OPINIONS

OF THE

ATTORNEY GENERAL

OF THE

STATE OF WISCONSIN

VOLUME 64

January 1, 1975 through December 31, 1975

BRONSON C. LA FOLLETTE

ATTORNEY GENERAL

MADISON, WISCONSIN
1975

ATTORNEYS GENERAL OF WISCONSIN

FROM THE ORGANIZATION OF THE STATE

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

BRONSON C. La FOLLETTE, Madison.....from Jan. 5, 1965, to Jan. 6, 1969
ROBERT W. WARREN, Green Bay.....from Jan. 6, 1969, to Oct. 8, 1974
VICTOR A. MILLER, Saint Nazianz.....from Oct. 8, 1974 to Nov. 25, 1974
BRONSON C. La FOLLETTE, Madison.....from Nov. 25, 1974 to

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LEGAL SERVICES DIVISION

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DAVID J. HASE	Deputy Attorney General
HOWARD J. KOOP	Executive Assistant
WILLIAM H. WILKER	Admin., Legal Services Division
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JOHN E. ARMSTRONG	Assistant Attorney General
JAMES H. BAILEY[1]	Assistant Attorney General
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CHARLES A. BLECK	Assistant Attorney General
MARY V. BOWMAN	Assistant Attorney General
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BETTY R. BROWN	Assistant Attorney General
WILLIAM D. BUSSEY	Assistant Attorney General
JOHN W. CALHOUN	Assistant Attorney General
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BRUCE A. CRAIG	Assistant Attorney General
LEROY L. DALTON	Assistant Attorney General
FREDERICK J. ERHARDT	Assistant Attorney General
GEORGE L. FREDERICK	Assistant Attorney General
WILLIAM L. GANSNER	Assistant Attorney General
DAVID J. GILLES	Assistant Attorney General
JOHN J. GLINSKI	Assistant Attorney General
PAUL J. GOSSENS[1]	Assistant Attorney General
JOHN DOUGLAS HAAG	Assistant Attorney General
ALBERT O. HARRIMAN	Assistant Attorney General
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DANIEL A. MILAN	Assistant Attorney General
ROY G. MITA	Assistant Attorney General
MARGUERITE M. MOELLER[2]	Assistant Attorney General
STEPHEN L. MORGAN[1]	Assistant Attorney General
JOHN C. MURPHY	Assistant Attorney General
LOWELL E. NASS	Assistant Attorney General
DAVID W. NEEB	Assistant Attorney General
STEPHEN J. NICKS[1]	Assistant Attorney General
JOHN D. NIEMISTO[2]	Assistant Attorney General
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PETER A. PESHEK	Assistant Attorney General
JAMES H. PETERSEN	Assistant Attorney General
WILLIAM A. PLATZ[3]	Assistant Attorney General
THEODORE L. PRIEBE	Assistant Attorney General

ROBERT D. REPASKY ..... Assistant Attorney General
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E. WESTON WOOD ..... Assistant Attorney General
E. GORDON YOUNG ..... Assistant Attorney General
MICHAEL L. ZALESKI ..... Assistant Attorney General

[1]Resigned, 1975.

[2]Appointed, 1975.

[3]Died, 1975.

In Memoriam: William A. Platz

The sudden death of Assistant Attorney General William A. Platz on December 12, 1975, brought to a close a life memorable, among other things, for a rich and remarkable contribution to our system of criminal law in Wisconsin.

William A. Platz, much better known to a host of friends and admirers as "Bill," was born in Watertown, Wisconsin, on November 10, 1910. He graduated from Marquette University, then entered the University of Wisconsin Law School, where he proved to be an outstanding student, and was Editor-in-Chief of the *Wisconsin Law Review*. He was also a member of the Order of the Coif, which is made up of persons who have demonstrated academic excellence in law school.

In 1937 Bill joined the staff of the Attorney General's office. Not long after doing so, he commenced his work in the field of criminal law. It was in that field that he developed the formidable expertise that was to serve the State of Wisconsin and its citizens so well and which brought Bill well-deserved respect and renown.

Bill was a rare individual and lawyer: a remarkable blend of knowledge, industry, courage, kindness and good humor.

As Bill's colleagues and so many others well knew, he was a walking repository of knowledge of the criminal law. It was great knowledge without arrogance or stuffiness about its possession, and Bill had a willingness to share it generously with those less knowledgable--meaning nearly everybody.

As for industry, Bill, German by descent, had the fine appetite for work so often attributed to those of that ancestry. That appetite, coupled with his great knowledge of the criminal law, predictably produced a most substantial contribution to our criminal law system in Wisconsin--a contribution spanning not years, but decades.

Courage, too, was something Bill had in large measure. For years before his death, he worked diligently and faithfully under a burden of physical ailments that would have driven many persons into retirement or at least a marked reduction in productivity. He did not complain, got the job well done, and enjoyed a deeply personal, if unsung triumph, over his physical ills that was the product of pure courage. To borrow from the poet Henley's "Invictus," Bill's head remained "bloody but unbowed" through

many years when good physical health was no longer his, though his mind remained keen and, as always, a prodigious storehouse of well-remembered knowledge.

Finally, Bill was endowed with kindness and a sense of humor. The practice of criminal law can and often does serve as a pickling process, a sort of vat of legal brine whose contents are hostile to the qualities of good humor and kindness and tend to leach out those qualities from the minds of lawyers long immersed in that vat. That leaching process, however, didn't work with Bill. He was kind to those he dealt with; and his good humor was always close to the surface, ready to emerge in telling a good story, or in enjoying one told, or in making a remark, in writing or in conversation, which was witty and amusing, and which helped to light up the dark precincts of the criminal law in which he worked, which are so full of man's errors and failings, criminal and legal.

Long ago, in medieval times, some monk who thought as ill of the legal profession as many in our nation now do, uttered the maxim, "Bonus jurista, malus Christa." That translates, "Good lawyer, bad Christian" or, "A good lawyer makes a bad Christian." This maxim was a faulty generalization when first uttered, and is faulty now--and it is men such as Bill Platz whose lives, manners and morals show it to be so. Regretting his passing, we can nevertheless be thankful that we had him so long in the legal profession and in our state. He strengthened both, not only because he was "bonus jurista"--a good lawyer, and many would say a great one--but also because he was a good and humorous and humane man.

PREFACE

Formal opinions of the Attorney General are now classified as either published or unpublished opinions. Published opinions will appear in full in the annual volume of *Opinions of the Attorney General of Wisconsin.* Beginning with this volume, the captions of all unpublished opinions for the year will appear in the appendix.

Published opinions are those having wide application or interest. Unpublished opinions are those having limited application or interest.

All formal opinions of the Attorney General, whether ultimately published or not, are consecutively designated as they are issued. The designation for each opinion shows its number, followed by the last two digits of the year in which it is issued. Thus all formal opinions for 1975 were consecutively numbered OAG 1-75, OAG 2-75, etc.

Beginning with this volume, the designation for each opinion will be shown at the end of the caption to the opinion. This designation is not intended to replace the traditional form of citation for opinions of the Attorney General, *e.g.*, 64 OAG 1 (1975), but will serve as an alternate form of citation when the traditional form is unavailable and as another method of reference particularly when requesting the full text of an opinion not otherwise available.

Requests for copies of the full text of any opinion may be made to the Wisconsin Department of Justice, 114 East, State Capitol, Madison, Wisconsin 53702. All requests should designate the opinion sought by number.

OPINIONS

OF THE

ATTORNEY GENERAL

Volume 64

Contracts; Natural Resources, Department Of; Public Officials; Article XIII, sec. 3, Wis. Const., does not bar a "congressional home secretary" from serving as a member of the Natural Resources Board. OAG 5-75.

March 13, 1975.

HAROLD C. JORDAHL, *Chairman*
Natural Resources Board

You have requested my opinion with respect to whether Art. XIII, sec. 3, Wis. Const., bars a "congressional home secretary" from serving as a member of the Natural Resources Board of the Department of Natural Resources.

In relevant part, Art. XIII, sec. 3, Wis. Const., provides:

> "No member of congress, nor any person holding any office of profit or trust under the United States (postmasters excepted) ..., shall be eligible to any office of trust, profit or honor in this state."

The answer to your question depends on whether a "congressional home secretary" is an officer of the United States, subject to the constitutional prohibition. This office has been

called upon on several prior occasions to render similar opinions with respect to other federal positions. Perhaps the most comprehensive analysis is found in 19 OAG 241 (1930). That opinion lists criteria for distinguishing between office and employment. Those criteria which are characteristic of an office are the following: The position is continuous and permanent, having a fixed tenure. Oath and bond are required. Duties of the position are described by law. The holder of the position has been delegated some portion of the sovereign power. Qualifying this list of criteria, the opinion notes that not all are required in order to conclude that a position constitutes an office. These criteria are likewise not the only tests applicable.

Many federal cases have dealt with the officer-employe distinction. See 54 Am. Jur., United States, secs. 11 and 12, pp. 528-530. *Walsh v. United States* (E.D. Penn. 1957), 156 F. Supp. 619, citing *Burnap v. United States* (1920), 252 U.S. 512, 40 S. Ct. 374, 64 L. Ed. 692, lays down the following test for determining whether a particular position is a "federal office":

> "... the United States Supreme Court has emphasized in its most recent case on the subject [*Burnap*] that the 'manner in which Congress has specifically provided for' the following three attributes of the position is the determining factor:
>
> "a. The creation of the position.
>
> "b. The duties of the position.
>
> "c. The appointment to the position."

Beal v. United States (6th Cir., 1950), 182 F. 2d 565, also elaborates on the *Burnap* test. In concluding that the plaintiffs were not officers of the United States, the *Beal* court stated:

> "Here, ... no Act of Congress appears which specifically creates the positions occupied and details the duties, tenure and emoluments of incumbents. The posts were filled under a blanket authority (5 U.S.C.A. sec. 43), which authorizes employment by each executive department and independent establishment of such clerks and other employees of various classes as may be appropriated for by Congress from year to year. ... Appropriation acts do not create offices. There must be a basic authority for the creation of an office. ... We think the sounder rule to be that an office of the United States does

not exist unless it is created by some specific Act of the Congress. ..." 182 F. 2d at 567-568.

As nearly as I have been able to determine, a "congressional home secretary" serves as the personal representative in the home district of the congressman by whom he is appointed. 2 U.S.C. sec. 57 appears to provide authority for the position and for compensation to be paid out of a general fund allocated to each congressman. That section provides in part:

> "(a) Until otherwise provided by law, the Committee on House Administration may, as the committee considers appropriate, fix and adjust from time to time, ... the amounts of allowances ... within the following categories:
>
> "(1) for Members of the House of Representatives, ... allowances for clerk hire, ... official office space and official office expenses in the congressional district represented, ..."

The "congressional home secretary" acquires his position through appointment by a congressman, and may assume the position upon completion of various pay and retirement forms and the satisfaction of an oath requirement. Bond is not required. A regular salary is paid from which certain job-related expenses must be deducted. As the congressman's personal representative, the secretary performs a number of duties. He is responsible for the supervision of the congressman's district office and the persons employed in connection therewith. He serves as a liaison between the congressman in the nation's capital and the citizens in the district. In addition, he is called upon to make personal appearances on behalf of the congressman.

Application of the previously stated tests to these facts requires the conclusion that a "congressional home secretary" is not an officer of the United States. The secretary is not required to post bond. His duties are nowhere specifically detailed in the law. The phrase "congressional home secretary" is not used in the United States Code. He has not been vested with any portion of the sovereign power. His appointment is not by the President, a federal court, or an authorized federal departmental head. Article II, Section 2, Clause 2, U.S. Constitution.

The position appears to be of the sort discussed in *Beal v. United States, supra.* Apparently, the position was created and the

secretary appointed under a blanket authority (2 U.S.C. sec. 57), authorizing the employment of individuals by congressmen within the general category of clerk. The authorizing statute, which merely provides for the allocation of funds, appears to be that type of appropriation Act which *Beal* held could not create a federal office.

Only the oath requirement stands out on the officer side of the officer-employe distinction. But in this case, even the oath is not indicative of an office. The requirement (5 U.S.C. sec. 3333) is satisfied by the execution of an affidavit under oath that the "acceptance and holding of the office or employment does not and will not violate" 5 U.S.C. sec. 7311. The latter provision relates to loyalty, national security and striking. This affidavit is required of individuals who accept an office or employment in the United States Government. Taken alone, it does not indicate an office.

Therefore, I conclude that Art. XIII, sec. 3, Wis. Const., does not operate to bar a "congressional home secretary" from serving as a member of the Natural Resources Board.

BCL:JCM

Public Welfare, Department Of; Purchases, Bureau Of; The provisions of ch. 16, subch. IV, Stats., applying to state purchases, do not apply to the purchase of materials, supplies, equipment and other personal property and contractual services made by the Division of Vocational Rehabilitation for clients under rehabilitation plans. OAG 6-75.

March 13, 1975.

ROBERT R. RINGWOOD, *State Auditor*
Legislative Audit Bureau

You have asked for my opinion on the following question:

> "Do the provisions of Chapter 16, Subchapter IV of the state statutes, which govern state purchases, apply to the purchase of materials, supplies, equipment and other personal property and contractual services made by the Division of

Vocational Rehabilitation in conjunction with individual client rehabilitation plans?"

As you have indicated, the issue underlying this inquiry is whether the statutory purchasing regulations apply to all purchases made by the expenditure of state funds, including federal funds deposited in the State Treasury, regardless of the purpose for which the purchase is made. It is my opinion that the purpose for the purchase, not the source of funds, determines whether the statutory purchasing requirements apply.

The statutory requirements relevant to your inquiry are found in secs. 16.71 (1) and 16.75 (1), Stats. The latter section requires that materials, supplies, equipment and contractual services valued in excess of $3,000 be purchased from the lowest responsible bidder. The applicability of that section and the general regulation of state purchasing are governed by sec. 16.71 (1), Stats., which provides as follows:

> "PURCHASING, POWERS. The department of administration shall purchase and may delegate to special designated agents the authority to purchase:
>
> "(1) All necessary materials, supplies, equipment, all other permanent personal property and miscellaneous capital, and contractual services and all other expense of a consumable nature *for all state offices.* All such materials, services and other things and expense furnished to any such office shall be charged to the proper appropriations of the offices to whom furnished, as provided in s. 20.505." (Emphasis supplied.)

The statutory purchasing regulations apply only to purchases "for all state offices." Section 16.70 (1), Stats., defines the term "office" as including "both houses of the legislature and any department, board, commission or body connected with the state government, including all educational, charitable, correctional, penal and other institutions."

An examination of the applicable provisions of the Wisconsin State Rehabilitation Plan and related federal regulations clearly indicate that such purchases are for the benefit of the rehabilitation client.

Section 20.6 of the Wisconsin State Plan provides:

"20.6 Purchase of Equipment

"The Department will provide to eligible clients tools, initial stocks (including livestock) and supplies, equipment; initial stocks and supplies for vending stands and small business enterprises; and occupational licenses to the extent necessary to achieve the vocational rehabilitation objectives indicated on the rehabilitation plan. The department may elect, in certain instances, to retain residual title to items provided under this section."

Chapter 12, HEW-SRS Vocational Rehabilitation Manual provides in part:

"Occupational tools, supplies, etc. are issued to clients or beneficiaries as a rehabilitation service. In general the client or beneficiary has both the custody and control of the equipment and retains such equipment for use in connection with his occupation."

While the Division of Vocational Rehabilitation does have the option of retaining residual title in property purchased for rehabilitation clients, the availability of that option does not operate to make the purchase one for a state office. It is clear that purchases made for rehabilitation clients are primarily for the benefit of the client and not the state.

In 36 OAG 75 (1947), this office observed that any power exercised by the bureau of purchases must be based upon an express statutory provision conferring such power. Administrative agencies have only such powers as are expressly granted to them or necessarily implied, and any power sought to be exercised must be found within the four corners of the statute under which the agency operates. *American Brass Co. v. State Board of Health* (1944), 245 Wis. 440, 15 N.W. 2d 27.

In the fifty-four years of administration of the vocational rehabilitation program and the forty-five years of administration of the state purchasing program, the language of ch. 16, subch. IV, Stats., has never been interpreted as applicable to the purchase of goods and services for rehabilitation clients. This long-standing interpretation is entitled to great weight, providing as it does a practical administrative construction which resolves any ambiguity which may exist on account of the state's option to retain residual

title in property purchased for rehabilitation clients. *Sutherland Statutory Construction*, 4th Edition, Volume 2A, sec. 49.07; *Forsberg Paper Box Co. v. Dept. of Taxation* (1961), 14 Wis. 2d 93, 109 N.W. 2d 457.

Because ch. 16, subch. IV, Stats., applies only to purchases of property for the state, those regulations are not applicable to purchases of property for rehabilitation clients by the Division of Vocational Rehabilitation notwithstanding the fact that all purchases for rehabilitation clients are made with state funds or federal funds deposited with the state.

BCL:APH

Corporations; Credit Unions; The Wisconsin Credit Union Share Insurance Corporation does not have authority unilaterally to regulate the credit union industry of this state. OAG 7-75.

March 24, 1975.

WILLIAM H. HUGHES
Commissioner of Credit Unions

You have requested my opinion as to the powers and authority of the Wisconsin Credit Union Share Insurance Corporation. Specifically you ask whether that corporation has the authority to demand reports from credit unions, to conduct examinations and inspections of credit unions, to dictate lending and collecting procedures of credit unions, and to approve the actions of the commissioner of credit unions in the granting of a certificate of authority for the establishment of subsidiary offices. You also ask whether the Wisconsin Credit Union Share Insurance Corporation has authority analogous to that of the Federal Deposit Insurance Corporation over its member banks.

The commissioner of credit unions has primary responsibility for regulation of credit unions in this state and the enforcement of all laws relating to credit unions. Sec. 186.012 (2), Stats. The Wisconsin Credit Union Share Insurance Corporation was created by ch. 375, Laws of 1969, and it derives its authority from the provisions of sec. 186.35, Stats. That corporation is under and

subject to the exclusive supervision of the commissioner of credit unions. Sec. 186.35 (1) and (7), Stats.

The purpose of the Wisconsin Credit Union Share Insurance Corporation is to "aid and assist any member credit union which develops financial difficulties ... in order that the shareholdings of any individual member of a credit union shall be protected or guaranteed to any amount not to exceed $20,000." Sec. 186.35 (2) (a), Stats. The corporation is also under an obligation to "cooperate with its member credit unions and the credit union division of the office of the commissioner for the purpose of improving the general welfare of credit unions in this state." Sec. 186.35 (2) (b), Stats.

The corporation does not have the authority to regulate, on its own motion and without your approval, any aspect of the credit union industry. No such regulatory authority is expressly provided to it under its general powers set forth in sec. 186.35 (3), Stats. It is clear from the general definition of its purposes that the corporation is limited to aiding and assisting member credit unions with respect to financial difficulties and cooperating with its members and the commissioner in the improvement of the general welfare of credit unions throughout the state.

Any attempted regulation of credit unions by the Wisconsin Credit Union Share Insurance Corporation without your approval would be in direct conflict with the "supervisory control" over that corporation which the legislature has vested in the commissioner of credit unions. The legislature has determined the regulatory policy relating to credit unions. Such right of regulation is exclusively within the domain of the legislature. *State ex rel. Barber v. Circuit Court* (1922), 178 Wis. 468, 478, 190 N.W. 563. The subject matter being fully regulated by state statutes, the corporation cannot further regulate by asserting power which is repugnant to the statute. 16 C.J.S., *Constitutional Law*, sec. 169.

While there is no doubt that the corporation has a great interest in maintaining the stability of credit unions, its authority within the framework of ch. 186, Stats., is that of an advisor to member credit unions and to the commissioner where liquidation is in order. Sec. 186.35 (3) (e), Stats. In this connection, it might be noted that while final judgment and discretion in credit union matters must be exercised by the commissioner, your office would not be

precluded from using the corporation as a subordinate in aid of the exercise of such discretion. *Park Bldg. Corp. v. Industrial Comm.* (1960), 9 Wis. 2d 78, 100 N.W. 2d 571. However, the commissioner could not abdicate his discretionary responsibilities to such a subordinate and become merely a rubber stamp for such body. *State ex rel. Farrell v. Schubert* (1971), 52 Wis. 2d 351, 190 N.W. 2d 529.

The authority of the Wisconsin Credit Union Share Insurance Corporation is not analogous to the authority of the Federal Deposit Insurance Corporation. The latter corporation is made up of a board of directors consisting of the Comptroller of the Currency together with two members appointed by the President of the United States. This federal corporation is explicitly authorized under federal statutes to issue regulations and orders, to make examinations and hold hearings, to issue subpoenas and conduct investigations. 12 U.S.C. sec. 1811 *et seq.*

The Federal Deposit Insurance Corporation is not a mere subordinate in the regulatory scheme of administrative law. It is an instrument of the federal government which exercises legislative power according to specific Congressional enactments.

The Wisconsin Credit Union Share Insurance Corporation cannot make such claims of authority. It is a non-profit corporation with relatively limited powers defined by statute. Its operations are "under the exclusive supervision of the commissioner" and by Wisconsin statute its articles of incorporation require his approval. Sec. 186.35 (1), Stats. Standing alone, it does not have investigative, hearing, subpoena, regulatory or enforcement powers.

It is my opinion that the Wisconsin Credit Union Share Insurance Corporation does not have authority unilaterally to regulate the credit union industry of this state. Subject to the supervision and approval of the commissioner of credit unions, however, that corporation could exercise functions related to insuring the financial stability of credit unions and improving the general welfare of credit unions throughout the state.

BCL:WLJ

Banks And Banking; The twenty-five-mile limitation upon the location of branch banks pursuant to sec. 221.04 (1) (j), Stats., is to be measured on a straight-line distance basis. OAG 8-75.

March 28, 1975.

ERICH MILDENBERG
Commissioner of Banking

You have asked for an interpretation of sec. 221.04 (1) (j), Stats., which requires that a branch bank in a contiguous county be located within twenty-five miles of the home bank. You have asked whether this distance is to be measured in a straight-line, or on the basis of public road miles. It is my opinion that the required twenty-five miles is to be measured on a basis of straight-line distance.

Section 221.04 (1) (j), Stats., in part states that banks have the power:

> "To establish and maintain a branch bank, upon approval by the commissioner and the banking review board, in a municipality other than that in which the home bank is located, if such municipality has no bank or branch bank at the time of application and if no bank or branch bank is located within a radius of 3 miles from the proposed site of the branch; *however, such 3-mile limitation shall be computed by measuring the street or road mileage of that route* which the commissioner and board find would be ordinarily and customarily traveled as the shortest distance between such bank or branch bank and the proposed site of the branch. *A branch bank established under this paragraph shall be located in the same county in which the home bank is located or in a contiguous county if the location of such branch bank is no more than 25 miles from the home bank.* ..." (Emphasis supplied.)

Your question implies that the method of measurement for the three-mile radius limitation may also apply to the twenty-five-mile limitation. These are separate limitations. In such cases, the rule of statutory construction generally applied provides that a limiting

or qualifying phrase will limit or qualify the antecedent phrase or clause unless a clear intention to the contrary is apparent. 2A Sand, *Statutes and Statutory Construction*, sec. 47.33 (4th Ed. 1973). Utilizing this rule, the road mileage method of measurement limitation would apply only to the antecedent clause relating to a three-mile radius.

In this instance, the statutory history of the legislative provision under consideration provides additional help. Section 221.04 (1) (j), Stats., came into being by the enactment of ch. 253, sec. 2, Laws of 1967. The three-mile radius provision together with the road mileage method of measurement was added to that legislation by Senate Amendment 3. The fact that this amendment was added as a separate package leads to the conclusion that the road mileage measurement method applies only to the three-mile radius provision.

Generally a limitation expressed in terms of mileage refers to a straight-line measurement. *Macon & Smith Counties v. Trousdale County*, 61 Tenn. (2 Baxt.) 1, 10. Therefore, the twenty-five-mile limitation in sec. 221.04 (1) (j), Stats., is to be measured on a straight-line basis.

BCL:DJH

Interest; Securities Law; Section 138.05 (1) (a), Stats., operates to limit the interest rate which a securities broker-dealer may charge to a noncorporate customer under a margin account agreement; a choice-of-law provision in margin account agreement will have the effect of avoiding the applicability of sec. 138.05 (1) (a) to interest charges made under the agreement if and only if the agreement bears "a reasonable relation" to the state of the chosen law. OAG 9-75.

April 8, 1975.

JEFFREY B. BARTELL
Commissioner of Securities

You have requested my opinion as to whether sec. 138.05 (1) (a), Stats., operates to limit the interest rate which may lawfully be charged by a securities broker-dealer in connection with margin account agreements with its noncorporate Wisconsin customers. You state that under the federal securities laws, securities broker-dealers are in effect permitted to loan money to their customers pursuant to margin account agreements for the purpose of financing purchases of certain registered securities which are referred to as purchases "on margin." You further state that the Board of Governors of the Federal Reserve System promulgates rules with respect to the amount of credit that may be initially extended (and subsequently maintained) by a broker-dealer on any registered security.

You further give the following example of the type of transaction to which you refer: that if the margin level prescribed by the Board of Governors is 50 percent, a customer purchasing for $100 a qualified security in a margin account must put up $50 in cash (or securities which at 50 percent of their current market value equal $50) to make the purchase. The balance of $50 needed to pay the seller of the security is then "loaned" to the customer by the broker-dealer who makes use of its existing credit sources to obtain the money.

You further state that the rate of interest charged customers by broker-dealers under margin account agreements varies from firm to firm, but is generally set at approximately 1 percent above the rate which the broker-dealer is charged by its lenders.

A second, related question on which you solicit my opinion is whether the presence of a clause in such a margin account agreement stating that the agreement and its enforcement should be governed by the laws of some state other than Wisconsin affects my determination of the first question.

As set forth more fully below it is my opinion with respect to your first question that sec. 138.05 (1) (a), Stats., does operate to limit the interest rate which may be lawfully charged by a

securities broker in connection with margin account agreements with its noncorporate Wisconsin customers. With respect to your second question, it is my opinion that a choice-of-law provision in a margin account agreement will have the effect of avoiding the applicability of sec. 138.05 (1) (a) to interest charges made under the agreement if and only if the agreement bears "a reasonable relation," as that phrase is used in sec. 401.105 (1), Stats., to the state of the chosen law.

1. *Applicability of Sec. 138.05 (1) (a) to margin account agreements.*

Section 138.05 (1) (a) of the Wisconsin Statutes reads as follows:

> "(1) Except as authorized by other statutes, no person shall, directly or indirectly, contract for, take or receive in money, goods or things in action, or in any other way, any greater sum or any greater value, for the loan or forbearance of money, goods or things in action, than:
>
> "(a) At the rate of $12 upon $100 for one year computed upon the declining principal balance of the loan or forbearance;"

Since I find no other provisions of the Wisconsin Statutes which authorize securities broker-dealers to charge interest on margin accounts at a rate in excess of that permitted by this provision, your first question must be answered simply by a determination of whether the transactions which you describe are covered by the particular language of sec. 138.05 (1) (a). The conduct proscribed by this provision is, of course, commonly known as usury, the elements of which were set forth by the Wisconsin Supreme Court in *State v. J. C. Penney Co.* (1970), 48 Wis. 2d 125 at 132, 179 N.W. 2d 641, quoting *Zang v. Schumann* (1952), 262 Wis. 570 at 579, 55 N.W. 2d 864, and 55 Am. Jur., *Usury*, page 331, sec. 12:

> "The definition of usury imports the existence of certain essential elements generally enumerated as (1) a loan or forbearance, either express or implied, of money, or of something circulating as such; (2) an understanding between the parties that the principal shall be repayable absolutely;

(3) the exaction of a greater profit than is allowed by law; and (4) an intention to violate the law. ..."

With respect to the first and second elements stated above, their presence would seem to be implicit in your example. When the broker-dealer purchases securities for his customer, the customer presumably becomes indebted to the broker-dealer for such amount as the broker-dealer has borrowed for the purpose of making the purchase, and the resulting debt is presumably carried by the broker-dealer so long as the customer pays the interest and meets the other requirements of the margin account agreement. This constitutes a forbearance of the money owed the broker-dealer by the customer. See *State v. J. C. Penney Co., supra*, at 133 et seq. Since, in your example, it does not appear that the customer's obligation to satisfy such a debt is conditioned in any respect, it is "repayable absolutely."

The third element of usury--the exaction of a greater profit than allowed by law--is, I believe, also present under the agreements you describe, if the rate of interest charged by the broker-dealer exceeds the 12 percent per annum rate established by sec. 138.05 (1) (a). It may be true, of course, that much, if not all, of this "profit" simply offsets the cost of the borrowed money to the broker-dealer. However, the same is true to some extent with respect to any lender who "buys" money to lend to others, and I can find no basis in the language of sec. 138.05 (1) (a) or in the case law for taking such costs into account in determining how much "profit" was exacted.

It might be argued by a broker-dealer that at least the additional 1 percent which he charges to the customer for the money he has borrowed should not be considered "profit" if such amount merely serves to cover administrative expenses incurred by him in obtaining the loan. While there is case law for the proposition that certain specific expenses incurred by a lender in connection with making a loan may be charged to the borrower in addition to interest at the highest lawful rate (see 91 C.J.S., *Usury*, sec. 48), the Wisconsin Supreme Court has recognized that such additional charges are frequently the means by which the usury laws are violated. The Court, in *State ex rel. Ornstine v. Cary* (1905), 126 Wis. 135, at 140, 105 N.W. 792, stated:

> "Contracts made in connection with the transaction of loaning money, under a scheme whereby the lender or his authorized agent receives payments of money or its equivalent in excess of the legal rate of interest, have been held to be prohibited by the law and not enforceable as valid obligations. [Citing cases.] The most common devices to accomplish such purposes were by means of charges against the borrower in the form of commissions, fees for appraisals, views, examinations, and renewals in connection with the loan. ..."

And in *Friedman v. Wisconsin Acceptance Corp.* (1927), 192 Wis. 58 at p. 60, 210 N.W. 831, the Court has said that:

> "... in determining whether or not the transaction is usurious the court 'will disregard its form and look to the substance, and will condemn it if all of the requisites of usury are found to be present, despite any disguise it may wear.' [Citing cases.]"

With respect to the example you have given, because the amount of the additional charge to the customer appears to be determined not by reference to specific expenses but rather on the basis of the amount loaned, it is my opinion that the additional charge must be considered as a part of the profit exacted by the broker-dealer.

If the third element of usury is present in the transactions you describe, it is likely that the fourth element--that of intent--will also be present. This element may be found from the face of the contract or from all of the facts and circumstances surrounding the transaction. *State v. J. C. Penney Co., supra,* at 150-151. If the transaction in question results in the lender's exacting a profit in excess of the maximum lawful limit and it was the intent of the parties that the lender receive such profit, then, in my opinion, the fourth element would also be present.

In summary if in the transactions you describe the broker-dealer charges the customer "interest" in excess of 12 percent, it is likely that all of the elements of usury would be present. Section 138.05 (1) (a) does, therefore, operate to limit such charges by broker-dealers.

2. *The Choice-of-Law Question.*

Your second question is whether a clause in a margin account agreement between a broker-dealer and customer providing that the law of a state other than the State of Wisconsin shall govern the agreement would affect my answer to your first question.

The Wisconsin Supreme Court recognized at an early date that whether a particular contract or transaction is usurious depends upon which state's laws govern the contract or transaction in question. See e.g. *Fisher v. Otis* (1850) 3 Pin. 78, 3 Chand. 83; *Newman v. Kershaw* (1860), 10 Wis. 275. With respect to transactions subject to the Uniform Commercial Code (hereinafter the "UCC"), the extent to which parties may effectively choose which state's laws shall apply is now governed by sec. 401.105 (1), Stats. That section provides in pertinent part that:

> "... when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. ..."

Since the transactions you describe appear to be subject to the UCC (see ch. 408, Stats.), sec. 401.105 (1) has applicability here. A choice-of-law provision in a margin account agreement will, therefore, have the effect of avoiding the applicability of sec. 138.05 (1) (a) if the agreement and transactions thereunder bear "a reasonable relation" to the state of the chosen law. Whether such a relation is present depends upon whether a "significant enough portion of the making or performance of the contract is to occur or occurs" in the state of the chosen law. See Official UCC Comment to sec. 401.105.

Though our supreme court has not had occasion to apply the "reasonable relation" test of sec. 401.105 to an agreement such as you describe, courts in other states have applied the test to such situations. In *Mell v. Goodbody & Co.*, (App. Ct. Ill., 1st Dist. 3d Div., 1973) 10 Ill. App. 3d 809, 295 N.E. 2d 97, a securities broker was sued by two customers for having charged excessive interest under Illinois law in connection with margin account agreements. The agreements provided that they would be governed by the laws of New York, under which the interest charged by the broker was legally permissible. The court, in applying the "reasonable relation" text contained in the Illinois UCC equivalent to sec. 401.105, noted that New York was the defendant's primary

place of business; that the major portion of the securities under the contracts were purchased and sold there; that the plaintiffs' collateral and the defendant's central records of all its margin accounts were kept there; that bills on margin accounts were made there; and that the defendant made its principal borrowings to cover its margin accounts there. The court also noted that the agreements in question had substantial relationships with Illinois (the opinion discloses that the defendant had three branch offices in the state) but held that the above factors established a sufficient "reasonable relation" with New York to justify giving effect to that state's laws as provided in the agreements. Similar decisions on similar sets of facts are found in *McGrath v. Paine, Webber, Jackson & Curtis, Inc.* (Sup. Ct., D.C., 1974) CA 6807-73; *Olerich v. CBWL-Hayden, Stone, Inc.* (Dist. Ct., Iowa, Sac Cty., 1974) Equity No. 14553; and *Apel v. Reynolds Securities, Inc.* (Dist. Ct., Minn., Hennepin Cty., 1973) File No. 688046.

Though the above cases are not, of course, controlling as to what constitutes a "reasonable relation" under Wisconsin law, it is my opinion that if the facts surrounding an agreement of the type you describe are similar to those set forth above, the agreement will bear a "reasonable relation" to the state of the chosen law under sec. 401.105, Wis. Stats., and the choice-of-law provision therein will therefore have the effect of avoiding the applicability of sec. 138.05 (1) (a), Stats. If, however, the facts are such that an agreement does not bear a "reasonable relation" to the state of the chosen law, then sec. 138.05 (1) (a)., Stats., will apply regardless of the choice-of-law provision.

BCL:WDB

Collective Bargaining; Legislature; Pensions; The legislature would not commit an unfair labor practice if it unilaterally increased state employe pension benefits and costs. Such increases would not apply to employes in collective bargaining units, however, unless the legislature so provided expressly or by necessary implication.

The Group Insurance Board, however, being a part of the executive branch of government, would commit an unfair labor practice if it unilaterally increased benefits and costs to state employes in collective bargaining units.

The removal of state employes from the state retirement system, the cessation of all contributions thereto, and the removal of a bargaining unit from the provisions of ch. 40 are subjects of collective bargaining under the State Employment Labor Relations Act. OAG 10-75.

April 18, 1975.

ANTHONY S. EARL, *Secretary*
Department of Administration

You have asked for my opinion on the following questions:

1. Would the legislature commit an unfair labor practice if it unilaterally increased the pension benefits and costs to state employes in collective bargaining units?

2. Would an act of the legislature increasing such pension benefits and costs apply to state employes within collective bargaining units as well as to those without?

3. Is the removal from the state retirement system or the cessation of all contributions subject to the duty to bargain collectively?

4. Would the Group Insurance Board commit an unfair labor practice if it unilaterally increased benefits and costs to state employes in collective bargaining units?

5. Would such increases by the Group Insurance Board apply to state employes within collective bargaining units as well as to those without?

6. Is removal of a bargaining unit from the provisions of ch. 40, Stats., subject to the duty to bargain collectively?

I.

It is my opinion that the legislature would not commit an unfair labor practice if it unilaterally increased the pension benefits and costs to state employes in collective bargaining units.

The State Employment Labor Relations Act (SELRA), secs. 111.80-111.97, Stats., requires the state to bargain collectively about certain subjects with the representative of a majority of its employes in an appropriate collective bargaining unit. See sec. 111.84 (1) (d), Stats. The coverage, scope and content of health insurance and retirement are among those subjects. See sec. 111.91 (1) and (1) (c), Stats. As a general rule, an employer cannot unilaterally, *i.e.*, without bargaining, change something which is subject to the duty to bargain collectively. See *NLRB v. Katz* (1962), 369 U.S. 736, 743, 82 S.Ct. 1107, 8 L.Ed. 2d 230.

A statutory change in such benefits, however, would not violate the duty to bargain collectively. There is no constitutional right or duty to bargain collectively. See *Federation v. Hanover School Corp.* (7th Cir. 1972), 457 F.2d 456, and *Atkins v. City of Charlotte* (3-judge court, W.D. N.C. 1969), 296 F. Supp. 1068, 1077. The right and duty exist by statute. Although statutes may violate the constitution, they cannot violate other statutes. The earlier act at most is impliedly repealed by the inconsistent, later act. See *Abdella v. Abdella* (1954), 268 Wis. 127, 130, 66 N.W. 2d 689, and *State ex rel. Badtke v. School Board* (1957), 1 Wis. 2d 208, 214, 83 N.W. 2d 724.

Therefore, the legislature can unilaterally increase pension benefits and costs to state employes in collective bargaining units with impunity.

This conclusion equally applies to the legislature's power to reduce benefits or costs. The legislature may not, however, impair the obligations of contracts. See Art. I, sec. 10, U.S. Const.; Art. I, sec. 12, Wis. Const. See also *State ex rel. O'Neil v. Blied*

(1925), 188 Wis. 442, 446, 206 N.W. 213. Whether the legislature acted unconstitutionally as to a particular contract depends on the facts and circumstances of a specific case. See *State ex rel. Bldg. Owners v. Adamany* (1974), 64 Wis. 2d 280, 294, 297, 219 N.W. 2d 274.

By an act of the "legislature" I mean a sovereign act through a bill passed by the senate and assembly and signed by the governor. See Art. V, sec. 10, Wis. Const. This sovereign power cannot be surrendered. See 16 C.J.S., *Constitutional Law*, sec. 179, p. 913, and *McKenna v. State Highway Comm.* (1965), 28 Wis. 2d 179, 185-186, 135 N.W. 2d 827. Therefore, I cannot accept the argument that SELRA gives state employes a property right in collective bargaining which subsequently cannot be abolished. See *State ex rel. Anderson v. Barlow* (1940), 235 Wis. 169, 182-183, 292 N.W. 290, and *State ex rel. McKenna v. District No. 8* (1943), 243 N.W. 324, 327, 10 N.W. 2d 155.

II.

It is my opinion that a statute unilaterally increasing pension benefits and costs to state employes would apply to state employes in collective bargaining units only if the act so provided expressly or by necessary implication. Such an act would be inconsistent with the state's duty under SELRA to bargain collectively about such increases, and inconsistent statutes are to be harmonized if possible to avoid repeals by implication. See *Kramer v. Hayward* (1973), 57 Wis. 2d 302, 311, 203 N.W. 2d 871.

Such a statute could be harmonized with SELRA if the former is construed to apply only to those state employes with whom the state has no duty to bargain collectively. If the statute stated, expressly or by necessary implication, that it applied to employes within collective bargaining units, then it would so apply and SELRA would impliedly have been repealed to the extent of the inconsistency.

III.

It is my opinion that the removal from the state retirement system or the cessation of all contributions is subject to the duty to bargain collectively.

Section 111.91 (2) (c), Stats., provides that amendments to SELRA are prohibited as a subject of bargaining. Section 111.92 (1), Stats., however, provides in part:

> "Tentative agreements reached between the department of administration, acting for the executive branch, and any certified labor organization shall, after official ratification by the union, be submitted to the joint committee on employment relations.... If the committee approves the tentative agreement, it shall introduce in companion bills, to be put on the calendar, that portion of the tentative agreement which requires legislative action for implementation, such as salary and wage adjustments, changes in *fringe benefits, and any proposed amendments, deletions or additions to existing law.* ..." (Emphasis added.)

Section 111.92 (1), Stats., cannot narrowly be construed as authorizing the committee to make recommendations for changes in the law but as withholding from employes the right to bargain about them. First, such a construction is difficult to reconcile with the overall function of this subsection to have the committee act on an existing agreement proposal. Second, sec. 111.91 (2) (c), Stats., says only that changes in SELRA are prohibited as subjects of bargaining. The principle expressio unius est exclusio alterius militates against such a narrow construction. See *Columbia Hospital Asso. v. Milwaukee* (1967), 35 Wis. 2d 660, 669, 151 N.W. 2d 750. Third, the proximity within sec. 111.92 (1), Stats., of "fringe benefits" and the provision for recommending amendments to "existing law" strongly suggests that the legislature anticipated that collective bargaining might produce a need for changes in other laws concerning fringe benefits, such as pension rights. Fourth, sec. 111.91 (1), Stats., expressly states that fringe benefits are among the subjects of collective bargaining without limitation to those not covered by law.

IV.

It is my opinion that the Group Insurance Board would commit an unfair labor practice if it unilaterally increased benefits and costs to state employes in collective bargaining units.

The Group Insurance Board, hereafter "board," is given administrative powers by sec. 40.10, Stats., relative to group life

and health insurance. The board has only such powers as are expressly granted to it or necessarily implied therein, and any power sought to be exercised must be found within the four corners of the statute under which it proceeds. See *State ex rel. Farrell v. Schubert* (1971), 52 Wis. 2d 351, 357, 190 N.W. 2d 529, *vacated* on other grounds, 408 U.S. 915, 92 S.Ct. 2500, 33 L.Ed. 2d 327. The powers in ch. 40, Stats., must be harmonized with the state's duty under SELRA not to unilaterally change benefits. Since SELRA was passed later in time, it must be treated as modifying prior statutes and may not be given a restrictive interpretation. See *Muskego-Norway C.S.J.S.D. No. 9 v. WERB* (1967), 35 Wis. 2d 540, 555-558, 151 N.W. 2d 617, and *Joint School District No. 8. v. Wis. E.R. Board* (1967), 37 Wis. 2d 483, 494, 155 N.W. 2d 78. Therefore, the board is without power to increase costs and benefits unilaterally as to state employes in collective bargaining units.

The board is not immune from the inhibitions of SELRA even though the state, rather than the board, is therein expressly named as the employer. First, such a conclusion clashes with the duty of any agency to construe its own powers in harmony with the statutory responsibilities of other units of government. See *Board of Education v. WERC* (1971), 52 Wis. 2d 625, 640, 191 N.W. 2d 242.

Second, such conclusion improperly bifurcates the state. The state as an employer is subject to SELRA. See sec. 111.80 (4) and (16), Stats. The department of administration represents the "executive branch" of the state. See sec. 111.92 (1), Stats. The board itself is part of the executive branch. See secs. 15.161 (2) and 15.165 (2), Stats. Thus, the board is no less bound by SELRA than is the department of administration.

Third, the executive branch of government cannot violate the duly passed laws of the sovereign. See *United States v. Nixon* (1974), 418 U.S. 683, 94 S.Ct. 3090, 3101-3102, 41 L.Ed. 2d 1039, and *Ekern v. McGovern* (1913), 154 Wis. 157, 208, 142 N.W. 595.

The agency charged with enforcement of the law may proceed against any "person" disobeying its orders. See secs. 111.84 (4) and 111.07 (7), Stats. Under SELRA unfair labor practices are committed by "an" employer. Sec. 111.84 (1), Stats. The

respective agencies of state government have "management" rights. See sec. 111.90, Stats. Thus, the legislature has recognized that although the state is the ultimate employer, the various agencies of the state function as "an" employer in differing circumstances and are "persons" subject to SELRA.

Therefore, such a unilateral increase by the board would be an unfair labor practice within the meaning of SELRA.

Of course, a bargaining unit is free to accept unilateral changes since the duty to bargain is waivable. See *C & C Plywood Corp.* (1964), 148 NLRB No. 46, 57 LRRM 1015, 1016-17, 1964 CCH NLRB par. 13, 358, *aff'd* (1967), 385 U.S. 421, 87 S.Ct. 559, 17 L.Ed. 2d 486. Moreover, it is conceivable that certain labor agreements create such a waiver by their terms. Bargaining units must submit their proposals a year in advance, see sec. 111.91 (1) (c), Stats., and whether a failure to meet this requirement together with certain contract language or acceptance of unilateral changes constitutes such a waiver must await a proper determination on the facts of a particular case.

V.

For the reasons given in IV., *supra*, it is my opinion that such unilateral increases by the board could not apply to state employes in collective bargaining units.

In addition, sec. 111.93 (3), Stats., provides that the terms of a labor agreement supersede civil service "and other applicable statutes related to wages, hours and conditions of employment." It hardly can be doubted that such fringe benefits relate to wages, hours and conditions of employment. See OAG 6-74 (January 28, 1974). Thus, it would be contradictory to say that such board increases could be extended to bargaining unit employes when the labor agreement in respect thereto would supersede the very terms so extended.

It cannot successfully be argued that the collective agreement does not supersede the statutes empowering the board to establish benefits and costs on the ground that sec. 111.93 (3), Stats., mentions only wages and not fringe benefits whereas secs. 111.91 (1) and 111.92 (1), Stats., set wages apart from fringe benefits. Such a contention misses the significance of the provision in sec. 111.91 (1), Stats., that fringe benefits are bargainable. For the

duty to bargain requires the parties to meet with the intention of reaching an agreement on bargainable subjects and to reduce their agreement to writing. See sec. 111.81 (2), Stats. The state hardly could be required to intend to reach agreement on fringe benefits and to reduce any agreement to writing if, through another agency, it could void those terms unilaterally. Thus, the express mention of fringe benefits in secs. 111.91 (1) and 111.92 (1), Stats., more reasonably is explained as the legislature's effort to be clear that fringe benefits are subject to the collective bargaining process.

