of the sale of liquors.’”

It is true that under sec. 176.06 (5), Stats., hotels, restaurants, bowling alleys and golf courses licensed for the sale of intoxicating liquors are permitted to remain open after other “Class B” intoxicating liquor licensees must close their doors. However, pursuant to said statute, these four types of businesses are only allowed to remain open to conduct their primary business but not to sell intoxicating liquors. With this one exception, sec. 176.06 (5), Stats., does not treat hotels, restaurants, bowling alleys or golf courses licensed for the sale of intoxicating liquors any differently than any other holder of an intoxicating liquor license.

BCL:SLM

Compatibility; Offices of county assessor and town supervisor are compatible.

December 30, 1974.

JOSEPH SALITURO, *Corporation Counsel*
Kenosha County

You request my opinion whether the offices of county assessor and town supervisor are compatible and further whether an employe of a county assessor may also serve as a town supervisor. I am of the opinion that a county assessor or an employe of a county assessor may, while so employed, also serve as a town supervisor.

A county assessor appointed under sec. 70.99 (1), Stats., is a county officer. *Thompson v. Kenosha County* (1974), 64 Wis. 2d 673, 682, 221 N.W. 2d 845. There are neither statutory nor common law limitations prohibiting a town supervisor from also holding a county office or from being employed by a county officer.

A person holding an assessor's position, however, is prohibited from serving as a member of the board of review which must consider his assessments. The Legislature has provided in several instances that an assessor may not sit on such boards of review. Sections 70.46 (1) and 70.46 (1a) provide that city, village and town boards of review shall be made up of officials other than the assessor.

Section 70.99 (10), Stats., provides for a county-wide board of review in those counties utilizing the county assessor system. While there is no statutory prohibition against a county assessor serving on the county board of review, I am of the opinion that the holding of the two offices would be prohibited by common law rules of incompatibility.

By statute, a town supervisor is a member of the town board of review. However, when the county assessor system is elected by a particular county, a county-wide board of review is substituted for the local boards of review. Although section 70.47 (3) (c), Stats. (1971), provided that a town board could elect to conduct its own board of review even though the county had elected a county assessor system, that provision was repealed by ch. 90, Laws of 1973. Hence, a town supervisor also holding the office of county assessor or serving as an employe of a county assessor will not be placed in a position of having to serve on the board which reviews those assessments for which he is in whole or in part responsible.

This opinion should not be construed as a comment on the desirability of dual office holding. Where two or more offices are not incompatible, it is for the electorate or the appointing authority to determine the desirability of a person holding more than one office. Since a county assessor and his staff are county officials, the county board can, pursuant to sections 59.15 (2) (c) and 59.07 (20), Stats., adopt reasonable regulations with respect to outside employment or office holding.

BCL:DJH:RJV

Navigable Waters; Riparian Rights; Public rights in navigable streams permit reasonable use of the bottom for purposes of anchoring various types of watercraft while and only so long as a public right is being enjoyed. Anchored watercraft may not be left unattended except by a riparian owner.

December 30, 1974.

GERALD K. ANDERSON, *District Attorney*
Waupaca County

You have asked my opinion concerning appropriate criminal action in a number of situations involving watercraft anchored or moored longer than one day.

Before addressing your specific questions, I will set forth certain general assumptions limiting the fact situations to which my opinion will apply. I will also state certain general principles upon which that opinion relies.

First, my opinion relates only to navigable streams, and should not be considered to extend to lakes or nonnavigable streams. Second, I have assumed that the boat owner in each situation described by your questions is not the riparian owner of the lands immediately adjacent to the area in which the boat is moored or anchored. Third, I have assumed the owner of the riparian lands has not given permission to the boat owner to use his land, trees or any structure attached thereto or set thereon.