VI.

For the reasons given in III., *supra*, it is my opinion that the removal of a bargaining unit from the provisions of ch. 40, Stats., is a subject of collective bargaining.

BCL:CDH

Education; Legislature; Schools And School Districts; Tuition; Vocational And Adult Education; Neither Art. X, sec. 3, Wis. Const., nor any other constitutional provision prohibits the charging of tuition for any course of instruction offered at a school in the system of vocational, technical and adult education operated pursuant to ch. 38, Stats. The charging of tuition at such schools, and the manner and extent whereby such charges are to be made, is a matter of policy which the legislature is free to determine in the exercise of its legislative power under Art. IV, sec. 1, Wis. Const. OAG 11-75.

May 7, 1975.

THE HONORABLE, THE ASSEMBLY

Legislature

By 1975 Assembly Resolutions 17 and 18, you have requested my opinion as to whether any provision of the Wisconsin Constitution prohibits the charging of tuition to students at vocational, technical and adult education schools. Further, and apparently on the assumption that the charging of tuition in some instances may be unconstitutional, 1975 Assembly Resolution 17

asks specifically whether it is nevertheless constitutional to charge tuition for post-secondary, adult, vocational or hobby courses.

It is my opinion that neither Art. X, sec. 3, Wis. Const., nor any other constitutional provision prohibits the charging of tuition for any course of instruction offered at a school in the system of vocational, technical and adult education operated pursuant to ch. 38, Stats. The charging of tuition at such schools, and the manner and extent whereby such charges are to be made, is a matter of policy which the legislature is free to determine in the exercise of its legislative power under Art. IV, sec. 1, Wis. Const.

The fundamental underlying question you raise is the extent to which the legislature may exercise its powers. In contrast to the federal constitution, the constitutions of the several states are not the source of legislative power but rather limitations upon the exercise of such powers. Therefore, the Wisconsin Legislature has broad authority and discretion in the exercise of all legislative powers not delegated to the federal government unless expressly or impliedly prohibited or limited in such exercise by the constitutions of the United States or Wisconsin. *Outagamie County v. Zuehlke* (1917), 165 Wis. 32, 35, 161 N.W. 6; *Manitowoc v. Manitowoc Rapids* (1939), 231 Wis. 94, 97, 285 N.W. 403.

Article X of the Wisconsin Constitution deals with the subject of education. The only reference to tuition therein is found in sec. 3 which provides, in part:

> "The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years; ..."

This provision is a limitation upon legislative power only to the extent that it mandates the legislature to establish "district schools" which must be "free and without charge for tuition to all children between the ages of 4 and 20 years." As the Wisconsin Supreme Court observed in *Manitowoc v. Manitowoc Rapids* (1939), 231 Wis. 94, 98, 285 N.W. 403:

> "The purpose [of Art. X, sec. 3, Wis. Const.] was not to grant a power to the legislature to establish schools, for this

> power would exist without grant, but to compel the exercise of the power *to the extent designated.*" (Emphasis supplied.)

The constitutional mandate for an education "free and without charge for tuition" is subject to two conditions. First, such education is constitutionally required only for children between the ages of 4 and 20 years. Second, such education is required only within the system of "district schools" which the legislature must, under the constitution, establish.

Determinative of your question, then, is whether the schools which comprise the vocational, technical and adult education system are "district schools" within the meaning of Art. X, sec. 3, Wis. Const.

I.

The constitutional meaning of the term "district schools" as it is used in Art. X, sec. 3, must be ascertained by reference "to the history of the times, the state of society at the time ... the constitution was framed and adopted, and to prior well-known practices and usages ..." *State ex rel. Zimmerman v. Dammann* (1930), 201 Wis. 84, 89, 228 N.W. 593; *Board of Education v. Sinclair* (1974), 65 Wis. 2d 179, 222 N.W. 2d 143; 57 OAG 45 (1968). Previous analysis of the available historical materials has led the Supreme Court to conclude that Art. X, sec. 3, Wis. Const., was not intended to mandate any particular form of school district organization but rather to prescribe a minimum standard of instruction:

> "An examination of the debates in the conventions that framed our present constitution and the constitution of 1846 (which contained a similar provision [to Art. X, sec. 3, Wis. Const.]) discloses that the members of those conventions, when they were framing the article relating to schools, were concerned, not with the method of forming school districts, but with the character of instruction that should be given in those schools after the districts were formed,--with the training that these schools should give to the future citizens of Wisconsin." *State ex rel. Zilisch v. Auer* (1928), 197 Wis. 284, 289-290, 221 N.W. 860.

In *West Milwaukee v. Area Board of Vocational, Technical and Adult Education* (1971), 51 Wis. 2d 356, 377, 187 N.W. 2d 387, appeal dismissed 404 U.S. 981, 30 L.Ed. 2d 364, 92 S.Ct. 452, the Supreme Court observed in dicta that "the constitution neither requires nor prohibits the creation of vocational schools, ..." This observation is supported by the historical record.

In the territorial period, the educational system in Wisconsin consisted of local schools (often referred to interchangeably as "district schools," "common schools," and "primary schools"), academies, and normal schools. Patzer, *Public Education in Wisconsin* (1924), 6-8, 9, 27, 199-206; Jorgenson, *The Founding of Public Education in Wisconsin* (1956), 15-49, 83-86; See *Journal and Debates, Constitutional Convention 1847-1848*, 263-265, 341-345. The local schools were organized on a district basis and financed in part by property taxes levied throughout the district, in part by per capita charges made by the district to each student, and in part by charges made directly to the student or his family by the teacher. *Board of Education v. Sinclair* (1974), 65 Wis. 2d 179, 183, 222 N.W. 2d 143. Normal schools and academies were essentially private schools which were financed through tuition charges. Patzer, *supra*; Jorgenson, *supra.*

The education provided at the local level was very rudimentary. There is no indication that the common or district schools of the territorial period provided anything akin to vocational or technieal education. Some adults, particularly immigrants, did attend the local schools but apparently for the purpose of obtaining a basic education. Certainly the use of these schools by adults was not for the purposes of "adult education" in the modern sense. *Journal and Debates, Constitutional Convention 1847-1848*, 341-345; *Nesbit, Wisconsin: A History* (1973), 230.

Academies and normal schools provided schooling for those who wished further education beyond the basic level. Normal schools were basically teacher training schools, while academies educated those bound for further education at a university or college. Jorgenson, *supra*; Patzer, *supra.* The framers recognized a clear distinction between the education provided at the district level and that provided in academies and normal schools. The latter were clearly thought to serve elitist and privileged interests because, unlike the district schools, they served those with an interest in

advanced and more specialized education and were not usually financed publicly to any appreciable degree.

A review of the proposals of the standing committee on education and school funds of the 1847-48 convention discloses an intention on the part of the committee to prepare an education article for the constitution which would mandate a complete system of education from the "district schools" through the university. That comprehensive system contemplated constitutionally mandated academies and normal schools in addition to district schools and the university. The convention, however, eliminated the mandatory provisions with respect to academies and normal schools and limited the constitutional mandate to the establishment of district schools and a state university. Art. X, secs. 3, 6, Wis. Const.; *Journals and Debates, Constitutional Convention 1847-1848*, 263-265, 341-345.

The "character of instruction" provided by the district school during the territorial period was basic education publicly financed, at least in part. Therefore, the constitutional requirement that free district schools be established is essentially a requirement that fundamental basic education be provided by the state "free and without charge for tuition." Beyond this requirement, the legislature is free to establish additional education programs without restriction with respect to the manner in which those programs are to be financed. *Manitowoc v. Manitowoc Rapids*, *supra*, at 97; *West Milwaukee v. Area Board of Vocational, Technical and Adult Education*, *supra*, at 377.

Vocational education in even its most incipient form was unknown at the time Art. X, sec. 3, Wis. Const., was drawn. *Cf. Maxcy v. Oshkosh* (1910), 144 Wis. 238, 252-253, 128 N.W. 899. The development of vocational education began with the pioneering programs established by the Wisconsin Legislature at the start of the Twentieth Century. See Grieber, "Training our Citizens to Earn a Living," 1956 *Wisconsin Blue Book*, 107-112. These programs have been expanded to meet the needs for not only vocational and technical education but also continuing and adult education. Today they include instructional offerings ranging from high school alternative, and collegiate transfer programs, as well as post-secondary full and part-time programs in the trades and

technical occupations to both vocationally oriented and hobby and avocational continuing programs. Sec. 38.001, Stats.

The diverse programs offered by the vocational, technical and adult education system are available only for persons age 16 years and older. Secs. 38.02, 118.15 (1) (b), Stats. Attendance at a school within this system presumes prior basic schooling. The programs offered go well beyond basic primary education and are much more akin to the course offerings of the territorial normal school or academies than to the basic education provided by the territorial common or district school.

It is clear that the "character of instruction" provided by the vocational, technical and adult education system is beyond the fundamental level of education required by Art. X, sec. 3, Wis. Const. Fundamental education is provided in Wisconsin by a public school system consisting of "elementary and high schools supported by public taxation," sec. 115.01 (1), Stats., which is under the supervision of the Superintendent of Public Instruction. While the content of instruction provided in both the public and vocational school systems is always changing to meet new needs, the essential difference in the "character of instruction" offered by each system (fundamental versus advanced) remains unchanged. Therefore, the schools within the vocational, technical and adult education system are not, unlike the schools in the public school system, subject to the restrictions of Art. X, sec. 3, Wis. Const.

This conclusion is not inconsistent with the holding in *Maxcy v. Oshkosh* (1910), 144 Wis. 238, 252-253, 128 N.W. 899. That case dealt with the enforceability of a condition placed upon a charitable bequest setting up a "manual training" school within the public school system of the city of Oshkosh. The condition stipulated that tuition be charged at the vocational training school established by the bequest. The Supreme Court held that condition unenforceable because it would have required the public school system to charge tuition contrary to the mandate of Art. X, sec. 3, Wis. Const. The case dealt with the content of instruction within the public school system and simply stands for the proposition that the public school system and its constantly evolving instructional program is subject to Art. X, sec. 3, Wis. Const.

Nothing in this opinion is meant to suggest that there may not be some overlap between the public and vocational school systems with respect to the content of instruction. Similar programs now exist in both systems and will likely continue to do so in the future. The determinative factor, insofar as the requirements of Art. X, sec. 3, Wis. Const., are concerned, however, is the difference between the basic missions of each system. Those missions--the "character of instruction" in the respective systems--determine the constitutional issue.

II.

While I believe the foregoing analysis is dispositive of your question, certain arguments to the contrary should be considered because of the affect they have on the validity of the present organization of the vocational, technical and adult education system.

That system is, and has been since its inception, organized on a district basis and financed primarily by a local property tax. Ch. 122, Laws of 1907; ch. 616, Laws of 1911; ch. 494, Laws of 1917; ch. 38, Stats. Until 1917, vocational education was under the supervision of the Department of Public Instruction, but by ch. 494, Laws of 1917, a separate system was established which has evolved as today's vocational, technical and adult education system. See generally, Grieber, "Training our Citizens to Earn a Living," 1956 *Wisconsin Blue Book*, 107-112; 1973 *Wisconsin Blue Book*, 429-433.

At present, the entire state is organized into vocational, technical and adult education districts which include "one or more counties, municipalities or school districts in any contiguous combination." Sec. 38.06 (1), Stats. The schools within each district are operated and primarily controlled by a district board. See secs. 38.12 (1), 38.14, Stats. Financing is primarily dependent upon a property tax levied upon the taxable property within each district by the respective district boards. Sec. 38.16, Stats.

The argument has been advanced that the district form of organization chosen by the legislature for vocational education is determinative of the question whether vocational schools are "district schools" within the meaning of Art. X, sec. 3, Wis. Const. This argument is unconvincing for two reasons.

First, it is based upon the untenable assumption that Art. X, sec. 3, Wis. Const., does not have any meaning independent of that which the legislature may, from time to time, give to it. Aside from the fact that a statutory definition of a term does not control its constitutional meaning, see *State ex rel. Froedtert G. & M. Co. v. Tax Comm.* (1936), 221 Wis. 225, 233, 265 N.W. 672, if such were the case, Art. X, sec. 3, Wis. Const., would be without purpose since the legislature could avoid it merely by organizing any school system (vocational or public) in the state on other than a district basis. This would be clearly inconsistent with the purpose of that provision which is to act as a limitation upon the exercise of legislative power. *Manitowoc v. Manitowoc Rapids* (1939), 231 Wis. 94, 285 N.W. 403.

Second, this argument ignores previous judicial determinations that Art. X, sec. 3, Wis. Const., relates not to the form of school district organization, but rather to the "character of instruction" that must be afforded the citizens of this state by the legislature. *State ex rel. Zilisch v. Auer* (1928), 197 Wis. 284, 289-290, 221 N.W. 860; *Joint School District v. Sosalla* (1958), 3 Wis. 2d 410, 420, 88 N.W. 2d 357. While the form of school district organization may and should enhance, it does not determine the substance of instruction offered.

Likewise unconvincing is a corollary argument that the legislative designation of vocational schools as "district schools" in sec. 66.01 (14), Stats., resolves the constitutional issue. Section 66.01 (14), Stats., provides:

> "All laws relating to public instruction, pursuant to secs. 1, 2, 3, 4 and 5 of article X of the constitution, remain and shall continue in force for the establishment, administration and government of the district schools as heretofore, until amended or repealed by the legislature. The term 'district schools' as here used, in addition to common schools includes, among others, any and all public high schools, trade or vocational schools, auxiliary departments for instruction of pupils who are deaf or of defective speech or blind, and truancy or parental schools."

This provision was first enacted by ch. 325, Laws of 1925, and except for renumbering has not since been modified. The second sentence in sec. 66.01 (14), Stats., is surplusage if vocational

schools are "district schools" within the meaning of Art. X, sec. 3, Wis. Const. The addition of the second sentence reflects the continuing understanding of the legislature that vocational schools are not so included.

Further, this provision, together with the other subsections of sec. 66.01, Stats., is the enabling legislation for the "home rule" amendment to the constitution adopted in 1924. Art. XI, sec. 3, Wis. Const. See Note, 3 Wis. L. Rev. 423, 427 (1924-26).

The purpose of sec. 66.01 (14), Stats., was to except the entire subject of education from municipal home rule. In *State ex rel. Harbach v. Mayor* (1926), 189 Wis. 84, 90, 206 N.W. 210, the Supreme Court held this exception was declarative of the constitutional power of the legislature to deal with education as a matter of statewide rather than local concern. The broad definition of "district schools" in sec. 66.01 (14), Stats., therefore, does not serve any purpose except to declare that all matters pertaining to education, including matters both required and permitted under Art. X, sec. 3, Wis. Const., are beyond the scope of municipal home rule powers.

"The decision to provide vocational education is a political determination to be made by the legislature, ..." *West Milwaukee v. Area Board of Vocational, Technical and Adult Education* (1970), 51 Wis. 2d 356, 378, 187 N.W. 2d 387. Included in that political determination are not only matters of financing, but also matters of organization. The organization of the vocational, technical and adult education system on a district basis does not make the schools in that system "district schools" within the meaning of Art. X, sec. 3, Wis. Const. Therefore, the legislature may decide to charge tuition from students attending schools within the vocational, technical and adult education system without necessarily first changing the organizational structure of that system.

BCL:DJH

Industrial Commission; The administrative duties of the Industry, Labor and Human Relations Commission, vested in the chairman by sec. 15.06 (4), Stats., may be exercised solely by the chairman or may be delegated to other commission members, in the discretion of the chairman. Classification of various duties of the Commission as "administrative," "policy," and "statutory," discussed. OAG 12-75.

May 14, 1975.

PATRICK J. LUCEY
Governor of Wisconsin

In connection with the appointment of a new chairman of the Industry, Labor and Human Relations Commission, you express a concern about the administrative duties of the chairman and you request an opinion from me that "will more clearly interpret Section 15.06 (4), Wisconsin Statutes" as relates to such duties.

By way of background for your opinion request, you state:

> "... A report done by the Department of Administration late last year recommended that the Department of Industry, Labor and Human Relations proceed to implement the legislative intent of Section 15.06 (4), Wisconsin Statutes, namely that the chairman act as chief executive of the department. In that report the Department of Administration defined and gave examples of the various decision making responsibilities of the department, namely quasi-judicial, policy and statutory, and administrative."

You have provided me with a copy of the above mentioned report, entitled "DILHR Administrative Structure Study," (hereinafter referred to as "the Study"), and you pose four questions:

(1) Are those matters described in the Study as administrative responsibilities accurately defined as "administrative," within the meaning of sec. 15.06 (4), Stats.?

(2) Can administrative responsibilities be assigned solely to the chairman as sec. 15.06 (4), Stats., requires?

(3) Are those matters described in the Study as "policy and statutory duties" accurately defined?

(4) Are policy and statutory responsibilities matters that should be agreed to by two or more commissioners?

The administrative responsibilities of the Chairman, as specified in the Study, include:

(1) Implementing Commission policy by providing all instructions and decisions to the divisions;

(2) Keeping the other two Commissioners informed of major activities in the Department and its divisions;

(3) Serving as prime contact with the Governor's office;

(4) Exercising administrative responsibility for the following types of activities:

a. Supervision and evaluation of division administrators
b. Departmental planning and budgeting
c. Personnel matters
d. Employe activities
e. Systems and procedures
f. Client service
g. Fund management
h. Relationships with other agencies and U.S. Dept. of Labor
i. Public information

Your first question is whether matters described in the Study as administrative responsibilities are accurately defined as "administrative," within the meaning of sec. 15.06 (4), Stats. That section provides:

> "CHAIRMAN; ADMINISTRATIVE DUTIES. The administrative duties of each commission shall be vested in its chairman, to be administered by him under the statutes and rules of the commission and subject to the policies established by the commission."

Section 15.06 (4), Stats., was created by ch. 327, Laws of 1967, in order to implement the Kellett Bill, ch. 75, Laws of 1967, and is substantially similar to preexisting sec. 101.02 (2), Stats., which outlined the authority of the chairman of the then Industrial Commission as follows:

> "The administrative and executive authority of the commission shall be vested in the chairman, to be administered by him under the statutes and rules of the commission and subject to the policies established by the commission. The commission shall make rules for administering the internal affairs of the commission."

In Wisconsin, the general rule is that all words and phrases are to be construed according to their common and approved usage, unless such construction would produce a result inconsistent with the manifest intent of the legislature. Sec. 990.01 (1), Stats. Common and approved usage defines the word "administration" to mean, in a context relevant here:

> "... [4] b: the management of public affairs as distinguished from the executive or political function of policy making
>
> "5a: the principles, practices, and rationalized techniques employed in achieving the objectives or aims of an organization ..." *Webster's Third New International Dictionary* (unabridged, 1961), p. 28.

In answer to your first question, it is my opinion that most, but not all, of those matters described in the Study as administrative responsibilities are accurately defined as "administrative" within the meaning of the above quoted definition and sec. 15.06 (4), Stats.

My reservations with respect to the classifications employed by the Study relate to the recognition therein of the distinction between the administrative and policy functions. The exercise of responsibility over departmental planning, budget preparation and individual personnel matters is properly classified as "administrative." On the other hand, the setting of departmental objectives, the approval of the budget, the formulation of personnel policies (excluding individual personnel transactions), and the appointment of division administrators are policy matters to be

determined by all three commissioners. Therefore, I do not believe, by way of example, that serving as prime contact with the Governor's office, or with other state and federal agencies, can be properly classified, in most cases, as an administrative function since such contacts, at least in a substantive sense, will likely involve matters relating to departmental objectives and general concerns of a like kind.

Your second question is whether the administrative responsibilities can be assigned solely to the chairman as sec. 15.06 (4), Stats., requires. That section provides that the "administrative duties of each commission shall be vested in its chairman ..." It does not *require*, contrary to the assumption underlying your question, that the commission's administrative duties be exercised *solely* by the chairman. Administrative duties are vested in the chairman by the statute and he or she may delegate them to the other commission members, in much the same manner as deputies and executive assistants may be delegated various administrative responsibilities for a particular division in departments headed by a secretary. Sec. 15.05 (2) and (3), Stats.

Your third question is whether those matters described in the Study as "policy and statutory duties" are accurately defined. The Study states that all three commissioners establish policy, by majority vote, and that policy-making includes:

a. The overall setting of objectives.
b. Planning and approval of the budget or all reallocation from one division to another.
c. Personnel policies (excluding individual personnel transactions.)
d. Administrative rule-making, fee schedules, etc.
e. Major organizational changes.
f. Appointments of Division administrators.

It is my opinion, in answer to your third question, that these duties described in the Study as "policy" are accurately defined, particularly as contrasted with the "administrative duties" vested in the chairman by sec. 15.06 (4), Stats. The classification employed by the Study again is in accord with accepted usuage. In this regard a definition of "policy" which I find helpful is the following:

"... [5] a: a definite course or method of action selected (as by a government, institution, group, or individual) from among alternatives and in the light of given conditions to guide and usu [age] determine present and future decisions;

"[5] b(1): a specific decision or set of decisions designed to carry out such a chosen course of action

"[5] b(2): such a specific decision or set of decisions together with a related action designed to implement them

"[5] c: a projected program consisting of desired objectives and the means to achieve them ..." *Websters Third New International Dictionary* (unabridged, 1961), p. 1754.

Also included in the Study's classification of policy and statutory responsibilities are what the author apparently deems "statutory responsibilities." They are:

"2. All three Commissioners appoint members to the Department's boards and advisory councils, while the Chairman appoints members to specific inner Departmental committees.

"3. One Commissioner would take on the primary role of studying, reviewing and suggesting appropriate legislation and in maintaining liaison with the legislature for informational purposes.

"4. One Commissioner would take on the primary role of Departmental representative for each collective bargaining group.

"5. All three Commissioners share the responsibility of bringing to their combined attentions problem areas. Decisions regarding these problem areas affecting the Divisions would be channeled through the Chairman.

"6. All three Commissioners would share in representing the Department to various outside organizations."

In further response to your third question, I would offer the following comments concerning the Study's classification of these functions as "statutory responsibilities." As to paragraph 2 above quoted, while appointments to "boards and advisory councils" of the Department are undoubtedly statutory in nature, and while

appointments to "special inner-Departmental committees" are also governed by statute, I cannot completely agree with the allocation of responsibilities for such appointments made by paragraph 2 above quoted. It is true that, "All three Commissioners appoint members to the Department's boards and advisory councils ...". See secs. 15.04 (3) and 15.01 (1) and (3), Stats. I question, however, the statement that, "the Chairman appoints members to special inner Departmental committees" because it seems to me that such committees (presumably intra-Departmental in nature) are also appointed under sec. 15.04 (3), Stats., by the "head of the department," i.e., in the case of the Department by the Commission. See sec. 15.01 (1) and (3), Stats.

Paragraphs 5 and 6 above quoted appear to me to deal with responsibilities, not expressly conferred by statute but necessarily inferred from certain powers and duties of the Commission. Such statutory responsibilities are not, in my opinion, "administrative duties" of the Commission under sec. 15.06 (4), Stats., but are instead aspects of the "direction and supervision" of the Department by the Commission, under sec. 15.22, Stats., in which all three commissioners may properly share.

As to paragraphs 3 and 4 above quoted, involving a "primary role" for but one commissioner in certain functions which I believe may properly be viewed as statutory responsibilities, if such functions are administrative in nature, they may lawfully be performed by a single commissioner. If, however, such functions are policy-making in nature, they must be performed by the commission as a body.

Your fourth question is whether policy and statutory matters should be agreed to by two or more commissioners. It is my opinion that matters described as policy and statutory *must* be agreed to by two or more Commissioners. Section 15.06, Stats., provides that "[a] majority of the membership constitutes a quorum to do business ..." At least two commissioners, and preferably three, must act in the performance of the policy-making and statutory functions assigned to the head of the Department. Sec. 15.22, Stats.; *cf.*, *Wisconsin Telephone Co. v. DILHR* (May 6, 1975), No. 488 August Term, 1974, pp. 11-12.

In giving my opinion as to the four questions you raise, I neither approve nor disapprove the Study. Moreover, it must be understood

that the answers to your questions provide general guidance only, and that specific questions as to the classification of functions as "administrative" or "policy" matters depends upon careful consideration of the particular facts in each case.

BCL:DJH

Appropriations And Expenditures; The Wisconsin Constitution does not preclude grants (including those made retroactively) of state money to individuals and families, or to private corporations, for the purpose of affording disaster relief under the Disaster Relief Act of 1974 (P.L. 93-288). The federal funding provided by the Act is now available through the state since the Wisconsin Statutes already provide an appropriation for state administration of federal grants; a new and separate appropriation by the legislature is required, however, to provide the state funding contemplated by the Act. However, the state may not constitutionally indebt itself to the federal government for advances made to the state except to the extent that such advances and all other extraordinary expenditures for which the state has contracted debt do not exceed $100,000. OAG 13-75.

May 15, 1975.

RONALD S. SANFELIPPO, *Administrator*
Division of Emergency Government
Department of Local Affairs and Development

Your predecessor has asked a number of questions of this office dealing with the implementation of the Disaster Relief Act of 1974 (P.L. 93-288) and particularly as to whether there are any obstacles of a constitutional or statutory nature which would hinder the implementation of such a relief program in Wisconsin. The portion of the program with which this opinion is concerned provides for 75 percent federally funded grants to individuals and families who qualify under sec. 408, with the state furnishing the remaining 25 percent of the funds.

The first question you have asked is whether state agencies now make grants of state money to individuals and families for any

purpose that might be considered an "expense" or "need" in the context of sec. 408 and, if not, is the obstacle constitutional or statutory.

Section 408 authorizes grants to be made to meet the necessary disaster-related expenses or serious needs of individuals or families adversely affected by a major disaster in such instance where the individuals or families are unable to meet these expenses or needs through assistance under other provisions of the Act or from other means.

Wisconsin has organized a system of emergency government for the purpose of preparing the state and its subdivisions for emergencies resulting from enemy action and natural or man-made disasters. The powers and duties of the governor and other individuals and governmental units are set out in secs. 22.16 to 22.22, Stats. Currently the state organization for emergency government gives aid in the way of grants and government services only to the local emergency governmental units in the counties, towns, and municipalities. There is no statutory authority for the granting of aid directly to the individual or family.

However, it is my opinion that the absence of any grants of state money to individuals and families is not the result of a constitutional obstacle. It is necessary to examine a number of provisions of the Wisconsin Constitution and the doctrine of public purpose in connection with the expenditure of state funds in order to arrive at this conclusion.

Article VIII, sec. 2, Wis. Const., provides that "No money shall be paid out of the treasury except in pursuance of an appropriation by law. ..." Therefore, until the state legislature authorizes and appropriates money to make the type of payments contemplated by sec. 408 of the Disaster Relief Act of 1974, any payments so made would constitute an illegal expenditure of state funds.

Article VIII, sec. 3, Wis. Const., states that "The credit of the state shall never be given, or loaned, in aid of any individual, association or corporation."

The Attorney General has considered the affect of this prohibition in connection with other types of state expenditures. In 34 OAG 65 (1945) the Attorney General determined that there was no loan of the state's credit involved in the making of loans to

war veterans out of state funds when appropriations from the treasury had been made by the legislature to cover the loans and the state had not engaged in borrowing to finance the loans. Similarly, in 42 OAG 103 (1953) the Attorney General, referring to the 34 OAG 65 opinion, determined that there was no loan of credit involved in the advancement of travel expenses to state employes when the funds for such payments came from a legislative appropriation.

Similarly, if grants are made to individuals from money previously appropriated by the legislature for this purpose, such payments would not constitute a violation of the Wisconsin Constitution, provided that the expenditures are for a public purpose.

State funds can only be spent for a public purpose and since a tax must be spent at the level at which it is raised, in this instance, where state funds are involved, the public purpose must also be a state purpose. *State ex rel. Warren v. Nusbaum* (1973), 59 Wis. 2d 391, 208 N.W. 2d 780.

Section 101 of the Disaster Relief Act of 1974, containing the declaration of Congressional intent, states that the federal government is providing a means of assisting state and local governments during periods of disaster because of the inability of these local units to always provide adequate relief and because disasters often cause loss of life, human suffering, loss of income, property loss and damage, and disruption of the normal functioning of governments and communities. Presumably the state legislature would state a similar intent, should it decide to appropriate funds and participate in this federal assistance program.

In *State ex rel. New Richmond v. Davidson* (1902), 114 Wis. 563, 88 N.W. 596, 90 N.W. 1067, the court addressed itself to the issue as to whether an appropriation to aid the City of New Richmond in the wake of a cyclone which caused numerous deaths and extensive property damage, constituted a public purpose and, also, whether that public purpose was a state purpose. The court never seemed to doubt that the expenditures were for a public purpose. The opinion states, at page 575: "But it is not seriously claimed that the object of the legislation in question was not public." The more difficult question was whether the aid to a local

community served a state purpose. The court held that it did, stating, at page 579:

> "... No forecast could have anticipated and guarded against the calamity. The local authorities were powerless in the presence of such great destruction, suffering, and death. The condition of things, so suddenly precipitated, the claims of humanity, and the good of the state called for immediate and extraordinary relief. In passing the act the legislature were called upon to consider the whole situation. The people of the commonwealth were bowed in sorrow over the great calamity, and the call was for the immediate exercise of the police power of the state on a large scale. The object of the act being public, and to subserve the common interest and well-being of the people of the state at large, brought the subject legitimately within the power of the legislature. ..."

However, in *State ex rel. New Richmond* the appropriation was made to the city government. The grant did not go to the individual citizens of the city, as sec. 408 of the Disaster Relief Act contemplates. It is, therefore, necessary to consider whether state funds can be paid to private individuals, assuming that such payment is serving a public purpose. It is my opinion that they can be so paid.

In *State ex rel. Wisconsin Development Authority v. Dammann* (1938), 228 Wis. 147, 277 N.W. 278, 280 N.W. 698, the court considered the validity of an appropriation of state funds to the Wisconsin Development Authority, a private corporation. The court said, at page 176:

> "The mere fact that the appropriation was to reimburse a private corporation for expenditures incurred by it to effect purposes specified in the act does not render the appropriation invalid if the services are for a public purpose. ... When, however, the appropriation is solely for a public purpose and is under proper governmental control and supervision, it is not invalid merely because it is paid to or through a private corporation or agency. ..."

At pages 180 and 181 of the opinion, the court, in attempting to determine whether the Authority's functions constituted a public purpose, cited numerous examples of public purposes. They are of

relevance to this opinion because many of the examples cited involve payments to private individuals. The list includes educational assistance to veterans of the World War, *State ex rel. Atwood v. Johnson* (1919), 170 Wis. 251, 176 N.W. 224; special aid to farmers in situations where many farmers and their families might otherwise suffer in health or die from want of food, *Cobb v. Parnell* (1931), 183 Ark. 429, 36 S. W. 2d 388; and aid to tornado victims, *State ex rel. New Richmond v. Davidson, supra.*

In *State ex rel. Warren v. Nusbaum* (1972), 55 Wis. 2d 316, 198 N.W. 2d 650, the court held that a contract with the Marquette University School of Dentistry to provide for an increase in the training of much-needed dentists constituted a public purpose, although the court held that the statute itself was unconstitutional as a violation of the "establishment" and "free exercise" clauses of Amendment I, U. S. Const. Subsequent to this decision legislation was enacted which enabled the state to appropriate money for the aid of dental education at Marquette. In *State ex rel. Warren v. Nusbaum* (1974), 64 Wis. 2d 314, 219 N.W. 2d 577, the court upheld payments to private schools that are providing special educational services to handicapped children as provided in ch. 89, Laws of 1973, an admittedly public purpose.

The cases cited above are additional support for my opinion that funds may be paid to private corporations or individuals if the appropriations constitute a public purpose.

Your second question asks whether my response would be different if all of the funds for grants were provided by the federal government, with state administration of the grant. As I have found that no constitutional obstacle exists, although currently there is no statutory authorization for the appropriation as required by Article VIII, sec. 2, Wis. Const., my opinion as regards the constitutionality of the payments would not be changed as applied to the hypothetical situation which you have posed. However, I am of the further opinion that it would not be necessary for the legislature to pass a statute authorizing the expenditure of such funds because such an appropriation already exists.

Section 16.54, Stats., authorizes the governor to accept all funds on behalf of the state that are made available to the state by the United States government. Section 20.545 (2) (n), Stats., appropriates such money as received by the state from the federal

government, as authorized by the governor under sec. 16.54, Stats., for local assistance to the emergency government. Therefore, the Wisconsin constitutional requirement that only such money as appropriated by law shall be paid out of the treasury has been met.

Your third question asks whether the state can give such a grant retroactively. *State ex rel. New Richmond v. Davidson, supra,* speaks to this issue. The situation was that the city had borrowed money from trust funds of the state for purposes of cleanup and reconstruction after the cyclone. Later the state passed an act which relieved the city of its indebtedness to the state. The court held that because the legislature could have appropriated money to the city at the time of the disaster, had it been in session, it necessarily followed that it had the power to reimburse the city for such expenditures.

Your fourth question asks whether there are any constitutional or statutory obstacles to accepting a federal advance of the state's share, and whether the state would consider the advance, "to be repaid to the United States when such state is able to do so," to be a grant or a loan.

Section 408 (b) of the Federal Disaster Act of 1974 provides that when the state is not able to pay immediately its 25 percent share, that the President will authorize an advancement to the state and that "any such advance is to be repaid to the United States when such State is able to do so." I read this to mean that while the state is not under any specified time requirements as to repayment of the money, nevertheless the money must be repaid at some time. I find that this reading is compelled by the use of the word "advance." Therefore, in accepting such an advance, the state is contracting a debt and is legally obligated to repay the advance.

Article VIII, sec. 4, Wis. Const., provides that "The state shall never contract any public debt except in the cases and manner herein provided." Article VIII, sec. 7, provides for the contracting of public debt for public defense and bonding for public purposes, and as written does not apply to this situation. Article VIII, sec. 6, Wis. Const., provides for contracting public debt for the purpose of defraying extraordinary expenditures and is applicable to this situation. However, this section provides that all such debts shall never in the aggregate exceed $100,000.00. Therefore, assuming

that the state had not created any other debts under this section, the state can only be constitutionally obligated under this section to the extent of $100,000.00.

The term "debt" as used in Article VIII, sec. 4, was defined by the court in *State ex rel. Owen v. Donald* (1915), 160 Wis. 21, at page 59, 151 N.W. 331:

> "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. [cases cited]."

In *State ex rel. Warren v. Nusbaum* (1973), 59 Wis. 2d 391, 208 N.W. 2d 780, the court referred to the above-cited case saying, at page 428:

> "This court has heretofore consistently held that no state debt is created unless the state itself is under a legally enforceable obligation. ..."

It is my opinion that an advance to the state of its share of the grant would constitute a debt, and would therefore be subject to the limitations set forth in Article VIII, secs. 4 and 6, Wis. Const.

Assuming that the state decided to incur a debt as provided in Article VIII, sec. 6, Wis. Const., statutory authorization would be required pursuant to the above constitutional provision.

BCL:JEA

Education; Schools And School Districts; Transportation; A school owned or operated automobile, used in casual and occasional transportation of school children to extracurricular activities is not a school bus as defined in sec. 340.01 (56), Stats., and sec. 121.54 (7), Stats., does not prohibit such use. OAG 14-75.

May 21, 1975.

ZEL S. RICE, II, *Secretary*
Department of Transportation

Your Department has asked whether sec. 121.54 (7), Stats., requires extracurricular transportation of school children to be performed solely in school busses as defined in sec. 340.01 (56), Stats., and driven by school bus operators licensed under sec. 343.12, Stats.

Section 121.54 (7), Stats., reads:

"(7) TRANSPORTATION FOR EXTRACURRICULAR ACTIVITIES. (a) A school board may provide transportation for pupils attending public schools only, their parents or guardians, authorized chaperones, school district officers, faculty and employes and school doctors, dentists and nurses in connection with any extracurricular school activity, such as a school athletic contest, school game, school outing or school field trip or any other similar trip when:

"1. A school bus which is regularly used by or for the school district is used and such transportation is under the immediate supervision of a competent adult employe of the school district and the school bus is operated by a driver regularly used as a bus driver by the school district;

"2. A school operated by the school district has an actual educational interest in such activity;

"3. Such use does not extend more than 50 miles beyond the boundary of this state, but this restriction does not apply to any such use by the Wisconsin school for the deaf or by the Wisconsin school for the visually handicapped; and

"4. The school principal or other person with comparable authority authorizes such use.

"(b) The school board may make a charge for such transportation, to be paid by the persons transported, sufficient to reimburse it for the use of the school bus. If the school bus is operated by a person under contract with the school board under s. 121.52 (2) (b), the school board may authorize a charge for the transportation, to be paid by the

persons transported, sufficient to make reimbursement for such use."

This statute provides that the regular school bus with the regular driver may be used for extracurricular transportation. This does not constitute a prohibition of extracurricular transportation by any other legal means, such as those methods specified by sec. 121.55, Stats., for example.

Nor does sec. 121.54 (7), Stats., prohibit extracurricular transportation by use of a school owned automobile other than a school bus. Under certain circumstances such an automobile is not considered a school bus and its operation is not therefore subject to the provisions of sec. 343.12, Stats., which requires that no person shall operate a school bus transporting school children unless he has a school bus operator's license.

The definition of school bus is found in sec. 340.01 (56), Stats., which reads:

"(56) 'School bus' means a motor vehicle which transports children to or from a public or private school or which transports school groups engaged in extracurricular activities to or from points designated by such schools, but does not include:

"(a) A motor vehicle owned or operated by a parent or guardian transporting only his own children, regardless of whether the school has made a contract with or paid compensation to such parent or guardian for such transportation; or

"(b) A vehicle having a seating capacity of fewer than 10 persons, including the operator, and used in casual, occasional or reciprocal transportation of school children and not under contract.

"(c) Busses operated by a common motor carrier of passengers used in urban transportation of school children, or when used in extra curricular activities to and from points designated by a school."

An automobile is clearly a motor vehicle, and thus is included in the definition of school bus. However, exempted from the definition of school bus is a vehicle seating less than 10 persons and

used in the casual, occasional or reciprocal transportation of school children and not under contract. The purpose of this exemption is to permit parents of two or more families to take turns driving each other's children to school. The word "reciprocal" would apply to such transportation.

Furthermore, by use of the words "casual" and "occasional" the exemption is broad enough to include transportation of children to extracurricular activities in a school owned automobile on infrequent and unanticipated occasions when a licensed school bus and a licensed school bus operator are not available.

In such cases, the school owned automobile would not be a school bus and the driver of the vehicle need not be licensed as a school bus driver. However, it should be emphasized that the words "casual" and "occasional" are real limitations and their use does not constitute a loophole in the law. "Casual" means occurring by chance or without regularity. "Occasional" means occurring at irregular or rare intervals. Therefore, if a school uses a vehicle with some regularity for transporting students, such vehicle would be considered a school bus and the driver would have to be licensed as a school bus driver.

You indicate that this has been your construction of sec. 340.01 (56), Stats., for some period of time and that the Department of Public Instruction holds the same view. This construction is not inconsistent with sec. 121.54 (7), Stats., and such administrative construction is entitled to great weight in construing these statutes. *Transport Oil Co. v. Cummings* (1972), 54 Wis. 2d 256, 267, 195 N.W. 2d 649.

Furthermore, the legislature has, for the time being, acquiesced in this construction. Substitute Amendment 2 to 1973 Senate Bill 751 would have made any school owned automobile a school bus, thus requiring it to be driven by a person licensed as a school bus operator. However, that bill was not passed.

It is, therefore, my opinion that a school owned or operated automobile, used in casual and occasional transportation of school children to extracurricular activities is not a school bus and sec. 121.54 (7), Stats., does not prohibit such use.

BCL:AOH

Lobbying; Secretary Of State; The Secretary of State may promulgate rules and forms to aid in the administration of the lobbying law. However, a substantial portion of the rules proposed on April 30, 1975, would be invalid if adopted since they exceed bounds of correct interpretation of the relevant statutes and impose substantive requirements in excess of statutory authority. OAG 19-75.

June 23, 1975.

THE HONORABLE, THE ASSEMBLY
Legislature

By 1975 Assembly Resolution 27, you have requested my opinion whether the Secretary of State has authority to issue the proposed rules relating to the administration of the Wisconsin lobbying laws which were submitted to members of appropriate standing committees of the legislature on April 30, 1975, pursuant to sec. 227.018 (2), Stats.

As a constitutional officer, the Secretary of State has certain duties which are prescribed by the Constitution and set forth in Art. VI, sec. 2, Wis. Const. The same section provides that "... He shall perform such other duties as shall be assigned him by law. ..." As head of his department, sec. 15.04 (1), Stats., empowers him to "plan, direct, co-ordinate and execute the functions vested in his department." Section 14.361, Stats., provides that the office of Secretary of State shall have the program responsibilities specified under subch. III of ch. 13, Stats., which is concerned with regulation of lobbying.

Every administrative agency must conform precisely to statutes from which it derives its power. *Mid-Plains Tel. Inc. v. P.S.C.* (1973), 56 Wis. 2d 780, 202 N.W. 2d 907. As an administrative officer, the Secretary of State has only those powers which are expressly granted by the Constitution or statute or which are necessarily implied. *State ex rel. Martin v. Zimmerman* (1939), 233 Wis. 16, 20, 288 N.W. 454; *American Brass Co. v. State Bd. of Health* (1944), 245 Wis. 440, 15 N.W. 2d 27.

With the exception of the power to hold hearings under sec. 13.63 (1), Stats., on the denial of applications for lobby licenses,

the responsibilities of the Secretary of State with respect to the administration of the lobby laws (secs. 13.60-13.73, Stats.) are, in large part, ministerial. This is in keeping with the primarily ministerial character of the office and its duties. See sec. 14.361, Stats.; *State ex rel. Martin v. Zimmerman* (1939), 233 Wis. 16, 17, 288 N.W. 454; *State ex rel. Attorney General v. Cunningham* (1892), 81 Wis. 440, 486, 51 N.W. 774. As an officer with ministerial duties, the Secretary of State has powers considerably narrower than those of an officer invested with broad responsibilities requiring the exercise of discretion.

Section 13.63 (1), Stats., however, does provide that the Secretary of State shall provide a form of application for license, prescribes fees for such licenses and secs. 13.60-13.73, Stats., do provide for the filing of certain reports and statements by lobbyists and their principals. These sections and sec. 227.014 (2), Stats., would permit the Secretary of State to adopt standard forms to aid in his administration of the statutes and to promulgate rules to interpret provisions of the statutes which might otherwise be unclear. Section 227.08, Stats., requires the Secretary of State to adopt rules of procedure for any necessary hearings. The proposed rules do not cover the latter subject matter.

Section 227.014 (1), (2), Stats., provide in part:

> "Extent to which the administrative procedure act confers rule-making authority. (1) Except as provided in sub. (2) and s. 227.08 ... nothing in this chapter confers rule-making authority upon or augments the rule-making authority of any agency.
>
> "(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.*
>
> "(b) Each agency *is authorized to prescribe such forms and procedures* in connection with statutes to be enforced or administered by it as it considers to be necessary to effectuate the purpose of the statutes, *but nothing in this paragraph*

authorizes the imposition of substantive requirements in connection with such forms or procedures." (Emphasis added.)

Section 227.013, Stats., provides:

"FORMS. A form which imposes requirements which are within the definition of a rule shall be treated as a rule for the purpose of this chapter, except that:

"(1) Its adoption, amendment or repeal need not be preceded by notice and public hearing; and

"(2) It need not be adopted, amended or repealed by the board or officer charged with ultimate rule-making authority but may be adopted, amended or repealed by any employe of the agency to whom such board or officer has delegated the authority; and

"(3) It need not be published in the administrative code or register in its entirety, but may be listed by title or similar description together with a statement as to how it may be obtained."

By reason of sec. 227.01 (5) (j), (q), Stats., a rule is not involved where the action of the agency:

"(j) Relates to the form and content of reports, records, or accounts of state, county or municipal officers, institutions or agencies;

"***

"(q) Is a form the content or substantive requirements of which are prescribed by a rule or a statute;"

The adoption of forms and the promulgation of rules are subject to certain limitations. The forms or procedures adopted cannot impose substantive requirements beyond those included in the relevant statute. Rules must be limited to correct interpretation of provisions of statutes *which need interpretation* to effectuate the purpose of such statutes but cannot impose substantive requirements which are broader than the statutory language.

State v. Grayson (1958), 5 Wis. 2d 203, 92 N.W. 2d 272 contains an example of proper use of the rule-making power. The

Chiropractic Examining Board was charged with the duty of licensing and regulating chiropractors, but the legislature had failed to define the term "chiropractic." The board proceeded to do so under sec. 227.014 (2) (a), Stats. The court held that it was proper for the board to adopt the rule to effectuate the purpose of the statutes and that the definition adopted did not exceed the bounds of correct interpretation.

Where the provisions of a statute are clear and unambiguous, however, so that the intent of the legislature is clear, there is no need for interpreting such provisions by rule. Proper interpretation does not in any event permit the addition of substantive requirements.

Administrative rules are for the purpose of effectuating the purpose of the statutes and to aid in their interpretation and administration. They should not be used to repeat in exact terms statutory language which needs no interpretation. Mere repetition in rule form is surplusage and although probably not invalid, is not good form. Section 227.024 (5), Stats., provides:

> "Rules shall not unnecessarily repeat statutory language. Whenever it is necessary to refer to statutory language in order to effectively convey the meaning of a rule interpreting that language, the reference shall clearly indicate the portion of the language which is statutory and the portion which is the agency's amplification of that language."

Section 13.69, Stats., provides that violations of secs. 13.61-13.68, Stats., are punishable by fine, and in some cases, imprisonment. Since the statutes are penal in nature, they are to be strictly construed in favor of the accused. Accordingly, a lobbyist may not be required to provide any more information than is strictly required by law as a condition precedent to being issued a license. *State v. Decker* (1950), 258 Wis. 177, 45 N.W. 2d 98; *State v. Hoebel* (1950), 256 Wis. 549, 41 N.W. 2d 865.

With these general comments in mind, I will comment on each of the six proposed rules. The proposed rules are set forth in full. Underlined material indicates that, in my opinion, there is no statutory authority for the same or that the interpretation is broader than that permissible. Comments as to each of the proposed rules, or subsections thereof, appear after each rule.

"SS 1.01 DEFINITIONS. In chapter 13, subchapter III, Wis. Stats., and these rules, and unless the context otherwise requires:

"(1) With respect to lobbying as defined in section 13.62, Wis. Stats.:

"(a) 'Lobbying' means the attempt to promote or oppose the introduction or enactment of legislation before the legislature or before a legislative committee or any members of the legislature.

"(b) 'Lobbyist' means any person who engages in the practice of lobbying for hire which includes the activities of any agents, attorneys, employes, or officers of any principal who are paid a regular salary for full time lobbying, or who are paid a regular salary for performing services which include, but are not limited to lobbying, or who are paid a retainer by such principal for lobbying.

"(c) 'Unprofessional conduct' as defined in section 13.62(3), Wis. Stats. includes:

"1. A violation of sections 13.62 to 13.71, Wis. Stats.

"2. Instigating the introduction of legislation for the purpose of gaining employment from any principal.

"3. Attempting to influence the vote of legislators by a promise of support or opposition at any future election.

"4. Making public any insubstantiated charges of improper conduct on the part of another lobbyist or legislator.

"5. Engaging in activities which discredit the practice of lobbying or the legislature.

"6. Furnishing anything of pecuniary value to the governor, any legislator, any employe of the state, or any candidate for state office.

"(d) 'Principal' means:

"1. Any person, corporation, or association who engages a person in lobbying.

"2. Any board, department, commission or other agency of the state, or any county or municipal corporation which engages a person in lobbying"

Comment to SS 1.01: The definitions are almost wholly lifted from sec. 13.62 (1)-(4), Stats. No substantial interpretation is involved. This repetition of statutory language is in bad form and

violates sec. 227.04 (5), Stats., but does not make the proposed rule invalid.

"SS 1.02 LICENSES FOR LOBBYISTS. (1) A separate license to lobby shall be obtained for each principal. Payment of $10.00 shall be made for each license. A lobby license, under section 13.63, Wis. Stats. shall contain the following information:

"(a) The applicant's name, permanent business address and telephone number, date of the preparation of the license, *and the anticipated duration of the applicant's employment.*

"(b) The applicant's temporary address in Dane County during the legislative session and telephone number.

"(c) The name and address of the applicant's principal *and the nature of business of said principal.*

"(d) *The amount received as compensation for lobbying which shall be the prorated amount of a regular salary based on the estimated percent of the lobbyist's time spent engaged in lobbying activities, the amount of a regular salary received for lobbying, or the amount of a retainer. If the applicant serves as legal counsel as well as a lobbyist for said principal, the prorated amount of compensation based on the estimated percent of time spent engaged in lobbying activities, or the hourly, daily, weekly or monthly rate of compensaiton [sic] or retainer received in conjunction with lobbying activities shall be reported.*

"(e) *The type of expenditures to be reimbursed by the principal, (Note: this shall include, for example, meals, lodging, travel, postage or printing expenses.) and the maximum amount of reimbursement. (Note: If the applicant maintains an expense account, the amount shall be reported. If the applicant is reimbursed for any amount of expenditures, '100%' shall be reported. If the applicant is not reimbursed for any expenditures 'none' shall be reported.)*

"(f) *A statement of explanation if any members of an applicant's business associates or immediate family are in the legislature, employed by the state or by the applicant's principal.*

"(g) *The occupation of the applicant other than lobbying, if any.*

"(h) *A list of the applicant's principals, other than stated principal, if any.*

"(i) *A statement of the applicant's capacity of employment as a lobbyist which includes information that the applicant will be employed solely as a lobbyist or as a regular employe performing services for his or her employer which include, but are not limited to lobbying, and the position held by the applicant in this capacity. If the applicant serves as legal counsel as well as a lobbyist for said principal, state 'Legal Counsel'.*

"(j) A list of the general subjects of legislative interest of the applicant under the employment of the stated principal.

"(k) A list of the specific legislative interests *and the position, for or against, of the applicant serving in the capacity as a lobbyist for the stated principal.*

"(l) The application shall be signed and dated."

Comment to SS 1.02: Again, much of the language is excessive repetition of statutory provisions of sec. 13.63, Stats., which is clear and needs no interpretation. Statutory authority for the approved material is found in secs. 13.63, 13.64 and 13.65 (1), (2), Stats.

With respect to SS 1.02 (1) (a), the duration of lobbyists' employment need not be stated. Section 13.63 (1) provides license expires December 31 of each even-numbered year. Employment can be terminated earlier and in such case that fact should be recorded as provided in sec. 13.64, Stats.

With respect to SS 1.02 (1) (d), (e), (f), (g), (h) and (i), sec. 13.63 (1), Stats., establishes the criteria for eligibility for license. There is no provision requiring statement of other occupation, business of principal, amount of compensation, type of expenditures to be reimbursed, disclosure of employment of business associates or members of immediate family.

"SS 1.03 AUTHORIZATION OF LOBBYIST. (1) Within 10 days after the lobbyist's registration, any principal employing any lobbyist shall file with the secretary of state under section 13.65 Wis. Stats. an authorization of said lobbyist which shall contain the following information:

"(a) The name, permanent business address and telephone number of the lobbyist, the date the authorization

was prepared *and the anticipated duration of the lobbyist's employment.*

"(b) The name and address of the principal, *the nature of the principal's business* and telephone number.

"(c) *The amount the lobbyist receives as compensation for lobbying which shall be a prorated amount of a regular salary based on the estimated percent of the employe's time spent lobbying, the amount of a regular salary received by the lobbyist, or the amount of a retainer paid to the lobbyist. If the lobbyist serves as legal counsel as well as a lobbyist for the principal making such authorization, the prorated amount of compensation based on the estimated percent of time spent engaged in lobbying activities, or the hourly, daily, weekly or monthly rate of compensation or retainer paid in conjunction with lobbying activities shall be reported.*

"(d) *The type of expenditures to be reimbursed by the principal. (Note: this shall include, for example, meals, lodging, travel, postage, or printing expenses.) and the maximum amount of reimbursement paid to the lobbyist. (Note: If the lobbyist maintains an expense account, the amount shall be reported. If the lobbyist is reimbursed for all expenditures, '100%' shall be reported. If the lobbyist is not reimbursed for any expenditures, 'none' shall be reported.)*"

"(e) A list of the general subjects of legislative interest in relation to which the lobbyist is employed. This list shall be kept current and additional entires [sic] shall be made as additional subjects of legislative interest arise.

"(f) The statement shall be signed and dated with information including the group the signer represents and the title of the signer."

Comment to SS 1.03: Authority for the approved material is found in sec. 13.65 (1), (2) and (3), Stats. Most of such material is repetition of statutory language. None of the provisions of SS 1.03 (b), (c) and (d), represent correct interpretation of sec. 13.65, Stats., or other provisions of lobbying law and all, inpermissibly, introduce substantial additional requirements.

"SS 1.04 STATEMENT OF EXPENSE BY LOBBYIST. (1) Within 10 days after the end of each calendar month of the legislative session, every lobbyist shall file with the secretary

of state, under section 13.67, Wis. Stats., a sworn statement of financial standing which shall contain the following information:

"(a) The lobbyist's name, permanent business address and telephone number, the date of preparation, and the period covered by the statement.

"(b) The lobbyist's temporary address in Dane County and telephone number, if any.

"(c) *A separate itemized list for each principal of reimbursements and receipts from lobbying activities. If the lobbyist bills his or her principals based on the amount of time spent lobbying, the billed amount shall be reported on the expense statement covering the month in which the bill was issued. The total receipts from each principal and the overall total receipts to date shall be reported.*

"(d) The amount of all loans received or repayed by the lobbyist *or principal* in connection with lobbying activities, the date of the transaction and the creditor's name and whether the transaction was a receipt or a repayment.

"(e) A separate itemized list for each principal of all expenditures made by the lobbyist *or principal* in conjunction with lobbying activities. This list shall include *office expenses, (Note: in estimating office expenses, a reasonable estimate of the dollar amount spent on rent, supplies and other office expenses based on the percent of time spent engaged in lobby related activities shall be included.)* printed or duplicated material, telephone or telegraph expenses, postage, *travel, food,* entertainment, *living accomodations,* [sic] wages, salaries or retainers (Note: the lobbyist's compensation *and the estimated dollar amount spent on research backup, clerical staff or assistants* based on the percent of time they spend on lobby related activities shall be reported.) public relations and advertising, gifts and contributions. If the lobbyist pays for lobbying expenses directly out of his or her retainer, salary, or compensation, the lobbying expenses shall be itemized as stated, *the balance of which shall be reported as an expense of the principal in the form of compensation.* The total expenditures made for each principal *and the overall total expenditures to date* shall be included.

"(f) The amounts of all individual expenditures *of over $50.00* made by the lobbyist *or principal* in conjunction with lobbying activities. The total expenditures made for each principal *and the overall total expenditures to date shall be included.*

"(g) The statement shall be signed, dated and notarized.

"(h) Should a registered lobbyist receive no compensation or reimbursements and incur no expenses in conjunction with lobbying activities for the entire legislative session, he or she may file with the secretary of state a statement, signed under oath, indicating the same. Subsequent to this statement, the lobbyist need not file the lobbyist's monthly expense statements for the balance of the legislative session."

The primary support for the approved material is found in sec. 13.67 (1), Stats. However, the statute is solely concerned with "expenses made and obligations incurred" and not with receipts or amounts directly paid by the principal. Such latter amounts are reportable by the principal. Nor must the lobbyist report cumulative expense totals, his own personal living and travel expenses or indirect and overhead expenses. See comment to SS 1.05, *infra.* However, lobbyists could be required to report amounts paid in entertaining any state official or employe in support of pending legislative matters. See sec. 13.67 (2), Stats.

SS 1.04 (d), as written, may exceed statutory authority. A loan is reportable only if it amounts to an obligation incurred by the lobbyist or his agent; activities by the principal with respect to such obligations are not reportable by his lobbyist. Loans repaid could be included only if they constituted expenses to the lobbyist.

"SS 1.05 STATEMENT OF EXPENSE BY PRINCIPAL. (1) Within 30 days of the sine die adjournment of the legislature, every principal shall file with the secretary of state under section 13.68 Wis. Stats. a complete and detailed expense statement under oath which shall include the following information:

"(a) The lobbyist's name, address and telephone number, date of the preparation of the statement, and the duration of the lobbyist's employment.

"(b) The name and address of the principal, *the nature of the principal's business* and telephone number.

"(c) A separate itemized list for each lobbyist of all expenses paid or incurred by such principal in connection with the employment of a lobbyist or with lobbying activities. This separate and itemized list shall include the amount of compensation or retainer paid to each lobbyist. If the lobbyist is a regular employe who performs services for his or her principal which include, but are not limited to lobbying, a prorated amount of a regular salary based on the percent of the lobbyist's time spent engaged in lobbying activities shall be reported. If the lobbyist serves as legal counsel as well as a lobbyist for the reporting principal, the prorated amount of compensation based on the percent of time spent engaged in lobbying activities, or the total compensation based on an hourly, daily, weekly or monthly rate of compensation or the total amount of retainers paid to the lobbyist shall be reported. The list shall also include reimbursements paid or expenses incurred itemized by *office expense (Note: In estimating office expenses for a regular employe who performs services for the principal which include but are not limited to lobbying activities, report the prorated amount of office overhead based on the percent of time the lobbyist spent engaged in lobbying activities. In estimating office expenses paid for a lobbyist who also serves as legal counsel for the reporting principal, report the prorated amount of office overhead based on the percent of time the lobbyist spent engaged in lobbying activities.)* printed or duplicated material, telephone or telegraph reimbursements, postage, travel, food, entertainment, living accomodations, [sic] wages, salaries, or retainers paid to the lobbyist *and the estimated dollar amount spent on research backup, clerical staff or assistants employed by the lobbyist or principal based on the percent of time they spent on lobby related activities*, public relations and advertising, gifts and contributions. The total expenses paid or incurred for each lobbyist and the total of all expenses paid or incurred in connection with lobbying efforts shall be reported.

"(d) The statement shall be signed, dated and notarized."

Comment to SS 1.05: Much of this proposed rule is a valid interpretation of the provisions of secs. 13.68 and 13.62 (2), Stats. However, to clarify the situation with respect to reportable

expenses, I offer the following construction of the filing requirements which is applicable to both secs. 13.67 and 13.68, Stats.

Section 13.68 requires disclosure by principals of "all expenses paid or incurred by such principal in connection with the employment of lobbyists ..." This refers to any type compensation, whether it be a fee, salary, or other form of remuneration. In the case of lobbyists who are employes of their principal (as opposed to independent contractors compensated on a basis other than salary) that portion of the lobbyist-employe's salary attributable to lobbying activities must be reported by the employer.

Section 13.68 also requires principals to report "all expenses paid or incurred by such principal ... in connection with promoting or opposing in any manner the passage by the legislature of any legislation affecting the pecuniary interest of such principal." Section 13.67 requires disclosure by lobbyists of "expenses made and obligations incurred by himself or any agent in connection with or relative to his activities as such lobbyist ..." This broad and somewhat ambiguous language in both sections must be read narrowly because each statute from which it is drawn is penal in character and must be strictly construed. Therefore, expenses reportable under these provisions are limited to those expenses directly paid or incurred in connection with a lobbying effort. Reportable direct expenses include those expenses of a lobbyist reimbursed by his principal as well as expenses by the principal or lobbyist himself made primarily for the purpose of promoting or opposing legislation. See *State v. Decker* (1950), 258 Wis. 177, 45 N.W. 2d 98; 44 OAG 174 (1955). On the other hand, indirect expenses, such as those that would be classified as the expenses of maintaining an office, including incidental supplies, or as overhead, need not be reported.

> "SS 1.06 TERMINATIONS. (1) Should a lobbyist and principal wish to terminate a lobbying license, the lobbyist may file with the secretary of state a signed statement of termination which shall include the name and address of the principal for which the termination is sought. A principal's expense statement shall be filed with the secretary of state within 30 days of the sine die adjournment of the legislature

for any portion of the legislative session in which the lobbyist was engaged in lobbying activities."

Comment to SS 1.06: This rule is a reasonable implementation of sec. 13.64, Stats., which permits termination and of sec. 13.68, Stats., which requires expense statement by principal. Either the lobbyist or principal may terminate the relationship and, under sec. 13.64, Stats., either may enter the fact of termination on the lobby register.

It may be desirable to require lobbyists to disclose more information than is presently required under the laws regulating lobbying. That is, however, an issue for the legislature to consider and resolve. Until the legislature provides otherwise, it is my opinion that failure to provide information for which there is not presently statutory or implied authority does not, by itself, constitute cause for denying an application for a lobbying license or for suspension or revocation of any such license.

In conclusion, it is my opinion that while the Secretary of State does have power and duty to adopt forms and promulgate rules to aid in the administration of the lobbying law, a substantial portion of the rules proposed on April 30, 1975, would be invalid if adopted since they exceed the bounds of correct interpretation of the relevant statutes and impose substantive requirements in excess of statutory authority.

BCL:RJV

Wisconsin Retirement Fund; The prior service credit for elected officials participating in the Wisconsin Retirement Fund, authorized by ch. 288, Laws of 1973 (sec. 41.02 (12) (i), Stats.), may be paid in whole or in part by the governmental employer of those officials eligible for that credit. OAG 20-75.

June 23, 1975.

DENNIS J. FLYNN, *Corporation Counsel*
Racine County

You request my opinion whether the prior service credit for elected officials authorized by ch. 288, Laws of 1973, may be paid in whole or in part by the governmental employer of officials eligible for that credit.

Chapter 288, Laws of 1973, amended sec. 41.02 (12) (i), Stats., to provide that an elected official participating in the Wisconsin Retirement Fund could receive credit for his service performed before he was a member of the Fund. Such prior service credit is contingent upon him making all of the required contributions to the Fund which he would have made had he been a participating employe during the time of such service plus interest.

You inform me that as of January 1, 1968, Racine County, by county board resolution, assumed the responsibility for paying the employes' required contribution to the Retirement Fund in addition to the employer's payment. You ask whether Racine County, as the employer, may pay the employe share of that contribution for the period after January 1, 1968, for those eligible elected county officials who obtained the right to retroactive participation in the Wisconsin Retirement Fund and retroactive credit for earlier years pursuant to ch. 288, Laws of 1973.

Section 41.02 (12) (i) as amended by ch. 288, Laws of 1973, reads:

> "(12) The definition of employe shall not include persons:
>
> "***
>
> "(i) Who *before January 1, 1974*, are elected to office by vote of the people unless any such elected person requests the board in writing to be included within this fund. Any elected person included at his request shall be included during any subsequent term or part thereof which he may serve in the same office or in any other elective office while serving any participating employer. Persons so electing to participate shall be considered employes on the effective date of participation

of the employer, but only if such election is received by the board within 90 days of such effective date and if such person was in the service of such employer on such effective date. In all other cases any person so electing to participate shall become an employe as of the first day of the month following the receipt by the board of notice of such election, *but creditable service shall be granted for service as an official elected by vote of the people which has not been granted previously if the person, before July 1, 1974, makes all required contributions which he would have made had he been a participating employe in a position meeting the requirements of sub. (6) during such service plus the compounded interest which would have accrued on said contributions at the effective rate if such official had been a participating employe during such service. The Wisconsin retirement fund board may accept the certification of the 600-hour requirement for prior local elective service by a state senator or representative to the assembly upon his certification of 600 hours of local elective service for a maximum of 8 years' service.*" (Emphasis upon amended portion.)

Counties are authorized to pay the employes' required contribution to the Retirement Fund on behalf of the employe under sec. 41.07 (2) (c), Stats., which provides:

> "For participating employes other than state employes, in lieu of the contributions required by par. (a) or (am), all or part of such contributions may be paid by the employer; but all such payments shall be reported to the board as though contributed by participating employes, and all such payments shall be available for all retirement fund benefit purposes to the same extent as normal contributions which were deducted from the earnings of such participating employes. Action to assume employe contributions as provided herein shall be taken at such time and in such form as is determined by the governing body of the participating employer."

Subparagraphs (a) and (am), determine the amount of the employe contribution which subpar. (c), quoted above, authorizes employers other than the state to pay in lieu of payment by the employe. The prior service credit authorized by sec. 41.02 (12)

(i), Stats., as amended, is defined as "all required contributions which ... would have been made had [the eligible elected official] been a participating employe. ..." This is clearly a reference to the employe contributions provided for in sec. 41.07 (2) (a) and (am), Stats. Since the employe contributions required under those provisions may be paid by the employer, it follows that the employe contributions for the prior service credit under sec. 41.02 (12) (i), Stats., may likewise be paid by the employer at its option.

Section 41.07 (2) (a) and (am), Stats., does not contemplate employe contributions in the nature of interest, however. Nevertheless, no provisions in ch. 41, Stats., relating to the Wisconsin Retirement Fund, would prohibit employers from also making that part of the employes' contribution for prior service credit attributable to interest. Because such contributions are not in conflict with the plain language of any provision of the statutes regulating the Wisconsin Retirement Fund, the employer is not precluded from paying any part of the employes' contribution for prior service credit including the interest thereon. 59 OAG 186, 189-191 (1970).

In the event that the county makes the payments for all or part of the prior service credit authorized by sec. 41.02 (12) (i), Stats., for presently employed elected officials, you ask whether the county must also make such payments for those formerly so employed. Such payments can be made only for those elected officials employed by the county on or after June 16, 1974, the effective date of ch. 288, Laws of 1973. In this regard, I call your attention to the enclosed copy of an opinion by my predecessor to Mr. C. M. Sullivan, Secretary of the Department of Employe Trust Funds, dated November 25, 1974. In such opinion he stated that a claim for additional credits was properly denied where the elected official was no longer employed on the effective date of ch. 288, Laws of 1973.

BCL:DJH

Licenses And Permits; Nurses; Sections 441.04, 441.07 and 441.10, making citizenship a prerequisite to obtaining a certificate/license to practice nursing in the State of Wisconsin, are unconstitutional in that they violate rights under the Fourteenth Amendment of the United States Constitution when applied to resident aliens. OAG 22-75.

June 24, 1975.

ELAINE F. ELLIBEE, *Secretary Administrator*
Board of Nursing and Division of Nurses
Department of Regulation and Licensing

You have requested my opinion concerning the constitutionality of secs. 441.04, 441.07, and 441.10, Stats., with respect to the citizenship requirement contained therein.

Section 441.04 provides in material part:

> "Any person who is a citizen or who has legally declared his intention to become a citizen ... shall be entitled to examination. ..."

Section 441.07 provides in material part:

> "The board may revoke, suspend or deny renewal of a certificate of registration of a nurse, or license of a trained practical nurse, upon proof that the person ... has failed to become a citizen within 7 years after declaring such intent, ..."

Section 441.10 (1) provides in material part:

> "... A citizen or an alien who has legally declared his intention to become a citizen, ... may apply to the board for licensing as a trained practical nurse, and ... shall be entitled to take an examination for such purpose. ..."

Your first question is whether these provisions are in violation of the Constitution of the United States.

It is my opinion that secs. 441.04, 441.07, and 441.10, Stats., are manifestly unconstitutional in that they operate to deprive

resident aliens, as a class, from benefits mandated by the Fourteenth Amendment to the United States Constitution.

The Fourteenth Amendment provides:

> "... [N]or 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." (Emphasis added.)

Since 1886, the United States Supreme Court has consistently held that a lawfully admitted resident alien is a "person" within the meaning of the Fourteenth Amendment's directive. *Yick Wo v. Hopkins* (1886), 118 U.S. 356, 369, 6 S.Ct. 1064, 31 L.Ed. 2d 220.

The court in *Torao Takahashi v. Fish and Game Commission* (1948), 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478, considered the issue whether or not California could use a federally created racial ineligibility for citizenship as a basis for barring Takahashi, a resident alien, from earning a living in California. In holding that California's purported ownership of fish in the ocean off its shores was not such a special public interest as would justify prohibiting aliens from making a living by fishing in those waters while permitting others to do so, it was said:

> "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws. ... [T]he power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits." 334 U.S. at 420.

The court's holding was grounded on the additional theory that state laws which imposed discriminatory burdens upon the entrance or residence of aliens, lawfully within the United States, conflict with the constitutionally derived federal power to regulate immigration. Art. I, sec. 8, cl. 4, U.S. Const. Under the Constitution, the states have neither been provided the power to add nor take away from the conditions lawfully imposed by Congress upon admission or residency in the United States or the several states. In *Hines v. Davidowitz* (1941), 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581, the court struck down a Pennsylvania

alien registration statute on the grounds that the federal government had preempted the field. The court stated:

> "Where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulations ... states cannot, inconsistent with the purpose of Congress, conflict or interfere with, curtail or complement the federal law, or enforce additional or auxiliary regulations." 312 U.S. at 66-67.

To deny an individual, citizen or alien, the right to work in the common occupations of the community is to deprive him of the freedoms the Fourteenth Amendment was intended to secure. This issue was effectively laid to rest by the court in *Treux v. Raich* (1915), 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131. It was stated there:

> "The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work." 239 U.S. at 42.

The statutes involved herein operate to both deny to aliens as a class, rights guaranteed under the equal protection clause of the Fourteenth Amendment, and directly challenge federal preemption in the immigration area. Certainly Congress never envisioned a situation whereby employment-qualified resident aliens would be shunted, by a necessity, to those states choosing to extend their hospitality.

It is well settled that under traditional equal protection principles, a state retains broad discretion to classify as long as its classification has a reasonable basis. *McGowan v. Maryland* (1961), 336 U.S. 420, 425-427, 81 S.Ct. 1101, 1106, 6 L.Ed. 2d 393. The above principle applies in the area of economics and social welfare. *Dandridge v. Williams* (1970), 397 U.S. 471, 485, 90 S.Ct. 1153, 1161, 25 L.Ed. 2d 491. In *Graham v. Richardson* (1971), 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed. 2d 534, a case involving a challenge to both Arizona's and Pennsylvania's welfare laws which discriminated against aliens, the court stated:

> "[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a

> 'discrete and insular' minority (see *United States v. Carolene Products Company*, 304 U.S. 144, 152-153, 58 S.Ct. 778, 783-784, 82 L.Ed. 1234 (1938), for whom such heightened judicial solicitude is appropriate." 403 U.S. at 372.

In determining that a Connecticut rule of court requiring that applicants for the state bar exam be citizens violated the equal protection clause of the Fourteenth Amendment, it was stated:

> "The court has consistently emphasized that a state which adopts a suspect classification 'bears a heavy burden of justification,' *McLaughlin v. Florida*, 379 U.S. 184, 196, 13 L.Ed. 2d 222, 85 S.Ct. 283 (1964), a burden which, though variously formulated, requires the state to meet certain standards of proof. In order to justify the use of a suspect classification, a state must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary ... to the accomplishment' of its purpose or the safeguarding of its interest." *In re Griffith* (1973), 413 U.S. 717, 723, 93 S.Ct. 2851, 37 L.Ed. 2d 910.

The above legal theories were cited by the court in *Sugarman v. Dugall* (1973),413 U.S. 63, 37 L.Ed. 2d 853, 93 S.Ct. 2842, in holding that a New York statute which prohibited aliens from being appointed for any position in the competitive civil service violated the Fourteenth Amendment's equal protection guarantee. Similar logic was applied in holding that the federal government could not discriminate against aliens in competitive civil service positions where the government failed to demonstrate a compelling governmental interest. *Mow Sun Wong v. Hampton* (9th Cir. 1974), 500 F. 2d 1031, *Ramos v. United States Civil Service Commission v. Butz* (D. P.R. 1974), 376 F. Supp. 361. See also *Purdy v. State of California* (1969), 456 P. 2d 645, 79 Cal. Rptr. 77, where a state statute prohibiting employment of resident aliens on public works was struck down on grounds that it directly conflicted with the equal protection clause of the Fourteenth Amendment.

The sole and paramount interest of the state is in providing and maintaining as high a level of nursing expertise as is practical. Chapter 441 of the Statutes and accompanying pertinent sections of the Wisconsin Administrative Code adequately provide a

structural framework for achieving this end. The mechanisms and standards already exist for excluding the incompetent and ill prepared from the nursing profession and a broad exclusion of aliens as a class is clearly unnecessary.

It is entirely conceivable that a resident alien could have received his or her entire formal education within the State of Wisconsin and subsequent thereto be denied eligibility to take the nursing certification exam on the tenuous ground of a citizenship deficiency. Equally discriminatory is the situation where an individual receives the requisite professional training in the Wisconsin educational system and subsequent thereto is denied the opportunity to sit for the nursing exam but is allowed to take the exam in another state. Upon successfully passing the exam and subsequent licensing, that individual would again be denied the opportunity to return to Wisconsin and practice nursing. Such a denial would be predicated not on qualification but solely on a deficiency of citizenship.

In your second question you ask that if the statutes here in question are found to be unconstitutional, what posture should the Board of Nursing assume as to their enforcement.

It is my opinion that you should disregard the citizenship requirement in secs. 441.04, 441.07, and 441.10, Stats. with respect to resident aliens.

BCL:CLR

Veterans; Those provisions of sec. 45.37, Stats., which limit derivative membership in the Wisconsin Veterans Home of otherwise eligible spouses and surviving spouses to spouses of male veterans and which limit the derivative membership of otherwise eligible parents of veterans to mothers are violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because there is no rational relationship between the sex of the otherwise eligible spouse or parent of the veteran and the state objectives sought to be advanced by sec. 45.37, Stats. OAG 25-75.

July 24, 1975.

THE HONORABLE, THE ASSEMBLY

Legislature

By 1975 Assembly Resolution 20 you have requested my opinion on the constitutionality of sec. 45.37, Stats. This section is on the subject of eligibility for membership in the Wisconsin Veterans Home, and its here material content has been a part of the statutes of this state for many years.

Within the limitations of the facilities of the home at King, both male and female veterans[1] are eligible for membership if they meet the requirements set forth in sec. 45.37 (2), Stats., or fall within the exceptions thereto stated in sec. 45.37 (3), Stats. The home, therefore, does house and care for both men and women. In addition to Wisconsin veterans, certain other persons, who derive their eligibility for membership through a veteran,[2] are eligible for membership in the home, if they also meet additional eligibility requirements. As pointed out in your resolution, these persons are spouses and surviving spouses of male veterans, but not of female veterans, and mothers of veterans, but not their fathers. Sec. 45.37 (4) (b) and (c), (5), (6), and (7), Stats. The provisions of sec. 45.37, Stats., therefore, deny benefits on the basis of sex to persons otherwise similarly situated and this fact is apparently the reason for your request for my opinion on the constitutionality of sec. 45.37, Stats.

The United States Supreme Court recently has decided a number of cases involving sex discrimination.[3] Four of these, *Stanton*, *Geduldig*, *Kahn*, and *Reed*, involved challenges to state laws on the ground that such laws, which allegedly discriminated between the sexes, violate the Equal Protection Clause of the

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[1] A "veteran" is defined in sec. 45.37 (1a), Stats., as "any person who served on active duty under honorable conditions in the U.S. armed forces ...."

[2] Sec. 45.37 (4) (b), Stats.

[3] *Stanton v. Stanton* (1975), 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed. 2d 688; *Weinberger v. Wiesenfeld* (1975), 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed. 2d 514; *Schlesinger v. Ballard* (1975), 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed. 2d 610; *Geduldig v. Aiello* (1974), 417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed. 2d 256; *Kahn v. Shevin* (1974), 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed. 2d 189; *Frontiero v. Richardson* (1973), 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed. 2d 583; and *Reed v. Reed* (1971), 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed. 2d 225.

Fourteenth Amendment to the United States Constitution.[4] The Wisconsin Supreme Court also has recently decided two cases involving similar claims[5] and in both instances found no violation of the Equal Protection Clause of the Fourteenth Amendment, despite a difference in the treatment of the sexes.

These cases made it clear that a classification on the basis of sex is not impermissible in all instances. *Kahn v. Shevin* (1974), 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed. 2d 189, 193, 194, n. 10. The Equal Protection Clause does not deny to the states the power to treat the sexes in different ways, but, as held in *Reed v. Reed* (1971), 404 U.S. 71, 92 S.Ct. 251, 253, 254, 30 L.Ed. 2d 225, it does:

> "... deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989 (1920). ..."

In arriving at a conclusion on whether a particular state law which does treat the sexes differently violates the Equal Protection Clause, the courts first identify the state objective sought to be advanced by the statute in question and then determine whether there is a rational or reasonable relationship[6] between a difference in sex and the state objective sought to be advanced by the statute.

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[4] The challenge was successful in *Stanton* and *Reed*, but unsuccessful in *Geduldig* and *Kahn*.

[5] *State v. Mertes* (1973), 60 Wis. 2d 414, 210 N.W. 2d 741, and *Warshafsky v. The Journal Co.* (1974), 63 Wis. 2d 130, 216 N.W. 2d 197.

[6] The United States Supreme Court to date has found it unnecessary to decide whether a classification based on sex is "inherently suspect." *Stanton v. Stanton* (1975), 421 U.S. 7, 95 S.Ct. 1373, 1377, 43 L.Ed. 2d 688. If a classification is "inherently suspect," a state statute containing such a classification is in violation of the Equal Protection Clause unless a "compelling state interest" is shown to require such classification. If a classification is not "inherently suspect," the statute is constitutional unless its challenger establishes that there is no "rational" or "reasonable" basis for the classification. In general, see the discussion in *Warshafsky v. The Journal Co.* (1974), 63 Wis. 2d 130, 137-140, 216 N.W. 2d 197.

If there is such a rational relationship, the statute does not violate the Equal Protection Clause,[7] but, if not, it does.[8] In order to answer your question, therefore, I must so analyze the relevant content of sec. 45.37, Stats.

Under the provisions of sec. 45.37, Stats., a wife, but not a husband, of a veteran member of the home is eligible for membership if the additional requirements set forth in sec. 45.37 (5), Stats., are met. The principal state objective of this provision appears from the content of sec. 45.37 (4) (c) 5, Stats. It is "to prevent the separation of a family unit of husband and wife." I see no rational relationship between the sex of the spouse of an eligible veteran member and this state objective. In fact, the state objective of preventing the separation of husbands and wives is defeated by limiting derivative membership of otherwise eligible spouses to female spouses. A family unit of husband and wife is separated when either spouse is ineligible for membership. It is, therefore, my opinion that when a person with standing to do so brings a proper suit, a court will declare this provision of sec. 45.37, Stats., unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The content of sec. 45.37, Stats., also allows an otherwise eligible surviving wife, but not a surviving husband, of a veteran and an otherwise eligible mother, but not father, of a veteran to become a member of the home. The state objective of these provisions, as revealed by the very strict additional eligibility requirements, is to provide a home and care for middle-aged and elderly persons who have the closest degree of relationship by marriage or blood to a veteran and who are both physically and financially disabled to the point that they are unable to care for and support themselves. Again, I see no rational relationship between the sex of a surviving spouse or of a parent and this state objective. Both the relationship to the veteran and the need of the eligible surviving spouse or of the eligible parent are the same

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[7] *Kahn v. Shevin* (1974), 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed. 2d 189; *State v. Mertes* (1973), 60 Wis. 2d 414, 210 N.W. 2d 741; *Warshafsky v. The Journal Co.* (1974), 63 Wis. 2d 130, 216 N.W. 2d 197.

[8] *Stanton v. Stanton* (1975), 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed. 2d 688; *Reed v. Reed* (1971), 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed. 2d 225.

whether that person happens to be a male or a female. That fewer male than female surviving spouses and parents can meet the additional eligibility requirements and therefore seek membership in the home provides no rational basis for depriving those males who are eligible of the benefits of membership in a state home which cares for both males and females. Cf: *Weinberger v. Wiesenfeld* (1975), 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed. 2d 514. Because of this, it is also my opinion that when a person with standing to do so brings a proper suit, a court will declare that these provisions of sec. 45.37, Stats., are unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

BCL:BRB

County Board; Elections; Utilization of a secret ballot by county board to appoint zoning administrator constitutes violation of sec. 66.77 (6), Stats., and is voidable. OAG 26-75.

July 31, 1975.

WILLIAM E. CHASE, *District Attorney*
Ashland County

You request my opinion whether the Ashland County Board of Supervisors violated sec. 66.77 (6), Stats., in voting for the appointment of a county zoning administrator under the following statement of facts:

> "The Ashland County Board of Supervisors met in a special meeting on May 20, 1975. One of the items on the agenda at that meeting was the appointment of a Zoning Administrator for Ashland County pursuant to section 12.0 of the Ashland County Amendatory Ordinance which provides in part, 'The Ashland County Board of Supervisors shall appoint a Zoning Administrator who shall be responsible for enforcing the provisions of this ordinance ...'. The appointment was made by a secret ballot of the Board of Supervisors, i.e., each board member put his choice on a slip of paper, the slips were put in a hat, and the votes were then

> tallied. The Zoning Administrator was selected by a majority of the Board of Supervisors on the second ballot. No board member asked that the vote of each member be ascertained and recorded."

It is not wholly clear whether the position referred to is a county building inspector authorized by sec. 59.07 (16), Stats., the appointing authority for which is the county board, or an office or position created under sec. 59.025 (3), Stats. For the purposes of this opinion, it is assumed that an office is involved and that the board had power to create and fill such office.

I am of the opinion that there was a violation of sec. 66.77 (6), Stats., under the facts stated.

Section 66.77 (6), Stats., 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."

I am aware of no specific statute which would authorize the use of a secret ballot in this instance. The prohibition in the statute prohibits the use of secret ballots in both open and authorized closed meetings. It refers to elections and decisions and would include appointments made by collective action by the members of the county board. These and related questions are discussed in an opinion to the Corporation Counsel for Oneida County dated November 22, 1974, a copy of which is enclosed.

You further inquire what course of action can be pursued if a violation is present.

If a verified complaint is made, you may institute an action against those county board members who were present at the meeting to recover the forfeiture provided in sec. 66.77 (8), Stats. However, a court might hold that members are not subject to a forfeiture if it were proven that they acted in reliance upon advice given by their district attorney or county corporation counsel. *State v. Davis* (1974), 63 Wis. 2d 75, 216 N.W. 2d 31.

The appointment is presumed valid until held otherwise in a proper action. However, I am of the opinion that it could be voided in an action brought under sec. 66.77 (3), Stats., which provides that "action taken at a meeting held in violation of this section shall be voidable." This language refers to any action taken in violation of any provision of sec. 66.77, Stats.

BCL:RJV

Schools And School Districts; Chapter 307, Laws of 1973, creating sec. 118.255, Stats., authorizes local school districts to provide health and welfare services, but not educational services, to students attending private schools. However, that act may be unconstitutional to the extent that any of the services authorized thereby are rendered in church-affiliated private schools. OAG 27-75.

August 5, 1975.

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

You have directed my attention to ch. 307, Laws of 1973, creating sec. 118.255, Stats., to provide "health treatment services to private school pupils with special physical or mental health treatment needs." You advise that the statute is ambiguous and that you are uncertain as to what services may be provided as "health treatment services" under the act.

You indicate that you have interpreted this act as permitting local school districts to provide students in private schools with those services rendered by certain health and treatment oriented personnel such as speech and language therapists, physical therapists, occupational therapists, school psychologists and school social workers. Specifically you ask whether the statute would permit a local school district to send certified special education teachers into private schools to establish and provide special education services to the pupils therein.

The legislative purpose and intent with respect to ch. 307, Laws of 1973, is expressed therein as follows:

> "SECTION 1. PURPOSE. The intent of this act is to provide for the health and welfare of children by providing health treatment services within the private school facilities to private school pupils with special physical or mental health treatment needs."

Section 118.255 (1) (a), Stats., created by ch. 307, Laws of 1973, defines "physical or mental health treatment services" as "treatment for physical, crippling or orthopedic disability, developmental disability, emotional disturbance, hearing impairment, visual disability, speech or language disabilities; and includes itinerant services such as evaluation and diagnostic services." Although there is great similarity between the conditions for which "health treatment services" may be provided under sec. 118.255, Stats., and the conditions for which exceptional education programs must be provided pursuant to ch. 89, Laws of 1973, sec. 115.76, et seq., Stats., ch. 307, interpreted in light of the express legislative intent, is limited to authorizing services related to the health and welfare of children attending private schools.

Therefore, it is my opinion that ch. 307, Laws of 1973, does not authorize local school districts to send special education teachers into private schools to establish and provide special education services to private school pupils. Neither sec. 118.255, Stats., nor any statute grants authority to provide special education teachers at public expense in nonpublic schools. Without such statutory authority, the provision of such services is improper. 63 OAG 8 (1974).

Furthermore, it is my opinion that ch. 307, Laws of 1973, would be unconstitutional under both Art. I, sec. 18, Wis. Const., and the First Amendment to the United States Constitution if it were construed as authorizing educational services for students attending private schools with religious affiliations. *Meek v. Pittenger* (1975), 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed. 2d 217; 55 OAG 124 (1966). To the extent that ch. 307, Laws of 1973, is confined to authorizing services that are strictly related to health and welfare, its constitutionality may be less suspect. *Everson v. Board of Education* (1946), 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711; *State ex rel. Warren v. Reuter* (1969), 44 Wis. 2d 201, 170 N.W. 2d 790; but see, *State ex rel. Reynolds v. Nusbaum* (1962), 17 Wis. 2d 148, 115 N.W. 2d 761.

In *Meek*, the United States Supreme Court struck down a Pennsylvania statute which, among other things, provided for remedial academic programs and therapeutic services in nonpublic schools. The specific services which were to be provided by the Pennsylvania law were:

> "... guidance, counseling and testing services; psychological services; services for exceptional children; remedial and therapeutic services; speech and hearing services; services for the improvement of the educationally disadvantaged (such as, but not limited to, teaching English as a second language), and such other secular, neutral, non-ideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth." *Meek v. Pittenger*, 421 U.S. at 352, fn. 2.

Like the Pennsylvania statute, ch. 307, Laws of 1973, provides that certain services may be provided "within the private school facilities to those private school pupils who are referred to [the public school authorities]" provided that the same services are also made available to students attending public schools. Since the Pennsylvania statute dealt with the provision of educational services, there is little doubt that ch. 307, Laws of 1973, would be unconstitutional to the extent that it were construed to authorize such services.

The principal constitutional defect in the statute before the court in *Meek* was its potential for providing "excessive entanglement" between church and state. *Meek v. Pittenger*, 421 U.S. at 369-370. This excessive entanglement arose from the provision in the Pennsylvania statute, also present in ch. 307, Laws of 1973, which allows for public school personnel to provide services to students within sectarian private school facilities. The law makes it virtually impossible administratively to keep the publicly provided program neutral and nonsectarian. It is also virtually impossible politically to maintain and continue that program without dividing the community along religious lines. Consequently, the law creates an unconstitutionally excessive entanglement between church and state. *Meek v. Pittenger*, 421 U.S. at 372.

The United States Supreme Court acknowledged in *Meek* that the First Amendment to the United States Constitution is flexible enough to allow certain kinds of incidental services to be rendered students attending private church-related schools.

> "It is, of course, true that as part of general legislation made available to all students, a State may include church-related schools and programs providing bus transportation, school lunches, and public health facilities--secular and non-ideological services unrelated to the primary, religious-oriented educational function of the sectarian school. The indirect and incidental benefits to church-related schools from those programs do not offend the constitutional prohibition against establishment of religion." *Meek v. Pittenger*, 421 U.S. at 365.

To the extent that ch. 307, Laws of 1973, is related solely to providing public health services, it may pass constitutional muster. However, the potential for excessive entanglement between church and state under ch. 307, Laws of 1973, exists regardless of the type of services, health and welfare or educational, authorized thereunder. Therefore, even if its "primary effect" is not to aid religion, because of the potential for excessive entanglement its constitutionality may nevertheless be in jeopardy. Furthermore, Art. I, sec. 18, Wis. Const., has been read more restrictively than the First Amendment and, therefore, ch. 307, even as strictly construed, may fail to pass the more restrictive test imposed by the Wisconsin Constitution. Compare *Everson v. Board of Education, supra*, with *State ex rel. Reynolds v. Nusbaum, supra*; but see, *State ex rel. Warren v. Nusbaum* (1972), 55 Wis. 2d 216, 332-333, 198 N.W. 2d 650; *State ex rel. Warren v. Nusbaum* (1974), 64 Wis. 2d 314, 327-329, 219 N.W. 2d 577.

To the extent that you have interpreted ch. 307, Laws of 1973, as allowing local school districts to provide health and welfare services--as distinguished from education services--to private school students your interpretation is consistent with the legislative act. This is so even if those services are rendered by persons also qualified to render educational services although the latter type services are not authorized by the act. However, even as limited by this narrow construction, the law may be unconstitutional if the services thereunder are rendered in church affiliated private

schools. Ultimate determination of this issue must be left to a court test.

BCL:DJH

Automobiles And Motor Vehicles; Licenses And Permits; Under sec. 343.05 (1), Stats., a driver's license, indorsed for motor-driven cycle operation, is not required for operation of a motor-driven cycle on private property. OAG 28-75.

August 13, 1975.

ROGER L. HARTMAN, *District Attorney*
Buffalo County

You have related to me that your county is having problems with the operation of motor-driven cycles on public ways and private property by pre-licensing age juveniles. You have pointed out that the first sentence of sec. 343.05 (1), Stats., provides that no person shall operate a motor vehicle upon a highway without a driver's license. The last sentence of this section provides that no person shall operate a motor-driven cycle without a driver's license which has been specifically indorsed for motor-driven cycle operation. You note that the last sentence does not contain the words "upon a highway," and ask whether the requirement of a driver's licence with a motor-driven cycle indorsement is applicable to off-highway operation of such a vehicle. The answer is "no."

A driver's license is required only for the operation of a motor vehicle upon the highway. Section 340.01 (35), Stats., defines motor vehicle as a self-propelled vehicle. Similarly, sec. 340.01 (33), Stats., defines motor-driven cycle as a motor vehicle. Thus the words "motor vehicle" clearly include a motor-driven cycle. The authority to operate a motor-driven cycle is not a separate license in itself. It is only a cycle indorsement upon the regular license. Since a person does not need a regular driver's license for off-highway operation of a motor vehicle, he does not need a cycle indorsed driver's license for off-highway operation of a motor-driven cycle. It seems clear that the words "upon a highway" in

the first sentence of sec. 343.05 (1), Stats., apply to the whole section.