Understanding this opinion requires that we recognize certain general principles relating to the state's governmental trust in navigable waters. A riparian owner on a navigable stream normally holds title to the bed of the stream to its thread. *Franzini v. Layland* (1903), 120 Wis. 72, 81, 97 N.W. 499; *Mayer v. Grueber* (1965), 29 Wis. 2d 168, 138 N.W. 2d 197. However, that title is qualified by the rights of the public resulting from the trust in our navigable waters. *Muench v. Public Service Comm.* (1952), 261 Wis. 492, 502-503, 53 N.W. 2d 514, 55 N.W. 2d 40. While the trust was created for the benefit of all the state's citizens, the legislature authorized limited encroachments upon the beds of such waters where the public interest will be served. *Hixon v. Public Service Comm.* (1966), 32 Wis. 2d 608, 146 N.W. 2d 577. In that case, the court said at p. 618:

"In all of these legislative authorizations of fill or structures on the beds of navigable waters, it was the function of the legislature to weigh all the relevant policy factors including the desire to preserve the natural beauty of our navigable waters, to obtain the fullest public use of such waters, including but not limited to navigation, and to provide for the convenience of riparian owners. ..."

Public rights in navigable waters consist primarily of the right to navigation and to its incidents such as fishing, hunting, skating, swimming, and enjoyment of scenic beauty. *State v. Public Service Comm.* (1957), 275 Wis. 112, 118, 81 N.W. 2d 71. Riparian rights relate primarily to the use of waters in relation to the use of adjacent shores, for example the rights to pierage, wharfage, exclusive possession of the exposed bed of the navigable water, relictions and accretions, *State ex rel. Chain O'Lakes P. Asso. v. Moses* (1972), 53 Wis. 2d 579, 582, 193 N.W. 2d 708; *Doemel v. Jantz* (1923), 180 Wis. 225, 193 N.W. 393. In contrast, public rights relate to the use of the waters themselves with only such use of the adjoining upland and river beds as is necessary to permit such use. *Willow River Club v. Wade* (1898), 100 Wis. 86, 101-102, 76 N.W. 273, 42 L.R.A. 305; *Munninghoff v. Wisconsin Conservation Comm.* (1949), 255 Wis. 252, 38 N.W. 2d 712; *Olson v. Merrill* (1877), 42 Wis. 203.

With the foregoing principles in mind, I will attempt to answer your questions in order. You first inquire what criminal action, if any, is appropriate where "a person, for a period of time longer than

one day, secures a boat/raft/shanty to a river bottom by means of anchors, pilings or poles placed there by himself or someone else, all of which is within the high water - including the normal river channel?"

Section 30.50 (1), Stats., provides:

“ ‘Boat’ means every description of watercraft, other than a seaplane on the water, used or capable of being used as a means of transportation on water.”

Accordingly, this opinion, when referring to boats, includes the various floating vessels referred to in your questions.

You do not indicate whether the “person” remains on board the boat during the time it is anchored, but it is assumed that your inquiry relates to those left unattended. If an unattended boat is attached to the bed of a navigable waterway for a period of time and in a manner which connotes permanency, e.g. spud poles, chain attached to cement filled drum or an object driven into the river bed, it would, in my opinion, be a prohibited “structure” in violation of sec. 30.12, Stats., and may also constitute an unlawful obstruction to navigation in violation of sec. 30.15. If the unattended and anchored boat is left on navigable water for an unreasonable length of time, it constitutes a violation of sec. 30.15. Since sec. 30.15 (3), Stats., provides that each day an obstruction to navigation exists constitutes a separate violation, it is likely that leaving such unattended and anchored boat for more than one day would *prima facie* be a violation.

Next, you ask what criminal action, if any, is appropriate if a person secures a boat (as defined in sec. 30.50 (1), Stats.), to trees growing on the river bottom between ordinary high water mark and the normal land, or to a dock or wharf projecting from shore beyond the high water mark in true effect, and owned by an adjoining landowner.