Since highway is defined by sec. 340.01 (22), Stats., to include the entire width between the right-of-way lines, any operation of a motor-driven cycle on the off roadway portion of the right-of-way or on an alley would require a driver's license with a motor-driven cycle indorsement. Also the cycle would have to be registered as required by sec. 341.04, Stats.

The law relating to criminal trespass to land, sec. 943.13, Stats., is applicable in the case of the operation of a motor-driven cycle on the private property or others without consent of the owners.

BCL:AOH

Land; Plats And Platting; Discussion of circumstances under which lots in a recorded subdivision may be legally divided without replatting. OAG 29-75.

August 13, 1975.

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

You request my opinion on the applicability of the replat provisions of ch. 236, Stats., in two particular factual settings. The situations you postulate are the following:

> Situation #1 -- a single lot, situated within a recorded subdivision, is divided into two parcels, both of which satisfy state and local minimum lot size requirements.
>
> Situation #2 -- two adjacent lots, situated within a recorded subdivision, are each divided into two parts, and the parts of each lot adjacent to the common lot boundary are combined as one parcel, creating in effect three parcels, each of which satisfies state and local minimum lot size requirements.

Section 236.02 (13), Stats., provides:

> " '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."

In Situation #1, since the division of that single lot into two parcels does not involve a change in the exterior boundaries of that lot, such division does not constitute a replat.

However, it should be noted, as pointed out in OAG 36-74 (April 26, 1974), that every division of a platted lot is subject to sec. 236.335, Stats., which 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. ..."

That opinion indicated that the division of a lot into two parcels not meeting the minimum lot size requirements of sec. 236.16 (1), Stats., or a local ordinance, was prohibited by ch. 236, Stats. Since the parcels resulting from the division in Situation #1 satisfy state and local minimum lot size, such a division would be permissible, providing other relevant state and local restrictions have been satisfied.

The answer to the question raised by Situation #2 can be resolved by the same analysis as applied above. If each adjoining single lot is divided into two parts or parcels, each of which meets the minimum lot size requirements set forth in sec. 236.16 (1), Stats., the effect as to each individual lot is really the same as in Situation #1. As pointed out in reference to Situation #1, as long as the state and local requirements previously referred to are met by *each* newly-created part or parcel (two in each lot), the division is legal and no replat occurs. In such a case, the subsequent sale of the two adjoining parts, one from each of the original lots, to a third party would not appear relevant to the validity of the division or involve a replat. As was stated in OAG 36-74, *supra*,

> "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."

The validity of a division of a platted lot must, therefore, be determined on the basis of the division, and not on the basis of the subsequent disposition of the resulting parcels. In each situation, if each parcel created satisfies pertinent state and local restrictions, no replat is involved and the division is not prohibited by ch. 236, Stats.

However, in Situation #2, it is not clear that either of the two parts of the adjoining platted lots used to create the third parcel would individually satisfy state and local minimum lot size requirements. It is possible that such requirements are only satisfied by combining such parts. If such is the case, the act of division actually results in the elimination of the common boundary of the adjacent lots and the substitution therefor of two new boundaries which serve to set off the newly-created third parcel. Such a division would involve a replat.

BCL:JCM

Criminal Law; Procedures; The physician-patient privilege expressed in sec. 905.04, Stats., Wisconsin Rules of Evidence, is a testimonial privilege only, and has no existence outside of judicial proceedings. The privilege applies at all stages of civil and criminal proceedings, except the actual trial on the merits in homicide cases.

Under principles of professional conduct and sec. 448.18 (1) (d), Stats., a physician is ethically precluded from disclosing confidential communications unless otherwise provided in law or disclosure is required to prevent danger to the patient or the community. OAG 30-75.

August 20, 1975.

DANIEL L. LAROCQUE, *District Attorney*
Marathon County

I

You ask whether a physician, who is informed by a patient, for purposes of diagnosis or treatment, of matters relating to a homicide, may disclose such confidential communication to appropriate authorities, without consent of the patient, prior to commencement of criminal proceedings.

Generally, the public is entitled to, and may compel disclosure of, every man's evidence. VIII *Wigmore on Evidence* (McNaughton Rev. 1961), secs. 2285, 2290, pp. 527, 543; 97 C.J.S., *Witnesses*, sec. 252, p. 740.

Contemporaneous with recognition, in the sixteenth century, of the right of the public to disclosure, however, an exception appeared for communications between attorney and client. *Wigmore on Evidence, supra*, sec. 2290, p. 542. Somewhat later a privilege for communications between husband and wife evolved in the common law. *Id.*, sec. 2333, p. 644.

Any privilege with respect to communications between physician and patient, though, is purely a product of statute. Platz, *The Competency of Attorneys and Physicians to Disclose Privileged Communications in Testamentary Cases*, 1939 Wis. L. Rev. 339, 353. At common law information acquired by a physician in attending a patient was not privileged; the physician was at liberty to disclose it in or out of court, whatever effect the disclosure would have on the rights, reputation or feelings of his patient. *Boyle v. Northwestern Mutual Relief Ass'n.* (1897), 95 Wis. 312, 320, 70 N.W. 351. Also see *Wigmore on Evidence, supra*, sec. 2380, p. 818. There is no constitutional physician-patient privilege. See *Bremer v. State* (1973), 18 Md. App. 291, 307 A. 2d 503, 529, cert. den. 415 U.S. 930.

Wisconsin, in 1839, was one of the first jurisdictions legislatively to establish a physician-patient privilege. Sanborn, *Physician's Privilege in Wisconsin*, 1 Wis. L. Rev. 141, 141 (1921).

The contemporary descendant of the original rule, sec. 905.04 (2), Stats., Wisconsin Rules of Evidence, provides that:

> "A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of his physical, mental or emotional condition, among himself, his physician, or persons, including members of the patient's family, who are participating in the diagnosis or treatment under the direction of the physician."

Unfortunately, statutes prior to the present one, while expressing exceptions to applicability of the privilege created, failed facially to indicate the circumstances in which it did apply, the only indication of that in the statute books being the title heading "Provisions Common to Actions and Proceedings in All Courts" preceding statement of the privilege. E.g., Title XLIII, Stats. (1971).

Perhaps it was thought by the legislature unnecessary to address the topic of initial applicability because, generally, it is well established that the rule of privileged communications, including those between physician and patient, is not a principle of substantive law, but merely a rule of evidence. See 97 C.J.S., *Witnesses*, secs. 252, 293, pp. 739, 826, 827. Also see 58 Am. Jur., *Witnesses*, sec. 432, p. 245. Cf. *Wigmore on Evidence*, *supra*, sec. 2285, pp. 527, 528.

Omission of such specificity, though, undoubtedly caused misunderstanding.[1]

In considering a question somewhat similar to that asked me, a predecessor concluded that the physician-patient privilege was absolute, except as specifically provided otherwise, so that information obtained by a physician from his patient could not be

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[1] 1. As recently as last year the California supreme court considered it necessary to state:

"It is perhaps pertinent to remember the obvious, namely that the physician-patient privilege is a rule of evidence concerning the admissibility of evidence in court and is not a substantive rule regulating the conduct of physicians." *Rudnick v. Superior Court of Kern County* (1974), 114 Cal. Rptr. 603, 523 P. 2d 643, 650 fn. 10.

disclosed prior to commencement of enumerated excepted judicial proceedings. 17 OAG 504 (1928).

That opinion, in retrospect, erred, not only in failing to consider the legal and historical context of the privilege, but in ignoring a direct decision of the Wisconsin supreme court stating the limits of the Wisconsin law.

In *Boyle v. Northwestern Mutual Relief Ass'n., supra*, 321, 322, the court made plain that:

> "The disclosure by a physician of information acquired in his professional character, in attending on a patient, where not made in the course of his professional duty, is a plain violation of professional propriety, but the law does not prohibit such disclosure in his general intercourse. The statute relates only to his giving testimony in court in relation to information thus acquired ..."

A series of later cases has confirmed that the purpose of the privilege under discussion is prevention of disclosure by a physician on the witness stand. E.g., *Wilkins v. Durand* (1970), 47 Wis. 2d 527, 538, 177 N.W. 2d 892, and cases cited.

The question which arose in *Wilkins* was whether the privilege embodied in the immediate ancestor of sec. 905.04 (2), Stats., could "be exercised so as to foreclose discovery as well as admission into evidence" of portions of a patient's medical record. *Ibid.* Answering in the negative the supreme court ordered that:

> "... the entire record should be made available and the ruling on privilege reserved for trial." *Id.*, 540.

It thus could be discerned from the cases, if not from the face of older statutes, that the physician-patient privilege was a provision applying to actions and proceedings in court.

The deficiency of previous statements of the privilege, however, happily has been supplied in the Wisconsin rules of evidence where it now is found.

Section 905.01, Stats., warns that no person has a privilege to refuse to disclose, or to prevent another from disclosing, any matter except as provided by, or inherent or implicit in, statute, court rule, or constitution. Section 911.01 (3), Stats., provides that the

privileges having their existence in the rules of evidence apply at all stages of all actions, cases, and proceedings. And secs. 901.01 and 911.01 (1), Stats., limit the listed activities to those conducted in the courts of the state of Wisconsin.

Both decision and statute make plain, therefore, that communications between physician and patient are privileged only insofar as they might be made evidence at some stage of an action, case, or proceeding in state courts. And it is only in that instance that a patient peremptorily may prevent his physician from disclosing confidential communications.

The physician-patient privilege, then, does not prohibit a physician from disclosing confidential communications of a patient prior to, or outside of, evidentiary court proceedings.

This is not to say, though, that a physician always may disclose to police, out of court, a patient's confidential statements.

Quite apart from the testimonial physician-patient privilege, principles of professional conduct, in most circumstances, would prohibit disclosure.

Section 448.18 (1) (d), Stats., classes as unprofessional conduct, which could cause revocation of a license to practice medicine, willful betrayal of a professional secret.[2]

This societal prohibition of behavior is a substantive rule regulating the conduct of physicians, differing in kind from the testimonial privilege which permits patients to prevent evidentiary disclosures by their doctors.

No special definition of "professional secret" is provided in the statute. As a general rule, though, all words and phrases in Wisconsin laws are to be construed according to common usage. Sec. 990.01 (1), Stats.

The principles of medical ethics of the American Medical Association, which may be deemed to indicate a consensus in the medical community, provide, in sec. 9, that as a matter of professional ethics:

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[2] In some jurisdictions willful betrayal of a professional secret has been held to create a civil cause of action for damages. See Anno., *Doctor-Disclosure of Information*, 20 A.L.R. 3d 1109.

> "A physician may not reveal the confidences entrusted to him in the course of medical attendance, or the deficiencies he may observe in the character of patients, unless he is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or of the community."

Several sister states having unprofessional conduct statutes similar to our own have construed them in conjunction with the A.M.A. principles of ethics to include confidential communications of a patient within the definition of "professional secret." See *Horne v. Patton* (Ala. 1973), 287 So. 2d 824, 828-830; *Hammonds v. Aetna Casualty and Surety Co.* (N.D. Ohio 1965), 243 F. Supp. 793, 797, 798; *Barber v. Time, Inc.* (Mo. 1942), 159 S.W. 2d 291, 295; *Simonsen v. Swenson* (1920), 104 Neb. 224, 177 N.W. 831, 832, 9 A.L.R. 1250. Also see Anno., *Doctor-Disclosure of Information*, 20 A.L.R. 3d 1109, sec. 5, p. 1118.

Although decided prior to enactment of this state's law, *Boyle v. Northwestern Mutual Relief Ass'n., supra*, 321, 322, as was noted earlier, declared that professional propriety is violated by a physician's disclosure, outside the course of professional duty, of information acquired in his professional character in attending a patient.

It seems safe to say, therefore, that professional secrets, within the meaning of sec. 448.18 (1) (d), Stats., include confidences entrusted to physicians in the course of medical attendance.

Disclosure of such confidences, however, is not equated automatically with willful *betrayal* of a professional secret.

The A.M.A. principles of medical ethics except from the category of unprofessional conduct revelations required by law or necessary to protect the welfare of the individual or the community.[3] Accord, *Horne v. Patton, supra*, 830. Also see Anno., *Doctor-Disclosure of Information, supra*, sec. 6 [a], pp. 1118-1120. *Boyle v. Northwestern Mutual Relief Ass'n., supra*, seems in

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[3] It should be noted that this opinion deals only with one exception to the substantive rule of professional secrecy. It in no way should be considered exclusive or as foreclosing other exceptions, such as disclosures required, or perhaps permitted, by law. See, *e.g.* secs. 48.981, 905.04 (4) (e), Stats., requiring disclosure in certain cases of child abuse.

agreement, stamping the stigma of impropriety only on disclosures not made in the course of professional duty. *Id.*, 321, 322.

Closely in point on the question here is *Tarasoff v. Regents of the University of California* (1974), 118 Cal. Rptr. 129, 529 P. 2d 553.

In that case the court adopted a balancing approach to safeguarding the confidential character of psychotherapeutic communication, weighing the public interest in supporting effective treatment of mental illness and in protecting the right of patients to privacy against another public interest, that of safety from violent assault. 529 P. 2d at 560.

Noting decisions of diverse jurisdictions holding that the relationship of a doctor to his patient is sufficient to support a duty to use reasonable care to warn third persons of dangers emanating from the patient's illness, the court reasoned:

> "As the present case illustrates, a patient with severe mental illness and dangerous proclivities may, in a given case, present a danger as serious and as foreseeable as does the carrier of a contagious disease or the driver whose condition or medication affects his ability to drive safely." *Id.*, 559.

It was concluded that, if the psychotherapist has reasonable cause to believe that a patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another, and that disclosure of his communication is necessary to prevent the threatened danger, revelation of a confidential communication is not a breach of trust or violation of professional ethics. *Id.*, 561.

Moreover, the court concluded:

> "... that a doctor or a psychotherapist treating a mentally ill patient, just as a doctor treating physical illness, bears a *duty* to use reasonable care to give threatened persons such warnings as are essential to avert foreseeable danger arising from his patient's condition or treatment." *Id.*, 559. (Emphasis added.)
>
> "... [T]he public policy favoring protection of the confidential character of patient-psychotherapist communications must yield in instances in which disclosure is

essential to avert danger to others. The protective privilege ends where the public peril begins." *Id.*, 561.

The reasoning in *Tarasoff* is persuasive, and the result in conformity with what appears to be the trend of analogous cases. See Anno., *Doctor-Disclosure of Information, supra.* Also see *Boyle v. Northwestern Mutual Relief Ass'n., supra*, 321, 322.

I must conclude, therefore, that a physician not only may, but may have a duty to, disclose to police, prior to commencement of criminal proceedings, a confidential communication of a patient, when he has reason to believe that the patient is in such physical or mental condition as to be dangerous to himself, or to the person or property of another, and that disclosure of his communication is necessary to prevent the threatened danger.

Certainly a physician should not be encouraged routinely to reveal matters to police. But he must make decisions with respect to disclosure involving a high order of expertise and judgment, weighing against the danger of violence the harm to the patient that might result from revelation. *Tarasoff v. Regents of the University of California, supra*, 560. Within that broad range in which professional opinion and judgment may differ respecting the proper course of action, the physician is free to exercise his own best judgment. *Ibid.*

II

Additionally, you request my opinion interpreting sec. 905.04 (4) (d), Stats., Wisconsin Rules of Evidence, which provides that:

> "There is no [testimonial] privilege in *trials* for homicide when the disclosure relates directly to the facts or immediate circumstances of the homicide." (Emphasis added.)

You ask, considering that the physician-patient privilege applies at all stages of all actions, cases, and proceedings (see sec. 911.01 (3), Stats.), how the term "trial" is defined in the context of this exception to the privilege.

Section 270.06, Stats., defines a "trial" as "the judicial examination of the issues between the parties, whether they be issues of law or fact." This provision has been interpreted as excluding discovery proceedings undertaken before the pleadings have been completed. *Cousins v. Schroeder* (1919), 169 Wis. 438,

440-441, 172 N.W. 953. In that case, the court held that the banking commissioner properly refused to produce certain records in his custody for discovery which by statute he was required to keep confidential "except when called as a witness in any criminal proceeding or trial in a court of justice."

More recently, in *Strong v. State* (1967), 36 Wis. 2d 324, 327, 152 N.W. 2d 890, the Wisconsin Supreme Court adopted the definition of the term "trial" in *Berness v. State* (1935), 263 Ala. 641, 646, 83 So. 2d 613, as " 'proceedings in open court, after pleadings are finished, down to and including rendition of the verdict.'" On the basis of this definition, the court excluded the sentencing proceeding from the definition of "trial." Furthermore, the court has held that a preliminary hearing in a criminal action is not part of the trial. *State ex rel. Kennon v. Hanley* (1946), 249 Wis. 399, 401, 24 N.W. 2d 683.

As a general rule, all privileges, including the physician-patient privilege, apply "at all stages of all actions, cases and proceedings; ..." Sec. 911.01 (3), Stats. The provisions of sec. 905.04 (4) (d), Stats., barring the physician-patient privilege in "trials for homicide" is an exception from this rule. It is clear from a comparison of sec. 905.04 (4) (d), Stats., with sec. 911.01 (3), Stats., that this exception does not apply coextensively with the privilege. Furthermore, the term "trial" in both civil and criminal actions has been limited by the supreme court to the ultimate resolution of all issues, legal and factual, in dispute. Accordingly, sec. 905.04 (4) (d), Stats., must be construed as limited only to that stage of the criminal action during which there is a judicial examination and resolution of all issues culminating in a jury verdict or findings of fact. *Strong v. State*, *supra*, at 327.

BCL:TJB

Natural Resources, Department Of; Highways; The Department of Natural Resources does not have authority to waive the permit requirements of sec. 30.12 (2), Wis. Stats., for individuals who would otherwise be subject to the statute; however, chs. 30 and 83, Stats., read together, indicate that county highway construction is not subject to the permit requirements of sec. 30.12 (2). OAG 34-75.

September 5, 1975.

RODNEY ZEMKE, *District Attorney*
Eau Claire County

Your predecessor requested my opinion on the questions raised by the following facts: Eau Claire County wishes to build a road crossing Black Creek, a navigable stream in the Town of Fairchild, Eau Claire County. The crossing would involve either two 30-inch culverts or one 40-inch culvert. District employes of the Wisconsin Department of Natural Resources ("DNR"), charged with issuing or denying permits for bridges under sec. 30.12, Stats., advised county representatives that the county did not need a permit for the crossing. Alternative theories for the exemption were expressed: one employe said that a governmental agency doing the work to DNR specifications did not need a permit; his superior said a permit was unnecessary because the structure was in essence a bridge, and DNR had "no permitting authority" over bridges built by a governmental entity.

The Madison office of DNR expressed a different policy: If the crossing involves one or more culverts spanning less than the whole watercourse, the culvert is a "structure" within the meaning of sec. 30.12 and a permit is required. If the culvert spans the entire stream, it is a "bridge over the river," as the term is used in sec. 30.10 (4), and a municipality building such a bridge need not get a permit. Thus, contrary to the district office, the DNR central office would take the position that a permit is required for the crossing in question, if two culverts are used.

If the question as to DNR's power to waive permit requirements is answered in the negative, we must also ask whether, and under

what circumstances, culverts and bridges are subject to sec. 30.12 (2).

In correspondence after this question arose, the agency indicated that it does not view its interpretation as a waiver and does not seek to assert the power to exempt certain parties from obligations of the statute. Such an assertion would be improper here, as I can find nothing in either the statutes or case law which confers on DNR any power to determine, without further authority and on a case-by-case basis, that individuals who would ordinarily be subject to ch. 30 need not comply with the requirements of the chapter.

Section 30.12, "Structures and deposits in navigable waters prohibited; exceptions; penalty," begins with a general prohibition:

> "Unless a permit has been granted by the department pursuant to statute or the legislature has otherwise authorized structures or deposits in navigable waters, it is unlawful:
>
> "(a) To deposit any material or to place any structure upon the bed of any navigable water..."

Under this language, DNR must decide whether "the legislature has otherwise authorized" placement of structures or deposits in waters.

The term "highway" includes bridges. Sec. 990.01 (12), Stats. In my opinion, there is no legal distinction between bridges built with one culvert or more than one. The culverts are as much a part of the highway as are bridges.

The county's authority to build highways is set out at length in ch. 83, Stats. Specifically, sec. 83.025 vests power in the county board to lay out new highways and make changes in already-existing ones. Sec. 83.015 (2) vests power in the county highway committee to make the "necessary arrangements for the proper prosecution of the construction and maintenance of highways provided for by the county board..."

Reading these sections in conjunction with sec. 30.12 (1), prohibiting structures in navigable waters unless "... the legislature has otherwise authorized," it appears that ch. 83 furnishes such legislative authority for highway-related structures.

Section 30.12 (2) further supports this conclusion. The relevant portion reads:

> "The department may ... grant to any riparian owner a permit to build or maintain *for his own use a structure* otherwise prohibited by statute ..." (Emphasis added.)

The county is not engaged in constructing the bridge and its supporting structures "for (its) own use," but is rather performing the governmental function of providing a highway system. The same subsection indicates that the department's permit power applies to private structures "otherwise prohibited by statute." By contrast, county highways are required and authorized by statute, and thus would not fall into the permit requirement.

Paragraphs (2) and (4) of sec. 30.10, Stats., read together, likewise suggest a legislative intent to exempt municipalities from DNR regulation of bridges. While sub. (2) declares that "... no dam, bridge or other obstruction shall be made in or over (navigable waters) without the permission of the state," sub. (4) provides, "This section does not impair the powers granted by law to municipalities to construct bridges over streams." "Municipality" is specifically defined in that chapter to include counties. Sec. 30.01 (1), Stats.

I note further that the legislature made explicit provision to regulate municipal dams under the extensive guidelines of sec. 31.38. A similar provision for municipal bridges is conspicuously absent.

Section 84.11 (7), Stats., lists certain types of bridges over which the DNR expressly has some measure of supervision; however, these types do not include the county highway bridges contemplated in your situation by Eau Claire County. If sec. 30.12 did require a permit for every bridge, the portion of sec. 84.11 giving regulatory authority to DNR *as to limited classes of bridges* would be superfluous.

In concluding that municipalities may build bridges, in performance of their highway-building obligations, without DNR approval under sec. 30.12 (2), I am well aware of the importance this state has always placed on preservation of its navigable waters. Any attempted delegation of power by the legislature involving a complete abdication of the trust is void. See for example *Muench*

v. Public Service Comm. (1952), 261 Wis. 492, aff'd. on rehearing, 261 Wis. 515a, 55 N.W. 2d 40, in which the court stressed the state-wide importance of preserving navigable waters.

I am also aware that the legislature's delegation to the counties, as I have defined it *supra*, is a delegation permitting localities to *impair* the trust, rather than further it, under the analysis used in *Menzer v. Elkhart Lake* (1970), 51 Wis. 2d 70, 83, 186 N.W. 2d 290. However, the court has recently pointed out that the delegation of authority to build streets and municipal bridges carries an implied prohibition against bridges "... that constitute an unnecessary obstruction or hazard to the free use of navigable waters." *Capt. Soma Boat Line, Inc. v. Wisconsin Dells* (1972), 56 Wis. 2d 838, 847, 203 N.W. 2d 369. The court elaborated:

> "Legislative authority to construct and maintain a bridge carries no implication of authority to create or maintain a nuisance. (Footnote omitted.) The state has authorized only the construction and maintenance of municipal bridges that do not obstruct navigable waters. Such a delegation does not violate the state's trust of the navigable waters."

The legislature may eventually find it desirable to spell out in more detail the limits of its delegation to municipalities in this area. Until such time, municipal officials must exercise their own best judgment to assure that bridges they authorize and build are not unnecessary obstructions or hazards to navigation

For all of the foregoing reasons, it is my opinion that sec. 30.12 (2) governs only private construction that is otherwise prohibited, not public highway construction authorized by law.

BCL:MVB

Indigent; Municipalities; A defendant may be incarcerated by court order for failing to pay a fine imposed for the violation of a municipal ordinance. Unless the defendant applies to the court and obtains relief on the grounds that because of his indigency he is unable to pay the fine, the sheriff may lawfully accept and hold such defendant in the county jail. OAG 35-75.

September 11, 1975.

OWEN R. WILLIAMS, *District Attorney*
St. Croix County

You have requested my opinion with respect to two questions:

1. "[W]hether the Sheriff of St. Croix County, as custodian of the county jail, may lawfully accept and hold persons incarcerated pursuant to a municipal or county ordinance violation *prior* to the defendant's appearance or conviction for said violation when he fails to post bond."

2. "[W]hether the Sheriff of St. Croix County, as custodian of the county jail, may lawfully accept and hold persons incarcerated following their conviction for a municipal or county ordinance violation, who have failed to pay the court-imposed fine when said defendant is indigent but has *not* raised the issue of his indigency on his own motion."

I.

Your first question has recently been considered in *City of Madison v. Raymond R. Stenstrom* (Dane County Court, Case No. 169-161, 12-10-74, rev'd. on appeal, Dane County Circuit Court, Case No. 145-161, 5-20-75). In that case, the County Court held that arrest and detention in the prosecution of a municipal ordinance violation is unconstitutional, and further held that the imposition of cash bail on indigents in ordinance violation cases is unconstitutional. The Circuit Court sustained the constitutionality of arrest and detention in municipal ordinance cases, and declined to rule on the constitutionality of the imposition of cash bail on indigents. It is anticipated that the Circuit Court decision will be appealed to the Supreme Court.

It has been the long-standing policy of this office not to answer opinion requests on questions currently in litigation. See, e.g., 24 OAG 115 (1935). The reason for that policy is twofold. First, the answering of such an opinion request might seriously embarrass this department if it became the duty of the attorney general to appear in such litigation on behalf of the state. See 20 OAG 322 (1931). Second, it would be unseemly for the attorney general to

render an opinion which might appear to some to have been issued to influence a court. See 63 OAG 159 (1974).

Those reasons for declining to render an opinion on questions currently in litigation are especially compelling in the present case. This office appeared in the action referred to above in the County Court for Dane County pursuant to sec. 269.56 (11), Wis. Stats., since the constitutionality of certain state statutes was at issue in that action. This office may also be required to appear in that action in the Supreme Court.

For that reason, I believe that this office's normal policy with respect to giving opinions on questions involved in pending litigation should be adhered to with respect to your first question. I must therefore decline to express an opinion on that question.

II.

I now turn to a consideration of your second question. The answer to that question is found in *State ex rel. Pedersen v. Blessinger* (1972), 56 Wis. 2d 286, 201 N.W. 2d 778 (hereinafter "*Pedersen*").

As you recognize in your letter requesting my opinion, in *Pedersen* the Supreme Court clearly and unequivocally indicated that the burden is on the defendant to raise the issue of his indigency when he is committed to jail upon his failure to pay a fine. The Court stated:

> "... [T]he defendant when given a period of time in which to pay a fine *has the burden* to apply to the court for relief, if he is unable to pay within the given time. ... We repeat the defendant *has the burden* to raise and prove his inability to pay the fine where a commitment is ordered for his failure to do so." 56 Wis. 2d at 295-296. (Emphasis supplied.)

Where a defendant has not raised the issue of his indigency on his own motion, the sheriff may lawfully accept and hold such defendant when he has been ordered incarcerated on account of his failure to pay the fine imposed following his conviction for a municipal or county ordinance violation.

You apparently feel that the language from *Pedersen*, upon which I rely, has no application in cases involving municipal ordinance violations, but rather is limited to cases involving

violations of state statutes. Based on certain statements in the *Pedersen* decision, you conclude, "By implication, *Pedersen* seems to prohibit *any* incarceration for the conviction of a municipal or county ordinance." (Emphasis supplied.)

I do not find any such implication in the *Pedersen* decision. On the contrary, the decision clearly appears to have reaffirmed the Court's earlier holdings in *State ex rel. Keefe v. Schmiege* (1947), 251 Wis. 79, 28 N.W. 2d 345, and *Milwaukee v. Horvath* (1966), 31 Wis. 2d 490, 143 N.W. 2d 446, that while direct imprisonment as punishment for a municipal ordinance infraction would be improper and invalid, imprisonment to enforce the collection of a fine imposed for such infraction would not. In *Pedersen* the Court stated:

> "... We still think imprisonment should be a sanction for the inexcusable failure to pay a fine--in ordinance traffic cases it can have no other function in this state." 56 Wis. 2d at 297.

The clear and unmistakable implication of that language is that imprisonment remains a permissible sanction for the inexcusable failure to pay a fine in municipal ordinance violation cases as well as in state criminal cases.

That implication was made explicit in the recent case of *West Allis v. State ex rel. Tochalauski* (1975), 67 Wis. 2d 26, 226 N.W. 2d 424. In that case, which involved a municipal ordinance violation, the Supreme Court stated:

> "... it is recognized by the defendant that the statute [sec. 66.12 (1) (c), Wis. Stats.] vests in the municipal court the discretion to order confinement and withholds any power to order imprisonment in lieu of the forfeiture as distinguished from the power to order imprisonment as a means of collection." 67 Wis. 2d at 30.

In addition to reaffirming the power of a municipal court "to order imprisonment as a means of collection" of a fine imposed in a municipal forfeiture action, the Supreme Court also reaffirmed its holding in *Pedersen* that the burden is on the defendant to raise and prove his inability to pay a fine where a commitment is ordered for his failure to do so. The Court stated:

> "... [The trial court] was of the opinion that the municipal court was required to make a determination as to indigency prior to ordering confinement regardless of the effective date thereof or whether the issue was raised by the defendant. We believe the *Pedersen Case* makes it clear that a defendant who believes himself to be indigent on the effective date of a stayed commitment can and should apply to the committing court for resentencing. ..." 67 Wis. 2d at 32.

In conclusion, it is my opinion that a defendant may be incarcerated by court order for failing to pay a fine imposed for the violation of a municipal ordinance. Unless the defendant applies to the court and obtains relief on the grounds that because of his indigency he is unable to pay the fine, the sheriff may lawfully accept and hold such defendant in the county jail.

BCL:DJB

Indigent; Municipalities; Law enforcement officials of this state, insofar as it is within their power to do so, ought to establish procedures for giving notice to those who face possible incarceration on account of their failure to pay a fine of their constitutional right not to be confined if the failure to pay the fine results from their indigency and of their right to a hearing on the question of their indigency. OAG 35A-75.

December 29, 1975.

OWEN R. WILLIAMS, *District Attorney*
St. Croix County

On September 11, 1975, in response to a request from your office, I issued an opinion regarding the jailing of indigents in municipal ordinance cases as a means of collecting a fine. In that opinion I dealt with two issues which were raised by your request: 1) Is incarceration for nonpayment of a fine permitted in municipal ordinance cases? 2) If so, does a defendant, whose failure to pay a fine results from his indigency, have the burden to raise such indigency if he wishes to escape incarceration for that failure? Relying primarily on *West Allis v. State ex rel.*

Tochalauski (1975), 67 Wis. 2d 26, 226 N.W. 2d 424, which directly and unequivocally addresses itself to both those issues, I advised that such incarceration is permitted and that the burden to raise the issue of indigency is on the defendant.

Since I rendered that opinion, another issue, not raised in your opinion request, but related to the problem of the jailing of indigents for failure to pay a fine, has been brought to my attention. That issue is whether or not there must be notice given to a defendant who may potentially be subject to incarceration for nonpayment of a fine of his right not to be incarcerated if such nonpayment results from financial inability to pay the fine and of his right to a hearing on the question of his indigency before such incarceration is imposed. At least one federal district court, upon consent of the public officials involved in the case, has entered a judgment requiring such notice. See *Leo Balderas, et al. v. Donald N. Thorgaard, et al.*, Civil Action No. 73-C-290 (E.D. Wis. July 22, 1975).

Without regard to whether such notice is constitutionally required, I do believe that the giving of such notice to defendants on whom fines are imposed represents a commendable practice which I would encourage district attorneys and other law enforcement officials in this state to adopt. The adoption of such a practice would be desirable for two reasons.

First, and foremost, such practice would insure that the citizens of this state who are subjected to possible incarceration on account of nonpayment of a fine will have full knowledge of their constitutional right not to be incarcerated if such nonpayment is due to their indigency. Such knowledge will, of course, be of significant aid in protecting that right.

Second, the giving of the type of notice in question will serve a prophylactic purpose. It will prevent a defendant who is jailed on account of his nonpayment of a fine from challenging such incarceration on the ground that some alleged constitutional right to such notice was violated.

In conclusion, I would recommend that you and other law enforcement officials of this state, insofar as it is within your power to do so, establish procedures for giving notice to those who face possible incarceration on account of their failure to pay a fine of

their constitutional right not to be confined if the failure to pay the fine results from their indigency and of their right to a hearing on the question of their indigency.

BCL:DJB

Municipalities; Salaries And Wages; Turnkey construction may be used for the construction of public works projects unless another method expressly is required. Municipalities are subject to sec. 66.293 (3), Stats., the prevailing wage law, on contracts for any project of public works even if done by the turnkey method. OAG 36-75.

September 26, 1975.

VIRGINIA B. HART, *Chairman*
Department of Industry, Labor and Human Relations

Your predecessor has advised me that a Wisconsin common school district contemplates construction of a school bus garage, and that it plans to utilize a "turnkey" method of construction. By this method the district will purchase the completed project from a contractor-developer. My opinion has been requested on two questions:

1. May this school district and other municipalities utilize the turnkey construction method?

2. If so, is such a method of construction subject to the prevailing wage law, sec. 66.293 (3), Stats.?

As to the first question, it is my opinion that turnkey construction is not *per se* unlawful in the case of unified, common and union school districts. The general rule is that a municipality may use any construction method unless the statutes provide otherwise. See 63 C.J.S., *Municipal Corporations*, sec. 1063, p. 699. Wisconsin law is in accord. As stated in *Cullen v. Rock County* (1943), 244 Wis. 237, 242, 12 N.W. 2d 38:

> "In this respect the case is quite different from [*L. G. Arnold, Inc., v. Hudson* (1934), 215 Wis. 5, 254 N.W. 108] which involved a city which was bound by law to let the

> contract to the lowest bidder. The county here was free to build the building itself, or to make *any sort* of contract to build the building that it deemed provident." (Emphasis added.)

Unified, common and union school districts are not required to construct by advertising and competitive bids. See *Consolidated School Dist. v. Frey* (1960), 11 Wis. 2d 434, 439, 105 N.W. 2d 841.

I have considerable doubt, however, as to whether municipalities which are required to take competitive bids (such as city school districts, see sec. 120.55, Stats.), may construct by turnkey. The reason is that turnkey and competitive bidding are regarded as alternatives. See Comment, *Turn-key Public Housing in Wisconsin*, 1969 Wis. L. Rev. 231, 237-239.

Since the school district in question is a common school district, it is not *per se* unlawful for it to construct by the turnkey method. It is not possible to state that every use of turnkey construction is lawful. Legality may turn on the facts peculiar to particular cases. See *Akin v. Kewaskum Community Schools* (1974), 64 Wis. 2d 154, 218 N.W. 2d 494.

The answer to your second question is yes.

The essence of the prevailing wage law, sec. 66.293, Stats., is that workers employed on public construction projects must be paid the economic benefits prevailing in the area. Justice Cardozo described the purpose of such a law to be:

> "... an attempt by the state to hold its territorial subdivisions to a standard of social justice in their dealings with laborers, workmen, and mechanics." *Austin v. City of New York* (1932), 258 N.Y. 213, 217, 179 N.E. 313, 314.

The Wisconsin Supreme Court addressed itself to the prevailing wage law as it affects highway construction in *Green v. Jones* (1964), 23 Wis. 2d 551, 128 N.W. 2d 1. Two relevant purposes of such a law were stated: (1) to stimulate and protect the economic position of individual workers, 23 Wis. 2d at 558, 559; and (2) to cover the work done without regard to the relationships involving the government or the contractor, 23 Wis. 2d at 561, 562.

The language of the prevailing wage law is sufficiently broad to include turnkey construction. Section 66.293 (3), Stats. 1971, included:

> "Every municipality, before soliciting bids on a contract for any project of public works ..."

As amended by ch. 181, Laws of 1973, however, sec. 66.293 (3) now includes:

> "Every municipality, before *making a contract by direct negotiation* or soliciting bids on a contract, for any project of public works ...." (Emphasis added.)

Since the 1971 statute was restricted to municipalities which solicited bids, it did not cover construction done by other than competitive bidding. Thus, all negotiated work, including turnkey construction, was exempt. Since turnkey construction is a form of making a contract by direct negotiation, turnkey construction is now included within sec. 66.293 (3), Stats.

Any other interpretation would frustrate rather than serve the purposes of the prevailing wage law. Surely if the school district constructed the bus garage by taking competitive bids, the laborers' work would be covered. Since it is the individual whom the legislature seeks to protect and since it is the nature of the work rather than the contractual relationship between the government and the contractor which is dispositive of coverage, it is my opinion that the operation of the prevailing wage law cannot be circumvented by the turnkey method of construction. It is my opinion, therefore, that public works projects are subject to sec. 66.293 (3), Stats., even if construction is by the turnkey method.

Section 66.293 (3), Stats., however, does not embrace all turnkey construction. It applies only to municipal projects for "public works." Not all turnkey projects are public works projects. For example, turnkey projects financed by industrial revenue bonds under sec. 66.521, Stats., typically are private industrial projects. See 63 OAG 145 (1974). Although the use of public financing under sec. 66.521 serves a public purpose sufficient to support the constitutionality of the law, the projects financed thereby do not, merely as a consequence of the method of financing, become public in character. See *State ex rel. Hammermill Paper Co. v. La Plante* (1973), 58 Wis. 2d 32, 205 N.W. 2d 784.

This is not to say, however, that sec. 66.521 does not cover the financing of public works projects. Chapter 265, Laws of 1973, substantially broadened the definition of a "project" subject to financing by industrial revenue bonds (see sec. 66.521 (2) (b), Stats.) to include categories of projects which, in some contexts could be public, rather than private, in character.

Whether a particular project is public or private requires an analysis of the specific factors involved. Each case must be separately evaluated. Generally speaking, however, a public works project is one for the use of a public body. See 35 Words & Phrases, pp. 134 *et seq.* The fact of public involvement through public monies or through ultimate public ownership does not itself make the project one of public works. See *United States v. Harrison and Grimshaw Construction Co.* (3rd Cir. 1962), 305 F. 2d 363, 367; *Grant v. Milwaukee* (1914), 156 Wis. 635, 639, 146 N.W. 780; *Knuth v. Fidelity & Casualty Co.* (1957), 275 Wis. 603, 608, 83 N.W. 2d 126; *Ozaukee Sand & Gravel Co. v. Milwaukee* (1943), 243 Wis. 38, 9 N.W. 2d 99; and *Standard Oil Co. v. Clintonville* (1942), 240 Wis. 411, 414-416, 3 N.W. 2d 701.

BCL:CDH

Counties; Municipalities; Counties and municipalities do not have authority to regulate the interception and rebroadcast of local law enforcement agency radio communications. OAG 37-75.

October 2, 1975.

DENNIS J. FLYNN, *Corporation Counsel*
Racine County

You have requested my opinion as to whether or not Racine County or the City of Racine has the authority to regulate the interception and rebroadcast of local law enforcement agency radio communications. You indicate that an individual in the Racine area has expressed the desire and has taken some steps toward rechanneling the official Racine County Sheriff's Department and Racine City Police Department's radio frequencies through a community antenna television (CATV) system to paying

subscribers. You further indicate that there appears to be a strong state or public interest against making these law enforcement agency communications available to a vast sector of the general public. For the reasons which follow, I have concluded that counties and municipalities do not have the authority to regulate the proposed activity which you describe.

Governmental regulation of CATV systems is of relatively recent origin, having developed for the most part during the past ten years. While significant regulation of some aspects of such systems has been undertaken by localities and states during this period, by far the most important development has occurred at the federal level.

Federal regulation of CATV began in 1965 when the Federal Communications Commission promulgated rules requiring systems importing distant signals to carry local competing programs and forbidding duplication of local programming by such systems. In *United States v. Southwestern Cable Co.* (1968) 392 U.S. 157, 20 L.Ed. 2d 1001, 88 S.Ct. 1994, the Supreme Court considered whether the commission had the statutory authority to engage in such regulation and concluded that it did.

Regulation of CATV at both the local and federal levels raised the question of federal preemption. While it is true that federal regulation of a subject does not always preclude concurrent local regulation, the federal preemption doctrine holds that where there is "such actual conflict between the two areas of regulation that both cannot stand in the same area," the local regulation will be invalidated under the supremacy clause of the Constitution. *Florida Lime and Avocado Growers v. Paul* (1963) 373 U.S. 132, 141, 83 S.Ct. 1210, 1217, 10 L.Ed. 2d 248, 256.

In *T.V. Pix, Inc. v. Taylor* (1968) 304 F.Supp. 459, a three-judge panel held that a Nevada law regulating CATV systems as public utilities had not been preempted by federal regulation. Said the court:

> "... whether preemption has in fact occurred ... depends on whether the Federal Communications Commission has, in fact, regulated in this area and not upon whether it has the power to do so...

"The answer to the question of whether the Nevada Community Antenna Television System Law does in fact conflict with federal regulation of community antenna companies is clear. To date, as related in the *Southwestern Cable Co.* case, the FCC has imposed its will on community antenna companies in but three limited areas. [citation omitted.] Not only has the FCC failed to promulgate regulations concerning rates, quality of service and franchises of community antenna companies, it has, through the years, sought to eschew legislative authority in this area. [footnote omitted.]" *T.V. Pix, supra*, at 465-466.

It should be noted, however, that the state statute considered in *T.V. Pix* did not attempt to regulate signal carriage, which was an area dealt with in some respects by the earliest FCC regulation. Moreover, the state of FCC regulation of CATV has changed dramatically since the *T.V. Pix* decision. In 1972, the commission promulgated a comprehensive set of rules regulating many facets of CATV operation, which are now codified in 47 C.F.R. Part 76. In particular, with regard to signal carriage, Subpart D deals with carriage of television broadcast signals, Subpart F deals with program exclusivity, and Subpart G deals with origination cablecasting, including regulations pertaining to the fairness doctrine, lotteries, obscenity, advertising and sponsorship identification.

The rules do contemplate - indeed, require - that CATV systems be franchised or licensed by local authorities, but such franchises must meet FCC standards. See 47 C.F.R., sec. 76.31. With respect to attempts to regulate signal carriage in such franchises, the commission has stated its position as follows:

"The fact that this Commission has pre-empted jurisdiction of any and all signal carriage regulation is unquestioned. Nonetheless, occasionally we receive applications for certificates of compliance which enclose franchises that attempt to delineate the signals to be carried by the franchisee cable operator. Franchising authorities do not have any jurisdiction or authority relating to signal carriage." *Clarification of Rules and Notice of Proposed Rule-Making* (1974) 29 Pike and Fisher Radio Regulation 2d 1621, 1627.

In light of the FCC rules regulating signal carriage on CATV systems and the above pronouncement by the commission, I must conclude that federal regulation has preempted this area, and that consequently Racine County and the City of Racine do not have the authority to regulate the interception and rebroadcast of law enforcement agency radio communications. It should be noted though that no CATV system may commence operations or add a television broadcast signal until it has received a certificate of compliance from the commission. 47 C.F.R., sec. 76.11 (a). The commission gives public notice of the filing of such applications, and 47 C.F.R., sec. 76.27 specifically provides for the filing of objections to them. These provisions may provide you with the opportunity to express your concerns to the commission should the need arise.

BCL:WDB

Housing; Municipalities; A county cannot use county funds and county employes to improve, reconstruct or repair homes of private citizens who do not qualify for aid under ch. 49, Stats., without utilizing a housing authority pursuant to secs. 59.075, 66.40-66.404, Stats. Employes of housing authority are not county employes. OAG 39-75.

October 9, 1975.

DENNIS J. FLYNN, *Corporation Counsel*
Racine County

You request my opinion whether Racine County can use county funds and county employes to improve, reconstruct, alter or repair existing homes of private citizens who do not qualify for aid under ch. 49, Stats., without utilizing a housing authority pursuant to secs. 59.075, 66.40-66.404, Stats.

Stated another way, you inquire whether a county under 500,000 population can do directly all those things referred to in secs. 66.40-66.404 and particularly sec. 66.40 (9), Stats., which it can do indirectly by creation of a housing authority. It is my opinion that it cannot.

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.

In 63 OAG 297 (1974), it was stated that the provisions of sec. 59.07 (1), Stats., were not sufficiently broad to permit the county to furnish housing for elderly and low-income persons where specific statutes provide for furnishing of such housing. On the other hand, however, the opinion stated that sec. 59.07 (55), Stats., applicable only to counties over 500,000 population, would permit such counties to "... build, furnish and rent housing facilities to persons ... whose income is insufficient. ..."

There is no similar statute applicable to counties under 500,000 population. Such counties can utilize a county housing authority by reason of secs. 59.075, 66.40-66.404, Stats. However, such authority is limited by the terms of the express statutes, and by reason of sec. 59.075 (3), Stats., counties cannot undertake projects within the boundaries of any city or village without the approval of the local governing board.

Your inquiry does not state that Racine County wishes to limit any construction, repair or improvement to housing owned or occupied by any specific class of citizens such as the elderly or persons of insufficient income. The legislature has by statute provided that the needs of such citizens can be met, at least in part, in a specified manner. Without question, providing for such needs does constitute a public purpose which would permit the expenditure of public funds if the provisions of secs. 59.075, 66.40-66.404, Stats., were followed.

On the other hand, the legislature has not determined that the improvement, reconstruction, alteration or repair of homes of *all* private citizens, regardless of financial ability, age, or location of existing property owned, is a sufficiently public purpose to permit a county to engage in such activity. Without such a determination of public purpose, the expenditure of public funds for purposes which otherwise are primarily private is prohibited. Counties have no commercial status and cannot *unreasonably* compete with private enterprises. *Heimerl v. Ozaukee County* (1949), 256 Wis. 151, 40 N.W. 2d 564. *Garfield Inv. Co. v. Town of Oconomowoc* (1950), 257 Wis. 98, 42 N.W. 2d 361. What constitutes a public purpose is in the first instance a question for the legislature to determine.

State ex rel. Hammermill Paper Co. v. La Plante (1973), 58 Wis. 2d 32, 48, 205 N.W. 2d 784. Final determination is for the Supreme Court in a proper case. *Hammermill, supra*, p. 50.

You also inquire whether, if Racine County were to create a housing authority, the employes of such authority, employed under sec. 66.40 (5) (c), Stats., would be county employes if Racine County were to provide the authority with most of its funds. I am of the opinion that they would not.

Section 66.40 (4), Stats., provides that when a housing authority is created it is a "public body corporate and politic." In 62 OAG 333 (1973), it was stated that such authority is not an arm, department, or agency of the municipality which created it but is an independent entity separate and distinct from such municipality. 45 OAG 180 (1956); 37 OAG 626 (1948). The employes of the authority are not paid by the county but by the authority. As stated in 62 OAG 333:

> "Section 66.404 (2), Stats., provides that the municipality or county can advance money to such housing authority for administrative expenses during the first year or appropriate money thereafter. Such funds may be treated as a donation or a loan as the municipality shall determine. Generally speaking, once received by the housing authority, such funds are beyond the control of the county and are to be used by the housing authority to pay its lawful obligations."

BCL:RJV

Counties; Pharmacy; County supervisor who is pharmacist is probably not in violation of sec. 946.13, Stats., when he furnishes prescription services to medicaid patients where state is solely liable for payment. OAG 40-75.

October 9, 1975.

MICHAEL T. SOLOVEY, *District Attorney*
Juneau County

You request my opinion whether there is a probable violation of sec. 946.13, Stats., under the following statement of facts.

A member of the Juneau County Board, first elected in the spring of 1974, is a pharmacist who has had business relationships with county institutions including the county infirmary for some 18 years. These relationships include supplying the county infirmary with miscellaneous merchandise on an "as needed" basis and contracting to supply prescription drugs to patients under medical assistance and "medicaid" programs as provided by secs. 49.46, 49.47, Stats. Some of the medicaid patients are residents of the county infirmary and others are not. Prescription sales to all such patients are substantially in excess of $2,000 per year. Sales of miscellaneous merchandise amount to substantially less than $2,000 per year.

You indicate that the state has assumed payment of all prescription needs of aged indigents under the medical assistance or supplemental security income programs as of January 1, 1974. All billings are made to Wisconsin Physicians Service of Madison, Wisconsin, which is the private contractor retained by the State of Wisconsin for this purpose. You state that it is not known whether payment of these bills has been assumed partially or entirely by the federal government, but that it is certain that Juneau County pays no portion of these prescription bills directly and that these costs do not appear in any form in the budget of the county infirmary.

You state that the administrator (superintendent) of the infirmary, as part of his day-to-day supervision, is vested with discretion to arrange for the furnishing of services to residents in the nature of pharmaceutical prescriptions. The superintendent is under the supervision of a county board committee, which for the purposes of this opinion has powers of the board of trustees appointed under sec. 46.18, Stats. I am advised that Juneau County has transferred the powers of such board of trustees to a five-member committee of the county board, acting under secs. 59.06 and 59.025, Stats., as created by ch. 118, Laws of 1973, and that the supervisor-pharmacist is not a member of such committee.

Section 946.13, Stats., provides in part:

"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.

"(2) Subsection (1) does not apply to the following:

"(a) *Contracts in which any single public officer or employe is privately interested which do not involve receipts and disbursements by the state or its political subdivision aggregating more than $2,000 in any year.*" (Emphasis added.)

I am of the opinion that public contracts are involved but that the supervisor-pharmacist is probably not in violation of sec. 946.13, Stats.

There is no violation of the statute with respect to the purchases of miscellaneous merchandise because the dollar volume of those sales is within the $2,000 exemption. Sec. 946.13 (2) (a), Stats.

The public contracts with respect to prescription drugs are primarily between the pharmacist and the state. The state has authorized Wisconsin Physicians Service to process and pay claims directly to suppliers if submitted within standards approved by the Wisconsin Department of Health and Social Services. Prior approval by Health and Social Services is required as to certain items. The superintendent of the infirmary is acting primarily for

the state in selecting the supplier and the superintendent is partially insulated from the county board in exercising such power.

Section 46.18, Stats., provides that every county infirmary "shall (subject to regulations approved by the county board) be managed by a board of trustees" chosen by the county board. The powers and duties of the trustees can be transferred to a committee of the county board pursuant to secs. 59.06 and 59.025, Stats., as created by ch. 118, Laws of 1973. 63 OAG 256 (1974); see also 21 OAG 1036 (1932). Such trustees or committee would have the powers provided in secs. 46.18, 49.19, Stats., which include the power to appoint a superintendent for day-to-day management. The superintendent is only removable by the trustees or committee for cause. While you should review the resolutions creating the county infirmary and transferring power of the trustees to the committee of the board, it appears that the superintendent is fairly well insulated from direct supervision by the county board. There is chance of favoritism, however, since the county board selects the members of the board committee managing the institution and also holds latent power to abolish such committee, reinstitute a board of trustees, or abolish the institution itself.

In 28 OAG 58 (1939), it was stated that a dentist who was a member of the county board would be in violation of then sec. 348.28, Stats., if he performed services for an indigent, which services had been approved in advance by the county pension department, since the bill for services would ultimately be paid out of the children's aid fund which was in part created by appropriations by the county board.

The prescription services we are concerned with are those provided under secs. 49.46, 49.47, Stats. Former sec. 49.52 (3) (b), Stats. (1971), provided that "Each county shall be liable for its pro rata share of the medical expenses paid by the state under ss. 49.46 and 49.47." If that statute were still applicable, the reasoning in 28 OAG 58 (1939), would apply as the pharmacist-supervisor would be in a position to vote on the funding of such pro rata share. However, sec. 49.52 (3) (b), Stats., was amended by the 1973 legislature to release the county from such liability. Sec. 260v of ch. 90, Laws of 1973.

If further insulation is deemed desirable, the Department of Health and Social Services and the county board committee

supervising the infirmary could consider the advisability of having the superintendent select the supplier of prescription services on an annual bid basis. Such procedure would have a number of advantages, including the possibility of a more favorable price.

BCL:RJV

Counties; Waters; A bulkhead line is not legally established if the ordinance for the establishment of the line and accompanying map have not been filed with the register of deeds of the county in which the affected waters lie.

The passage of a number of years between the adoption and approval of the ordinance and the filing of the same with the register of deeds does not affect the legality of the line once the filing has occurred.

A bulkhead line established by a town and affecting lands subsequently annexed to a municipality which has not established such a bulkhead line, remains in effect with respect to the annexed lands. OAG 41-75.

October 15, 1975.

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

You have requested my opinion regarding the validity of a bulkhead line on the Fox River established by the Town of Ashwaubenon in Brown County. You state that in 1960 the Town filed an application for approval of the proposed bulkhead line with the Public Service Commission pursuant to sec. 30.11, Stats.,[1] and that, though the Commission initially denied the application, it subsequently approved the bulkhead line in 1965 following review of its initial decision by the supreme court in *Ashwaubenon v. Public Service Comm.* (1963), 22 Wis. 2d 38, 125 N.W. 2d 647.

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[1] Administration of this section was transferred from the Public Service Commission to the Department of Resource Development by ch. 614, Laws of 1965, and subsequently to the Department of Natural Resources by ch. 276, Laws of 1969.

You further state that in the intervening years considerable filling has been done by riparians behind the bulkhead line, but that it recently has come to the attention of your department that a copy of the ordinance adopted by the town establishing the bulkhead line and accompanying map was not filed with the Brown County Register of Deeds until March 7, 1975.

In light of the above, you ask the following questions:

First, does a town's failure to file copies of a bulkhead line ordinance and map with the register of deeds of the county within which the town is situated as required by sec. 30.11 (3), Stats., render the ordinance void?

Second, if a town's failure to so file does impair the validity of a bulkhead line ordinance, can a subsequent filing cure this defect and render the ordinance effective?

Third, is a bulkhead line established by a town pursuant to sec. 30.11, Stats., effective with respect to riparian lands originally located in the town and affected by the bulkhead line ordinance but subsequently annexed to a municipality which had not adopted the same bulkhead line ordinance as the town?

For the reasons stated below, I conclude that all three of these questions, when construed to properly characterize the issues, should be answered in the affirmative.

In the statement of your first and second questions you characterize the failure to file as voiding or invalidating the ordinance. This characterization is not correct. The ordinance was at all times valid subject to becoming effective upon the occurrence of a condition subsequent, namely, filing in the manner required by statute.

With respect to your first question, sec. 30.11 (3), Stats., provides in pertinent part that:

> "... Whenever any municipality proposes to establish a bulkhead line ... the municipality shall indicate both the existing shore and such proposed bulkhead line upon a map and shall file with the department for its approval 3 copies thereof together with 3 copies of the ordinance establishing the bulkhead line. ... Upon approval by the department, the municipality shall file the copies of the map and ordinance as

follows: one in the office of the department, one in the office of the clerk of the municipality, and one in the office of the register of deeds of the county in which the waters lie. *No such lines are legally established until such copies of the map and ordinance have been so approved and filed.*" (Emphasis added.)

From this language it is clear that the bulkhead line was not legally established prior to the filing of a copy of the ordinance and map with the Brown County Register of Deeds, even though the town passed an ordinance for the establishment of the bulkhead line during or prior to 1960 and the bulkhead line was approved by the Public Service Commission in 1965. The town's failure to file did not "render the ordinance void," but approval of the ordinance itself was not sufficient to legally establish the bulkhead line. The bulkhead line was established only after both approval of the ordinance *and* compliance with the filing requirements.

With respect to your second question, sec. 30.11 (3), Stats., does not specify any time limitations for the filing of the map and ordinance with the county register of deeds subsequent to approval by the department. I conclude, therefore, that the filing of the ordinance and map with the requisite local authorities, even though it was done a number of years after the approval of the ordinance and map, did finally result in the legal establishment of the bulkhead line. The delay in filing did not "impair the validity" of the ordinance, but merely postponed the legal establishment of the bulkhead line approved thereby.

With respect to your third question, the general rule is that when territory is annexed to a municipal corporation, it thereby becomes subject to all the laws and ordinances by which the municipality is governed, and all ordinances of the annexed territory cease to exist. 62 C.J.S. *Municipal Corporations*, sec. 73. However, a well-established exception to this rule is that when an ordinance of the annexed territory affords contractual rights to third parties, such rights are not impaired by the subsequent annexation of the territory in question. *People v. Chicago Rys. Co.* (1915), 270 Ill. 278, 110 N.E. 394 (concerning the right to operate a street railway in the annexed territory); *People v. Chicago Telephone Co.* (1910), 245 Ill. 121, 91 N.E. 1065 (concerning the right to operate a telephone system in the annexed

territory); *People v. Blocki* (1903), 203 Ill. 363, 67 N.E. 809 (concerning the right to maintain a switch track on a public street in the annexed territory). See generally, 62 C.J.S. *Municipal Corporations*, secs. 73 and 78.

In applying these rules to the situation which you describe, it should first be noted that our supreme court has not had occasion to consider them, and I have been unable to find decisions from any other jurisdiction which consider the precise question you raise. It does appear, however, from the decision in the *Ashwaubenon* case, *supra*, that the establishment of a bulkhead line pursuant to sec. 30.11, Stats., creates in each riparian owner adjacent thereto a "right" to use the river bed up to the established bulkhead line. *Ashwaubenon v. Public Service Comm.*, *supra*, at 49. Although such rights are apparently revocable by the state (*Id.* at 49) and may not be "contractual," it is my opinion that their acknowledged existence, and the reliance by riparian owners which they may be expected to engender, would result in a ruling by our supreme court, if it were presented the issue, that an exception to the general rule similar to the "contractual rights" exception exists.

I conclude, therefore, that where riparian lands subject to a town bulkhead line ordinance are subsequently annexed to a municipality without such an ordinance, the bulkhead line remains in effect with respect to the annexed lands.

BCL:WDB

Natural Resources, Department Of; Pollution; Individual property owners incidentally affected by a Department of Natural Resources legislative decision to approve or disapprove plans for an air contaminant source pursuant to sec. 144.39, Stats., are not guaranteed a hearing before the Department by statute or by constitutional provisions of due process. Thus, proceedings under sec. 144.39, Stats., do not constitute a contested case. OAG 46-75.

October 30, 1975.

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

You have requested my opinion concerning the following set of facts: A group of individuals has requested a contested case hearing on the plan approval of a new air contaminant source on the theory that, if approved, the contaminant source may destroy or injure their private property. The group argues that, although sec. 144.39, Stats., does not provide a contested case hearing, constitutional due process requires that such a hearing be held.

You inquire whether their argument is valid and, if so, what standard should be applied to evaluate the deprivation of property suffered by the private property owners as well as the claimed deprivation of property (i.e., loss of funds due to delay caused by the hearing) suffered by the source owner.

The statutes involved are secs. 144.39, 227.07, and 227.01 (2), Stats. The pertinent parts of sec. 144.39, Stats., provide:

> "NOTICE REQUIRED FOR CONSTRUCTION. (1) The department shall require that notice be given to it prior to the construction, installation or establishment of particular types or classes of air contaminant sources specified in its rules. Within 15 days after receipt of such notice, the department shall require, as a condition precedent to the construction, installation or establishment of the air contaminant source covered thereby, the submission of plans, specifications and such other information as it deems necessary in order to determine whether the proposed construction, installation or establishment will be in accordance with applicable rules in force pursuant to ss. 144.30 to 144.46. If within 30 days after the receipt of such plans, specifications or other information the department determines that the proposed construction, installation or establishment will not be in accordance with the requirements of ss. 144.30 to 144.46 or applicable rules, it shall issue an order prohibiting the construction, installation or establishment of the air contaminant source. If the department does not issue such order within such 30-day period the construction, installation or establishment may

proceed in accordance with the plans, specifications or other information, if any, required to be submitted.

"***

"(3) In addition to any other remedies available on account of the issuance of an order prohibiting construction, installation or establishment of such source, and prior to invoking any such remedies, any person aggrieved thereby shall, upon request in accordance with rules of the department, be entitled to a hearing on the order. Following such hearing, the order may be affirmed, modified or withdrawn.

"(4) Any addition to or enlargement or replacement of an air contaminant source, or any major alteration therein, shall be construed as construction, installation or establishment of a new air contaminant source.

"***"

Section 144.39 provides no hearing procedure except that "any person aggrieved" may request a hearing if approval of the plans is denied.

Section 227.07, Stats., is part of the Wisconsin Administrative Procedure Act (APA), which essentially regulates agency rule making, prescribes the procedure to be followed by agencies in contested cases, and provides for judicial review of agency decisions. Section 227.07, Stats., provides:

"Prior to the final disposition of any contested case, all parties shall be afforded opportunity for full, fair, public hearing after reasonable notice, but this shall not preclude the informal disposition of controversies by stipulation, agreed settlement, consent orders, or default."

The citizens involved claim that this matter is a "contested case" and thus requires a "full, fair, public hearing" under sec. 227.07. "Contested case" is defined by sec. 227.01 (2) as follows:

" 'Contested case' means a proceeding before an agency in which, after hearing required by law, the legal rights, duties or privileges of any party to such proceeding are determined or directly affected by a decision or order in such

> proceeding and in which the assertion by one party of any such right, duty or privilege is denied or controverted by another party to such proceeding."

Thus, a case is considered "contested" only when the following three elements are satisfied: 1) a hearing is required by law, 2) the legal rights, duties, or privileges of a party will be determined or adversely affected by the proceeding, and 3) a controversy exists between parties. See *Daly v. Natural Resources Board* (1973), 60 Wis. 2d 208, 216-17, 208 N.W. 2d 830; *Hixon v. Public Service Commission* (1966), 32 Wis. 2d 608, 146 N.W. 2d 577; *Hall v. Banking Review Board* (1961), 13 Wis. 2d 359, 366-367; 108 N.W. 2d 543. Although a hearing on this particular matter would no doubt entail a determination on a privilege of the source owner which would be controverted by the property owners, the key question is whether this determination would occur after a "hearing required by law." The Wisconsin Administrative Procedure Act does not itself provide a right to an administrative hearing in contested cases. See Hoyt, Wisconsin Administrative Procedure Act, 1944 Wis. L. Rev. 214, 220-221.

In *Nick v. State Highway Commission* (1963), 21 Wis. 2d 489, 124 N.W. 2d 574, the court said:

> "... [T]he reference to a 'hearing required by law' presupposes either (1) a hearing expressly provided for by the regulating statute or administrative rule, or (2) a hearing necessitated constitutionally by the requirements of due process." *Id.* at 495.

See also, *Town of Ashwaubenon v. Public Service Commission* (1963), 22 Wis. 2d 38, 46, 125 N.W. 2d 647, rehearing denied, 126 N.W. 2d 567.

Since no statute or rule, including sec. 144.39, Stats., requires a hearing before the Department of Natural Resources on plan approval for construction of a new air contaminant source, the question remains whether constitutional due process requires a hearing. It is my opinion that, in this matter, it does not.

In *Town of Norway v. State Board of Health* (1966), 32 Wis. 2d 362, 145 N.W. 2d 790, the Town of Muskego sought plan approval for its proposed sewage treatment plant. The Town of Norway claimed that installation of a sewage treatment plant

would adversely affect the quality of its waters located downstream from the plant. Norway requested and received a hearing from the State Board of Health and the Committee on Water Pollution. The Wisconsin Supreme Court, however, ruled that such a hearing was not required by either statute or the constitutional provisions of due process.

> "... In *Ashwaubenon v. Public Service Comm.* (1963), 22 Wis. (2d) 38, 125 N. W. (2d) 647, 126 N. W. (2d) 567, and in *Nick v. State Highway Comm.* (1963), 21 Wis. (2d) 489, 124 N. W. (2d) 574, we pointed out a contested case before an agency is one in which a hearing is required by law or by constitutional provisions of due process. The approval of plans for a proposed sewage-treatment system under sec. 144.04 does not depend upon a requirement of a prior hearing, nor have the agencies promulgated a rule which requires a hearing as a condition precedent in a proceeding for the approval of such plans. Sec. 144.04 requires the board to examine the plans and conditions without delay and as soon as possible approve or disapprove or state what it will require. In performing this function the agency may and in this instance did hold gratuitous hearings. But gratuitous hearings do not change the nature of a legislative type of hearing in an administrative proceeding to a 'contested case.' It is not the fact [of a hearing] but the requirement of a hearing which is the test. *Milwaukee v. Public Service Comm.* (1960), 11 Wis. (2d) 111, 104 N. W. (2d) 167; *Park Bldg. Corp. v. Industrial Comm.* (1960), 9 Wis. (2d) 78, 100 N. W. (2d) 571." *Town of Norway, supra,* 32 Wis. 2d at 367.

Since the gratuitous hearing, though held, was not required by statute or constitution, the matter was deemed not to be a contested case. *Id.* at 367-368.

Arguably, the *Town of Norway* case is distinguishable on the grounds that the town was acting in a governmental capacity, not in a proprietary one, and that no deprivation of private property was alleged. In the situation at hand, the citizens are requesting a hearing to protect against injury to private property. These distinctions, however, in light of other law on the subject, do not change my conclusion that no hearing is required by law.

It is true that the Fourteenth Amendment to the United States Constitution often requires that state agencies provide notice and hearing before taking action which deprives an individual of "life," "liberty," or "property." *Ruhmer v. Wisconsin State Teachers Retirement Bd.* (1970), 48 Wis. 2d 419, 426, 180 N.W. 2d 542. Wisconsin's counterpart to the federal due process clause is Art. I, sec. 1, Wis. Const. *Lacher v. Venus* (1922), 177 Wis. 558, 571-72, 188 N.W. 613. These two constitutional provisions provide as follows:

> "... [N] or shall any State deprive any person of life, liberty, or property, without due process of law; ..." Amend. XIV, sec. 1, U.S. Const.
>
> "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." Art I, sec. 1, Wis. Const.

At the same time, Art. I, sec. 13, Wis. Const., requires that just compensation be afforded an individual subject to a "taking" of private property for public purposes.

> "The property of no person shall be taken for public use without just compensation therefor." Art. I, sec. 13, Wis. Const.

The two concepts of due process and just compensation often overlap. See, e.g., *Loeb v. Bd. of Regents of Univ. of Wisconsin* (1965), 29 Wis. 2d 159, 164-65, 138 N.W. 2d 277; *State ex rel. Thomas v. Giessel* (1953), 265 Wis. 185, 202, 60 N.W. 2d 873.

Here, the property owners arguably could claim, under the due process clauses, a right not to be deprived of their lives, liberty, or property without due process and, under the just compensation provision, the right not to have their property taken for public use without just compensation. (If the source owner is a public utility, as in this case, the taking is for a public use. See *Blair v. Milwaukee Electric Railway and Light Co.* (1925), 187 Wis. 552, 555, 203 N.W. 912.)

It is my opinion, however, that the approval of plans for an air contaminant source does not involve a constitutionally protected

right and, thus, due process rights do not attach under the constitution. While it is arguable that the interest in a healthful environment, including clean air, should be afforded due process protection, the case law has held otherwise. See, e.g., *Ely v. Velde* (4th Cir. 1971), 451 F. 2d 1130, 1139; *Pinckney v. Ohio EPA* (N.D. Ohio, E.D. 1974), 375 F. Supp. 305, 309-311; *EDF v. Corps of Engineers* (E.D. Ark. 1971), 325 F. Supp. 728, 738-739.

Further, it is my opinion that the action contemplated does not deprive the property owners of due process in determining the reasonableness of, necessity for, or compensation due for a taking, if indeed the action constitutes a taking. Whether construction of an air contaminant source would constitute a "taking" is a factual determination beyond the scope of this opinion. The cases have not dealt directly with this question. Compare *Hasslinger v. Hartland* (1940), 234 Wis. 201, 290 N.W. 2d 647; *Nick v. State Highway Commission* (1963), 13 Wis. 2d 511, 514-515, 124 N.W. 2d 574, with *Jost v. Dairyland Power Cooperative* (1969), 45 Wis. 2d 164, 176-177, 172 N.W. 2d 647; see also the discussion in *Wisconsin Power and Light Co. v. Columbia County* (1958), 3 Wis. 2d 1, 4-7, 87 N.W. 2d 279.

Whether or not approval of plans for construction of an air contaminant source constitutes a taking, sec. 144.39, Stats., in any case does not deny just compensation. In *Green Bay & W. R. Co. v. Public Service Commission* (1955), 269 Wis. 178, 68 N.W. 2d 828, a similar issue was raised with the plaintiff railroad arguing that sec. 195.29, Stats., deprived the railroad of property without due process and just compensation. Section 195.29, Stats., authorized the Public Service Commission to establish, after a legislative hearing, highway crossings across railroad grades.

> "The next issue to be considered is the constitutional question. The learned trial judge in his memorandum opinion disposed of such issue as follows:
>
> " 'The contention that the statute (sec. 195.29) which due process of law is unconstitutional must fail for the reason that the petitioner may properly seek its remedy under the condemnation statutes (ch. 32, Stats.), in a separate proceeding.'

> "... There is nothing in sec. 195.29, or in the order entered by the Public Service Commission before us on this appeal, which would prevent the Railroad Company from instituting condemnation proceedings to enforce its right to compensation for such easement.
>
> "Therefore, neither sec. 195.29 (1), Stats., nor said order of the Public Service Commission, has the effect of depriving the Railroad Company of its property without compensation, and such statute and order are not unconstitutional." *Id.* at 188.

See also *David Jeffrey Co. v. Milwaukee* (1954), 267 Wis. 559, 592-594, 66 N.W. 2d 362.

Likewise, in this instance even though sec. 144.39 authorizes the Department of Natural Resources to approve plans without a hearing, it does not require a taking of property without compensation; it does not prevent the affected property owners from instituting inverse condemnation proceedings under ch. 32 against the public utility which owns the air contaminant source.

In any event, due process does not in every case require a hearing before the administrative agency.

> "Notice and hearing in a proceeding before an administrative agency may often be necessary to comply with the constitutional requirement of due process of law, even though the statute governing the proceedings does not require a hearing, *although not every administrative determination, even those affecting private individuals, requires notice and hearing.* The constitutional necessity for notice and hearing must depend somewhat on the nature of the right affected by the administrative action; the nature of the power exercised and the issues to be determined; the existence of factors other than the requisite of a hearing which operate to safeguard the rights of individuals and to prevent arbitrary action on the part of officials, such as the right to judicial review, and the urgency of public need requiring prompt action without the delay necessitated by notice and hearing." (Emphasis added.) 2 Am. Jur. 2d, Administrative Law, sec. 399, pp. 204-205.

Resolution of the issues to be determined and the nature of the power exercised in this matter do not lend themselves to a contested case hearing. The power being exercised by the Department of Natural Resources in approving or disapproving plans is a legislative one. Cf. *Ruffalo v. Common Council of Kenosha* (1968), 38 Wis. 2d 518, 157 N.W. 2d 568; *Hixon v. Public Service Commission* (1966), 32 Wis. 2d 608, 146 N.W. 2d 577; *State ex rel. La Crosse v. Rothwell* (1964), 25 Wis. 2d 228, 130 N.W. 2d 806; *Town of Ashwaubenon v. Public Service Commission* (1963), 22 Wis. 2d 38, 125 N.W. 2d 647; *Town of Ashwaubenon v. State Highway Commission* (1962), 17 Wis. 2d 120, 115 N.W. 2d 498.

The issues to be determined under sec. 144.39, Stats., are related solely to "whether the proposed construction, installation or establishment will be in accordance with applicable rules in force pursuant to secs. 144.30 to 144.46." See sec. 144.39, Stats. The issue of whether approval of such construction will constitute a "taking" or the issue of the amount of compensation due the property owners are not appropriate for the administrative forum. Rather, such issues are appropriate for the statutorily-prescribed inverse condemnation procedures under ch. 32, Stats. These procedures, along with a public hearing on the environmental impact statement under sec. 1.11, Stats., a public hearing under sec. 144.537, Stats., judicial review under ch. 227, Stats., and private nuisance actions against the source owner, act as safeguards of the individuals' rights as property owners and as members of the public.

While the property owners may prefer a public hearing at this time before the Department of Natural Resources on the issue of plan approvals, their rights are not denied or compromised by failure to receive such a hearing. The Wisconsin Constitution provides:

> "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws." Art. I, sec. 9, Wis. Const.

This section does not guarantee a choice of remedies, however, but merely guarantees a day in court. As the court said in *Metzger v. Department of Taxation* (1967), 35 Wis. 2d 119, 129-30, 150 N.W. 2d 431: "If present procedures are inconvenient or unsuitable, the legislature is the proper forum in which to seek a change."

I have researched the federal cases for analogous situations under federal statutes and the Federal Administrative Procedure Act, 5 U.S.C. Sec. 551, et seq. Much federal legislation seems to require a hearing upon agency action with possible "intervention" by "persons affected," "persons aggrieved," "interested parties," etc. Determining standing to intervene, then, is essentially a matter of interpretation of legislative intent and statutory construction. The cases are split on the question whether standing to obtain judicial review and standing to intervene consist of the same elements. Compare *National Welfare Rights Organization v. Finch* (D.C. Cir. 1970), 429 F. 2d 725, with *First National Bank of Smithfield v. Saxon* (4th Cir. 1965), 352 F. 2d 267. However, I found no case which stated that either standing to intervene or to seek judicial review encompassed or automatically conferred standing to *initiate or demand* an administrative hearing. Indeed, in Wisconsin, the court implicitly held otherwise. *Town of Norway v. State Board of Health* (1966), 32 Wis. 2d 362, 145 N.W. 2d 790. See also E. Gelhorn, Public Participation in Administrative Proceedings, 81 Yale L. J. 359, 386 (1972), in which the author said that standing to intervene does not envision initiation of agency proceedings. " 'Intervention,' then, is technically limited to participation in an *ongoing* agency proceeding." (Emphasis added.)

Furthermore, the federal APA, like ch. 227, the Wisconsin APA, does not itself confer an independent right to an agency hearing. *Sisselman v. Smith* (3d Cir. 1970), 432 F. 2d 750, *La Rue v. Udall* (D.C. Cir. 1963), 324 F. 2d 428, *cert. denied*, 376 U.S. 908.

Hence, the multitude of cases discussing standing to seek judicial review and standing to intervene in an ongoing proceeding have no bearing on the question before me--i.e., standing to seek or initiate an administrative hearing. I did find, however, several federal cases in which no statute granted either a hearing or a right

of intervention but in which individuals indirectly affected by agency action nonetheless sought to initiate an administrative hearing.

In those cases the courts held that constitutional due process does not require a hearing upon demand by a group of persons indirectly affected by an agency proceeding involving another. See, e.g., *Hahn v. Gottlieb* (1st Cir. 1970), 430 F. 2d 1243; *Gart v. Cole* (2d Cir. 1959), 263 F. 2d 244, 250-251, *cert. denied* (1959), 359 U.S. 978, 79 S.Ct. 898; *Trager v. Peabody Redevelopment Authority* (D. Mass. 1973), 367 F. Supp. 1000; *Powelton Civic Home Owners' Association v. Department of Housing and Urban Development* (E.D. Pa. 1968), 284 F. Supp. 809, 828-830.

In light of the holdings in *Town of Norway*, *David Jeffrey Co.*, and *Green Bay W. R. Co.*, *supra*, and the facts that the property owners' interests are more adequately safeguarded in possible condemnation and nuisance proceedings, that other public hearings will be held on the issue under. sec. 1.11, Stats., that ch. 227 judicial review is available, that a citizen petition for public hearing is available under sec. 144.537, Stats., and that the Department's determination reflects a legislative rather than adjudicative function, I must conclude that constitutional due process does not require a hearing under sec. 144.39, Stats. It follows that the proceeding under sec. 144.39, Stats., is not a contested case.

Since I have concluded that there is no requirement for a hearing, your second and third questions need not be answered.

BCL:LMC

Administrative Code; Natural Resources, Department Of; A proposed revision of Wis. Adm. Code Chapter NR 80, prohibiting the use of the chemical 2,4,5-T unless a permit has been obtained from DNR therefor, is within the statutory authority of DNR as set forth in sec. 29.29 (4), Stats. There is sufficient justification and documentation to support this restriction on the use of 2,4,5-T by rulemaking. The standards set forth in the rule to guide DNR's evaluations of permit applications are valid, since such standards can be inferred from the information required in the rule to be submitted on the applications themselves. Finally, the DNR's submittal of notice to the legislature under sec. 227.018 (2), Stats., effectively complied with the requirements thereof on the facts presented. OAG 47-75.

November 5, 1975.

THE HONORABLE, *The Assembly*
Legislature

By 1975 Assembly Resolution 34 you have requested my opinion as to the validity of a recently proposed rule of the Department of Natural Resources (DNR), providing regulations of the use of the chemical 2,4,5-T.

These regulations were proposed under the authority of sec. 29.29 (4), Stats., and constitute an amendment to existing Wis. Adm. Code Chapter NR 80 so as to include the chemical 2,4,5-T as a "limited use pesticide," which is defined in Wis. Adm. Code section NR 80.01 (4):

> "(4) 'Limited use pesticide' means a pesticide which under certain conditions or usages constitutes a serious hazard to wild animals other than those it is intended to control."

Proposed section NR 80.02 prohibits the use of a limited use pesticide, unless a permit has been obtained from DNR. The rule requires an applicant to furnish a description of the area to be treated, the interval or calendar period when the treatment will be made, the number of applications, the purpose of treatment, the pesticide to be used, the method of application and the rate of

application. Discretion is vested with the secretary of the department or his designated agent to grant or deny the permit.

The first question is:

> "If Wis. Adm. Code Chapter NR 80 were adopted, would the department of natural resources be exceeding its statutory authority as set forth in section 29.29 (4) of the statutes?"

The answer is "no." Section 29.29 (4), Stats., grants to DNR the authority to adopt rules, after public hearing, governing the use of any pesticide which it finds is a serious hazard to wild animals other than those it is intended to control. The department made such a finding by including 2,4,5-T as a "limited use pesticide" under section NR 80.01 (4).

It appears that proper rule-making procedures were followed by DNR including public hearing and approval by the Pesticide Review Board as required by sec. 29.29 (4), Stats.

I conclude, therefore, that section NR 80 is within the scope of the authority of DNR to enact rules under sec. 29.29 (4), Stats., governing the use of pesticides which it finds is a serious hazard to wild animals other than those it is intended to control.

The second question is:

> "Was there sufficient justification and documentation to support the inclusion of 2,4,5-T on a limited use listing in Wis. Adm. Code Chapter NR 80?"

This question involves a quantitative and qualitative evaluation of technical articles and affidavits evaluated by an agency with presumed expertise in areas of law which it is required to administer. Neither the Department of Justice nor I possess the expertise necessary to make such an evaluation nor do the statutes contemplate such a role. Review of the record made at the hearings on the rules discloses that there is substantial evidence in the form of scientific opinion by independent experts, which if accepted by the administrative agency in its rule-making capacity would indeed justify the inclusion of 2,4,5-T on a limited use list in NR 80. The agency acts in a legislative capacity while making rules and is not restricted to facts in any one "record" in its decision, *State ex rel. La Crosse v. Rothwell* (1964), 25 Wis. 2d 228, 238, 130 N.W. 2d 806.

In promulgating its rules, DNR made a finding of fact on a matter of substantial disagreement among experts. Resolution of conflicting opinion evidence is the function of an administrative agency, and its evaluation of scientific questions of facts are not to be lightly overturned. In *Kachian v. Optometry Examining Board* (1969), 44 Wis. 2d 1, 7, 170 N.W. 2d 743, the Supreme Court set forth the basic test:

> "... The fact that experts disagree on the desirability of a particular standard is not necessarily a valid objection to such standard. Agreement among experts is a rare enough phenomenon in many fields. We quote with approval, and find controlling, this statement as the scope of judicial review of administrative regulations where experts divide on the issue of reasonableness:
>
> " 'In order to set aside a regulation, it must be clearly unreasonable. If reasonable minds may well be divided on the question, the administrator must be upheld. It must be shown that no reasonable administrator would have made such a regulation and that it is so lacking in reason that it is essentially arbitrary.'"

Experts have advised DNR that these rules are reasonable and necessary. The department has in its files affidavits to this effect. In addition, two federal district courts have found the scientific concern over the environmental effects of 2,4,5-T sufficient to warrant the issuance of temporary injunctions against two applications of the substance by the United States Forest Service, pending more detailed studies of the effects in the particular applications, *State of Wisconsin v. Butz* (E.D. Wis. 1975), 389 F. Supp. 1065; *Kelley v. Butz* (W.D. Mich. 1975), 404 F. Supp. 925.

I believe there is sufficient justification and documentation available to DNR to support its decision.

I am aware of the argument that the term "serious hazard" in sec. 29.29 (4), Stats., must mean "immediate" or "imminent" impairment to a community of wild animals. Such an argument, in my opinion, is unpersuasive.

The term "serious" is defined as:

> "Important; weighty; momentous, grave, great, as in the phrases 'serious bodily harm,' 'serious personal injury' ...." *Black's Law Dictionary*, Revised Fourth Edition, at 1532.

The term "hazard" is further defined as:

> "... A danger or risk lurking in a situation which by change or fortuity develops into an active agency of harm. ... Exposure to the chance of loss or injury. ..." *Black's Law Dictionary*, Revised Fourth Edition, at 850.

"Danger" is a synonym. *Webster's Third New International Dictionary* (1968 Unabridged), at p. 573.

Taking these definitions together, the term "serious hazard" refers to the existence of a risk of harm or danger which is nontemporary or nontransient in nature.

I therefore conclude that sec. 29.29 (4) requires nothing more than a finding that the chemicals carry with them a tangible, if not imminent, risk of serious injury to wild animals. This is consistent with the purposes of ch. 29 and ch. 144, Stats. Section 29.02 vests the title to, and the custody and protection of all wild animals, in the state "... for the purposes of regulating ... and conservation thereof." Chapter 29 itself is a detailed series of regulations protecting these animals. The legislature has recognized that pesticides are among those chemicals which "... require special handling and disposal to protect and conserve the environment." Sec. 144.30 (10), Stats.

In *Reserve Min. Co. v. Environmental Protection Agcy.* (8th Cir. 1975), 514 F. 2d 492, 7 ERC 1618, 1636, the 8th Circuit Court of Appeals adopted a general analysis which completely supports the basis utilized by DNR in adopting Chapter NR 80. There, the court essentially summarized the evidence as being one upon which experts disagree, and where no actual health harm had been demonstrated:

> "In assessing probabilities in this case, it cannot be said that the probability of harm is more likely than not. ... The best that can be said is that the existence of this asbestos contaminant in air and water gives rise to a reasonable medical concern for the public health. The public's exposure

> to asbestos fibers in air and water creates some health risk. Such a contaminant should be removed."

The court concluded that *Reserve's* discharge "endangers" the public health, and in so doing adopted the following definition of "endanger":

> "Case law and dictionary definition agree that 'endanger' means something less than actual harm. When one is 'endangered,' harm is *threatened*; no actual injury need ever occur."

Such an interpretation is also consistent with the basic posture of an administrative agency, which is to conserve and protect those under its jurisdiction from actual harm. See, e.g., *State ex rel. Martin v. Juneau* (1941), 238 Wis. 564, 573, 300 N.W. 187:

> "... [The] state ... is [not] obliged to postpone action until the health of a community is impaired or some citizen has died as a result of the pollution of the water of the state. ..."

Therefore, I conclude that DNR had ample justification upon which to include 2,4,5-T as a limited use pesticide in its amendments to Wis. Adm. Code Chapter NR 80.

The third question is:

> "Would the adoption of Wis. Adm. Code Chapter NR 80 in its present form, without any standards, be proper; would principles of fairness and requirements of substantive due process be met? Lacking any standards or criteria, can the regulation of chemicals be considered, in effect, a banning of the chemicals?"

The answer is that the adoption of Wis. Adm. Code Chapter NR 80 in its present form has adequate standards to meet the principles of fairness and requirements of substantive due process.

I base this opinion upon the fact that section NR 80.02 (1) sets forth a number of requirements concerning information that must be furnished in applications for permits. The Wisconsin court has held that provisions such as these, specifying information that must be on the application forms, constitute sufficient standards to uphold the constitutionality of municipal zoning ordinances, *Lerner v. Delavan* (1930), 203 Wis. 32, 36, 233 N.W. 608:

> "... It will be noticed that the ordinance requires the person applying for the permit to give his name, the place where the business is to be carried on, and an enumeration of the articles and merchandise to be handled therein. It is fairly to be implied that there was no intention to vest an arbitrary power in the council, but that the ordinance gives to the council the power, and imposes upon it the duty, to consider and exercise its discretion with reference to those factors in the junk business which have made it a proper subject for special legislation. These factors are: the type of person who proposes to engage in the business; the character of goods that he proposes to handle, and the location of the business."

This case has been favorably cited in several recent decisions, *State ex rel. Humble Oil & Ref. Co. v. Wahner* (1964), 25 Wis. 2d 1, 7, 130 N.W. 2d 304; *State ex rel. American Oil Co. v. Bessent* (1965), 27 Wis. 2d 537, 135 N.W. 2d 317; *Grams v. City of Cudahy* (E.D. Wis. 1964), 226 F. Supp. 385, 386.

The materials that must be submitted in the application form all clearly pertain to factors which are reasonably related to the effects of pesticides upon wild animal populations. Since such standards have been upheld as sufficient to guide the exercise of permit granting authorities, *Lerner v. Delavan, supra*, and the other cases cited, I conclude that the proposed amendments to section NR 80.02 meet the basic principles of fairness and requirements of substantive due process.

The fourth question is:

> "Did the material submitted to the legislative committees meet the statutory requirements of section 227.018 (2) of the statutes? Was this documentation sufficient to justify the extension of the regulation of 2,4,5-T to all agricultural uses?"

Section 227.018 (2), Stats., requires that when a revision of a rule is in final draft form, an agency shall notify members of "appropriate standing committees of the legislature," and forward with its notice a brief summary of the draft. Apparently, DNR did, in fact, so notify the legislature by forwarding a copy of the proposed revisions to Chapter NR 80 (identical in form to the final text of the rules), but failed to include a brief summary thereof.

Therefore, DNR did not meet the precise statutory requirements of sec. 227.018 (2) of the statutes. Judging from the legislature's response, however, I am satisfied that DNR submitted sufficient information to fulfill the spirit of the procedure set forth in the statute; to-wit, the placing of the legislature upon notice so that committees may proceed to meet with the agency to review the drafts.

I come to this conclusion because of what actually transpired after DNR's submittal of notice. First, DNR was requested by the Natural Resources committees of the two chambers to defer implementation of the rule until such time as a hearing could be had with the committees. Such a hearing was, in fact, held on June 23, 1975, before the Senate Natural Resources Committee, at which many members of the Assembly Natural Resources Committee were in attendance. Shortly thereafter, members of each committee forwarded their comments to DNR on the proposed rules.

Section 228.018 (2), Stats., is a procedural statute, with the intent of enabling committees within the legislature to provide their comments to agencies upon rules in advance of their promulgation. Since DNR's notice had precisely this effect, I must conclude that DNR's submittal substantially met the requirements of sec. 227.018 (2) in this instance.

I take into account the fact that DNR did not provide the appropriate legislative committees with any documentation in support of the proposed rule. I agree that such documentation may be desirable, insofar as it may answer in advance any questions the legislative committee may have concerning the rules. However, I find no statutory requirement that DNR submit such documentation. I must conclude, therefore, that the material submitted to the legislative committees did, in fact, meet the statutory requirements of sec. 227.018 (2), Stats., under the circumstances you state.

BCL:JEK

Bonds; Private Clinics; Discussion of what constitutes a "clinic" under sec. 66.521 (2) (b) 7, Stats. OAG 48-75.

November 5, 1975.

WILLIAM C. KIDD, *Secretary*
Department of Business Development

You have called my attention to two fact situations relating to the construction of facilities for use by physicians and others providing health care. In each situation, you ask whether the proposed facility will qualify as a "clinic" under sec. 66.521 (2) (b) 7, Stats. If so qualified, in either case, the "clinic" would be a "project" subject to the industrial development revenue bond law and its construction could be financed with revenue bonds issued pursuant to that law.

It is my opinion that neither of the proposed facilities is a "clinic" for the purposes of the industrial development revenue law.

Your first fact situation is a proposed medical arts building with nine offices for medical practitioners, plus common laboratory, x-ray, minor surgery and physiotherapy facilities, and a small pharmacy. All tenants will not necessarily use all common facilities. Use of the common facilities will be chargeable at the same rate to all occupants of the building. The concept behind the common facilities is that it has become increasingly important to have such facilities within a physician's office but that the cost of maintaining such facilities for a sole practitioner or two-man partnership is prohibitive.

Significantly, there will be no "group practice" among the physicians occupying the building in the sense of any formal business affiliation which predetermines the distribution of income from medical practice. The tenants will be invited to become limited partners in the ownership and operation of the building along with the two general partners who are the physicians promoting the building. These general partners contemplate they will be tenants along with other physicians practicing in a variety of recognized specialties. Each tenant would be conducting his medical practice independently of the other tenants. Each suite of

offices would be separate from those of the other tenants with no common waiting rooms. Consultation among tenants on an informal basis may result from their close physical proximity to each other, but there would be no formal arrangements for consultation. Nor are any formal coverage arrangements for each other's patients contemplated in the event of vacations, hospital duty or sickness.

Your second fact situation is a contemplated local health facility consisting of a doctor's home, office, pharmacy and parking facilities. The facility would be located in an area not large enough to support more than one, or possibly two, doctors.

These fact situations do not describe projects suitable for industrial development revenue bonding.

There is no definition of the word "clinic" in the statute. It is a familiar rule of statutory construction that ordinary words be given their usual and common significance if such meaning harmonizes with the evident intent of the language employed and with the purpose to be accomplished. *Van Dyke v. Milwaukee* (1915), 159 Wis. 460, 464, 146 N.W. 812. It is also possible that this particular term should be viewed as a word of art having a special meaning to professional persons.

Webster's *Third New International Dictionary* (1968), defines the word "clinic" as follows on page 423:

> "3a: an institution connected with a hospital or medical school where diagnosis and treatment are made available to outpatients b: a form of group practice in which several physicians (as specialists) work in cooperative association"

Schmidt's *Attorneys' Dictionary of Medicine - Volume 1* (1974), defines the word "clinic" on page C-89 as follows:

> "4. A place where patients are treated by physicians who practice medicine as a group."

That same source defines the term "group medicine" on page G-37 as follows:

> "2. The practice by a group of physicians (including various specialists) associated for the advantage of consultation, laboratory facilities, etc."

The Court of Appeals of Ohio held in *Deibel v. Wilson* (1957), 77 Ohio Law Abst. 471, 150 N.E. 2d 448, 456, that a doctor engaged in the general practice of medicine but with only one employe and only that equipment ordinarily employed by a practicing physician would not be conducting a "clinic" within the meaning of an ordinance permitting the use of his residence for a doctor's office, but providing that such office should not include a clinic.