Securing a boat to a tree growing on the river bottom is a permitted use of the bottom, as is use of an anchor. Standing timber has always been considered part of the real estate. *Van Doren v. Fenton* (1905), 125 Wis. 147, 103 N.W. 228. However, the right to anchor a boat floating on navigable water does not extend to the use of a pier, wharf or dock without the consent of the riparian owner.

The riparian owner, of course, has the right to charge for the use of the pier, and use of such a structure without the owner's consent would constitute a trespass. In such a case, the riparian owner must look to the civil courts for redress.

It is imperative to note that a "boat" anchored for the purposes of allowing its occupants to fish, swim or otherwise sport upon the waterway is free from legal objection. So long as the craft is occupied it is difficult to credit any basis for legal objection thereto, whether the boat is anchored for one hour or one week. Only in the event the place and manner in which it is anchored should constitute an *unreasonable* obstruction to navigation could there be complaint. 65 C.J.S. Navigable Waters, sec. 44.

As pointed out in 56 Am. Jur., Waters, sec. 467, even a riparian owner may not interfere unreasonably with the public right of navigation in the exercise of his riparian rights. Surely, however, the riparian rights are greater than those who only exercise the rights of the public-at-large.

I would also observe that any riparian owner may charge a fee for the use of his lands in conjunction with the storage, moorage or anchorage of a boat on his premises. Riparian owners have a right to store, dock or anchor boats on their premises. The only authority of local municipalities to interfere with those rights are those set forth in sec. 30.77, Stats., where for purposes of health or safety there is a need for regulation of boats, their use or operation. There is no authority to require annual licenses or permits for such objects. *Madison v. Tolzmann* (1959), 7 Wis. 2d 570, 97 N.W. 2d 513; *Menzer v. Village of Elkhart Lake* (1971), 51 Wis. 2d 70, 186 N.W. 2d 290.

In summary I answer your questions by saying that any "boat" as defined in sec. 30.50 (1) may be used on rivers of the state for floating, fishing, swimming or any of the recognized incidents of navigation without charge or fee by any landowner or municipality. Use of the bottom is permitted for purposes of anchoring the boat while it is being used in connection with the exercise of the above-mentioned public rights. The use may also include such incidental utilization of the shore or bottom as tying to trees standing in or hanging over the water that can be reached from the boat, or driving of poles or piling for such anchor purposes.

Public rights in navigable waters do not extend to the use of privately owned uplands, or trees thereon, adjacent to the waters of the stream where such use requires entry upon these lands. Neither do public rights extend to privately owned structures such as wharves, piers, docks or buoys within or extending over a stream. Public rights do not permit anchorage in a waterway which unnecessarily or unreasonably impedes navigation of the stream by other craft.

Riparian owners have a right to tie up their boats when not in use to their own docks, piers or buoys, and may permit another to do so with or without charge. These riparian rights only exist so long as they do not unnecessarily or unreasonably conflict with the right of the public to use the stream.

Finally municipalities may not license or require permits for the exercise of any public right in navigable waters except where specifically authorized by statute. They may enact reasonable police power limitations upon the exercise of riparian rights. Such power may not be used to diminish the riparian owner's exercise of his public rights in navigable waters.

BCL:RBM

Public Records; A copy of an official record may be admitted in evidence if it is certified as correct in accordance with sec. 909.02 (4), Wisconsin Rules of Evidence, even though the certification does not comply with the provisions of sec. 889.08 (1), Stats.

December 31, 1974.

NORMAN M. CLAPP, *Secretary*
Department of Transportation

Section 889.08 (1), Stats., provides that, in certifying a copy of a public record, the custodian thereof shall certify that the copy has been compared "by him" with the original and found to be a true copy. In *Stevens v. Clark County Supervisors* (1877), 43 Wis. 36, the court held that a certification without the words "by him" is insufficient as a certification under this statute. Your question is whether a certification without the words "by him" but in compliance

with sec. 909.02 (4), Wisconsin Rules of Evidence, 59 Wis. 2d R p. 341, would be sufficient to authenticate a copy so that it could be admitted into evidence. The answer is yes.