More recently in *People v. Dobbs Ferry Medical Pavillion, Inc.* (1973), 340 N.Y.S. 2d 108, 114, 40 A.D. 2d 324, the Appellate Division of the Supreme Court of New York, after concluding that the word "clinic" was vague and ambiguous and virtually synonymous with the term "group practice," referred with approval to the definition of "group practice" advanced by the American Medical Association as "the application of medical services by three or more full-time physicians formally organized to provide medical care, consultation, diagnosis, and/or treatment through the joint use of equipment and personnel, with the income from medical practice distributed in accordance with methods previously determined by the group."

In 62 OAG 141 (1973) my predecessor discussed the legislative intent of the Wisconsin Industrial Development Law. That opinion referred to the decision of the Wisconsin Supreme Court in *State ex rel. Hammermill Paper Co., et al. v. La Plante* (1973), 58 Wis. 2d 32, 205 N.W. 2d 784, which upheld the constitutionality of the law. At pp. 73-75 the court answered the attack upon the law where the argument was made that the legislation granted industrial enterprises privileges and benefits denied to nonindustrial enterprises, saying that it was the "industry" in this state that was being induced to move their operations, and in order to ease this economic drain upon the state, the legislature determined it was necessary to promote "industrial enterprises." Although the law was subsequently amended by Chapter 265, Laws of 1973, to include "hospital, clinic or nursing home facilities" within the meaning of the terms "project" and "industrial project," the word "clinic" should not be so broadly defined as to reach beyond the intended purpose of the law.

Whether the term "clinic" is examined in its common significance or as a word of art, its meaning includes the concept of

group practice for purposes of this statute. Accordingly, it is my opinion that the word "clinic" as used in sec. 66.521 (2) (b) 7, Stats., means a form of group practice providing a wide variety of medical services in which actively practicing physicians, usually specialists, work in cooperative association, formally affiliated with each other in a professional business enterprise with a predetermined arrangement for the distribution of the income from the medical practice.

BCL:APH

Public Instruction, Superintendent Of; Education; Article I, sec. 18, Wis. Const., prohibits the use of funds received under Title I of the Elementary and Secondary Education Act, as amended, to pay salaries of persons teaching in church affiliated private schools. OAG 49-75.

November 6, 1975.

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

You have advised that Title I of the Elementary and Secondary Education Act, as amended by Public Law 93-380, Education Amendments of 1974 (hereinafter Title I) provides federal aids for educationally deprived children and mandates that those aids be spent for children attending both public and private schools. You note my previous advice to your predecessor, 55 OAG 124 (1966), that the use of federal funds received under Title I is subject to the limitations imposed by Art. I, sec. 18, Wis. Const., and that such limitations prohibit the use of Title I funds to pay the salary of public school teachers who may be sent into church affiliated private schools to teach. You ask whether it is still constitutionally impermissible to pay salaries of public school teachers who may be sent into parochial schools to teach in Title I programs.

It is my opinion that Title I funds may not be used in Wisconsin to pay teaching personnel in parochial schools.

Title I funds must be spent in a manner which is consistent with state law. *Wheeler v. Barrera* (1974), 417 U.S. 402, 94 S.Ct.

2274, 41 L.Ed. 2d 159. This requirement exists regardless of whether the federal funds can be separately identified and distinguished from state funds. 55 OAG 124 (1966).

The academic programs included in Title I encompass such subjects as art, reading, speech, mathematics, pre-kindergarten and kindergarten classes. This broad range of programs provides a course of instruction little different from that usually offered as a part of basic education. Accordingly support of these programs confers a substantial benefit upon the recipient, that is, the school.

Conferring such a benefit on a parochial school violates that provision of Art. I, sec. 18, Wis. Const., which provides, in part, "... nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries." *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.

Article I, sec. 18, Wis. Const., is to be read more restrictively than the First Amendment. *State ex rel. Weiss v. District Board, supra*; compare *Everson v. Board of Education* (1946), 330 U.S. 1, 67 S.Ct. 501, 91 L.Ed. 711, with *State ex rel. Reynolds v. Nusbaum, supra.* Furthermore, the recent case of *Meek v. Pittenger* (1975), 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed. 2d 217 invalidated, under the First Amendment to the U. S. Constitution, a program which would have allowed for public school teachers to teach special education courses in parochial schools. Consequently, it is doubtful under both the Wisconsin and the United States Constitutions, that Title I funds may be used to pay the salary of any person who teaches in a parochial school. See also, OAG 27-75, August 5, 1975.

My conclusion is not disturbed in any way by the holdings in *State ex rel. Warren v. Nusbaum* (1972), 55 Wis. 2d 316, 198 N.W. 2d 650, or *State ex rel. Warren v. Nusbaum* (1974), 64 Wis. 2d 314, 218 N.W. 2d 577. In the 1972 case the Wisconsin Supreme Court determined that a contract between the state and Marquette University to provide funding for the Marquette Dental School was unconstitutional because it broadly provided funds to be used by a sectarian university "exclusively in support of its operating costs." The court did note that a more narrowly drawn

contract serving an exclusively secular purpose, namely, the advancement of dental education, would be valid.

In the 1974 case the state Supreme Court sustained the validity of sec. 115.85 (2) (d), Stats., which allows for state payment of tuition for children with special educational needs at private schools. The statute was found to serve a secular purpose and to be drawn so narrowly as to limit eligibility to those private institutions which effectively separate their religious characteristics, if any, from the secular purpose of providing special education.

Both these cases are in harmony with the "primary effect" test enunciated by the United States Supreme Court. To be permissible under the "primary effect" test, the use of state funds must have the primary effect of promoting some legitimate secular purpose under the police power of the state and must not have any direct or immediate effect which advances or benefits religion. *Committee for Public Education v. Nyquist* (1973), 413 U.S. 756, 783 fn 39, 93 S.Ct. 2955, 37 L.Ed. 2d 948.

As suggested in 55 OAG 124 (1966), and *Wheeler v. Barrera, supra*, Title I does not have to be implemented by providing teaching services in parochial schools. Title I merely requires that programs be provided for parochial school students which are comparable, but not identical to services provided to public school students. Such services can be provided through the use of dual enrollment programs, educational television and mobile education programs, among others. Determination of the method by which such services are to be provided is delegated to state and local educational authorities. Those authorities have considerable latitude in the exercise of this authority subject, however, to state constitutional and statutory limitations and federal constitutional limitations.

BCL:DJH:JWC

Public Instruction, Superintendent Of; Education; Schools And School Districts; In the administration of Title IV, Elementary and Secondary Education Act, as amended, funds may not be spent to provide educational services on the premises of church affiliated private schools but such funds may be spent to provide services through "dual enrollment" or "shared time" programs; nor may school districts be required to equalize, on a per enrollee basis, expenditures as between private and public school students; nor may the Department of Public Instruction administer Title IV programs if local school districts refuse or are legally unable to do so. OAG 50-75.

November 6, 1975.

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

You have posed six questions concerning specifically the administration of sec. 406, Title IV of the Elementary and Secondary Education Act of 1965, as amended. Section 406 was a part of the Education Amendments of 1974, Public Law 93-380, and provides that children enrolled in private, non-profit elementary and secondary schools be provided with secular services, materials and equipment, and that expenditures for such programs be equal as between children in private and public schools.

Section 406 (d) provides for a bypass of state administration of the programs provided by Title IV under certain circumstances:

> "If a State is prohibited by law from providing for the participation in programs of children enrolled in private elementary and secondary schools, as required by this section, the Commissioner may waive such requirement and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of this section."

Whether this bypass provision is to be used depends upon an interpretation of state law and upon the interpretation and

implementation of the federal statute through the administrative regulations of the Department of Health, Education and Welfare.

To date there are no federal guidelines interpreting the requirement in sec. 406 (a) that private school pupils be provided programs such "as will assure equitable participation of such children in the purposes and the benefits of this title." Prior to the enactment of sec. 406, the Federal Office of Education equated the term "equitable" with the term "comparable" in the interpretation of its own regulations. That interpretation may carry over. However, sec. 406 (b) may impose a stricter standard than comparability upon the interpretation of the term "equitable." Until new federal regulations are published, questions related to whether programs for private school students provide "equitable participation" cannot be resolved.

Your specific questions concern alternative methods for providing Title IV programs for children attending non-public schools.

We are not here concerned with whether sec. 406, as amended, violates the Establishment Clause of the First Amendment to the United States Constitution. Rather, we are concerned with whether sec. 406 can be administered consistent with the constitution and laws of Wisconsin. With these considerations in mind, your questions and my responses are as follows:

I.

"1. Can public school districts employ persons, such as teachers, teacher aids, co-curricular activity directors, recreation coordinators, and school media specialists, who are paid from funds received under the above Act to provide educational and instructional programs to children and teachers on the premises of the private school?

"2. Can the public school district employ persons to provide services such as speech correction, nursing, and transportation (including teacher training) for private school children and teachers on the premises of the private school?

"3. Can public school districts contract with other persons or agencies to provide equitable educational programs and services to private school children and teachers on the premises of private schools?

Questions 1, 2 and 3 raise a common issue. That issue is whether public school districts may employ persons either directly or by contract with other agencies, to provide teaching and other educational and related services to private school children on the premises of the private school. It is my opinion that such programs are prohibited if offered at church affiliated private schools.

This conclusion is consistent with my recent advice to you with respect to the interpretation of sec. 118.255, Stats., OAG 27-75, August 5, 1975, and with my advice to you concerning the interpretation of the provisions of Title I of the Elementary and Secondary Education Act of 1965, as amended, OAG 49-75, November 6, 1975.

Article I, sec. 18, Wis. Const., provides, in part, that no monies shall be "drawn from the treasury for the benefit of religious societies, or religious or theological seminaries." This provision has been interpreted as applying to parochial elementary and secondary schools. *State ex rel. 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.

Payment of persons employed as described in your first three questions with funds received under the federal act would be expenditures prohibited by the Wisconsin Constitution. That prohibition is not circumvented if public school districts contract with other persons or agencies to provide instructional services in private schools.

II.

"4. Can public school districts expend money to provide instructional programs and services to private school children and teachers on the premises of the public school?

Your fourth question contemplates the use of "shared time" or "dual enrollment" programs. Such programs are probably

permissible under the Wisconsin Constitution. See generally, 55 OAG 124 (1966), OAG 49-75, November 6, 1975. Implicit in any dual enrollment program is the requirement that both public and private school students be permitted to participate in the same program. Subject to this condition and the condition that the services be rendered on the premises of a public school, it is permissible for a public school district to spend money to provide instructional programs and services to private school children and teachers.

III.

> "5. Can public school districts be required to make expenditures for educational programs and services to serve children and teachers from private schools equal to per enrollee expenditures for programs for children enrolled in the public schools?

Administration of Title IV programs in the manner contemplated by your fifth question might be helpful in conforming the programs to the "equitable" standards of the federal act. However, a program requiring statewide equality of expenditures between private and public school students might necessitate such a continuing, comprehensive and discriminating administrative structure as to bring the program within the proscription of Art. I, sec. 18, Wis. Const. Cf. *Committee for Public Education v. Nyquist* (1973), 413 U.S. 756, 767, 788, 93 S.Ct. 2955, 37 L.Ed. 2d 948. I would, therefore, caution against requiring public school districts to equalize expenditures, on a per enrollee basis, for educational programs and services in private schools with expenditures for such programs in the public schools.

IV.

> "6. If a local school district refuses, or is legally unable to provide for the participation of private school children on an equitable basis, can the state educational agency provide for such participation to children and teachers in a private school?"

Wisconsin has a firmly established policy of local control over elementary and secondary education. This policy is expressed

throughout the statutes relating to education. For example, sec. 120.12 (1), Stats., vests in the local school board the care, control and management of school district property and affairs. And sec. 120.49 (1), Stats., authorizes school boards to establish and organize schools and prescribe courses of study. The proposal set forth in your sixth question to allow the state educational agency to provide for participation of private school children in Title IV programs in the event a local school district refuses to provide such programs is inconsistent with the policy of local control over education.

In addition, the Department of Public Instruction is without statutory authority to provide for participation of private school children in the place of a local school district which refuses or is legally unable to do so. For these reasons your department may not supplant a local school district in the administration of Title IV programs.

BCL:DJH:JWC

Public Officials; When one person holds two government positions and sec. 19.42 (8), Stats., identifies the holder of one of the positions as a state public official and specifically exempts from that definition the holder of the other position, the person is a state public official when acting in his covered capacity and is not a state public official when acting in his exempted capacity. OAG 51-75.

November 12, 1975.

R. ROTH JUDD, *Executive Director*
State Ethics Board

Your letter indicates that the State Ethics Board desires my opinion on a question affecting its administration of the Code of Ethics for Public Officials, which is found in subch. III, ch. 19, Stats. This Code is applicable to state public officials, and the term "state public official" is defined in sec. 19.42 (8), Stats., as

> "... all persons appointed by the governor with the advice and consent of the senate, except trustees of any private

higher educational institution receiving state appropriations, and all persons identified under s. 20.923, except officers and employes of the judiciary, trustees and employes of the investment board and teaching personnel of the university of Wisconsin system."

The question posed to me is: "When one person holds two government positions and the law identifies the holder of one of those positions as a state public official and specifically exempts from the definition of state public official the holder of the other position, is the person a state public official within the meaning of section 19.42 (8)?" Four examples are given. They are:

1. A state legislator (identified in sec. 20.923 (2) (a) 5) who also teaches a course at the University of Wisconsin System (and is therefore identified as teaching personnel under sec. 20.923 (6) (m));

2. The Secretary of the Department of Employe Trust Funds (identified under sec. 20.923 (4) (d) 5) who is also a member of the Investment Board;

3. A member of a state board (appointed by the Governor with the advice and consent of the Senate) who is also a professor in the University of Wisconsin System; or

4. A member of a state board (appointed by the Governor with the advice and consent of the Senate) who also happens to be a trustee of the Medical College of Wisconsin.

In the absence of a constitutional or statutory prohibition, there is no reason why one person cannot hold two public offices at the same time as long as the functions of the offices are not incompatible.[1] When acting in his official capacity in each office, however, the person is bound by all applicable requirements and laws governing that office.[2] One who accepts and holds a public office does so *cum onere* and accepts its burdens and obligations

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[1] 67 C.J.S., *Officers*, sec. 23; 63 Am. Jur. 2d, *Public Officers and Employees*, sec. 62; 56 OAG 121 (1967).

[2] 63 Am. Jur. 2d, *Public Officers and Employees*, sec. 61.

along with its benefits.[3] He is not relieved of the burdens or obligations arising because of his holding of one office merely because he also holds another office which does not impose similar burdens and obligations on him.

The above-described state legislator, Secretary of the Department of Employe Trust Funds, or member of a state board is a "state public official" within the meaning of sec. 19.42 (8), Stats., when he is acting in that capacity, and, as such, he is covered by the applicable provisions of the Code of Ethics for Public Officials. He is not a "state public official" for purposes of subch. III, ch. 19, Stats., however, when he is acting in his capacity as a teacher at a state university, a member of the Investment Board, or as a trustee of a private higher educational institution receiving state appropriations.

Perhaps an illustration of this might be helpful. A state legislator, who is also a state university professor, is a state public official within the meaning of sec. 19.42 (8), Stats., is covered by the Code, and does violate sec. 19.45 (3), Stats., thereof if he, as a state legislator, solicits or receives something of value with the understanding that he will vote in a certain way on a bill pending in the legislature. He, however, is not a state public offical, is not directly covered by the Code, and does not violate sec. 19.45 (3), Stats., if he, as a professor at a state university, solicits or receives something of value in exchange for an understanding that he will vote at a university departmental executive committee meeting in a certain way on a question of the grant of tenure to a teaching colleague. The latter conduct may violate a university code of ethics,[4] ch. 946, Stats., but it does not violate sec. 19.45 (3), Stats.

In summary, then, a person who is a "state public official" within the meaning of sec. 19.42 (8), Stats., does not cease to be such merely because he also holds another office which is exempted from that definition. When he acts in his official capacity as a "state public official" he is covered by the provisions of the Code of Ethics for Public Officials. When he acts in his exempted

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[3] 63 Am. Jur. 2d, *Public Officers and Employees*, sec. 279.

[4] In sec. 19.45 (11) (b), Stats., the legislature directed the Board of Regents of the University of Wisconsin System to establish a code of ethics for teaching personnel in the system. Violations of the university code are also punishable under the provisions of sec. 19.50, Stats.

capacity, he is not a "state public official" and is not directly covered by the provisions of that Code.

BCL:BRB

Plats And Platting; The requirements of sec. 236.16 (3), Stats., requiring subdivisions on navigable lakes or streams to provide public access does not apply to navigable lakes created by artificially enlarging a previously nonnavigable watercourse. The Department of Local Affairs and Development is not required by Executive Order No. 67 to object to a subdivision plat based on information supplied by the Department of Natural Resources that the plat is not in compliance with NR 115 or NR 116, Wis. Adm. Code. OAG 52-75.

November 17, 1975.

WILLIAM R. BECHTEL, *Secretary*
Department of Local Affairs and Development

Your predecessor has requested my opinion concerning the creation of two small lakes over privately owned land and its relationship to several statutes which you are empowered to administer. The situation is as follows:

A subdivider has created two small lakes over privately owned lands by trapping groundwater and damming an intermittent, nonnavigable stream. The subdivider properly complied with sec. 31.33, Stats., relating to Department of Natural Resources approval of dams on nonnavigable streams. The two lakes are joined by a covered conduit and are connected to a navigable river about two miles downstream by an intermittent nonnavigable watercourse.[1] Both lakes, respectively six and eight acres in size, are navigable in fact.

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[1] I am assuming, for the purposes of this opinion, that sec. 30.19, Stats., does not apply.

The developer has submitted preliminary and final plats to the head of the Planning Function as required by sec. 236.12 (2) and (6), Stats.

I.

APPLICABILITY OF SEC. 236.16 (3)

Your first question is:

> "Are the public access to navigable water requirements of sec. 236.16 (3), Wis. Stats., applicable to the subdivision?"

It is my opinion that sec. 236.16 (3), Stats., does not apply to this project. Public rights in navigable waters attach by virtue of the public trust doctrine under which state holds the beds of its navigable lakes and streams in trust for the people, subject only to the condition that riparians have a qualified title to the beds of navigable streams. The public, as beneficiary of the trust, enjoys the rights of navigation, fishing, hunting, swimming, bathing, boating, and enjoyment of scenic beauty. *Muench v. Public Service Commission* (1952), 261 Wis. 492, 53 N.W. 2d 514, 55 N.W. 2d 40. The trust does not extend, however, to the beds underlying nonnavigable lakes and streams; full title to those lands is in the riparian owner.

Public rights attach to the increased surface water formed by artificially raising a previously *navigable* waterway, although title to the newly formed lake or stream bed remains in the original owner. *Mendota Club v. Anderson* (1899), 101 Wis. 479, 493, 78 N.W. 185; *Haase v. Kingston Cooperative Creamery Association* (1933), 212 Wis. 585, 589, 250 N.W. 444, overruling *Pewaukee v. Savoy* (1893), 103 Wis. 271, 79 N.W. 536.

In contrast, public rights do not attach, except by prescription or dedication, to the increased surface water area formed by artificially raising a previously *nonnavigable* waterway. *Haase v. Kingston Cooperative Creamery Associaton*, 212 Wis. at 589. The basis for the difference in policy between the two situations illustrated by the *Mendota Club* and *Haase* cases is that it is impossible in the *Mendota Club* situation to differentiate the original navigable area from the newly formed navigable area so that the public could know where its rights of navigation would begin and end. In addition, in the *Haase* situation, the state has no

proprietary interest in the bed underlying the nonnavigable waterway, and hence no basis on which the public trust could expand.

Similar to the *Haase* situation is the creation of an entirely artificial lake. No public rights attach to the surface water of such a body. Rather, "all of the incidents of ownership are vested in the owner of the [submerged] land." *Mayer v. Grueber* (1965), 29 Wis. 2d 168, 176, 138 N.W. 2d 271. Even ownership of land along the artificially created shoreline fails to confer riparian rights. *Id.* at 179. The public could acquire rights only by dedication or by prescriptive user or over a period of time. *Mayer v. Grueber, supra*; *Haase v. Kingston Cooperative Creamery Association, supra.*

The statutes do not abrogate this court-made rule that public rights do not attach to lakes created by enlarging a previously nonnavigable waterway. In fact, the statutes recognize the distinction between artificially enlarged navigable streams and artificially enlarged nonnavigable streams. For example, an applicant for a permit to construct a dam in a navigable stream must provide public access to the resulting body of water. Sec. 31.14 (3) (c), Stats. This is in accord with the *Mendota Club* case which held that public rights accrue to the waters previously navigable but artificially enlarged "the same as though they had always remained in that condition."

An applicant for approval of a dam in a nonnavigable stream, on the other hand, need not provide public access to the resulting navigable body of water. Sec. 31.33, Stats. This is in accord with the *Haase* case which held that public rights do not attach, except after dedication or prescription, to waters previously nonnavigable but artificially enlarged to become navigable.[2]

Section 236.16 (3), Stats., provides:

> "LAKE AND STREAM SHORE PLATS. All subdivisions abutting on a navigable lake or stream shall provide public access at least 60 feet wide providing access to the low watermark so that there will be public access, which is

[2] Compare sec. 30.19 (5) requiring artificial waterways connected to or within 500 feet of an existing body of navigable water to be deemed public waterways.

connected to existing public roads, at not more than one-half mile intervals as measured along the lake or stream shore except where greater intervals and wider access is agreed upon by the department of natural resources and the head of the planning function, and excluding shore areas where public parks or open-space streets or roads on either side of a stream are provided. No public access established under this chapter may be vacated except by circuit court action."

This section speaks simply of "a navigable lake or stream" and does not include the words "natural" or "artificial." Other statutes regulating navigable waters include the reference to artificial waterways when so intended. Compare secs. 30.19, 144.01 (1), and 144.26 (2) (d), Stats.

It is fundamental that a statute be presumed consistent with the common law unless expressly provided otherwise. 3 Sutherland, Statutory Construction, secs. 5301, et seq. and 6201, et seq. (3d ed. 1943). In this instance, to require public access to entirely artificial lakes where the common law confers no public rights would abrogate the common law. Since sec. 236.16 (3) does not expressly include "artificial" lakes and streams, it must be presumed that the legislature did not intend to include them. Section 236.16 (3), Stats., construed strictly and read together with secs. 31.14 and 31.33, requires public access only to natural navigable lakes and streams. See also, Kusler, Artificial Lakes and Land Subdivisions, 1971 Wis. L. Rev. 369, 382-383 n. 26.

Since sec. 236.16 (3), Stats., is not applicable to artificial lakes, your second question relating to the assumed applicability of that statute need not be answered.

II.

APPLICABILITY OF EXECUTIVE ORDER NO. 67

Your third question is as follows:

"Since ss. 236.12 (2) and 236.13 (3) specifically limit the Department's plat review authority to compliance with the requirements of ss. 236.15, 236.16, 236.20 and 236.21 (1) and (2); does Governor Lucey's Executive Order #67 permit or require the DLAD to object to this subdivision if the

Department of Natural Resources deems it not in compliance with NR 115 or NR 116, Wis. Admin. Code?"

NR 115 and NR 116, Wis. Adm. Code, were promulgated pursuant to secs. 87.30, 59.971, and 144.26, Stats. These sections were enacted by ch. 614, Laws of 1965, to establish flood plain and shoreland zoning. Section 87.30 requires counties to adopt a reasonable and effective flood plain zoning ordinance to prevent flood damage. It applies to both navigable and nonnavigable water. Section 59.971 requires counties to zone all unincorporated land within certain distances of navigable waters as defined in sec. 144.26 (2) (d), Stats.

Executive Order No. 67, to which you referred in your question, is entitled "Participation by State Agencies in Flood Hazard Evaluation and Wetland Protection--And Coordination With A Comprehensive Flood Plain-Shoreland Management Program." The applicable provisions of Executive Order No. 67 regarding shoreland zoning are written in general terms.

"IT IS HEREBY ORDERED as follows:

"The heads of all State agencies shall provide leadership to encourage a broad and unified effort to prevent the uneconomic use and development of the flood plains and wetlands of the State and, in particular, to lessen the risk of flood losses as related to State-owned lands and installations and State-insured or approved or supported improvements and, to ensure consistency of activities with rules and regulations regarding land use and flood plain and shoreland development and management as promulgated by the Department of Natural Resources under the provisions of ch. 614, Laws of 1965."

Paragraph 3 of the Executive Order No. 67 deals with flood plain zoning in more specific terms:

"3. All State agencies responsible for review and approval of applications for subdivision plats, buildings, structures, roads, sanitary or other facilities, shall evaluate existing or potential flood hazards associated with such activities and *as may be permitted by law*, prevent actions which will expose citizens to unnecessary hazards or cause future public expenditures for flood disaster relief." (Emphasis added.)

The key phrase is "as may be permitted by law." Section 236.12 (2) authorizes the Department of Local Affairs and Development to review plats for compliance with secs. 236.15, 236.16, 236.20, and 236.21 (1) and (2). Section 236.12 (6) expressly limits its review to these sections:

> "... Within 20 days of the date of receiving the copies of the plat any agency having authority to object under sub. (2) shall notify the subdivider, and all agencies having the authority to object, of any objection based upon failure of the plat to comply with the statutes or rules *which its examination under subsec. (2) is authorized to cover*, ..." Sec. 236.12 (6).

Approval of a preliminary or final plat is conditioned upon compliance with county ordinances. See sec. 236.13 (1) (b). Indeed, the review conducted by the department under secs. 236.16 and 236.20 (4) (d) does include review for compliance with certain local ordinances regarding, for example, minimum street width and lot width and area. Unless a shoreland ordinance contains regulations governing those particular areas, the department has no authority to review plats for compliance with such ordinances. It is limited by statute to an examination of plats to determine compliance only with secs. 236.15, 236.16, 236.20, and 236.21 (1) and (2), Stats. Executive Order No. 67 cannot compel agencies to do that which is not permitted by law and, by its terms, it does not purport to do so.

BCL:LMC

Attorneys; Prisons And Prisoners; A jailer may not absolutely prohibit paralegal personnel from conducting interviews of inmates but may adopt reasonable regulations to assure discipline and control of inmates and maintenance of order and safety in the jail.

A jailer cannot set up certification or training requirements for paralegal personnel who are assigned by lawyers to interview inmates.

A jailer cannot deny paralegal personnel access to inmate clients of lawyers, solely because of past criminal record of such paralegal personnel.

A jailer can control and limit visits by paralegal personnel because of overcrowding or lack of adequate facilities but may not prohibit such visits for those reasons. OAG 53-75.

November 17, 1975.

DENNIS J. FLYNN, *Corporation Counsel*
Racine County

It appears from information you have provided that the sheriff and the administrator of the Racine County jail take the position that they will not allow nonattorney investigators for the Racine Public Defender's office to interview prisoners confined within the Racine County jail. This policy apparently has developed because of the alleged lack of physical space to permit such interviews, because some of the nonattorney investigators for the Public Defender's office have a past criminal activity record, the fear that these people might pass contraband items to a prisoner while conducting interviews, and the lack of a physical outlay of the jail complex so as to physically separate the prisoner from the paralegal personnel conducting the interviews.

You request my opinion as to whether nonattorney legal personnel fall within the Sixth Amendment's right to counsel when they are performing legal services on behalf of an attorney. Other related questions include whether a paralegal person should have a specified amount of formal training and whether the sheriff can deny access rights to prisoners by a paralegal assistant who has a

criminal record or for any other reason such as overcrowding or lack of adequate facilities.

There is no question that under Wisconsin law the sheriff has charge of the jail, is responsible for discipline, maintenance, and security of the jail premises and the inmates placed in his custody. See sec. 59.23 (1) and (2) and, generally, ch. 53, Stats.

The statutes are silent regarding the right of a prisoner to see a paralegal person, but sec. 946.75 makes it a crime for any person while holding another in custody to deny that person his right to consult and be advised by an attorney "if that person requests a named attorney." Article I, sec. 7, of the Wisconsin Constitution and the Sixth Amendment to the United States Constitution have been construed to require that a prisoner have the assistance of counsel in all criminal prosecutions. *State ex rel. Traister v. Mahoney* (1928), 196 Wis. 113, 219 N.W. 380; *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694.

Although sec. 905.03, Stats., provides for privileged communications between a client and a "representative of the lawyer" as well as between the client and the lawyer himself, no Wisconsin cases are directly in point on the question of whether the prisoner is entitled to have a paralegal person consult with him under the provisions of the state or federal constitutions. However, several federal courts have considered the question and the United States Supreme Court has given some guidance in *Procunier v. Martinez* (1974), 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed. 2d 224. In that case, Procunier, in his capacity as director of the California Department of Corrections, adopted a regulation which banned the use of law students and legal paraprofessionals to conduct attorney-client interviews with inmates in the state correctional institutions. The regulation read as follows:

> "Investigators for an attorney-of-record will be confined to not more than two. Such investigators must be licensed by the State or must be members of the State Bar. Designation must be made in writing by the Attorney."

The three-judge district court had concluded that the regulation would impose an absolute ban on the use by attorneys of law students and legal paraprofessionals to interview inmate clients or to even delegate to such persons the task of obtaining prisoners'

signatures on legal documents. The district court held that the rule constituted an unjustifiable restriction on the right of access to the courts, in violation of the prisoners' due process rights. The supreme court affirmed, pointing out that the constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights. The court also adopted the reasoning of the lower court that the ban against the use of law students or other paraprofessionals for attorney-client interviews would deter some lawyers from representing prisoners who could not afford to pay for their traveling time or that of licensed private investigators, and those lawyers who agreed to do so would waste time that might be better used in working on the inmates' legal problems. The court said:

> "... Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid. Ex parte Hull, 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed. 1034 (1941).
>
> "***
>
> "... Allowing law students and paraprofessionals to interview inmates might well reduce the cost of legal representation for prisoners. The District Court therefore concluded that the regulation imposed a substantial burden on the right of access to the courts." 94 S.Ct. 1814.

The door was left open, however, to some reasonable regulation and control of the use of law students and paraprofessional personnel to interview prisoners. The court suggests that prison administrators might well legitimately control access of paraprofessionals who posed some colorable threat to security or access to those inmates thought to be especially dangerous.

Although the inmate may have a due process right to see an attorney or the attorney's agent, such right is subject to reasonable prison regulations relating to prison security, discipline, and the general operation of the institution. However, if the government has reasonable and adequate alternatives available to a given end, it must choose the measures which least interfere with individual constitutional rights.

The *Martinez* case was decided on April 29, 1974, and on June 26, 1974, the United States Court of Appeals for the First Circuit decided *Souza v. Travisono* (1st Cir. 1974), 498 F. 2d 1120. This case involved an unwritten policy of the Rhode Island adult correctional institutions which had the effect of denying inmates access to law students serving as agents of lawyers. Although pointing out that inmate access to law students is not always a matter of constitutional right, the court affirmed that part of the district court order relating to access to the adult correctional institution by attorneys "or their paralegal assistants, including law students."

The district court, as did the supreme court in *Martinez*, held that the summary barring of paralegal personnel who were rendering general legal services to inmates under the direction of an attorney does in effect impair the prisoner's right to access to the courts. *Souza v. Travisono* (D. R.I. 1973), 368 F. Supp. 959. In both instances the courts indicated that the right of access to the courts must mean access to competent legal assistance, reasonably available and capable of responding to the legal needs of the inmate population. The court said in *Travisono*, at page 967:

> "A penumbra incident thereto which is necessary to effectuate its meaning must include the right of a prisoner to consult with his attorney's agent."

In addition to the due process rights, of course, the Sixth Amendment right to counsel is also to be considered. Where such right is involved, not only must an attorney be given the broadest possible opportunity to meet and confer with inmate clients, but the same right, as of necessity, filters down to the attorney's paralegal assistants, which would include investigators, accountants, and other experts in appropriate cases.

Your second question is what amount, if any, of formal training or certification must these assistants present to the sheriff before they are allowed access to the jail.

In *Travisono*, the district court said, at 368 F. Supp. 970:

> "... And the right to select such assistant rests with the attorney and not the prison officials. If this were not so it could seriously impair the inmate's Sixth Amendment right. ..."

It would appear, therefore, that the sheriff may not set up standards as to formal training or education for paralegal assistants. What the sheriff can do, of course, is to require that the attorney for whom the paralegal assistant works certify to the sheriff that such person is, in fact, the agent and representative of the attorney and that the attorney has a "legitimate interest" in having the prisoner interviewed. The courts have recognized that a legitimate interest may be created by a request by the prisoner, by a family member, a friend, or even by an anonymous person to an attorney that the attorney see an inmate because such prisoner has so requested or needs help.

Your third question asks whether it is within the discretion of the sheriff to deny access to the jail to a nonattorney legal assistant because of that person's past record or for any other reason, such as overcrowding or lack of adequate facilities.

In *Martinez, supra*, the United States Supreme Court pointed out that, with respect to access, reasonable administrative regulations or policies clearly relating to the screening and monitoring of paralegal assistants visiting the institution, the discipline and control of inmates, and the maintenance of order and safety in the jail or prison would appear to be permissible. Thus, if it can be shown that a particular paralegal person has caused or is likely to cause problems in the area of security, discipline, and control of inmates, the sheriff could probably control or deny such person's access to a prisoner under the compelling and overwhelming state interest test set out in *Gilmore v. Lynch* (N.D. Cal. 1970), 319 F. Supp. 105. However, the sheriff would not have the authority to deny access to the jail solely because of such person's past criminal record. The mere fact of criminal record, in my opinion, would not satisfy the compelling interest test. Any impairment of the inmate's Sixth and Fourteenth Amendment rights must be weighed against the state interest. It is my opinion that the courts, in applying such balancing test, would find that the state has failed to establish a compelling and overwhelming state interest in restricting the inmate's Sixth and Fourteenth Amendment rights if the grounds were solely that the paralegal person has a past criminal record.

As to denial of paralegal access because of overcrowding or lack of adequate facilities, again, the balancing test certainly would

result in a court finding that the state has unjustly denied the prisoner Sixth and Fourteenth Amendment rights. If facilities do not exist for adequate consultations between inmates and lawyers or paralegal personnel, the courts have the power to order, and have in other cases ordered, that facilities be prepared so that the constitutional rights of the prisoners can be accommodated. Thus, in the *Travisono* case, the court directed that the director of the Rhode Island Department of Corrections submit a plan to the court for modifying existing rooms to facilitate private conferences between inmates and their attorneys or the attorneys' agents.

Therefore, although visits can be reasonably controlled and limited because of overcrowding or lack of adequate facilities, any policy designed to prevent paralegal personnel from ever visiting inmates because of overcrowding or lack of adequate facilities would in all likelihood be found unconstitutional by a court.

BCL:LLD

District Attorneys; District attorneys have a statutory duty to prosecute state traffic violations. District attorneys cannot properly refuse to prosecute state actions when such refusal is based on consideration of the ultimate deposition of the proceeds from such actions. Such consideration is for the legislature, not the district attorney. OAG 54-75.

November 21, 1975.

WAYNE F. MCGOWN, *Deputy Secretary*
Department of Transportation

You have requested my opinion as to whether it is proper for district attorneys, as a matter of policy, to prosecute under county ordinances rather than the statutes all actions involving traffic violations initiated by the State Patrol. It is my opinion that the implementation of this policy, applied generally and without consideration of the particular circumstances of each case, is a violation of the statutory duty of the district attorney and constitutes an abuse of prosecutorial discretion.

I.

In discussing the nature of the position and the duties of the district attorney, the court in *State ex rel. Kurkierewicz v. Cannon* (1968), 42 Wis. 2d 368, 380, 166 N.W. 2d 255, stated:

> "... that the position of district attorney, though constitutional, was not one of inherent powers, but was answerable to specific directions of the legislature. It appears settled, therefore, in Wisconsin at least, that the prosecutor is subject to the enactments of the legislature. ...
>
> "While it is thus apparent that the district attorney is invested with great discretion and in the usual case can manage his office free from the overseership of the courts or the legislature, it is equally clear that the legislature may, if it desires, spell out the limits of the district attorney's discretion and can define the situations that will compel him to act in the performance of his legislatively prescribed duties."

In *State v. Coubal* (1945), 248 Wis. 247, 21 N.W. 2d 381, the court, in discussing the role of the district attorney, held:

> "It is true that the district attorney is a *quasi*-judicial officer. This court has so held in the sense that it is his duty to administer justice rather than to obtain convictions. No one would deny that there are many instances in the performance of his duty in which he may be called upon to exercise discretion. All his duties are not ministerial. There is, however, no basis for holding that his duties in representing the state are not subordinate to legislative direction as to the cases in which he shall proceed. ..."

As to the situation under discussion, the legislature has given both specific and general directions to the district attorneys.

Section 110.07 (1) (b), Stats., provides, in part:

> "All municipal justices, judges, district attorneys ... shall assist in enforcing chs. 110, ... 341 to 350 ..."

Section 59.47, Stats., provides, in part:

> "The district attorney shall:
>
> "(1) Prosecute ... all actions ... in the courts of his county in which the state or county is interested or a party; ..."

The cases to which you refer are without question actions "in which the *state*" is both interested and, of necessity, a party. Members of the State Patrol, as complaining witnesses, do not have the authority to bring charges based on violations of county ordinances. 43 OAG 36 (1954). They are state officers with limited authority. See sec. 110.07, Stats. Therefore, actions based upon traffic violations and initiated by members of the State Patrol must be brought and proceed on behalf of the state.

Under secs. 59.47 and 110.07, it is the duty of the district attorney to represent the state in the matter of state traffic charges. While, as a *quasi*-judicial officer, he may exercise discretion as to whether the facts in a particular situation warrant prosecution of the particular charge, this discretion does not grant authority to act arbitrarily. *Thompson v. State* (1973), 61 Wis. 2d 325, 330, 212 N.W. 2d 109. General policies guiding the exercise of prosecutorial discretion are desirable, *American Bar Association, Standards for Criminal Justice Relating to The Prosecution Function and The Defense Function*, sec. 2.5 (Approved Draft 1970),. but "by its very nature the exercise of discretion cannot be reduced to a formula." *Id.*, sec. 3.9, Commentary a., p. 93. The present actions have nothing to do with discretion, but can only be described as wholesale refusal to comply with a statutory duty.

II.

I am advised that the policy to which you refer represents the reaction by the Wisconsin District Attorneys Association to certain policy changes affecting the compensation of district attorneys enacted by the legislature as part of the 1975-77 budget act, ch. 39, Laws of 1975. Under secs. 59.471 (1) and 20.855 (2) (b), Stats. (1973), the annual salary of the district attorneys had been supplemented by the state in the amount of $4,500. This substantial salary supplement was repealed by the legislature in ch. 39, Laws of 1975.

Apparently in retaliation against this legislative action, the district attorneys in several counties have moved the court for an order "amending" the state traffic patrol citations to county ordinance citations. I have been further advised that on three separate occasions in three separate counties, approximately 250 such citations were so "amended" by the court on the motion of

the respective district attorneys. I further understand that in each instance, the state charges had not been contested.

It is unfortunate that the judges of the courts involved granted the motions to "amend." The motions of the district attorneys, which were premised on the refusal of the district attorney to prosecute state actions, did not constitute an amendment of state charges. Such motions can only be described as the voluntary dismissal of state charges and the attempt to bring new charges based, of course, on compatible county ordinance violations. The "amendment" dismissed the action of the state and purportedly instituted new proceedings on behalf of a new party plaintiff, i.e., the county. It is inconceivable how such action can be properly denominated as an amendment of the pleadings.

I assume that new citations and complaints were not prepared after motions to amend were granted; that, at most, docket entries were made to reflect the granting of the district attorneys' motions. If this is so, the court files reflect new and entirely different actions without the proper pleadings or complaining witnesses.

It is my opinion that a complaint issued by a state patrol officer under sec. 345.11, Stats., cannot be amended so as to substitute parties plaintiff and change state charges to county charges; that such action constitutes a dismissal of the state action and the institution of new county charges on behalf of a new party plaintiff. Accordingly, in my opinion, the "amendment" was improper and should not have been allowed by the court.

The penalty for most state traffic violations is a forfeiture. The proceeds from such forfeitures are appropriated by Art. X, sec. 2, Wis. Const., to the state school fund. On the other hand, the proceeds from forfeitures collected for violation of county ordinances are, under sec. 288.105, Stats., paid to the county. Accordingly, the action of changing the uncontested violations from state charges to county charges, if valid, would result in the state school fund losing substantial sums.

District attorneys may not properly refuse to prosecute state traffic charges merely to secure a diversion of the fine proceeds from the state school fund to the county treasuries. While, under the circumstances noted before, such a result may have personal

and political advantages for the district attorney, it is improper to exercise prosecutorial discretion to secure such advantages.

> "In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved ..." *American Bar Association, Standards Relating to The Prosecution Function and The Defense Function*, sec. 3.9 (c) (Approved Draft 1970), cited with approval; *Thompson v. State* (1973), 61 Wis. 2d 325, 329 n. 1, 212 N.W. 2d 109.

It is my opinion that the described actions of the district attorneys were improper and constitute both a neglect of their statutory duty to represent the state and an abuse of prosecutorial discretion.

BCL:CAB

Alcoholic; Inebriates And Drug Addicts; Persons incapacitated by alcohol who engage in disorderly conduct in treatment facility may be so charged. Persons so incapacitated may not be charged with a crime merely for the purpose of arranging for their confinement in jail. OAG 55-75.

November 25, 1975.

WILLIAM E. CHASE, *District Attorney*
Ashland County

You have asked my opinion regarding the options available concerning a person incapacitated by alcohol who is placed in an approved public treatment facility and thereafter becomes, or continues to be, disorderly. You indicate that the reason for your inquiry is that it has been the experience in your county that some of the incapacitated persons who have been admitted to the approved public treatment facility have thereafter become violent and a danger to themselves or others and the treatment facility does not have either the staff or the facilities to control and protect these persons.

This situation is now governed by sec. 51.45, Stats., the "Alcoholism and Intoxication Treatment Act" which became effective August 1, 1974, pursuant to ch. 198 of the Laws of 1973.

Section 51.45 (1), Stats., entitled "Declaration of Policy" states as follows:

> "It is the policy of this state that alcoholics and intoxicated persons may not be subjected to criminal prosecution because of their consumption of alcoholic beverages but rather should be afforded a continuum of treatment in order that they may lead normal lives as productive members of society."

Section 51.45 (11) (b), Stats., indicates that a person appearing to be incapacitated by alcohol as defined by sec. 51.45 (2) (d), Stats., shall be taken into protective custody and forthwith taken to an approved public treatment facility for emergency treatment.

Section 51.45 (17), Stats., entitled "Applicability of Other Laws; Procedure" provides that:

> "(a) Nothing in this section affects any law, ordinance or rule, the violation of which is punishable by fine, forfeiture or imprisonment."

Violations of law punishable by fine or imprisonment or both are crimes. See sec. 939.12, Stats.

Thus, the question is whether a person who is incapacitated by alcohol may be removed from the approved public treatment facility to the county jail under a charge of disorderly conduct pursuant to sec. 947.01 (1), Stats., if there is probable cause to believe his conduct at the treatment center constitutes disorderly conduct. I conclude that, under these circumstances, a criminal charge may be made, and the person charged taken to the county jail.

It is my opinion that the legislature intended, as indicated by its expressed declaration of policy, to absolve alcoholics and intoxicated persons from prosecution based only upon their consumption of alcoholic beverages. This is further indicated by the legislature's simultaneous repeal of the crime of public drunkenness contained in sec. 947.03, Stats. See sec. 32, ch. 198, Laws of 1973, effective August 1, 1974.

It is my further opinion that by its enactment of sec. 51.45 (17), Stats., as quoted above, the legislature expressly mandated that the Alcoholism and Intoxication Treatment Act is not to operate to shield persons from responsibility for criminal conduct merely because such conduct may be associated with the consumption of alcoholic beverages. Diminished criminal responsibility, or relief from liability, for acts associated with an intoxicated condition of the actor is governed solely by the intoxication defense defined in sec. 939.42, Stats.

I am concerned by language in your letter which indicates that your problem arises from the fact that Ashland County's Alcoholic Treatment Center "does not have the staff or facilities to control" incapacitated persons who are admitted to the treatment center and then become violent. Your letter states:

> "... The County Jail is the only place available in the community to handle these types of persons.
>
> "Our practice under these circumstances, *for lack of any better way to handle the patient*, is to charge him with disorderly conduct, put him in the County Jail and then dismiss the case if he is found to be in need of treatment (under the Act) ... At this point the patient has usually calmed down and is no longer violent and can be handled at the treatment center." (Emphasis added.)

If you have no intent of carrying through with the disorderly conduct charge, and the charge's only purpose is to justify or authorize the alcoholic's temporary confinement in the jail, then an unnecessary criminal record has been created. This is clearly inconsistent with the Act's policy providing that the "taking into protective custody" of an incapacitated person "is not an arrest," and that "no entry or other record shall be made to indicate that the person has been arrested or charged with a crime." See sec. 51.45 (11) (b), Stats.

Criminal charges should not be used except when warranted by the facts. It is inappropriate to bring such charges merely to deal with security or other problems involving persons in need of treatment for alcoholism.

A potential viable alternative would be for the proper person or agency in your county to seek approval pursuant to sec. 51.45,

Stats., of a portion of the County Jail as an approved facility for the strictly limited purpose of providing a secure facility for the protection and safekeeping of persons incapacitated by alcohol who have become violent and therefore a danger to themselves and others.