Section 909.02, Wisconsin Rules of Evidence, reads in part:

“909.02 Self-authentication. Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

“(1) PUBLIC DOCUMENTS UNDER SEAL. A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer or agency thereof, and a signature purporting to be an attestation or execution.

“***

“(4) CERTIFIED COPIES OF PUBLIC RECORDS. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with sub. (1), (2) or (3) or complying with any statute or rule adopted by the supreme court.”

This rule provides that extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to a copy of an official record, where it is certified as correct by the custodian thereof by a certificate complying with sub. (1) or complying with any statute or supreme court rule. The Judicial Council Committee's Note on sub. (4) of this section, 59 Wis. 2d Rp. 344, provides in part:

“Sub (4). The manner of certification provided in this subsection is different from that provided for in s. 889.08; however, there is no need to amend s. 889.08 ...”

Thus it is clear that this rule provides an alternate method for certifying copies of official records. The certificate may comply with a statute, such as sec. 889.08 (1), Stats., for example. However, a

certificate may also comply with sub. (1) of the above rule, in which case it need not comply with the statute.

For the certificate to comply with sub. (1) of the rule it need only bear the seal of a state department and a signature purporting to be an attestation or execution. The copy need only be certified as correct by the custodian of the original record. There is no requirement that the custodian must state that the copy has been compared by him with the original. It is, therefore, my opinion that a copy of an official record may be admitted in evidence if it is certified as correct in accordance with sec. 909.02 (4), Wisconsin Rules of Evidence, even though the certification does not comply with the provisions of sec. 889.08 (1), Stats.

The Administrator of the Division of Motor Vehicles need not personally sign his name to such certificates. Section 110.015, Stats., specifically authorizes him, through his authorized employes, to execute or affix his signature to a certificate with a stamp, reproduction print, or other similar process. Preparation of copies and certificates, and affixing the seal and signature involves no discretion and is purely ministerial. The law is clear that such ministerial duties can be delegated by the Administrator to his subordinates. 73 C.J.S., Public Administrative Bodies and Procedure, sec. 57, page 381; *School District v. Callahan* (1941), 237 Wis. 560, 577, 297 N.W. 407; *Park Bldg. Corp. v. Industrial Com.* (1960), 9 Wis. 2d 78, 86, 100 N.W. 2d 571.

BCL:AOH

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<i>Counties; Zoning;</i> County shoreland zoning of unincorporated areas adopted pursuant to sec. 59.971, Stats., is not superseded by municipal extraterritorial zoning under sec. 62.23 (7a). Sections 59.971, 62.23 (7), 62.23 (7a) and 144.26 discussed. Municipal extraterritorial zoning within shorelands is effective insofar as it is consistent with, or more restrictive than, the county shoreland zoning regulations.	69
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<i>Real Estate Examining Board; Zoning;</i> Provisions in Executive Order 67 (1973), with respect to duty of real estate broker to advise prospective purchasers of flood plain zoning status of property, do not constitute new standard but suggest course of action Real Estate Examining Board might take. Action to be taken would depend on facts in each case.	236
<i>Towns; Zoning;</i> Under the provisions of sec. 59.97 (5) (c), Stats., town board approval of a comprehensive county zoning ordinance must extend to such ordinance in its entirety and may not extend only to parts of such ordinance.	199
<i>Zoning; Foster Homes;</i> Foster homes owned, operated or contracted for by the Department of Health and Social Services or a county agency are immune	

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from local zoning ordinances. Foster homes owned, operated or contracted for by licensed child welfare agencies are not immune. All family operated foster homes are subject to local zoning. Municipal foster home licensing ordinances are unenforceable. Zoning ordinances utilizing definitions of "family" to restrict the number of unrelated persons who may live in a single family dwelling are of questionable constitutionality..... 36