BCL:JM

Forest Crop Law; Highways; The exceptions established by sec. 348.20 (3), Stats., are not applicable to violations of weight limits established under sec. 348.175, Stats. OAG 56-75.

November 25, 1975.

DAVID B. DEDA, *District Attorney*
Price County

You have asked whether sec. 348.20 (3), Stats., allows the shifting of loads of forest products in order to conform to increased weight limitations promulgated under sec. 348.175, Stats. Section 348.20 (3), Stats., reads:

> "When a vehicle or combination of vehicles is transporting livestock, bulk products or peeled or unpeeled forest products cut crosswise and a violation of a single axle or a group of axles over the limits set forth in ss. 348.15 (3) (b), (c) or (d) and 348.16 is detected, there shall be no prosecution provided that the axles under consideration can be made legal by shifting the load but no shifting of load shall be required unless the overload is more than 1,500 pounds per axle or group of axles. This shall not apply to the national interstate and defense highway system."

This statute clearly excuses, under the specified circumstances, weights in excess of those specified by secs. 348.15 (3) (b), (c) and (d), and 348.16, Stats. Your question is whether this same statute also excuses, under the same circumstances, weights in excess of those increased maximum weights declared by highway authorities pursuant to sec. 348.175, Stats. It is my opinion that this question must be answered in the negative.

Section 348.15 (3) (b), (c) and (d), Stats., establishes maximum weight limitations for single axles, groups of two or more axles and total weight of a vehicle. Section 348.175, Stats., authorizes the transportation of peeled or unpeeled forest products cut crosswise in excess of such weight limitations when the highways are so frozen that no damage will result to the highway. This statute directs highway authorities to declare which highways are eligible for the increased weight limitations, and such declaration must include a statement of the maximum weight on each axle, combination of axles and the gross weight allowed. When this has been done, a load of such forest products may exceed the weights set forth in sec. 348.15 (3), Stats., up to the maximum weights established and declared pursuant to sec. 348.175, Stats.

You point out that the weight of these forest products is difficult to estimate at the time of loading and that this is recognized in the public policy of excusing certain weight violations where they can be made legal by shifting the load, as set forth in sec. 348.20 (3), Stats. You also point out that this difficulty is the same in both summer and winter. You conclude that this allowance of weight shifting has thus been declared by the legislature to be the public policy of the state in regard to these forest products, and therefore, sec. 348.20 (3), Stats., was meant to apply to sec. 348.175, Stats., as well as to sec. 348.15, Stats. I cannot agree with your conclusion.

Section 348.20 (3), Stats., specifically states that it applies to violations of the weight limits set forth in secs. 348.15 (3) (b), (c) and (d), and 348.16, Stats. It does not specifically provide that it applies to violations of higher weight limitations set under sec. 348.175, Stats. As a matter of public policy, the legislature could have made it so applicable, but it did not do so. This omission cannot be remedied by construction. In 60 OAG 28 (1971), we advised that sec. 348.20 (3), Stats., is not a statute which must be strictly construed in favor of the alleged violator. It is, in fact, an exception. A person claiming the benefit of such exception has the burden of proving, as a matter of defense, that he falls within the exception. The prosecution does not have to negative the applicability of the exception. Inasmuch as the legislature has not provided that the exception established by sec. 348.20 (3), Stats., is to apply to violations of weight limits set under sec. 348.175,

Stats., as well as to limits set by sec. 348.15 (3), Stats., it is my opinion that sec. 348.20 (3), Stats., is not applicable to violations of weight limits set under sec. 348.175, Stats.

BCL:AOH

Conservation Wardens; Snowmobiles; A conservation warden, acting pursuant to the arrest power conferred upon him by sec. 29.05 (1), Stats., may arrest with or without a warrant, any person detected in the actual violation, or any person whom such officer has reasonable cause to believe guilty of a violation of ch. 350, except where applicable to highways. A conservation warden has the power under sec. 29.05 (1), Stats., to stop any snowmobile and to make necessary inquiries, if he has reasonable cause to believe there is a violation of ch. 350, and to conduct a limited weapons search where he reasonably suspects that he or another is in danger of physical injury. OAG 58-75.

December 3, 1975.

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

You ask whether ch. 218, sec. 42, Laws of 1973, which substitutes civil forfeiture sanctions for criminal sanctions for certain violations of ch. 350, Stats., regulating the use of snowmobiles, has the effect of denying conservation wardens the power to arrest for snowmobile violations notwithstanding sec. 29.05 (1), Stats.

Section 29.05 (1), Stats., provides, in material part, as follows:

> "... [A conservation warden] may arrest, with or without a warrant, any person detected in the actual violation, or whom such officer has reasonable cause to believe guilty of a violation under ... ch. 350, except where applicable to highways, and may take such person before any court in the county where the offense was committed and make proper complaint."

In my opinion, the arrest power conferred by sec. 29.05 (1), Stats., is undisturbed by the decriminalization of ch. 350.

The enactment of ch. 218, sec. 42, Laws of 1973, which (with the exception of sec. 350.07) decriminalized violations of ch. 350, is presumed to have been done with full knowledge of the existing law, including knowledge of sec. 29.05 (1), Stats. *Kindy v. Hayes* (1969), 44 Wis. 2d 301, 314, 171 N.W. 2d 324. Had the legislature intended to preclude arrest by wardens for violations of ch. 350, it would have amended sec. 29.05 (1), Stats., to eliminate the power of arrest at the same time that it decriminalized violations of ch. 350. There is nothing in the legislative history of the recent changes in ch. 350 to suggest that the legislature intended to repeal or to amend sec. 29.05 (1), Stats., and a repeal by implication is disfavored if the two sections of the statutes can be reconciled. *Jicha v. Karns* (1968), 39 Wis. 2d 676, 680, 159 N.W. 2d 691.

The decriminalization of ch. 350 and the arrest powers granted to conservation wardens under sec. 29.05 (1), Stats., are not irreconcilable. There is nothing in the language of sec. 29.05 (1), Stats., to indicate that the exercise of the arrest power is confined to criminal conduct, nor is the use of arrest power in civil actions unprecedented. See e.g. sec. 264.02 (arrest in civil actions); secs. 345.21, 345.22, 83.016 (1) (arrest for violations of traffic regulations); sec. 62.09 (13) (city police authorized to arrest for violation of any state law); sec. 61.28 (village marshal authorized to arrest for violation of any state law). Thus, while it is true that an arrest under the criminal code can be made only for criminal conduct (see, sec. 968.07, Stats.), a valid arrest of a person for noncriminal conduct is authorized under other statutes, including sec. 29.05 (1), Stats.

The power to arrest for noncriminal violations also has been judicially recognized. In *Madison v. Geier* (1965), 27 Wis. 2d 687, 692, 135 N.W. 2d 761, the court observed:

> "... We recently pointed out in *Milwaukee v. Wuky* (1965), 26 Wis. (2d) 555, 133 N.W. (2d) 356, such forfeiture cases at best are in fact a hybrid proceeding--one has no right to a special verdict; pleas of guilty, of not guilty, or of *nolo contendere* are made instead of an answer; *the*

action is commenced by warrant or summons; and one may be arrested and bail provisions apply." (Emphasis added.)

In *State ex rel. White v. Simpson* (1965), 28 Wis. 2d 590, 137 N.W. 2d 391, a noncriminal paternity action, the court held that constitutional limitations on arrest and search apply, notwithstanding the civil nature of the proceedings.

You ask further whether a conservation warden may stop a snowmobiler for temporary questioning when the warden reasonably suspects that such person has violated a section of ch. 350, and, if so, whether a warden may conduct a limited weapons search of a person he has stopped for temporary questioning when he reasonably suspects that he or another is in danger of physical injury.

Section 29.05 (1), Stats., expressly authorizes a conservation warden, "for the purpose of enforcing ... ch. 350, except where applicable to highways, ... [to] stop any snowmobile, if he has reasonable cause to believe there is a violation of such sections." Furthermore, a snowmobiler has an absolute duty to stop when requested to do so by a warden, sec. 350.17 (2), Stats. After the stop has been effected, it would logically follow that the warden could make such inquiry as would be necessary to ascertain whether cause for arrest existed.

Once the authority to make the original stop has been established, it necessarily follows that under appropriate circumstances, the right to conduct a limited weapon search may also be established. As stated by the United States Supreme Court in *Terry v. Ohio* (1968), 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed. 2d 889, if an officer entitled to make a stop has reason to believe that the suspect is armed and dangerous, he is also entitled to conduct a weapons search limited in purpose to protecting himself or others against injury from the person stopped.

Although the stop in *Terry* was made for the purpose of investigating possible criminal behavior, the reasons the Court suggests for allowing a limited weapons search apply equally well to a stop which is made for the purpose of investigating noncriminal violations of the law. Support for this position is implicit in *Milwaukee v. Cohen* (1973), 57 Wis. 2d 38, 46, 203 N.W. 2d 633, where the court held that Fourth Amendment

standards apply to civil as well as criminal cases. Remedies for the abuse of a power imply the existence of that power.

A search need not be expressly authorized by statute, but need only meet the Fourth Amendment standard of reasonableness. The nature of the sanction the suspect may ultimately incur does not determine the reasonableness of a search, but rather the reasonableness of the search must be determined in light of the surrounding circumstances. A limited weapon search of a person stopped for temporary questioning in a remote area might be reasonable if the officer making the stop has cause to believe that he or another is in danger of physical injury. It would be unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm. *Terry v. Ohio*, 392 U.S. at 24.

In contrast to the treatment of the subject in other chapters of the statutes, there is no provision in ch. 350 addressing the subject of the action to be taken by a conservation warden following the arrest of a person for a noncriminal violation of ch. 350. In the absence thereof, it is my opinion that the power to arrest for noncriminal violations of ch. 350 includes, under appropriate circumstances, the power to require the deposit of security sufficient to guarantee payment of any forfeiture which may be imposed. Consistent with the Motor Vehicle Code, see sec. 345.06 (2) (a), Stats., and other statutes dealing with arrests for civil forfeitures, maximum use should be made of fixed deposit schedules and arrangements should be made to facilitate the deposit of security through the use of checks and credit cards in lieu of cash. Any and all steps necessary to minimize the circumstances under which detention would be necessary must be taken.

BCL:DJH

Bonds; Section 66.521 (11), Stats., as created by ch. 265, Laws of 1973, does not require a municipality to obtain performance bonds for typical industrial revenue bond projects constructed by private industry. OAG 59-75.

December 8, 1975.

WILLIAM C. KIDD, *Secretary*
Department of Business Development

You have requested my opinion to clarify the meaning of sec. 66.521 (11), Stats., as created by ch. 265, Laws of 1973, and to delineate the circumstances thereunder which would require any issuing municipality to require a performance bond so as to protect itself from financial responsibility for unpaid contractors' bills.

Section 66.521 is Wisconsin's industrial revenue bond law, the constitutionality of which was sustained in *State ex rel. Hammermill Paper Co. v. LaPlante* (1973), 58 Wis. 2d 32, 205 N.W. 2d 784. Section 66.521 (11), Stats., provides:

> "(11) **Certain laws not applicable.** With respect to the enforcement of any construction lien or other lien under ch. 289 arising out of the construction of projects financed under this section, no deficiency judgment or judgment for costs may be entered against the municipality. Projects financed under this section shall not be deemed to be public works, public improvements or public construction within the meaning of ss. 59.08, 62.15, 289.14, 289.15 and 289.155 and contracts for the construction of such projects shall not be deemed to be public contracts within the meaning of ss. 59.08 and 66.29 unless factors such as and including municipal control over the costs, construction and operation of the project and the beneficial ownership of the project warrant such conclusion."

The first sentence of subsec. (11) declares that with respect to the enforcement of any lien under ch. 289, no deficiency judgment or judgment for costs may be entered against a municipality arising out of its involvement in a construction project financed under the industrial bond law.

The first clause of the second sentence of subsec. (11) declares that industrial revenue bond projects shall not be deemed to be public works, public improvements or public construction within the meaning of secs. 59.08, 62.15, 289.14, 289.15 and 289.155, Stats. The second clause of the second sentence of subsec. (11) provides that contracts for the construction of industrial revenue

bond projects shall not be deemed to be public contracts within the meaning of secs. 59.08 and 66.29, Stats.

Sections 59.08, 62.15 and 66.29 are concerned with receiving bids and awarding public contracts for public works and public construction in counties and municipalities. Sections 289.14, 289.15 and 289.155 are concerned with the form of contracts, performance bonds, liens and rights of judgment creditors pertaining to public works and public improvements at the municipal and state levels.

The exclusions in sec. 66.521 (11) are consistent with the typical construction project financed by industrial revenue bonds. Most are "turn-key" projects, where 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 proceeds from the bonds. The industrial concern agrees to lease the project back from the municipality on such terms as would retire the bonds as they mature. See 63 OAG 145 (1974).

It is my opinion that the language of sec. 66.521 (11), Stats., specifically excludes contracts for the construction of industrial revenue bond projects from the provisions of the statutes enumerated therein unless the exception clause at the end of the second sentence applies. That is, unless factors such as and including municipal control over the project *and* the beneficial ownership of the project warrant the conclusion that the contract for construction of the industrial revenue bond project is a public contract for public works, public improvements, or public construction, then the statutes relating to public works, etc. shall not apply.

The ordinary project under 66.521 is not a project for "public works," but rather is a private project financed by a municipality. In general, a public works project is one the public body will use. See *Knuth v. Fidelity & Casualty Co.* (1957), 275 Wis. 603, 608, 83 N.W. 2d 126; *35 Words & Phrases*, p. 134 *et seq.* In fact, the phrase "public works" has been narrowly construed to require more than mere use of a product; it embraces purchase of supplies and labor. See *Ozaukee Sand & Gravel Co. v. Milwaukee* (1943), 243 Wis. 38, 9 N.W. 2d 99; *Standard Oil Co. v.*

Clintonville (1942), 240 Wis. 411, 414-416, 3 N.W. 2d 701. The premise that public involvement by way of public monies makes the project a project of public works has been rejected. *Grant v. Milwaukee* (1914), 156 Wis. 635, 146 N.W. 780.

In summary, for there to be a project of public works more is required than the mere expenditure of public monies. At least a governmental use must be made of the end product.

Given the fact that industrial revenue bond projects are typically constructed by and for private industry rather than by and for the municipality, the exception clause to sec. 66.521 (11), Stats., will apply only rarely. Accordingly, the municipality financing the typical industrial revenue bond project constructed by private industry cannot require a performance bond as a matter of course. Such a requirement would be inconsistent with the total concept of such projects which provides for only restricted municipal involvement.

BCL:APH

Counties; Highways; County under sec. 349.06, Stats., can enact and enforce a traffic ordinance in strict conformity with state statutes which is applicable to town roads. 30 OAG 431 (1941) and 38 OAG 184 (1949) no longer state the law in this respect because of subsequent statutory changes. OAG 56-75.

December 9, 1975.

DAVID B. DEDA, *District Attorney*
Price County

You request my opinion whether a county traffic ordinance which is in strict conformity with state regulations can be made applicable to town roads which are not part of the state or county trunk systems.

I am of the opinion that it can.

In 30 OAG 431 (1941) and 38 OAG 184 (1949), it was stated that the scope of a county highway traffic ordinance was limited to highways maintained at the expense of the county and state, or

either of them, and could not include city or town highways wholly supported by such municipalities. The conclusion was primarily based on former sec. 59.07 (11), Stats., which empowered the county board to enact ordinances regulating traffic "... of all kinds on any highway ... in the county which is maintained at the expense of the county and state, or either thereof ..." That statute was subsequently repealed. However, even under that statute it was generally conceded that, where a county trunk ran through a city, traffic regulation on such highway was subject to state statutes, and to both city and county traffic ordinances which were in conformity with state regulations.

Under present statutes, the field of traffic regulations has been preempted by the state. *City of Janesville v. Walker* (1971), 50 Wis. 2d 35, 183 N.W. 2d 158. State traffic regulations are applicable to all highways within the state. That does not mean that municipalities are without power to enact ordinances which regulate traffic on all highways within their respective boundaries. The *Walker* case holds that sec. 349.03, Stats., providing that the traffic law shall be uniform in operation throughout the state and that no local authority may enact any traffic regulation unless it is not contrary or inconsistent with the statutes or is expressly authorized by statute, and sec. 349.06, Stats., which affirmatively delegates to local authorities power to enact traffic regulations which are in strict conformity with state traffic statutes, must be read together and establish but one test for validity of municipal traffic regulations.

I find nothing in chs. 59, 60, 340 to 348, which limits the power of a county to enact traffic regulations so as to be only applicable to highways which are maintained at the expense of the county and state, or either. Nor do I find statutory authority giving towns the exclusive right to enact traffic ordinances which shall be applicable to town roads. Jurisdiction for the purposes of traffic regulation is separate and apart from the duty of a municipality to construct and maintain a highway.

Town roads in a town within a county are within the corporate boundaries of a county. The statutes contemplate that there may be overlapping jurisdiction as between the state, county and town, city or village insofar as traffic regulation on highways is concerned. See discussions at 46 OAG 280 (1957), 58 OAG 72

(1969) and 61 OAG 79, 85 (1972), as to overlapping jurisdiction problems. Unless limited by statute, a municipality or quasi-municipality, such as a county, has power to enact ordinances which are applicable to all territory within its corporate limits.

Section 59.07 (64), Stats., empowers the county board to enact ordinances to preserve the public peace and good order within the county. Section 59.24, Stats., provides that the sheriffs and their undersheriffs and deputies shall keep and preserve the peace in their respective counties and their primary duty is to preserve law and order throughout the county. *Andreski v. Industrial Comm.* (1952), 261 Wis. 234, 241, 52 N.W. 2d 135. Under sec. 83.016 (1), Stats., the county board may "... appoint traffic patrolmen for the enforcement of *laws relating to the highways* or their use ..." (Emphasis added.)

Section 349.01, Stats., provides that the definitions in sec. 340.01, Stats., shall apply to ch. 349, Stats.

Section 349.06, Stats., provides that, except for exceptions not material here, "... *any local authority* may enact and enforce any traffic regulation which is in strict conformity with ... chs. 341 to 348 ..." (Emphasis added.)

Chapters 341 to 348 are primarily concerned with traffic regulations on highways. Section 340.01 (22), Stats., defines "highway" as:

> "(22) 'Highway' means all public ways and thoroughfares and bridges on the same. ..."

Also, see sec. 990.01, (12), Stats., for a similar definition.

Section 340.01 (26), (27), Stats., provides:

> "(26) 'Local authorities' means every county board, city council, town or village board or other local agency having authority under the constitution and laws of this state to adopt traffic regulations.
>
> "(27) 'Local ordinance which is in conformity therewith' means a local traffic regulation enacted pursuant to s. 349.06."

The county is a local authority and in my opinion can enact and enforce a traffic ordinance in strict conformity with state statutes

which is applicable to all highways within a county, including town roads.

BCL:RJV

Plats And Platting; Unless a condominium under ch. 703, Stats., actually involves a division of land, or successive divisions of land, it is not subject to the land platting and subdivision approval requirements of ch. 236, Stats.

The extent to which local governments may vary the terms of secs. 236.16 (1) and (2) and 236.20 (4) (d), Stats., by ordinance, discussed. OAG 62-75.

December 30, 1975.

WILLIAM R. BECHTEL, *Secretary*
Department of Local Affairs and Development

You ask my opinion concerning the extent to which condominium projects under the Unit Ownership Act, ch. 703, Stats., are required to comply with the land platting and subdivision approval requirements of ch. 236, Stats.

The answer to your question depends upon whether the condominium involved falls within the statutory definition of "subdivision" as set forth in sec. 236.02 (8), Stats.

"Subdivision" is defined in sec. 236.02 (8), Stats., as follows:

> " 'Subdivision' is a division of a lot, parcel or tract of land by the owner thereof or his agent for the purpose of sale or of building development, where:
>
> "(a) The act of division creates 5 or more parcels or building sites of 1 1/2 acres each or less in area; or
>
> "(b) Five or more parcels or building sites of 1 1/2 acres each or less in area are created by successive divisions within a period of 5 years."

Section 236.03 (1), Stats., reads:

> "(1) 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."

Section 236.31 (2), Stats., further provides that an assessor's plat may be required, at the expense of the subdivider or his agent, if a subdivision is created by successive divisions, under sec. 236.02 (8) (b), Stats.

A condominium, sometimes referred to as a "horizontal property regime," is an estate in real property typically consisting of ownership in severalty of a part of a residential apartment-type building combined with an undivided interest-in-common of certain other portions of the property, including the land upon which the building stands. 31 C.J.S. Condominiums, sec. 145, *et seq.* However, there is nothing which necessarily prevents a condominium project from consisting of a number of separate individually owned dwelling units located on a single commonly owned parcel of land, *Ackerman v. Spring Lake of Broward, Inc.* (Fla. 1972), 260 So. 2d 264. Finally, it is also technically possible, at least under ch. 703, Stats., to have a condominium project where the land located under the individually owned units is not a part of the commonly held property.

The possible application of ch. 236, Stats., to a condominium project would only arise in the last instance above, or where a condominium otherwise fell within the definition of "subdivision" by virtue of being the fifth in a succession of land divisions for condominium purposes. However, such circumstances would probably seldom arise. Thus, it is my opinion that the typical condominium project, i.e., where individually owned units rest on a single commonly owned parcel of land, is not required to comply with the land platting and subdivision approval requirements of ch. 236, Stats.

I am aware that some confusion has existed as to whether the typical condominium project is subject to ch. 236, Stats. To some extent, such confusion has resulted from the fact that condominium developments may not only physically resemble the traditional

subdivision, the only clear-cut distinction being the ownership of land in common, but they may also present the same problems affecting the public health, safety and general welfare which the subdivision regulations of ch. 236, Stats., are designed to combat. See sec. 236.01, Stats. Proper statutory interpretation of the law has also been hindered by the absence of any provisions in either ch. 236 or 703, Stats., specifically interrelating the provisions of the two chapters, while at the same time both chapters use similar statutory language.

For instance, under sec. 703.04, Stats., each condominium unit, together with its undivided interest in the common areas and facilities, constitutes real property "for all purposes." Further, under sec. 990.01 (18) and (35), Stats., "real property" and "land" have identical statutory definitions. Finally, sec. 703.22 (1), Stats., provides:

> "(1) Each unit and its percentage of undivided interest in the common areas and facilities *shall be deemed to be a parcel* and shall be subject to separate assessments and taxation by each assessing unit and special district for all types of taxes authorized by law including but not limited to special ad valorem levies and special assessments. Neither the building, the property nor any of the common areas and facilities shall be deemed to be a parcel separate from the unit." (Emphasis added.)

Thus, it is possible to argue that a condominium is a division of real property for the purposes of sale or building development where the act of division may create five or more parcels or building sites. The acreage of each parcel or building site would presumably be determined by dividing the total commonly held acreage by the number of parcels.

Regardless of the apparent neatness of the foregoing statutory construction and the admitted logic of applying subdivision standards to condominium projects which resemble traditional land divisions, the fact remains that in the typical condominium development under ch. 703, Stats., the land itself is not divided, while the subdivision of land under ch. 236, Stats., does involve the division of the land itself, as well as the tenements, hereditaments and rights thereto and interests therein.

In addition, the use of the term "parcel" in sec. 703.22, Stats., to describe the condominium unit and its undivided interest in common areas and facilities, is clearly intended only to define the status of each individual condominium for assessment and tax levy purposes. Such a tax provision was designed to meet federal regulations covering condominium eligibility for FHA mortgage insurance, 12 U.S.C. sec. 1715y, and nothing appears in ch. 703, Stats., to suggest that the legislature intended any broader application of the term.

Chapter 703, Stats., is an act complete in itself requiring nothing further to assist in its implementation. The Act applies only to property voluntarily submitted to the provisions of the chapter by duly executed and recorded "declaration." Secs. 703.02 (9) and 703.03, Stats. The chapter contains its own provisions for removal of property from the terms of the Act, as well as for subsequent resubmission of such property. Secs. 703.06 (3), 703.16, 703.17, and 703.26, Stats. More importantly, perhaps, the chapter establishes its own separate minimal requirements concerning the filing of a "plat of survey of the land" in the condominium development. Sec. 703.13, Stats. Where a condominium act is complete in itself, it is unnecessary to go elsewhere to fill in any requisites to make the act work. *Kaufman & Broad Homes of Long Island, Inc. v. Albertson* (1972), 73 Misc. 2d 84, 341 N.Y.S. 2d 321, 322. And in some instances, such as the case of the simple conversion of existing apartments into condominiums, subdivision approval would clearly appear inappropriate. See *Maplewood Village Tenants Association v. Maplewood Village* (1971), 116 N.J. Super. 372, 282 A. 2d 428.

There is an apparent need to relate the requirements of ch. 236, Stats., at least to those condominium developments which can only be distinguished from land subdivisions on the basis of the manner in which legal title in development property is held. Such developments affect many of the same public interests and may have the same impact on surrounding areas as the more traditional subdivision. However, until such time as the legislature specifically addresses the question of the extent to which such condominium projects should be subjected to the platting and subdivision approval requirements of ch. 236, Stats., it will be possible for such projects to avoid such statutory requirements unless they actually

involve divisions of land which constitute a subdivision under the provisions of sec. 236.02 (8), Stats.

You next inquire as follows:

Sections 236.16 (1) and (2) and 236.20 (4) (d), Stats., permit local ordinances to vary the statutory requirements. What, if any, are the limits imposed upon local governments enacting ordinances varying requirements?

It is first necessary to consider the statutory context in which your question arises. Section 236.16 (1), Stats., which establishes the minimum width and area requirements for each lot in a subdivision, further provides:

> "... 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."

Section 236.16 (2), Stats., which establishes minimum street width requirements for a subdivision, further provides:

> "... but no full street shall be less than 60 feet wide unless otherwise permitted by local ordinance. ..."

Section 236.20 (4) (d), Stats., requires that each lot in a subdivision have access to a public or private street "unless otherwise provided by local ordinance."

62 OAG 315 (1973) contains a general discussion of the circumstances under which the statutory platting standards set forth in these sections may be waived or varied. That opinion is equally applicable here.

With respect to sec. 236.16 (1), Stats., any municipality, town or county may reduce minimum lot and area requirements only if it has enacted a subdivision control ordinance pursuant to sec. 236.45, Stats., and only if the lots involved are served by public sewers. Otherwise, the minimum requirements stated in sec. 236.16 (1), Stats., are applicable. Where a local government unit which has adopted a local subdivision control ordinance shares overlapping approval authority with one which has not and the lots involved are served by public sewers, the requirements of sec. 236.16 (1) may be unilaterally reduced in accordance with the

duly enacted subdivision control ordinance. Where either the subdivision control ordinance or some other local ordinance of one of the approving authorities establishes more restrictive standards than those stated in sec. 236.16 (1), Stats., the most restrictive requirement is applicable. Sec. 236.13 (4), Stats. See 62 OAG 315 (1973) at 323.

However, the requirements of secs. 236.16 (2) and 236.20 (4) (d), Stats., may be altered by "local ordinance," which may be, but need not be, a subdivision control ordinance. In these sections, the legislature is referring only to "local ordinances" of cities, villages and towns. 62 OAG 315 at 323-324. Only where a county has adopted a sec. 236.45 subdivision control ordinance with provisions more restrictive than secs. 236.16 (2) and 236.20 (4) (d) would the county ordinance prevail over the local ordinance. Sec. 236.13 (4), Stats.

As stated in 62 OAG 315, at 317-318, there are three methods by which the provisions of secs. 236.16 (1) and (2) and 236.20 (4) (d) may be varied by local ordinance or local subdivision control ordinance, i.e., affirmative provision, variance and special exception.

1. *Affirmative provision.* The minimum lot width and area requirements stated in sec. 236.16 (1), Stats., may be varied by an affirmative provision in the local subdivision control ordinance establishing specific reduced requirements. Similarly, the minimum street width requirement stated in sec. 236.16 (2), Stats., and the street access requirement stated in sec. 236.20 (4) (d) may be reduced by affirmative provisions in a city, village or town ordinance, or made more restrictive by affirmative provisions in such ordinances or in the county subdivision control ordinance.

2. *Variance.* Municipalities possess broad authority under sec. 236.45, Stats., to enact provisions allowing variances to the terms of their subdivision control ordinances. *City of Mequon v. Lake Estates Company* (1971), 52 Wis. 2d 765, 774, 190 N.W. 2d 912. The purpose of variance provisions is to protect against individual hardship and to provide the flexibility of procedure necessary to give relief against unnecessary and unjust invasions of the right of private property. 8 Mc Quillin, Mun. Corp. (3rd Ed.), 1965 Rev. Vol., p. 512, sec. 25.160. This protection and flexibility is as necessary in the regulation of subdivisions as in the regulation of

land use through zoning laws. As a practical matter, however, it is important to recognize that the legitimate application of variances is limited. The variance provision must establish a standard to govern the grant of variances so that the exercise of discretion by the agency granting the variance will not be tantamount to legislation. Mc Quillin, *supra*, p. 521-522, sec. 25.161. In the context of zoning law, the standard to be applied in granting variances is normally phrased in terms which require the showing of "unnecessary hardship or practical difficulty." See secs. 59.97 (7) (c), 60.75 (4), 61.35 and 62.23 (7) (e) 7, Stats. Although sec. 236.45, Stats., is not similarly explicit, the same or a similar uniform standard is obviously necessary to govern a grant or denial of a variance from the terms of a subdivision control ordinance. See Mc Quillin, *supra*, secs. 25.166 and 25.167. In this regard, it can also be pointed out that the circumstances giving rise to a claimed variance must be peculiar to the particular property involved, and involve more than loss of expected profits or inconvenience, since if the hardship is common to all land in the area, some change in the ordinance itself and not merely a variance must be sought. Mc Quillin, *supra*, secs. 25.167 and 25.168.

3. *Special Exception.* A special exception or conditional use allows a property owner " 'to put his property to a use which the ordinance expressly permits' when certain conditions have been met." *State ex rel. Skelly Oil Company v. Common Council, City of Delafield* (1973), 58 Wis. 2d 695, 703, 207 N.W. 2d 585, at 701, citing 2 Rathkopf, *The Law of Zoning and Planning* (1968), p. 54-4. Through use of this flexible device in local ordinances, the designated agency may grant special exceptions to the terms of the ordinance in harmony with its general purpose and intent only where it is shown that the particular property involved meets the conditions, specifically set forth in the ordinance, which are deemed to justify such special exception.

With this brief general background in mind, it is clear that within the limitations previously discussed an appropriate ordinance may contain a variance provision which may permit the reduction of one or more of the requirements set forth in secs. 236.16 (1) (2) and 236.20 (4) (d), Stats. There need be no specific reference in such ordinances to these sections of ch. 236, Stats., as long as the ordinance clearly treats the same subject matter. Likewise, since a condominium project may be a

subdivision within the purview of ch. 236, Stats., no direct reference need be made to condominium projects. The above discussion of the means by which the requirements of secs. 236.16 (1) and (2) and 236.20 (4) (d), Stats., may be reduced would be applicable in all respects to such condominiums.

Finally, you ask a number of questions concerning a specific city subdivision ordinance provision, which reads essentially as follows:

> "Sec. 18.11 *Variances.* When in the judgment of the Plan Commission it would be inappropriate to apply literally a provision of this chapter because the subdivision is part of a planned residential development as defined in section 17.03 (72), M.C. of the Municipal Code, is located outside the corporate limits or because extraordinary hardship would result, it may waive or vary such provisions so that substantial justice may be done and the public interest secured, provided that in no event shall the requirement of filing and recording the plat or survey map be waived."

Most of your questions concerning this provision have already been answered by my response to your previous questions. I have rephrased your remaining questions for clarity and conciseness. Thus rephrased, your question asks whether this ordinance provision may be viewed as authorizing or forming the basis for the grant of a variance from the requirements of sec. 236.16 (1) and (2) or sec. 236.20 (4) (d), Stats.

Hardship. If the subdivision control ordinance, of which the above provision is a part, otherwise purports to control the same subject matter as the above sections of the statutes, then the above provision may be said to properly authorize the granting of a variance on the basis of a showing of "extraordinary hardship." However, in order to determine whether such a variance is appropriate to vary the terms of such statutes, reference must be made to other provisions of the subdivision control ordinance.

Planned Residential Development. A relatively new zoning concept, the "planned unit development" district, involves a "floating zone" with special requirements and review procedures designed for a unified large-scale development of a tract of land, and is considered as a form or variation of the zoning exception, rather than a subject for a zoning variance. 43 A.L.R. 3d 888,

Anno., Zoning: Planned Unit, Cluster, or Greenbelt Zoning. In fact, arguably, such zoning provisions are better conceived as setting forth terms for an alteration of the comprehensive plan of the community which require in each instance basic amendment to the zoning ordinance. See Krasnowiecki, *Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control.* 114 U. Pa. L. Rev. 47 (1965); *Dillsburg Borough Council v. Gettys* (1973), 7 Pa. Cmwlth. 519, 300 A. 2d 805, 808.

The adoption of a planned unit development under the zoning ordinance may present conflicts with subdivision control ordinance provisions. Under such circumstances, it is appropriate to insure that the requirements of the subdivision control ordinance are reconciled with the zoning ordinance. Apparently, this is the purpose of the planned residential development variance. However, the terms of the above ordinance provision lack specificity, and therefore it is not possible to ascertain whether the requirements of the platting statutes could be lowered by virtue of action under the above ordinance provision without first ascertaining whether the planned residential development zoning specifically involved makes provision for such lowered requirements.

Rural Platting. By permitting the plan commission to vary the provisions of the subdivision control law upon a showing that the subdivision is located outside the corporate limits, the city has apparently determined that it may not wish to require strict compliance if the subdivision is so removed from the corporate limits that inclusion of the subdivision within the corporate limits will not soon occur. To the extent the ordinance attempts a general grant of a variance on such a basis, without any guiding standards, the ordinance appears overly broad. In addition, I note that the legislature was aware of this problem and has specifically authorized a procedure by which a municipality may waive its right to approve plats within any part or all of its extraterritorial plat approval jurisdiction. Sec. 236.10 (5), Stats. Ordinarily, where the legislature has provided a method to accomplish its legislative purpose, that method should be followed to the exclusion of others.

The above ordinance provision can be viewed as authorizing a variance from the requirements of secs. 236.16 (1) and (2) and

236.20 (4) (d), Stats., only under the limited circumstances discussed.

BCL:JCM

Indians; Jurisdiction; Public Law 280 (67 Stat. 588, 28 U.S.C. sec. 1360 and 18 U.S.C. sec. 1162) is not applicable to the Menominee Tribe but state general jurisdiction will continue until the Federal and Tribal Governments assume jurisdiction pursuant to the Menominee Restoration Act.

Menominee County, or portions thereof, could be merged with an adjoining county or counties by procedures set forth in sec. 59.997, Wis. Stats., but any division of the county would require prior majority vote of the county's legal voters. OAG 63-75.

December 30, 1975.

WILLIAM J. ROGERS, *Chairman*
Menominee Indian Study Committee

Your predecessor raised the following questions regarding restoration of Menominee County to status as a federal Indian reservation:

1. Can the present structure of Menominee County be altered by division, partition, abolition, or any other means? If so, what procedures are available for such alteration, and what are the implications of the various procedures available?

2. What is my position regarding the applicability of P.L. 280 to Menominee County and the reservation after restoration?

I. Abolition, partition, or other alteration of Menominee County.

The Wisconsin statutes provide for alteration of a county's identity through division, the removal of portions from an existing county, and for merger with another county. Impetus for alteration may come from the legislature, or the counties involved. Article XIII, sec. 7, Wis. Const., provides:

> "DIVISION OF COUNTIES. SECTION 7. No county with an area of nine hundred square miles or less shall be divided or have any part stricken therefrom, without submitting the question to a vote of the people of the county, nor unless a majority of all the legal voters of the county voting on the question shall vote for the same."

Menominee County is subject to the above provisions and therefore cannot be divided or reduced in size without a prior majority vote of the county's legal voters. Menominee County voters would not have to vote if Menominee County were to *receive* territory from a neighboring county, however.

The statutes do not permit the abolition of a county if that would leave a "blank" on the map of Wisconsin. Section 59.997, Wis. Stats., sets up a detailed procedure for a county to follow when it is to consolidate with an adjoining county or counties. Consolidation may be initiated by the county boards involved, by joint agreement (subsec. (2)), or by petition of 20 percent of the electors of each county to be consolidated (subsec. (5)). Subsection (6) requires publication of the consolidation agreement for two successive weeks, and subsecs. (7) *et seq.* specify how the question is to be placed before the voters by referendum. The remainder of sec. 59.997 deals with election of new county officers, school districts, legislative representation, and similar matters.

You asked about the "implications" of the different procedures for changing a county's boundaries. Since I do not know what changes are now contemplated for Menominee County, I cannot comment except to say that the boundaries of many Wisconsin counties have varied in the past, and the litigation accompanying these changes may provide guidance as to the types of issues raised and the judicial resolution of such issues. See for example, *State ex rel. Haswell v. Cram* (1863), 16 Wis. 365. So long as the legislature or the counties involved comply with the appropriate statutory procedures, Menominee County could be merged entirely with an adjoining county; portions of Menominee County contiguous to another county could be merged with the latter; Menominee County could receive territory from or be divided among adjoining counties. The county would not be required to change at all, nor would it be required to reassume the county boundaries that preceded termination of the reservation and

creation of Menominee County. I would be able to comment further if a specific question arises in the future.

II. Applicability of P.L. 280 to Menominee Reservation

Your predecessor also asked my views on the applicability of Public Law 280 (67 Stat. 588, 28 U.S.C. sec. 1360 and 18 U.S.C. sec. 1162), to Menominee County and the Menominee Reservation after the reinstatement of the Menominee Tribe "as a federally recognized sovereign Indian Tribe" pursuant to the Menominee Restoration Act (87 Stat. 770, 25 U.S.C. secs. 903-903f). Under Public Law 280 state jurisdiction over various matters both civil and criminal was extended to cover the affairs of certain Indian Tribes.

You noted in your request that the United States District Court of the Eastern District of Wisconsin was presented with the issue of the applicability of Public Law 280 to the Menominee Tribe and land after Restoration *In the Matter of the Application of Darrell Nacotee for a Writ of Habeas Corpus, Case No. 74-C-158.* The District Court concluded that Public Law 280 survived Restoration. However, the judgment in that case was ordered vacated as moot by the Seventh Circuit Court of Appeals. Subsequently, the judgment was vacated by order of the District Court on October 20, 1975.

Where a judgment is vacated or set aside, as in *Nacotee*, it is as though no judgment had ever been entered, and it is not controlling precedent. See, *e.g.*, 49 C.J.S., *Judgments*, sec. 306. Consequently, the applicability of Public Law 280 with respect to the Menominees after restoration must be determined through an analysis of the relevant legislation.

Congress did not, in the Restoration Act, expressly deal with Public Law 280 as it applied to the Menominee Tribe and land. It is, therefore, necessary to look not only to specific provisions in the Restoration Act but also to legislative history and current federal policy to answer your question.

It may be helpful as the first step in such an analysis to review the federal law as it has developed since the policy of leaving Indians free from state jurisdiction and control, sometimes referred to as the "Indian Sovereignty Doctrine," was first articulated by the U.S. Supreme Court in *Worcester v. the State of Georgia*

(1832), 6 Pet. 515, 8 L.Ed. 483. Mr. Chief Justice Marshall, speaking for a unanimous court, held that Indian nations were "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all lands within those boundaries, which is not only acknowledged, but guaranteed by the United States." *Id.* at 557. Thus, the concept of Indian reservations as domestic dependent nations established the principle that state law could have no role to play within the reservation boundaries except with the assent of the Tribe itself, or in conformity with treaties, and with the acts of Congress. It was further determined that "[t]he whole intercourse between the United States and [the Indian tribes] is, by our constitution and laws, vested in the government of the United States." *Worcester v. the State of Georgia, supra,* at 561. See also *United States v. Kagama* (1886), 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228; *Ex parte Kang-Gi-Shun-Ca (Crow Dog)* (1883), 109 U.S. 556, 3 S.Ct. 396, 27 L.Ed. 1030.

The Indian Sovereignty Doctrine has undergone considerable evolution in response to changed circumstances during the years since *Worcester* was decided. For example, in *Williams v. Lee* (1959), 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed. 2d 251, the court summarized a number of cases that modify the Indian Sovereignty Doctrine.

> "Over the years this Court has modified [the *Worcester* principle] in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized .... Thus, suits by Indians against outsiders in state courts have been sanctioned. ... And state courts have been allowed to try non-Indians who committed crimes against each other on a reservation. ..." *Id.*, 358 U.S. at 219-220.

The more recent cases view the Indian Sovereignty Doctrine as a backdrop against which the applicable treaties and federal statutes must be read rather than providing a definitive resolution of the issues presented. *McClanahan v. Arizona Tax Commission* (1973), 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed. 2d 129. See also *Mescalero Apache Tribe v. Jones* (1973), 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed. 2d 114. Nevertheless, the court continues to acknowledge the fact that:

> "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory; they are a separate people possessing the power of regulating their internal and social relations." *United States v. Mazurie* (1975), 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed. 2d 706, 709, (Citing with approval *Worcester v. Georgia, supra.*)

The relevant statutes under consideration here, therefore, must be read with this tradition of sovereignty in mind in order to properly construe their meaning as intended by Congress.

As originally enacted on August 15, 1953, Public Law 280 granted civil and criminal jurisdiction to the State of Wisconsin in "all Indian country within the state *except the Menominee reservation.*" (Emphasis added.) Initially, Public Law 280 was not applied to the Menominee Tribe because the Tribe had an effective law and order program. See *Report of Orme Lewis, Assistant Secretary of the Interior, to Committee on Interior and Insular Affairs*, 83d Cong., 1st Sess., Rept. No. 848 (July 1953).

On June 17, 1954, the Menominee Termination Act (68 Stat. 250, 25 U.S.C. sec. 891, *et seq.*), was enacted. It was the purpose of the Act "to provide for orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin." The Act required the Tribe and the Secretary of the Interior to formulate a "plan for the future control of the tribal property and service functions now conducted by or under the supervision of the United States, including ... services in the [field] of ... law and order. ... The responsibility of the United States to furnish all such supervision and services to the tribe and to the members thereof, because of their status as Indians, shall cease on April 30, 1961, *or on such earlier date as may be agreed upon by the tribe and the Secretary [of the Interior]*." (Emphasis added.) 25 U.S.C. sec. 896.

The removal of tribal property from federal trust status was the event that would signal the cessation of federal services to tribal members as Indians. Thereafter, the Tribe was to be subject to state jurisdiction. Section 899 of the Act provided:

> "When title to the property of the tribe has been transferred ... the Secretary shall publish in the Federal Register an appropriate proclamation of that fact. Thereafter

> individual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, *all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.* ..." (Emphasis added.)

Clearly, the congressional intent was to sever forever the relationship between the federal government and the Tribe. Without question the state was authorized to begin exercising its jurisdiction on the effective date of the land transfer. The plan went into effect on April 30, 1961. 26 *Fed. Reg.* 3726.

On August 24, 1954, at the request of the Menominee Tribe and upon the recommendation of the Secretary of the Interior, Public Law 280 was amended, thereby extending state civil and criminal jurisdiction to the Menominee Tribe and land as of that date. The Tribe's request was based generally upon its desire to accelerate the date on which it would become subject to the general application of the civil and criminal laws of Wisconsin under the Menominee Termination Act. (See, *e.g.*, letter dated August 16, 1954 from Assistant Secretary of the Interior to Mr. Hughes.)

Public Law 280 and the Termination Act were direct manifestations of the termination policy expressed in House Concurrent Resolution 108, passed by Congress on June 9, 1953. (See, Senate Committee on Interior and Insular Affairs, *Background Report on Public Law 280*, Committee Print, 94th Cong., 1st Sess. (1975).) Termination continued as the official Congressional Indian policy until it was repudiated by the Menominee Restoration Act of December 22, 1973 (87 Stat. 770, 25 U.S.C. sec. 903, *et seq.*).

It was the purpose of the Restoration Act to "... repeal the act terminating supervision over the affairs of the Menominee Indian Tribe of Wisconsin, reinstate such supervision, make available to the tribe the federal services lost through termination, and provide for the reestablishment of tribal self-government." S. Rep. No. 93-604, 93d Cong., 1st Sess. (1973) at 1. See also, H. R. Rep. No. 93-572, 93d Cong., 1st Sess. (1973).

Section 3 (b) of the Restoration Act expressly repealed the Menominee Termination Act and together with sec. 3 (c) reinstated all rights and privileges of the Tribe or its members lost pursuant to the Menominee Termination Act. The specific language is as follows:

> "(b) The Act of June 17, 1954, (68 Stat. 250; 25 U.S.C. 891-902), as amended, is hereby repealed and there are hereby reinstated all rights and privileges of the tribe or its members under Federal treaty, statute, or otherwise which may have been diminished or lost pursuant to such Act.
>
> "(c) Nothing contained in this Act shall diminish any rights or privileges enjoyed by the tribe or its members now or prior to June 17, 1954, under Federal treaty, statute, or otherwise, which are not inconsistent with the provisions of this Act."

When the Restoration Act, specifically sec. 3 (b) and (c), is read in view of the Indian Sovereignty Doctrine, I believe it is clear that Congress intended to restore to the Tribe the full rights of tribal sovereignty which the Tribe enjoyed prior to the passage of the Menominee Termination Act, including the fundamental right to govern its internal affairs on its reservation. It follows that Public Law 280, insofar as it may have been applicable to the Menominees at the time of Restoration, thereafter ceased to have any force or effect with respect to state jurisdiction over the Menominee Tribe and land.

Section 3 (b) of the Restoration Act, quoted above, provides for the reinstatement of rights of the Tribe lost "pursuant to" the Termination Act. The right of the Menominee Tribe to be free from state jurisdiction and control was to end on April 31, 1961. Before that date, however, Public Law 280 was amended at the request of the Menominee Tribe and the Secretary of the Interior thereby making its provisions applicable to the Tribe. Thus, essentially the same jurisdictional transfer mandated in the Termination Act was effectuated immediately by mutual agreement in anticipation of termination. This was done merely for convenience and thus, as noted above, it is clear that the amendment of Public Law 280 to apply to the Menominee Tribe was done only as an extension of Termination policy.

The provisions in the Termination Act relating to the jurisdictional transfer did not on its face contain any qualifications. Public Law 280, however, in its general unilateral application did not authorize a complete assumption of jurisdiction by the state. 18 U.S.C. 1162 codified Public Law 280 as it related to state jurisdiction over criminal offenses in Indian country. Section (b) qualified the state's jurisdiction as follows:

> "(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; *or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.* (Emphasis added.)

Similar qualifying language is contained in 28 U.S.C. 1360, the codification of Public Law 280 as it related to state civil jurisdiction. The Menominee remained under the state's jurisdiction, pursuant to Public Law 280, from August 24, 1954, to April 30, 1961, when the broader grant of jurisdiction in sec. 899 of the Termination Act took effect.

A liberal construction of the Restoration Act, especially sec. 3 (b), leads to the conclusion that the right of the Menominee Tribe to be free from state jurisdiction, which was lost "pursuant to" the Termination Act, was restored to the Tribe. Based on the legislative history of the Restoration Act and appropriate consideration of the Indian Sovereignty Doctrine, there can be little doubt that Congress intended to restore the Menominee Tribe to its pre-termination status as a federally recognized sovereign Indian tribe.

In reaching this conclusion, I adopt the canon of construction consistently applied by the U.S. Supreme Court for over a century and a half that doubtful expressions in treaties and statutes dealing with Indians are to be resolved in their favor. See, *e.g.*, *Antoine v.*

Washington (1975), 420 U.S. 194, 43 L.Ed. 2d 129, 134, 135, 95 S.Ct. 615, and cases cited therein. I also believe that the Restoration Act can be read as remedial legislation which requires liberal construction in view of congressional policy existing at the time of enactment. See 82 C.J.S., sec. 388. See also 3 *Sutherland, Statutory Construction*, sec. 60.01.

The house and senate reports on the Restoration Act cited above reflect the general consensus that termination as a general policy was a tragic mistake and that the application of termination to the Menominees resulted in disastrous consequences for the Tribe. In order to correct the mistake and to repudiate termination as a policy, Congress enacted the Menominee Restoration legislation.

It is also significant that Congress repudiated the unilateral application of Public Law 280 to Indian country by providing in the 1968 Civil Rights Act (as codified in 25 U.S.C. secs. 1321-1323), that state assumption of jurisdiction can be accomplished only "... with the consent of the Indian Tribe occupying the particular Indian country or part thereof which could be affected by such assumption. ..."

In view of the relevant legislation discussed herein, the various rules of statutory construction cited, the Indian Sovereignty Doctrine, and the congressional intent noted, I believe the courts, if squarely presented with the issues identified, would likewise conclude that Public Law 280 is no longer applicable to the Menominee Tribe and land.

Although it is my opinion that Public Law 280 is not now applicable to the Menominees, it is also my opinion that the state has jurisdiction over the Menominee Tribe and land until such time as the federal government, pursuant to the implementation of the Restoration Act, officially notifies the state that it, together with the Menominee Tribe, will assume jurisdiction. The Restoration Act requires the Secretary of the Interior and the Menominee Restoration Committee to "consult with appropriate State and local government officials to assure that the provision of necessary governmental services is not impaired as a result of the transfer of assets ...." 25 U.S.C. sec. 903d (d). I, therefore, conclude that the Restoration Act and not Public Law 280 is the current basis for state jurisdiction.

You also have asked what will be the specific legal and jurisdictional implications for the state government and the local county and town governments in the event federal and tribal government civil and criminal jurisdiction is legally established in Menominee County. Since it is my opinion that state jurisdiction will be applicable generally only until the federal and tribal governments assume jurisdiction under provisions of the Restoration Act, your inquiry has major significance for all jurisdictions involved. During recent years, certain broad, general guidelines have been established by the United States Supreme Court in answering jurisdictional questions involving Indian reservations. Generalizations on this subject have become particularly treacherous, however, and should be avoided. See *Mescalero Apache Tribe v. Jones, supra.*

The importance of your final question warrants special consideration in a separate opinion. I, therefore, defer further comment concerning jurisdictional implications for the governments involved to a subsequent opinion involving some specific factual context.

BCL:JDN

Counties; Workmen's Compensation; County is liable for the negligent acts of Rescue Unit volunteers gratuitously performing service for the county, and is liable to such volunteers for Workmen's Compensation when the unit has not insured its liability for compensation to them. OAG 64-75.

December 30, 1975.

JAMES L. CIRILLI, *District Attorney*
Douglas County

You have advised that a group of volunteers in Douglas County has organized a non-profit corporation which operates the Douglas County Sheriff's Rescue Unit. You have further advised that, although the Rescue Unit is manned entirely by unpaid volunteers through the corporation referred to, it makes use of vehicles owned

by Douglas County, and operates under the control of the Douglas County Sheriff's Department.

You seek my opinion as to what liability Douglas County has for Workmen's Compensation coverage for the volunteer members of the Rescue Unit, and what liability Douglas County may incur as a result of any negligent action of the Rescue Unit or its volunteer members.

In my opinion, your inquiry concerning Workmen's Compensation coverage is controlled by sec. 102.07 (7), Stats. That statute provides:

> "Every member of ... any legally organized rescue squad shall be deemed an employe of such ... squad ... If such ... squad has not insured its liability for compensation to its employes, the municipality or county within which such ... squad was organized shall be liable for such compensation."

You have not stated specifically whether the Rescue Unit carries Workmen's Compensation insurance. Since, however, you have indicated that it is the Unit which has raised the question as to Workmen's Compensation, I assume that it does not, and since you have indicated further that the volunteers have organized a non-profit corporation, and are unpaid, I assume further that the Unit has no funds from which a Workmen's Compensation claim could be recovered. Making these assumptions, and since the Rescue Unit is legally organized and located within Douglas County, I conclude that Douglas County is liable for Workmen's Compensation to the volunteer members of the Rescue Squad.

Your second question involves possible county liability in two different respects, (1) liability for the negligent acts of members of the Rescue Unit in a general sense, such as in the performance of their duties, and (2) liability for their negligent operation of the county owned rescue vehicle.

With respect to any negligent actions in general on the part of any of the Rescue Unit volunteers, it is my opinion that Douglas County would be liable for injuries resulting from such negligence. While, since you indicate the volunteers are unpaid, they would probably not be considered employes, even for Workmen's Compensation purposes, except for sec. 102.07 (7), *Enderby v. Industrial Commission* (1960), 12 Wis. 2d 91, 106 N.W. 2d 315, I

see the issue as one of a principal and agent or master-servant relationship rather than an employer-employe relationship. "Consideration is not necessary to create the relation of principal and agent, and it is not necessary in the case of master and servant." *Restatement (Second) of Agency* sec. 225. See also 57 C.J.S. *Master and Servant* sec. 563. For a person serving gratuitously to become an agent or a servant, however, there must be consent of the principal or master. *Restatement (Second) of Agency* secs. 221 and 225. Since the volunteers serving Douglas County are making use of county owned equipment, and have submitted themselves to the control of the County Sheriff, there appears to be no question whatsoever but what the county has in fact consented to the performance of services by the volunteers, thereby rendering them the county's servants.

As you are aware, recovery against a county in an action founded on tort appears to be limited to $25,000 pursuant to sec. 895.43 (2), Stats. You are advised, however, that portions of that statute are currently under constitutional attack in the courts of our state. I am involved in the defense of the constitutionality of the statute in those actions, and in my opinion, it would be inappropriate, under the circumstances, for me to render an opinion as to the statute's constitutionality.

The other aspect of the negligence question involves the operation of the county owned rescue vehicle. In my opinion, the liability would be the same as it is with respect to any other negligence, except that in the case of the operation of a motor vehicle the $25,000 limitation upon recovery does not apply. Sections 345.05 and 895.43, Stats.

You have, of course, advised me that Douglas County carries liability insurance on its vehicles, and that you have been assured by the insurance carrier that the operation of the rescue vehicles by volunteers would be fully covered by such insurance. While such insurance coverage may, as a practical matter, solve most problems which the county may have arising out of the negligent operation of its vehicles, it must be remembered that the county would remain liable for any excess in the amount of a judgment beyond the limits of the insurance coverage.

BCL:CRL

Counties; Under sec. 21.14, Stats., county employe, who is member of National Guard, is entitled to leave of absence to attend summer encampment, but is not necessarily entitled to paid leave. OAG 65-75.

December 30, 1975.

JAMES L. CIRILLI, *District Attorney*
Douglas County

You request my opinion whether the provisions of sec. 21.14, Stats., prohibit a county from denying an employe any pay while taking leave of absence from his employment to serve in summer encampment with the National Guard.

It is my opinion that it does not so long as the action is not discriminatory.

You state that several employes in the Sheriff's Department were formerly granted leave of absence with full pay to attend summer camp. The county now proposes to deny them all county pay while on leave for such purpose. You further state that there is no collective bargaining agreement covering this problem.

Section 21.14, Stats., provides:

> "A person who, either by himself or with another, wilfully deprives a member of the national guard of his employment, or prevents his being employed by himself or another, or in respect to his trade, business or employment, because said member of said national guard is such member, or dissuades any person from enlistment in the said national guard by threat of injury to him in case he shall so enlist, in respect to his employment, trade, or business, *or who refuses to grant leave to any employe who is a duly enrolled member of the national guard*, state guard, officers reserve corps, enlisted reserve corps, naval reserve, marine corps reserve or any other reserve component of the military or naval forces of the United States or the state of Wisconsin organized or constituted under federal law *to attend military schools, armory drill, field training, field camps of instruction and*

training cruises which have been duly ordered or who shall cause the seniority, vacation, or salary advancement of such employe to be adversely affected by reason of such leave, shall be fined not less than $50 nor more than $200, or imprisoned not more than 6 months, or both." (Emphasis added.)

The statute, in effect, requires the employer to grant leave of absence, but there is no requirement that such leave be with partial or full pay. If an employe is entitled to vacation with pay, he may use vacation leave with pay to serve with the National Guard. However, he is entitled to separate leave for military purposes and cannot be compelled to use any vacation days he may have for such purpose.

Compensation and leave benefits for county employes are established by the county board or delegated authority under the provisions of sec. 59.15 (2), Stats. The compensation plan may provide for leave with pay for certain purposes and leave without pay for others. In general, the county can change fringe benefits unless there is a negotiated contract which precludes change during a stated period.

In *Cayo v. Milwaukee* (1969), 41 Wis. 2d 643, 165 N.W. 2d 198, the court held that a city council could enact an ordinance changing leave benefits to police officers, who were members of the U.S. Army Reserve, from full-city pay during training period, to the difference between each officer's city salary and basic military pay for the annual fourteen-day training periods. The court held that the ordinance did not deprive a city employe from continuing to enjoy the benefits of his employment and that, in absence of contract, fringe benefits could be altered.

BCL:RJV

Agriculture, State Department Of; Dairy, Food And Drugs; When the Department of Agriculture is presented with a petition for the adoption of a proposed milk marketing order under sec. 96.21, Stats., it is required to submit the proposed order to a public hearing under secs. 96.04 and 96.05, Stats. Marketing orders adopted under sec. 96.21, Stats., are subject to referendum or assent approval by milk producers. The secretary of the department, rather than the board, has the authority and responsibility to administer marketing orders pursuant to ch. 96 and sec. 96.21 (3), Stats. Administration of ch. 96, Stats., discussed. OAG 66-75.

December 31, 1975.

GARY E. ROHDE, *Secretary*
Department of Agriculture

Your predecessor requested my opinion on a number of questions pertaining to the milk stabilization provisions of sec. 96.21, Stats., Wisconsin's milk marketing law. The Department of Agriculture has received a petition requesting that it adopt a marketing order, as proposed by the petitioners, establishing minimum prices for milk produced and sold for manufacturing dairy products. A technical advisory committee was appointed to review the marketing order proposal and make recommendations to the department concerning the feasibility of such an order. The committee concluded that the adoption of such an order would not be feasible or effectuate the basic purposes or objectives of the law, whereupon the Board of Agriculture rejected the petition without submitting the proposal to a public hearing under secs. 96.04 and 96.05, Stats., on the ground that it would not be feasible or accomplish the basic purpose or objectives of sec. 96.21, Stats. As a result of such action, the questions set forth below have arisen.

You first ask:

> When the department is presented with a petition for the adoption of a proposed marketing order under s. 96.21 is it required to submit the proposed order to a public hearing under ss. 96.04 and 96.05, if it is of the opinion the order

would not be feasible, or may it in its discretion reject the petition and proposed order without public hearing, giving its reasons therefor, if in its judgment the proposed order would not effectuate the basic purposes or objectives of the milk stabilization provisions of s. 96.21?

The pertinent section of the milk stabilization provisions, sec. 96.21 (3) (a), Stats., states:

> "Upon petition by 5% or 100, whichever is less, of the milk producers in the marketing area proposed in the petition to be affected by a marketing order under this section and after notice and hearing under ss. 96.04 and 96.05, the secretary may issue a marketing order establishing minimum prices at which milk may be purchased from milk producers in the affected area. Different minimum prices may be established for various marketing areas in the state."

The petition contained over 600 signatures of milk producers in the marketing area, which is clearly in excess of the minimum required. We may also conclude that the petitioners will, along with the entire state, be affected by the marketing order. The statute then specifies that "... and after notice and hearing under ss. 96.04 and 96.05, the secretary may issue a marketing order, ..."

Section 96.04 (1), Stats., states:

> "Whenever the secretary has reason to believe that the issuance of a marketing order or amendments to an existing marketing order will tend to effectuate the declared policy of this chapter with respect to any agricultural commodity, he shall, either upon his own motion or *upon petition signed by 5% or 100 of the producers or handlers of such agricultural commodity, whichever is less, give due notice of and an opportunity for a public hearing upon a proposed marketing order or such amendments to such existing marketing order.* ..." (Emphasis added.)

The language of sec. 96.04 (1) and sec. 96.21 (3) (a) indicates that the legislature intended a hearing to be required upon valid petition. Therefore, when the department is presented with a petition for the adoption of a proposed marketing order under sec. 96.21, it is required to submit the proposed order to a public hearing under secs. 96.04 and 96.05.

Your second question reads:

> In the adoption of a marketing order, must the department take into consideration all of the factors or criteria listed under s. 96.21(3)(b) or can it omit some from consideration, such as supply and demand factors?

Section 96.21 (3) (b), Stats., states:

> "In establishing minimum prices for milk purchased from producers the following economic factors shall be taken into consideration:
>
> "1. The differing methods by which milk is produced and transported;
>
> "2. Reasonable and necessary costs of production and transportation, including a reasonable return on investment;
>
> "3. Quantities of dairy products consumed; and
>
> "4. Other economic factors which substantially and directly affect supply and demand of milk and dairy products."

The legislative intent of this section is clear. The statute prescribes that the department shall take into consideration all the above factors. Therefore, in the adoption of a marketing order, the department must take into consideration all of the factors or criteria listed under sec. 96.21 (3) (b), and may not omit any from consideration.

Third, you ask:

> Do general substantive and procedural provisions of Chapter 96 apply to marketing orders under s. 96.21, or is s. 96.21 to be interpreted as being totally separate and independent of other qualifying conditions in Chapter 96 relating to adoption of marketing orders?

The policy considerations of ch. 96 (see sec. 96.02) and sec. 96.21 (see sec. 96.21 (1)) are substantially the same. Both policy statements are concerned with the health and welfare of the citizens of the State of Wisconsin. There are, however, marginal differences. Whereas the policy consideration stated in sec. 96.02 is directed towards the orderly and efficient marketing of agricultural

commodities in general, the policy statement in sec. 96.21 (1) carries this same notion one step further by authorizing the Department of Agriculture to establish reasonable prices for the producers of milk. Although some variations between the two exist, sec. 96.21 should not be interpreted as being totally separate and independent of ch. 96.

There are, aside from similarities of policy statement, other considerations which suggest that the substantive and procedural provisions of ch. 96 apply to marketing orders under sec. 96.21. The words and terms used in sec. 96.21 are defined in the beginning of ch. 96 in sec. 96.01. The term "marketing order," for example, as defined in 96.01 (1), means "an order issued by the secretary of agriculture *under this chapter.*" (Emphasis added.) "Marketing order" is then referred to throughout the chapter, including sec. 96.21 (3) (a). When sec. 96.21 was enacted in 1973, there was no attempt to regard this section or any of the terms therein as being totally separate and independent of ch. 96.

The link between sec. 96.21 and ch. 96 becomes more apparent when the procedural provisions of sec. 96.21 are closely analyzed. The provisions of sec. 96.21 (3) incorporate the notice and hearing requirements of secs. 96.04 and 96.05, and suggest that the secretary may not issue a marketing order for milk until the procedural requirements of secs. 96.04 and 96.05 are satisfied. These provisions of sec. 96.21 (3) (a) could not stand independently from the rest of ch. 96.

Section 96.21 makes reference to other sections of ch. 96. Section 96.21 (3) (c) states that "Section 96.07 (1) (a) does not apply to marketing orders issued under this section." Since the framers of sec. 96.21 were careful to exclude sec. 96.07 (1) (a), the obvious inference is that other sections in ch. 96 are applicable.

Therefore the general substantive and procedural provisions of ch. 96 apply to marketing orders under sec. 96.21, and sec. 96.21 is not to be interpreted as being totally separate and independent of other qualifying conditions in ch. 96 relating to the adoption of marketing orders.

Your fourth question reads:

> Are marketing orders adopted under s. 96.21 subject to referendum or assent approval by producers under s. 96.07, or

are such marketing orders exempt from referendum or assent approval by virtue of s. 96.21(3)(c)?

Section 96.21 (3) (c), Stats., states:

"Section 96.07 (1) (a) does not apply to marketing orders issued under this section."

Section 96.07 (1) (a) provides generally that major marketing orders, or amendments, relating to a commodity directly affecting *handlers* or specifically named *processors* shall not be effective until assented to by a prescribed segment of *handlers* or *processors* of the commodity. Section 96.07 (1) (b) contains similar language to sec. 96.07 (1) (a), but refers only to *producers*.

Section 96.21 (3) (c) states that the sec. 96.07 (1) (a) referendum provision does not apply to sec. 96.21 marketing orders. Therefore, marketing orders adopted under sec. 96.21 clearly would not be subject to referendum or assent approval by handlers and processors. If, however, the legislature had desired to include producers under the provisions of sec. 96.21 (3) (c), it would have specified that sec. 96.07 (1) (a) *and* (b) do not apply to marketing orders issued under sec. 96.21. Since the legislature did not so specify sec. 96.07 (1) (b), it continues to have application; and marketing orders adopted under sec. 96.21 are subject to referendum or assent approval by producers.

Therefore, marketing orders adopted under sec. 96.21 are subject to referendum or assent approval by producers.

Your fifth question is:

Can the Secretary of Agriculture, who is appointed by the Board of Agriculture under s. 15.05(1)(b), act independently of the Board in the issuance, administration and enforcement of marketing orders under Chapter 96, and more specifically s. 96.21(3), or can he execute those functions only with the approval of, or under the direction and supervision of the board, as the head of the department, under ss. 15.05(1)(b) and 15.13?

The secretary of the Department of Agriculture is appointed pursuant to sec. 15.05 (1) (b), Stats., which states:

> "If a department is under the direction and supervision of a board, the board shall appoint a secretary to serve at the pleasure of the board, ... outside the classified service. In such departments, the powers and duties of the board shall be regulatory, advisory and policy-making, and not administrative. All of the administrative powers and duties of the department are vested in the secretary, to be administered by him under the direction of the board. The secretary, *with the approval of the board*, shall establish rules for administering the department and performing the duties assigned to the department." (Emphasis added.)

Generally, the secretary of a department under the supervision and direction of a board must obtain board approval for administrative rules promulgated in the performance of the duties of the department. Marketing orders issued pursuant to ch. 96, Stats., are in the nature of administrative rules. See secs. 96.04 and 96.05, Stats. However, sec. 96.03, Stats., grants the Secretary of Agriculture authority to administer and enforce the statutes relating to marketing orders. This provision derives from ch. 511, sec. 3, Laws of 1957, and precedes the enactment of the last sentence (emphasized, in part, above) of sec. 15.05 (1) (b), Stats., by ch. 366, sec. 3, Laws of 1969. Accordingly, the specific provisions of sec. 96.03, Stats., constitute an exception to the general requirement of board approval of administrative rules.

Therefore, even though the Secretary of Agriculture is appointed by the Board of Agriculture under sec. 15.05 (1) (b), Stats., the secretary can, nevertheless act independently of the board in the issuance, administration and enforcement of marketing orders under ch. 96 and sec. 96.21 (3). Those functions do not need the approval of, or the direction and supervision of the board.

BCL:TLP

Criminal Law; Fish And Game; NR 10.07 (8), Wis. Adm. Code, requiring hunters to make reasonable efforts to retrieve game birds killed or injured, does not exempt a person from criminal prosecution under sec. 943.13 (1) (b), Stats., for trespassing upon posted lands to retrieve birds shot from outside the posted area. OAG 67-75.

December 31, 1975.

WILLIAM N. BELTER, *District Attorney*
Waushara County

You have asked my opinion whether the Department of Natural Resources' regulation NR 10.07 (8), Wis. Adm. Code, privileges a hunter to enter upon posted land to retrieve game birds which he has shot legally from a point outside the posted land. The answer to your question is no.

NR 10.07 (8) provides:

> "It shall be unlawful for any person to fail to make every reasonable effort to retrieve all game birds killed or crippled by him; and until such effort is made, such game birds shall be included in his daily bag."

NR 10.07 (8) was promulgated under the legislative authorization of sec. 29.174 (2) (a), Stats., which provides:

> "The department shall establish open and closed seasons, bag limits, size limits, rest days and other conditions governing the taking of fish or game, in accordance with the public policy declared in sub. (1) ... ."

That policy is to:

> "... conserve the fish and game supply and insure the citizens of this state continued opportunities for good fishing, hunting and trapping." Sec. 29.174 (1), Stats.

NR 10.07 (8) must be read together with sec. 943.13 (1) (b), Stats., which provides penalties for criminal trespass against a person who "enters or remains on any land of another after having been notified by the owner or occupant not to enter or remain on

said premises." Under sec. 943.13 (2), posting of land constitutes notice for purposes of 943.13 (1) (b).

There is a privilege providing a defense to a prosecution under sec. 943.13, Stats., only if the "reasonable effort" demanded by NR 10.07 (7) requires a hunter to enter posted land for retrieval. See sec. 939.45 (6), Stats. A less strained reading of the regulation, however, would interpret the word "reasonable" to include only lawful efforts, since it is hardly reasonable to require a hunter to violate one law in order to avoid violating another.

Under this reading, the criminal trespass law would of course be unaffected by the regulation, and any unauthorized person who entered posted land to retrieve a fallen bird would be subject to prosecution. This reading gains support from the fact that the Department of Natural Resources does not have the power to pass a regulation which would suspend the operation of the criminal trespass statute.

In addition, statutes are to be construed together and harmonized. *Kramer v. City of Hayward* (1973), 57 Wis. 2d 302, 203 N.W. 2d 871. Conflicts between statutes are not favored and will not be found to exist if avoidable through reasonable construction. *Harte v. City of Eagle River* (1970), 45 Wis. 2d 513, 173 N.W. 2d 683.

Section 943.13 (1) (b) is an absolute prohibition against entering on posted land without permission. It does not indicate that a legitimate purpose would justify an otherwise illegal entry. An implied exception for retrieval of fallen birds would do violence to the language of the statute.

On the other hand, the policy underlying sec. 29.174 (2) (a) is not distorted by a reading which forbids administrative interference with the prohibition of 943.13 (1) (b). Since this reading avoids conflict between the statutes, it is to be preferred.

For all the above reasons, NR 10.07 (8) may not be construed to privilege a hunter to enter on posted land to retrieve a bird he has killed or crippled.

BCL:LMC

Plumbing; Towns; Town sanitary district organized under secs. 60.30-60.309, Stats., has power to levy special assessments for improvements against county-owned park lands located within the district. OAG 68-75.

December 31, 1975.

MR. GERALD K. ANDERSON, *District Attorney*
Waupaca County

You request my opinion whether a town sanitary district organized under secs. 60.30-60.309, Stats., has power to levy special assessments against county-owned park lands located within the district.

For the purposes of this opinion, it is assumed that the special assessment involved is for a local improvement which benefits the properties in the town sanitary district in different degrees.

I am of the opinion that it can.

The authority of a town sanitary district was set forth in *Duncan Develop. Corp. v. Crestview San. Dist.* (1964), 22 Wis. 2d 258, 263-264, 125 N.W. 2d 617, wherein it was stated:

> "A town sanitary district for the purpose of carrying out and performing its duties in addition to the powers given in sec. 60.307, Stats., may levy special assessments 'for *any improvement* within the limits of a sanitary district.' Sec. 60.309. If this method of financing is used, sec. 60.309 (1) (b) provides the commissioners 'shall then examine the entire area to be improved and severally and separately consider *each parcel of real estate therein and determine the benefits to each of said parcels and make assessments thereagainst* in an aggregate amount equal to the determined cost of the work to be done. ...' The assessments are made in accordance with sec. 66.60 relating to special assessments by cities and villages. This latter section provides a city or village may levy 'special assessments upon property in a limited and determinable area for special benefits conferred upon such property by any municipal work or improvement,' but the

amount assessed against any property for an improvement 'which does not represent an exercise of the police power shall not exceed the value of the benefits accruing to the property therefrom.'" (Emphasis added.)

Section 60.309 (1) (b), Stats., provides that "... Such assessments shall be made in accordance with s. 66.60." Neither sec. 60.309, Stats., nor sec. 66.60, Stats., expressly include provision regulating the liability of another governmental unit for such assessments. However, because local improvements are involved, *Duncan Develop. Corp. v. Crestview San. Dist., supra*, I am of the opinion that the provisions of sec. 66.64, Stats., apply to a special assessment made by a town sanitary district under secs. 60.309, 66.60, Stats.

Section 66.64, Stats., provides in material part:

"Special assessments for local improvements. The property of the state, except that held for highway right of way purposes, and *the property of every county*, city, village, town, school district, sewerage district or commission, sanitary or water district or commission, or any public board or commission within this state, and of every corporation, company or individual operating any railroad or street railway, telegraph, telephone, electric light or power system, or doing any of the business mentioned in ch. 76, and of every other corporation or company whatever, *shall be in all respects subject to all special assessments for local improvements.* Certificates and improvement bonds therefor may be issued and the lien thereof enforced against such property, except property of the state, in the same manner and to the same extent as the property of individuals. ..." (Emphasis added.)

BCL:RJV

Counties; County Boards are without authority to appropriate funds to a voluntary agency which provides information to the public of services offered by various public and private agencies in the county. Power of a Section 51.42 Board or a Board of Public Welfare to contract for purchase of informational services from such voluntary agency discussed. OAG 69-75.

December 31, 1975.

ROBERT R. FLATLEY, *Corporation Counsel*
Brown County

The Wisconsin Information Service is a nonprofit organization which, in response to telephone inquiries, provides information on the various public and private agencies in Brown County, including services they provide, in an effort to direct people to the agency which can best provide assistance on their particular problem. The Information Service has been funded through a federal grant which is now due to expire, and has requested that the County Board appropriate $8,000 to the agency so that it can continue its services.

The first of your three questions is:

1. May the County Board appropriate funds to a nonprofit, voluntary agency which provides information to the public on the services offered by various public and private agencies in the county?

I am of the opinion that it cannot.

In *Maier v. Racine County* (1957), 1 Wis. 2d 384, 385, 84 N.W. 2d 76, it was stated:

> "County boards have only such legislative powers as are conferred upon them by statute, expressly or by clear implication. *Spaulding v. Wood County*, 218 Wis. 224, 228, 260 N.W. 473; *Dodge County v. Kaiser*, 243 Wis. 551, 557, 11 N.W. (2d) 348."

I have been unable to find express authority for an appropriation for the purpose stated in any of the many subsections of sec. 59.07, Stats., or in any section of ch. 59, Stats.

Section 59.07 (95), Stats., does provide:

> "CULTURAL AND EDUCATIONAL CONTRIBUTIONS. Appropriate money for cultural, artistic, educational and musical programs, projects and related activities, including financial assistance to nonprofit corporations devoted to furthering the cultivation and appreciation of the art of music or to the promotion of the visual arts."

In 61 OAG 316 (1972), it was stated that the word "educational" as used in sec. 59.07 (95), Stats., is limited to activities connected with the fine arts. It could not, in my opinion, be expanded to include education of the public with respect to awareness of all public and private agencies and the services they offer in any county.

Undoubtedly, the legislature could authorize counties to expend money for such purpose, and it would in that case be a proper public purpose. However, the mere fact that certain benefits to the public would accrue does not justify the appropriation. In *Pugnier v. Ramharter* (1957), 275 Wis. 70, 81 N.W. 2d 38, the court held that unless expressly authorized by statute, a town could not appropriate money to charitable organizations even though the causes promoted were generally recognized as good ones. At p. 74, the court stated:

> "In the absence of legislative authorization, a municipality cannot apply its public funds to the payment of claims or obligations which are founded upon mere moral or equitable considerations, and are not enforceable against the municipality by legal process..."

Your second question reads:

2. If the County Board cannot make such an appropriation, can the appropriation be made by the Section 51.42 Board or by the Board of Public Welfare?

I am of the opinion that neither the Section 51.42 Board nor the County Board of Public Welfare has any power to appropriate

money from the county treasury. Appropriations are made to such boards, as county agencies, by the County Board, to be expended by them in such manner and for such purposes as stated in the budget and are authorized by statute. See sec. 65.90, Stats., relating to municipal budgets and authority to transfer funds between budgeted items of individual county offices or departments. See sec. 51.42 (3) (b), Stats., as to power of County Board to make appropriations to the Section 51.42 Board and to review and approve the overall plan, program and budgets proposed by such board. See sec. 46.21 (6) (b), Stats., as to authority of the County Board to make appropriations to the County Board of Public Welfare and purposes for which such appropriations shall be used.

Your third question is:

3. Could the Section 51.42 Board or the Board of Public Welfare provide the funds by entering into a contract to purchase services from the agency?

A specific answer is not possible in the absence of more facts. As a general rule, however, both the Section 51.42 Board and the Board of Public Welfare may purchase services so long as those services are relevant to their respective missions.

Under sec. 51.42 (5) (e), Stats., a Community Mental Health, Mental Rehabilitation, Alcoholism and Drug Abuse Board has authority to provide for "public informational and educational services." Pursuant to sec. 51.42 (5) (h) 3 and 7, such board can utilize available community resources and can enter into contracts to render services to or secure services from other agencies.

Under sec. 46.22 (5) (e), Stats., the County Board of Public Welfare can furnish services to families or persons other than the granting of financial or material aid where such services may prevent such persons from becoming public charges or restore them to a condition of self-support. Under sec. 46.22 (5m), Stats., such board may contract "with public or voluntary agencies or others" to purchase or furnish services authorized by statute.

The County Board could appropriate, and may have appropriated, funds for the particular educational and informational purposes outlined above. To the extent that such funds have been appropriated for such purposes, each board would

have power to contract with a voluntary agency for the furnishing of such services. It is a matter of policy for each board to determine whether such services can be furnished directly by employes of each board, county department supervised, or by a private agency.

The programs supported by each board may well benefit from all, some or none of the services presently rendered by the Wisconsin Information Service. The information you have furnished does not reflect the extent of the services presently furnished by that voluntary association, nor the method used by such agency to insure delivery of its services to persons in need or in potential need of the services supervised by either board.

BCL:RJV

Nursing Homes; The governing body and/or administrator of a nursing home is not accountable for the actions of nursing home patients when such patient is not physically present in the nursing home. OAG 70-75.

December 30, 1975.

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

You have asked my opinion on the following question: "Is the governing body and/or administrator of a nursing home accountable for the actions of a nursing home patient at times during which such patient is not physically present in the nursing home?"

You indicate that your department allows the practice of "home visits," in which the patient is released in the care of a relative for brief visits to the relative's home. During these visits, patients sometimes avail themselves of medication, diets and treatments without prior or subsequent knowledge of the nursing home or the attending physician. You have stated that it has been the position of the department that such actions are not governable by sec. 146.30, Stats., licensing and regulation of nursing homes, or the

ERRATA SHEET
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rules promulgated thereunder, and are not the responsibility of the nursing homes' governing bodies and/or administrators.

It is my opinion that neither the governing body nor the administrator may be held responsible for patient actions occurring outside the nursing home, including actions affecting the patient's health and medical treatment.

A nursing home functions in relation to the patient as provider of maintenance services and health and medical care. It is defined by its functions as a place "... for the reception and care or treatment ... of ... individuals ... who by reason of disability, whether physical or mental, are in need of nursing home services ..." (Wis. Adm. Code section H32.01 (1)).

The Wisconsin Administrative Code, Chapter H32, gives responsibility for the overall conduct of the nursing home to the governing body, or licensee, (Wis. Adm. Code section H32.05 (1) (a)), and responsibility for the total operation of the home to the administrator appointed by the governing body, (Wis. Adm. Code section H32.05 (2)). This responsibility includes that for written policies governing skilled nursing care and related services, (Wis. Adm. Code section H32.05 (4) (k)). In other words, nursing home licensees and administrators have responsibility under normal circumstances to govern the care and treatment afforded a patient within the home rather than over the patient himself.

The laws and administrative rules governing nursing homes may not be interpreted so that they infringe the constitutional rights of patients, including the right not to be deprived of liberty without due process of law. A person does not surrender control of himself by entering a nursing home. The control necessarily exerted by nursing home policy aimed at enforcing health and medical care programs must not contradict fundamental principles of individual liberty.

The nursing home may have a responsibility to inform the patient or the person in whose care he leaves the home, or to whom his medication is entrusted, of the importance of maintaining ongoing health and medical care programs during the patient's absence. However, it is my opinion that the nursing home, its governing body and administrator, are not accountable for actions,

taken by patients outside the home contrary to the policies of the home.

BCL:WHW

Intoxicating Liquors; Licenses And Permits; No violation of sec. 176.07, Stats., is committed where premises licensed for the sale of intoxicating liquor at retail are so constructed, either by original construction or by remodeling, as to eliminate at all times any view of the interior of such premises from the outside. OAG 71-75.

December 30, 1975.

BRUCE E. SCHROEDER, *District Attorney*
Kenosha County

You ask my opinion "with respect to whether or not a violation of Section 176.07 [Stats.] is committed where premises licensed for the sale of intoxicating liquor at retail are so constructed whether by remodeling or by original construction to eliminate any view from the outside during all hours, both during hours of operation and during the hours they are required to remain closed."

It is my opinion that the question you ask should be answered in the negative.

Section 176.07, Stats., provides:

> "BLINDS PROHIBITED WHEN PREMISES CLOSED. No premises licensed for the sale of intoxicating liquor at retail shall, during the days they are required to close or during the hours in which the sale of liquor is prohibited, obstruct by the use of curtains, blinds, screens or in any other manner, a full and complete view of the interior from the outside. During the hours in which the sale of intoxicating liquor is permitted the premises shall be properly and adequately lighted."

Only if the words "in any other manner" appearing in sec. 176.07, Stats., be construed as encompassing the building or remodeling of the licensed premises to eliminate a window or windows providing the complete view can it be said that such

building or remodeling would give rise to a violation of sec. 176.07, Stats. In my judgment, the phrase, "in any other manner," cannot properly be so construed, for reasons hereinafter shown.

First, it should be noted that while a liquor license is peculiarly subject to police regulation, revocation and control (see *People v. Ballas* (1951), 344 Ill. App. 644, 101 N.E. 2d 844, 845), a statute such as sec. 176.07, Stats., which is plainly penal, is subject to strict construction. See *State v. Bronston* (1959), 7 Wis. 2d 627, 633, 97 N.W. 2d 504; *State v. Minneapolis, St. P. & S. S. M. R. Co.* (1960), 12 Wis. 2d 21, 24, 106 N.W. 2d 320; *State v. Wrobel* (1964), 24 Wis. 2d 270, 275, 128 N.W. 2d 629. Section 176.07, Stats., is penal, for its violation can lead not only to revocation of license under secs. 176.11 and 176.12, Stats., or under sec. 176.121, Stats., but also to criminal prosectuion under sec. 176.41, Stats. It follows that "in any other manner," as used in sec. 176.07, Stats., must be strictly construed.

Second, the doctrine of *ejusdem generis*, as applied to the words "curtains, blinds, screens, or in any other manner" appearing in sec. 176.07, Stats., makes it clear that the phrase "in any other manner" cannot be construed as encompassing the building or remodeling of licensed premises which eliminates the window or windows providing the complete view. The doctrine is, "that, where an enumeration of specific things is followed by some more general word or phrase, such general word or phrase is to be held to refer to things of the same kind." 28 C.J.S. *Ejusdem*, at p. 1049. The rationale supporting such doctrine is that, "... had the legislature intended the general words [here, "in any other manner"] to be used in their unrestricted sense, it would have made no mention of the particular words [here, "curtains, blinds, screens"], but would have used 'only one compendious' expression." 2A, Sutherland Statutory Construction, p. 104 (Bracketed material supplied.) The words "curtains, blinds, screens" appearing in sec. 176.07, Stats., are plainly descriptive only of temporary and readily removable obstructions to a view, placed in a window. Under the doctrine of *ejusdem generis*, the general words following must be construed as embracing only other obstructions of the same kind, and not permanent elimination of a window or windows.

While the Wisconsin Supreme Court has yet to rule on any aspect of sec. 176.07, Stats., there is case law from other jurisdictions which supports the proposition that a licensed premises may be built or remodeled to eliminate a window or windows providing the complete view. In *Shultz v. Cambridge* (1883), 38 Ohio St. Rep. 659, the court dealt with an ordinance prohibiting saloon-keepers from permitting, at, in or about the doors, windows, openings, or in the interior of their saloons "any blind, screen, painted or frosted glass, shade, curtain or other device." Applying the *ejusdem generis* doctrine to such language, the court had no difficulty in ruling that the words "other device" did not embrace a board partition between different rooms of a building, such partition extending from floor to ceiling, fastened in the usual manner, and intended by the owner, when he placed it in the building, as a permanent accession to the realty. In *People v. Brasi* (1953), 118 N.Y.S. 2d 608, the court dealt with a statute providing that, "No restaurant licensed to sell liquors and/or wines for on-premises consumption shall be permitted to have: (a) Any screen, blind, curtain, article or thing covering any part of any window on said licensed premises, which prevents a clear and full view into the interior of said premises from the sidewalk at all times." Referring to this statute (and perhaps to other provisions of the New York State Alcoholic Beverage Control Law, too) the court said: "An analysis of the provisions of the statute fails to disclose any provision which makes it mandatory for every licensed premises to have a window through which the interior of the premises can be clearly observed from the street." (118 N.Y.S. 2d at p. 614.) In my judgment, the same thing can be said of sec. 176.07, Stats. Under such analysis the building or remodeling of the licensed premises to eliminate a window or windows affording the complete view would constitute no violation of the statute.

There are, of course, statutes--I would term them the "plain view statutes"--which in clear and unequivocal language require that licensed premises be so maintained as to provide a plain view of the interior of such premises from the street. Thus, in *McColl v. Rally & Fisher, et al.* (1905), 127 Iowa 633, 103 N.W. 972, the statute involved required "that the bar where liquors are furnished *shall be in plain view from the street*, unobstructed by screens, blinds, or any other device" (emphasis supplied; 103 N.W. at p. 973); and in *State v. McCann* (1914-Del.), 90 A. 81, the statute

involved provided that, "every person licensed under this act shall keep his principal place of business, *so as to be seen fully and easily by passers-by*, and shall not obstruct such view by screens, blinds, inside shutters, frosted glass, or any other device, of whatsoever kind or character." (Emphasis supplied.) Section 176.07, Stats., clearly is not one of these "plain view statutes," since it does not require, either expressly or by implication, that licensed premises be so maintained as to provide a plain view of the interior from the street. It does provide, as above indicated, that if a window is present on the premises, affording such a view, it shall not be obstructed by the use of temporary and readily removable obstruction. Such a requirement is obviously not the "plain view" requirement of the Delaware and Iowa statutes above mentioned.

BCL:JHM

APPENDIX

OAG 1-75. Individual appointed to fill vacancy in office of sheriff is entitled to same salary as predecessor. County board may increase but cannot decrease such compensation during term of such officer.

OAG 2-75. Chapter 147, Laws of 1973, amended the State Medical Assistance Program to provide for payment for chiropractic services, including necessary x-rays. Such payment is authorized regardless of whether there are matching federal funds.

OAG 3-75. Sections 13.60 through 13.73, Stats., providing for filing by lobbyists of reports and statements concerning expenditures discussed.

OAG 4-75. A county may acquire real estate owned by a private fair association without referendum where it does not intend to conduct county fairs or exhibitions on such property itself.

OAG 15-75. The Department of Health and Social Services has no authority to impose forfeitures upon persons violating sec. 146.30, Stats., or to initiate court actions for same using agency personnel.

OAG 16-75. Section 146.30 (1) (a), Stats., does not prohibit nursing homes from providing adequate administrative office space to enable those nursing home employes, licensed to treat the sick, to perform their duties and responsibilities with respect to the care of patients residing therein.

OAG 17-75. A state public official who requests and receives confidential advice from State Ethics Board under sec. 19.46 (2), Stats., does not waive confidentiality by partial disclosure of advice.

OAG 18-75. Pursuant to sec. 20.865, Stats., both segregated revenues and general purpose revenues of the general fund are available for the payment of judgments arising out of segregated fund activities in the same proportion in which they were, or would have been, used to finance a program appropriation for the payment of such judgments; sec. 20.865 (1) (a), Stats., includes authority for payment of settlements made by the Attorney General pursuant to sec. 165.25 (6), Stats.

OAG 21-75. Family court commissioners must be appointed in Pepin and Buffalo counties; each must be a resident of the county

he serves and each county is obligated to pay an annual salary to each officer and each part-time officer is entitled to the state salary supplement at the rate of $2,000 per year.

OAG 23-75. The Chairman of the Industry, Labor and Human Relations Commission may assume direct personal supervision over all divisions within the department, as an exercise of the administrative duties vested in the chairman by sec. 15.06 (4), Stats., without securing approval of a majority of the commission.

OAG 24-75. Blanket honesty bonds for officers and employes under sec. 59.07 (2) (d), Stats., must be for definite period and liability for renewals is cumulative for each period and cannot be limited by policy.

OAG 31-75. The professional health care liability insurance policy for hospitals issued under the Health Care Liability Insurance Plan may include as "persons insured" the named hospital and its nonexcluded employes while acting within the scope of their duties as hospital employes.

OAG 32-75. A county cannot meet the requirements of sec. 59.68 (1), Stats., by constructing a jail outside the county seat and maintaining a facility at the county seat to be used only for securing defendants on the day of trial. A facility housing county jail functions other than rehabilitation may not be located outside the county seat.

OAG 33-75. Member of combined 51.42-51.437 board who is also county board member may resign from combined board and county board has duty to fill vacancy within reasonable time.

OAG 38-75. The Wisconsin Environmental Policy Act discussed as it applies to the Department of Military Affairs.

OAG 42-75. Administrator or trustees of county infirmary cannot deposit funds of residents in interest bearing account and use interest to purchase items for common use of residents.

OAG 43-75. Equal Rights conciliation session involving representative of a city, the employe and a representative of the Department of Industry, Labor and Human Relations is not a meeting of a governmental body under sec. 66.77, Stats., and may be closed to the public.

OAG 44-75. Although a person elected as a "part time" district attorney may not be required to forego the private practice of law and devote all his time to the performance of official duties, he may voluntarily do so. A county board may increase the salary of the district attorney during his term of office. A county board must act timely to prohibit future district attorneys from engaging in the private practice of law. Secs.. 59.15 (1) (a), 59.471 and 66.197, Stats.

OAG 45-75. The expenses incurred by a city in converting a vehicular traffic street to a pedestrian mall may be assessed against the state as an abutter under sec. 66.64, Stats., and the assessment paid if approved by the Board of Commissioners of Public Lands.

OAG 57-75. Wisconsin Arts Board should elect officers and members of advisory panels, and discuss applications and make grants-in-aid in open sessions unless disclosure of financial, social or personal histories of individuals involved would result in undue damage to reputations.

OAG 60-75. Wisconsin law does not authorize the state to take over the assets of a corporation organized and existing under ch. 180, Stats., against the will of the corporation.

STATUTES AND CONSTITUTIONAL PROVISIONS, SESSION LAWS, LEGISLATIVE BILLS, OPINIONS OF THE ATTORNEY GENERAL, AND RESOLUTIONS REFERRED TO AND CONSTRUED

U.S. CODE

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